
In the Penalty Dispute of
Juan A. Sanchez, Claimant
Contested Case No: 07-083H

PROPOSED & FINAL ORDER

November 28, 2007

COMMERCE AND INDUSTRY INSURANCE CO., Petitioner
JUAN A. SANCHEZ, Respondent

Before Geoffrey G. Wren, Administrative Law Judge

Pursuant to notice, a hearing was scheduled for September 27, 2007 before the undersigned Administrative Law Judge. Prior to that time, the parties, through counsel, notified the Hearings Division that this matter could be submitted on the documentary record with written closing arguments. Donald M. Hooton represents claimant. The employer, Cal-Am Properties, Inc., and its insurer, AIG Claims Services, Inc., are represented by Jerald P. Keene. The record closed on November 27, 2007.

Exhibits 1-26 are admitted.

ISSUES

Assessment of ORS 656.262(11) Penalty and Fees: The insurer contends that the Director erred in assessing a penalty and fees under ORS 656.262(11).

Amount of ORS 656.262(11) Attorney Fees: Claimant contends that his counsel should be awarded additional attorney fees.

STATEMENT OF FACTS

Claimant has an accepted claim for L3-4 and L5-S1 disc herniations. That claim closed on December 29, 2005, with the employer awarding permanent partial disability (“PPD”) benefits of 17 percent whole person impairment and 22 percent work disability. That award totaled \$23,982.18. Claimant sought reconsideration, and the Director awarded 15 percent whole person impairment and 15 percent work disability. That award totaled \$27,069.30. Claimant requested a hearing. (*See Ex. 1*).

By Opinion and Order dated July 25, 2006, claimant was awarded 19 percent whole person impairment and 39 percent work disability. The order identified Donald Hooton (“Hooton”) as claimant’s counsel. The order did not state the total monetary amount of benefits payable. The order approved a fee of 25 percent of the increased permanent disability, payable out of claimant’s compensation, “and directly to claimant’s attorney.” (Ex. 1). The order became final by operation of law.

Pursuant to OAR 436-060-0150(8), the insurer issued claimant periodic payments of his PPD award. (Ex. 25). On August 8, 2006, Hooton sent insurer’s counsel a completed form application for payment of a the PPD award in a lump sum. The form identified Hooton as

claimant's attorney. Claimant checked the box stating: "I request approval of a lump-sum payment of the remaining balance of my award." In the caption over that text, claimant wrote that the PPD award amounted to \$45,448.38. (Ex. 2). Hooton sent the application under a cover letter signed by him wherein he identified claimant's current address and stated: "Please forward claimant's portion of the PPD award to that address." The letter did not list Adriana Ortega as a member of Hooton's firm. (Ex. 3).

Insurer's counsel received the August 8, 2006 application and cover letter the next day. The insurer neither paid claimant's award in a lump sum nor submitted the lump sum application to the Director within 14 days.

An assistant for the insurer's attorney called Hooton's assistant on September 5, 2006. She stated that the insurer owed only \$27,069.30, not \$45,448.38 and wanted a call back from Hooton or his assistant. A handwritten note, apparently by Hooton, stated: "\$34,845.81 A/F of 1,944.13." (Ex. 4). Hooton's assistant called the assistant for the insurer's attorney to ask that she fax the lump sum application back so that Hooton could initial a change in the PPD amount to \$34,845.81. (Ex. 5). The assistant to the insurer's attorney faxed the application to Hooton's office on September 5, 2006. Hooton initialed a change showing the amount of PPD due to be \$34,845.81. He then faxed the application back. (Exs. 6, 7, 8).¹

On September 7, 2006, the insurer sent a check to Hooton in the amount of \$26,030.97 payable jointly to claimant and Adrianna Ortega ("Ortega"). (Ex. 10). Hooton returned the check to the insurer's attorney, asking that the insurer issue two checks, one to claimant for his portion of the PPD award and one to Hooton's office for the attorney fee portion. (Ex. 14).

On September 30, 2007, the insurer sent a check to Hooton in the amount of \$26,214.85 payable jointly to claimant and Hooton. On an attached check stub under the title "Total to Date" was the amount \$43,139.79. (Ex. 12). Hooton mailed the check to claimant under a cover letter asking him to sign and return it, as the check had been made jointly payable. (Ex. 13).

