
In the ORS 656.262(11) Penalty Dispute of

LORI WHITE, Claimant

Contested Case No: H04-205

PROPOSED AN FINAL ORDER

MARCH 29, 2005

LORI WHITE, Petitioner

SAIF CORP., Respondent

Before Lawrence S. Smith, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Lori White (Claimant) appeals a December 15, 2004 Order Denying Assessment of a Penalty pursuant to ORS 656.262(11)(a) issued by the Workers' Compensation Division (WCD) of Department of Consumer and Business Services. The Order concluded that Claimant was not entitled to a penalty for SAIF Corporation's (SAIF) allegedly unreasonable denial of a claim. Claimant's appeal was referred to the Office of Administrative Hearings (OAH) on January 13, 2005.

On March 9, 2005, Administrative Law Judge (ALJ) Lawrence S. Smith conducted a telephone hearing in this matter. Attorney Vance Day represented Claimant and called her as a witness. Attorney David Runner represented SAIF and called no witnesses. The record closed that day.

ISSUE

Whether Claimant is entitled to a penalty for SAIF's allegedly unreasonable refusal to pay temporary disability benefits.

EVIDENTIARY RULING

Exhibits 1 through 9 were admitted without objection.

FINDINGS OF FACT

(1) Claimant was paid temporary disability benefits by SAIF for the weeks from at least July 2004 through September 29, 2004. She was not paid benefits for the weeks of September 30, 2004, through October 27, 2004, because she changed her treating physician and SAIF concluded that neither the treating physician nor her prior treating physician gave her a modified authority to work during those weeks. (Ex. 9 at 2.)

(2) Claimant has not been found eligible for benefits for the weeks she was not paid. SAIF has paid her temporary disability benefits again, starting October 28, 2004. (Ex. 7.)

CONCLUSION OF LAW

Claimant is not entitled to a penalty for SAIF's allegedly unreasonable refusal to pay temporary disability benefits.

OPINION

The only issue is whether Claimant is entitled to a penalty for SAIF's unreasonable refusal to pay workers' compensation for the weeks of September 30, 2004, through October 27, 2004. ORS 656.262(11)(a) states:

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. 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.]

Claimant has not established that she was eligible for temporary disability benefits during the period she claims was unreasonably denied. Neither WCD nor the ALJ has the authority to decide whether she was eligible for benefits during that period. Claimant must establish "amounts then due" before she can claim unreasonable delay or denial. Because she has not established such eligibility for benefits, there is no basis for a penalty under ORS 656.262(11)(a).

ATTORNEY FEES

Claimant did not prevail and is, therefore, not entitled to attorney fees. ORS 656.385(1).

ORDER

WCD's December 15, 2004 Order Denying Assessment of a Penalty Pursuant to ORS 656.262(11)(a) is affirmed.