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

Lahti, Marvin, Claimant

Contested Case No: HH02-012

PROPOSED & FINAL ORDER

May 20, 2002

MARVIN LAHTI, Petitioner

LIBERTY NORTH INSURANCE CORP., Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

On April 19, 2002, Hearings Officer Paul Vincent conducted a telephonic hearing in this matter. The petitioner, Marvin Lahti (claimant), appeared with attorney George Wall. The respondent, Liberty Northwest Insurance Co. (insurer), appeared through its counsel, Kathryn Ricciardelli. 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 insurer's failure to reimburse net loss of wages for claimant's attendance at an insurer's medical examination.

EVIDENTIARY RULING

Exhibits 1-18, submitted by the Workers' Compensation Division, were admitted without objection.

FINDINGS OF FACT

Claimant is employed as a long-haul truck driver. His route routinely requires an entire week to complete. (Testimony of claimant; Ex. 4). On October 24, 2000, insurer notified claimant that it had scheduled a mandatory insurer medical examination (IME) for him on November 21, 2000. Claimant was notified that he would be reimbursed for an amount equivalent to his net lost wages if he were required to be absent from work to attend this examination. (Ex. 1). On November 3, 2000, claimant's attorney wrote insurer to request that the IME be rescheduled to a Friday, claimant's day off. (Ex. 2). Insurer did not grant claimant's request to reschedule the appointment and claimant asked his employer to allow him to miss one day of work. Claimant's employer denied his request to miss one day of work and claimant was forced to take an entire week off from work in order to attend the IME. (Testimony of claimant; Ex. 4).

On May 5, 2001, claimant wrote to insurer and requested reimbursement for his entire week's lost wages due to his IME. Insurer received the request for reimbursement of 60 miles
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roundtrip mileage and \$836.52 for one week of net lost wages on May 7, 2001. (Exs. 4-6). On May 21, 2001, insurer reimbursed claimant in the amount of \$133.50 for one day's wages (\$114) and mileage. (Exs. 4-6).

On May 18, 2001, claimant signed a stipulation and order that rescinded insurer's previous denial of the claim. Insurer agreed "to accept claimant's claim for bilateral hearing loss, and to pay compensation according to law." The Order also ordered that "all issues raised or raisable as of the time this Stipulation is approved by the administrative law judge are hereby dismissed with prejudice." The order was signed by an Administrative Law Judge on May 24, 2001. (Ex. 7-2).

On December 20, 2001, the Workers' Compensation Division, Compliance Section, Investigations and Sanctions Unit (WCD) issued an order finding that whether claimant was entitled to reimbursement was a moot issue because the matter was "raisable" at the time the Stipulation and Order was signed on May 24, 2001. (Ex. 17). Claimant appeals that decision. (Ex. 18).

CONCLUSIONS OF LAW AND REASONING

The issue in this case is whether claimant is entitled to compensation or a penalty, pursuant to ORS 656.262(11), for unreasonable resistance to the payment of compensation. WCD determined that claimant has entered into a stipulated agreement which either implicitly or explicitly bars claimant's requests. I agree that the Stipulated Order bars claimant's request for compensation or penalty in this matter.

In *Dawna L. Ellis*, 1 WCSR 403 (1996), the director determined that where a stipulation has been entered into by the parties which purports to settle all issues "raised or raisable" at the time of stipulation, claimant may not seek penalties under ORS 656.262(11)(a) for an alleged failure to pay benefits if the request for penalties could have been raised at the time of the stipulation. The director stated the law to be applied in this situation is as follows:

"The Court of Appeals has previously held that, if a stipulation contains language settling "all issues that were raised or raisable" at the time of settlement, the claimant is barred from litigating a matter that was at issue, or of which the claimant had notice, at the time of settlement. *Safeway Stores, Inc. v. Seney*, 124 Or App 450, 454 (1993); see *Good Samaritan Hospital v. Stoddard*, 126 Or App 69, 73 (1994). The correct inquiry is whether the matter could have been negotiated before approval of the settlement agreement. Furthermore, the analysis of a stipulation is based on contract law. See *Mary Lou Claypool*, 34 Van Natta 943, 946 (1982)." *Ellis* at 404.

Here, claimant has explicitly waived the right to seek penalties for non-payment of compensation in relation to the accepted claim through the release of rights contained in the Stipulated Order approved on May 24, 2001. The claimant was aware at the time of the agreement that the insurer disputed his May 5, 2001 claim for compensation. (See Exs. 4; 5; 6). Because claimant has waived his rights under the Stipulated Order, and is barred from raising issues that were raised or raisable at the time of the Stipulation, he cannot be entitled to

compensation or a penalty in this matter.

ORDER

IT IS HEREBY ORDERED that:

The Compliance Section's Notification of Decision, dated December 20, 2001, is affirmed.

DATED this _____ day of May, 2002.

Paul Vincent, Hearing Officer
Hearing Officer Panel