When Court's Found *"Good Faith"* Was BAD

Franks v. U.S. Fidelity & Guar. Co., 718 P.2d 193, 149 Ariz. 291 (Ariz. App. 1985).

USF & G argues that Art. 18, § 8 of the Arizona Constitution specifically authorizes the system of workers' compensation that has been set up by the legislature so Franks cannot rely on a theory of unconstitutionality. USF & G also relies on A.R.S. § 23-906 which permitted Franks to elect between the workers' compensation system or the right to sue under the common law. However, compensation law is exclusive only when, in fact, it provides a remedy. The injury that occurs as a result of the tort of bad faith is a separate and distinct injury from the original industrial injury to the worker giving rise to the election of remedy under compensation law. The injury resulting from the intentional tort of bad faith is not compensable under the workers' compensation scheme because it does not arise out of or in the course of employment.

Hays v. Continental Ins. Co., 838 P.2d 1334, 172 Ariz. 573 (Ariz. App. 1992)

Hayes v. Continental Ins. Co., 178 Ariz. 264, 872 P.2d 668 (Ariz. 1994)

…Plaintiff's demands for payment, Plaintiff brought a tort action for damages, alleging that Defendant had acted in bad faith by intentionally withholding payment without reasonable justification. Defendant moved to dismiss for lack of subject matter jurisdiction, asserting that A.R.S. § 23-930 divests state courts of all jurisdiction over such actions.

Plaintiff opposed the motion, arguing that the statute abrogates her cause of action for bad faith and limits her recoverable damages, thus violating Ariz. Const. art. 18, § 6, and art. 2, § 31. Plaintiff also alleged that the statute violates her right to a jury trial guaranteed by art. 2, § 23.

Plaintiff sought review of the court of appeals' opinion. In this court, the parties joined issue on a preliminary question: does § 23-930, properly interpreted, preempt the jurisdiction of our state courts to adjudicate bad faith claims against workers' compensation carriers? If not, there is no need to consider any constitutional issues. See Petolicchio v. Santa Cruz County Fair & Rodeo Ass'n, 177 Ariz. 256, 259, 866 P.2d 1342, 1345 (1994) (constitutional question avoided because unnecessary to resolve appeal); Dunn v. Industrial Comm'n, 177 Ariz. 190, 196, 866 P.2d 858, 864 (1994) (same). We therefore examine first the statute's proper interpretation.

In two opinions, one filed before A.R.S. § 23-930 was adopted and one filed shortly thereafter, the Arizona Court of Appeals held that the exclusivity doctrine [2] does not bar common-law actions for bad faith against workers' compensation carriers. Boy v. Fremont Indem. Co., 154 Ariz. 334, 742 P.2d 835 (Ct.App.1987); Franks v. United States Fidelity & Guar. Co., 149 Ariz. 291, 718 P.2d 193 (Ct.App.1985). In 1987, our legislature enacted § 23-930. [3] Defendant argues that this statute deprives the courts of jurisdiction over Plaintiff's common-law action. However, Arizona courts have long recognized that the scope of an insurer's duty of good faith "cannot be delineated by customs of the insurance industry." Sparks v. Republic Nat. Life Ins. Co., 132 Ariz. 529, 539, 647 P.2d 1127, 1137, cert. denied, 459 U.S. 1070, 103 S.Ct. 490, 74 L.Ed.2d 632 (1982); see also Rawlings v. Apodaca, 151 Ariz. 149, 158, 726 P.2d 565, 574 (1986) (compliance with industry custom is not an absolute defense to a bad faith claim). Thus, by saying that the Commission has "exclusive jurisdiction as prescribed in this section," the statute seems to grant the Commission jurisdiction only over those administrative complaints meeting this special statutory definition, which differs from that of the common law. Such an interpretation, of course, would not affect the courts' jurisdiction over common-law actions. This interpretation is further supported by the scant remedy provided for victims of bad faith practices. [4]

CONCLUSION

We hold that A.R.S. § 23-930 does not divest Arizona's courts of jurisdiction over workers' compensation bad faith actions but instead establishes an administrative remedy complementing the common-law action afforded by our courts and recognized in Franks. Accordingly, we reverse the trial court's judgment of dismissal, vacate the court of appeals' opinion, and remand this case to the trial court for further proceedings consistent with this opinion.

