



1 **FINDINGS OF FACT**

2 In April 2000, claimant and insurer entered into a CDA concerning a compensable  
3 injury. (Ex. 1-5). The agreement specified that the insurer shall make payment within fourteen  
4 days after the Workers' Compensation Board (Board) mails its notice of approval. (Ex. 1-4).  
5 The Board mailed its notice of approval on May 2, 2000. (Ex. 2-1).

6 Insurer agrees and admits that payment of the CDA was due on May 16, 2000. On May  
7 26, 2000, claimant filed a request with WCD for assessment of a penalty. (Ex. 3). Insurer paid  
8 the amounts due under the CDA to claimant and claimant's attorney on May 31, 2000. (Ex. 7-2  
9 and 7-3). This was the first instance of late payment on the claim. (Ex. 9-3).

10 **CONCLUSIONS OF LAW AND REASONING**

11 Claimant requests assessment of a penalty under ORS 656.262(11)(a). The standard of  
12 review is *de novo*. OAR 436-001-0225(6).

13 **Assessment of Penalty**

14 ORS 656.262(11)(a) provides:

15 "If the insurer or self-insured employer unreasonably delays or  
16 unreasonably refuses to pay compensation, or unreasonably  
17 delays acceptance or denial of a claim, the insurer or self-  
18 insured employer shall be liable for an additional amount up to  
19 25 percent of the amounts then due. Notwithstanding any other  
20 provisions of this chapter, the director shall have exclusive  
21 jurisdiction over proceedings regarding solely the assessment  
22 and payment of the additional amount described in this  
23 subsection. The entire additional amount shall be paid to the  
24 worker if the worker is not represented by an attorney. If the  
worker is represented by an attorney, the worker shall be paid  
one-half the additional amount and the worker's attorney shall  
receive one-half the additional amount in lieu of an attorney fee.  
The director's action and review thereof shall be subject to ORS  
183.310 and 183.550 and such other procedural rules as the  
director may prescribe."

1           In *Neighbors v. Country Mutual Insurance Company*, 167 Or App (2000), the court  
2 assessed a penalty against an insurer for late payment of a CDA. In *Neighbors*, the court  
3 interpreted the terms of the CDA as if it were a contract and reasoned that if the CDA specifies a  
4 due date, any late payment properly subjects the insurer to an assessed penalty.

5           The Director has previously held that an insurer is properly assessed a penalty for late  
6 payment of a CDA. *Joe B. Drace*, 4 WCSR 132 (1999). Insurer argues that *Drace* was wrongly  
7 decided. I am bound by a previous Director’s Final Order as precedent. Accordingly, under  
8 *Neighbors* and *Drace*, insurer is liable for an assessed penalty for late payment of the CDA.

9   Amount of Penalty

10           The Compliance Section of WCD assessed a penalty equaling 15 percent of the CDA  
11 amount. Insurer contends that only 5 or 10 percent is warranted.

12           OAR 436-060-0155(7) provides:

13                   “The Director will use the matrix attached to these rules in  
14                   Appendix “B” in assessing penalties. When there are “no  
15                   amounts then due” upon which to assess a penalty, no penalty will  
                      be issued under this rule.”

16           Here, insurer paid the CDA fifteen days late. This was the first late payment violation.  
Under OAR 436-060-0155 Appendix “B”, a fifteen percent penalty is warranted.

17   Attorney Fee

18           In lieu of an attorney fee, insurer shall pay to claimant’s attorney 50 percent of the  
19 penalty out of, and not in addition to, the penalty amount. ORS 656.262(11).

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**ORDER**

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IT IS HEREBY ORDERED that:

Administrative order PA0096-00 dated September 13, 2000 is affirmed.

DATED this \_\_\_\_\_ day of March, 2001.

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Catherine P. Coburn,  
Administrative Law Judge  
Hearing Officer Panel

1 **NOTICE OF REVIEW AND APPEAL RIGHTS**

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

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

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

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

14 **Technical Coordinator, Policy Section**  
15 **Workers' Compensation Division**  
16 **Department of Consumer and Business Services**  
17 **350 Winter Street NE, Rm. 27**  
18 **Salem, OR 97301-3879**