

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

**Hathaway, Douglas J., Claimant**

Contested Case No: H02-128

**PROPOSED AND FINAL ORDER**

April 18, 2003

DOUGLAS J. HATHAWAY, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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**HISTORY OF THE CASE**

Claimant appeals a Notification of Decision issued on November 1, 2002 by the Sanctions Unit of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). The matter was referred to the Hearing Officer Panel (the Panel) on December 23, 2002. On January 22, 2003, the Panel's Administrative Law Judge Paul Vincent conducted a contested case hearing by telephone in Salem, Oregon. Petitioner Douglas J. Hathaway (claimant) was represented by attorney Brad Vinson. Responding insurer SAIF Corporation, Inc. (insurer) was represented by Trial Counsel Michael G. Fetrow. No witnesses testified. The record closed on the date of hearing.

The record of this proceeding, consisting of written argument, tape recording, all evidence received, and all hearing papers filed, has been considered. The findings of fact and conclusions of law are based upon the entire record.

**ISSUES**

(1) Whether OAR 436-060-0155(2), which requires complaints to be filed within 180 days from the date of the violation, is invalid.

(2) Whether a penalty is warranted for insurer's delay in paying temporary disability in January 2002.

**EVIDENTIARY RULINGS**

The record consists of WCD Exhibits 1 through 4, claimant's Supplementary Exhibits A through I and 5 and 6, and insurer's Supplementary Exhibits Fa, Fb and 7, which were received into the record without objection.

**FINDINGS OF FACT**

I adopt the findings of fact contained in the Notification of Decision dated November 1, 2002 with the following supplementation.

(1) Mr. Hathaway was compensably injured on October 17, 2001 and SAIF accepted the claim. SAIF paid him temporary total disability (TTD) totaling \$29,787.88 for 423 days. (Ex. 1

at pages 1-4.) Mr. Hathaway was underpaid \$347.68 in TTD during the period from January 7, 2002 through January 14, 2002. (Ex. G.)

(2) An audit of SAIF's claim records on September 9, 2002 revealed that SAIF underpaid Mr. Hathaway's TTD in the amount of \$347.68 in January 2002. The audit also revealed that SAIF had overpaid him in the amount of \$182.11 in November 2001 for three days TTD that was not authorized. This resulted in a net underpayment of \$165.57 after deducting the overpayment. (Id.) On September 17, 2002, SAIF notified Mr. Hathaway that the audit had resulted in a net underpayment of \$165.57. (Exs. 5, Fa.) On September 18, 2002, SAIF paid him the net underpayment of \$165.57. (Ex. Fb.)

(3) On October 28, 2002, Mr. Hathaway filed a request for assessment of a penalty against SAIF for its delay in paying the underpayment and for offsetting more than 25 percent of TTD overpayment against the TTD underpayment. (Ex. Fb) Mr. Hathaway calculated the penalty to be 25 percent of \$347.68 or \$86.92 to be equally divided between him and his attorney. (Ex. G.)

(4) On November 1, 2002, WCD's Investigations and Sanctions Unit declined to assess a penalty finding that the complaint was filed more than 180-days after the violation. (Ex. 3.)

### CONCLUSIONS OF LAW

(1) OAR 436-060-0155(2), which requires complaints to be filed within 180 days from the date of the violation, is not invalid.

(2) A penalty is not warranted for insurer's delay in payment of the entire underpayment because claimant filed the complaint more than 180 days after the violation.

### OPINION

The question is whether claimant's complaint was timely filed and, if so, whether a penalty is warranted. Jurisdiction lies with the director. ORS 656.262(11) and ORS 656.704(2); OAR 436-060-0155(2). Since ORS 656.262(11) prescribes no standard of review, I review *de novo*. *Archie M. Ulrich*, 2 WCSR 152, 153 (1997); OAR 436-001-0225(6). The burden of proving a fact or position rests with the proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving by a preponderance of the evidence that the administrative decision is incorrect. *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). I conclude that claimant has failed to meet his burden.

WCD's Investigations and Sanctions Unit determined that claimant's request for a penalty for the insurer's delay in paying TTD in January 2002 was untimely because his

complaint was filed more than 180 days from the date of the violation. Claimant makes several arguments in the alternative as to why his complaint is not time-barred. He first argues that the director's administrative rule, OAR 436-060-0155, is invalid because the director is without authority to impose a time limit for filing complaints when the statute itself does not contain a limitation. I disagree. ORS 656.262(11) provides in pertinent part:

(11)(a) If the 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. Notwithstanding any other provision of this chapter, the director shall have exclusive jurisdiction over proceedings regarding solely the assessment and payment of the additional amount described in this subsection. The entire additional amount shall be paid to the worker if the worker is not represented by an attorney. If the worker is represented by an attorney, the worker shall be paid one-half the additional amount and the worker's attorney shall receive one-half the additional amount, in lieu of an attorney fee. The director's action and review thereof shall be subject to ORS 183.310 to 183.550 and such other procedural rules as the director may prescribe.

