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

**Richey, Sharon D., Claimant**

Contested Case No: H04-027

**PROPOSED & FINAL ORDER ON DEFAULT**

April 7, 2004

SHARON D. RICHEY, Petitioner

BROADSPIRE INSURANCE CORPORATION, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Office of Administrative Hearings

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**HISTORY OF THE CASE**

Claimant appeals a Notification of Decision issued on January 22, 2004 by the Sanctions Unit of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On February 11, 2004, the department referred the matter to the Office of Administrative Hearings (OAH) to conduct a contested case hearing. On March 22, 2004, Administrative Law Judge (ALJ) Catherine P. Coburn conducted a hearing. Petitioner Sharon D. Richey (claimant), *pro se*, failed to appear. Respondent Broadspire Insurance Corporation (insurer) was represented by attorney Kenna L. West. No witnesses testified. The record closed on the date of hearing.

Pursuant to OAR 137-003-0670, when a party is notified of the time and place of a hearing and fails to appear for hearing for reasons not beyond that party's reasonable control, an adverse order may be entered only upon a *prima facie* case on the record. The ALJ may consider whether the record contains evidence that persuades her of the existence of facts necessary to support the order. Claimant was duly notified of the time of the hearing<sup>1</sup> but failed to appear<sup>2</sup>. I now consider whether the record contains facts establishing a *prima facie* case.

**ISSUE**

Whether claimant is barred from seeking a penalty for late payment of a permanent partial disability award because her request for a penalty was untimely.

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 7, as well as insurer's Supplementary Exhibits A through D were admitted into the record without objection.

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<sup>1</sup> The file contains a certified mail card establishing that claimant received the Notice of Hearing. Additionally, the Notice of Hearing was sent to claimant's last known address by regular mail and is presumed received. OEC 311(1); *Berliner v. Weyerhaeuser*, 92 Or App 264, 267 (1988) (applying OEC 311(1) in a workers' compensation case).

<sup>2</sup> I convened the hearing at 9:20 a.m., 20 minutes past the convening time. Furthermore, claimant has not contacted the Office of Administrative Hearings to report any circumstances that might constitute circumstances beyond her reasonable control and excuse her failure to appear.

### FINDINGS OF FACT

(1) The claim was closed by Notice of Closure dated September 19, 2002. Claimant was awarded temporary partial disability (TPD) benefits for the period December 23, 2001 through July 24, 2002. (Ex. 1.)

(2) On January 14, 2002, claimant indicated that she did not recall receiving TPD benefits for the period January 9, 2002 through July 24, 2002. Claimant requested the WCD Sanctions Unit to investigate and to award a penalty for late payment if appropriate. (Ex. 5.)

### CONCLUSION OF LAW

Claimant is barred from seeking a penalty for late payment of a permanent partial disability award because her request for a penalty was untimely.

### OPINION

The sole issue presented is timeliness of a penalty request, and therefore, jurisdiction lies with the director. ORS 656.262(11)(a); OAR 436-060-0155. Since ORS 656.262 prescribes no standard of review, I review *de novo*. *Archie M. Ulbrich*, 2 WCSR 152, 153 (1997); OAR 436-010-0225. The burden of proving a fact or position rests with the proponent. ORS 184.450(2). As petitioner, claimant bears the burden of proving by a preponderance of the evidence that the administrative order is incorrect. See *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of evidence). Preponderance of the 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).

The Sanctions Unit determined that claimant's request for a penalty was untimely, and therefore, declined to consider the question whether a penalty was due. Claimant disagreed and requested a hearing. In contrast, insurer contends that the administrative order is correct. I agree.

ORS 656.262(11) provides in relevant part:

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.

OAR 436-060-0155 provides in relevant part:

(1) Pursuant to ORS 656.262(11), the director may require the insurer to pay an additional amount due to the worker as a penalty

when the insurer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim.

(2) Requests for penalties under this section must be in writing, stating what benefits have been delayed or remain unpaid, and mailed or delivered to the division within 180 days of the alleged violation.

(3) For the purpose of this section, “violation” is either:

(a) A late payment or the nonpayment of any single payment due, in which case a request for penalty must be mailed or delivered to the director within 180 days of the date payment was due;

Here, TPD benefits were due no later than the fourteenth day after the Notice of Closure dated September 19, 2002. *See* OAR 436-060-0150(5)(f)<sup>3</sup>. Consequently, TPD benefits were due on October 3, 2002. Next, pursuant to OAR 436-060-0155(3), claimant was required to request a penalty for nonpayment within 180 days. Consequently, the last day claimant could properly file the penalty request was April 1, 2003. However, claimant requested a penalty on January 14, 2004, eight months late. Inasmuch as claimant’s request for a penalty was untimely, the Sanctions Unit correctly declined to address the question whether a penalty was due. Accordingly, I affirm.

### ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated January 22, 2004 is affirmed.

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<sup>3</sup> OAR 436-060-0150(5)(f) provides:

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

(f) The date of a notice of claim closure issued by the insurer which finds the worker entitled to temporary disability;