

Coston, James

PENALTIES (RCW 51.48.017)

Unreasonable delay – medical treatment

Payment of medical bills is a benefit under the Industrial Insurance Act. If a self-insured employer unreasonably delays the benefit or refuses to pay the benefit as it comes due, then RCW 51.48.017 requires a penalty against the self-insured employer. *Overruling In re John Meyer*, BIIA Dec., 03 14702 (2004). ...***In re James Coston, BIIA Dec., 11 12310 (2012)*** [*Editor's Note: The Board's decision was appealed to Thurston County Superior Court Nos. 12-2-02093-8 and 12-2-02114-4.*]

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

1 **IN RE: JAMES C. COSTON**) **DOCKET NO. 11 12310**
2 **CLAIM NO. SC-40235**) **DECISION AND ORDER**

3 APPEARANCES:
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5 Claimant, James C. Coston, by
6 Putnam Lieb, per
7 Wayne Lieb

8 Self-Insured Employer, J H Kelly, LLC, by
9 Ronald W. Atwood, P.C., per
10 Ronald W. Atwood

11 The claimant, James C. Coston, filed an appeal with the Board of Industrial Insurance
12 Appeals on March 18, 2011, from an order of the Department of Labor and Industries dated
13 March 4, 2011. In this order, the Department denied the claimant's request for a penalty against
14 the self-insured employer for delay of payment of medical bills. The Department order is
15 **REVERSED AND REMANDED.**

DECISION

16 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
17 review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and
18 Order issued on March 7, 2012, in which the industrial appeals judge affirmed the Department order
19 dated March 4, 2011. This order addresses whether the self-insured employer should be penalized
20 for a delay in payment of medical bills in the claim of James Coston.

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

23 We have granted review because we determine that payment of medical bills is a benefit
24 contemplated by Title 51 RCW. In doing so we overrule our significant decision *In re John Meyer*,
25 BIIA Dec., 03 14702 (2004).

26 On September 20, 2007, Brodie Wood, M.D., of Olympia Orthopaedic Associates, PLLC,
27 performed bilateral knee surgery on the claimant, James Coston. Shortly thereafter, Olympia
28 Orthopaedic sent Mr. Coston a bill for the cost of the bilateral knee surgery. About a month later,
29 he received a second bill for the surgery and was cautioned by Olympia Orthopaedic that if the bill
30 was not paid it would be turned over to collections. Danielle Dodge, the billing office supervisor at
31 Olympic Orthopaedic, testified that typically, bills are paid within 60 days of billing. After the first
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1 billing was sent to the claims adjuster on January 31, 2008, five additional bills were sent.
2 Ms. Dodge spoke several people to find out where the payments were. Payment was finally
3 received in full on January 26, 2011.

4 On April 4, 2008, Mr. Coston filed a claim for the bilateral knee condition, which was allowed
5 on May 13, 2008. Dr. Wood's office submitted bills for services in the amounts of \$3,123.92 and
6 \$6,756.76 to the self-insured employer, J H Kelly, on January 31, 2008. Repeat bills were provided
7 to JH Kelly, or its third-party administrator, Gallagher Basset, on July 15, 2008; October 16, 2008;
8 March 17, 2009; June 3, 2009; and June 4, 2009. An entry in the claim notes indicates that surgical
9 bills were sent for claim processing to Gallagher Bassett on February 6, 2009. The bills were
10 re-submitted on April 21, 2009; January 13, 2010; and March 25, 2010.

11 Following the issuance of the June 5, 2009 Department order, which directed the
12 self-insured employer to take responsibility for the claim (including the bilateral knee surgeries
13 performed by Dr. Wood), Gallagher Bassett requested additional documents from Olympia
14 Orthopaedic. Olympia Orthopaedic's response of January 12, 2011, shows the outstanding dates
15 of service for Mr. Coston's care. Exhibit No. 4. The amount paid by Gallagher Bassett on April 8,
16 2010, using funds provided by J H Kelly, was \$1,614.35. On January 26, 2011, using funds
17 provided by J H Kelly, \$9,053 was paid by Gallagher Bassett.

