

Slade, Jacque

PENALTIES (RCW 51.48.017)

Unreasonable delay

A self-insured employer can be penalized for an unreasonable delay in the time between making the decision not to contest a payment order and the actual payment of the benefits.*In re Jacque Slade*, BIIA Dec., 04 11552 (2005)

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

1 **IN RE: JACQUE K. SLADE) DOCKET NOS. 04 11552 & 04 12746**
2 **CLAIM NO. W-185686) DECISION AND ORDER**

3 **APPEARANCES:**

4 Claimant, Jacque K. Slade, by
5 Casey & Casey, P.S., per
6 Gerald L. Casey

7 Self-Insured Employer, Group Health Cooperative of Puget Sound, by
8 Keehn Arvidson, PLLC, per
9 Gary D. Keehn

10 The claimant, Jacque K. Slade, filed an appeal (Docket No. 04 11552) with the Board of
11 Industrial Insurance Appeals on February 11, 2004, from an order of the Department of Labor and
12 Industries dated January 30, 2004. In this order, the Department denied the claimant's request for
13 a penalty against the self-insured employer for unreasonable delay in the payment of benefits. The
14 Department order is **REVERSED AND REMANDED**.

15 The claimant filed a second appeal (Docket No. 04 12746) on March 10, 2004, from an order
16 of the Department of Labor and Industries dated February 25, 2004. In this order, the Department
17 issued a repeated denial of the claimant's request for a penalty against the self-insured employer
18 for unreasonable delay in the payment of benefits. The Department order is **REVERSED AND
19 REMANDED**.

DECISION

20 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
21 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
22 issued on January 18, 2005, in which the industrial appeals judge affirmed the orders of the
23 Department dated January 30, 2004, and February 25, 2004.

24 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
25 no prejudicial error was committed. The rulings are affirmed. We grant review to address, as we
26 have in other recent orders, the issue of unreasonable delay in the payment of benefits. In so
27 doing, it is important to review the sequence of events in this particular case. The claimant,
28 Jacque K. Slade, injured her low back on October 30, 1997, during the course of her employment
29 with Group Health Cooperative of Puget Sound (Group Health). She was paid time-loss
30 compensation until July 21, 2003. At that time, the self-insured employer stopped paying time-loss
31 after receiving an employability determination that the claimant could work.

1 On September 4, 2003, the self-insured employer received a letter from the Department
2 determining that the claimant was not eligible for vocational services. On September 16, 2003, the
3 Department issued a letter declining the claimant's request for a review of the vocational
4 determination. On November 10, 2003, the Department reversed its decision and determined that it
5 would address Ms. Slade's vocational dispute. On November 14, 2003, the self-insured employer
6 received a letter from claimant's counsel arguing that the claimant was eligible for time-loss. On
7 November 19, 2003, the self-insured employer received the November 17, 2003, Department order
8 in which the Department found that the claimant was temporarily totally disabled and ordered
9 payment of time-loss from July 19, 2003, to the date of the order.

10 The self-insured employer explored the possibility of protesting or appealing the order. The
11 claims manager, Scott Ruijters, discussed the issue with a vocational counselor and the claimant's
12 supervisor. Mr. Ruijters also discussed the potential of an appeal with an attorney on
13 December 15, 2003. On December 31, 2003, the employer made the decision not to protest or
14 appeal. On December 31, 2003, Mr. Ruijters approved payment of time-loss compensation for the
15 period from July 19, 2003, through November 17, 2003. The check was issued on January 2, 2004.

16 Based on this particular set of facts, we find that the delay in the payment of benefits was
17 unreasonable. RCW 51.48.017 provides that the self-insured employer shall pay a penalty for
18 unreasonably delaying the payment of benefits when they become due. These benefits become
19 due as soon as the claimant is entitled to them. The Department does not need to issue an order
20 before the employer is required to pay benefits. See, *Taylor v. Nalley's Fine Foods*, 119 Wn. App.
21 919; 83 P.2d 1018 (2004) and *In re Jackie Washburn*, BIIA Dec., 03 11104 (2004).

