

In the ORS 656.262(11) Penalty Dispute of

Borth, Lisa L., Claimant

Contested Case No: HH02-025

PROPOSED & FINAL ORDER

May 7, 2002

NATIONAL UNION FIRE INSURANCE CORPORATION, Petitioner

LISA L. BORTH, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Insurer appeals an Administrative Order issued on February 5, 2002 by the Sanctions Unit of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On March 28, 2002, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing in this matter. Petitioner National Union Fire Insurance Corporation (insurer) was represented by attorney Thomas P. Busch. Respondent Lisa L. Borth (claimant) appeared *pro se* and testified on her own behalf. No other witnesses testified and the record closed on the date of hearing.

The record of this proceeding, consisting of written argument, all evidence received, and all hearing papers filed, has been considered. The findings of fact and conclusions of law are based upon the entire record.

ISSUE

The issue is whether a penalty is warranted for late payment of temporary disability benefits.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 20 were received into the record without objection. Exhibit 15-2 was redacted to delete a handwritten note.

FINDINGS OF FACT

On September 15, 2001, claimant suffered a compensable left wrist injury while working as a certified nurse's assistant. (Ex. 2).

On November 8, 2001, insurer listed in its computer a temporary disability check to cover the period October 25, 2001 through October 31, 2001. (Exs. 6 and 15-2). The check was mailed on November 8, 2001. (Exs. 6, 15-1 and 15-2).

On November 20, 2001, insurer listed in its computer a temporary disability check

to cover the period November 1, 2001 through November 14, 2001. (Exs. 15-1 and 15-2). The check was mailed on the following day, November 21, 2001 from insurer's out-of-state office. (Exs. 15-1 and 15-2).

On December 5, 2001, insurer listed in its computer a temporary disability check to cover the period November 15 through November 28, 2001. (Exs. 15-1 and 15-2). The check was mailed on the following day, December 6, 2001 from insurer's out-of-state office. (Exs. 15-1 and 15-2).

On December 19, 2001, insurer listed in its computer a temporary disability check to cover the period November 29, 2001 through December 12, 2001. (Ex. 15-2). The check was mailed on the following day, December 20, 2001 from insurer's out-of-state office. (Exs. 15-1 and 15-2).

On January 2, 2002, insurer listed in its computer a temporary disability check to cover the period December 13 through December 26, 2001. (Ex. 15-2). The check was mailed on the following day, January 3, 2002 from insurer's out-of-state office. (Exs. 15-1 and 15-2).

Insurer's local office lists temporary disability checks in insurer's computer on the day before the check is due to be mailed. Insurer's out-of-state office mails temporary disability checks the following day. (Ex. 15-1).

CONCLUSIONS OF LAW AND REASONING

The sole issue presented is whether a penalty is warranted, and therefore jurisdiction lies with the director. ORS 656.262(11)(a); OAR 436-060-0155. Since ORS 656.262 prescribes no standard of review, I review *de novo*. *Archie M. Ulrich*, 2 WCSR 152, 153 (1997); OAR 436-010-0225. The burden of proving a fact or position rests with the proponent. ORS 184.450(2). As petitioner, insurer bears the burden of proving by a preponderance of the evidence that the administrative order is incorrect. See *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of evidence).

The Sanctions Unit determined that penalties were warranted for three late payments of temporary disability. The Sanctions Unit found that although the payments were made every fourteen days, they were not made within seven days of the last day of the disability period. Insurer contends that the payments were not untimely and that no penalties are warranted. Claimant contends that the administrative order is correct and should be affirmed.

ORS 656.262(4)(a) provides:

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 authorizes the payment of temporary disability compensation. Thereafter, temporary disability compensation shall be paid at least once each two weeks, except where the Director of the Department of Consumer and Business Services determines that payment in installments should be made at some other interval. The director may by rule convert monthly benefit schedules to weekly or other periodic schedules.

OAR 436-060-0150(1) provides:

Benefits are deemed paid when addressed to the last known address of the worker or beneficiary and deposited in the U.S. Mail or deposited in the worker's or beneficiary's account by approved electronic equivalent. Payments falling due on a weekend or legal holiday pursuant to ORS 187.010 and ORS 187.020 may be paid on the last working day prior to the first working day following the weekend or legal holiday. Subsequent payments may revert back to the payment schedule prior to the weekend or legal holiday.

OAR 436-060-0150(6) provides in part:

Temporary disability shall be paid to within seven days of the date of payment at least once every 14 days.***

Pursuant to OAR 436-060-0150(1), temporary disability benefits are deemed paid when they are deposited in the U.S. Mail. Here, the temporary disability checks were mailed periodically every 14 days in compliance with ORS 656.262(4)(a).

The Sanctions Unit found that three temporary disability checks were mailed later than 7 days after the last day of the payment period in violation of OAR 436-060-0150(6).

The first check is dated November 8, 2001; insurer's response to WCD indicates that the check was mailed the same day. This is consistent with insurer's computer sheet which lists the "Action Date" as November 8th. Since the check was mailed on November 8th and the last day of this payment period was October 31, 2001, the temporary disability was not paid to within seven days of the date of payment. The check was mailed on the eighth day after this disability period ended, or one day late. The matrix attached to OAR chapter 436 as "Appendix B" prescribes that the first violation of less than two days warrants no penalty. Therefore, no penalty is due for late payment of the temporary disability check mailed on November 8th.

The Sanctions Unit found that the temporary disability for one day, November 29, was paid 14 days late. Temporary disability for November 29 was paid in the payment

period November 29 through December 13, 2001. However, the question remains when the check was mailed. Insurer's response to WCD indicates that the date listed on a temporary disability check is the mailing date. For example, on the November 8th check, the check date, which is mailing date, matches the "Action Date" on insurer's computer sheet. Inasmuch as a copy of the check for November 29 through December 13 is not in evidence, I conclude that it was mailed on December 20, 2001 which is the "Action Date" on insurer's computer sheet. Furthermore, since the last day of this disability period was December 13 and the check was mailed on December 20, I find that the temporary disability was paid to within seven days of the date of payment. Therefore, no penalty is due for temporary disability benefits for November 29, 2001.

The Sanctions Unit found that the temporary disability benefits for one day, December 13, 2001 were paid 14 days late. Temporary disability for December 13 was paid in the payment period December 13 through December 27. Inasmuch as a copy of the check for December 13 through December 27 is not in evidence, I conclude that it was mailed on January 3, 2002 which is the "Action Date" as listed on insurer's computer sheet.¹ Furthermore, since the last day of this payment period was December 27, and the check was mailed on January 2, I find that the temporary disability was paid to within 7 days of the date of payment. Therefore, no penalty is due for temporary disability benefits for December 13, 2001.

In conclusion, I find that temporary disability benefits were paid periodically every 14 days in compliance with ORS 656.262(4)(a) and OAR 436-060-0150(1). Furthermore, I find that temporary disability benefits were paid to within 7 days of the date of payment at least once every 14 days in compliance with OAR 436-060-0150(6). Therefore, no penalties for late payment of temporary disability benefits are warranted.

¹ Again, insurer's response to WCD indicates that the date listed on the check is the mailing date. For example, on the check dated November 8th, the check date, which is the mailing date, matches the "Action Date" listed on insurer's computer sheet.

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated February 5, 2002 is reversed.

DATED this _____ day of May 2002.

Catherine P. Coburn
Administrative Law Judge
Hearing Officer Panel