Paterson, Alta

PENALTIES (RCW 51.48.017)

Side bar agreements

Private agreements to pay an amount not required as a benefit under the Industrial Insurance Act are not contemplated by the Act, and no penalty can be awarded for a delay in the payment. **….*In re Alta Paterson*, BIIA Dec., 05 15987 (2005)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ALTA D. PATERSON	)	**DOCKET NO. 05 15987**
	)	
CLAIM NO. W-373602	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Alta D. Paterson, by
Law Office of William D. Hochberg, per
William D. Hochberg

Self-Insured Employer, The Boeing Company, by
Reinisch, Weier & Mackenzie, P.C., per
Renee M. Bliss

The claimant, Alta D. Paterson, filed an appeal with the Board of Industrial Insurance Appeals on June 1, 2005, from an order of the Department of Labor and Industries dated May 17, 2005. In this order, the Department denied the claimant's April 18, 2005, request for a penalty against The Boeing Company, a self-insured employer, for delay in payment of money in accord with a sidebar agreement between the claimant and the self-insured employer. The Department order is **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on November 8, 2005, in which the industrial appeals judge affirmed the order of the Department dated May 17, 2005. The issue presented in this appeal is whether penalties, as contemplated by RCW 51.48.017, are applicable if the employer has delayed fulfilling the terms of a sidebar agreement.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and the rulings are affirmed.

We agree with our industrial appeals judge and affirm the Department order dated May 17, 2005. We have granted review to address the cross motions for summary judgment that each of the parties filed. Our decision is based upon a careful review of the following materials:

1. Claimant's Motion for Summary Judgment and Trial Brief, dated September 2005;
2. Stipulation of Facts signed by the parties and dated September 9, 2005;
3. A December 15, 2004, letter from the employer's attorney to the claimant's counsel, attached to Claimant's Motion as Exhibit 1;

4. Department order dated January 21, 2005, attached to Claimant's Motion as Exhibit 2;
5. Declaration of Alta Peterson In Support of Motion for Summary Judgment;
6. Employer's Reply Brief and Cross Motion for Summary Judgment, dated September 30, 2005;
7. Claimant's Response to Employer's Reply Brief and Cross Motion for Summary Judgment, dated October 5, 2005;
8. Declaration of William D. Hochberg in Support of Claimant's Response to Employer's Reply Brief, dated October 5, 2005;
9. The arguments of the parties that occurred at the October 10, 2005, hearing on the cross motions; and
10. Judicial notice, as provided by ER 201, is taken of the December 22, 2004, Agreement of Parties under Docket No. 04 12488.

The Department issued an order dated March 1, 2004, in which it closed Ms. Paterson's claim with permanent partial disability awards equivalent to 5 percent of the amputation value of each arm, and directed that she receive time-loss compensation benefits through January 18, 2004. Ms. Paterson appealed the closing order to the Board of Industrial Insurance Appeals, (Docket No. 04 12488), and it was from that appeal that the parties reached a settlement agreement that eventually formed the basis of this appeal. Their agreement was that Ms. Paterson should be given increased permanent partial disability awards, 15 percent of the amputation value of her right arm plus 5 percent for the claimant's left arm, and that her time-loss compensation benefits be paid through February 29, 2004. Those terms would be committed to a Department order. Additionally, Ms. Paterson and The Boeing Company, through their respective attorneys, entered into what is known as a "sidebar" agreement. That private contract between them called for Ms. Paterson to receive a further sum of $24,764.60 at some point in time after the Department issued its ministerial order memorializing the agreement of the parties in Docket No. 04 12488.

After the Department issued its January 21, 2005, ministerial order, Ms. Paterson asked the Department to assess a penalty against The Boeing Company. The claimant felt that the self-insured employer did not fulfill the payment terms of the sidebar agreement within the time frame agreed upon. When the Department declined to penalize the employer in its May 17, 2005, order, Ms. Paterson appealed that decision to the Board, which is the basis of this appeal.

RCW 51.48.017 is the statutory mechanism through which penalties may be assessed when self-insured employers unreasonably delay paying benefits to injured workers. It says:

> If a self-insurer unreasonably delays or refuses to pay **benefits** as they become due there shall be paid by the self-insurer upon order of the director an additional amount equal to five hundred dollars or twenty-five percent of the amount then due, whichever is greater, which shall

> accrue for the benefit of the claimant and shall be paid to him with the benefits which may be assessed under this title. The director shall issue an order determining whether there was an unreasonable delay or refusal to pay **benefits** within thirty days upon the request of the claimant. Such an order shall conform to the requirements of RCW 51.52.050.

RCW 51.48.017 (emphasis added).

Whether The Boeing Company unreasonably delayed paying Ms. Paterson the sum called for in the private agreement between them is immaterial. The issue is whether the terms of a private, sidebar contract are **benefits** within the meaning of the Industrial Insurance Act. We determine they are not.