22 In this case, the self-insured employer was required to pay benefits once the November 17,
23 2003, order was issued if there was not a reasonable doubt that the worker was entitled to the
24 benefit. Prior to that, there was an ongoing dispute and a genuine doubt with regard to entitlement.
25 However, it took the self-insured employer until January 2, 2004, to issue a check. Ms. Slade was
26 forced to wait six weeks during the holidays to receive her time-loss compensation. This may seem
27 insignificant unless you are the disabled worker going without income. It is unreasonable for the
28 self-insured employer to take this much time to decide whether it will pursue the claim further.

29 We no longer subscribe to the former rule, which held that benefits were not due until the
30 Department issued a payment order. Neither will we continue to hold that it is reasonable for a
31 self-insured employer to wait until the sixty-day appeal period has passed before rendering
32

1 payment. See, *In re Jackie L Washburn*, BIIA Dec., 03 11104 (2004); overruling *In re Agnes*
2 *Levings*, BIIA Dec., 99 13954 (2000). According to the Court in *Nalley*, the Department's ability to
3 issue orders in self-insured claims is to assist injured workers in receiving payments. It was not
4 intended to delay the payments in legitimate claims. Similarly, the statutory appeal period cannot
5 be used as a shield by employers who are reluctant to pay benefits.

6 In this case, the self-insured employer took over six weeks to determine whether to appeal
7 or protest the order. The delay between the December 15, 2003, discussion with the attorney and
8 the issuance of the check on January 4, 2004, was also unreasonable.

9 Injured workers are entitled to speedy relief under Title 51. The most recent line of cases
10 construing RCW 51.48.017 echo this principle. Employers must react swiftly in dispatching relief to
11 the workers of this state. Based on the recent shift in the case law, the sequence of events in this
12 appeal constitute unreasonable delay. Both of the orders under appeal shall be reversed and the
13 claim remanded with direction to issue one penalty order for failure to pay benefits within a
14 reasonable time for the period of July 19, 2003, through November 17, 2003.

15 **FINDINGS OF FACT**

- 16 1. On November 6, 1997, the self-insured employer, Group Health
17 Cooperative of Puget Sound, received an Application for Benefits on
18 behalf of the claimant, Jacque K. Slade, alleging a back injury on
19 October 30, 1997. On September 2, 2003, the Department of Labor and
20 Industries issued a letter to the claimant in which it determined that
21 claimant was not eligible for vocational services and taking into
22 consideration claimant's accepted condition, Ms. Slade was considered
23 able to work at her pre-injury occupation. On September 9, 2003, a
24 Protest and Request for Reconsideration was filed on behalf of the
25 claimant and a penalty against the self-insured employer was requested
26 for not sending a complete copy of the file. On September 16, 2003, the
27 Department of Labor and Industries issued a letter to the claimant
28 indicating that her letter could not be accepted by the Director as a
29 dispute. On October 16, 2003, the Department issued an order
30 indicating that the claimant had requested a penalty against the
31 self-insured employer for not providing complete copies of the file and a
32 request for penalty failure to act on her request for claim closure, which
were both denied. On October 22, 2003, a Notice of Appeal was filed by
the claimant from the Department order of October 16, 2003.

On October 24, 2003, the Department denied the claimant's request for
a penalty against the self-insured employer for an unreasonable delay in
authorizing surgery. On October 29, 2003, the Department denied the
claimant's request for a penalty against the self-insured employer for an
unreasonable delay of time-loss payments.

