

FINDINGS OF FACT

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2 The claimant was compensably injured on March 8, 1999. The accepted conditions are
3 multiple left rib fractures, left pneumothorax. (Ex. 11-1).

4 On August 11, 1999, a pulmonary function test was performed by Robert Unitan, MD.
5 Dr. Unitan interpreted the results as showing only mild airflow obstruction and lung volumes
6 within normal limits. (Ex. P1).

7 On September 23, 1999, the department issued a Determination Order which awarded
8 claimant temporary disability and permanent partial disability¹. Yellow Freight was ordered to
9 pay claimant \$4,409.60. (Ex. 2). On October 12, 1999, Yellow Freight filed a Request for
10 Reconsideration of the September 23, 1999 Determination Order. (Ex. 3). An Amended
11 Request for Reconsideration was filed on November 16, 1999.

12 On November 16, 1999, the claimant contacted WCD by telephone to discuss the status
13 of his claim during the reconsideration process. He notified WCD that even though he had
14 received an award on September 23, 1999, Yellow Freight had not made payment. Following
15 that conversation, a WCD employee contacted the insurer's attorney and inquired as to the status
16 of payment on the September 23, 1999 order. (Ex. 7-2). On November 24, 1999, the worker
17 again contacted WCD and indicated he wanted to file for a penalty against the insurer for failure
18 to pay the September 23, 1999 award. (Ex. 7-3). On November 30, 1999, claimant filed a
19 request for penalties against insurer with WCD for insurer's late payment of the Determination
20 Order dated September 23, 1999. (Ex. 8).

21 On December 13, 1999 WCD's Compliance Section (Compliance) sent a Notice to
22 Insurer informing of the worker's complaint, requiring documentation of the date of payment of
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24 ¹ The medical basis for this award is unclear. The evaluator's worksheet which accompanies the
25 award lists a primary part code of Left 850 Lung with 10 Total Percent for 32 Total Degrees
Unscheduled impairment. The record contains none of the medical reports used to reach this
determination. (Ex. 1).

1 the September 23, 1999 award, and requesting explanation for any delays. (Ex. 9). On January
2 3, 2000, insurer submitted a response to WCD stating that as of that date no payment had been
3 made to claimant; insurer explained the delays as follows:

4 “It is Yellow Freight’s belief that the permanent disability award presented
5 on the September 23, 1999 Determination Order is not founded in the medical
6 record to date. We have requested Reconsideration which has now been
7 postponed through February 15, 2000. As you may be aware, there is little
8 recourse Yellow Freight has to recoup its payment of the \$4,409.60 award if the
9 Department overturns the Order on Reconsideration. It is Yellow Freight’s belief
they have complied with the administrative and legal requirements prior to the
Department order of September 23, 1999 and that the order is not a fair
representation of any disability Mr. Ward may or may not have from his industrial
event of March 8, 1999.” (Ex. 10-1).

10 On January 19, 2000, a medical arbiter’s examination was performed by Michael S.
11 Lewis, MD. Based on the results of that examination, an Order on Reconsideration issued on
12 February 11, 2000. The order reduced claimant’s award of permanent partial disability to none.
13 (Ex. 11).

14 On May 15, 2000, the Workers’ Compensation Division, Compliance Section
15 (Compliance), issued a Proposed and Final Order Assessing Penalty of an Additional Amount,
16 PA 0240-99. The order assessed a penalty of 25 percent of the amount due to claimant after
17 finding that Yellow Freight unreasonably failed to timely issue payment for permanent partial
18 disability awarded in the September 23, 1999 Determination Order. (Ex. 12). Yellow Freight
19 contests this penalty. (Exhibit 13).