Rowland v. Great States Ins. Co., 199 Ariz. 577, 20 P.3d 1158 (Ariz. App. 2001)

"[t]he tort of bad faith arises when the insurance company intentionally denies, fails to process or pay a claim without a reasonable basis for such action." *Noble v. National American Life Ins. Co.,* 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981). Such acts or omissions, however, are not the sole or exclusive bases for a bad faith claim.

Thus, an insurer may be found liable for bad faith whenever it unreasonably "`seeks to gain financial advantage of its insured through conduct that invades the insured's right to honest and fair treatment.'" *Zilisch v. State Farm Mut. Auto. Ins. Co.,* 196 Ariz. 234, ¶ 20, 995 P.2d 276, ¶ 20 (2000), quoting *Rawlings,* [20 P.3d 1164] 151 Ariz. at 156, 726 P.2d at 572. And, although a contractual nexus is required, failure to pay or process a claim is not a necessary element of bad faith. *Deese; Rawlings; Lloyd.*

¶ 11 The common law cause of action for breach of the covenant of good faith and fair dealing extends to claims against workers' compensation insurers. See *Hayes v. Continental Ins. Co.,* 178 Ariz. 264, 274, 872 P.2d 668, 678 (1994); *Boy v. Fremont Indem. Co.,* 154 Ariz. 334, 337, 742 P.2d 835, 838 (App.1987); *Franks v. United States Fidelity & Guar. Co.,* 149 Ariz. 291, 295-97, 718 P.2d 193, 197-99 (App.1985). In addition, that this action stems from an insurer's assertion of a workers' compensation lien does not necessarily negate Rowland's bad faith claim. As Great States points out, an insurer has a right to protect its valid interest so long as it does not give that interest paramount consideration, and an insurer does not act in bad faith by refusing to compromise its statutory lien. See *Stout v. State Compensation Fund,* 197 Ariz. 238, 3 P.3d 1158 (App.2000); *Boy.*

¶ 15 For workers' compensation purposes, "compensation" is defined as "the compensation and benefits provided by [Title 23, chapter 6, A.R.S.]." A.R.S. § 23-901(4). Although that definition is less than illuminating, "compensation" generally refers to lost wages and lost earning capacity, see A.R.S. § 23-1041, and "benefits" refers to "medical, surgical and hospital benefits or other treatment, nursing, medicine, surgical supplies, crutches and other apparatus ... reasonably required at the time of the injury, and during the period of disability." A.R.S. § 23-1062(A). The insurer also must "give equal consideration in handling the claim, and do so in fairness and honesty." *Lee,* 199 Ariz. 52 n. 3, 13 P.3d 1169 n. 3. And, even when the insurer defends a case by asserting that its actions conformed to statute, the insurer

may be liable for bad faith "if the evidence shows its employees could not or did not reasonably believe that [the claimant's demand] could be rejected within the bounds of the law." *Id.* at ¶ 15, 13 P.3d 1169, ¶ 15.

Merkens v. Fed. Ins. Co., 237 Ariz. 274, 349 P.3d 1111, 713 Ariz. Adv. Rep. 28 (Ariz. App. 2015)

¶ 16 To prove a bad faith denial of workers' compensation benefits, a plaintiff must demonstrate: (1) the carrier and the injured worker had an insurer-insured relationship, or the worker is a third-party beneficiary of the policy, *see Franks,* 149 Ariz. at 295, 718 P.2d at 197 (citations omitted); (2) the absence of a reasonable basis for denying benefits of the policy, *see id.* ; (3) "the [carrier's] knowledge or reckless disregard of the lack of a reasonable basis for denying the claim," *see Noble,* 128 Ariz. at 189, 624 P.2d at 867 ; and (4) traditional tort damages proximately caused by the denial of workers' compensation benefits rather than the damages resulting from the workplace injury, [237 Ariz. 278] [349 P.3d 1115] e.g., damages for pain, humiliation and inconvenience, and pecuniary losses, *see Mendoza,* 222 Ariz. at 149, ¶¶ 32–33, 213 P.3d at 298.

