
In the Matter of the ORS 656.262(11) Penalty Dispute of
Mendoza-Razo, Martin , Claimant

Contested Case No: HH02-035

PROPOSED & FINAL ORDER

May 2, 2002

MARTIN MENDOZA-RAZO , Petitioner

KEMPER INSURANCE COMPANY , Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals an administrative order issued on February 28, 2002 by the Sanctions Unit of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On April 29, 2002, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Petitioner Martin Mendoza-Razo (claimant) was represented by attorney Aaron Clingerman. Respondent Lumbermens' Mutual Casualty, Kemper Insurance Companies (insurer) was represented by attorney Mark P. Bronstein. The Workers' Compensation Division (WCD) waived appearance. No witnesses testified and the record closed on the date of hearing.

The record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered. The findings of fact set out below are based upon the entire record.

ISSUE

Pursuant to ORS 656.262(11), is a penalty warranted for untimely claim closure?

EVIDENTIARY RULINGS

WCD Exhibits 1 through 7 and claimant's Supplementary Exhibit A were received into the record without objection.

FINDINGS OF FACT

On June 7, 2001, claimant suffered a compensable work injury. (Exs. 1 and 4). Insurer accepted a disabling claim for "sliver with infection to right index finger." (Exs. 1-3 and 4).

On September 24, 2001, Ronald Yamada, MD conducted a closing examination and declared the accepted condition medically stationary. (Ex. A). Insurer received Dr. Yamada's chart note on October 15, 2001. (*Id.*) Relying on Dr. Yamada's chart note, insurer issued a Notice of Closure on November 29, 2001. (Ex. 1). Insurer rated the extent of claimant's scheduled permanent partial disability at 47 percent for loss of use of the right index finger for a SPPD award of \$5,767.35. (Ex. 1-3).

CONCLUSIONS OF LAW

No penalty is warranted for untimely claim closure.

OPINION

Since the sole issue presented is a penalty dispute, jurisdiction lies with the director of WCD. ORS 656.262(11)(a). The statute does not specify a standard of review, and therefore, I review *de novo*. OAR 436-001-0225(6). *See Archie M. Ulrich*, 2 WCSR 152 (1997). The burden of proof falls upon the proponent of that fact or position. ORS 183.450(2).

ORS 656.262(11)(a) authorizes the director to assess penalties if an insurer unreasonably delays payment of compensation. ORS 656.262(11)(a) provides in part:

(11)(a) If an insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the **amounts then due***** (Emphasis added.)

OAR 436-030-0020(1)(a) provides:

(1) The insurer shall issue a Notice of Closure on an accepted disabling claim within 14 days when:

(a) medical information indicates the worker's compensable condition is medically stationary and there is sufficient information to determine the extent of permanent disability.

The Sanctions Unit determined that no penalty was due because prior to claim closure, there was no amount "then due" as required by ORS 656.262(11)(a). Claimant contends that insurer is liable for an additional amount because insurer failed to close the claim within 14 days of receiving Dr. Yamada's chart note.¹ In support of his position, claimant points out that OAR 436-030-0020(1)(a) is mandatory and requires an insurer to close a claim within fourteen days of receiving notice of medically stationary status and medical information sufficient to rate

¹ Claimant does not contend that insurer failed to pay the SPPD award. Claimant does not contend that insurer paid the SPPD award untimely following issuance of the Notice of Closure.

the extent of permanent partial disability. In contrast, insurer contends that there is no statutory basis for the penalty claimant seeks.

I agree with the Sanction Unit's conclusion that no penalty is due. Insurer received Dr. Yamada's chart note, containing the essential information on October 15, 2001; insurer issued

the Notice of Closure on November 29, 2001, more than 14 days later. Notwithstanding the untimely claim closure, no penalty is warranted because ORS 656.262(11)(a) authorizes assessment of a penalty only as a percentage of amounts owing to claimant at the time of untimely claim processing. Here, no amount was owed to claimant until after issuance of the Notice of Closure. Therefore, no penalty is warranted for untimely claim closure.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing, and therefore, is entitled to no attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order February 28, 2002 is affirmed.

Dated this _____ day of May 2002

Catherine P. Coburn
Administrative Law Judge
Hearing Officer Panel