

In the ORS 656.262 Penalty Dispute of
RONALD R. McELROY, Claimant

Contested Case No: H05-156

PROPOSED AND FINAL ORDER

December 21, 2005

RONALD R. McELROY, Petitioner

SAIF CORP., Respondent

Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on September 29, 2005 by the Investigations and Sanctions Unit of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On October 13, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On November 17, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney Keith Semple represented petitioner Ronald R. McElroy (claimant). Attorney David L. Runner represented respondent SAIF Corporation (insurer). No witnesses testified and the record closed on the date of hearing.

ISSUE

Whether claimant is entitled to a penalty for late payment of temporary total disability (TTD) benefits.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 13, as well as insurer's Supplementary Exhibits 1A, 3A and 3B were admitted into the record without objection.

FINDINGS OF FACT

1. On June 10, 2005, claimant suffered a compensable injury while performing construction work and insurer accepted left tibia and fibula fractures. (Exs. 1 and 2.)
2. Claimant was hospitalized and in lieu of his signature on the claim form, it was stamped "Received in Fast Track". (Ex. 1.) The corporate president signed the claim form on June 13, 2005. (*Id.*) On the claim form, the employer listed a gross weekly wage of \$405. (*Id.*) Based on this information, on June 23, 2005, insurer mailed the first TTD payment of \$270.01 for the period June 11 through June 23, 2005. (Ex. 3.)
3. On June 24, 2005, insurer wrote to the employer requesting complete and accurate wage information. (Ex. 1A.) On July 5, 2005, insurer received payroll records from employer, showing that claimant's wages varied from week to week. (Exs. 3A and 10-1.) On July 7, 2005, insurer mailed the second TTD payment of \$270.01 for the period June 24 through June 30,

2005. (Ex. 10.)

4. On July 8, 2005, based on employer's payroll records, insurer adjusted claimant's weekly wage to \$461.57 and began paying TTD of \$307.73. (Exs. 3A-3, 4 and 5.) On July 21, 2005, insurer paid claimant TTD of \$461.57 plus the underpayment of \$105.61. (Exs. 6 and 10-1.)

CONCLUSION OF LAW

Claimant is not entitled to a penalty for late payment of TTD.

OPINION

Since the sole issue is whether claimant is entitled to a penalty for insurer's unreasonable delay in paying compensation, jurisdiction lies with the director. ORS 656.262(11)(a). I review *de novo*. OAR 436-001-0225(6). The burden of presenting evidence to support a fact or position falls upon the proponent. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982). As petitioner, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of contrary legislation, the standard of proof in administrative hearings is preponderance of evidence). Preponderance of evidence means that the factfinder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1998).

RRU determined that no penalty was warranted because the delay in payment was reasonable. Claimant seeks a penalty based on late payment of TTD totaling \$105.61. In support of his position, claimant contends that the employer's knowledge concerning his weekly wages is imputed to the insurer. In contrast, insurer contends that no penalty is due because it did not unreasonably delay payment of compensation. Insurer further argues that the doctrine of imputed knowledge is inapplicable.

ORS 656.262(4)(a)¹ provides in pertinent part:

The first installment of temporary disability compensation shall be paid no later than the 14th day after the subject employer has notice or knowledge of the claim, if the attending physician or nurse practitioner authorized to provide compensable medical services under ORS

¹ Similarly, OAR 436-060-0150 provides in pertinent part:

(5) Timely payment of temporary disability benefits means payment has been made no later than the 14th day after:

(a) The date of the employer's notice or knowledge of the claim, provided the attending physician or authorized nurse practitioner has authorized temporary disability.

(6) Temporary disability must be paid to within seven days of the date of payment at least once each 14 days.

656.245 authorizes the payment of temporary disability compensation. Thereafter, temporary disability compensation shall be paid at least once each two weeks,

*****.

Additionally, ORS 656.262 (11)(a) provides in pertinent part:

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 plus any attorney fees assessed under this section.

(Emphasis added.)

In *Nix v. SAIF*, 80 Or App 656 (1986), the court applied ORS 656.262(11)(a) and determined that a penalty was justified where insurer paid interim compensation untimely due to the employer's failure to report an injury. Quoting *Anfilofieff v. SAIF*, 52 Or App 127 (1981), the court stated,

[W]e interpret the statute to authorize penalties to be paid by SAIF to the extent **unreasonable conduct of** a contributing or noncomplying **employer** causes or contributes to the delay or refusal of compensation.

Imputed Knowledge

In *Nix* and *Anfilofieff*, the court imputed the employer's knowledge to the insurer where the employer engaged in unreasonable conduct by either failing to report an injury to the insurer, or providing untruthful information to the insurer, apparently attempting to evade the expense of compensable claims. In contrast, here, the employer reported the claim to insurer on a fast track because claimant was hospitalized and unavailable to sign the claim form. On the claim form, the employer listed gross wage information and then within weeks, the employer provided payroll records to insurer for the purpose of calculating the correct TTD rate. Under the circumstances, I find that the employer did not act unreasonably and therefore, the employer's knowledge concerning claimant's wages is not imputed to insurer for the purpose of assessing a penalty.

Furthermore, OAR 436-060-0025 provides in pertinent part:

Rate of Temporary Disability Compensation

(4) The insurer shall resolve wage disputes by contacting the employer to confirm the correct wage and then contacting the worker with that information. If the worker does not agree, the worker may bring the dispute to the division for resolution

The rule contemplates that communication will take place between employer and insurer for the purpose of correctly calculating the TTD rate. Therefore, the doctrine of imputed knowledge does not apply to the present case.

Unreasonable Delay

In *Brown v. Argonaut Insurance Company*, 93 Or 588 (1988), the court held that a denial is not unreasonable, and no penalty is due where the insurer had a legitimate doubt as to its liability. Here, insurer initiated TTD payments timely based on wage information provided by the employer on the claim form. At this point, there was a legitimate doubt whether insurer was liable for TTD at any greater rate. Then, within weeks of the date of injury, insurer requested complete payroll information from the employer and promptly adjusted the TTD rate and paid claimant the \$105.61 underpayment. Under the circumstances, I agree with WCD's determination that insurer properly processed the claim and there was no unreasonable delay in payment.

In conclusion, I find that the employer acted reasonably in reporting the claim and that the insurer processed the claim reasonably. Inasmuch as insurer did not unreasonably delay payment of any compensation, no penalty is due. Accordingly, I affirm.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing and is not entitled to an attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated September 29, 2005 is affirmed.