Buxton, Carol

PENALTIES (RCW 51.48.017)

Failure to submit medical reports (WAC 296-15-070(3))

Where a violation of WAC 296-15-070(3) is established, the Board, in reviewing the amount of the penalty to be assessed, will consider: (1) whether the employer intended to mislead the Department by withholding medical records at the time a determination was requested; (2) the context and significance of the medical records not submitted to the Department; (3) whether the employer in question had been previously found to be in violation of Department rules; and (4) the length of time during which a discovered violation remains unabated after proper notice by the Department that a violation has occurred. **….*In re Carol Buxton*, BIIA Dec., 89 5931 (1991)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CAROL M. BUXTON	**)**	**DOCKET NO. 89 5931**
	)	
CLAIM NO. T-134675	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Carol M. Buxton, by
None

Self-Insured Employer, Marriott Corporation, by
Crawford & Company, per
Heather Foster and Douglas K. Abrams, Worker Compensation Specialists

Department of Labor and Industries, by
The Attorney General, per
Kent E. Mumma, Assistant, and Gary W. McGuire, Paralegal

This is an appeal filed by the self-insured employer, Marriott Corporation, on December 18, 1989 from an order of the Department of Labor and Industries dated November 7, 1989 which adhered to the provisions of an order dated October 9, 1989 which assessed a penalty against Marriott Corporation in the amount of $500.00 under RCW 51.48.080 for failure to comply with WAC 296-15-070(3), which requires that all medical reports and other pertinent information in the self-insurer's possession not previously forwarded to the Department must be submitted with all determination requests. **AFFIRMED**.

PROCEDURAL AND EVIDENTIARY MATTERS

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 Department of Labor and Industries to a Proposed Decision and Order issued on July 24, 1990, in which it was concluded that the employer did not commit the violation as alleged and in which the order dated November 7, 1989 was reversed.

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

In its Petition for Review, the Department argues that the specific amount of penalty assessed is not properly before the Board, rather only whether a violation occurred. We disagree. The appealed order sets a specific penalty amount of $500.00 which was the maximum allowed by RCW 51.48.080. The notice of appeal filed on behalf of the Marriott Corporation expressed "disgust with a fine of $500 over a human error" in the broader context of denying that any violation had occurred. Appeal letter of December 13, 1989. The appealed order and the notice of appeal are sufficient to put

the specific amount of penalty before us. Brakus v. Dep't of Labor & Indus., 48 Wn.2d 218, 220, 292 P.2d 865 (1956) and Lenk v. Dep't of Labor & Indus., 3 Wn.App. 977, 982, 478 P.2d 761 (1970).

The Department contends that the Crawford & Company Worker Compensation Specialist, Heather Foster, for Marriott Corporation, waived the issue of the specific penalty amount during a colloquy following her testimony on June 4, 1990. We have carefully reviewed the transcript of that discussion before our industrial appeals judge. Although it is clear that the Department's counsel initiated the discussion for the purpose of limiting the issues on appeal, we are equally convinced that Ms. Foster did not understand that she was being asked to legally bind the Marriott Corporation to a narrower limitation of the issues on appeal than established by the Department order and the notice of appeal. Ms. Foster's response to our industrial appeals judge's final question on the matter was equivocal at best. Although she stated the dispute was over the "penalty itself" and the "amount at this point is irrelevant", she in the same breath raised the possibility that the matter should be "concluded" for a considerably lower penalty. 6/4/90 Tr. at 11. The amount of penalty is properly before us.

DECISION

The issues in this appeal are properly identified in the Proposed Decision and Order: first, whether the Marriott Corporation violated WAC 296-15-070(3) and thereby, RCW 51.48.080, by failing to submit to the Department all medical reports and other pertinent information in its possession at the time of its request for a final determination on Ms. Buxton's industrial injury claim [1]; and, secondly, if a violation occurred, whether $500.00 is an appropriate penalty amount. With regard to the first issue of whether a violation occurred, this case turns on the factual question of whether the Marriott Corporation, through Crawford & Company Worker Compensation Specialist Heather Foster,

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[1] WAC 296-15-070(3):F

> A self-insurer shall file a complete and accurate supplemental or final report on injury or occupational disease claims resulting in time loss payments, ... at the following times:
>
> > (c) On the date a determination is requested or date temporary disability claim is closed....
>
> All medical reports and other pertinent information in the self-insurer's possession not previously forwarded to the department must be submitted with the request for all determinations. (Emphasis supplied)

RCW 51.48.080: "Every person, firm or corporation who violates or fails to obey, observe or comply with any rule of the department promulgated under authority of this title, shall be subject to a penalty of not to exceed five hundred dollars."

enclosed Ms. Buxton's medical records along with the other documents forwarded to the Department upon request for claim closure. We find that a violation occurred in that all of the medical records in the Marriott Corporation's possession were not forwarded to the Department. We further find that a penalty in the amount of $500.00 is appropriate.