Mendoza v. McDonald's Corp., 213 P.3d 288, 222 Ariz. 139 (Ariz. App. 2009)

¶ 39 Adopting what is known as the *Hearn* test[22] for determining when a party has impliedly waived the attorney-client privilege, the supreme court held: "in cases such as this in which *the litigant* claiming the privilege *relies* on and advances as a claim or defense a subjective and allegedly reasonable evaluation of the law—but an evaluation that necessarily incorporates what the litigant learned from its lawyer—the communication is discoverable and admissible." *Id.* at 58, ¶ 15, 13 P.3d at 1175.

…a party will be deemed to have waived the privilege if it

> asserted some claim or defense, such as the reasonableness of its evaluation of the law, which necessarily includes the information received from counsel. In that situation, the party claiming the privilege has interjected the issue of advice of counsel into the litigation to the extent that recognition of the privilege would deny the opposing party

> access to proof without which it would be impossible for the factfinder to fairly determine the very issue raised by that party.
> *Id.* at 62, ¶ 28, 13 P.3d at 1179.

…At the heart of *Lee* is the recognition that, in the bad faith context, when an insurer raises a defense based on factual assertions that, either explicitly or implicitly, incorporates the advice or judgment of its counsel, it cannot deny an opposing party the opportunity to discover the foundation for those assertions in order to contest them. *Id.* at 61, ¶ 23, 13 P.3d at 1178 (discussing with approval *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259-60 (Del.1995)).

¶ 56 We agree with Mendoza, and McDonald's has not argued to the contrary, that under Arizona law, "an insurer who owes the legally imposed duty of good faith to its insured[] cannot escape liability for a breach of that duty by delegating it to another, regardless of how the relationship of that third party is characterized." *Walter v. Simmons*, 169 Ariz. 229, 238, 818 P.2d 214, 223 (App.1991). Although in *Walter* we did not reach the issue of an insurer's vicarious *punitive* liability for its agent's conduct "because there was insufficient evidence to support a punitive damages award against the agent," we have in subsequent cases confirmed that our state's common law doctrine of respondeat superior "allows punitive liability against a principal for the conduct of its agent without any showing of the principal's evil mind." *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 130, 907 P.2d 506, 516 (App.1995). *See also Haralson v. Fisher Surveying, Inc.*, 201 Ariz. 1, 6-7, ¶ 24, 31 P.3d 114, 119-20 (2001) (rule in Arizona is that punitive damages may be awarded against employer for acts of employee as long as acts committed in furtherance of employee's business and within scope of employment); *Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498, 502, 647 P.2d 629, 633 (1982) (same). Because "a lawyer is the agent of his or her client" and "the rules of agency law generally apply" to the attorney-client relationship, *Cahn v. Fisher*, 167 Ariz. 219, 221, 805 P.2d 1040, 1042 (App.1990), it follows that punitive damages may be assessed against an insurer for the actions of its attorney if those actions were taken in furtherance of the insurer's business and within the scope of the attorney's agency.

¶ 63 To prevail on a claim for punitive damages, the "plaintiff must prove that [a] defendant's evil hand was guided by an evil mind." *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578. This "evil mind" exists when a defendant intends to injure the plaintiff. It can also be found when, although not intending to cause injury, the "defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others." *Id.* Thus, punitive damages can be awarded on proof

"from which the jury may find that the defendant was `aware of and consciously disregard[ed] a substantial and unjustifiable risk that' significant harm would occur." *Id.* (quoting A.R.S. § 13-105(10)(c) (Supp.2008)) (then numbered A.R.S. § 13-105(5)(c)). The burden of proof for punitive damages is clear and convincing evidence. *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331-32, 723 P.2d 675, 680-81 (1986). Further, the "question of whether punitive damages are justified should be left to the jury if there is any reasonable evidence which will support them." *Farr v. Transamerica Occidental Life Ins. Co. of Cal.*, 145 Ariz. 1, 9, 699 P.2d 376, 384 (App.1984).

