

In the ORS 656.262 Penalty Dispute of  
**LEONA D. SCHEMINSKE, Claimant**

Contested Case No: H04-077

**FINAL ORDER**

December 14, 2004

LEONA D. SCHEMINSKE, Petitioner  
LIBERTY NORTHWEST INSURANCE CORP., Respondent  
Before John Shilts, Administrator, Worker's Compensation Division

---

Respondent, Liberty Northwest (insurer), and the Investigations and Sanctions Unit of the Workers' Compensation Division (the unit) submitted exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Ella D. Johnson's August 16, 2004 Proposed and Final Order. This matter comes before the director for issuance of a final order. The entire record has been reviewed, including the exhibits in evidence, the audio recording of the hearing, and the parties' written submissions. The issues are penalties and attorney fees. The director does not adopt the ALJ's proposed order and affirms the April 26, 2004 Notification of Decision.

The director does accept the ALJ's findings of fact as supported by a preponderance of the evidence in the record, ORS 183.650(3) and OAR 137-003-0665(4), and supplements them as follows.

On October 30, 2003, insurer notified claimant that an audit of her claim file revealed an overpayment in the amount of \$1,430.80 for time loss benefits paid for the period May 2, 2003 through August 29, 2003. (Ex. 2-2). The September 8, 2003 notice of closure only awarded time loss for the period February 27, 2002 through June 15, 2002. (Ex. 7). By check also dated October 30, 2003, insurer paid claimant \$8.15 for "time loss due" on February 27, 2002. (Ex. 4-3.) Insurer indicated that it discovered it owed this amount during the claim file audit. (Ex. 4).

On April 15, 2004, claimant requested the director to award penalties for unreasonable delay of payment of compensation pursuant to ORS 656.262(11). (Ex. 1). The unit determined that payment for time loss for February 27, 2002 was due by September 22, 2003, 14 days after the notice of closure, under OAR 436-060-0150(5)(f).<sup>1</sup> (Ex. 5). However, the unit declined to consider the matter further because claimant's request was untimely under the rules; OAR 436-060-0155(2) requires that a complaint be submitted within 180 days of the alleged violation, and the 180th day would have been March 20, 2004.

Claimant appealed the unit's April 26, 2004 Notification of Decision. (Ex. 6). The ALJ reversed, concluding that the unit incorrectly determined that claimant's request was untimely. The ALJ reasoned that under OAR 436-060-0150(5)(f), payment was due within 14 days from the date insurer discovered its failure to pay and sent claimant a check. The ALJ found the violation to be a continuous nonpayment under OAR 436-060-0155(3)(b), and therefore the 180-day time frame did not begin to accrue until the last payment of temporary disability, made on October 30, 2003. Because insurer did not provide an explanation for its nonpayment, the ALJ

---

<sup>1</sup> The relevant rules are restated and discussed below.

concluded insurer acted unreasonably, and awarded claimant a penalty under ORS 656.262(11) in the amount of \$2.04, 25 percent of the unpaid amount.

Insurer filed exceptions to the ALJ's order. Insurer argues that because of the net overpayment, no benefits were due and there was no violation. Insurer agrees with the unit's interpretation of the rules regarding the timeliness of the request for penalties, arguing that the ALJ erred in her interpretation and application of OAR 436-060-0150(5)(f). Insurer further argues the ALJ erred in applying the definition of continuous nonpayment under OAR 436-060-0155; this case involves a single payment.

The unit's argument in its exceptions is consistent with insurer's argument. The unit further explains circumstances in which application of OAR 436-060-0155(3)(b) regarding continuous nonpayment is appropriate: when there is an ongoing problem with a series of payments. Further, the unit contends the ALJ's application of OAR 436-060-0150(5)(f) is unclear.

Claimant responds that insurer continuously failed to pay temporary disability compensation from February 27, 2002 until October 30, 2003, and her April 15, 2004 request for penalties was timely submitted within 180 days of payment. Claimant contends insurer's long-term resistance to paying the amount and its failure to provide any rationale for late payment is unreasonable.

Penalties for delay of payment of compensation are provided for in ORS 656.262(11)(a), which provides, in part:

“If the insurer \* \* \* unreasonably delays \* \* \* compensation, \* \* \* the insurer \* \* \* shall be liable for an additional amount up to 25 percent of the amounts then due \* \* \*.”

The director has adopted rules implementing the statute. OAR 436-060-0155 provides, in 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

“(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.”

The threshold issue is whether claimant’s request for penalties under ORS 656.262(11) and OAR 436-060-0155(1) was timely. OAR 436-060-0155(2) requires penalty requests to be made within 180 days of the date of the alleged violation. OAR 436-060-0155(3) defines a violation as either a late or non-payment of a single payment, or a continuous under- or non-payment. The parties dispute which type of violation occurred here. If the former, claimant’s request was untimely. If the latter, claimant’s request was timely.

