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

Borth, Lisa L., Claimant

Contested Case No: HH02-025

FINAL ORDER

October 31, 2002

NATIONAL UNION INSURANCE CORPORATION, Petitioner

LISA L. BORTH, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

The Investigations & Sanctions Unit of the Workers' Compensation Division issued an administrative order on February 5, 2002 assessing petitioner penalties for late payment of temporary disability compensation. On March 28, 2002, Hearing Officer Catherine P. Coburn conducted a telephone hearing. Petitioner, National Union Fire Insurance Corporation, and its claims processor, Constitution State Service Company, were represented by attorney Thomas Busch. Respondent Lisa L. Borth appeared *pro se*. The WCD waived appearance. Claimant testified on her own behalf.

The Hearing Officer's May 7, 2002 Proposed and Final Contested Case Hearing Order reversed the administrative order. The Sanctions Unit filed exceptions to which the insurer timely responded.

Before the Director, the issue is penalty for alleged late payment of temporary disability compensation. The entire record, consisting of a tape recording of the hearing, all evidence received, and all documents filed, has been considered.

Evidentiary Rulings

The Hearing Officer's evidentiary ruling is affirmed with the following supplementation:

Petitioner's Exhibits 1P through 29P were received into the record at hearing over claimant's objection to inclusion of her chart notes and medical records as irrelevant to the issue of penalties.

Findings of Fact

The Hearing Officer's findings of fact are modified as explained below and are otherwise adopted. If I modify the Hearing Officer's order in any substantial manner, I must identify the modifications and provide an explanation to the parties as to why I am making those modifications. Section 12(2), chapter 849, Oregon Laws 1999; OAR 137-003-0665(3). Additionally, I may modify a finding of historical fact made by the Hearing Officer only if I determine that the finding is not supported by a preponderance of the evidence in the record. Section 12(3), chapter 849, Oregon Laws 1999; OAR 137-003-0665(4).

The Hearing Officer found that the first check was listed in the insurer's computer on

November 8, 2001 and mailed on November 8, 2001. I do not modify that finding.

The Hearing Officer then found that the second check was listed in the insurer's computer on November 20, 2001 and mailed on November 21, 2001; the third check was listed in the computer on December 5, 2001 and mailed on December 6, 2001; the fourth check was listed in the computer on December 19, 2001 and mailed on December 20, 2001; and the fifth check was listed in the computer on January 2, 2002 and mailed on January 3, 2002.

The date a check is mailed is the date the check is considered paid under the rules. OAR 436-060-0150(1). In determining the mailing dates, the Hearing Officer relied on the insurer's written statement that "checks are input on the day before the actual check is due to be mailed. They are mailed the next day ***. They are put [in] the mail on the same day that the check is processed." Ex. 15-1. Using as an example the November 8, 2001 check, the Hearing Officer reasoned that the date listed on the check was the mailing date (see *Proposed and Final Order*, page 4). While I agree with her conclusion that the date listed on the check is the mailing date, the hearing officer's reasoning conflicts with the findings of fact.

Excluding the November 8, 2001 check,¹ copies of the second and third checks are in the record. Ex. 19-3, 19-2. The checks are dated November 20, 2001 and December 5, 2001, respectively. These dates coincide with the "issue date," but are one day before the "action date." See Ex. 15-2. The dates the hearing officer found as the mailing dates, however, coincide with the "action dates," which are one day *after* the date listed on the check. The Sanctions Unit made the same finding.

There is no evidence in the record which compels the finding that the "action date" is the mailing date.² There is no testimony that explains the insurer's statement or that draws a clear connection between the date on the check and the date the check was listed in the computer. While claimant argued in closing that she was told that the "action date" was the mailing date, that portion of Exhibit 15-2 was redacted and therefore cannot be considered.³

Based on the above, the preponderance of evidence in the record supports the finding that the checks were mailed, and therefore paid, on the date listed on the check itself. Therefore, I find accordingly:

For the checks of which there are copies in the record, the date on the check is the date the check was paid:

¹The November 8, 2001 check is the only check at issue for which the date on the check, the issue date, and the action date coincide. For the other four checks, the "action date" is one day later than the "issue date." See Ex. 15-2.

