

In the ORS 656.262 Penalty Dispute of

MARIO GALEANA, Claimant

Contested Case No: H05-076

FINAL ORDER

January 27, 2006

SAIF CORP., Petitioner

MARIO GALEANA, Respondent

Before John Shilts, Administrator, Workers' Compensation Division

Petitioner insurer, through its attorney David L. Runner, timely submitted exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Lawrence S. Smith's August 2, 2005 Proposed and Final Order. Respondent claimant, through his attorney Donald M. Hooton, responded. This matter comes before the director for a final order. The issue is whether insurer timely paid stipulation proceeds. I affirm for the following reasons.

I adopt ALJ Smith's findings of fact with one correction. In finding of fact (2), ALJ Smith found that the Order of Dismissal was issued on October 2, 2004. The record shows that the Order of Dismissal was issued on October 1, 2004. (Ex. 12.) The finding is modified accordingly.¹

The parties reached agreement on the issue of time loss rate. The parties signed a Stipulation and Order, and Workers' Compensation Board ALJ Fulsher signed an Order of Dismissal approving the stipulation on October 1, 2004. Insurer paid claimant the agreed amount on November 8, 2004. The issue is whether insurer paid timely. The Investigations and Sanctions Unit, by order dated May 10, 2005, found that insurer paid late and assessed a penalty. ALJ Smith affirmed the unit's order.

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

“If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation * * * 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. * * *”

Timely payment of temporary disability compensation is defined in OAR 436-060-0150,² which provides in part:

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

¹ I may modify a finding of historical fact made by the ALJ if I find that the finding is not supported by a preponderance of the evidence in the record. ORS 183.650(3); OAR 137-003-0665(4).

² WCD Admin. Order 04-051, eff. 2/29/04.

“* * * * *

“(h) The date any litigation authorizing retroactive temporary disability becomes final. Temporary disability accruing from the date of the order shall begin no later than the 14th day after the date the order is filed. For the purpose of this rule, the ‘date the order is filed’ for litigation from the Workers’ Compensation Board, is the signature date and from the courts, it is the date of the appellate judgment;

“* * * * *.”

The parties dispute the interpretation of this rule. Insurer argues the Order of Dismissal did not become final until 30 days after it was issued. Claimant argues the order became final upon issuance.

The parties frame their arguments in terms of when the Order of Dismissal became final. However, the first sentence of OAR 436-060-0150(5)(h) does not use the term “order.” Rather, it refers to the finality of the litigation authorizing retroactive temporary disability. I find that the litigation on the issue of time loss rate became final when the parties’ agreement on that issue was approved. The issue was one of several presented to the Hearings Division for resolution. The Amended Opinion and Order that issued after hearing states, “At the second hearing proceeding on August 18, 2004, the parties agreed to submit a separate stipulation relating to issues concerning interim compensation.” (Ex. 10-2.) The cover letter submitted to the ALJ with the stipulation states, “As you will recall this was a separate resolution of an issue originally presented at hearing.” (Ex. 9-1.) The Stipulation and Order states, “Claimant filed a Request for Hearing raising issues including: time loss rate, denial, penalty and attorney fee. The parties agree to settle the issue of time loss rate as follows: * * * The Request for Hearing with regard to the time loss rate is dismissed with prejudice. *All other issues remain in litigation.* * * *” (Ex. 9-2 and 9-3. Emphasis added.) The Order of Dismissal approving the dismissal was signed October 1, 2004, and states, “[T]he Hearings Division received a proposed ‘Stipulation and Order’ that is designed to fully *and finally* resolve the issues between the parties in the above-captioned case and claim.” (Ex. 12. Emphasis added.) While the other issues in dispute between the parties remained in litigation, the parties reached agreement regarding time loss. When that agreement was approved, litigation on that issue was final.

Insurer refers to ORS 656.289(3). ORS 656.289 provides, in part:

“(1) Upon the conclusion of any hearing, or prior thereto with concurrence of the parties, the Administrative Law Judge shall promptly and not later than 30 days after the hearing determine the matter and make an order in accordance with the Administrative Law Judge’s determination.

“* * * * *

“(3) The order is final unless, within 30 days after the date on which a copy of the order is mailed to the parties, one of the parties requests a review by the Workers’ Compensation Board under ORS 656.295. * * * The order shall contain a statement explaining the rights of the parties under this subsection and ORS 656.295.

“* * * * *”

OAR 438-009-0005(4) further provides,

“For purposes of ORS 656.289(1)–(3), an Administrative Law Judge’s order approving a settlement stipulation is a determination of all matters included within the terms of the settlement stipulation.”

As insurer points out, there is case law providing that, under ORS 656.289(3), an ALJ’s order is not final for 30 days. *See e.g. Geer v. SAIF Corp.*, 121 Or App 647, 649 (1993); *McCormac v. Cottage Gifts*, 13 Or App 173, 176 (1992); *Farmers Ins. Group v. SAIF Corp.*, 301 Or 612, 619 (1986); *Drews v. EBI Companies*, 310 Or 134, 149 (1990). However, under OAR 436-060-0150(5)(h), it is not when the Order of Dismissal became final that controls here, but when the litigation on the issue of time loss became final.³ For the reasons stated above, I find that the litigation on this issue of time loss became final on the date ALJ Fulsher approved of the parties’ stipulation.

The parties’ stipulation was approved on October 1, 2004, the date ALJ Fulsher signed the Order of Dismissal. Under OAR 436-060-0150(5)(h), payment was due no later than the 14th day after October 1, 2004, or October 15, 2004. Insurer’s payment on November 8, 2004 was therefore late, and the unit’s assessment of a penalty under ORS 656.262(11) was correct.

ORS 656.262(11)(a) also provides for the assessment of an attorney fee. As to the amount, it provides:

“* * * The [attorney] fees assessed * * * under this section shall be proportionate to the benefit to the injured worker. The board shall adopt rules for establishing the amount of the attorney fee, giving primary consideration to the results achieved and to the time devoted to the case. An attorney fee awarded pursuant to this subsection may not exceed \$2,000 absent a showing of extraordinary circumstances.”

³ In cases where the issue of retroactive temporary disability is resolved by the ALJ after hearing, and not through a stipulation of the parties, it may be that the date the ALJ’s order authorizing the benefits becomes final controls. However, that is not the case here.

Under OAR 438-015-0110, the factors listed in OAR 438-015-0010(4)⁴ must also be considered; however, primary consideration must be given to the results achieved and to the time devoted to the case.

The unit awarded claimant's attorney \$200, assuming he spent one to two hours on the case at the administrative review level. ALJ Smith awarded an additional \$600, estimating that claimant's attorney spent three hours on the case at the hearing level. Although claimant's attorney represents that he has spent an additional two hours on this case during the exceptions process, I decline to award an additional fee. The fee must be proportionate to the benefit to claimant. The benefit to claimant is \$500 (25% of \$2000). Claimant's attorney has already been awarded \$800. An additional award would be out of proportion with the benefit to claimant.

⁴OAR 438-015-0010(4) provides:

- (4) In any case where an Administrative Law Judge or the Board is required to determine a reasonable attorney fee, the following factors shall be considered:
- (a) The time devoted to the case;
 - (b) The complexity of the issue(s) involved;
 - (c) The value of the interest involved;
 - (d) The skill of the attorneys;
 - (e) The nature of the proceedings;
 - (f) The benefit secured for the represented party;
 - (g) The risk in a particular case that an attorney's efforts may go uncompensated; and
 - (h) The assertion of frivolous issues or defenses.