

Blackwood, Melvin

PENALTIES (RCW 51.48.017)

Unreasonable delay

After a penalty was properly imposed for unreasonable delay or refusal to pay benefits as they became due, the Department may not reverse the imposition of the penalty solely because the self-insured employer was bankrupt and the Department had assumed jurisdiction over the claim. ...*In re Melvin Blackwood*, BIIA Dec., 10 15912 (2011)

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

1 **IN RE: MELVIN L. BLACKWOOD**) **DOCKET NO. 10 15912**
2)
3 **CLAIM NO. W-899807**) **DECISION AND ORDER**

4 APPEARANCES:

5 Claimant, Melvin L. Blackwood, by
6 Parham, Hall & Karmy, per
7 Robert R. Hall

8 Self-Insured Employer, Fleetwood Homes of Washington, Inc.,
9 None

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 Natalee Fillinger, Assistant

13 The claimant, Melvin L. Blackwood, filed an appeal with the Board of Industrial Insurance
14 Appeals on August 24, 2010, from an order of the Department of Labor and Industries dated
15 August 18, 2010. In this order, the Department canceled a prior order dated August 2, 2010, and
16 denied the claimant's request for a penalty. The Department order is **REVERSED AND
17 REMANDED.**

DECISION

18 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
19 review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and
20 Order issued on May 18, 2011, in which the industrial appeals judge affirmed the Department order
21 dated August 18, 2010.

22 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
23 no prejudicial error was committed. The rulings are affirmed. We grant review, however, because
24 we believe the Department order is incorrect, and accordingly we grant the claimant's motion for
25 summary judgment. Additionally, we have reviewed this file as authorized by our decision in *In re*
26 *Mildred Holzerland*, BIIA Dec., 15,729 (1965), and based on this review we have amended the
27 Findings of Fact and Conclusions of Law.

1 Pursuant to CR 56(h), in evaluating the Department's Motion and the Claimant's
2 Cross-Motion for Summary Judgment, the following evidence, arguments, and authority were
3 considered:

- 4 1 Department's Motion for Summary Judgment.
- 5 2. Department's Declaration of Larry Wilkinson.
- 6 3. Claimant's Cross-Motion for Summary Judgment and Response to
7 Department's Motion.
- 8 4. Claimant's Exhibit A - April 16, 2010 Department Order.
- 9 5. Claimant's Exhibit B - April 22, 2010 Letter from claimant's
10 representative to Peggy Campbell, SI Claims Adjudicator.
- 11 6. Claimant's Exhibit C - August 2, 2010 Department Order.
- 12 7. Claimant's Exhibit D - May 19, 2010 Department letter to claimant.
- 13 8. Department's Reply to Summary Judgment.
- 14 9. The transcript of the oral argument presented at the telephonic hearing
15 on April 13, 2011.
- 16 10. The pleadings, records, and files in this case.

17 The facts in this matter are simple. Mr. Blackwood was injured on March 31, 2006, during
18 the course of his employment with a self-insured employer, Fleetwood Homes. The claim was
19 allowed, and benefits were paid. On April 16, 2010, after a number of orders, including litigation at
20 the Board, the Department directed the self-insured employer to pay a penalty for unreasonable
21 delay in the payment of time-loss compensation benefits for the period of October 23, 2008 through
22 December 10, 2009. Unfortunately, when the Department calculated the time-loss compensation
23 benefits for that period, it assessed a penalty of \$799.70, based on a time-loss compensation
24 benefit amount of \$3,118.80 for that period. In fact, the self-insured employer delayed paying over
25 \$16,000 in time-loss compensation benefits; it would appear that the Department left out a year of
26 time-loss compensation benefits, and calculated it based on October 23, 2008 through
27 December 10, 2008, when the latter date should have been December 10, 2009. Thus, the penalty
28 should have been over \$4,000.

29 Claimant's counsel thus filed a Protest and Request for Reconsideration on April 22, 2010
30 asking that the Department recalculate the amount of time-loss compensation benefits due, and
31 thus the penalty as well. The Department acknowledged receipt of this document in a letter dated
32 April 30, 2010, and stated that it received the request for and/or protest from the recent order
issued on April 16, 2010.

1 At some point during the pendency of the Protest and Request for Reconsideration, the
2 self-insured employer went bankrupt. On May 19, 2010, the Department sent a letter to the
3 claimant and his counsel informing them that Fleetwood Homes had defaulted on their Workers'
4 Compensation claims, and that the Department was assuming jurisdiction.

5 On August 2, 2010, the Department issued a further order stating:

6 The department has reconsidered the 4/16/10 order and notice and the following
7 action taken:

8 Melvin Blackwood is entitled to time-loss compensation benefits for 10/23/08 through
9 12/10/09 in the amount of \$18,188.94. On 2/09/09 Fleetwood Enterprises paid time
10 loss compensation in the amount of \$2,133.46.