20 **CONCLUSIONS OF LAW AND REASONING**

21 Yellow Freight’s argument at hearing is essentially the same argument made in its
22 January 3, 2000 response to compliance’s inquiry. Yellow Freight argues that there was
23 “obvious error” committed in the September 23, 1999 Determination Order, and it was not
24 required to pay disability benefits because Yellow Freight had filed a Request for
25 Reconsideration of the order with a good faith belief in its success. Insurer believes it was

1 reasonable to refuse to pay the ordered benefit under such circumstance and argues that the
2 department erred by not taking the reasonability of their behavior into account. Claimant, on the
3 other hand, simply asks that I rely upon the argument set out in Compliance's order and affirm.

4 ORS 656.262(11) provides for a penalty if the insurer or self-insured employer
5 unreasonably delays or unreasonably refuses to pay compensation or delays acceptance or denial
6 of a claim. It further provides that "the director shall have exclusive jurisdiction over
7 proceedings regarding solely the assessment and payment of the additional amount described in
8 this subsection." Whether a delay in payment is reasonable or unreasonable in a particular case
9 commonly involves both factual and legal questions. *Neighbors v. Blake*, ____ Or App ____
10 (2000). In other cases, however, reasonableness or unreasonableness may be determined as a
11 matter of law. *Finley v. SAIF*, 34 Or App 129, 132(1978). This is such a case.

12 OAR 436-060-0150(7)(c) states in relevant part:

13 “(7) Permanent disability and fatal benefits shall be paid no later than the 30th day
14 after:

15 “(c) The date of any department order which orders payment of
16 compensation for permanent partial disability. A request for
17 reconsideration of a determination order does not stay payment of
18 permanent partial disability compensation ordered.”

19 By its explicit terms OAR 436-060-0150(7)(c) requires payment of permanent partial
20 disability benefits within 30 days of the date of a determination order awarding such benefits
21 regardless of any belief on the part of the employer as to the propriety of the determination order
22 or the likelihood that the determination order will be overturned by reconsideration.

23 Accordingly, the payment awarded to claimant on September 23, 1999 was due to claimant no
24 later than October 23, 2000. Where, as here, insurer has presented no circumstances justifying
25 its late payment outside of its good faith belief that it would succeed on appeal, OAR 436-060-
0150(7)(c) acts to make insurer's refusal to make payment unreasonable as a matter of law. No
reasonable fact finder could find that insurer's actions were reasonable in this instance and,

1 therefore, insurer's refusal to make the required payment was unreasonable as a matter of law.
2 *Neighbors*, supra. Compliance correctly found that Yellow Freight had unreasonably refused to
3 issue payment for permanent partial disability awarded by the September 23, 1999
4 Determination Order and a penalty was warranted under ORS 656.262(11).

5 **ORDER**

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7 IT IS HEREBY ORDERED that:

8 The Compliance Section's Proposed and Final Orders Assessing Penalty of an Additional
9 Amount, Order No. PA 0240 99, is affirmed.

10 DATED this _____ day of December, 2000.

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12 By: _____
13 Paul Vincent, Hearing Judge
14 Hearing Officer Panel
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1 **NOTICE OF REVIEW AND APPEAL RIGHTS**

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3 **As provided in ORS 183.460, the parties are entitled to file written exceptions, including**
4 **argument, to this Proposed and Final Contested Case Hearing Order. The exceptions must**
5 **be served on the parties and filed with the Administrator of the Workers' Compensation**
6 **Division at the address set forth below within 30 days following the date of service of this**
7 **order. Written responses to exceptions must be filed within 20 days of service of the**
8 **exceptions. Replies, if desired, must be filed within 10 days of service of the response.**

9 **If no exceptions are filed, this order shall become final upon expiration of 30 days following**
10 **the date of service on the parties.**

11 **After this order becomes final, you are entitled to judicial review pursuant to the**
12 **provisions of ORS 183.480. Judicial review may be obtained by filing a petition with the**
13 **Court of Appeals within 60 days from the date that this order becomes final.**

14 **Mail any exceptions and a copy of any petition for judicial review to:**

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**Technical Coordinator, Policy Section
Workers' Compensation Division
Department of Consumer and Business Services
350 Winter Street NE, Rm. 27
Salem, OR 97301-3879**