Hooton wrote insurer's attorney on October 26, 2006, outlining the sequence of events to that date. He stated that he had sent the check to claimant for endorsement rather than returning it to the insurer to avoid further delay. He asked that the insurer explain the basis for the \$43,139.79 figure on the September 30, 2006 check stub. (Ex. 14).

Claimant endorsed the joint check and returned it to Hooton. Hooton deposited the payment into his trust account and issued claimant a check for the PPD due him. (Ex. 25).

On January 10, 2007, Hooton wrote the Director to request assessment of sanctions. (Ex. 15). Following receipt of the insurer's response, the Director issued a Proposed and Final Order Assessing Penalty of an Additional Amount Pursuant to ORS 656.262(11)(a). The Director

¹ The record includes a fax cover sheet from the assistant to insurer's attorney to the assistant to claimant's attorney stating that a revised application was faxed on September 6, 2006. (Ex. 9). The record does not clarify which document was faxed. As best I can discern from scrutiny of Exhibits 7 and 8, Hooton's office faxed the lump sum application with the \$34,845.81 figure on September 5, 2007. The parties apparently understood that the \$34,845.81 figure did not include benefits already paid. (*See* Ex. 9, so noting).

found that the insurer unreasonably had delayed payment of claimant's compensation. The Director assessed a penalty under ORS 656.262(11)(a) in the amount of 25 percent of the lump sum PPD benefits due and awarded Hooton a \$1,000 attorney fee. (Ex. 25).

CONCLUSIONS OF LAW AND OPINION

Appropriateness of Assessment of ORS 656.262(11) Penalty and Fees

The Director assessed a 25 percent penalty and awarded a \$1,000 attorney fee pursuant to ORS 656.262(11) for the insurer's delay in payment of claimant's lump sum PPD award. The insurer challenges that award as not clearly justified in the Director's order. I review that order *de novo*. OAR 436-001-0225(1).

OAR 436-060-0060 governs applications for payment of lump sum PPD awards. Subsection (4) of that rule provides if an insurer agrees with a worker's request for a lump sum payment, the insurer "must make the lump sum payment within 14 days of receipt of the signed application." Subsection (5) provides that if the insurer disagrees with the worker's request, the insurer "must submit the lump sum application with the reason for disagreement to the director within 14 days of receipt of the signed application."

The insurer received claimant's original lump sum application on or about August 9, 2006. (Exs. 2, 3).² That application incorrectly stated the total amount of PPD benefits due claimant. The insurer neither paid the PPD benefits actually due in a lump sum nor sent the Director the lump sum application with a reason for not paying within 14 days as required by OAR 436-060-0060. The insurer contends that it did not in fact disagree with claimant's application for the lump sum payment. Rather, claimant's error in stating the amount of PPD benefits resulted in a situation that falls between the two contemplated by the rule, i.e., paying the PPD benefits in a lump sum or sending the claimant's application to the Director. The insurer contends that it should not be penalized for acting reasonably in trying to figure out the correct amount of PPD due.

Three problems undercut the insurer's argument. First, OAR 436-060-0060 does not expressly permit the "middle way" urged by the insurer. The rule requires an insurer to either pay the PPD due in a lump sum or submit the matter to the Director.

Second, even if a "middle way" could be read into the rule, the requirement that the insurer respond in 14 days at the least would mean that the insurer would have to take some action within that time. The insurer failed to take any action within 14 days of receipt of the lump sum application. The insurer offers no explanation for this delay.

Third, the insurer's argument hinges on the premise that it acted reasonably, all things considered, in light of the fact that claimant stated the incorrect amount of PPD benefits due. This argument disregards the plain terms of OAR 436-060-0060(5). If an insurer disagrees that the amount claimed is due, the insurer must send the application to the Director with its

² Hooton sent insurer's counsel the application under cover letter dated August 8, 2006. The cover letter has a receipt date of August 9, 2006.

disagreement. The claimant, in any event, is not charged with responsibility for determining what benefits in fact are due. Processing of claims and providing compensation for a worker is the responsibility of the insurer or self-insured employer. ORS 656.262(1). If the insurer disagreed with claimant's request because it lacked the ability to calculate the correct amount of benefits due, the procedure required by OAR 436-060-0060(5) – submission of the matter to the Director – would have fixed the problem.

