

---

In the Matter of the ORS 656.262(11) Penalty Dispute of

**McGarry, Robert E. Claimant**

Contested Case No: HH02-002

**PROPOSED & FINAL ORDER**

June 28, 2002

ROBERT MCGARRY, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

---

This case involves a challenge to a Proposed and Final Order Denying Assessment of a Penalty Pursuant to ORS 656.262(11) issued by the Sanctions Unit of the Workers' Compensation Division (WCD), Department of Consumer and Business Services. On February 21, 2002, Administrative Law Judge Paul Vincent conducted a telephone hearing in the matter. Petitioner Robert McGarry (claimant) was represented by Attorney Stanley Fields. Respondent SAIF Corporation (insurer or SAIF) was represented by Attorney Mary Goebel-Adams. WCD waived appearance at the hearing. No witnesses testified. The record closed on February 21, 2002.

The record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered.

**ISSUE**

Whether the insurer unreasonably failed to pay permanent partial disability due from an August 13, 2001 Notice of Closure and whether the assessment of a penalty pursuant to ORS 656.262(11).

**EVIDENTIARY RULING**

WCD's Exhibits 1-15 were admitted into the record without objection.

**FINDINGS OF FACT**

On November 7, 1996, claimant suffered a compensable injury. The injury was accepted as non-disabling and processed accordingly. Claimant lost no time from work on the original injury claim. (Exs. 1-2).

In 2000, claimant's condition worsened. On October 2, 2000, SAIF notified claimant that it had reopened the claim. On October 16, 2000, the claimant underwent surgery on an out-patient basis for the accepted condition. Following surgery, claimant lost time from work as a result of his compensable injury beginning on October 16, 2000. Claimant returned to work on October 25, 2000. (Exs. 1-4).

SAIF modified its acceptance and reclassified the claim as disabling on October 30, 2000. In the modified notice, SAIF notified claimant that he might be entitled to time loss

payments, and that a three day waiting period might apply during which time loss payments would not be made. (Ex. 4).

On August 13, 2001, SAIF notified claimant that it had allegedly overpaid his time loss benefits during the three day waiting period from October 16, 2000 through October 18, 2000 in the amount of \$377.18.

On August 23, 2001, SAIF paid claimant Permanent Partial Disability (PPD) in the amount of \$5,267.62 reflecting an award of \$5,644.80 minus the alleged \$377.18 overpayment.

On October 11, 2001, claimant's attorney contacted WCD and requested a penalty/attorney's fee, alleging that SAIF failed to pay benefits timely by recovering a three-day waiting period out of the PPD awarded "that does not apply in aggravation claims."

On December 26, 2001, the WCD Compliance Section, Investigations and Sanctions Unit (Sanctions) issued an Order Denying Assessment of a Penalty pursuant to ORS 656.262(11).

### **CONCLUSIONS OF LAW AND REASONING**

Claimant argued at hearing, as he did before sanctions, that the insurer erred in deducting an overpayment from his PPD award because no three-day waiting period applies to aggravation claims. Claimant relies on *Liberty Northwest Insurance Corp. v. Short*, 102 Or App 495 (1990) for the proposition that the three day waiting period contained in ORS 656.210(3) applies only to original injury claims. In *Short*, the court addressed the issue of whether this statute, which requires that an injured worker be absent from work for three days before recovering temporary disability benefits, applies only to original injury claims or to all claims. The employer in *Short* appealed an order awarding compensation to claimant and assessing attorney's fees and penalties for failing to pay compensation. The court affirmed after determining that ORS 656.210(3) applies only to original injury claims, and does not allow an employer to delay payment of compensation for three days on any claim but the original injury claim. The court stated:

Employer argues that an injured worker's absence from work must exceed three days before he is entitled to temporary disability benefits by reason of an aggravation because, under ORS 656.263(6), an aggravation claim is processed in accordance with the provisions of ORS 656.262 that apply to an original claim. However, ORS 656.210(3) can also be reasonably interpreted, when read with ORS 656.273(1), to limit the three-day waiting period only to original injury claims, because (1) the statute refers only to a compensable injury and (2) the legislature could have easily added the words "or aggravation" after "compensable injury" had it intended a broader application. *Short* at 498.

The court went on to examine the legislative history of ORS 656.210(3), noting that while there were discussions indicating that the three-day waiting period was added to reduce the cost of administering the workers' compensation system, the three-day waiting period was strongly opposed and the overall history supported the inference that "compensable injury meant only the original injury." *Short* at 499. The court concluded that "the legislature intended to

require a worker to incur more than one three-day waiting period without compensation relating to the same injury, it would have expressly said so.” *Short* at 500.

Insurer argues that I should discount the court’s interpretation of ORS 656.210(3) because of the court’s express application of the *former* rule requiring interpretation of the Workers’ Compensation Law in the light most favorable to the worker to its opinion. Were the court’s opinion to appear essentially in balance prior to the application of this rule, I would agree with insurer that the director might not be bound by the court’s interpretation. However, as indicated by the quotes above, the matter did not seem to be in balance prior the application of that rule, rather the court had already indicated that the overall legislative history and examination of the statute in context indicated that it applied only to an initial opening. Accordingly, I find that Sanctions erred in applying ORS 656.210(3) to any injury other than “the original injury.” *Short* at 499.

This leaves the question of what is the appropriate penalty amount to be assessed for insurer’s unreasonable delay in payment. Penalties are to be assessed pursuant to the matrix set forth at Appendix B to the OAR 436-060 rules. OAR 436-060-0155(7). Under the matrix, the penalty for a payment varies from 0 to 25 percent depending on the number of days the payment was late and the number of violations. In any case in which the payment is 22 or more days late the penalty is 25 percent of the amount due. Payment of the full PPD due in this case has been delayed well in excess of 22 days. Consequently, pursuant to the matrix set forth in Appendix “B,” the appropriate penalty is 25 percent of the overdue amount (25 percent of \$377.18 or \$94.30).

### **ORDER**

IT IS HEREBY ORDERED THAT: the Sanctions Unit order dated December 26, 2001 is reversed. Claimant is awarded a penalty of 25 percent of the PPD proceeds not paid. In lieu of an attorney fee, 50 percent of the penalty amount shall be paid out of and not in addition to the of the penalty, to claimant’s counsel, Stanley Fields.

DATED this 22nd day of March 2002.

---

Paul Vincent, Hearing Officer  
Hearing Officer Panel