

Washburn, Jackie

[PENALTIES \(RCW 51.48.017\)](#)

Unreasonable delay

A penalty against a self-insured employer should not be denied merely because the Department had not issued an order requiring the payment. The test is whether the self-insured employer maintained a genuine doubt as to the worker's legal or factual entitlement to the benefits. *Overruling In re Agnes Levings*, BIIA Dec., 99 13954 (2000).
...In re Jackie Washburn, BIIA Dec., 03 11104 (2004) [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 04-2-01401-0.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: JACKIE L. WASHBURN**) **DOCKET NO. 03 11104**
2)
3 **CLAIM NO. S-802203**) **DECISION AND ORDER**
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5 APPEARANCES:

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7 Claimant, Jackie L. Washburn, by
8 Casey & Casey, P.S., per
9 Gerald L. Casey and Carol L. Casey

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11 Self-Insured Employer, Sears Roebuck & Co., by
12 Reinisch, Mackenzie, Healey, Wilson & Clark, P.C., per
13 Steven R. Reinisch
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15 The claimant, Jackie L. Washburn, filed an appeal with the Board of Industrial Insurance
16 Appeals on January 28, 2003, from an order of the Department of Labor and Industries dated
17 January 21, 2003. In this order, the Department affirmed its order dated October 31, 2002, in which
18 the Department denied the claimant's attorney's request for a penalty against the self-insured
19 employer for unreasonable delay in claim adjudication. The Department order is **AFFIRMED**.
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22 style="text-align:center">**DECISION**

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24 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
25 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
26 issued on December 12, 2003, in which the industrial appeals judge affirmed the order of the
27 Department dated January 21, 2003.
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30 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
31 no prejudicial error was committed. The rulings are affirmed. We have granted review to
32 reconsider this appeal in light of *Taylor v. Nalley's Fine Foods*, 119 Wn. App. 919 (2004), which
33 was issued subsequent to the December 12, 2003 publication of the Proposed Decision and Order.
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36 The following is a summary of evidence necessary to explain our decision. Jackie L.
37 Washburn injured his low back on January 31, 1985, while moving a lawnmower in the course of
38 his employment with Sears, a self-insured employer. The Department initially closed the claim on
39 July 24, 1985. The closing order was litigated and ultimately, the claim was closed with a
40 Category 3 low back impairment. Mr. Washburn's July 1, 1992 application to reopen the claim was
41 denied by the Department in its order dated September 29, 1992. On appeal, the Board upheld the
42 Department order. A subsequent appeal to superior court resulted in a November 15, 1995
43 judgment in which the court reversed the order and directed the reopening of Mr. Washburn's claim,
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1 effective May 2, 1992. The Department received the order during the year 2000, when it was
2 submitted by the Board to the Department. On March 13, 2002, the Department issued a
3 ministerial order in which it reopened the claim.
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5 The claimant then requested that the Department assess a penalty against the self-insured
6 employer, per RCW 51.48.017. The statute provides:
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8 If a self-insurer unreasonably delays or refuses to pay benefits as they
9 become due there shall be paid by the self-insurer upon order of the
10 director an additional amount equal to five hundred dollars or twenty-five
11 percent of the amount then due, whichever is greater, which shall accrue
12 for the benefit of the claimant and shall be paid to him with the benefits
13 which may be assessed under this title. The director shall issue an order
14 determining whether there was an unreasonable delay or refusal to pay
15 benefits within thirty days upon the request of the claimant. Such an
16 order shall conform to the requirements of RCW 51.52.050.
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18 Aisha Housain, a Department adjudicator, reviewed the claimant's request and issued the
19 February 20, 2002 order denying that request. The ground presented by Mr. Washburn in support
20 of his request was that the employer was not taking action to close the claim. Ms. Housain testified
21 to her understanding that there is no legal basis for assessing a penalty based on delay in
22 submitting a claim for closure. Since 1998, the claimant has sought the Department's intervention
23 in the claim. Neither Ms. Housain, nor any Department adjudicator, has determined
24 Mr. Washburn's entitlement to time loss compensation since the claim was reopened by the
25 Department in its 2002 ministerial order.
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30 The self-insured employer presented the testimony of six doctors who examined
31 Mr. Washburn at various times between January 1993 and November 2002. A preponderance of
32 the medical opinions support the conclusion that any disabling findings were unrelated to the
33 industrial injury and that, subsequent to claim reopening, there was no permanent worsening of the
34 residuals of the January 31, 1985 industrial injury.
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38 John F. Berg, VRC, testified that in 1994, 1995, and 1996, the claimant's loss of earning
39 power was more than 50 percent. In Mr. Berg's opinion, Mr. Washburn has been unemployable
40 since 1996. There is no indication that Mr. Berg's opinion was at any time presented to the
41 self-insured employer's claim administrator.
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44 Daniel Brzusek, D.O., testified regarding the examination of Mr. Washburn that he
45 conducted on June 4, 2003, subsequent to issuance of the order on appeal. It appeared to
46 Dr. Brzusek that the claimant's condition was fixed and stable "several years ago." Brzusek Dep. at
47 15. Mr. Washburn had reported that he retired in 1992 or 1993.

