

In the Matter of the Assessment of a Penalty Pursuant to ORS 656.262(11)
of

Dugan, Donald L., Claimant

Contested Case No: HH02-079

PROPOSED & FINAL ORDER

November 7, 2002

DONALD L. DUFFGAN , Petitioner
SAIF CORPORATION , Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

On September 19, 2002, Hearings Officer Paul Vincent conducted a telephonic hearing in this matter. The petitioner, Donald Dugan (claimant), appeared pro se. The respondent, SAIF Corporation, appeared through its counsel, Mike Whitty. The Workers' Compensation Division (WCD) did not appear. The record is now closed.

The entire record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered.

ISSUE

Whether claimant is entitled to a penalty, pursuant to ORS 656.262(11), for the insurer's unreasonable resistance to the payment of compensation.

EVIDENTIARY RULING

Exhibits 1-7, submitted by the Workers' Compensation Division, were admitted without objection.

FINDINGS OF FACT

On May 22, 2002, attorney Richard Dobbins, acting on claimant's behalf, sent a letter to the Workers' Compensation Division, Sanctions Unit (WCD), requesting that a penalty be assessed against SAIF for failure to pay time loss on this workers' compensation claim. (Ex. 1). On May 29, 2002, WCD notified insurer of the complaint and requested an insurer response. (Ex. 2). On June 17, 2002, insurer responded to the request for information with a letter response. SAIF's letter stated that SAIF's position was that Mr. Dugan's claim showed an overpayment and disputed whether any temporary time loss benefits was currently due. (Ex. 3). On June 27, 2002, claimant was notified by WCD that they had investigated the May 22, 2002 request for penalty and found that the insurer disputed whether any payments were currently due. The letter stated:

“Since the insurer contends there remains an overpayment on the claim, no temporary disability compensation is due. And because our office cannot order

time loss to be paid, then your recourse is to request a hearing before the Workers' Compensation Board, Hearings Division." (Ex. 6).

CONCLUSIONS OF LAW AND REASONING

The issue in this case is whether claimant is entitled to a penalty, pursuant to ORS 656.262(11), for unreasonable resistance to the payment of compensation. Compliance reasoned that because an issue other than entitlement to a penalty had been raised by either party it was without jurisdiction to continue its review of claimant's entitlement to a penalty. This determination was correct.

ORS 656.262(11) grants the director exclusive jurisdiction over those proceedings *solely* related to the assessment and payment of penalties when an insurer or self-insured employer unreasonably delays or refuses to pay compensation¹. WCD correctly noted that if any other issue is raised by either party, then the assessment and payment of a penalty is no longer the sole issue in the case. Here, the insurer raised the issue of whether temporary disability compensation is due as a defense to a penalty for non-payment of compensation. Because the insurer raised an issue other than entitlement to a penalty, WCD correctly determined that it had no jurisdiction in the matter and referred claimant to the Workers' Compensation Board, Hearings Division for further resolution of the issues involved.

¹ See also OAR 436-060-0155(6) which clarifies the director's interpretation of the statute:

"The director will only consider a penalty issue where the assessment and payment of additional amounts described in ORS 656.262(11) is the sole issue of any proceeding between the parties. If a proceeding on any other issue is initiated before the Hearings Division of the Workers' Compensation Board between the same parties prior to the director issuing an order under this section, and the director is made aware of the proceeding, jurisdiction over the penalty proceeding before the director shall immediately rest with the Hearings Division and result in referral of the proceedings to the Hearings Division. If the director has not been made aware of the proceeding before the Hearings Division and issues a penalty order which becomes final, the penalty of the director will stand. "

ORDER

IT IS HEREBY ORDERED that:

The Compliance Section's Notification of Decision, dated June 27, 2002, is affirmed.

DATED this day of November, 2002.