

In the ORS 656.262(11) Penalty Dispute of

**Peggy A. Mower, Claimant**

Contested Case No: 06-024H

**PROPOSED & FINAL ORDER**

April 19, 2006

PEGGY A. MOWER, Petitioner

SAFEWAY INC., Respondent

Before Robert Brazeau, Administrative Law Judge, Workers' Compensation Board

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Safeway Stores, Inc., moves for the dismissal of claimant's request for hearing on the ground that the Hearings Division lacks subject matter jurisdiction over this matter. Claimant responds that the Hearings Division does, in fact, retain jurisdiction and asks that the employer's motion be denied. She also has appealed the Compliance Section's January 3, 2006 order that denied claimant's request for an assessment of a penalty pursuant to ORS 656.262(11).

Based on the administrative record and Exhibits 1 through 19, 14A and 18A, which are hereby admitted into evidence, I deny the employer's motion to dismiss. I further conclude, however, that the Compliance Section's order should be affirmed.

With regard to the issue of jurisdiction, this matter is on referral to the Workers' Compensation Board's Hearings Division from the Workers' Compensation Division. As such, this is not a case in which the Board's Hearings Division held original jurisdiction. Rather, the Hearings Division's authority in this case is limited to a *de novo* review of an order from the Division, which held the original jurisdiction over claimant's request for hearing under ORS 656.262(11)(a). *See* ORS 656.704(2)(a); OAR 436-001-0225(1). Had the Board's Hearings Division held original jurisdiction in this case, the employer's argument on jurisdictional grounds might have been appropriate. The Board's Hearings Division clearly has jurisdiction to review the substantive order of the Workers' Compensation Division, however, and the employer's motion to dismiss cannot be granted on the basis of lack of jurisdiction.

Pursuant to OAR 436-001-0170(1), I may reach the disposition of this matter in any manner that will achieve substantial justice. In the present case, in which there is no substantial disagreement regarding the facts pertinent to a *de novo* decision, I conclude that a hearing involving the receipt of testimony under oath is unnecessary. The parties' disagreement here involves solely an interpretation of the effect of the provisions of a Claim Disposition Agreement (CDA) entered into by the parties. There is no factual dispute regarding whether that agreement, in fact, existed. Nor is there a dispute regarding any other fact necessary for a decision regarding claimant's request for penalties.

**FINDINGS OF FACT**

Claimant compensably injured her right shoulder in January of 2004. The employer accepted her claim for right elbow medial epicondylitis on March 17, 2004 and closed it with an award of permanent partial disability compensation on April 11, 2004. Claimant filed a claim for aggravation of her accepted condition on May 18, 2005. She also filed a claim for a new

medical condition involving each of her arms. The employer issued a denial of both claims on July 15, 2005. The parties entered into a Disputed Claim Settlement (DCS), which was approved on November 10, 2005. Through the agreement, claimant agreed to a dismissal of her request for hearing regarding the aggravation and new claim denials in exchange for a sum of money. On the same date, the Board approved the parties' Claim Disposition Agreement (CDA), whereby claimant agreed to release her right to certain workers' compensation benefits regarding her claim for an award of permanent partial disability compensation for her accepted right arm condition. Among those released rights were penalties and associated attorney fees under ORS 656.262(11), .268, 307, .308, .382, .385, .386 and .388. In fact, all rights under the workers' compensation law were released via the CDA, except for claimant's right to medical services related to her accepted right arm claim. Claimant was represented by an attorney at the time she entered into the DCS and CDA agreements.

The parties' CDA document included the provision that the employer was to submit payment of the settlement proceeds to claimant within 14 days of the employer's receipt of the Board's postcard documenting the approval of the agreement. Claimant received the bulk of her settlement proceeds more than 14 days after the postcard from the Board was received. She, therefore, sought the assessment of a penalty by the Workers' Compensation Division's Compliance Section. On January 3, 2006, the Compliance Section issued an order denying claimant's request. Claimant requested a hearing from the Section's order on February 1, 2006. On February 16, 2006, the Section referred this matter to the Board's Hearings Division pursuant to ORS 656.704(2)(A).

### CONCLUSIONS OF LAW AND OPINION

The employer has moved for the dismissal of claimant's request for hearing on the ground that the Hearings Division lacks subject matter jurisdiction over the present controversy. Specifically, the employer cites ORS 656.236(1)(a), which provides the vehicle for the release of certain rights on a claim. As previously noted, however, the Hearings Division obtains jurisdiction under ORS 656.704(2)(a) to review the Division's substantive order. The employer's motion to dismiss, therefore, is denied.

With regard to the merits of claimant's issue regarding a penalty, the Division's order held that although a penalty might otherwise have been available to claimant because of the employer's apparent untimely payment of the CDA proceeds, the right to seek that penalty had been released via the same CDA. I conclude that the Division's order was correct.

Section 17 of the parties' CDA provided that payment of the settlement proceeds should occur within 14 days after the employer received indicia of the Board's approval. It is upon that section that claimant relies in asserting her claim for a penalty. As claimant acknowledges, however, Section 12 of the same agreement specifically provides for the release of claimant's right to pursue penalties under ORS 656.262(11). A CDA is a contractual arrangement and I am to review the provisions of a CDA using the same rules of construction that apply to contracts. *Trevitts v. Hoffman-Marmolejo*, 138 Or App 455 (1996).

In *Matthew J. Rigel*, 57 Van Natta 2027 (2005), the claimant's aggravation rights had expired in November 2000. The parties entered into a CDA in 2001, whereby the claimant fully released all benefits regarding the injury claim except medical services and assistance from the Re-employment Assistance Reserve. With those exceptions, the CDA released the carrier "from responsibility for said benefits payable for all conditions that are presently compensably related to this claim as well as any other conditions that may be subsequently determined to be compensably related to this claim." Enforcement of the CDA provisions went to a hearing before an ALJ and the judge awarded an assessed attorney fee for services related to setting aside the carrier's compensability denial. The carrier, however, argued that an award of attorney fees was precluded by the CDA's provision for the release of all rights, except those involving medical benefits.

The Board reasoned that because the claimant did not "otherwise specify" in the CDA that he retained the right to future attorney fees related to denials of compensability of future medical services, the claimant was not entitled to an attorney fee award. *Id.* at 2032; *see Leslie C. Matkins*, 54 Van Natta 2194 (2002) where CDA did not retain right to attorney fees for future medical services disputes, the claimant was not entitled to an attorney fee for prevailing over current condition denial.

In *Rash v. McKinstry Co.*, 331 Or 665 (2001), the Supreme Court held that the phrases "matters regarding a claim," and "all matters \* \* \* potentially arising out of claims," contained in ORS 656.236(1) were intended to provide that a CDA resolves all matters that, in the future, could arise out of a claim, not merely the matters currently known to arise out of a claim. *Id.* at 672-73.

Here, claimant did not retain her rights to any future claims arising from her accepted condition, except the right to related medical services. To the contrary, she released her claim for specific benefits, including the right to seek penalties under ORS 656.262(11). As previously noted, ORS 656.236(2) provides that "an order approving the disposition of a claim pursuant to this section is not subject to review." Therefore, the CDA at issue, which has been duly approved by the Board, is not subject to review. Because claimant released all future rights to seek penalties under ORS 656.262(11), as well as other statutes, I conclude that she is not entitled to the relief she seeks. The Division's order, therefore, will be affirmed.

### **ORDER**

The employer's Motion to Dismiss is denied.

The Workers' Compensation Division Compliance Section's order dated January 3, 2006 is approved. The relief sought by claimant is denied.