Lister, Martin & Thompson's

WORKERS' COMPENSATION COMMENTARY

November 2001 Volume 8 Issue 2

A LITTLE LIGHT IN A DISMAL PLACE: REASONABLENESS IN PENALTIES?

By: Stephen Piccola, Esq.

A ray of reasonableness has indeed insinuated itself into the dark recesses of the netherworld that we refer to collectively as "penalties". In the recent case of *County of San Luis Obispo vs. Workers' Compensation Appeals Board (Barnes)*, [(2001) 2001 DJDAR 10702] the Court of Appeal determined that a single inadvertent late payment of benefits was not unreasonable. Apparently prompted by the Supreme Court, the Court of Appeal is sending a strong signal to the WCAB to apply a little common sense to this area of the law, something that has been sorely lacking. The Court utilized the *totality of circumstances* and *fair balance* tests in reaching its conclusion. In doing so, it helped move the law of penalties away from the harsh ground of strict liability and onto a somewhat more level area.

In *Barnes*, payments had been made for ten years pursuant to a Findings and Award issued in 1981. Due to a delay of medical payments in 1991, a single 10% penalty was awarded on medical care pursuant to Labor Code §5814 in 1991. The parties reached an agreement that a penalty check would issue at the end of each quarter after calculating additional medical expenses paid in that quarter. The agreement did not contain a time limit for paying the quarterly penalty.

In 1997, the Applicant filed a Petition for multiple penalties during the period 1991 to 1997 including a delay in the payment of $97.87, the penalty payment due for the quarter ending 4/30/95. The check for that amount had been generated on 5/11/95 but not sent to the Applicant until 7/15/95.

After a trial on the 1997 penalty petition, the WCAB judge awarded three penalties and was sustained on reconsideration and at the Court of Appeal. That Award was annulled by the California Supreme Court and remanded to the WCAB for reconsideration. On remand, one 5814 penalty was awarded for the delay of the penalty payment of $97.87. The WCAB affirmed that decision and an appeal was taken to the Court of Appeal. This time the Court of Appeal was paying attention.

The Court of Appeal noted that the remand to the WCAB by the Supreme Court was based on two of the Court's recent decisions, *SCIF vs. WCAB (Stuart)* (1998) 18 Cal. 4th 1209 and *Avalon Bay Foods vs. WCAB* (1998) 18 Cal. 4th 1165. Relying heavily on *Stuart*, the Court of Appeal noted that case required a consideration of the *totality of circumstances* in determining whether a delay was unreasonable. The court also specified that an assessment of penalties must achieve a *fair balance* between the right of the employee to prompt payment and avoidance of harsh and unreasonable penalties. Applying those two standards, the Court did not think a penalty was warranted in the *Barnes* matter.

At the trial the adjuster described the penalty payment process. The day after the quarter's end the County's Fresno office calculated the total amount of medical payments and sent that to Chicago for review. Usually within three weeks Chicago sent a check back to the adjuster who mailed it to the applicant soon thereafter.

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In an important statement the Court of Appeal said that notwithstanding the fact that the adjuster could not explain why it took Chicago over two months to send Fresno the check, the uncontradicted evidence gave rise to an inference that the delay was inadvertent. The Court noted that the adjuster mailed the check to the Applicant as soon as she received it and that she was not aware of any delay until that time. The Court concluded that these were not the actions of an employer bent on delaying payment.

The importance of this part of the decision cannot be over emphasized. The Court specifically noted that the Workers' Compensation Appeals Board awarded the penalty because the County could not explain the delay. By rejecting such an approach, the Court of Appeals has made a subtle but important modification to the generally applied rule that an Applicant need only show a delay while the Defendant must prove it was reasonable. While that rule still stands, the *Barnes* court advances the proposition that the mere existence of a delay alone does not support the assessment of a penalty even if the delay cannot be explained. For once it seems that a Court has ruled that the Defendant should be given the benefit of an inference if the evidence shows the delay was inadvertent. In the *Barnes* case the evidence came from the longstanding history of payments and the prompt correction of the error.

