

In the ORS 656.262(11) Penalty Dispute of

ELAINE RADKE, Claimant

Contested Case No: H04-114

PROPOSED AND FINAL ORDER OF DISMISSAL

February 23, 2005

ELAINE RADKE, Petitioner

UNITED AIRLINES, Respondent

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

HISTORY OF THE CASE

Claimant appeals an Administrative Order issued on June 2, 2004 by the Sanctions Unit of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On October 7, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). A contested case hearing was set for December 14, 2004 and the parties agreed to submit the case through written argument. Petitioner Elaine Radke was represented by attorney at law J. Michael Casey. Responding self-insured employer, United Airlines, was represented by attorney at law Leslie J. Mackenzie. The record closed on January 19, following receipt of written argument.

ISSUE

Whether the director has jurisdiction over a penalty issue where the parties dispute the amount of an overpayment.

EVIDENTIARY RULINGS

The following exhibits were admitted into the record without objection: WCD Exhibits 1 through 18, claimant's Supplementary Exhibits A through 17A, AA through CC, 22 and 23, as well as insurer's Supplementary Exhibits A through 21 and 24 through 27.

FINDINGS OF FACT

(1) Claimant was employed as an airline customer service representative. On November 11, 2002, she tripped over a baggage cart and suffered a compensable injury. (Ex. A.) On January 10, 2003, insurer accepted a right rotator cuff tear. (Exs. B and 6.)

(2) Claimant's condition became medically stationary on January 5, 2004, and insurer issued a Notice of Closure on March 11, 2004. (Ex. 4.) Temporary total disability (TTD) benefits were authorized from November 11, 2002 through January 5, 2004. (*Id.*) Claimant's right shoulder permanent partial disability (PPD) was rated at 10 percent for an award of \$5,888. (*Id.*)

(3) On May 17, 2004, insurer notified claimant of a \$12,656.27 overpayment.

(Ex. 11.)

(4) In an Order on Reconsideration dated June 29, 2004, the department increased the PPD award to 16 percent, for an additional \$3,532.80. The department also affirmed the time loss dates and approved deduction of any overpaid TTD or PPD. Neither party appealed the Order on Reconsideration. (Ex. 17A.)

CONCLUSION OF LAW

The director lacks jurisdiction over a penalty issue where the parties dispute the amount of an overpayment.

OPINION

The burden of proving a fact or position rests with the proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving by a preponderance of the evidence that the June 2, 2004 administrative order was 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 evidence means that the factfinder is persuaded that the facts are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

The Sanctions Unit determined that no penalty was due. Citing ORS 656.268(13)(a),¹ the Sanctions Unit reasoned that insurer had properly deducted an overpayment from the PPD award and concluded that there were no “amounts then due” on which to base a penalty as required by ORS 656.262(11).

Insurer contends that jurisdiction lies with the Workers’ Compensation Board Hearings Division rather than with the director. In support of its position, insurer argues that a penalty is not the “sole” issue presented because claimant raises an issue concerning entitlement to PPD benefits. In contrast, claimant contends that jurisdiction lies with the director. In support of her position, claimant urges the ALJ, acting on the director’s behalf, to calculate the overpayment amount and to award any PPD that may be due to claimant, as well as a penalty for late payment of that PPD and an attorney fee.

ORS 656.262 (11) provides:

ORS 656.262 (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

¹ ORS 656.268(13)(a) provides:

An insurer or self-insured employer may offset any compensation payable to the worker to recover an overpayment from a claim with the same insurer or self-insured employer. When overpayments are recovered from temporary disability or permanent total disability benefits, the amount recovered from each payment shall not exceed 25 percent of the payment, without prior authorization from the worker.

or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees assessed under this section. The fees assessed by the director, an Administrative Law Judge, the board or the court under this section shall be proportionate to the benefit to the injured worker. The board shall adopt rules for establishing the amount of the attorney fee, giving primary consideration to the results achieved and to the time devoted to the case. An attorney fee awarded pursuant to this subsection may not exceed \$2,000 absent a showing of extraordinary circumstances. **Notwithstanding any other provision of this chapter, the director shall have exclusive jurisdiction over proceedings regarding solely the assessment and payment of the additional amount and attorney fees described in this subsection.** The director's action and review thereof shall be subject to ORS chapter 183 and such other procedural rules as the director may prescribe.

(Emphasis added.)

Pursuant to ORS 656.262(11), the director has jurisdiction over penalty disputes if the sole issue is the assessment and payment of a penalty.² Here, petitioner's opening brief reads, "Claimant filed a Request for a Contested Case Hearing based on a dispute about her entitlement to certain permanent partial disability (PPD) payments. [Petitioner] alleges entitlement to a portion of the PPD payments. Petitioner further alleges entitlement to a penalty for the employer's unreasonable refusal to issue the disputed payments. In addition to the penalty, counsel requests an attorney fee of \$2,000 based on ORS 656.262(11)(a)." (Petitioner's Brief, p. 1.) Claimant further urges the ALJ to calculate the overpayment and make a ruling on the penalty issue. In contrast, insurer first contends that WCD lacks jurisdiction because a penalty is not the "sole" issue presented. Insurer next contends that no penalty is due because it appropriately withheld PPD as a result of overpaid TTD.

An overpayment³ is a math calculation⁴ (PPD awarded minus TTD previously paid). Here, the parties agree that the amount of PPD awarded by a final Order on Reconsideration is

² See ORS 656.704(3)(a) regarding the respective authority of the director and the board. "Matters concerning a claim" are within the jurisdiction of the board.

³ ORS 656.268(13) provides:

(13)(a) An insurer or self-insured employer may offset any compensation payable to the worker to recover an overpayment from a claim with the same insurer or self-insured employer. When overpayments are recovered from temporary disability or permanent total disability benefits, the amount recovered from each payment shall not exceed 25 percent of the payment, without prior authorization from the worker.

⁴ OAR 436-030-0020(12) provides:

The insurer may allow overpayments made on a claim with the same insurer to be deducted from compensation to which the worker is entitled but has not yet been paid.

Additionally, OAR 436-060-0170(2) provides:

\$5,888. However, the parties dispute the other figure in the math calculation; the dates and amount of TTD to which claimant is entitled are undetermined. Consequently, it is necessary to determine the correct amount of TTD in order calculate the overpayment and ultimately decide whether a penalty is due. Furthermore, entitlement to TTD is a “matter concerning a claim” and jurisdiction vests with the Board. Inasmuch as a penalty is not the sole issue presented, the director lacks jurisdiction. Accordingly, I dismiss the request for hearing.

ORDER

IT IS HEREBY ORDERED that:

Claimant’s July 1, 2004 request for hearing is dismissed.

Insurers may recover an overpayment from any benefits currently due on any claim the worker has with that insurer. Insurers must explain in writing the reason, amount and method of recovery to the worker and the worker's attorney or to the worker's survivors.