D DATE 12-15-11

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

[redacted], Applicant,	ICA CLAIM NO. [redacted]
vs.	CARRIER CLAIM NO. [redacted]
[redacted], Defendant Employer,	DATE OF INJURY: [redacted]
[redacted] Defendant Insurance Carrier.	**DECISION UPON HEARING AND FINDINGS AND AWARD** **(Bad Faith)**

Applicant filed a Request for Hearing on June 21, 2011, protesting the Commission's Findings and Award Denying Bad Faith and/Or Unfair Processing Practices issued March 30, 2011. Applicant is represented by [redacted]. Defendants are represented by [redacted]. A hearing was held in Phoenix on November 14, 2011. The undersigned, having fully considered the file, records and all related matters, now enters FINDINGS AND AWARD as follows:

FINDINGS

1. Applicant sustained a compensable injury on January 25, 2008, while working for the defendant employer. He has had surgery and has been on temporary partial or temporary total disability status during the period his claim was open for temporary benefits.

2. Applicant, through counsel, filed letters on July 22, 2010, and August 18, 2010, to Claims Manager Noreen Thorsen, advising that the carrier had established a pattern of paying applicant's disability checks late, and advising that messages left reminding the claims representative to pay these checks had not been acknowledged.

3. The carrier responded, through counsel, on September 14, 2010, that some checks had been issued late "through error" and that they hoped this would not continue. Defendants response to their poor communication was that the claims adjusters had changed during the period when messages were left.

[redacted]

4. No further action appears to have been taken until March 30, 2011, when the Commission issued its Findings and Award Denying Bad Faith and/or Unfair Claim Processing Practices. On June 21, 2011, applicant filed a Request for Hearing. Applicant brought his bad faith claim pursuant to A.R.S. § 23-930(A) and A.A.C.R20-5-163(A)(2)(a), the latter of which provides:

> A. For purposes of A.R.S. § 23-930, an employer, self-insured employer, insurance carrier, or claims processing representative commits "bad faith" if the employer, self-insured employer, insurance carrier, or claims processing representative:
>
> 2. Unreasonably delays:
> a. Payment of benefits

5. A hearing was convened on October 28, 2011, with testimony taken telephonically from applicant, who resides in [redacted], and from the defendant insurance carrier's claims adjuster [redacted].

6. Applicant testified that after his accident, he moved from [redacted] to [redacted]. He counts on his workers' compensation disability checks to live. He supports dependent children. Since moving, his home was destroyed by fire. His truck broke down so he no longer has transportation. Applicant was unable to work after the accident, and for a long period of time was on temporary total disability ("TTD") status. Applicant testified that his workers' compensation disability checks were distributed to him irregularly, not every 14 days. He testified in fact they were "never on time." [redacted]

7. [redacted], an adjuster with thirty years' experience, testified that he handled applicant's claim from date of injury through 2009, and from September, 2010, to the present. [redacted] did not identify the person who handled the claim during the first nine months of 2010.) Applicant was on TTD status during the latter period. [redacted] was the adjuster responsible for ordering applicant's TTD checks. He testified he knows when to order checks because he manually keeps a spreadsheet listing claimants for whom he is responsible and the dates their disability checks are due. When due, he orders checks by making computer entries for each. To his knowledge, the insurance carrier's computer system

[redacted] generates checks that are then mailed the next day from one of the carrier's offices in either the [redacted]

8. [redacted] acknowledged that he became "a little bit rattled" for a short period by contacts from applicant's attorneys' office requesting that checks be issued on time. For that reason, a couple of times he issued checks seven or eight days earlier than he otherwise would. (He characterized these contacts as "harassment.")[1] [redacted] admitted that when an injured worker has a knee replacement, as applicant did, the worker will be on temporary total disability for up to four months or more. He admitted he knew that applicant's house had burned down and that applicant was without transportation.