1 Jill W. Rosenthal, VRC, testified that she met with Mr. Washburn on December 12, 1997
2 and November 28, 2000, at the request of the self-insured employer's third party administrator.
3 She reviewed medical records from both treating doctors and examining doctors. She understood
4 from the December 12, 1997 meeting that, in 1992, the claimant quit a job at Roy's Appliance
5 because he was not physically capable of continuing. Mr. Washburn reported to Ms. Rosenthal that
6 he was retired and was not interested in retraining. Ms. Rosenthal submitted to the employer a
7 report that found Mr. Washburn able to work. An examining doctor approved the service writer job
8 analysis Ms. Rosenthal had prepared.
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13 Karen Knebel is employed by Sears' third party administrator and has managed
14 Mr. Washburn's claim for the past three years. She acknowledged that, since March 1994, the
15 self-insured employer rejected requests for payments from Mr. Washburn's chiropractor,
16 Dr. David L. Corley. The requests were rejected because neither Dr. Corley nor Dr. Doyle (another
17 treating doctor) submitted reports setting forth objective findings or demonstrating that the treatment
18 was curative.
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22 On or about February 13, 1996, the third party administrator received an affidavit from the
23 claimant, which included his statement that since April 1994, he has not been able to work due to
24 his January 31, 1985 industrial injury. The claim administrator determined that Mr. Washburn was
25 not entitled to loss of earning power because, at the time the request was made, he was earning
26 more than he earned at injury. No payment of time loss compensation was authorized subsequent
27 to the May 1992 reopening because, although Drs. Doyle and Corley certified it, a preponderance
28 of medical evidence supported Mr. Washburn's ability to work. Ms. Knebel also considered
29 information gleaned from a conversation with Mr. Washburn's vocational counselor, Jill W.
30 Rosenthal. Ms. Rosenthal reported that Mr. Washburn had removed himself from the workplace
31 and was retired. Ms. Knebel did not attempt to close the claim when she received this information
32 because of ongoing litigation. She testified that she submitted paperwork recommending closure of
33 the claim on May 8, 2001, December 30, 2002, and June 17, 2003. The Department did not take
34 action.
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41 In his Petition for Review, the claimant contends that the self-insured employer
42 unreasonably delayed benefits by failing to timely provide time loss compensation benefits or timely
43 determine the claimant's entitlement thereto.
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1 Subsequent to the issuance of the Proposed Decision and Order rejecting the claimant's
2 contentions, the Court of Appeals decided *Taylor v. Nalley's Fine Foods*, 119 Wn. App. 919 (2004).
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4 In *Taylor*, the claimant filed a claim for a neck injury sustained in December 1990 while in the
5 course of employment with self-insurer Nalley's. The Department allowed the claim and provided
6 benefits through October 1993, when the Department closed the claim with time loss as paid
7 through February 26, 1993. In its closing order the Department also segregated a low back
8 condition as unrelated to the December 1990 industrial injury. In March 1994, the Department
9 canceled the closing order and directed Nalley's to accept the low back condition. On appeal to the
10 Board, the March 1994 order was reversed. Mr. Taylor appealed to superior court, and on
11 October 26, 1999, a jury found that the low back condition was proximately caused by the
12 December 1990 injury. In January 2000, the superior court issued a judgment that reversed the
13 Department order and remanded the claim to the Department with directions to accept the low back
14 condition and pay benefits related to that condition. The Department issued its ministerial order in
15 February 2000, directing Nalley's to "pay benefits for the low back condition." *Taylor*, at 3.
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22 In March 2000, Mr. Taylor wrote to the Department asking for issuance of an order directing
23 Nalley's to pay benefits, asserting that the employer was delaying payment of time loss benefits for
24 the period February 27, 1993 through that date. He also requested interest and penalties for
25 "unnecessary delay in payment." *Taylor*, at 3. On May 31, 2000, the Department issued a
26 determinative order directing the self-insured employer to pay time loss compensation and loss of
27 earning power benefits from February 27, 1993 through that time, and ongoing. On July 26, 2000,
28 Nalley's issued a check to Mr. Taylor for \$149,649 and did not appeal the Department order. In
29 August 2000, the Department assessed a penalty of \$36,862.80 pursuant to RCW 51.48.017.
30 Nalley's protested the order and the Department affirmed it. On appeal, the Board adopted the
31 proposed decision, in which it was determined that Nalley's did not unreasonably delay payment of
32 benefits. In superior court, summary judgment was granted to Nalley's, upholding the Board order.
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38 On appeal from the superior court judgment, the self-insured employer argued that it was
39 not required to make payments until the 60-day appeal period elapsed from the Department's
40 May 31, 2000 order. The claimant and the Department argued that the order was independent of
41 the appeal period and that Nalley's unreasonably delayed payment. The *Taylor* court held that
