
In the Matter of a Proposed Order Assessing Penalty of an Additional
Amount Pursuant to ORS 656.262(11) of

Golden, Mary N., Claimant

Contested Case No: H03-045

PROPOSED AND FINAL ORDER

October 9, 2003

HARTFORD UNDERWRITERS INSURANCE CO., Petitioner

MARY N. GOLDEN, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Petitioner Hartford Underwriters Insurance Company (Hartford) appeals a Proposed and Final Order Assessing Penalty of an Additional Amount Pursuant to ORS 656.262(11) issued on March 28, 2003 by the Investigations and Sanctions Unit (Sanctions) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). The matter was referred to the Office of Administrative Hearings May 1, 2003. On June 10, 2003, Administrative Law Judge Paul Vincent conducted a contested case hearing by telephone in Salem, Oregon. Attorney John Snarskis represented petitioner. Claimant Mary N. Golden responded and appeared on her own behalf. The record closed on the date of hearing.

ISSUE

Pursuant to a Notice of Hearing dated May 7, 2003, the issue is whether the insurer unreasonably delayed payment of temporary disability compensation from November 20, 2002 through January 28, 2003, thereby warranting assessment of penalties.

EVIDENTIARY RULINGS

WCD Exhibits 1-19 were admitted without objection. Petitioner's Exhibit P2A was admitted without objection.

FINDINGS OF FACT

1. Claimant injured her left shoulder on May 2, 2000, while employed by K-M Traffic Services, Inc. (Exs. 1 through 3). The employer's insurer, Hartford Underwriters Insurance Company, accepted the claim as non-disabling on June 9, 2000, for the conditions of left shoulder contusion / trapezius strain. (Ex. P2A).

2. On October 28, 2002, the claimant was treated at Cartersville Family Practice in Georgia for pain in the left shoulder and arm, and tingling and numbness in the left hand. Claimant's treating physician was Scott Leeth, MD. His report states that the chief complaint was "what she thinks is a workman's comp injury." Upon examination, Dr. Leeth found that the triceps motor strength was weak on the left compared to the right. He assessed the claimant as presenting with "1. Adjustment disorder with possible history of seasonal affective disorder. 2.

Workman's compensation injury to left shoulder with paresthesias." Dr. Leeth prescribed medication for pain prevention. (Ex. 5-1).

3. On November 20, 2002, insurer received a claim aggravation form signed by the worker and attending physician Leeth, along with Dr. Leeth's October 28, 2002 report. The Form 827 indicated that the worker was released to modified duty from October 28, 2002 through January 28, 2002.¹ (Ex. 6).

4. The employer at injury reported the worker's weekly wage as \$400. Based on that pay rate, the insurer calculated the temporary total disability rate as \$288.75 weekly. The insurer mailed a payment for temporary disability compensation on December 5, 2002 for the period from October 28, 2002 through December 1, 2002 in the amount of \$1,443.75. (Exs. 7 through 8). The next payment was mailed December 24, 2002 for the period from December 2, 2002 through December 29, 2002 in the amount of \$1,155.00. (Ex. 9).

5. On December 17, 2002, the insurer received from the worker documents indicating a higher wage was earned than reported by the employer. The insurer adjusted the AWW on January 2, 2003 to \$740.00 and the TTD rate to \$534.18. (Ex. 10). A third payment, calculated at the higher TTD rate, was mailed on February 6, 2003 for the period from December 30, 2002 through January 26, 2003 in the amount of \$2,136.72. (Ex. 11). The last payment was mailed February 12, 2003 for the period from January 27, 2003 through January 28, 2003. (Ex. 14-1).

6. Claimant returned to work on February 11, 2003. (Ex. 14-1). The insurer has neither accepted nor denied the claim for aggravation. (Testimony of Tony Nordone).

CONCLUSIONS OF LAW

The insurer did not unreasonably delay payment of temporary disability compensation from November 20, 2002 through January 28, 2003.

