

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

McGarry, Robert E., Claimant

Contested Case No: H02-002

PROPOSED & FINAL ORDER

March 22, 2002

ROBERT H. MCGARRY , Petitioner

SAIF CORPORATION , Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

On February 21, 2002, Hearing Officer Paul Vincent conducted a telephone hearing. Attorney Stanley Fields represented petitioner Robert McGarry (claimant). Respondent, SAIF Corporation (insurer), appeared through attorney Mary Goebel-Adams. The Department of Consumer and Business Services, Workers' Compensation Division (WCD) waived appearance.

The respondent filed exceptions to Hearing Officer Vincent's March 22, 2002 Proposed and Final Contested Case Order, which assessed a 25 percent penalty based on the insurer's unreasonable offset against claimant's permanent disability award. Petitioner timely responded to the exceptions. Before the Director, the issues are jurisdiction and penalty. The entire record, consisting of a tape recording of the hearing, all evidence received, and all documents filed, has been considered.

Findings of Fact

The Director adopts the hearing officer's findings of fact with the following supplementation.

On October 11, 2001, claimant submitted a request for reconsideration of the insurer's Notice of Closure. He checked issue boxes 2, 3, 4, and 5 on the Request for Reconsideration Form and, in addition, raised the issue of penalty and attorney fees for the insurer's alleged unreasonable reduction of his permanent disability award by recovering overpaid time loss benefits. (Ex. 10).

The director takes administrative notice that claimant filed a request for hearing with the Hearings Division of the Workers' Compensation Board seeking enforcement of the December 31, 2001 Order on Reconsideration and requesting a penalty for alleged unreasonable failure to pay temporary disability benefits pursuant to the Order on Reconsideration. By Order on Reconsideration dated May 7, 2002, Administrative Law Judge (ALJ) Monte Marshall determined that claimant was not entitled to temporary disability benefits for the three-day waiting period from October 16, 2000 through October 18, 2000.

Conclusions of Law and Opinion

The hearing officer determined that the three day waiting period in ORS 656.210(3) applied only to original injury claims and, thus, the insurer erred in deducting overpaid time loss

from claimant's permanent partial disability (PPD) award on his aggravation claim. Therefore, the insurer had unreasonably refused payment in the amount equal to the overpaid time loss (\$377.18). Because the payment of the full PPD award had been delayed in excess of 22 days, under the penalty matrix, the hearing officer assessed a 25 percent penalty of the overdue amount (\$94.30).

In its exceptions, the insurer moved to dismiss for lack of subject matter jurisdiction over the underlying matter and/or the penalty issue. Specifically, the insurer contended that the same issues were raised, and decided, before the Workers' Compensation Board pursuant to claimant's request for hearing on the December 31, 2001 Order on Reconsideration. Alternatively, the insurer contended that it had a reasonable doubt as to its liability regarding the underlying issue of the payment of interim compensation, and that there were no amounts due upon which to base a penalty.

Jurisdiction

In October 2000, the insurer reopened claimant's claim for aggravation and reclassified the claim as disabling. Claimant underwent outpatient surgery on October 16, 2000. On August 13, 2001, the insurer notified claimant that it had overpaid time loss because it had incorrectly paid for the three-day waiting period from October 16 through October 18, 2000. (Ex. 6). That same day, the insurer issued a Notice of Closure (NOC), which awarded permanent disability (PPD) and time loss from October 19, 2000 through December 5, 2000. The insurer subsequently paid claimant the PPD award, but deducted the overpaid time loss. Claimant requested reconsideration of the NOC on October 11, 2001. Claimant disagreed with the medically stationary date, the temporary disability dates, the impairment findings, and the rating of permanent disability. In addition, claimant requested a penalty and attorney fee on the ground that the insurer unreasonably offset the alleged overpaid time loss.

