

Hopkins, Josannah

Decision removed April 2020

PENALTIES (RCW 51.48.017)

Unreasonable delay

Where the Department determines that a penalty is due for unreasonable delay in payment of benefits, the amount "then due" as set out in RCW 51.48.017 is the aggregate amount due.*In re Josannah Hopkins, Order Denying Motion for Reconsideration, BIIA Dec., 13 21202 (2015)* [*Editor's Note: The decision is removed from the Board's significant decisions because the Legislature amended RCW 51.48.017. Effective September 1, 2020, every time a self-insured employer unreasonably delays or refuses to pay benefits as they become due, they are required to pay a penalty not to exceed the greater of one thousand dollars or 25 percent of either the amount due or of each underpayment made to the claimant. Josannah Hopkins is no longer good law.*]

Scroll down for order.

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

1 **IN RE: JOSANNAH HOPKINS**) **DOCKET NO. 13 21202**
2)
3 **CLAIM NO. SD-85849**) **DECISION AND ORDER**
4 _____)

5 **APPEARANCES:**

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7 Claimant, Josannah C. Hopkins, by
8 Busick Hamrick, PLLC, per
9 Douglas M. Palmer

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11 Self-Insured Employer, City of Vancouver, by
12 Sather, Byerly & Holloway, LLP, per
13 Aaron J. Bass

14
15 Department of Labor and Industries, by
16 The Office of the Attorney General, per
17 Penny L. Allen

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19 The claimant, Josannah C. Hopkins, filed an appeal with the Board of Industrial Insurance
20 Appeals on September 4, 2013, from an order of the Department of Labor and Industries dated
21 August 30, 2013. In this order, the Department ordered the self-insured employer to pay a penalty
22 of \$962.91 to the claimant for unreasonably delaying time-loss compensation benefits. The
23 Department order is **REVERSED AND REMANDED**.
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27 **DECISION**

28 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
29 review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and
30 Order issued on June 27, 2014, in which the industrial appeals judge reversed and remanded the
31 Department order dated August 30, 2013. The self-insured employer filed a response on
32 August 11, 2014.
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35 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
36 no prejudicial error was committed. The rulings are affirmed. We have granted review to
37 supplement the legal analysis supporting reversal and remand.
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40 The matter was decided on summary judgment. In resolving this appeal, the Board has
41 considered:
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- 44 • Jurisdictional History
 - 45 • Claimant's Motion for Summary Judgment and Reply Brief
 - 46 • Department's Response Brief and Cross Motion for Summary Judgment
- 47

- 1 • Employer's Cross Motion for Partial Summary Judgment and Response
- 2 • Deposition of Dawn Bambusch.
- 3
- 4 • Declaration of Douglas Palmer
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- 6 • Transcript of April 24, 2014 Hearing on Motion
- 7 • Exhibits:
 - 8 1. December 14, 2011 SIF-5 with attachments;
 - 9 2. September 10, 2013 SIF-5 with attachments;
 - 10 3. Daily time-loss compensation benefits rates spreadsheet;
 - 11 4. Untitled spreadsheet;
 - 12 5. Calendar for year 2013;
 - 13 6. September 20, 2011 chart note of Jane Hillstrom, FNP;
 - 14 7. Off-work note;
 - 15 8. December 14, 2011 SIF-5 and SIF-5A and payroll record;
 - 16 9. September 10, 2013 SIF-5 and SIF-5A and payroll record;
 - 17 10. Daily time-loss compensation benefits rates;
 - 18 11. Time-loss compensation benefits chart;
 - 19 12. 2013 Calendar;
 - 20 13. Hillstrom chart note September 20, 2011;
 - 21 14. Work note September 20, 2011;
 - 22 15. SIF-2 dated September 22, 2011;
 - 23 16. September 10, 2013 wage order;
 - 24 17. December 13, 2013 Department order;
 - 25 18. December 13, 2013 Department letter;
 - 26 19. June 11, 2013 Pelley letter;
 - 27 20. June 25, 2013 Department order;
 - 28 21. Declaration Mary Hartline with attachment: August 30, 2013 Department order;
 - 29 22. Declaration Mary Hartline;
 - 30 23. Claimant's protest dated August 2, 2013;
 - 31 24. Claimant's penalty request dated June 18, 2013;
 - 32 25. Department order dated July 31, 2013;
 - 33 26. Claimant's appeal dated September 4, 2013;
 - 34 27. Payment dated September 10, 2013;
 - 35 28. 1971 Executive Session Laws;
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- 1 29. 1985 Executive Session Laws;
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- 3 30. Final Bill Report SBH1089 (1985).

4 We agree with our industrial appeals judge that a penalty calculation for unreasonable delay
5 in payment of time-loss compensation benefits should be based on the delayed benefits for an
6 aggregate period rather than based on each delayed payment individually. We reject the
7 interpretation of the statute offered by Ms. Hopkins. She proposes that a \$500 minimum penalty
8 apply to each semimonthly or biweekly benefit period for which benefits were delayed. Under
9 Ms. Hopkins' proposed method, multiple \$500 penalties result in a total penalty of over \$20,000,
10 more than the \$962.91 penalty in the order under appeal.