18 Cecil Eric Boling is Assistant Branch Manager for Gallagher Bassett, the third-party
19 administrator. He acknowledged that the surgical bills were not paid until two and a half to three
20 and a half years after the surgery because he "probably missed it." 9/20/11 Tr. at 33.

21 Sally Jackson is a supervisor at Gallagher Bassett. About 1,000 bills come through her unit
22 on a monthly basis. She was unaware that Olympia Orthopaedic had billed multiple times for the
23 September 2007 knee surgeries performed on Mr. Coston and took no action to pay the bills.

24 Gary Goeman has worked for Gallagher Bassett since April 2006. He is a senior claims
25 manager. While acting as claims manager, he received a bill from Dr. Wood's office for surgeries
26 performed in September 2007. Had he looked at the medical payment screen for the claim in
27 August 2008, he would have seen that the bills had not yet been paid.

28 Barbara Jones, Worker's Compensation Claims Manager at J H Kelly, oversees all the
29 workers' compensation claims for the company. Gallagher Basset is the entity that actually pays
30 the bills. Ms. Jones acknowledged that the bills were not timely paid.

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1 Our industrial appeals judge decided this appeal in reliance on *In re John Meyer*, BIIA
2 Dec., 03 14702 (2004), in which the Board concluded that medical benefits were not contemplated
3 by the Legislature when it enacted RCW 51.48.017. The statute provides:

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

14 In *Meyer* we stated:

15 The language of the above section implies a financial payment that
16 inures to the advantage of the claimant. Although it is possible to
17 determine the dollar value of medical treatment by reference to the
18 Department fee schedule, it is unreasonable to conclude that medical
19 benefits were being contemplated by the Legislature when it passed this
20 section. The language, "the amount then due," strongly suggests time
21 loss compensation or permanent partial disability award; something in
22 money that is payable to the claimant. On balance, we have to agree
23 with our industrial appeals judge that an employer's denial of medical
24 treatment is outside the reach of RCW 51.48.017 as it relates to
25 assessing a penalty against the employer for failing to authorize
26 treatment.

27 Meyer at 2.

28 In the Petition for Review, Mr. Coston asks us to overrule *Meyer* on grounds that it is
29 inconsistent with RCW 51.48.017. Mr. Coston argues that contrary to our holding in *Meyer* the term
30 "benefits" as used in the statute includes treatment and payment for treatment as well as time loss
31 compensation and permanent partial disability. We agree with Mr. Coston. In determining that the
32 section "implies" a financial payment, the decision in *Meyer* failed to consider the plain reading of
the statute and existing case law. For these reasons, we overrule *In re John Meyer*, BIIA
Dec., 03 14702 (2004).

The first sentence of RCW 51.48.017 provides in part "If a self-insurer unreasonably delays
or refuses to pay benefits as they become due . . ." As we read this language we find two
situations that would trigger the penalty in the statute: (1) When a self-insurer unreasonably delays
benefits and (2) when a self-insurer refuses to pay benefits as they come due. There is no explicit

1 requirement in the statute that the refusal to pay the benefits is limited to payments due the worker
2 as compared to payments due a provider. Likewise, there is nothing in the statute that limits the
3 imposition of a penalty to only delaying benefits paid directly to the worker as opposed to the delay
4 of authorization of benefits. In each of these situations the worker is deprived of timely access to
5 the benefits.

6 There is no definition of the term "benefit" in the Industrial Insurance Act (Act). Instead the
7 Act incorporates several words or phrases to describe the worker's entitlements. The worker's
8 entitlements under the Act are the quid pro quo for the exclusive remedy provision of the Act which
9 limits the worker's ability to bring an action at law for damages against the employer. The Act refers
10 to "an application for compensation" (RCW 51.28.020). The term "compensation" is repeated
11 frequently in the Act. See RCW 51.32, et seq. The worker who is entitled to "compensation" is also
12 entitled to "receive proper and necessary medical and surgical services." RCW 51.36.010.
13 RCW 51.32.020 defines situations where a worker would not be entitled to "receive any payment
14 under this title."

