
In the ORS 656.262(11) Penalty Dispute of

Howell, Eric G., Claimant

Contested Case No: H03-021

FINAL ORDER

October 14, 2003

OREGON CONTRACTORS WORKERS' COMPENSATION TRUST, INC., Petitioner

ERIC G. HOWELL, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Petitioner, Oregon Contractors Workers' Compensation Trust, Inc. (insurer) timely submitted exceptions to Administrative Law Judge (ALJ) Catherine P. Coburn's May 27, 2003 Proposed and Final Contested Case Hearing Order. Respondent, claimant Eric G. Howell, responded and insurer replied.

The record of this matter, including the exhibits, the tape recording of the hearing, and the parties' written submissions, have been considered. The director adopts and affirms the May 27, 2003 proposed order with the following supplementation.

The issue is whether a penalty is warranted under ORS 656.262(11) for unreasonable delay or refusal to pay temporary disability benefits pursuant to the unappealed July 5, 2002 Order on Reconsideration.

The director adopts the ALJ's and the Sanctions Representative's findings of fact.

The Sanctions Representative, in a January 23, 2003 Proposed and Final Order Assessing Penalty of an Additional Amount Pursuant to ORS 656.262(11), ordered insurer to pay a penalty in the amount of 25% of the amount due. Sanctions reasoned that if insurer disagreed with the Order on Reconsideration it had the option to appeal that order. Because the order became final, the benefits awarded in the order became due and payable. The ALJ agreed and affirmed.

Insurer disputes whether the temporary disability benefits for the period of January 28, 2002 through February 11, 2002 are due and payable and contends they were more than 14 days retroactively authorized by the attending physician. At hearing, however, insurer clarified that the issue before the director is limited to whether its failure to pay the benefits is unreasonable as a matter of fact and law.¹ Insurer argues that it had a legitimate doubt as to whether the benefits were due and payable because it was following the statute and case law regarding retroactive authorization. Therefore, insurer contends, a 25% penalty is not warranted because insurer's adherence to the law was per se reasonable.

The July 5, 2002 Order on Reconsideration contains the following concerning the period

¹ See ORS 656.704 regarding the respective authority of the director and the Workers' Compensation Board. "Matters concerning a claim" are within the jurisdiction of the board. Further, the director only has jurisdiction over ORS 656.262(11) penalties if the sole issue is the assessment and payment of the penalty.

of temporary disability in dispute:

“ * * * In accordance with OAR 436-030-0036(1), only the beginning and ending dates of ‘authorized’ temporary disability for this open period of the claim are shown in this Order. * * * The temporary disability authorized by the attending physician should be from 12/27/01 through 1/7/02, 1/14/02 through 1/26/02, and 1/28/02 through 3/5/02, less time worked, pursuant to OAR 436-030-0036(1). * * * On 2/11/02 the attending physician retroactively authorized temporary disability to 1/28/02.” Ex. 5-2.

Insurer disputes that the attending physician retroactively authorized temporary disability to January 28, 2002 on February 11, 2002. However, the Order on Reconsideration was not appealed and has become final by operation of law. As the foregoing excerpt shows, it was determined in that order that the period from January 28, 2002 through February 11, 2002 was authorized by the attending physician on February 11, 2002. If insurer disputes that finding, insurer’s remedy was to have appealed the order to the Workers’ Compensation Board. ORS 656.268(6)(g); ORS 656.268(8), 656.283(7). Insurer did not do so. Therefore, based on the terms of the Order on Reconsideration, time loss for the period in dispute is due and payable.

ORS 656.262(11)(a) provides, in pertinent part,

“If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation * * * the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due.”

“Whether a * * * delay is unreasonable involves both legal and factual questions. * * * [The correct legal] standard is whether, from a legal standpoint, [the insurer] had a legitimate doubt as to its liability. If so, [it] was not unreasonable. ‘Unreasonableness’ and ‘legitimate doubt’ are to be considered in the light of all the evidence available to the insurer.” *Brown v. Argonaut Insurance Co.*, 93 Or App 588, 591 (1988).²

Insurer argues it had a legitimate doubt because it followed statutory and case law limits on the retroactive authorization of time loss. However, it has been determined that time loss for the period in dispute was authorized within those limits. Insurer’s reliance on statute and case law here is misplaced. Rather, insurer continues to dispute facts that have already been determined. Insurer is precluded from doing so. *E.g. Drews v. EBI Companies*, 310 Or 134 (1990); *see also Jeld-Wen, Inc. v. Bartz*, 142 Or App 433, 436 (1996) (collateral attacks on final orders of the board not permitted). Insurer’s failure to pay pursuant to the Order on

² In *SAIF v. Azorr*, 182 Or App 90 (2002), the employer argued that its refusal to follow legal precedent in processing a claim was reasonable because until the Supreme Court had reviewed the precedent and ruled, the precedent was not determinative. 182 Or App at 94. Despite the clear precedent, the employer contended, it could have a legitimate doubt as to its liability if there was a reasonable argument for reversing that precedent. The court affirmed the finding that employer did not have a legitimate doubt about its liability. *See also International Paper Co. v. Huntley*, 106 Or App 107, 110 (1991) (reliance on advice of counsel does not create legitimate doubt).

Reconsideration was therefore unreasonable.

The May 27, 2003 Proposed and Final Contested Case Hearing Order is adopted and affirmed. The January 23, 2003 Proposed and Final Order Assessing Penalty is affirmed. Insurer shall pay to claimant a penalty of an additional 25% of the amount due for temporary disability compensation for the period of January 28, 2002 through February 11, 2002, as awarded by the July 5, 2002 Order on Reconsideration.

DATED this 14th day of October, 2003.

CORY STREISINGER, DIRECTOR
DEPT. OF CONSUMER AND BUSINESS SERVICES

By: _____
John Shilts, Administrator
Workers' Compensation Division