1 The Board granted the appeal of the October 16, 2003, Department
2 order on November 14, 2003, and assigned it Docket No. 03 17949. On
3 September 17, 2004, we issued an order denying a Petition for Review
4 and adopted the Proposed Decision and Order that affirmed the
5 October 16, 2003, Department order. On November 17, 2003, the
6 Department issued an order in which it determined that the claimant was
7 temporarily disabled and ordered time-loss compensation be paid
8 starting July 19, 2003, and continuing according to the facts and the law.
9 On November 17, 2003, a Notice of Appeal was filed with the Board on
10 behalf of the claimant from the Department order of October 24, 2003.
11 The Board granted the appeal in its order dated November 25, 2003,
12 and assigned it Docket No. 03 18949. This appeal was dismissed on
13 May 5, 2004.

14 On December 26, 2003, a Protest and Request for Reconsideration was
15 filed with the Department on behalf of the claimant from the Department
16 order dated October 29, 2003. On January 30, 2004, the Department
17 issued an order adhering to its prior order dated October 29, 2003, and
18 denying the claimant's request for penalty against the self-insured
19 employer for delay in payment of time-loss benefits on the basis that
20 there was medical and legal doubt as to claimant's entitlement to time-
21 loss benefits effective July 19, 2003.

22 On February 11, 2004, the claimant filed an appeal with the Board from
23 the Department order of January 30, 2004. On February 25, 2004, the
24 Department denied the claimant's request for a penalty against the self-
25 insured employer for an unreasonable delay of benefits. On March 5,
26 2004, the Board issued an order granting the appeal from the
27 Department order of January 30, 2004, and assigned Docket
28 No. 04 11552.

29 On March 10, 2004, an appeal was filed with the Board on behalf of the
30 claimant from the Department order of February 25, 2004. On April 2,
31 2004, the Board issued an order granting the appeal from the
32 Department order of February 25, 2004, and assigning it Docket
No. 04 12746.

2. On July 21, 2003, an employability assessment report was submitted,
determining that the claimant, Jacque K. Slade, was employable.
Thereupon the self-insured employer ceased paying time-loss
compensation.
3. On November 10, 2003, the self-insured employer received a letter from
the Department dated November 4, 2003, determining that it would
address issues regarding the claimant's employability, and on
November 19, 2003, the self-insured employer received a Department
order dated November 17, 2003, in which the Department deferred

1 action on the claim to the self-insured employer and finding that the
2 claimant was temporarily totally disabled and requiring payment of
3 time-loss compensation from July 19, 2003, to the date of the order.

- 4 4. Following receipt of the Department order of November 17, 2003, the
5 self-insured employer discussed the possibility of protesting or
6 appealing the Department's order with its attorney and vocational
7 counselor. On December 31, 2003, the self-insured employer
8 determined not to appeal the order and on January 2, 2004, a check for
9 payment of back time-loss compensation was issued for the period from
10 July 19, 2003 through November 17, 2003. The self-insured employer
11 took too long to determine not to contest the Department order of
12 November 17, 2003, and this resulting six-week delay in the payment of
13 benefits was unreasonable.

14 **CONCLUSIONS OF LAW**

- 15 1. The Board of Industrial Insurance Appeals has jurisdiction over the
16 parties to and the subject matter of these appeals.
- 17 2. The self-insured employer unreasonably delayed in the payment of
18 benefits when due pursuant to the requirements of RCW 51.48.017.
- 19 3. The Department orders dated January 30, 2004, and February 25, 2004,
20 denying assessment of penalties against the self-insured employer are
21 incorrect and are reversed. The claim is remanded to the Department
22 with direction to issue a penalty for unreasonable delay in the payment
23 of time-loss compensation for the period of July 19, 2003, through
24 November 17, 2003.

25 It is so **ORDERED**.

26 Dated this 2nd day of August, 2005.

27 BOARD OF INDUSTRIAL INSURANCE APPEALS

28 /s/
29 THOMAS E. EGAN Chairperson

30 /s/
31 FRANK E. FENNERTY, JR. Member

32 /s/
CALHOUN DICKINSON Member