

1 **BEFORE THE HEARING OFFICER PANEL**
2 **STATE OF OREGON**
3 **for the**
 DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
 WORKERS' COMPENSATION DIVISION

4 **In the Matter of the ORS 656.262(11)**)
5 **Penalty Dispute of Francisco Soto**) **PROPOSED AND FINAL ORDER**
6 RSG FOREST PRODUCTS, INC., Petitioner) Contested Case No H01-081
7 And) Claim No: OR99-00099
8 FRANCISCO SOTO, Respondent) Date of Injury: 08/20/99
) WCD File No: H948211
) Order No. H948211
9)

10 Claimant challenges a July 17, 2001 Order Denying Assessment of a Penalty pursuant to
11 ORS 656.262(11) issued by the Sanctions Unit of the Workers' Compensation Division (WCD),
12 Department of Consumer and Business Services. On September 27, 2001, Administrative Law
13 Judge Ella D. Johnson conducted a telephone hearing in the matter. Petitioner claimant Francis
14 Soto (claimant) was represented by attorney Aaron Clingerman. The respondent self-insurer
15 employer RSG Forest Products, Inc. (employer) was represented by attorney Scott Monfils.
16 WCD waived appearance at the hearing. No witnesses testified. The record closed on September
17 27, 2001.

18 The record of this proceeding, consisting of a tape recording of the hearing, all evidence
19 received, and all hearing papers filed, has been considered. The Findings of Fact and
20 Conclusions of Law are based on the entire record.

21 **ISSUE**

22 Whether the Sanctions Unit order correctly determined that claimant was not entitled to
23 assessment of a penalty under ORS 656.262(11) for the employer's failure to notify claimant and
24

1 his counsel of an overpayment off-set prior to deducting the off-set from the proceeds of a lump
2 sum disability payment.

3 **EVIDENTIARY RULING**

4 WCD's Exhibits 1-8 and employer's Exhibits 1A, 1B, 1D,¹ and 1E were admitted into the
5 record without objection.

6 **FINDINGS OF FACT**

7 A March 23, 2001 Notice of Closure (NOC) issued by the employer's claims processing
8 agent, Pinnacle Risk Management Services (Pinnacle), awarded claimant 42 percent permanent
9 partial disability payment (PPD) for his low back injury equal to \$25,982.72 minus an
10 overpayment of \$510.06 for a total PPD payment of \$25,472.66. (Ex. 1-1).

11 Claimant subsequently received two PPD payments. On May 16, 2001, claimant
12 requested a lump sum payment of his PPD. Pinnacle subsequently paid the PPD to claimant
13 minus an overpayment of \$510.06 and the two previous PPD payments. (Ex. 5).

14 On June 14, 2001, claimant's counsel inquired regarding the amount of the lump sum
15 payment and was advised about the deduction for the overpayment. By letter dated June 18,
16 2001, Pinnacle sent claimant's counsel a copy of the audit sheet, advising him about the
17 overpayment, and updating the status of his claim. (Ex. 2).

18 By letter dated June 20, 2001, claimant's counsel requested a penalty alleging that the
19 employer was not entitled to an off-set because Pinnacle failed to provide proper notice
20 concerning the off-set to claimant and his counsel. (Ex. 3).

21 Pinnacle's failure to provide an explanation to claimant and his counsel was inadvertent
22 and not consistent with Pinnacle's usual practice. (Ex. 5).

23 *////*

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1 **CONCLUSIONS OF LAW AND REASONING**

2 Inasmuch as the sole issue is whether claimant is entitled to a penalty for employer’s
3 failure to notify claimant and his counsel of an overpayment off-set prior to deducting the off-set
4 from the proceeds of a lump sum disability payment, jurisdiction lies with the director. ORS
5 656.262(11)(a). I review *de novo*. OAR 436-001-0225(6). The burden of proof falls upon the
6 proponent of that fact or position. ORS 183.450(2).

