

In the ORS 656.262(11)(a) Penalty Dispute of

Loupee, Douglas L., Claimant

Contested Case No: H03-042

PROPOSED & FINAL ORDER

December 17, 2003

INSURANCE CO. STATE OF PENNSYLVANIA, Petitioner

DOUGLAS L LOUPEE, Respondent

Before Ray Myers, Administrative Law Judge, Office of Administrative Hearings

HISTORY OF THE CASE

Petitioner, Insurance Co of Pennsylvania appeals a Proposed and Final Order Assessing a Penalty of an Additional Amount Pursuant to ORS 656.262(11) issued on April 10, 2003 by the Investigations and Sanctions Unit of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). The matter was referred to the Office of Administrative Hearings (OAH) on April 18, 2003.

Administrative Law Judge (ALJ) Paul Vincent conducted a hearing by telephone in Salem, Oregon on August 6, 2003. The record closed on that date. Attorney Tom Busch represented petitioner. Respondent (claimant) did not appear at hearing. WCD waived appearance. No witnesses testified. The record closed following the hearing.

After the hearing, the OAH assigned the matter to Administrative Law Judge Ray Myers to review the record and to write this order. The record of this proceeding, consisting of tape recordings of the hearing, all evidence received and all hearing papers filed, has been considered. The findings of fact and conclusions of law are based upon the entire record.

ISSUES

Did petitioner unreasonably delay payment of temporary disability due for the period January 10 through January 12, 2003?

EVIDENTIARY RULINGS

The record consists of WCD's Exhibits 1 through 13 and petitioner's [e]Exhibits 1 through 29.

FINDINGS OF FACT

I adopt the Findings of Fact set forth in the April 10, 2003 Sanction Unit's order with the following supplementation:

1. Claimant injured his back while working for Express Personnel on December 28, 2002. (Ex. 1.) He saw Dr. Tobey, DC on December 30, 2002. Dr. Tobey authorized temporary disability from December 30, 2002 through January 10, 2002. (Ex. 2.) On January 2, 2003, Dr.

Tobey indicated that he anticipated that claimant would be able to return to work on January 10, 2002. (Ex. 3.) Petitioner paid temporary disability benefits for the period December 31, 2002 through January 9, 2003 on January 10, 2003. (Ex. 12.)

2. On January 10, 2003, Dr. Tobey authorized temporary disability from January 10, 2003 through February 3, 2003. Petitioner received the authorization on February 3, 2003. (Pet. Ex. 29.) It paid temporary disability benefits for the period January 10 through January 12, 2003 on February 4, 2003. (Ex. 12.)

3. On January 13, 2003, Dr. Tobey authorized temporary disability from January 13, 2003 through January 20, 2003. (Pet. Ex. 14.) Petitioner paid temporary disability benefits for the period January 23, 2003 through January 19, 2003 on January 21. It paid temporary disability benefits for the period beginning January 20, 2003 on January 31, 2003. (Ex. 12.)

CONCLUSIONS OF LAW

Petitioner did not unreasonably delay payment of temporary disability for the period January 10 through January 12, 2003.

OPINION

Because the sole issue is whether petitioner unreasonably delayed payment of the temporary disability and, if so, whether claimant is entitled to a penalty of 10 percent of the amounts then due, jurisdiction lies with the director. ORS 656.262(11) and ORS 656.704(2); OAR 436-060-0155(2). Since ORS 656.262(11) prescribes no standard of review, I review *de novo*. *Archie M. Ulrich*, 2 WCSR 152, 153 (1997); OAR 436-001-0225(6). The burden of proving a fact or position rests with the proponent. ORS 183.450(2). Therefore, petitioner, bears the burden of proving by a preponderance of the evidence that the underlying administrative decision is incorrect. *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). I conclude that petitioner has met its burden.

ORS 656.262(4) requires payment of temporary disability benefits within 14 days of the employer's notice of the claim. It states in relevant part:

(4)(a) The first installment of temporary disability compensation shall be paid no later than the 14th day after the subject employer has notice or knowledge of the claim, if the attending physician authorizes the payment of temporary disability compensation. Thereafter, temporary disability compensation shall be paid at least once each two weeks, except where the Director of the Department of Consumer and Business Services determines that payment in installments should be

made at some other interval. The director may by rule convert monthly benefit schedules to weekly or other periodic schedules.

* * * *

(g) Temporary disability compensation is not due and payable pursuant to ORS 656.268 after the worker's attending physician ceases to authorize temporary disability or for any period of time not authorized by the attending physician.

OAR 436-060-0015(5) further defines timely payment of temporary disability compensation. It states in relevant part:

(5) Timely payment of temporary disability benefits means payment has been made no later than the 14th day after:

(a) The date of the employer's notice or knowledge of the claim, provided the attending physician has authorized temporary disability....

(b) The date the attending physician authorizes temporary disability, if the authorization is more than 14 days after the date of the employer's notice or knowledge of the claim;

* * * * *

Dr. Tobey originally authorized temporary disability only through January 10, 2003. Later, he modified that authorization by stating that he anticipated that claimant would be able to return to work on January 10, 2003. The next release petitioner received was Dr. Tobey's January 13, 2003 release from work for the period beginning that date. Petitioner properly paid temporary disability benefits pursuant to those releases.

Petitioner did not receive Dr. Tobey's January 10, 2003 release until February 3, 2003. It paid temporary disability pursuant to that release on February 4, 2003. WCD read OAR 436-060-0015(5)(b) as requiring the insurer or self-insured employer to pay temporary disability benefits within 14 days of a release whether or not it had received the release. Thus, it assessed petitioner a penalty for late payment of temporary disability benefits because it did not pay within 14 days of the release, notwithstanding the fact that petitioner had not even received the release within 14 days. Although I am not convinced that WCD's reading of the rule is consistent with the statute, I need not decide that issue.

ORS 656.262(11)(a) states:

(11)(a) If the insurer or self-insured employer *unreasonably* delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due.

(Emphasis added.)

Thus, a penalty is only authorized if the delay in paying compensation is unreasonable. In this case, I conclude that petitioner's delay was entirely reasonable. The insurer paid the temporary disability benefits in issue the day after receiving the release. Accordingly, a penalty is not warranted.

ORDER

IT HEREBY ORDERED that WCD's Administrative Order dated April 10, 2003 is reversed.