George Pickett, then a Department disability adjudicator, testified that he received from Crawford & Company on May 15, 1989 an SIF-5 claim closure request, along with an original SIF-2 report of accident, the physician's initial report, an independent medical evaluation report dated April 6, 1989 and a letter of concurrence signed by attending Dr. Mark Hauck. Mr. Pickett testified that he did not receive the remaining treatment records with these materials.

In contrast, Heather Foster stated that she fully understood that all treatment records should have been enclosed with the other materials, and that she in fact placed the treatment records in the envelope herself with the other materials identified as received by Mr. Pickett. Our industrial appeals judge noted that Ms. Foster testified it was always her practice to mail treatment records when requesting a final determination, that she had never failed to do so in the past, and that she personally did so upon this occasion. We note that Ms. Foster also indicated she sealed the envelope and placed the envelope in the "outgoing mail" where "they referring to someone else meter them and mail them." 6/4/90 Tr. at 6. Relying upon this information, our industrial appeals judge found that there was sufficient proof of mailing to create a presumption that the documents in their entirety were eventually received by the Department in due course, citing ER 406 and Kaiser Aluminum v. Dep't of Labor & Indus., 57 Wn.App. 886, 791 P.2d 228 (1990). Ms. Foster offered the explanation that the medical records became separated from the other documentary materials at the Department and, thus, did not reach Mr. Pickett, although received by the Department.

The Proposed Decision and Order does not provide a detailed analysis of whether Ms. Foster's testimony taken alone creates a presumption of mailing in view of Kaiser Aluminum, supra. In Kaiser Aluminum, the court explained that ER 406 [2] does not relieve a party seeking to establish a presumption of receipt by mailing of the burden of presenting additional proof to establish that the

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[2] RULE 406. HABIT; ROUTINE PRACTICE

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

office custom and routine was in fact followed after the originator of the material placed it in the "out" box. Rather, ER 406 is simply a rule regarding the relevancy of evidence, designed to allow a court more discretion in the admission of evidence. Kaiser Aluminum, 57 Wn.App. at 891. See also, In re Edward S. Morgan, BIIA Dec., 09,667 (1959) and In re John T. Karns, BIIA Dec., 05,181 (1956).

The Department did not object to Ms. Foster's testimony concerning her routine. Likewise, the determining issue in this case is not the fact of mailing and receipt, but rather the content of the mailing. Since the Department acknowledges that it received the packet of materials from Ms. Foster, it is obvious that none of the requirements of the cases which we have just cited need be met in order to establish some presumption of receipt of a packet.

However, it is likewise true that these cases do not lend any greater credence or weight to Ms. Foster's testimony on the critical issue, that is, whether she in fact placed the medical treatment records in the packet before it was sealed. The cases we have cited are more pertinent here for the proposition that any presumption of receipt is a rebuttable presumption. Although testimony establishing a mailing is prima facie evidence of receipt, it is nothing more, and it will have but little weight against positive testimony that an alleged mailing was not received. In re Edward S. Morgan, supra, at 4.

We are convinced that Ms. Foster is in error in her belief that she placed the medical treatment records in the packet which the Department received. Ms. Foster placed a check in the box at the bottom of the SIF- 5 form, beside language indicating "Final Determination Requested of the Department of Labor and Industries. Copies of medical reports and pertinent information attached". 6/4/90 Tr. at 7. However, elsewhere in the remarks section of the form, Ms. Foster wrote: "Per attached IME and concurrence from the attending physician, we request closure based on the rating given by Doctor Cooke." 6/27/90 Tr. at 6 and 6/4/90 Tr. at 6. Thus, the only indication in Ms. Foster's own writing coincides with the Department's testimony as to exactly what medical records were in fact received. Her statement in the remarks section omitted reference to the medical treatment records while specifically identifying all of the other medical materials.

