

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2972-20

LOUIS RIPP,

Petitioner-Respondent,

v.

COUNTY OF HUDSON,

Respondent-Appellant.

APPROVED FOR PUBLICATION

June 3, 2022

APPELLATE DIVISION

Argued May 2, 2022 – Decided June 3, 2022

Before Judges Messano, Enright, and Marczyk.

On appeal from the New Jersey Department of Labor and Workforce Development, Division of Workers' Compensation, Claim Petition No. 2013-15549.

Cindy Nan Vogelman argued the cause for appellant (Chasan Lamparello Mallon & Cappuzzo, PC, attorneys; Cindy Nan Vogelman, of counsel and on the briefs; Priscilla E. Savage, on the briefs).

Evan L. Goldman argued the cause for respondent (Goldman Davis Krumholz & Dillon, PC, attorneys; Evan L. Goldman, on the brief).

The opinion of the court was delivered by

MESSANO, P.J.A.D.

Louis Ripp worked for the County of Hudson (the County) as an assistant chief engineer/boiler operator and injured his back in a workplace accident on February 11, 2013. Ripp filed a petition with the Division of Workers' Compensation (the Division) in June 2013, seeking benefits under the Workers' Compensation Act (the WCA), N.J.S.A. 34:15-1 to -142; the County filed an answer. Ripp received temporary disability benefits and medical benefits before both his medical expert and the County's medical expert declared Ripp was permanently disabled in 2016.

On January 26, 2021, the judge of workers' compensation (JWC) entered an Order for Total Disability (Order) approving a settlement in the amount of \$365,100. The Order stated Ripp was totally disabled as the result of a disc herniation and disc bulges, post-operatively, accompanied by radiculopathy at several vertebral levels of his spine. It is undisputed that the County was to pay Ripp \$173,480 within sixty days of the entry of the Order.¹

¹ In her written statement supplementing the reasons for her decision discussed infra, see Rule 2:5-1(b), the JWC said this amount represented "[p]ayments accrued pursuant to th[e] Order." The amount is not specifically contained within the Order, but the parties do not dispute the County was obligated to pay that amount within sixty days of entry of the Order.

Ripp filed a motion to enforce the Order because the County had not made the required payments.² He sought simple interest on the settlement amount pursuant to N.J.S.A. 34:15-28, and, pursuant to N.J.S.A. 34:15-28.2(a), Ripp sought enforcement of the Order through "an additional assessment not to exceed 25% of the money due . . . for unreasonable payment delay" and counsel fees. Ripp also moved for additional penalties for payment delay "not exceeding \$5,000[] . . . with proceeds . . . paid into the Second Injury Fund," pursuant to N.J.S.A. 34:15-28.2(b).

If the County filed a formal answer to the motion, it is not in the record. Nevertheless, it is undisputed Ripp received full payment of the amount due him on April 12, 2021, sixteen days after the due date, although the County had not paid reimbursement of other expenses at that time. At oral argument on the motion before the JWC on May 11, 2021, the County offered the following excuses for the late payment: its third-party administrator failed to submit the payment request in time for the February "bill listing," delaying its approval until the March meeting, presumably, of the county commissioners; delay by the third-party administrator was the result of a "transfer[]" [of the

² The motion in the appendix is dated March 25, 2021, one day before the expiration of the sixty-day period; the JWC's written amplification indicates it was not filed until April 1, 2021.

file] from one adjustor to another"; and because of the COVID-19 pandemic, payment to Ripp was briefly delayed.

In her oral decision, the JWC noted Ripp needed to successfully make enforcement motions to obtain temporary disability benefits. She recognized some delays were occasioned by the County being "a governmental entity," and, because it involved a total disability award, "an excess carrier [was] involved." The judge noted, "We first discussed voluntarily totaling Mr. Ripp in August 2019," but the County did not authorize settlement until January 2021.

The JWC noted Ripp was "without significant funding for quite a long time," and had "written to the [c]ourt on many, many occasions sharing over how long the process is of finalizing his case." She said Ripp was "anxious about money and the [c]ourt [was] very sensitive to all of that." The judge recognized the County's attorney "did everything in [his] power to . . . tie this up with [his] client so this would be paid timely, yet [it] didn't do that."