11 On 7/21/10 the department made payment of the balance of time loss benefits in the
12 amount of \$16,055.48.

13 The 4/16/10 order and notice which assessed a penalty is reversed.

14 This order was duly protested, and the Department issued an order on August 18, 2010, in which it
15 canceled the order of August 2, 2010, and denied the request for a penalty. It is this order that is
16 under appeal.

17 The claimant's protest of the penalty order, based on the fact that the penalty was not
18 accurately calculated, resulted in a delay in paying the penalty, during which time the self-insured
19 employer went bankrupt and the Department took over the claims. Ultimately, the Department
20 reversed the penalty assessment. It would appear that the Department reversed the imposition of a
21 penalty not because there was no unreasonable delay, but only because the self-insured employer
22 was bankrupt and the Department had assumed jurisdiction.

23 This matter was decided by way of Cross-Motions for Summary Judgment. Our industrial
24 appeals judge determined that if the penalty was upheld or recalculated to be larger, the
25 Department was, in effect, penalizing itself. Larry Wilkinson, a Self-Insurance Certification and
26 Compliance Manager for the Department, signed a declaration that was the basis for the summary
27 judgment motion. In it, Mr. Wilkinson explained that because Fleetwood defaulted on its
28 self-insured obligations, all claim costs associated with Fleetwood would be paid from the medical
29 aid and accident funds maintained by the Department. These funds are then reimbursed from a
30 pool of money funded with assessments against solvent self-insured employers, the Insolvency
31 Trust Fund.

32 Mr. Wilkinson further explained that in effect, penalizing the self-insured employer is thus
penalizing the Department for the self-insured employer's failure to pay time-loss compensation.
The Department would thus be penalizing itself. The claimant argued that the Legislature intended

1 the statute to provide compensation to claimants for suffering delays in receiving their workers'
2 compensation benefits.

3 Our industrial appeals judge correctly determined that this matter presents no genuine issue
4 of material fact. She further reasoned that public policy never intended that the Department should
5 pay a previously assessed penalty on behalf of a bankrupt self-insured employer. However, we do
6 not believe that this matter involves an analysis of public policy; rather, we believe the statute is
7 clear on this issue. Accordingly, we disagree with our industrial appeals judge, and grant review to
8 grant the claimant's motion for summary judgment.

9 RCW 51.48.017 provides, in pertinent part:

10 If a self-insurer unreasonably delays or refuses to pay benefits as they become due
11 there shall be paid by the self-insurer upon order of the director an additional amount
12 equal to five hundred dollars or twenty-five percent of the amount then due,
13 whichever is greater, which shall accrue for the benefit of the claimant and shall be
14 paid to him or her with the benefits which may be assessed under this title. The
15 director shall issue an order determining whether there was an unreasonable delay or
16 refusal to pay benefits within thirty days upon the request of the claimant. Such an
17 order shall conform to the requirements of RCW 51.52.050.

18 It is important that there is no issue as to whether the penalty was properly imposed in this
19 matter. Neither party has raised this as an issue, and there is no evidence that there was some
20 reasonable explanation for the self-insured employer's failure to pay time-loss compensation
21 benefits when due. In this regard the statute is indeed clear; once the Director determines that
22 there was an unreasonable delay, the statute mandates imposition of a penalty, which is specifically
23 to be paid to the claimant. Thus, there is no issue as to the claimant's entitlement to these funds.

24 Further, the statute also anticipates situations wherein the self-insured employer, for
25 whatever reason, abandons its responsibilities to the worker. RCW 51.14.060 provides that the
26 Director may bring suit upon the self insured's bond. Further, RCW 51.14.060(2) provides, in
27 pertinent part:

28 The director shall be authorized to fulfill the defaulting self-insured employer's
29 obligations under this title from the defaulting self-insured employer's deposit or from
30 other funds provided under this title for the satisfaction of claims against the
31 defaulting self-insured employer.

32 Significantly, the Legislature did not use the word "benefits" or "compensation;" it used the word
"obligation." By using the term "obligation," the Legislature intended that the Department fulfill all
debts of the self-insured employer, not just those considered "benefits." We believe that the
penalty that was undeniably due to the claimant by Department order is exactly one of these

1 obligations. Accordingly, we grant the claimant's Motion For Summary Judgment, reverse the
2 Department order, and remand this matter to the Department with direction to issue an order
3 calculating a penalty for the self-insured's failure to pay time-loss compensation benefits when due
4 for the period of October 23, 2008 through December 10, 2009.

5 **FINDINGS OF FACT**

6 1. On September 11, 2006, the claimant, Melvin L. Blackwood, filed an
7 Application for Benefits with the Department of Labor and Industries, in
8 which he alleged an injury to his back on March 1, 2006, while in the
9 course of employment with Fleetwood Homes of Washington, Inc. The
10 industrial insurance claim was allowed and benefits were paid.