42 self-insured employers have a statutory duty to adjudicate and administer the claim, without need
43 for a Department order directing action on the part of the self-insured employer. The court
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1 determined that Nalley's obligation to pay benefits arose in October 1999, the date of the jury
2 verdict that directed acceptance of the low back condition.
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4 Having determined that the obligation was established independent of any Department
5 order, the *Taylor* court analyzed the facts to determine whether a penalty was appropriate. To do
6 so, the court adopted the reasoning set forth in *In re Frank Madrid*, BIIA Dec., 86 0224-A (1987).
7 The test applied in *Madrid* is whether the employer had a "genuine doubt from a medical or legal
8 standpoint as to the liability for benefits." Nalley's asserted that it had a genuine doubt "because of
9 the lack of complete medical documentation regarding Taylor's low back condition from 1993 to the
10 present time." *Taylor*, at 12. The *Taylor* court found that the record presented a genuine issue of
11 material fact, *i.e.*, whether the employer did possess a genuine doubt regarding its liability for
12 benefits. Therefore, the trial court's grant of summary judgment was deemed incorrect, and the
13 case was remanded to trial.
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19 *Taylor* effectively overrules our prior decisions that concluded, as a matter of law: (1) a
20 self-insured employer's obligation to pay benefits cannot become "due" until the Department issues
21 an order directing payment; or (2) a delay in paying the benefits directed by a Department order is
22 reasonable if the 60-day appeal period has not expired. These decisions include *In re Agnes*
23 *Levings*, BIIA Dec., 99 13954 (2000); and *In re Toni E. Veich*, Dckt. No. 02 14100 (November 4,
24 2003), relied on by our industrial appeals judge. We find the *Taylor* decision consistent with
25 *In re Catherine A. Bellipanni*, Dckt. No. 02 17259 (December 9, 2003), wherein the Board
26 determined that "[a] self-insured employer's obligation to provide injured workers appropriate
27 benefits does not depend upon the issuance of an order from the Department requiring them to do
28 what they are statutorily required to do."
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34 In Mr. Washburn's case, no orders were issued that determined Mr. Washburn's entitlement
35 to benefits subsequent to the superior court's reopening of his claim. The Proposed Decision and
36 Order, which affirmed the Department decision denying a penalty, relies on findings that no
37 Department order had been issued directing payment by the self-insured employer. Pursuant to
38 *Taylor*, such findings are not sufficient to support the denial of a penalty for delay of benefits.
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40 The parties presented extensive lay, medical, and vocational evidence regarding
41 Mr. Washburn's entitlement to time loss compensation and loss of earning power subsequent to the
42 May 2, 1992 reopening of his claim. To resolve the penalty issue, however, we must focus solely
43 on whether the self-insured employer maintained a "genuine doubt" regarding the claimant's
44 entitlement during the period that benefits were withheld or denied. In Mr. Washburn's case, we
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1 conclude that a genuine doubt did exist. A preponderance of the evidence in the self-insured
2 employer's possession supported the decision to deny treatment, time loss compensation, and loss
3 of earning power. Mr. Berg's opinion was never shared with the employer. Dr. Brzusek's opinion,
4 formulated after issuance of the order on appeal, does not support the claimant's contention that
5 the self-insurer unreasonably withheld benefits subsequent to claim reopening.
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8 Further, we hold that our jurisdiction in this appeal is limited to determining whether a
9 penalty is appropriate pursuant to RCW 51.48.017. The Department order addresses
10 RCW 51.48.017 only, and Ms. Housain made clear that the Department was only asked to consider
11 RCW 51.48.017 in determining whether a penalty assessment was justified. The claimant seeks
12 consideration of his contention that an alternate statute, RCW 51.48.080, supports a penalty
13 against the self-insured employer. This statute permits assessment of a penalty where a
14 Department rule is violated. See RCW 51.48.080. The claimant alleges that the self-insured
15 employer failed to comply with WAC 296-15-490(2), which requires that self-insured employers
16 promptly submit to the Department a copy of all court judgments. We lack jurisdiction to determine
17 whether the facts support this alternate theory of penalty assessment because it was not first
18 considered by the Department. *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977, 982 (1970)
19 ("If a question is not passed upon by the department, it cannot be reviewed either by the board or
20 the superior court."). Further, we agree with our industrial appeals judge that WAC 296-15-490,
21 with an effective date of January 2, 1999, does not apply retroactively to a judgment issued on
22 November 15, 1995.
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25 It is unfortunate that this claim was not efficiently adjudicated; the evidence supported
26 closure of the claim years ago. Despite these circumstances, for which the Department and the
27 self-insured employer each bear some responsibility, we find no legal basis for assessing a penalty
28 against the self-insured employer pursuant to RCW 51.48.017.
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30 **FINDINGS OF FACT**