11 We reverse and remand because the Department failed to properly address Ms. Hopkins'
12 request for penalties. On remand, the Department must fully explain the time periods it is
13 addressing in response to Ms. Hopkins' request for a penalty and base the calculation on a correct
14 wage determination.

15 **Summary Judgment**

16 To meet the summary judgment standard a party must show there are no disputed issues of
17 material fact and the moving party is entitled to judgment as a matter of law.¹

18 The City of Vancouver argued in its cross-motion for partial summary judgment that an issue
19 of fact prevented full summary judgment because reasonableness of the delay in benefits remained
20 an issue. Our industrial appeals judge correctly determined that no issue of fact remained because
21 the Board's jurisdiction is limited to the issues raised in the Notice of Appeal and the self-insured
22 employer did not cross appeal.² She also pointed out that the Board has taken the position that an
23 appealing party cannot be placed in a worse position by appealing than if no appeal was filed.³ We
24 conclude that Ms. Hopkins' appeal did not raise the reasonableness of the delay, and there is no
25 issue of fact regarding the reasonableness we can address.

26 **Penalty Calculation Method**

27 RCW 51.48.017 provides:

28 If a self-insurer unreasonably delays or refuses to pay benefits as they become due
29 there shall be paid by the self-insurer upon order of the director an additional amount
30 equal to five hundred dollars or twenty-five percent of the amount then due,
31 whichever is greater, which shall accrue for the benefit of the claimant and shall be

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¹ CR 56.

² *Brakus v. Department of Labor & Indus.*, 48 Wn.2d 218 (1956).

³ *In re Zoyt Dejneka*, BIIA Dec., 51,408 (1979).

1 paid to him or her with the benefits which may be assessed under this title. The
2 director shall issue an order determining whether there was an unreasonable delay
3 or refusal to pay benefits within thirty days upon the request of the claimant. Such
4 an order shall conform to the requirements of RCW 51.52.050.

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6 RCW 51.32.190(3) provides in pertinent part:

7 Where temporary disability compensation is payable, the first payment thereof shall
8 be made within fourteen days after notice of claim and shall continue at regular
9 **semimonthly or biweekly intervals.**

10 Emphasis added.

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12 Ms. Hopkins argues that a review of the two statutes leads to a conclusion that a penalty is
13 due for each semimonthly or biweekly time-loss compensation benefits period for which benefits
14 were unreasonably delayed. She points out that the Industrial Insurance Act is "to be liberally
15 construed for the purpose of reducing to a minimum the suffering and economic loss arising from
16 injuries occurring in the course of employment."⁴

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18 The City of Vancouver and the Department argue that the aggregation method follows the
19 statute and its purpose. Under the aggregation method a penalty is calculated by the Department
20 by applying the greater of either \$500 or 25 percent of the total delayed benefits rather than for
21 each delayed payment individually.

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23 Using Ms. Hopkins' proposed method, \$3,851.65 in delayed benefits for the period the
24 period September 20, 2011, through July 3, 2013, would cause a penalty of over \$20,000. Using
25 the Department's method, the penalty was calculated to be \$962.91, or 25 percent of the amount of
26 delayed benefits over the period.

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28 In determining the meaning of a statute, we first look to the relevant statutory language.⁵ A
29 statute is ambiguous when after examination it is found to have more than one reasonable
30 interpretation.⁶ If after considering the statute and its related provisions the statute remains
31 ambiguous, it is appropriate to consider aids to construction, including legislative intent.⁷ When
32 construing a statute the primary goal is to ascertain and to give effect to the legislative intent.⁸

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34 The Industrial Insurance Act should be liberally construed to reduce to a minimum the
35 suffering and economic loss arising from injuries occurring in the course of employment.

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44 ⁴ RCW 51.12.010.

45 ⁵ *Everett Concrete Products v. Department of Labor and Indus.*, 109 Wn.2d 819, 821 (1998)

46 ⁶ *Jametsky v. Olsen*, 179 Wn.2d 756, 762 (2014)

47 ⁷ *Department of Ecology v. Cambell & Gwinn*, 146 Wn.2d 1, 11-12 (2002)

⁸ *Department of Labor and Industries v. Auman*, 110 Wn.2d 917, 921 (1988)