15 The Legislature has chosen a number of ways to describe the entitlements a worker has
16 under the Act. All of these entitlements inure to the benefit of the worker. Whether referred to as
17 compensation, services, benefits, or payments, the entitlements due the worker under the Act
18 constitute benefits due the worker in exchange for the exclusive remedy protection the employer
19 receives. Webster's Dictionary also defines "benefit" as "Payments made or entitlements available
20 in accord with a wage agreement, insurance contract, or public assistance program." *Webster's II*
21 166 (1994). We find that the use of the word benefits in RCW 51.48.017 includes all forms of
22 treatment services due the worker. Therefore, if a self-insurer unreasonably delays the benefits or
23 refuses to pay the benefits as they come due, RCW 51.48.017 requires a penalty against the
24 self-insurer.

25 Our decision to include medical services within the meaning of benefits in RCW 51.48.017 is
26 supported by the decision of the Washington State Supreme Court in *Wolf v. Scott Wetzel Services*,
27 113 Wn.2d 665 (1989). In *Wolf* the worker sought to recover damages in an action at law against
28 the self-insurer for "the initial refusal . . . to pay for psychiatric care." *Wolf*, at 667. The Court
29 distinguished a suit for wrongful delay or termination of benefits from one involving the tort of
30 outrage in administration of the claim. The tort of outrage would not be subject to the immunity
31 provided by the exclusive remedy; a claim for wrongful delay or termination is immune from a
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1 separate suit. In *Wolf* the claim was for the wrongful delay or termination of benefits. The Court
2 noted that RCW 51.48.017 provides specific remedies for the unreasonable delay or refusal to pay
3 benefits by the self-insurer, and provides the sole means of redress for the worker for the delay in
4 providing medical benefits. A separate suit for unreasonable delay was not permitted because of
5 the remedy provided by RCW 51.48.017 for unreasonable delay in providing psychiatric treatment.
6 The Court in *Wolf* did not distinguish the application of RCW 51.48.017 to monetary benefits as
7 opposed to treatment benefits. We conclude such a distinction is not warranted by the plain
8 language of the statute.

9 Despite numerous billings sent to the self-insured employer and its third-party administrator,
10 payment of Mr. Coston's medical bills was significantly, and unreasonably, delayed. This appeal is
11 remanded to the Department to assess a penalty against the self-insured employer, consistent with
12 the facts and the law.

13 **FINDINGS OF FACT**

- 14 1. On May 10, 2011, an industrial appeals judge certified that the parties
15 agreed to include the Jurisdictional History, in the Board record solely
16 for jurisdictional purposes.
- 17 2. On April 4, 2008, James Coston filed an Application for Benefits for an
18 occupational disease affecting both knees, and that became manifest on
19 June 20, 2007.
- 20 3. On September 20, 2007, Brodie Wood, M.D., of Olympia Orthopaedic,
21 performed bilateral knee surgery on Mr. Coston. Shortly thereafter,
22 Olympia Orthopaedic sent Mr. Coston a bill for the cost of the bilateral
23 knee surgery. About a month later, he received a second bill for the
24 surgery and was cautioned by Olympia Orthopaedic that if the bill was
25 not paid by him it would be turned over to collections.
- 26 4. Mr. Coston's industrial insurance claim for a bilateral knee condition was
27 allowed by the Department on May 13, 2008.
- 28 5. Olympia Orthopaedic submitted bills for services in the amounts of
29 \$3,123.92 and \$6,756.76 to the self-insured employer, J H Kelly, on
30 January 31, 2008. When these bills went unpaid, duplicate bills issued.
- 31 6. In January 2011, Gallagher Bassett, J H Kelly's third-party administrator,
32 paid the Olympia Orthopaedic bills.

CONCLUSIONS OF LAW

1. Based on the record, the Board of Industrial Insurance Appeals has
jurisdiction over the parties to and the subject matter of this appeal.
2. J H Kelly, LLC, unreasonably delayed payment of benefits as
contemplated by RCW 51.48.017.

1 3. The Department order dated March 4, 2011, is incorrect and is reversed.
2 This appeal is remanded to the Department to assess a penalty against
3 the self-insured employer and to take such further action as indicated or
4 required by law.

5 Dated: September 11, 2012.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS

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8 /s/ _____
9 DAVID E. THREEEDY Chairperson

10
11 /s/ _____
12 FRANK E. FENNERTY, JR. Member

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