The insurer finally issued payment of benefits on September 7, 2006. When it did so, however, the insurer unreasonably caused further delay. The insurer made the check jointly payable to claimant and Adrianna Ortega, an attorney who worked for Hooton's firm at a prior time.³ The insurer contends that it first received notice that Ortega no longer worked for Hooton's firm when Hooton returned the check and requested issuance of two checks. Why the insurer takes this position is unclear. The Opinion and Order awarding claimant additional PPD identified Hooton as claimant's counsel. (Ex. 1). Hooton filed the lump sum request. The request identified Hooton as claimant's attorney. (Ex. 2, 3). The cover letter under which Hooton filed the request did not list Ortega as part of Hooton's firm. (Ex. 3).

The insurer argues that given the terms of the retainer agreement signed by claimant, ORS 656.331 and OAR 436-060-0015 required it to issue a check payable to Ortega. Neither the statute nor the rule so state. Rather, they pertain to notice requirements once claimant's counsel has given "notice of representation," whatever the form of notice. The retainer agreement discussed by the parties is not an exhibit and is not in the hearings file.⁴ Regardless what it says, the record clearly identified Hooton as claimant's counsel by August 8, 2006. By the time the insurer first issued payment on September 7, 2006, no reasonable basis lay for it to have issued a check payable to Ortega.⁵

Further, no reasonable basis lay for the insurer to issue a check jointly payable in the first place. The insurer argues that it is permissible to issue checks jointly payable to claimant and counsel. That may be true as a general proposition, but it is irrelevant here. The July 25, 2006 Opinion and Order awarding claimant increased compensation stated that the approved attorney fee was to be paid "directly to claimant's attorney." (Ex. 1). The insurer offers no persuasive explanation why disregarding that order could be considered reasonable.

Still more remarkably, the insurer persisted in issuing a check jointly payable to claimant and counsel after Hooton requested separate checks. Again, the insurer offers no persuasive explanation why this conduct could be considered reasonable.

³ Citing OAR 436-060-0150(1), the Director reasoned that unreasonable delay arose because the insurer sent the check to Hooton. I need not determine whether that rule requires payment directly to a claimant, as I find that the insurer unreasonably delayed payment of compensation for other reasons.

⁴ Hooton submitted a retainer agreement to the Director. (Ex. 25). The Director did not forward that document to the Hearings Division.

⁵ The parties discuss the retainer agreement signed by claimant. The agreement is not an exhibit and is not in the hearings file, although Hooton sent the document to the Director. (*See* Ex. 25). Claimant states that the retainer agreement identified the law firm as Hooton, Wold, & Okrent, LLP. Regardless of the precise text of the agreement, it was clear by August 9, 2006 that Hooton represented claimant.

Considering the totality of the record, I find that the insurer acted unreasonably in three respects. The insurer failed to respond to the August 8, 2006 application for lump sum payment within 14 days. The insurer issued a check payable to an attorney who did not represent claimant at hearing or at any time thereafter, and the insurer issued checks jointly payable despite a final order and request from counsel to the contrary. The insurer's unreasonable conduct resulted in substantial delay in payment of benefits. The Director did not err in assessing the full 25 percent penalty and awarding attorney fees under ORS 656.262(11).

Amount of ORS 656.262(11) Attorney Fees

Claimant contends that the award of a \$1,000 attorney fee does not reasonably compensate counsel given insurer's appeal of the Director's order. I agree. ORS 656.262(11) requires "giving primary consideration to the results achieved and to the time devoted to the case" in assessing a fee. Counsel's efforts have resulted in protection of the full 25 percent penalty, and the record reflects that counsel has devoted meaningful time in protecting that award. Considering these factors in addition to other factors in OAR 438-015-0010(4), I find that \$2,000 is a reasonable fee.

I am nonetheless not able to award additional fees at this time because the hearings file does not contain a signed retainer. Although this does not appear to be the fault of counsel for claimant, a retainer agreement is required for me to award fees. OAR 438-015-0010(1).

ORDER

IT IS HEREBY ORDERED that the Director's May 25, 2007 order is affirmed as modified herein.