1 RCW 51.12.010. A statute need not be construed to achieve an unlikely, absurd, or strained
2 interpretation.⁹ Likewise, statutes should receive a sensible construction to effect the legislative
3 intent and if possible to avoid unjust or absurd consequences.¹⁰
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6 RCW 51.48.017 provides a remedy for the worker if a self-insured employer unreasonably
7 delays benefits as they become due. Under RCW 51.32.190, time-loss compensation benefits
8 become due at regular semimonthly or biweekly intervals. Under RCW 51.48.017, however, the
9 additional benefit in a penalty for unreasonable delay is calculated when the Department issues the
10 penalty. The penalty is equal to \$500.00 or 25 percent of the amount **then** due. The amount then
11 due is the aggregate amount due. To interpret the statute to mean the Department is to engage in
12 separate after the fact calculations for each periodic time-loss compensation benefit period severely
13 strains the language of the statute.
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16 The consequences of such a strained reading are illustrative. An error in time-loss
17 compensation benefits calculation that results in a dollar of underpayment over an extended period
18 could cause tens of thousands of dollars in penalties. Under Ms. Hopkins' proposed method the
19 statute is exceptionally punitive.
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22 The Department's method of penalty calculation is also supported by legislative history. The
23 final bill report SHB 1089 from 1985 that added the five hundred dollar minimum penalty to the
24 existing 25 percent penalty stated that "A self-insured employer is subject to a minimum
25 assessment of five hundred dollars for unreasonably delaying payments to claimant." Use of the
26 word "payments" suggests that the minimum penalty should cover multiple delayed payments.
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29 In summary, we agree with our industrial appeals judge that the aggregation method is the
30 proper method to calculate penalties for unreasonable delay in time-loss compensation benefits
31 under RCW 51.48.017.
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33 **Penalty Request**

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35 Although we agree that the aggregation method is proper under RCW 51.48.017 for
36 calculating a penalty, the Department did not properly respond to Ms. Hopkins' request for
37 penalties. Nor did it adequately explain how it calculated the penalty.
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40 Under RCW 51.48.017, the Department must respond to "the request of the claimant."
41 Ms. Hopkins requested penalties for the entire period "September 20, 2011 through June 5,
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46 ⁹ *State ex. Rel. Evergreen v. WEA*, 140 Wn.2d 615, 637 (2000)

47 ¹⁰ *Crown Zellerbach Corporation v. Department of Labor and Indus.*, 98 Wn.2d 102, 107 (1982)

1 2013."¹¹ The August 30, 2013 order on appeal suggests Ms. Hopkins only requested penalties for
2 unreasonable delay in payment of time-loss compensation benefits from September 20, 2011,
3 through March 31, 2012; April 16, 2012, through August 31, 2012; September 16, 2012, through
4 June 5, 2013; and June 20, 2013, through July 3, 2013, and nonpayment of time-loss
5 compensation benefits for the dates April 15, 2012, and September 15, 2012. The August 30, 2013
6 Department order did not explain why it failed to fully address all the time periods contained in Ms.
7 Hopkins request. Further, the Department acknowledged that the underpayment calculation was
8 based on an incorrect wage.¹²

9 Based on the record, we conclude that the order on appeal should be reversed and
10 remanded so the Department can calculate the penalty using the correct wage determination and
11 fully explain the time periods it is addressing in response to Ms. Hopkins' request.

12 **Subsequent Wage Order**

13 The record includes a wage order issued subsequent to the order on appeal. The wage
14 order corrects errors in the City of Vancouver's calculations. On remand the Department may
15 choose to fully address any outstanding penalty requests.

16 **FINDINGS OF FACT**

- 17 1. On November 20, 2013, an industrial appeals judge certified that the parties
18 agreed to include the Jurisdictional History in the Board record solely for
19 jurisdictional purposes.
- 20 2. Josannah Hopkins sustained an occupational disease affecting her neck and
21 right shoulder while working for the self-insured employer, the City of
22 Vancouver.
- 23 3. The pleadings and evidence submitted by the parties demonstrate there is no
24 genuine issue on any material fact.
- 25 4. Ms. Hopkins requested a penalty for unreasonable delay in payment of
26 time-loss compensation benefits for the period September 20, 2011, through
27 June 5, 2013.
- 28 5. The Department issued an order on August 30, 2013, addressing some of the
29 time periods contained in Ms. Hopkins penalty request.
- 30 6. In calculating the penalty the Department applied the greater of either \$500 or
31 25 percent of the delayed benefits over an aggregate extended period of time
32 rather than applying the greater of either \$500 or 25 percent of the delayed
33 benefits for each biweekly or semimonthly delayed payment.

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¹¹ Exhibit 24.

47 ¹² 4/24/14 Tr. at 5.

1 7. The underpayment used as a basis for the penalty calculation was based on an
2 incorrect wage order.

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4 **CONCLUSIONS OF LAW**

- 5 1. The Board of Industrial Appeals has jurisdiction over the parties and the subject
6 matter in this appeal.
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8 2. The Department is entitled to a decision as a matter of law as contemplated by
9 CR 56.
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11 3. The Department employed the correct method of aggregate penalty calculation
12 in the August 30, 2013 Department order, as provided by RCW 51.48.017.
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14 4. The Department order dated August 30, 2013, is incorrect and is reversed.
15 This matter is remanded to the Department with instruction to recalculate all
16 penalties due to Ms. Hopkins, based on Ms. Hopkins request and the
17 applicable facts and law.

18 Dated: December 1, 2014.

19 BOARD OF INDUSTRIAL INSURANCE APPEALS

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21
22 /s/ _____
23 DAVID E. THREEEDY Chairperson
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27 /s/ _____
28 FRANK E. FENNERTY, JR. Member
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32 /s/ _____
33 JACK S. ENG Member
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