Finding the County's explanation for delay in not paying the reimbursable expenses to Ripp was reasonable, the judge excluded those amounts from the 25% penalty she imposed on benefits due to Ripp. The judge's order required the County pay Ripp an additional \$43,370 within sixty days pursuant to N.J.A.C. 12:235-3.16. The County appealed.

In the written amplification of her reasons, the judge reiterated that the County agreed in early 2019 that Ripp was totally disabled. The judge noted Ripp was receiving Social Security Disability benefits, and because "Social Security is notoriously slow," it delayed computation of Ripp's "average current earnings," necessary so the Order "could be effectuated." The JWC also recognized that given the size of the award, the County needed to involve its excess insurance carrier, which authority to settle was not provided until December 2020. The judge said she granted five adjournments between September 2020 and December 2020, recognizing the County was a governmental entity, an excess carrier was involved, and the pandemic was extant.

However, the JWC said this delay "was to the dismay of [Ripp]." She cited "several letters" from Ripp that she "shared with counsel," detailing his "emotional and financial distress" as a result of not working. The judge cited Ripp's "life[-]altering injury," lack of "wages for over four years," and his "disabled child," all of which left the JWC "very sympathetic to the . . . stress this has caused [Ripp]." The JWC said the court had "bent over backwards to give the [County] the time to 'get it[']s ducks in a row,'" and it was "inconceivable" that payment was delayed. Finding the County's delay was

"unreasonable," the JWC concluded it was appropriate to impose the maximum additional assessment of 25% to enforce the Order.

Before us, the County argues the JWC erred "in her expansive application of N.J.S.A. 34:15-28.2," and, additionally, she abused her discretion in "imposing a manifestly excessive assessment under the [c]ircumstances." We agree, and therefore reverse and remand for further proceedings.

I.

Our review of decisions from the workers' compensation court are decidedly deferential. See, e.g., Hager v. M&K Const., 246 N.J. 1, 18 (2021) (noting appellate review is "limited to whether the findings could have been reached on sufficient credible evidence present in the record." (quoting Hersh v. Cnty. of Morris, 217 N.J. 236, 242 (2014))). This deferential standard recognizes "the compensation court's expertise and the valuable opportunity it has had in hearing live testimony." Ibid. Here, of course, the parties settled the petition and agreed Ripp was totally disabled from the workplace injury.

In the first instance, this appeal raises certain legal issues and questions of statutory interpretation; as to those, we owe no deference to the JWC's opinions and conduct our review de novo. Ibid.; see also Marconi v. United Airlines, 460 N.J. Super. 330, 337 (App. Div. 2019) ("[W]e owe no particular

deference to the judge of compensation's interpretation of the law." (quoting Sexton v. Cnty. of Cumberland/Cumberland Manor, 404 N.J. Super. 542, 548 (App. Div. 2009))).

The WCA does not require that payment of settlement benefits to petitioners must be made within a specific period of time. In her written supplement to her decision, the JWC said, "Under our [s]tatute, [the County] had up to [sixty] days to make . . . payment." We assume this was a reference to N.J.S.A. 34:15-28, which provides:

Whenever lawful compensation shall have been withheld from an injured employee or dependents for a term of [sixty] or more days following entry of a judgment or order, simple interest on each weekly payment for the period of delay of each payment may, at the discretion of the [D]ivision, be added to the amount due at the time of settlement.

In 1979, in an attempt to eliminate unreasonable delays by employers and their insurers in the payment of temporary disability benefits under the WCA, the Legislature enacted N.J.S.A. 34:15-28.1, which provides:

If a[n] . . . employer's insurance carrier, having actual knowledge of the occurrence of the injury, or having received notice thereof such that temporary disability compensation is due pursuant to [N.J.S.A.] 34:15-17, unreasonably or negligently delays or refuses to pay temporary disability compensation, or unreasonably or negligently delays denial of a claim, it shall be liable to the petitioner for an additional amount of 25% of the amounts then due plus any reasonable legal fees incurred by the petitioner as a result of and in relation

to such delays or refusals. A delay of [thirty] days or more shall give rise to a rebuttable presumption of unreasonable and negligent conduct on the part of . . . an employer's insurance carrier.

[Ibid. (emphasis added).]

