
In the Matter of the ORS 656.262(11) Penalty Dispute of
Green, Becky , Claimant

Contested Case No: H02-001

PROPOSED & FINAL ORDER

April 8, 2002

BECKY GREEN , Petitioner
SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

This case involves a challenge to a Proposed and Final Order Denying Assessment of a Penalty pursuant to ORS 656.262(11) issued by the Investigations and Sanctions Unit (Sanctions) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services. On March 7, 2002, Administrative Law Judge Paul Vincent conducted a telephone hearing in the matter. Petitioner Becky Green (claimant) was represented by Attorney Aaron Clingerman. Respondent SAIF Corporation (insurer or SAIF) was represented by Attorney Jill Blendinger. WCD waived appearance at the hearing. No witnesses testified. The record closed on March 7, 2002.

The 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 the insurer unreasonably delayed or refused payment of temporary disability compensation due from May 27, 1999 through September 30, 1999, by omitting the annual increase in the temporary total disability rate warranting assessment of penalty pursuant to ORS 656.262(11).

EVIDENTIARY RULING

WCD's Exhibits 1-51 were admitted into the record without objection.

FINDINGS OF FACT

At hearing, the parties did not dispute the findings of fact in the Order Denying Assessment of a Penalty under review. Having reviewed the record in its entirety, I make the following findings of fact:

On June 20, 1999, claimant filed a workers' compensation claim for bilateral carpal tunnel syndrome. SAIF denied the claim on September 20, 1999. SAIF accepted the claim by Stipulation and Order on February 16, 2000 for bilateral carpal tunnel syndrome. (Ex. 13).

SAIF began making temporary total disability payments (TTD) on March 9, 2000. SAIF calculated claimant's weekly wage at \$1,132.64 with a weekly TTD rate of \$576.64 for the period from May 27, 1999 through September 30, 1999 and a weekly TTD rate of \$601.21 for

the period from July 1, 1999 through September 3, 1999. (Exs. 15, 25).

On March 9, 2000, SAIF requested documentation from claimant's employer, the Oregon Department of Transportation (employer) to determine the appropriate wages and time loss rates. (Ex. 14). The employer provided the information to SAIF and claimant's average weekly wage was recalculated by SAIF to \$1,248.76. (Ex. 27). On April 18, 2000, a SAIF claim audit determined that claimant's TTD had been underpaid by \$1,009.22 for the period from May 27, 1999 through September 30, 1999. (Ex. 29). SAIF paid the underpayment to claimant on May 2, 2000. (Exs. 33, 48-1).

On July 14, 2001, claimant's attorney contacted WCD and requested a penalty/attorney's fee, alleging that SAIF failed to pay benefits timely by failing to apply the annual adjustment to the worker's temporary total disability rate. (Ex. 34). On December 7, 2001, Sanctions issued an Order Denying Assessment of a Penalty pursuant to ORS 656.262(11). (Ex. 48).

CONCLUSIONS OF LAW AND REASONING

Claimant argued at hearing, as he did before sanctions, that the insurer erred in failing to apply the annual increase in the temporary total disability rate from July 1, 1999 through June 23, 2000, thereby warranting the assessment of a penalty pursuant to ORS 656.262(11).

SAIF argues that Sanctions correctly determined that no penalty is due because insurer had not received accurate information from its insured and when it did so it promptly paid the underpayment.

Sanctions' order in this matter reasoned that "after acceptance of the claim, SAIF paid temporary disability to Ms. Green based on the wage reported when the claim was originally filed. SAIF continued to process Ms. Green's claim and requested supplemental wage information from her employer. After SAIF received the wage information, they audited the temporary disability due and paid. As a result of the audit, SAIF discovered an underpayment of temporary disability and paid Ms. Green an additional \$1,009.22." Ex. 48-2.

I agree with claimant that SAIF is liable for a penalty due to unreasonable delay in processing the annual increase in the temporary disability rate. Sanctions incorrectly concluded that SAIF was not aware of claimant's increased wage because the employer had not reported it to SAIF. An insurer cannot use a failure of communication between the insurer and its insured as a defense to improper processing because an employer's knowledge is imputed to the insurer. *Craig Wheeler*, 2 WCSR 501 (1997); *Nick v. State Accident Insurance Fund*, 80 Or App 656 (1986); *Perry J. Baker*, 49 Van Natta 40 (1997). Since the employer was aware that claimant's wages had changed, SAIF necessarily is imputed with the same knowledge. Therefore, SAIF's failure to receive wage information from the employer is irrelevant to whether SAIF acted reasonably. At the time SAIF initially paid temporary disability, it had imputed knowledge of the claimant's current wage. It was unreasonable for SAIF to fail to pay the proper amount timely when it possessed such knowledge.

This leaves the question of what is the appropriate penalty amount to be assessed for

insurer's unreasonable delay in payment. Penalties are to be assessed pursuant to the matrix set forth at Appendix B to the OAR 436-060 rules. OAR 436-060-0155(7). Under the matrix, the penalty for a payment varies from 0 to 25 percent depending on the number of days the payment was late and the number of violations. In any case in which the payment is 22 or more days late the penalty is 25 percent of the amount due. Payment of the amount due in this case was delayed well in excess of 22 days. Consequently, pursuant to the matrix set forth in Appendix "B," the appropriate penalty is 25 percent of the overdue amount (25 percent of \$1,009.22 or \$252.31).

ORDER

IT IS HEREBY ORDERED THAT: the Sanctions Unit order dated December 7, 2001 is reversed. Claimant is awarded a penalty of 25 percent of the TTD proceeds not paid. In lieu of an attorney fee, 50 percent of the penalty amount shall be paid out of and not in addition to the penalty, to claimant's counsel, Aaron Clingerman.

DATED this day of April 2002.

Paul Vincent, Hearing Officer
Hearing Officer Panel