

In the ORS 656.262(11) Penalty Dispute of

Michael L. Flower, Claimant

Contested Case No: 07-012H

PROPOSED & FINAL ORDER

October 10, 2007

MICHAEL L. FLOWER, Petitioner

SAIF CORPORATION, Respondent

Before Kate Donnelly, Administrative Law Judge

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on December 19, 2006 by the Investigations and Sanctions Unit of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (DCBS or Director). On January 18, 2007, WCD referred the matter to the Workers' Compensation Board (WCB) Hearings Division.

A hearing was scheduled to convene on July 31, 2007, in Eugene, Oregon before Administrative Law Judge Kate Donnelly. Claimant is represented by Christine Jensen. The employer, Myrmo & Sons, Inc., and its insurer, SAIF Corporation (SAIF), are represented by Dennis Ulsted. The hearing did not take place after the parties agreed that the matter be decided upon the documentary record in lieu of hearing. Claimant waived appearance in this matter. There were no recorded proceedings. The record closed on September 18, 2007, following receipt of claimant's reply argument.

ISSUES

1. Whether claimant is entitled to a penalty for an unreasonable delay in payment of temporary disability compensation due to a change in claimant's average weekly wage calculation.
2. Whether claimant is entitled to an attorney fee of \$300.00, rather than \$150.00, for prevailing on the penalty issue of unreasonable delay in reimbursement of mileage.
3. Whether claimant is entitled to a penalty for an unreasonable delay in payment of temporary partial disability (TPD) for the period from March 1, 2007 to April 6, 2007.
4. Jurisdiction. Specifically, whether the WCB Hearings Division has jurisdiction over the newly raised issue of a penalty for an allegedly unreasonable delay in payment of TPD for the period from March 1, 2007 to April 6, 2007.

EVIDENTIARY RULINGS

On February 1, 2007, WCD submitted Exhibits 1 through 20. On August 28, 2007, claimant submitted supplemental Exhibits 21 through 25 regarding the newly raised issue of a penalty for an unreasonable delay in payment of TPD for the period from March 1, 2007 to April

6, 2007.

On September 6, 2007, SAIF objected to claimant's submission of Exhibits 21 through 25 on the grounds that: (1) claimant failed to comply with the administrative rule for submitting additional evidence (OAR 436-001-0240(2)); *i.e.*, claimant did not submit these exhibits within 28 days before the July 31, 2007 hearing; and/or (2) these exhibits regard an issue that was not previously raised before the WCD, or the WCB Hearings Division.

On September 17, 2007, claimant submitted supplemental Exhibit 26 regarding the newly raised issue of a penalty for an unreasonable delay in payment of TPD for the period from March 1, 2007 to April 6, 2007.

Because this matter involves penalty/attorney fee issues pursuant to ORS 656.262(11), I have *de novo* review of the Director's December 19, 2006 Order. *See* OAR 436-0001-0225(1). However, for the reasons expressed below, I conclude that I do not have jurisdiction over the newly raised penalty issue of unreasonable delay in payment of TPD for the period from March 1, 2007 to April 6, 2007. Therefore, Exhibits 21 through 26 are not relevant to the issues raised and decided by the Director's December 19, 2006 Order. Accordingly, Exhibits 21 through 26 are not admitted into the documentary record.

FINDINGS OF FACT

The Findings of Fact in the December 19, 2006 Administrative Order are accepted and incorporated into this Proposed and Final Order, with the following supplementation.

The claim was initially classified as non-disabling (Ex. 17-1). When claimant underwent surgery on August 10, 2006, the claim became disabling and time loss payments became due within 14 days of the attending physician's authorization. SAIF paid the first installment of time loss on August 23, 2006, based on the average weekly wage given on the 801 form. However, on August 28, 2006, in order to be sure the time loss rate was correctly calculated, the SAIF claims adjuster requested the payroll records for the period from April 13, 2004 through April 12, 2005 (Exs. 3; 17-1). The employer faxed these records to SAIF on September 28, 2006 (Exs. 5-1; 17-2). The SAIF claims adjuster recalculated the correct average weekly wage on October 10, 2006 (Exs. 7; 17-2). By letter dated October 11, 2006, claimant was advised of the corrected time loss rate (Ex. 8). On October 18, 2006, SAIF paid claimant the underpayment of \$236.88 for the period from August 10, 2006 to September 28, 2006 (*See* Exs. 16; 17-2).