The ALJ concluded that a continuous nonpayment occurred here rather than a single nonpayment, citing *S-M Motor Co. v. Mather*, 136 Or App 91 (1995). Claimant argues that, under *Mather*, to be a continuous nonpayment, only the violation must be continuous; continuous payments are not required. Insurer and the unit contend the facts of *Mather* are distinguishable from the facts here. *Mather* involved a series of inaccurate temporary disability checks; here, the timeliness of one temporary disability payment is at issue.

*Mather* involved temporary disability payments due but not paid to the worker every 14 days over a four-month period. The rule in effect at the time only provided that requests for penalties must be submitted within 180 days of the alleged violation; the rule did not define violation.<sup>2</sup> The employer argued that the 180 days began from the date the worker’s physician released the worker from work. The worker argued that the 180 days did not begin until the last payment was due. The director determined that the 180 days did not begin so long as the violation was ongoing. The court deferred to the director’s interpretation of the rule that “violation” included continuing violation. As long as the request for penalties was submitted within 180 days from the date the final payment was due, it was timely.

Unlike in *Mather*, at issue here is a payment for temporary disability benefits due on a particular day, or “a late payment or the nonpayment of any single payment due” as contemplated by OAR 436-060-0155(3)(a). *See also Douglas J. Hathaway*, 8 CCHR 112 (2003) (claim file audit revealed insurer underpaid temporary total disability benefits for a specific period of time; ALJ rejected claimant’s argument that violation was continuous under OAR 436-060-0155(3)(b)). If insurer had failed to pay claimant *any* temporary disability benefits between February 27, 2002 and June 15, 2002, or underpaid each payment due during that period of time,

---

<sup>2</sup> OAR 436-060-0155(3) was adopted after *Mather*.

that would clearly be a “continuous nonpayment or underpayment” under OAR 436-060-0155(3)(b) and the *Mather* rationale would apply. However, those facts are not presented here.

The interpretation claimant urges -- that to be a continuous nonpayment, only the violation must be continuous -- would make OAR 436-060-0155(3)(a) meaningless. Every violation would be a continuous nonpayment until paid, whether it involved a single payment or a series of payments. Claimant cites a note in *Mather* to support her interpretation. However, the facts in *Mather* are distinguishable from the facts here, and the director adopted OAR 436-060-0155(3) after *Mather* was decided.

Having determined that OAR 436-060-0155(3)(a) applies here, the next question is whether claimant’s request was made within 180 days of the date payment was due. Due dates for temporary disability are provided in OAR 436-060-0150. The unit applied OAR 436-060-0150(5)(f), which provides:

“Timely payment of temporary disability benefits means payment has been made no later than the 14th day after \* \* \* [t]he date of a notice of claim closure issued by the insurer which finds the worker entitled to temporary disability[.]”

Claimant argues, and the ALJ agreed, that this language does not control. Contrary to the ALJ’s conclusion, the rules do not provide that payment was due within 14 days from the date insurer discovered and notified claimant of the nonpayment. Moreover, if the rules did so provide, the payment was timely and the ALJ erred in assessing a penalty; insurer paid claimant on the same day it notified her that she had been underpaid.

The temporary disability benefits may have been due much earlier in the claim.<sup>3</sup> However, on the limited facts in the record before me, the latest the benefits were due was 14 days after the notice of closure was issued, or by September 22, 2003. In order to be timely, claimant’s request for penalties had to be submitted no later than 180 days after that date, by March 20, 2004. Claimant’s request was not made until April 16, 2004. Claimant’s request for penalties was therefore untimely, and the unit was correct in not considering it further.

No penalty is awarded under ORS 656.262(11), and claimant’s attorney is awarded no fee.

One further point is worthy of mention here. At issue in this dispute is a penalty in the amount of \$2.04, plus attorney fees. Insurer’s payment of \$8.15 was late. Claimant requested that the Investigations and Sanctions Unit assess a penalty for unreasonable delay of payment. Any penalty would be statutorily limited to 25 percent - \$2.04. However, the unit determined that claimant’s request was untimely, and issued a written decision. Claimant appealed the unit’s decision and a contested case hearing was held. The ALJ issued a written opinion overturning the unit’s decision. Insurer and the unit each submitted written exceptions to the director contesting

---

<sup>3</sup> OAR 436-060-0150(5)(a) provides, in part, that “Timely payment of temporary disability benefits means payment has been made no later than the 14th day after \* \* \* [t]he date of the employer’s notice or knowledge of the claim, provided the attending physician or authorized nurse practitioner has authorized temporary disability.”

the ALJ's decision. Claimant responded in writing. The director now issues this written opinion affirming the unit's decision. The parties have taken this matter through three levels of administrative review, in addition to spending time attempting to settle the matter between themselves prior to bringing it before the unit. While the director does not disagree that claimant's workers' compensation benefits were significant to her and acknowledges the parties' rights to avail themselves of these administrative processes, the director finds it unfortunate that the parties could not have resolved this matter long ago without expending time and resources, both their own and others, significantly out of proportion to the bottom line issues in dispute.

IT IS HEREBY ORDERED the April 26, 2004 Notification of Decision is affirmed. The August 16, 2004 Proposed and Final Contested Case Hearing Order is not adopted.