The Appellate Review Unit (ARU) issued an Order on Reconsideration on December 31, 2001 that awarded time loss from October 16, 2000 through December 5, 2000, as the beginning and ending dates of authorized time loss. The order also stated that "[c]omputation of temporary disability compensation, including temporary partial disability and the three-day wait, shall otherwise be a function of claims administration under OAR 436-060." (Ex. 13). ARU referred the penalty issue to the Sanctions Unit of WCD. Sanctions issued an Order Denying Assessment of a Penalty pursuant to ORS 656.262(11). Relying on ORS 656.212(1) and OAR 436-060-0030(1), Sanctions determined that the insurer was not required to pay the three day waiting period. Also, relying on ORS 656.268(11) and OAR 436-060-0170(1), Sanctions concluded that the insurer was allowed to recover the time loss overpayment.

OAR 436-030-0135(6) provides that "the reconsideration order shall address issues raised by the parties and shall address compensation ..." In addition to raising issues regarding his compensation in his request for reconsideration, claimant also sought a penalty and attorney fee for the insurer's alleged unreasonable reduction of his PPD award. The Reconsideration Order addressed the medically stationary date, the period of authorized time loss, and the extent of permanent disability, *viz.* compensation issues. Penalties, however, are not "compensation" under the meaning of the workers' compensation law. *See Jay A. Nero*, 47 Van Natta 163 (1995)

(relying on *Saxton v. SAIF*, 80 Or App 631 (1986)). Thus, the Reconsideration Order correctly did not address the penalty and attorney fee issue. Because the penalty issue was outside the purview of the reconsideration process, the Sanctions Unit of WCD reviewed the penalty issue on referral from ARU pursuant to claimant's request for reconsideration. See OAR 436-030-0580.

WCD did not lose jurisdiction by virtue of claimant's request for hearing on the Reconsideration Order. The director retains jurisdiction over the penalty issue when the penalty order issued prior to a party initiating a proceeding before the Hearings Division. See OAR 436-060-0155(6). Sanctions issued its Order Denying Assessment of a Penalty on December 26, 2001. The Order of Reconsideration was not issued until December 31, 2001, and the proceeding before the Board was not initiated until after the request for hearing on that order was filed. Therefore, the director maintains jurisdiction over the penalty issue.

Penalty

Under ORS 656.262(11), a penalty may be assessed when an insurer "unreasonably delays or unreasonably refuses to pay compensation." The standard for determining reasonableness is "whether, from a legal standpoint, [the insurer] had a legitimate doubt as to its liability. *** 'Unreasonableness' and 'legitimate doubt' are to be considered in the light of all the evidence available to the insurer. *Brown v. Argonaut Ins. Co.*, 93 Or App 588, 591 (1988)(citations omitted).

The underlying issue in this case was the interpretation of ORS 656.210(3); *i.e.*, whether the insurer was entitled to recover time loss paid for the three-day waiting period under ORS 656.210(3). Claimant argued that, under the court's holding in *Liberty Northwest Ins. Corp. v. Short*, 102 Or App 495 (1990), the three-day waiting period did not apply to aggravation claims. The insurer disagreed with claimant's analysis of the *Short* decision. Thus, the insurer's liability for the time loss presented a question of law. Both sides had credible legal arguments to support their contrary positions. Therefore, from a legal stand point, the insurer had a legitimate doubt at to its liability. No penalty is warranted.

In addition, the issue of claimant's entitlement to temporary disability for the disputed period was a matter concerning a claim within the jurisdiction of the Hearings Division. ALJ Marshall found that claimant was not entitled to temporary disability benefits from October 16, 2000 through October 18, 2000. Thus, there are no amounts then due upon which to assess a penalty. OAR 436-060-0155(7).

IT IS HEREBY ORDERED that the March 22, 2002 Proposed and Final Contested Case Order is reversed.

DATED this _____ day of June, 2002.

**MARY NEIDIG, DIRECTOR
DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES**

By: _____
John Shilts, Administrator
Workers' Compensation Division