"[I]n combination" with regulations adopted at N.J.A.C. 12:235-3.14, the statute was "plainly designed to assure that a party's obligations under the compensation laws, and consequent rulings by judges of compensation adjudicating those obligations, must be taken — as they should be — very seriously." Flick v. PMA Ins. Co., 394 N.J. Super. 605, 613 (App. Div. 2007).³

In Stancil, we outlined public criticism of the workers' compensation system following our decision in Flick, and the Legislature's response. 418 N.J. Super. at 86–87. Among other provisions, the Legislature adopted N.J.S.A. 34:15-28.2(a) and (b) "to incentivize insurers to timely comply with compensation court orders." Id. at 89.

The statute provides:

³ At the time we decided Flick, the regulations were at N.J.A.C. 12:235-3.14; they were subsequently amended and renumbered in 2009. See Stancil v. ACE USA, 418 N.J. Super. 79, 85 (App. Div. 2011) ("The new regulation followed the legislative enactment of new enforcement provisions . . . , codified at N.J.S.A. 34:15-28.2 to -28.4. L. 2008, c. 93 §§ 1-3, effective October 1, 2008.", aff'd 211 N.J. 276 (2012)).

If any employer . . . fails to comply with any order of a judge of compensation . . . , a judge of compensation may, in addition to any other remedies provided by law:

a. Impose costs, simple interest on any moneys due, an additional assessment not to exceed 25% of moneys due for unreasonable payment delay, and reasonable legal fees, to enforce the order, statute or regulation;

b. Impose additional fines and other penalties on parties or counsel in an amount not exceeding \$5,000 for unreasonable delay, with the proceeds of the penalties paid into the Second Injury Fund;

[N.J.S.A. 34:15-28.2 (emphasis added).]

The Division then adopted N.J.A.C. 12:235-3.16(h)(1)(i), which allows a judge to "impose an additional assessment not to exceed 25 percent on any moneys due if the judge finds the payment delay to be unreasonable."

Unlike N.J.S.A. 34:15-28.1, which deals with delays in paying temporary disability benefits and defines a thirty-day delay as presumptively unreasonable, the Legislature here chose not to specify what is a presumptively unreasonable delay in payment of settlement proceeds under an order entered by the JWC. The imposition of statutory penalties for delays is common, although not uniform, among the workers compensation schemes of our sister states. See 13 Lex K. Larson, Larson's Workers' Compensation Law §

135.02[1] (Matthew Bender, Rev. Ed. 2021) (noting "a great deal of variation in the statutory prerequisites for an imposition of penalties. . . . [P]enalties may be imposed when the employer fails either to pay benefits or to controvert the claim within a specified time. Other states. . . require that the delay be unreasonable.").

By way of example, California's statute increases a compensation award "up to 25 percent or up to ten thousand dollars (\$10,000), whichever is less," when "payment has been unreasonably delayed . . . either prior to or subsequent to the issuance of an award." Cal Lab Code § 5814(a). In State Compensation Insurance Fund v. Workers' Compensation Appeals Board, California's Supreme Court reasoned "that a short delay caused by the realities of business cannot, standing alone, be considered unreasonable." 959 P.2d 1204, 1210 (Cal. 1998) (citing Kampner v. Workers' Comp. Appeals Bd., 150 Cal. Rptr. 222 (Ct. App. 1978)). Additionally, "the length of the delay, as well as the size of the late payment, should be considered . . . when assessing the reasonableness of the delay." Id. at 1211 (citing Gallamore v. Workers' Comp. Appeals Bd., 591 P.2d 1242, 1245–46 (Cal. 1979)).

We agree with Ripp that the Legislature intended to commit to the JWC's sound discretion consideration of what constitutes an "unreasonable payment delay" by leaving the term undefined in N.J.S.A. 34:15-28.2(a),

without any presumptive timeframe as the Legislature included in N.J.S.A. 34:15-28.1, where the exigencies posed by delay in the payment of temporary disability payments arguably may be more pressing. And, as the California Court of Appeals said in Kampner, proper exercise of that discretion requires more than simply calculating the passage of time beyond the due date anticipated by the JWC's order, because "delay of a certain number of days does not per se make a delay unreasonable but instead each case must be judged on its own facts as to whether the delay was reasonable or not." 150 Cal. Rptr. at 227.

