

In the ORS 656.262(11) Penalty Dispute of

**Watterson, Calvin, Claimant**

Contested Case No: H04-008

**PROPOSED & FINAL ORDER**

May 18, 2004

CALVAN WATTERSON, Petitioner

SAIF 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 December 31, 2003 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). On March 19, 2004, Administrative Law Judge Catherine P. Coburn conducted a hearing. Petitioner Calvin Watterson (claimant) was represented by attorney R. Adian Martin. Respondent SAIF Corporation (insurer) was represented by attorney Jerome P. Larkin. No witnesses testified. The record closed on April 19, 2004, upon receipt of supplementary legal argument from both parties.

**ISSUE**

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

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 6 were admitted into the record without objection.

**FINDINGS OF FACT**

(1) On November 6, 2002, the department issued an Order on Reconsideration awarding permanent partial disability (PPD). (Ex. 1.) Insurer paid the PPD award on November 21, 2003. (Exs. 2 and 4.)

(2) On December 3, 2004, claimant requested a penalty for late payment of the PPD award. (Ex. 2.)

**CONCLUSION OF LAW**

Claimant is barred from seeking a penalty for late payment of the PPD award because the penalty request 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(6). 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 contends that OAR 436-060-0155(3) is invalid because it conflicts with ORS 656.262(11). Insurer disagrees and contends that the administrative order is correct. I agree with insurer's contentions.

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.

(Emphasis added.)

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;

(Emphasis added.)

Claimant contends that OAR 436-060-0155 is invalid because it contains the discretionary term “may” while the governing statute, ORS 656.262(11) contains the mandatory term “shall.” However, the legislature has delegated responsibility to the director to administer the workers’ compensation system. Additionally, the legislature has authorized the director to promulgate administrative rules that are reasonably required in the performance of its duties<sup>1</sup>. This includes rules establishing time lines that are necessary for processing claims. *See Marianne Camp*, 6 WCSR 299 (2001) (The director is authorized to promulgate rules establishing processing timelines).

OAR 436-060-0155(3) provides that a claimant must request a penalty within 180 days of the alleged violation. The director acted well within her statutory authority in establishing a deadline for processing penalty requests. Moreover, the rule serves the social policy of providing an incentive to insurers to pay late benefits to injured workers even if the injured worker is unaware that he is entitled to the amount. Therefore, I find that OAR 436-060-0155(3) does not conflict with ORS 656.262(11) and is valid.

Here, the PPD payment was due on December 6, 2002, 30 days after the date of the Order on Reconsideration. OAR 436-060-0150(7)(c). The PPD payment was late from December 6, 2002 forward. Pursuant to OAR 436-060-0155(2), the last day claimant could properly request a penalty was June 4, 2003 *viz.*, 180 days after December 6, 2002. However, claimant asserted the penalty request on December 3, 2003, six months late. Consequently, claimant is barred from seeking a penalty for late payment of the PPD award. Accordingly, I affirm.

### **ORDER**

IT IS HEREBY ORDERED that:

The Notification of Decision dated December 31, 2003 is affirmed.

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<sup>1</sup> ORS 656.726(4) provides in relevant part:

The director hereby is charged with the duties of administration, regulation and enforcement of ORS 654.001 to 654.295, 654.750 to 654.780 and this chapter. To that end, the director may:

(a) Make and declare all rules and issue orders which are reasonably required in the performance of the director’s duties.