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In the Matter of Assessment of a Penalty Pursuant to ORS.262(11) of

**Buell, Kenneth E., Claimant**

Contested Case No: H02-094

**PROPOSED AND FINAL ORDER**

February 18, 2003

KENNETH K. BUELL, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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**HISTORY OF THE CASE**

On November 12, 2002, Hearings Officer Paul Vincent conducted a telephonic pre-hearing conference in this matter. The petitioner, claimant Kenneth Buell, appeared without counsel. The respondent, employer R.B. Brown Trucking, appeared through its insurer SAIF Corporation and its attorney, Janelle Irving. The Workers' Compensation Division (WCD) did not appear. Oral argument was taken on the record.

The entire record of this proceeding, consisting of a tape recording of the pre-hearing conference, 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.

**CONCLUSIONS OF LAW**

The Hearing Officer Panel lacks jurisdiction over the issue raised by claimant and must therefore dismiss claimants request for a hearing.

**REASONING**

Hearing in this matter was scheduled for November 12, 2002 pursuant to a hearing notice issued on October 15, 2002. On November 4, 2002, insurer filed a Motion to Dismiss in this matter. On November 8, 2002, I notified the parties that the hearing would not be held as scheduled on November 12, 2002, because Exhibits had not been received from the Workers Compensation Division; however, the assigned hearing time would be used to conduct a prehearing conference that would address insurer's Motion to Dismiss<sup>1</sup>.

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<sup>1</sup> Pursuant to OAR 137-003-0580(1), "[n]ot less than 28 calendar days before the date set for hearing, the agency or a party may file a motion requesting a ruling in favor of the agency or party on any or all legal issues (including claims and defenses) in the contested case." Once filed, the agency and other parties may file a response to the motion "[w]ithin 14 calendar days after service of the motion." Here, it was probably impossible for the insurer to have filed the motion timely under the rule because the Hearing Notice did not issue until October 15, 2002, exactly 28 days prior to the originally assigned hearing date. Because the hearing was postponed indefinitely for receipt of Exhibits at the November 12, 2002 prehearing conference, I find that the motion was timely filed.

Insurer's position is that the issue raised by claimant is entitlement to additional temporary disability as a result of his accepted claim of July 12, 2001. At prehearing conference, claimant confirmed that his contention is both that there is current compensation due and owing, and that a penalty should be assessed for the insurer's failure to pay that compensation. In the order of the Workers Compensation Division, Compliance Section (WCD) that claimant appeals, WCD stated:

ORS 656.262(11) allows the director to have exclusive jurisdiction over proceedings regarding solely the assessment and payment of penalties when an insurer or self-insured employer unreasonably delays or refuses to pay compensation. However, when another issue such as entitlement is raised by either party, then the assessment and payment of a penalty is no longer the sole issue between the parties.

Compliance Section, therefore, no longer retains jurisdiction; instead, resolution of the issues would be within the jurisdiction of the Workers' Compensation Board, Hearings Division. You will need to contact the Hearings Division to resolve your complaint. Their address is 2601 25<sup>th</sup> Street SE, Suite 150, Salem, Oregon 97302-1282 and the telephone number is (503) 378-3308. (Ex. 49-1).

In light insurer's contention that entitlement is at issue in this case, WCD's assessment that they lack jurisdiction in this matter is legally correct. ORS 656.262(11) provides for a penalty if the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation or delays acceptance or denial of a claim. It further provides that "the director shall have exclusive jurisdiction over proceedings regarding solely the assessment and payment of the additional amount described in this subsection." Accordingly, both WCD and I lack jurisdiction to conduct further hearing in this matter. Pursuant to OAR 137-003-0580, because there is "no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought," and "the ...party filing the motion is entitled to a favorable ruling as a matter of law," I find that insurer is entitled to judgment in its favor as a matter of law, and the Notification of Decision is affirmed in its entirety.

### **ORDER**

IT IS HEREBY ORDERED that:

The Compliance Section's Notification of Decision, dated July 24, 2002, is affirmed.

DATED this 18th day of February, 2003.

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Paul Vincent, Hearing Officer  
Hearing Officer Panel