On October 23, 2006, claimant requested penalties be imposed by the Sanctions Unit for SAIF's allegedly late payment of benefits (Ex. 9). The issues raised and addressed by the December 19, 2006 Administrative Order were: (1) whether SAIF unreasonably delayed paying claimant temporary disability compensation due to a change in the average weekly wage calculation; and (2) whether SAIF unreasonably delayed reimbursing claimant for mileage and net loss wages after attending an independent medical examination (Ex. 19-1).

CONCLUSIONS OF LAW AND OPINION

Jurisdiction/Whether claimant is entitled to a penalty for an unreasonable delay in payment of temporary partial disability (TPD) for the period from March 1, 2007 to April 6, 2007.

Claimant seeks a penalty and related attorney fee under ORS 656.262(11)(a) for SAIF's allegedly unreasonable delay in payment of TPD from March 1, 2007 to April 6, 2007. This issue was not addressed by the December 19, 2006 Order. Additionally, claimant did not raise this issue in his Request for a Contested Case Hearing (*See* Ex. 20).

SAIF responds that the WCB Hearings Division does not have jurisdiction over the newly raised penalty/attorney fee issue. I agree, based on the following reasoning.

ORS 656.704 defines the respective authority of the Director and the WCB. "Matters concerning a claim" are within the jurisdiction of the Board. ORS 656.704(3)(a). Alternatively, the Director's jurisdiction is limited to specifically enumerated matters. *Id.*

Furthermore, ORS 656.262(11)(a) provides:

"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).

The Director's Order dated December 19, 2006, addressed penalty/attorney fee issues under ORS 656.262(11)(a). There were no "matters concerning a claim" issues raised by claimant. Consequently, the Director had exclusive jurisdiction over the issues raised. ORS 656.262(11)(a). Moreover, the Order did not address the penalty issue that claimant raises for the first time in his appeal of the December 19, 2006 Order. In fact, the December 19, 2006 Order could not have addressed the newly raised penalty issue because the time period involved did not occur until March 1, 2007 to April 6, 2007.

Claimant's appeal of the December 19, 2006 Order does not raise any issues involving "matters concerning a claim." However, Claimant argues that the WCB has jurisdiction to address the new penalty issue because the WCB has jurisdiction to review the Director's Order.

I conclude that the only issues before me are those that the Director addressed in the December 19, 2006 Order. Those issues were solely penalty/attorney fee issues under ORS 656.262(11)(a). The character of the issues raised in the December 19, 2006 Order does not change simply because it has been appealed to the WCB for review. Consequently, I find that my review is limited to those issues that were addressed by the Director in the December 19, 2006 Order.¹ Therefore, I decline to review the newly raised issue of a penalty/attorney fee under ORS 656.262(11)(a) for SAIF's allegedly unreasonable delay in the payment of TPD from March 1, 2007 to April 6, 2007.

Whether claimant is entitled to a penalty under ORS 656.262(11)(a) for an unreasonable delay in payment of temporary disability compensation due to a change in claimant's average weekly wage calculation.

Claimant contends that the Director erred in concluding that SAIF did not unreasonably delay determining claimant's average weekly wage based on the employer's payroll records. Specifically, claimant argues that the employer had the payroll records in its possession, and did not provide these records until a month after SAIF requested them. Claimant further contends that it was unreasonable that it took 51 days for SAIF to issue a time loss check from the time it requested the payroll records to October 18, 2006 the date the check issued.

SAIF responds that the Director correctly found that SAIF did not unreasonably delay correcting the time loss rate. Specifically, SAIF argues that the error was not discovered until September 28, 2006, when it received the payroll records, and it corrected the time loss rate within 14 days of discovery. SAIF further argues that the case law does not impose a strict liability standard; *i.e.*, from the date of SAIF's request for payroll records, but rather, the 14-day period is calculated from the date of discovery of the error.

Claimant, citing *Nix v. SAIF*, 80 Or App 656 (1986), *rev den* 303 Or 158 (1987), responds that the employer's knowledge should be imputed to SAIF when determining whether there was an unreasonable delay in the payment of compensation. Claimant argues that SAIF's miscalculation of time loss rate was due to the incorrect provision of information by the employer on the 801 form. Additionally, claimant contends that the employer was delinquent in providing the payroll records to SAIF.

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 December 19, 2006 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 fact finder is

¹ There is nothing to prevent claimant from seeking Director's review regarding a penalty/attorney fee pursuant to ORS 656.262(11)(a) for the alleged delay in payment of temporary partial disability from March 1, 2007 to April 6, 2007.

persuaded that the facts are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

Here, the Sanctions Unit determined that no penalty was due. Applying OAR 436-060-0150(6), the Director found that the first payment of time loss was due no later than August 24, 2006 (10 days after claimant's surgery on August 10, 2006). Finding that SAIF mailed the first payment on August 23, 2006, the Director determined that SAIF's first payment was timely (Ex. 19-2).