The Board is a creature of the Legislature without inherent or common law powers, and may exercise only powers expressly conferred or implied by necessity. *Jaramillo v. Morris*, 50 Wn. App. 822, 829, 750 P.2d 1301 (1988). Its purpose is to adjudicate actions taken by the Department. RCW 51.52.010; 51.52.050; 51.52.060. Similarly, the Department of Labor and Industries is an agency whose powers are confined by legislative mandate. The Department administers the Industrial Insurance Act to provide benefits to injured workers. Benefits under the Act have been carefully enumerated in statute, and they are limited. *See* RCW 51.32.010. Benefits include medical treatment provided by RCW 51.36.010, permanent partial disability awards in accord with RCW 51.32.055, death benefits through RCW 51.32.050, pension benefits via RCW 51.32.060, time-loss compensation benefits as authorized by RCW 51.32.090, and vocational rehabilitation services granted by RCW 51.32.095. Enforcement of private contracts, such as sidebar agreements, is not one of the benefits within the Department's mandate. By virtue of their respective legislative mandates, both the Department and this Board are precluded from enforcing private contracts between parties such as the sidebar agreement at issue in this appeal.

The Board of Industrial Insurance Appeals has the authority to resolve appeals by summary judgment. RCW 51.52.140; WAC 263-12-125; CR 56. "The function of a summary judgment is to determine whether there is a genuine issue of material fact requiring a formal trial." *Chase v. Daily Record, Inc.*, 83 Wn.2d 37, 42 (1973) quoting *Leland v. Frogge*, 71 Wn.2d 197, 200-01, 427 (1967). "The evidence before the judge is that contained in the pleadings, affidavits, admissions and other material properly presented." *Chase*, 83 Wn.2d at 42, quoting *Leland*, 71 Wn.2d at 200. Summary judgment is available only if the materials properly presented show there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). In

considering a summary judgment motion, all facts and reasonable inferences are considered in the light most favorable to the nonmoving party. *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337 (1994).

There are no issues of material fact in this appeal and the self-insured employer is entitled to a judgment in its favor as a matter of law. This appeal is, therefore, ripe for disposition by way of summary judgment. The Department order dated May 17, 2005, is affirmed.

FINDINGS OF FACT

1. On September 11, 1998, the Department received an Application for Benefits in which it was alleged that the claimant, Alta D. Paterson, sustained an industrial injury while in the course of her employment with the self-insured employer, The Boeing Company. On October 16, 1998, the Department issued an order wherein it allowed the claim. On March 1, 2004, the Department issued an order in which it directed the claimant be paid the claimant time-loss compensation benefits through January 18, 2004, and closed the claim with permanent partial disability awards equivalent to 5 percent of the amputation value of each of the claimant's arms at or above the deltoid insertion or by disarticulation at the shoulders.

   On March 10, 2004, the claimant filed a Notice of Appeal to the Department order dated March 1, 2004, with the Board of Industrial Insurance Appeals. On April 9, 2004, the Board granted the appeal and assigned it Docket No. 04 12488. On December 23, 2004, the Board issued an Order on Agreement of Parties. On January 21, 2005, the Department issued a ministerial order to conform to the Order on Agreement of Parties. In that ministerial order the Department reversed its prior order dated March 1, 2004, and it closed the claim with time-loss compensation benefits paid through February 29, 2004, and directed the self-insured employer to pay the claimant permanent partial disability awards equivalent to 15 percent of the amputation value of her right arm at or above the deltoid insertion or by disarticulation at the shoulder and 5 percent of the amputation value of the claimant's left arm at or above the deltoid insertion or by disarticulation at the shoulder.

   On April 18, 2005, the claimant requested that the Department assess a penalty against the self-insured employer. On May 17, 2005, the Department issued an order that denied the claimant's request for a penalty assessment against The Boeing Company for a delay and paying a sum of money in accord with a sidebar agreement between the claimant and the self-insured employer. On June 1, 2005, the claimant filed a Notice of Appeal to the Department order dated May 17, 2005, with the Board. On June 22, 2005, the Board granted the appeal and assigned it Docket No. 05 15987.

2. On September 17, 1997, Alta D. Peterson sustained industrial injuries to each of her arms while in the course of her employment with The Boeing Company.

3. There are no disputed issues of material fact in this appeal.

4. On December 22, 2004, Alta D. Peterson and the self-insured employer, the Boeing Company, reached an agreement to settle the claimant's appeal pending before the Board under Docket No. 04 12488. The agreement between the claimant and the self-insured employer, formally memorialized by a December 23, 2004, Order on Agreement of Parties issued by the Board, provided Ms. Paterson with increased permanent partial disability awards and additional time-loss compensation benefits. The agreement between the parties at the Board did not include other terms and conditions.

5. The claimant and the self-insured employer also entered into a sidebar agreement that required The Boeing Company to pay Ms. Paterson the sum of $24,764.60 at some future date. The Department and the Board were not parties to that sidebar agreement.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.

2. A sidebar agreement is not a benefit within the meaning of RCW 51.32.010.

3. Delay in following the terms of a sidebar agreement between the claimant and the self-insured employer does not subject the employer to penalties contemplated by RCW 51.48.017 because those terms are not benefits, but amount to a private contract beyond the authority of the Industrial Insurance Act.

4. The self-insured employer, The Boeing Company, is entitled to judgment in its favor as a matter of law, as provided by Civil Rule 56.

5. The Department order dated May 17, 2005, is correct and is affirmed.

It is so **ORDERED**.

Dated this 30th day of December, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
THOMAS E. EGAN Chairperson

/s/ _____
CALHOUN DICKINSON Member