9. [redacted] testified to his belief that a TTD check is timely paid as long as he places an order for it within the 14 day disability period covered by the check. He believes a check is late if issued after the last day of the disability period. He testified that he ordered only "a couple" of checks late, but when asked to list the checks that he thought were late, he listed 7 of the 34 TTD checks issued from July 4, 2010 through October 21, 2011.[2] Of the seven checks he identified as late, three were mailed 4 days late, two were mailed 3 days late and one was mailed 2 days late.[3]

10. When asked whether he accounts for mail delays by mailing checks early, [redacted] said he tries to issue checks a few days early to account for mail delays, but suggested that he had to balance that with the possibility of overpayment of disability benefits.[4]

11. Following the initial hearing the record remained open so that the parties could file additional documentary evidence, which they did on November 7 and 15, 2011. Defendants' documents supplement the record by providing the actual mail dates of each disability check. To decide this case, I

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[1] Applicant's "Client Ledger Report" shows that there were six fax or emails sent to the carrier over a five month period (January through June, 2010) when applicant was receiving temporary partial disability ("TPD") benefits, a period when [redacted] was not the adjustor. Neither applicant nor defendant offered documentary evidence of the number or types of contacts made during [redacted] tenure on the claim, but I understand contacts occurred.

[2] Contrary to the September 14, 2011, letter referenced in Finding 3, no evidence of "error" was offered.

[3] [redacted] testified how late each late check was, but he determined lateness by the date he ordered the check, rather than by mail dates. Actual mailing dates add a day to each check. The late dates mentioned above are taken from defendant's evidence using actual mail dates.

[4] This might occur if applicant's disability status changed during the disability period. Of course, the carrier has an administrative remedy for overpayment by taking a credit against future benefits due, while applicant's remedy is to wait patiently for the check or initiate litigation, a time-consuming and impractical option at best for each single delay.

used the actual mail dates rather than the computer entry dates to which [redacted] testified.[5] Applicant filed a "Table of Benefit Payment August 2010 through September, 2011," which lists dates of receipt for each disability check and calculates how late the delayed checks were.

12. To determine whether the TTD checks were unreasonably delayed, it is first necessary to determine the points in time when a delay begins and when it ends. Defendants' theory, set forth in Finding 9 above, is that the delay begins at the last day of the disability period and ends when the check is either ordered or mailed. Applicant agrees delay begins with the last day of the disability period, but claims it ends when the check is received. The parties' clashing theories about when delay begins and ends is captured in this exchange between applicant's counsel [redacted] and [redacted]:

> Q (by [redacted]): Based upon the ledgers that you have seen that I provided, dic[redacted] receive benefits every 14 days, sir?
> A: Again, the statute doesn't address receipt.
> Q: It says they shall receive.
> A: It says issuance.
> Q: No, it doesn't, sir.
> A: Okay. I was not aware of that.

The applicable statute in fact doesn't use either term. *See* A.R.S. §23-1062(B). Instead it mandates that ". . . . [C]ompensation shall be *paid* at least once each two weeks during the period of temporary total disability . . . ." *Id. (emphasis added.)* What the legislature meant by the word "paid" has not been previously interpreted in the context of this statute. Defendants believe the applicant is "paid" when a check is either ordered or mailed. Applicant claims he is "paid" when he receives his check.

13. Based on this dispute, it is necessary to decide which event (ordering, mailing, or receiving) is the moment applicant is "paid," in order to determine which theory about delay is correct, and to determine which event is mandated "at least every two weeks." When interpreting the meaning of the statute one first looks to its language with the chief goal to ascertain and give effect to the legislative intent. If not sufficiently clear one can look at other factors including the statute's policy and what problem it was designed to address. *Gamez v. Industrial Comm'n,* 213 Ariz. 314, 318, 141 P.3d 794, 798 (App.

[5] [redacted] testimony relied upon a seven page computer print-out with a run date at the botton of 10/26/2011 and with pages numbered 1-5 and pages 1-2 of a second 1-5 run entitled [redacted] Program # [redacted]."

2006)(*citations omitted).* Moreover, Arizona's Workmen's Compensation Act is to be construed liberally to effectuate its purpose in protecting its beneficiaries, *Fullen v. Industrial Commission,* 122 Ariz. 425, 429, 595 P.2d 657, 661 (Ariz. 1979), and in compensating an injured employee for his lost earning capacity and preventing him and his dependents from becoming public charges during the period of disability. *Mail Boxes etc. U.S.A. v. Indus. Comm'n,* 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995).