Regarding the average weekly wage issue, the Director found that SAIF corrected it and issued an adjustment check in a timely fashion. The Director relied on SAIF's statement that there was no information in the claim to indicate the wages varied or that the average weekly wage reported on the 801 form was incorrect. Moreover, there was no dispute regarding the time loss rate and claimant had not requested review or reconsideration of the time loss rate (Ex. 19-3).

In *Nix v. SAIF*, 80 Or App 656 (1986), the court applied ORS 656.262(11)(a) and determined that a penalty was justified where the insurer paid interim compensation untimely due to the employer's failure to report an injury. The court imputed the employer's knowledge to the insurer where the employer engaged in unreasonable conduct by either failing to report an injury or providing untruthful information to the insurer.

Here the employer reported the claim to SAIF immediately when claimant signed the 801 form on April 14, 2005 (Ex. 1). Moreover, claimant completed his portion of the claim form and indicated that his regularly scheduled days off were Saturday and Sunday and that his shift was from 6 a.m. to 4 p.m. (Ex. 1). Claimant did not report overtime hours worked or irregular shifts and hours. The employer reported claimant's weekly wage as \$848.00.

I agree with the Director that there was nothing on the 801 form that would have caused SAIF to think the information was inaccurate. Therefore, SAIF's conduct in paying time loss based on the average weekly wage given on the form was not unreasonable on SAIF's part. However, the question remains whether the employer's actions were unreasonable in failing to initially report that claimant worked overtime hours and/or whether the delay in providing the requested payroll records was unreasonable.

First, I conclude that the employer did not act unreasonably in failing to initially report on the 801 form that claimant worked overtime hours. ORS 656.262(3)(a) requires employers to immediately, and not later than five days after notice of an injury, report the claim to the insurer. The information that the employer's report must include does not include payroll or wage information. See ORS 656.262(3)(a)(A) through (E). When the claim became disabling in August 2006, SAIF requested the payroll information. At that time, the employer was required to provide this information to SAIF. See ORS 656.262(11)(a)(E). Here, the employer met its obligation to provide the requested information on September 28, 2006.

The next issue is whether the employer provided this information within a reasonable time. SAIF requested the information on August 28, 2006 (Ex. 3). The employer faxed it to

SAIF on September 28, 2006 (Ex. 5). I found nothing in the statute or administrative rules requiring a response within a specific time period. Consequently, I must determine whether a one-month delay in reporting the payroll information was unreasonable. I conclude that it was not unreasonable, based on the following reasoning.

The August 28, 2006 letter from SAIF to the employer requested complete and accurate wage information for the period from April 13, 2004 through April 12, 2005. There is no indication that this information was readily available to the employer. Moreover, this period of time is presumably not the same as the yearly wages contained on claimant's W-2 tax form. Finally, other information was requested by SAIF as well. Under such circumstances, I do not have enough information to conclude that the employer unreasonably delayed in providing the requested information to SAIF.

Accordingly, that portion of the December 19, 2006 Administrative Order that declined to assess a penalty under ORS 656.262(11)(a) for unreasonably delay determining claimant's average weekly wage is affirmed.

Attorney Fee

Claimant seeks an attorney fee of \$300.00, in lieu of the \$150.00 fee awarded by the Director, for an unreasonable delay in processing claimant's mileage reimbursement request. Claimant contends that, given the skill and experience of the attorney involved in this case, a fee of \$300.00 is reasonable.

SAIF took no position regarding claimant's request for an increased attorney fee.

The Director awarded an assessed attorney fee of \$150.00 after considering the factors set forth in OAR 438-015-0110. The factors particularly considered were the complexity of the issue involved (a penalty for late payment of mileage); the time spent on the case (one-hour); and the benefit secured for the claimant (a penalty of 25 percent on the mileage portion of the reimbursement request).

I conclude that the assessed attorney fee of \$150.00 is a reasonable fee for the reasons expressed by the Director. Additionally, claimant prevailed on only one of the penalty issues raised. Moreover, the benefit to the claimant was a penalty of 25 percent on a mileage reimbursement amount of \$111.25 (*See Ex. 18*).

Under such circumstances, I affirm the \$150.00 assessed attorney fee awarded by the December 19, 2006 Administrative Order.

ORDER

IT IS HEREBY ORDERED that the December 19, 2006 Administrative Order is affirmed in its entirety.