OPINION

The issue is whether the insurer unreasonably delayed payment of temporary disability compensation from November 20, 2002 through January 28, 2003, thereby warranting assessment of penalties pursuant to ORS 656 and OAR chapter 436. Jurisdiction lies with the director. ORS 656.262(11) and ORS 656.704(2); OAR 436-060-0155(2). Since ORS 656.262(11) prescribes no standard of review, I review *de novo*. *Archie M. Ulrich*, 2 WCSR 152, 153 (1997); OAR 436-001-0225(6). The burden of proving a fact or position rests with the proponent. ORS 183.450(2). As petitioner, insurer bears the burden of proving by a preponderance of the evidence that the administrative decision is incorrect. *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder

¹ This date is a scrivener's error in the original.

is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). I conclude that the insurer has met this burden.

The petitioning insurer does not ask me to examine the various periods and penalties suggested in the order, but instead contends that the evidence presented establishes that the insurer's duty to commence interim compensation was never legally triggered in this case. I agree with insurer. ORS 656.273(6) provides that "a claim submitted in accordance with this section shall be processed by the insurer or self-insured employer in accordance with the provisions of ORS 656.262, except that the first installment of compensation due under ORS 656.262 shall be paid no later than the fourteenth day after the subject employer has notice or knowledge of the medically verified inability to work resulting from a compensable worsening under subsection (1) of this section."

Thus, there are four basic requirements set forth by statute:

- 1) a claim must be submitted in accordance with ORS 656.273(6),
- 2) the carrier must have notice or knowledge in a timely manner,
- 3) that notice or knowledge must be of a verified inability to work, and
- 4) the notice or knowledge must be of a compensable worsening of an accepted condition.

In *Stapleton v. Liberty NW Insurance Corp.*, 175 Or App 618 (2001), the court found that for an aggravation claim to be perfected, the claimant must contact insurer in a timely manner, provide the insurer with a proper aggravation claim, and include with the claim a physician's report that establishes "by written medical evidence supported by objective findings" that the claimant has suffered a worsening of the condition attributable to the compensable injury. I agree with insurer that in this case, the third and fourth elements were not met. The October 28, 2002 chart note and Form 827, even when read together, do not establish that there was a "medically verified inability to work resulting from a compensable worsening." The accepted conditions were "left shoulder contusion / trapezius strain," not tingling in the hand, joint pain, triceps weakness, seasonal affective disorder or depression. Accordingly, I find that on this record the insurer has never been presented with "notice or knowledge ... of a compensable worsening of an accepted condition." *Id.*

More importantly, I agree with insurer that there was no evidence of a verified inability to work presented to insurer. The Form 827 speaks only to a modified work for three months, without saying what the modification is. In *Sheila Wentz*, 50 Van Natta 1557 (1998) the board determined that the carrier has no affirmative duty to investigate the medical verification of claimant's inability to work. Although WCD is not bound by the Board's decisions, the same result should obtain here. The only information presented to the carrier was a statement of claimant's restriction to modified work, without any clarification of whether it was due to a shoulder injury or her mental state, or even what the restrictions are. There is no evidence in the record as to what the restrictions on claimant's work activity were. Without specifying what the restrictions are, there is no indication that the restrictions exceed regular work and therefore it is not a modified work release at all. Under *Wentz*, the carrier has no affirmative obligation to ferret out that information. Accordingly, I find that the insurer was under no legal obligation to

commence payment of temporary disability because 1) there was no linkage of the inability to work to a worsening of the accepted conditions as established by objective evidence, and 2) there was no medical verification of an inability of claimant to do her regular job. The mere statement that claimant is released to modified work without defining what the restrictions did not establish an entitlement to disability or create an obligation on the part of the carrier to pay. Without an obligation to pay, the payment at an incorrect rate does not create the obligation.

ORDER

IT IS HEREBY ORDERED that:

The Director's Proposed and Final Order, PA0037-03 dated March 28, 2003, is reversed.

DATED this 9th day of October, 2003.

Paul Vincent, Administrative Law Judge
Office of Administrative Hearings