11 On April 16, 2010, the Department issued an order in which it declared
12 the self-insured employer unreasonably delayed payment of time-loss
13 compensation benefits for the period from October 23, 2008, through
14 December 10, 2009, and assessed a \$799.70 penalty against the
15 self-insured employer, payable to the claimant.

16 On April 22, 2010, Mr. Blackwood filed a Protest and Request for
17 Reconsideration of the Department order dated April 16, 2010.

18 On May 19, 2010, the Department issued a letter in which it declared it
19 assumed jurisdiction over all claims filed against the self-insured
20 employer because they had defaulted on their worker's compensation
21 claims. The Department's self-insured employer section took over
22 management of all claims.

23 On July 21, 2010, the Department issued an order in which it set the
24 claimant's wage rate and paid time-loss compensation benefits for the
25 period from October 23, 2008, through December 10, 2009, and took a
26 deduction for previously paid time-loss compensation benefits.

27 On August 2, 2010, the Department issued an order in which it
28 reconsidered its April 16, 2010 order and notice, declared the claimant
29 was entitled to time-loss compensation benefits for October 23, 2008,
30 through December 10, 2009, in the amount of \$18,188.94; declared
31 Fleetwood Homes of Washington, Inc., had paid time-loss compensation
32 benefits on February 9, 2009, in the amount of \$2,133.46; declared the
Department paid the balance of time-loss compensation benefits on
July 21, 2010, in the amount of \$16,055.48; and reversed its April 16,
2010 order and notice that assessed a penalty.

On August 6, 2010, Mr. Blackwood filed a Protest and Request for
Reconsideration of the Department's August 2, 2010 order.

1 On August 18, 2010 the Department issued an order in which it
2 canceled its order and notice of August 2, 2010; declared the claimant
3 was entitled to time-loss compensation benefits for October 23, 2008,
4 through December 10, 2009, in the amount of \$18,188.94, less time-loss
5 compensation benefits paid by the self-insured employer on February 9,
6 2009, in the amount of \$2,133.46; for a balance of \$16,055.48 paid by
7 the Department on July 21, 2010; and denied the request for penalty.

8 On August 24, 2010, Mr. Blackwood filed a Notice of Appeal to the
9 August 18, 2010 order with the Board of Industrial Insurance Appeals.
10 On September 7, 2010, the Board granted the claimant's appeal of the
11 August 18, 2010 order under Docket No. 10 15912, and agreed to hear
12 the appeal.

- 13 2. As of August 18, 2010, Fleetwood Homes of Washington, Inc., was
14 insolvent and no longer a self-insured employer. On August 18, 2010,
15 all outstanding industrial insurance claims of Fleetwood Homes of
16 Washington, Inc., were being administered by the Department of Labor
17 and Industries.
- 18 3. The self-insured employer, Fleetwood Homes, did not pay
19 Mr. Blackwood's time-loss compensation benefits as they became due
20 for the period of October 23, 2008 through December 10, 2009, and the
21 Department determined that a penalty should be paid, and issued an
22 order assessing a penalty of 25 percent of the delinquent time-loss
23 compensation. Some or all of the penalty had not been paid to the
24 claimant as of the date Fleetwood Homes became insolvent.
- 25 4. The affidavits and exhibits submitted by the parties demonstrate that
26 there is no genuine issue as to any material fact.

CONCLUSIONS OF LAW

- 27 1. The Board of Industrial Insurance Appeals has jurisdiction over the
28 parties to and the subject matter of this appeal.
- 29 2. The self-insured employer, Fleetwood Homes, unreasonably delayed or
30 refused to pay time-loss compensation benefits as they became due for
31 the period of October 23, 2008 through December 10, 2009, within the
32 meaning of RCW 51.48.015.
3. As of August 18, 2010, Fleetwood Homes of Washington, Inc., was
insolvent, was no longer a self-insured employer, and all claims were
administered by the Department of Labor and Industries as provided by
RCW 51.14.060.
4. The payment of a penalty is an "obligation" within the meaning of
RCW 51.14.060(2).
5. The claimant is entitled to a decision as a matter of law as contemplated
by CR 56.

1 6. The order of the Department of Labor and industries dated August 18,
2 2010, is incorrect, and is reversed, and this matter is remanded to the
3 Department with direction to issue a further order calculating and paying
4 a penalty to the claimant for 25 percent of the time-loss compensation
benefits for the period of October 23, 2008 through December 10, 2009.

5 DATED: August 18, 2011.

6
7 BOARD OF INDUSTRIAL INSURANCE APPEALS

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9
10 /s/ _____
DAVID E. THREEEDY Chairperson

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12
13 /s/ _____
FRANK E. FENNERTY, JR. Member

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16 /s/ _____
LARRY DITTMAN Member