Secondly, Mr. Pickett indicated that he has worked at the Department five years and that he is not aware of any instance in the past where he had received at his desk only a portion of the documents actually mailed and not the rest. Department clerical supervisor Sherry Torrez has worked at the Department 24 years and as a clerical supervisor since 1983. She acknowledged past instances where mail was lost and not received by the Department at all, and very rare instances

where documents within packets became separated. Her experience, however, is that the documents do not remain separated for very long. Although somewhat equivocal, her response to the question as to whether there have ever been instances where material had remained separated and not found within the Department was essentially consistent with Mr. Pickett's experience: "No, not that I know of. They usually always get back together." 6/27/90 Tr. at 14.

We further note that Ms. Foster provided an account of the manner in which she arranged the materials within the packet. By her own account, the medical treatment records, if enclosed at all, would have been in the center portion of the stack rather than on the top or the bottom. Considering this along with the testimony of Mr. Pickett and Ms. Torrez, we find it more reasonable to believe that Ms. Foster simply neglected to include the medical treatment records, than that they were received by the Department but somehow lost. It seems unlikely that the only materials lost by the Department would have been treatment records from the center portion of the packet.

Third, other circumstantial evidence casts doubt upon Ms. Foster's or other Crawford & Company staff adherence to dependable office procedures concerning communications, at least pertaining to this claim. On June 12, 1989, Mr. Pickett sent a speed note to Crawford & Company requesting the medical treatment records which he noted were absent. The whereabouts of this communication is not known, as Ms. Foster said she never received the speed note. On June 23, 1989, Ms. Foster directed a letter to the Department inquiring as to the status of her request for a determination on the claim. On July 7, 1989, Mr. Pickett mailed to Crawford & Company a copy of the previously referenced speed note requesting the medical treatment records. Ms. Foster indicated that she did not receive this second communication of the speed note herself until August 1, 1989, and that there were two different date stamps of July 12 and July 24 on the speed note prior to her receipt.

Ms. Foster acknowledged the possibility that the original June 12, 1989 mailing of the speed note "ended up somewhere else within Marriott or the Crawford system" (6/4/90 Tr. at 8) and that the re-mailing of July 7, 1989 took 24 days to get to her, likely misrouted within the Crawford & Company system ("Yes, somewhere, but I don't know where . . . . the other two date stamps don't identify an office.") 6/4/90 Tr. at 9-10. This information suggests more thorough and prompt follow-through on the part of the Department as compared to Crawford & Company. Ms. Foster's inability to account for message delivery delays within Crawford & Company, in our view, casts at least some further doubt upon the accuracy of her detailed recollections, however sincere she may be in the belief that the treatment records were originally included in materials forwarded to the Department.

In sum, our review of the record in this case convinces us that it is much more likely that Ms. Foster neglected to forward the treatment records, with the other materials to the Department than it is that she indeed forwarded the medical treatment records, but that they were not received by Mr. Pickett for some other reason. To find otherwise would seem to place an insurmountable burden on the Department in most contested cases of this sort.

We disagree with Ms. Foster's characterization that the Department is "saying that it's their word against mine and they don't make mistakes." 6/4/90 Tr. at 4. Rather, the reverse is true. The only evidence in this case in favor of the self-insured employer is Ms. Foster's own word. The Department, on the other hand, has shown that the packet as mailed was received and properly routed within the Department to the file and that the medical treatment records simply were not included. Other than Ms. Foster's word, it is sheer speculation that the Department was somehow at fault. We cannot conceive of any better procedures which the Department might follow, or more thorough proof which the Department might provide, to establish that a violation occurred and that a self-insured employer should be held accountable.

The Proposed Decision and Order accurately sets forth the factors which should be considered at a minimum in determining the amount of penalty to be assessed for violations of WAC 296-15-070(3). These include: (1) whether the employer intended to mislead the Department by withholding medical records at the time that a determination was requested; (2) the context and significance of the medical records not submitted to the Department; and (3) whether the employer in question had been previously found to be in violation of Department rules. In re Susan K. Irmer, Dckt. No. 89 0492 (March 13, 1990).

In Irmer, we determined that RCW 51.48.080 sets the maximum amount of penalty at $500.00 and does not leave the specific amount of the penalty to the sole discretion of the Department or the Director. We noted that the Department had not at that time issued written guidelines for the assessment of penalties under RCW 51.48.080 and our belief that it would be most helpful if the Department would establish written criteria for this purpose. The record before us does not contain any reference to any such guidelines having been promulgated by the Department. However, we find a $500.00 penalty is appropriate.

