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In the Matter of the failure to Make Timely Payment of Compensation of

**Jones, Brandi K., Claimant**

Contested Case No: H03-144

**PROPOSED & FINAL ORDER**

May 20, 2004

SAIF CORPORATION, Petitioner

BRANDI K. JONES, Respondent

Before Ella D. Johnson, Administrative Law Judge, Office of Administrative Hearings

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**HISTORY OF THE CASE**

Petitioner SAIF Corporation (SAIF or insurer) appeals a Proposed and Final Order Assessing a Penalty of an Additional Amount Pursuant to ORS 656.262(11) issued on October 21, 2003 by the Investigations and Sanctions Unit of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). The matter was referred to the Office of Administrative Hearings (OAH) on February 26, 2004.

Administrative Law Judge (ALJ) Ella D. Johnson conducted a hearing by telephone in Salem, Oregon on April 8, 2004. No witnesses testified. The parties agreed to submit the matter on written argument. The record was left open until May 10, 2004 for the written submissions and closed on that date. Trial Counsel Dennis Martin represented SAIF. Attorney at Law David Hollander represented Brandi K. Jones (claimant).

**ISSUES**

Did insurer unreasonably delay payment of temporary disability warranting assessment of a penalty in the amount of 10 percent due rather than 25 percent of the amounts then due?

**EVIDENTIARY RULINGS**

The record consists of WCD's Exhibits 1 through 9 which are admitted into the record. If either party objects to the admission of any of these exhibits, they need to contact this office within five days of the receipt of this order.

**FINDINGS OF FACT**

I adopt the Facts set forth in the October 21, 2003 Proposed and Final Order Assessing Penalty of an Additional Amount Pursuant to ORS 656.262 (11) with the following supplementation:

(1) Claimant compensably injured her left knee on May 29, 2000 and the claim was closed by Notice of Closure (NOC) on July 14, 2003. The NOC awarded temporary partial disability (TPD) from December 17, 2002 through March 28, 2003 at a rate of \$427.56 per week and 9.00 percent (13.50 degrees) permanent partial disability (PPD) for loss of use of her left knee. (Ex. 1.)

(2) In response to a July 17, 2003 request for information from insurer, claimant informed insurer on August 20, 2003 that she was not released to return to work and had been off work on unpaid leave since October 10, 2002. (Ex. 3.) On September 12, 2003, claimant requested reconsideration of the July 14, 2003 NOC. (Ex. 4.)

(3) On September 22, 2003, claimant notified the department that she had not received the TPD awarded by the NOC and requested a penalty of 25 percent for the late payment of time loss and a penalty for failure to timely supply requested documentation. (Ex. 5.) SAIF responded that the time loss had been paid on September 19, 2003, 53 days late.

(4) SAIF attributed the delay to claimant's slow response to its request for information about earnings during the period that TPD was awarded and the placement of the claim file on inactive status which resulted in insurer's failure to immediately recognize the claim as requiring action after claimant's response was received. (Ex. 6.) The Sanctions/Investigations Unit determined that the payment of the time loss was still delayed 25 days due to internal processing after insurer received claimant's response and that this additional delay was unreasonable. (Ex. 8.)

(5) Under the matrix set forth in Appendix "B" of OAR 436-060-0155, an unreasonable delay in excess of 22 days warrants assessment of penalty in the amount of 25 percent of the amounts then due.

### CONCLUSIONS OF LAW

Insurer unreasonably delayed payment of temporary disability warranting assessment of a penalty in the amount of 25 percent of the amounts then due.

### OPINION

Because the sole issue is whether insurer unreasonably delayed payment of the temporary disability and, if so, whether claimant is entitled to a penalty of 10 or 25 percent of the amounts then due, jurisdiction lies with the director. ORS 656.262(11) and ORS 656.704(2); OAR 436-060-0155(2). Inasmuch as 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). Therefore, insurer bears the burden of proving by a preponderance of the evidence that the underlying 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 insurer has not met its burden.

OAR 436-060-0150(5) states in relevant part:

Timely payment of temporary disability benefits means that payment has been made no later than the 14<sup>th</sup> day after:

\* \* \* \* \*

(f) The date the notice of claim closure issued by the insurer which finds the worker entitled to temporary disability;

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Here, there is no question that SAIF failed to pay the temporary disability within 14 days of the July 14, 2003 NOC. The question is whether the delay was unreasonable.

ORS 656.262(11)(a) provides:

(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.

Whether an insurer acted unreasonably depends on whether it had a legitimate doubt, from a legal standpoint, about its liability. *Brown v. Argonaut Insurance Co.*, 93 Or App 588 (1988).

In its Hearing Memorandum, SAIF argues that the delay was caused by claimant's failure to timely respond to its request for information concerning her earnings. In support of its argument, SAIF contends that it did not receive claimant's response until August 25, 2003 and that on July 28, 2003 when the temporary disability was to be paid, it still had a legitimate doubt about its liability because it did not have information concerning claimant's earnings. Although SAIF may have had a legitimate doubt concerning its liability prior to the receipt of claimant's information on August 25, 2003, only a portion of the 53 day delay was attributable to claimant's failure to timely respond to SAIF's request for information. As noted by the Sanctions and Investigations Unit order, the remaining portion of the delay was due to SAIF's internal processing problems, which the order determined created an unreasonable delay in itself.

SAIF next argues that the penalty should be 10 percent, not 25 percent, of the amount then due based on several Workers' Compensation Board (WCB) cases holding that 14 days is a reasonable time for the insurer to pay temporary disability after an error is discovered. Applying the matrix, SAIF argues that only 10 percent is warranted because this was its first violation on the claim and the payment was mailed on September 19, 2003, only 11 days beyond the 14 day period after receiving claimant's information. However, SAIF does not specify the alleged error here nor does it indicate why I should find WCB's case law persuasive when the department calculates payment of temporary disability by counting the days after the payment was due.

Accordingly, I do not find SAIF's arguments persuasive and conclude that a 25 percent penalty of the amount then due is warranted.

**ORDER**

*IT HEREBY ORDERED* that:

SAIF shall pay to claimant a penalty of 25 percent of the temporary disability due, with 50 percent of the penalty payable to claimant's counsel in lieu of an attorney fee.