Emphasizing the *fair balance* test, the Court noted that at the time of the delay, benefits had been paid for more than 25 years and quarterly penalty payments had been timely for 4 years. By that time, in excess of $390,000 had been paid in medical benefits. By the time the case was finally decided, more than $650,000 had been paid! The Court clearly stated that it would be inequitable to award a penalty of $40,000 when the delayed amount was $97.87. This point too cannot be overemphasized. Without labeling it as such, the Court has basically applied the principal of prejudicial error. In other words, the late payment of $97.87 did not truly prejudice the Applicant. The Court noted that the delay did not involve furnishing or paying for actual medical treatment and therefore the imposition of a penalty would not serve the twofold purposes of 5814 which are to encourage prompt payment of benefits and the prevention of economic hardship to the Applicant. Often, penalty issues are raised where no real harm has come to the Applicant and the real purpose of the penalty petition is to enrich the Applicant and his attorney. The *Barnes* case specifically frowns on this practice, indicating that the imposition of a penalty in that case would result in a windfall to the Applicant disproportionate to the employer's conduct.

The Court also mentioned a number of other points based on the facts of the case. There was no specific timetable for the payment of the quarterly penalties. Therefore there was no specific time in which they needed to be paid. The Court also noted that the penalty was on the payment of medical care and therefore, like other payments of medical care, 60 days was allowed for the payment to be made. Therefore, when the quarter ended on 4/30/95 the Defendant had at least until 6/30/95 to issue a penalty check.

Also important was the fact that the Applicant had not acted diligently in either advising the Defendant of the 1995 late payment or of seeking a penalty petition for that violation. By these failures, the Court noted, the Applicant contributed to the delay. This too is a subtle but powerful statement since, in practice, Applicants often seem to have no obligation to assist the Defendant in providing benefits or do anything to mitigate their losses.

Trial judges often acquiesce to applicant's attorney's blanket assertions that the brevity of delay or the *de minimis* amount involved is not a defense to the imposition of a penalty. Defendants may now point to this decision to

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remind the judge that many additional factors must be considered. While a penalty may be levied on a brief delay or delay of a small amount, whether or not a delay was unreasonable in the first place must take into account factors such as the length of delay as well as the quality of benefit and the amount delayed. This decision should prove particularly useful in cases where small amounts of interest have been delayed and a huge penalty is sought on a whole species of benefit that has been provided timely.

ACKEY BREAKY BACK...

By: John C. Martin, Esq.

I am one of the last persons who will ever cast any disparagement on the safety members who, in performance of their jobs have to place their very lives on the line in the service of the community. There is, however, a political element to the police and fire unions that does not inspire much reverence in me. Trading on the good will and admiration earned by the workers at the WTC and Pentagon disasters, the unions have dusted off initiatives that have been tried and were laughed out of the legislature in the past. One of these measures was just signed into law by the Governor. Labor Code §3213.2 provides that, effective 10/1/01, uniformed police officers who have to wear a utility belt, known as a "Sam Browne" belt, have a rebuttable presumption of industrial injury if they develop a low back injury.

Now, how much scientific evidence is there that such belts cause back injuries? How many studies have been conducted? The answers are: None and None!

At least there is some probability of exposure to carcinogens in firefighting and if we accept the "stress theory" of heart problems, we can concede that the small percent of time the police and fire folks are not sitting and eating donuts, they can be involved in stressful activity. So, the Cancer and Heart presumptions have at least some logical basis, this one has none. The only reason for the existence of this law is the strength of the unions and the pure political fear of the legislature and the Governor to deny anything to these "heroes". This is just another shortcut to a disability retirement and a hand in the taxpayer's pocket. Fortunately, there are alternatives to the Sam Browne belt, vests and slings etc. and hopefully, these can be implemented soon. The police, by and large, won't like this a lot because they don't have the same panache but that's the way it goes.

These truly are, as Charles Dickens wrote, "... the best of times and the worst of times..." We have seen acts of unspeakable evil as well as feats of inspiring heroism.

We, at Lister, Martin & Thompson, join with you at this season, giving thanks for all those who protect us in these troubled times and for our good fortune to live in this wonderful country.

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