We have not determined that the Marriott Corporation, through Crawford & Company, actually intended to mislead the Department (factor (1)) or that the Marriott Corporation has previously been found to be in violation of Department rules (factor (3)). However, the Department has shown that the

content and significance of the medical records not initially submitted to the Department (factor (2)) was critical in this case. The then disability adjudicator, Mr. Pickett, testified that upon finally receiving the previously omitted treatment records, "[i]t was apparent that the attending physician had recommended further treatment and at that time closure was not appropriate and the issue needed to be clarified." 6/27/90 Tr. at 8. The claim was still not closed at the time of Mr. Pickett's testimony. Thus, the particular violation in this case was of the kind which, if it had remained unabated, would have cut at the very heart of fully informed and fair claim adjudication by the Department. The omitted information was contrary to the closure request made on behalf of the Marriott Corporation. In these particular circumstances, consideration of this factor alone justifies a maximum penalty of $500.00 in our view.

We further note that WAC 296-15-070(3) requires that all medical reports are to be submitted with the request made for determination on behalf of Marriott Corporation. The request was received by the Department on May 15, 1989. Yet, the required medical treatment records were not received by the Department until at least some 2 1/2 months later, after August 1, 1989. This further delay occurred despite prompt and thorough follow-through by Mr. Pickett in an attempt to remedy the situation. The further delay was admittedly due to fault on the self- insured employer's end. We believe the inordinate delay in abating the violation, after proper notice had been given by the Department that a violation was occurring, further justifies a $500.00 penalty in this case. We add, then, to the three factors which we considered minimum in Irmer, a fourth, that is, the length of time during which a discovered violation remains unabated after proper notice by the Department that a violation has occurred.

We adopt from the Proposed Decision and Order proposed Finding of Fact No. 1 and proposed Conclusion of Law No. 1. In addition, we make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

2. Crawford & Company is the self-insured employer Marriott Corporation's service representative. On May 15, 1989, the Department of Labor and Industries received from Crawford & Company a self-insurer's report of occupational injury or disease (SIF-5) requesting a determination be made on Claim No. T-134675. The self-insurer's service representative did not forward all medical reports and other pertinent information on the claim in its possession with this request. The medical treatment records in the self-insurer's possession were omitted.

3. The medical treatment records omitted were not forwarded to the Department until sometime after August 1, 1989, after two follow-up

requests had been made by the Department. These follow-up requests were dated June 12, 1989 and July 7, 1989.

4. The omitted medical treatment records called into question the advisability of granting the self-insurer's request that the claim be closed. It was apparent from the omitted medical treatment records that the attending physician had recommended further treatment.

CONCLUSIONS OF LAW

2. The self-insurer, Marriott Corporation's failure to forward medical treatment records as described in Findings of Fact Nos. 2 and 3 was a violation of WAC 296-15-070(3), for which RCW 51.48.080 allows a maximum penalty of $500.00.

3. A maximum penalty in the amount of $500.00 is appropriate in this case because the omitted medical treatment records had a direct bearing upon appropriate claim adjudication and because the violation remained unabated for a substantial period after proper notice of the violation was given by the Department to the self-insurer, Marriott Corporation.

4. The order of the Department of Labor and Industries dated November 7,1989 which affirmed an order dated October 9, 1989, which ordered that the self-insured employer be assessed a penalty of $500.00 as prescribed by RCW 51.48.080 for a violation of WAC 296-15-070(3) for failure to submit to the Department with a request for final determination on the claim all medical reports and other pertinent information in the self-insured employer's possession, is correct and is affirmed.

It is so ORDERED.

Dated this fourth day of March, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

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

DISSENT

I disagree with the conclusions reached by the Board majority. The Proposed Decision and Order of our industrial appeals judge has very adequately and fairly analyzed the issues here. In particular, I adopt as my own the discussion and conclusions set forth in the Proposed Decision and Order from page 6, line 3, through page 7, line 17. In short, I accept the truth of the facts as testified to by Ms. Heather Foster.

I would adopt the findings of fact and conclusions of law in the Proposed Decision and Order, and thereby reverse and hold the Department's penalty assessment for naught.

Dated this fourth day of March, 1991.

/s/
PHILLIP T. BORK Member