Additionally, OAR 436-060-0155 provides in relevant part:

(1) Pursuant to ORS 656.262(11), the director may require the insurer to pay an additional amount to the worker as a penalty when the insurer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim.

(2) Requests for penalties under this section must be in writing, stating what benefits have been delayed or remain unpaid, and mailed or delivered to the division within 180 days of the alleged violation.

(3) For the purpose of this section, "violation" is either:

(a) A late payment or the nonpayment of any single payment due, in which case a request for penalty must be mailed or delivered to the director within 180 days of the date payment was due; or

\* \* \* \* \*

Moreover, ORS 656.726 gives the director the broad authority to regulate the workers' compensation system, stating in part that:

4) The director hereby is charged with duties of administration, regulation and enforcement of ORS 654.001 to 654.295, 654.750 to 654.780 and this chapter. To that end the director may:

(a) Make and declare all rules and issue orders which are reasonably required in the performance of the director's duties. \* \* \*

Based on the director's broad grant of authority to regulate the worker's compensation system and the need to ensure that all information is filed within a reasonable time, I find that the time period set forth in OAR 436-060-0155 is reasonably necessary to the director's performance of her duties. Therefore, I conclude that the director is authorized to require claimant's to file complaints within 180 days from the date of the violation.

Claimant next argues that this was a continuing violation and that the time did not start running until the last date of the underpayment which occurred after the audit on September 18, 2002. OAR 436-060-0155 (3) provides in pertinent part:

(3) For the purpose of this section, "violation" is either:

\* \* \* \* \*

(b) A continuous nonpayment or underpayment such as with yearly cost of living increases for temporary disability compensation. In these instances, a request for penalty must be mailed or delivered to the director within 180 days of the date of the last underpayment. All prior underpayments will be considered as one violation, regardless of when the first underpayment occurred.

I do not find claimant's argument to be persuasive because this is a delay in paying TTD, which was due in January 2002, not a delay in a ongoing payment. I also do not find his argument that he is entitled to a penalty for insurer's offset of the entire overpayment against the underpayment. ORS 656.262(11) governs only the delay or refusal to pay compensation, not to irregularities in offsets which are governed by ORS 656.268(13)(a). This a matter a claim, not one which is addressed by a penalty payable to claimant. Therefore, he is not entitled to a penalty under ORS 656.268(13)(a).<sup>1</sup> See ORS 656.704.<sup>2</sup>

Finally, claimant argues that the director's administrative rule, OAR 436-060-0155(2), is unconstitutional because it allegedly denies him due process. However, claimant fails to identify

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<sup>1</sup> ORS 656.268(13)(a) provides:

(13)(a) An insurer or self-insured employer may offset any compensation payable to the worker to recover an overpayment from a claim with the same insurer or self-insured employer. When overpayments are recovered from temporary disability or permanent total disability benefits, the amount recovered from each payment shall not exceed 25 percent of the payment, without prior authorization from the worker.

<sup>2</sup> ORS 656.704 provides in relevant part:

(3)(a) For the purpose of determining the respective authority of the director and the board to conduct hearings, investigations and other proceedings under this chapter, and for determining the procedure for the conduct and review thereof, matters concerning a claim under this chapter are those matters in which a worker's right to receive compensation, or the amount thereof, are directly in issue.

the specific constitutional provision(s) violated by the administrative rule and how the rule violates the provision. As stated in *Deanna M. Boerger*, 2 WCSR 73 (1997):

A constitutional attack requires reference to specific textual provisions of the Constitution. *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 594 (1978). To successfully challenge the constitutionality of a governmental action, the provision of the constitution or the rights that flow therefrom which are being compromised must be identified. *Hall v. Northwest Outward Bound School*, 280 Or 655.658 (1977).

Inasmuch as claimant has failed to explain how the director's administrative rule violates the constitutional provision and which provision is violated, I find that claimant's constitutional challenge is likewise unpersuasive. Accordingly, I conclude that claimant has failed to meet his burden of proving that a penalty is warranted and affirm WCD's Notice of Decision.

#### **ATTORNEY FEES**

Claimant has not prevailed in this matter, and therefore, he is not entitled to an assessed attorney fee. ORS 656.385(1).

#### **ORDER**

IT IS HEREBY ORDERED that:

The Notification of Decision dated November 1, 2002 is affirmed.

DATED this 18<sup>th</sup> day of April 2003.

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Paul Vincent  
Administrative Law Judge  
Hearing Officer Panel