

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
ORLANDO DISTRICT OFFICE

THOMAS MCINTOSH)	
)	
Employee/Claimant)	
)	
vs.)	OJCC Case No. 11-016994-TWS
)	
CITY OF KISSIMMEE)	Accident date: 6/23/2011
Employer)	
)	
and)	
)	
PREFERRED GOVERNMENT CLAIM)	
SOLUTIONS)	
Carrier)	
_____ /)	Judge: Thomas W. Sculco
)	

FINAL COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims (JCC) at Orlando, Orange County, Florida on February 11, 2014, for a final merits hearing upon the two (2) petition for benefits (PFB) e-filed July 17, 2013. The record remained opened until February 17, 2014, to allow counsel to file case-law. Mediation was held on October 18, 2013. The parties' Uniform Pretrial Stipulation was e-filed November 4, 2013. Roland Tan, Esquire was present on behalf of the claimant. Teri Bussey, Esquire was present on behalf of the employer/carrier.

This order addresses the (2) Petition for Benefits filed with
DOAH on July 17, 2013.

LIVE TESTIMONY: Roland Tan, Thomas McIntosh, Pam Dyke,
Teri Bussey,

DOCUMENTARY EVIDENCE:

- #1 Claimant's: Envelope - post marked May 6, 2013
- #2 Joint: Joint Stipulation of Resolution of Workers' Compensation Issues
- #3 Claimant's: 7/19/2013 Petition for Benefits
- #4 E/C's: Payout ledger
- #5 E/C's: Stipulation of Resolution of Claimant's Costs with executed Order
- #6 E/C's: April 2013 Correspondence to Attorney Tan from Attorney Teri Bussey
- #7 E/C's: Trial Memorandum/attachments
- #8 Claimant's: Hearing Information Sheet
- #9 Judge's: Uniform Pretrial Stipulation/attachments

After hearing all of the testimony and evidence presented, and after having resolved any and all conflicts therein, the undersigned Judge of Compensation Claims makes the following findings of fact and conclusions of law: The issues for

determination are claimant's claims for: 1-penalties and interest for late payment of \$10,000.00 pursuant to a joint stipulation dated 4/19/13; and 2-costs and attorney's fees. The E/C took the positions that: 1-payment was made timely; and 2-no penalties, interest, costs, or attorney's fees ("PICA") was owed.

BACKGROUND

On 9/14/12 and 10/19/12, claimant filed petitions for benefits ("PFB's") seeking payment of allegedly underpaid temporary partial disability ("TPD") benefits from 4/11/12. The parties entered into a joint stipulation resolving the TPD claims that was signed and dated at different times by different participants. The stipulation was signed by claimant and his counsel, Roland Tan, Esq., on 4/15/13. The stipulation was signed by Pam Dyke, the adjuster, and Teri Bussey, Esq., counsel for the E/C, on 4/19/13.

The stipulation provides that the E/C will pay claimant \$10,000.00 "in full and final resolution of any workers' compensation indemnity claims for past due or under-calculated TPD benefits, penalties, and interest." In addition, paragraph 7 of the stipulation provides: "The parties agree that the Employer/Carrier shall have 14 days from the date this stipulation is signed by all parties in which to pay the

consideration herein. No penalty or interest shall possibly be due or owed for late payment of this consideration until the 15th day from the date this stipulation is signed by all parties and provided to the adjuster."

Pam Dyke testified that she signed the stipulation on 4/19/13. She testified that Ms. Bussey had not yet signed the stipulation when she signed it. She testified she received the stipulation signed by everyone on 4/23/13 from Ms. Bussey, and issued payment in her system on 4/30/13. A Pitney-Bowes stamp indicates that payment was mailed on 5/6/13, and Mr. Tan testified he received the check for \$10,000.00 on 5/8/13. Based on this sequence of events, claimant seeks statutory penalties and interest for late payment of the \$10,000.00.

CLAIMANT'S ENTITLEMENT TO PENALTIES AND INTEREST

A. *Does Section 440.20, Florida Statutes, Provide for Penalties and Interest for Late Payment of a Negotiated Lump-Sum Resolving an E/C's Liability for Disputed Past-Due TPD Benefits?*

At the beginning of the final hearing, counsel for claimant stated he was seeking penalties and interest pursuant to Section 440.20 rather than pursuant to the parties' agreement.

Consequently, I will first address claimant's entitlement to penalties and interest ("P&I") pursuant to the statute only,

without reference to the agreement. Initially, I note that a washout settlement pursuant to Section 440.20(11)(c) is not an award of compensation and is not subject to penalties and interest under Sections 440.20(7) and (8), absent an agreement by the parties providing for P&I for late payment. See *Lucas v. Englewood Community Hospital*, 963 So. 2d 894 (Fla. 1st DCA 2007); *Raban v. Federal Express*, 13 So. 3d 140, (Fla. 1st DCA 2009). Moreover, Section 440.20(7) is not applicable here because there is no order requiring payment of the \$10,000.00 agreed to by the parties.

Sections 440.20(2)(a), (6)(a), and 8(a) all deal with penalties and interest for late payments of installments of compensation. Thus, claimant's entitlement to P&I under the statute depends on whether the \$10,000.00 lump sum agreed to by the parties can be considered an installment of compensation. For the following reasons, I find the agreed lump-sum in this case is not an installment of compensation, and therefore that P&I is not owed pursuant to the provisions of the statute.