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1. The claimant, Jackie L. Washburn, filed an application for benefits with the self-insured employer on February 16, 1985, alleging that he sustained an industrial injury on January 31, 1985, during the course of his employment with Sears Roebuck & Company. The claim was allowed and benefits paid. The Department issued an order on July 24, 1985, in which it closed the claim with medical benefits only as approved. This order was appealed by the claimant, to the Board of Industrial Insurance Appeals on August 22, 1985. The appeal was granted by the Board on August 28, 1985. The Board issued a Proposed Decision and Order on August 7, 1986, the claimant filed a Petition for Review with the Board on September 8, 1986, and the Board

1 issued an order denying review on October 3, 1986. The claimant filed
2 an appeal with the Superior Court of Kitsap County on October 20,
3 1986. The court issued a judgment on April 7, 1989.
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5 On December 14, 1989, the Department issued an order pursuant to the
6 Superior Court judgment in which the Department set aside its July 24,
7 1985 order and found that the claimant was entitled to further medical
8 care and treatment and that the claimant was not entitled to time loss
9 compensation between April 5, 1985 and July 24, 1985. The
10 Department issued an order on April 30, 1991, in which it closed the
11 claim. The claimant filed a Notice of Appeal with the Board on May 9,
12 1991. The Board granted the appeal on June 18, 1991. The Board
13 issued a Proposed Decision and Order on May 28, 1992, reversing the
14 April 30, 1991 order and remanding the claim to the Department to close
15 the claim with an award for permanent partial disability equal to a
16 Category 3 low back impairment. The Board issued an order in which it
17 adopted the Proposed Decision and Order on July 13, 1992. The
18 Department issued a ministerial order on July 20, 1992, in which it
19 canceled the April 30, 1991 order, closed the claim, and directed the
20 employer to pay the claimant an award of Category 3 low back
21 impairment.
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23 The claimant filed an application to reopen his claim on July 1, 1992.
24 The Department denied the application on September 29, 1992. The
25 claimant filed a Notice of Appeal with the Board on November 3, 1992.
26 The Department held the September 29, 1992 order in abeyance and
27 the Board issued an order on November 12, 1992, in which it returned
28 the case to the Department.
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30 The Department issued a letter on February 18, 1993, in which it
31 extended the time to issue an order regarding the application to reopen
32 the claim to May 8, 1993. The Department affirmed the September 29,
33 1992 order on May 3, 1993. The claimant appealed this order to the
34 Board on May 13, 1993. The Board granted the appeal on June 2,
35 1993. The Board issued a Proposed Decision and Order affirming the
36 Department order on March 31, 1994. The claimant filed a Petition for
37 Review with the Board on May 24, 1994. The Board denied the petition
38 on June 13, 1994. The claimant filed an appeal in superior court on
39 June 21, 1994. The court issued a judgment reversing the Department
40 order on November 15, 1995.
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42 On February 20, 2002, the Department issued an order in which it
43 denied the claimant's request for a penalty against the self-insured
44 employer. The claimant protested this order on March 4, 2002.
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46 The Department issued a ministerial order on March 13, 2002, in which
47 it reopened the claim effective May 2, 1992. On March 14, 2002, the
Department issued an order in which it closed the claim with no