²The dates in the "date" column in Exhibit 15-3 coincide with the "action dates" and not the "issue dates" or the dates listed on the checks. But there is no testimony explaining what each of these dates represent.

³Likewise, Sanctions Unit relied on this portion of Exhibit 15-2 in its exceptions.

<u>Period of Temporary Disability</u>	<u>Paid</u>
10/25/01 through and including 10/31/01	11/8/01 (Ex. 5-1, 6-1, 8-1, 15-2)
11/1/01 through and including 11/14/01	11/20/01 (Ex. 15-2, 19-1, 19-3)
11/15/01 through and including 11/28/01	12/5/01 (Ex. 15-2, 19-1, 19-2)

For the checks of which there are not copies in the record, consistent with the other three checks I find that the “issue date” is the date the check was paid:

<u>Period of Temporary Disability</u>	<u>Paid</u>
11/29/01 through and including 12/12/01	12/19/01 (Ex. 15-2)
1/13/01 through and including 12/26/01	1/2/02 (Ex. 15-2)

These paid dates coincide with those listed in insurer’s response to the exceptions.

Conclusions of Law and Opinion

To determine whether temporary disability payments are timely, two factors are considered: 1) whether payment was made once each 14 days, and 2) whether the payment was “paid to within seven days of the date of payment.” OAR 436-060-0150(6); *William A. Taylor*, 45 Van Natta 2177, 2178 (1993). The second factor can be restated as whether the payment includes benefits payable for a period ending within seven days before the date of payment. *Taylor* at 2178, citing *Arlene Marshall*, 40 Van Natta 1828 (1988) (interpreting prior version of rule).

Accordingly, the payments at issue in this case were made as follows:

Payment date	Period of benefits included	Paid within 14 days of prior payment?	Does payment include benefits payable for period ending w/in 7 days before payment?
11/8/01	10/25/01 - 10/31/01	N/A	no, the period should have included 11/1/01
11/20/01	11/1/01 - 11/14/01	yes, 12 days	yes, 6 days
12/5/01	11/15/01 - 11/28/01	no, 15 days	yes, 7 days
12/19/01	11/29/01 - 12/12/01	yes, 14 days	yes, 7 days
1/2/02	12/13/01 - 12/26/01	yes, 14 days	yes, 7 days

The benefits payable for November 1, 2001 were not paid until November 20, 2001. To be paid to within seven days, the benefits should have been paid on November 8, 2001. Therefore, the benefits payable for November 1, 2001 were paid 12 days late. Under the penalty matrix (OAR 436-060-0155, Appendix “B”), for a first violation that is 12 days late, a penalty of 10% of amounts then due is assessed.

4 November 22, 2001 was a legal holiday. Payments falling due on a legal holiday may be paid on the last working day prior to or the first working day following the holiday. Subsequent payments may revert back to the payment schedule prior to the holiday. OAR 436-060-0150(1). This rule does not apply, based on my finding that the second payment was made on November 20, 2001, *two* working days prior to the holiday.

The payment made on December 5, 2001 was one day late because it was not made within 14 days of the prior payment made on November 20, 2001. Under the penalty matrix, for a second violation that is one day late, a penalty of 10% of amounts then due is assessed.

IT IS HEREBY ORDERED that the May 7, 2002 Proposed and Final Contested Case Hearing Order is modified. Insurer shall pay to claimant 10% of the benefits due for November 1, 2001, and 10% of the amount of the December 5, 2001 check.

DATED this _____ day of October, 2002.

**MARY NEIDIG, DIRECTOR
DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES**

By: _____
John Shilts, Administrator
Workers' Compensation Division