7 In its administrative order, WCD concluded that there was no penalty due under ORS
8 656.262(11) because there was no unreasonable refusal to pay compensation. Claimant
9 contended that in order to “perfect” its right to withhold a portion of the disability payment for
10 an overpayment off-set, employer must notify claimant and his counsel of the off-set and explain
11 why the off-set is warranted prior to the withholding pursuant to OARs 436-030-0020(12) and
12 436-060-0170. In support of his contention, claimant relies upon the legal principle of equitable
13 estoppel. However, he does not explain how the employer is estopped from withholding the
14 overpayment. Employer argues, and I agree, that the administrative rules require the employer to
15 notify claimant and his attorney but provide no sanction for the failure to timely do so and do not
16 require the employer to “perfect” the right to deduct an off-set for overpayment.

17 ORS 656.262(11)(a), provides in pertinent part that: “If the insurer *** unreasonably
18 delays or refuses to pay compensation, *** the self-insured employer *** shall be liable for an
19 additional amount of up to 25 percent of the amounts then due.” Here, like WCD, I find that
20 there was no unreasonable delay or refusal to pay compensation.

21 OAR 436-030-0020(12) addresses the types of adjustments that may be
22 made in the benefits paid to workers. It provides:

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¹ Claimant objected to employer’s Exhibit IC based on relevancy and the employer withdrew the exhibit.

1 “Insurers may allow adjustments of benefits awarded to the worker
2 pursuant to the documentation requirements of OAR 436-060-0170 for
the following purposes:

3 “(a) To recover payments for permanent disability which were
4 made prematurely;

5 “(b) To recover overpayments for temporary disability; and

6 “(c) To recover overpayments for other than temporary disability such as
7 prepaid travel expenses where travel was not completed, prescription
8 reimbursements or other benefits payable under ORS 656.001 to 656.794. “

9 Additionally, OAR 436-060-0170 addresses the process for recovery of overpaid
10 benefits. It provides:

11 “(1) Insurers may recover overpayment of benefits paid to a worker as
12 specified by ORS 656.268(13) and (15), unless authority is granted by
13 an Administrative Law Judge or the Workers' Compensation Board.

14 “(2) Insurers may recover an overpayment from any benefits currently
15 due on any claim the worker has with that insurer. Insurers shall
16 explain in writing the reason, amount and method of recovery to the
17 worker and the worker's attorney or to the worker's survivors.

18 “(3) When overpaid benefits are offset against monthly permanent
19 partial disability award payments, the recovery shall be from the total
20 amount of the award with the remainder of the award being paid out at
21 4.35 times the temporary total disability rate and no less than \$108.75,
22 starting with the first month's payment. “

23 I agree with WCD's reading of OAR 436-060-0170(2) that there is no specific time frame
24 within which the explanation of the offset must be made. Consequently, I conclude that, although
the explanation did not occur before the offset was taken, it did occur and there was no delay in
the actual payment or refusal to pay the compensation. The employer had the right to take the
offset. Claimant was not entitled to be paid the amount of the offset and there was no
compensation “due” claimant upon which to assess a penalty. Accordingly, WCD's order is
affirmed.

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ORDER

IT IS HEREBY ORDERED THAT: WCD’s order dated July 17, 2001 is affirmed.

DATED this _____ day of December 2001.

Ella D. Johnson
Administrative Law Judge
Hearing Officer Panel

NOTICE OF REVIEW AND APPEAL RIGHTS

As provided in OAR 137-003-0650, the parties are entitled to file written exceptions, including argument, to this Proposed and Final Order. The exceptions must be served on the parties and filed with the Administrator of the Workers’ Compensation Division at the address set forth below within 30 days following the date of service of the order. Written responses to exceptions must be filed within 20 days of service of the exceptions. Replies, if desired, must be filed within 10 days of service of the response.

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

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

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

Technical Coordinator
Policy Consultation Unit
Workers’ Compensation Division
Department of Consumer and Business Services
350 Winter Street NE, Room 27
Salem, OR 97301-3879