

In the ORS 656.262(11) Penalty Dispute of
STEVE ROBERTSON, Claimant

Contested Case No: H05-011

PROPOSED AND FINAL ORDER

October 3, 2005

STEVE ROBERTSON., Petitioner

SAIF CORP., Respondent

Before Daina Upite, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant Steve Robertson appeals the Administrative Order issued on December 20, 2004 by the Investigations and Sanctions Unit, Compliance Section, of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On February 3, 2005, the department referred the matter to the Office of Administrative Hearings (OAH).

On June 9, 2005, Administrative Law Judge Daina Upite conducted a hearing by telephone in Salem, Oregon. Attorney Stefan Gonzalez represented respondent SAIF Corporation (insurer). Claimant did not appear for the hearing. The record closed on the date of hearing.

ISSUE

Whether the Administrative Order issued December 20, 2004 denying claimant's request for a penalty for the insurer's allegedly late payment of temporary disability should be affirmed.

EVIDENTIARY RULINGS

Pursuant to the Notice of Rescheduled Telephone Hearing mailed May 17, 2005, the agency record, including WCD Exhibits 1 through 25, is designated as the record of this proceeding.¹

FINDINGS OF FACT

(1) Claimant sustained a work injury on July 18, 2003 while employed by Robbins Farm Equipment, Inc. (Exs. 3, 4.) The insurer accepted a disabling claim for partial tear of the right distal biceps tendon as a result of the injury. (Exs. 6, 7, 11, 14.) Claimant treated at St. Elizabeth Health Services on July 18, 2003 and was released to modified duty. (Exs.1, 3.) The employer did not promptly offer modified work, and claimant did not return to work. (Exs.16, 18, 21.)

(2) The insurer's first payment of temporary disability was made August 1, 2003, in the

¹ OAR 137-003-0670(3)(c).

amount of \$960.04, for the period July 21, 2003 through August 1, 2003. The insurer made a supplemental payment of \$65.40 on September 12, 2003 for the period July 21, 2003 through August 30, 2003. (Ex. 5 at 1, 4.)

(3) The insurer issued a Notice of Closure (NOC) dated March 17, 2004 awarding temporary disability for the period July 21, 2003 through February 25, 2004, with no permanent disability. (Ex. 9.) The insurer issued a corrected NOC on April 5, 2004, awarding temporary disability for the same period and no permanent disability. The April 5, 2004 NOC advised that claimant was overpaid \$209.70. (Ex.12.) The insurer indicated that the three-day waiting period applies, and the dates are July 18, 19 and 20, 2003. (Exs. 9 at 3, 12 at 3.)

(4) Claimant requested reconsideration of the NOC, and the Appellate Review Unit of WCD issued an Order on Reconsideration on August 2, 2004. WCD found that claimant's physician authorized time loss on July 18, 2003. Consequently, WCD modified the period of temporary disability authorized by the attending physician, as follows: "From 7/18/03 through 2/25/04, less time worked, pursuant to OAR 436-030-0036(1)." WCD did not affirm the overpayment amount of \$209.70, but directed the insurer to recalculate the amount of temporary disability due and payable, in light of the modification regarding the authorized period of temporary disability. WCD affirmed the NOC, as amended April 5, 2004, in all other respects. (Ex. 15.) The Order on Reconsideration was not appealed. (Ex. 17.)

(5) On November 10, 2004, claimant objected to the insurer's failure to pay additional time loss through February 25, 2004, as authorized in the Order on Reconsideration. (Ex. 16.) It is claimant's position that he should have been paid for the three-day waiting period, July 18-20, 2003, and that after offset of the two-day overpayment in February 2004, the insurer still owes claimant time loss for one day. (Ex. 22.)

(6) On December 20, 2004, the Investigations and Sanctions Unit, Compliance Section of WCD issued an Order Denying Assessment of a Penalty Pursuant to ORS 656.262(11)(a), holding that claimant was not entitled to receive a penalty because there are "no amounts then due" on which to assess the penalty. WCD explained that no time loss is due for the three-day waiting period of July 18, 19 and 20, 2003. (Ex. 23.) Claimant requested a hearing, stating that he was not released to modified duty until four days after July 18, 2003. (Ex. 24.)

CONCLUSION OF LAW

The Administrative Order dated December 20, 2004, finding that claimant is not entitled to a penalty under ORS 656.262911)(a), is supported by *prima facie* evidence in the record and should be affirmed.

OPINION

Claimant's request for hearing raised the sole issue of whether he is entitled to a penalty for insurer's unreasonable delay in paying compensation. Therefore, jurisdiction lies with the

director. ORS 656.262(11)(a). I review *de novo*. OAR 436-001-0225(4). The burden of proof falls upon the proponent of a particular fact or position. ORS 183.450(2).

In this case, because claimant requested the hearing, but failed to appear for the hearing after being notified of the time and place for the hearing, I may issue a final order by default, adverse to claimant, only upon a *prima facie* case made on the record. OAR 137-003-0670(1)(c), (3)(a). In other words, “The *** administrative law judge must find that the record contains evidence that persuades the *** administrative law judge of the existence of facts necessary to support the order.” OAR 137-003-0670(3)(a).

WCD denied claimant’s request for a penalty under ORS 656.262(11)(a) for the insurer’s allegedly late payment of temporary disability benefits because the insurer had paid all the temporary disability due claimant. Claimant reasoned that because the Order on Reconsideration modified the insurer’s Notice of Closure by extending the authorized time loss period by three days (to begin July 18, rather than July 21), then he is entitled to three additional days of temporary disability benefits. Because the insurer did not pay him any additional temporary disability after the Order on Reconsideration, claimant requested a penalty for insurer’s unreasonable delay or refusal to pay benefits. WCD denied the penalty because July 18, 19 and 20, 2003 was the three-day waiting period during which the insurer is not required to pay time loss.

ORS 656.262 (11)(a) provides in material 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** plus any attorney fees assessed under this section. *** 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.)

Thus, claimant would be entitled to a penalty if the insurer unreasonably delayed or refused to pay compensation. The amount of the penalty would be based on the “amounts then due.”

The insurer is required to promptly pay compensation due to an injured worker. ORS 656.262(2). The first installment of temporary disability compensation is due no later than the 14th day after the employer has notice or knowledge of the claim, if the attending physician authorizes temporary disability compensation. ORS 656.262(4)(a). However, ORS 656.212 further provides, in material part:

When the disability is or becomes partial only and is temporary in

character:

(1) No disability payment is recoverable for temporary disability suffered during the first three calendar days after the worker leaves work or loses wages as a result of the compensable injury. If the worker leaves work or loses wages on the day of the injury due to the injury, that day shall be considered the first day of the three-day period.

The only exception to the three-day waiting period is if the worker is totally disabled after the injury. ORS 656.210(3).

Claimant was not totally disabled after the injury. Therefore, there was a three-day waiting period during which claimant was not entitled to temporary disability benefits – July 18, 19 and 20, 2003. The Order on Reconsideration correctly determined that disability was authorized beginning July 18, 2003, but that did not mean that claimant was entitled to compensation for the first three days of disability. Consequently, the insurer did not unreasonably delay or withhold payment of compensation, and there were no “amounts then due” on which to base a penalty. Accordingly, WCD’s order is supported by the evidence in the record and, therefore, should be affirmed.

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated December 20, 2004 is affirmed. .