

STATE OF CALIFORNIA  
WORKERS' COMPENSATION APPEALS BOARD

Case No. SBA 0062169

GERRY FREESE

*Applicant*

vs.

HOLLY SUGAR CORPORATION;  
Permissibly Self-Insured,

*Defendant*

SUPPLEMENTAL  
FINDINGS AND ORDER

The Honorable, RALPH G. FISHER, Workers' Compensation Judge, Finds, Awards and Orders as follows:

FINDINGS OF FACT

1. The defendant not unreasonably delay the payment of temporary disability indemnity.
2. The defendants did not unreasonably fail to pay interest.
3. All other issues are moot.

ORDER

IT IS ORDERED that applicant take nothing by way of a ten percent penalty.



RALPH G. FISHER  
Workers' Compensation Judge

RGF:md

DATED: 8-25-95

Service by mail on parties as shown on  
Official Address Record effected on above date.

By: Mary Denny  
MARY DENNY

"A Petition for Reconsideration from this  
decision shall be filed only at the Santa  
Barbara office of the Workers' Compensation  
Appeals Board."

CASE. NUMBERS SBA 0062169

GERRY FREESE

v.

HOLLY SUGAR; Permissibly  
Self-Insured,

OPINION ON DECISION

In *Kerley vs. WCAB* 33 CCC 152, 154, the Supreme Court stated:

"The only satisfactory excuse for delay in payment of disability benefits, whether prior to or subsequent to an award, is genuine doubt from a medical-legal standpoint as to liability for benefits, and that the burden in on the employer or his carrier to present substantial evidence on which a finding of such doubt may be based..."

In *Rhiner vs. WCAB* 58 CCC 172, 181, the Court stated as follows:

"In the second to last paragraph of our *Gallamore* opinion, we admonished the WCAB to strike 'a fair balance between the right of the employer to prompt payment of compensation benefits and the avoidance of imposition upon the employer or carrier of harsh and unreasonable penalties.' (23) Cal. 3d at p. 828.) the employer here construes the language from *Gallamore* as meaning that the WCAB has discretion (1) to base the 10 percent penalty solely on the amount the employer unreasonably delayed in paying, (2) to base it on the entire amount owed to the employee, or (3) to base it on anything in between these two sums. Thus, the employer argues, the WCAB acted within its discretion (1) to base the 10 percent penalty solely on the amount the employer unreasonably delay paying, (2) to base it on the entire amount owed to the employee, or (3) to base it on anything in between these two sums. Thus, the employer argues, the WCAB acted within its discretion when it imposed the 10 percent penalty on the amount of the injured employer's unpaid medical treatment as of the date of the award, along with all future medical treatment.

What the employer overlooks or ignores is that the *Gallamore* statement at issue immediately followed one in which we declined to express an opinion as to whether certain acts of the carrier had been unreasonable. (*Gallamore, supra*, 23 Cal. 3d. at pp. 827-828.) Read in context, the statement in question pertains to the WCAB's authority to decide whether a penalty should be assessed at all, not to the calculation of the penalty."

In the present case, the evidence indicates that the defendant entertained a genuine factual doubt as to the compensation rate payable beginning August 5, 1991. The explanation as to why the defendants paid at a reduced rate for a short period of time is outlined in defendant's letter dated September 25, 1991. In summary, virtually all of Holly Sugar's Santa Maria employees are seasonal and the 1991 season ended on August 5, 1991. Because Mr. Freeze's earning capacity during the off season was significantly lower than during the working season, his compensation rate was reduced.

As soon as the employer realized that the applicant was one of the employees slated to be rehired to work during the off season, they promptly reinstated the higher compensation rate and paid the applicant the difference for the period in question.

Furthermore, it appears that the applicant had been overpaid temporary disability compensation all along and at the time applicant's weekly compensation was reduced, the applicant had been overpaid temporary disability compensation. While it is true, the defendants are not permitted to unilaterally take credit for overpayments, the inadvertent overpayment of compensation over a period of time, resulted in the applicant having been already overpaid benefits roughly equivalent to the underpayment. Taking into account the overpayment, the inadvertent under payment did not result in a delay of benefits.

With regard to whether temporarily reducing applicant's compensation rate was unreasonable, I conclude that the very minor and temporary reduction of benefits, at a time that the applicant had already been overpaid, versus the reasonable assumption that the applicant was a reasonable employee, leads to the conclusion that the imposition of a ten percent penalty case would be harsh and unreasonable. This appears to be a case where the admonition of the Supreme Court in *Gallamore* applies:

"In penalty cases the Board should proceed with a view toward achieving a fair balance between the right of the employee to prompt payment of compensation benefits, and the avoidance of imposition upon the employer or carrier of harsh and unreasonable penalties."

  
RALPH G. FISHER  
Workers' Compensation Judge

RGF:md

Served on: Lester Friedman  
Kegel, Tobin & Truce

On: 8-25-95

By: Mary Denny  
MARY DENNY