14. At least one case has interpreted the word "paid," but in a statute concerning wages. *See Dessauer v. Az Dept. of Economic Security,* 141 Ariz. 384, 386, 687 P.2d 392, 394 (App. 1984)(*reconsideration denied).* In *Dessauer,* the Court observed that the word "paid" is the past tense of "to pay" and held that an employee is "paid wages," when the employer actually pays the wages, regardless of when they may have been earned, with "paid" meaning the moment that the funds are made available to employee so that he has control of them and can draw upon them at any time. *Id.* Relying in part on this, I interpret "paid" in the context of A.R.S. §23-1062(B), to mean a check is to be received by the applicant at least every two weeks. I conclude the applicant's theory about when delay begins and ends is correct, and adopt it.

15. The same sentence in the statute under consideration has additional language in it requiring that payments be made "at least once every two weeks." A.R.S. §23-1062(B). This two week interval conforms, with some exceptions, to typical intervals between paychecks from an employer, and permits the TTD benefit to substitute in part for lost wages that the injured worker would have regularly collected had he not been injured.

16. Keeping these ideas in mind, the undersigned prepared a two page chart from which to make calculations from the parties' evidence. It is attached as [redacted] Summary Chart - Total Temporary Disability." To explain the chart, Column I lists the 34 two-week TTD periods under consideration herein.[6] Column II lists the mail dates of each check (provided by defendants). Column III

[6] Applicant asked that this bad faith claim cover dates back to February, 2010. Applicant was on temporary partial disability ("TPD") benefits from February, 2010, through July 3, 2010. TPD checks are issued monthly and require submission of forms by the applicant listing his earnings during the disability period in question. In this case, applicant failed to offer evidence of when he reported his earnings during these TPD periods. Without knowing when the forms were submitted, it is impossible for me to determine whether those checks were issued later than they should have been. I limit my consideration of the evidence herein then to the period applicant was on temporary total disabiltiy status from July 4, 2010 through October 21, 2011.

[redacted]

lists an "L" for each check mailed later than the last day of the corresponding 14 day disability period. This column corresponds to [redacted] testimony listing the checks he thought were issued late. Three columns over, Column VI, lists the dates applicant received his checks (data taken from applicant's evidence).

17. Columns IV, V, VII, and VIII contain my calculations. Column IV lists the interval in number of days between the carrier's mailing of checks. Those issued more than 14 days from the previous check have a ">14" next to the number. Column V calculates the number of days checks were in the mail. Column VII lists, for the 26 checks received after the end of the disability period, the number of days each was late. For example, "+9" means the check arrived 9 days after the disability period ends. Column VIII lists the intervals in number of days between checks. (E.g. "21" means that check was received 21 days after receipt of the previous check.) Checks received more than 14 days after the previous check have a ">14" designation next to them.

18. Calculations for the 34 TTD checks are summarized at the bottom of page two of the chart. Under applicant's theory of delay that I have adopted Column VII demonstrates that the checks were delayed 82% of the time. Column VIII demonstrates that checks failed to meet the mandated interval of "at least every two weeks" 59% of the time.

19. Mail contributes to delays and is not in either parties' control. Column V demonstrates variability in mail time from 2 to 10 days with the average mail taking between four and five days. Because this factor is a major variable contributing to delay, the question arises which party should assume the risk of the mail's delay? I find that common sense dictates this risk should be on the payor rather than on the payee. For example, most people or companies have monthly bills that must be paid by a date certain, and it is expected that sufficient mail time be allowed so that payments are timely received to avoid interest, penalties and other adverse effects. Here, the applicant's disability benefit stands in place of a paycheck, scheduled to arrive every two weeks similar to intervals used for paychecks. I think a reasonable and prudent carrier would allow for mail delay in planning when to issue TTD checks so that they are received

by the applicant in the manner mandated by law.[7] I think a reasonable carrier or claims adjuster would enter an automatic payment schedule in the carrier's computer system for an applicant on prolonged TTD, so that checks would issue every 14 days without the reliance on manual spreadsheets and without having to make individual data entries, a practice that enabled [redacted] to pay applicant every 14 days only 41% of the time and resulted in timely receipt of benefits only 18% of the time.