1 additional permanent partial disability. On April 2, 2002, the Department
2 issued an order in which it affirmed the February 20, 2002 order. The
3 claimant filed a Notice of Appeal with the Board from this order on
4 April 9, 2002. The Board issued an order granting the appeal, assigning
5 it Docket No. 02 13803, and ordering that further proceedings be held.
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7 The claimant filed a protest with the Department from the March 14,
8 2002 order on May 13, 2002. The Department held the order in
9 abeyance on May 16, 2002. On December 19, 2002, the Department
10 issued an order in which it canceled the March 14, 2002 closing order
11 and ordered the claim to remain open for further treatment.
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13 On October 31, 2002, the Department issued an order in which it denied
14 the claimant's request for a penalty against the self-insured employer.
15 The claimant filed a protest from this order on December 2, 2002. On
16 January 21, 2003, the Department issued an order in which it affirmed
17 its October 31, 2002 order. The claimant filed an appeal from this order
18 with the Board on January 28, 2003. The Board issued an order
19 extending the time to act on the appeal for an additional ten days on
20 February 26, 2003. The Board issued an order granting the appeal on
21 February 27, 2003, assigning the appeal Docket No. 03 11104, and
22 ordering that further proceedings be held.
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- 24 2. Jackie L. Washburn injured his low back on January 31, 1985, while
25 moving a lawnmower in the course of his employment with Sears
26 Roebuck & Company, a self-insured employer.
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- 28 3. On November 15, 1995, the Superior Court of Kitsap County issued a
29 judgment in which it reopened the claim effective May 2, 1992. The
30 order was not filed with the Department until sometime in 2000, when
31 this Board provided a copy to the Department.
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- 33 4. The Department has not issued an order directing the self-insured
34 employer to pay the claimant either time loss compensation benefits or
35 loss of earning power benefits since the claim was reopened by superior
36 court order on November 15, 1995.
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- 38 5. Subsequent to November 15, 1995, the claimant's treating physicians
39 did not provide the self-insured employer with medical records,
40 demonstrating that the claimant was receiving proper and necessary
41 medical treatment of his industrial injury-related condition.
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- 43 6. The employer received substantial medical information subsequent to
44 November 15, 1995, showing that: (1) Mr. Washburn was no longer in
45 need of proper and necessary treatment proximately caused by the
46 industrial injury of January 31, 1985; and that (2) he was not entitled to
47 time loss compensation or loss of earning power benefits.

- 1 7. Subsequent to the November 15, 1995 reopening of the claim, the
2 self-insured employer maintained a genuine doubt regarding the
3 claimant's entitlement to time loss compensation, loss of earning power,
4 and treatment benefits.
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6 8. The claimant failed to present any evidence that he incurred travel
7 expenses that the employer was required to pay after his claim was
8 reopened.
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10 9. As of January 21, 2003, the Department had not considered whether a
11 penalty against the self-insured employer was appropriate pursuant to
12 RCW 51.48.080.

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14 **CONCLUSIONS OF LAW**

- 15 1. The Board of Industrial Insurance Appeals has jurisdiction over the
16 parties to and the subject matter of this appeal, with the exception of the
17 applicability of RCW 51.48.080, as a potential basis for assessing a
18 penalty against the self-insured employer.
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20 2. The self-insured employer did not unreasonably delay payment of
21 benefits; nor did it refuse to pay benefits as they became due, as
22 contemplated by RCW 51.48.017.
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24 3. The Department order dated January 21, 2003, is correct and is
25 affirmed.
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27 It is so **ORDERED**.

28 Dated this 1st day of June, 2004.

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30 BOARD OF INDUSTRIAL INSURANCE APPEALS

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34 /s/ _____
35 THOMAS E. EGAN Chairperson

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39 /s/ _____
40 CALHOUN DICKINSON Member