First, it is well-settled that words in a statute should ordinarily be given their plain and ordinary meaning. *Velez v. Miami-Dade County Police Dept.*, 934 So. 2d 1162 (Fla. 2006). The Merriam-Webster online dictionary defines an "installment" as "One of the parts into which a debt is divided when payment is made at intervals." The agreed payment here cannot reasonably be

considered an installment under this definition. If anything, it is the very opposite of an installment - a single payment resolving the E/C's entire obligation to pay installments of compensation.

In addition, an agreed sum to resolve past liability is similar to a JCC's award of compensation in that both involve lump-sum payments to resolve disputed past-due obligations by the E/C. Thus, it is significant that Section 440.20(7), which addresses penalties for late payment of compensation payable under an award, does not use the term "installment". This shows that the legislature did not consider such a lump-sum payment to be an "installment" of compensation. Moreover, there is no logical or reasonable way to determine when an agreed lump sum would be due and owing without reference to the parties agreement.

In sum, I find that none of the penalty or interest provisions contained in Section 440.20, Florida Statutes, apply to the agreed lump-sum at issue in this case. Such a conclusion does not leave claimants at the whim and mercy of E/C's as to when they will receive agreed payments. The parties to an agreement are free to contract for the payment of penalties and interest on late-paid lump-sum amounts. Therefore, I will next analyze claimant's entitlement to P&I under the terms of the parties' 4/19/13 agreement.

B. *Has Claimant Established Entitlement to Penalties and Interest Under the Terms of the 4/19/13 Agreement?*

Even though claimant's counsel stated he was not seeking P&I pursuant to the parties' agreement, I will address that issue as both parties spent considerable time at the final hearing arguing over the meaning of language in the stipulation. Initially, I note that nothing in the agreement explicitly provides for the payment of penalties or interest for late payment of the lump-sum. Paragraph 7 contains the only mention of P&I in the agreement, and provides:

"The parties agree that the Employer/Carrier shall have 14 days from the date this stipulation is signed by all parties in which to pay the consideration herein. No penalty or interest shall possibly be due or owed for late payment of this consideration until the 15th day from the date this stipulation is signed by all parties and provided to the adjuster."

It could certainly be argued that the statement "No penalty or interest shall possibly be due or owed for late payment of this consideration..." is an implicit recognition of an agreement for statutory penalties and interest to apply for late payment. However, the use of the word "possibly" suggests that there may not have been an agreement that P&I would definitely apply to late payments. In any event, even assuming that paragraph 7 provides for P&I for late payment, I find that the E/C's payment

was made within 15 days from the date the stipulation was "signed by all parties and provided to the adjuster", and therefore that no penalties and interest is due under the terms of the agreement.

The undisputed testimony of Pam Dyke, which I accept as credible and truthful, is that when she signed the stipulation on 4/19/13, Ms. Bussey had not yet signed the document. She also testified that she received the stipulation signed by everyone on 4/23/13 from Ms. Bussey. While claimant does not dispute Ms. Dyke's testimony, he argues that Ms. Dyke could not have signed the stipulation on 4/19/13 unless it had already been "provided" to her, and therefore that the 15 day period described in paragraph 7 began on 4/19/13 rather than 4/23/13.

Claimant's interpretation, however, violates the "surplusage" canon of interpretation, which provides that, if possible, every word and provision should be given effect, and none should be treated as mere surplusage. See Reading Law: The Interpretation of Legal Texts, Antonin Scalia and Bryan Garner, Thompson West 2012, p. 174. Specifically, claimant's interpretation treats the phrase "and provided to the adjuster" as meaningless surplusage, because it is, by definition, impossible to sign a document that one has not been provided. The more reasonable interpretation of paragraph 7 is that providing the stipulation to the adjuster is an additional act that must

occur sometime after it is signed by all parties. This interpretation is also consistent with the obvious purpose of the provision - to trigger the adjuster's obligation to pay the lump-sum.

Consequently, the 15 day period before penalties and interest became due began on 4/23/13. A Pitney-Bowes certified mail certification establishes that the payment was mailed by the E/C on 5/6/13, which is two days before the expiration of the 15 days. Contrary to claimant's argument, this certification from Pitney-Bowes is competent substantial evidence to establish the date of mailing. See *JP Morgan Chase v. Bigley*, 120 So. 3d 1265, Fla. 3d DCA 2013). Moreover, the undisputed evidence establishes payment was received by claimant on 5/8/13, which is within the 15 day period in any event. As such, the E/C's payment was timely, and no penalties and interest are owed.

WHEREFORE it is hereby **ORDERED** and **ADJUDGED** that Claimant's claims for penalties, interest, costs, and attorney's fees are **DENIED** and **DISMISSED WITH PREJUDICE**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida this 7th day of March, 2014.

Thomas W. Sculco

Thomas W. Sculco
Judge of Compensation Claims
400 West Robinson Street, Suite 608N
Orlando, Florida 32801-1701

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the above Order was entered by the Judge of Compensation Claims and that a copy was served to the parties via electronic mail through their respective attorney of record or by U.S. Mail if unrepresented.

Yadira Suarez

Digitally signed by Yadira Suarez
Date: 2014.03.07 15:43:45 -05'00'

Assistant to Judge Sculco