20. Having discussed what constitutes a late or delayed payment, it is necessary to address the question of reasonableness or unreasonableness of the delays demonstrated by the attached chart. I begin by observing that a delay in payment of a few days for an individual TTD check would not be unreasonable in isolation, particularly in the absence of a pattern of delayed payments and especially when payment has otherwise been received regularly "at least every two weeks." In this case however applicant has established that the defendant carrier exhibited a pattern of delayed payments. He was not timely paid within a given disability period 82% of the time (or 28 of 34 checks) and had to wait *on average* 4 days for each delayed payment,[8] a delay equivalent to 30% of a 14 day disability period. Applicant further demonstrated that, 59% of the time, the intervals between received checks exceeded 14 days, showing no dependable pattern. The repeated delays coupled with the inconsistent intervals between payments can result in substantial hardship to an injured worker trying to support a family on disability and still timely pay rent, mortgage, and utilities, or plan a food budget. The intervals between each of the 20 checks issued more than 14 days after its prior check (with delays ranging 1 to 11 days later than due) alone contravene the purpose and express mandate of A.R.S. §23-1062(B). Considering this evidence as well as the purpose of Act, I conclude that applicant has established by a preponderance of the evidence that the actions of the carrier and its adjuster, as enumerated above, constitute unreasonable delay. I conclude that applicant has met his burden of proving the carrier's bad faith.

21. Unfortunately for the applicant who attempts to bring a carrier in compliance with the law by bringing a successful bad faith claim pursuant to A.R.S. §23-930 and Rule 163, the Legislature has allotted a *de minimis* penalty in situations like the present one in which benefits are merely delayed, but

[7] [redacted] mailed seven checks during the first week of their corresponding disability periods and when he did six were timely received by the applicant.
[8] With ranges between 2 to 9 days. *See* Chart, Column VII.

ultimately paid, and thus no order is required mandating payment. In such situations A.R.S. §23-930(B) permits applicant to collect a penalty benefit capped at $500. It is tempting in a situation such as the present one where there were repeated delays culminating in a finding of unreasonable delay of benefits to award a $500 penalty for *each* delayed check because it is doubtful that a single $500 penalty benefit will provide the necessary incentive to the carrier to change its practice to be in compliance with the statute. It is also tempting to postulate that if applicant had filed multiple Requests for Hearing (say, one every few delayed checks or so), a finding of bad faith in each case may have resulted in multiple penalties of $500. In this case, where applicant made efficient use of the Commission's time and resources, litigating the delayed payments in one hearing rather than filing multiple Requests for Hearing, he is essentially penalized for his effort by being limited to the collection of the single $500 penalty benefit. If it were the intent of the legislature to punish errant carriers and thus provide an incentive to stop such practices, a $500 penalty cap will likely fail to achieve its purpose. Nonetheless, the legislature's intent appears to have been to set such a cap, and I am thereby constrained. Applicant is awarded a penalty benefit of $500.

22. A.R.S. §23-930(C) does provide for additional civil penalties, the imposition of which the Commission must apparently initiate. This matter will be referred to the Claims Division to make a determination as to whether the facts in this case warrant imposition of civil penalties.

AWARD

IT IS ORDERED that the defendant insurance carrier pay applicant a $500 penalty benefit on the basis of the findings above of unreasonably delayed payments constituting bad faith.

IT IS FURTHER ORDERED referring this matter to the Claims Manager to take any further action deemed appropriate pursuant to A.R.S. §23-930(C).

[redacted]

NOTICE: Any party dissatisfied with this award may file a written request for review of the same with the Administrative Law Judge Division of the Industrial Commission within THIRTY (30) DAYS after the mailing of this award as provided by Arizona Revised Statutes, §§ 23-942D and 23-943A and 6B. Unless such written request is made within the time provided, this award is final.

By [redacted]

DATED AND MAILED IN PHOENIX, ARIZONA THIS THURSDAY 15 DECEMBER 2011.

[redacted]