Having set out the statutory framework, we turn to the specific facts of this appeal.

II.

In the first instance, N.J.S.A. 34:15-28.2(a) justifies imposition of a penalty, regardless of its amount, only to "enforce the order" of the JWC, and only if there is an "unreasonable payment delay" of the "moneys due." In construing this provision of the WCA, "[f]amiliar principles of statutory interpretation guide our review. We strive to 'divine and effectuate the Legislature's intent.'" N.J. Transit Corp. v. Sanchez, 242 N.J. 78, 85 (2020) (quoting Perez v. Zagami, LLC, 218 N.J. 202, 209 (2014)). "To that end, we look to the statute's plain language as 'the best indicator' of the Legislature's

intent, giving its words 'their ordinary meaning and significance.'" Id. at 86 (quoting In re Registrant H.D., 241 N.J. 412, 418 (2020)).

The plain and unambiguous language of N.J.S.A. 34:15-28.2(a) limits imposition of a penalty to situations justifying the court's enforcement of its order fixing the "moneys due" a petitioner pursuant to that order, and only if there is an "unreasonable payment delay." Here, the Order was not entered until January 26, 2021, and by "statute" or implication, the JWC recognized, and the parties understood, the County had sixty days thereafter to make payment to Ripp. There was no "delay," and certainly not an "unreasonable payment delay," prior to March 26, 2021.

Simply put, as the Legislature intended, N.J.S.A. 34:15-28.2(a) permits the JWC to enforce his or her previously entered order requiring payment when that payment is unreasonably delayed. Therefore, it was legal error for the JWC to consider, for example, the length of time it took to settle Ripp's petition after the parties agreed Ripp was totally disabled.⁴ No payments were "due" Ripp until the JWC entered the Order, and no payments were delayed for the first sixty days that followed. As a result, the JWC committed legal error

⁴ Indeed, the JWC recognized there were ample, legitimate reasons why it took until January 2021 to enter the Order finally settling the matter, and that those delays were not "unreasonable."

by considering litigation delays in fashioning an appropriate remedy under the statute.

Having said that, however, the County did not dispute before the JWC, or now before us, that it failed to pay Ripp the moneys due under the Order in a timely fashion. Rather it offered various excuses for the delay, which the JWC considered, and to some degree accepted as reasonable. Nevertheless, the judge imposed the maximum statutory penalty for a sixteen-day payment delay.

We found no reported case defining the appropriate standard of appellate review of a penalty awarded pursuant to a motion seeking enforcement of an order entered under the WCA. In an analogous circumstance, we review an order enforcing litigants' rights under Rule 1:10-3 for an abuse of discretion. Wear v. Selective Ins. Co., 455 N.J. Super. 440, 458–59 (App. Div. 2018) (citing Barr v. Barr, 418 N.J. Super. 18, 46 (App. Div. 2011)). An abuse of discretion occurs "when a decision [wa]s 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigr. & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)). We conclude the JWC mistakenly exercised her discretion in this case.

The County contends the judge erred by relying on personal ex parte correspondence from Ripp setting out the hardships occasioned by the delay. We have no reason to doubt, however, the judge's written statement in which she explained that she provided the correspondence to both counsel. Furthermore, in deciding whether the delay is unreasonable, we think it is appropriate for a JWC to consider "the length of the delay, as well as the size of the late payment," and, by implication, the effect a sizeable payment that is delayed beyond its due date, would undoubtedly have upon a petitioner and his or her family. State Comp. Ins. Fund, 959 P.2d at 1211.

However, as already noted, the JWC relied on "an impermissible basis" in fashioning the penalty, specifically, delays in the litigation that predated entry of the Order. In addition, the judge awarded the maximum penalty under the statute, even though the delay in payment was only sixteen days and she recognized certain extenuating circumstances that reasonably delayed payment. Additionally, the judge did not find any bad faith on the County's part.

We therefore vacate the order and remand the matter to the Division for reconsideration of an appropriate additional assessment for the minimal, yet "unreasonable payment delay," in this case. We see no reason to order that the remand be conducted by a different JWC.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

A handwritten signature in black ink, appearing to be 'AWA', is written over the text of the certification.

CLERK OF THE APPELLATE DIVISION