

In the Matter of the ORS 656.262(11) Penalty Dispute of

Justin T. Henlin, Claimant

Contested Case No: 11-005H

PROPOSED & FINAL ORDER

July 29, 2011

JUSTIN T. HENLIN, Petitioner

BROADSPIRE SERVICES, INC., Respondent

Before Jacqueline M. Jacobson, Administrative Law Judge

Pursuant to notice, a hearing was held on April 28, 2011, in Portland, Oregon before the undersigned Administrative Law Judge. Claimant was present, and was represented by his attorney, James O. Marsh. The employer, AlSCO, Inc., and its insurer, Broadspire, were represented by attorney Gordon T. Clark. The record closed and closing arguments were held on the day of hearing. On May 27, 2011, the record was reopened to allow supplemental argument from both parties. The record reclosed on June 30, 2011, upon receipt of claimant's supplemental reply brief.

Received into evidence was the Exhibit List generated by the Workers' Compensation Division of exhibits 1-10. Also received were claimant's supplemental exhibits submitted on April 25, 2011 of 1A, 2A-B, 3A-C. All exhibits were admitted without objection.

ISSUES

The issue at hearing was claimant's entitlement to penalties and attorney fees pursuant to ORS 656.262(11)(a). Claimant also requests an attorney fee under ORS 656.382(1).

FINDINGS OF FACT

On August 21, 2009, a hearing was held before the Workers' Compensation Board's Hearings Division to address penalties and penalty-related attorney fees related to the insurer's delayed claim closure. (Ex. 1). In an Opinion and Order issued October 26, 2009, the ALJ dismissed claimant's request for hearing for want of jurisdiction. (Ex. 3). Claimant requested review by the Appellate Division of the Workers' Compensation Board.

The Board issued an Order on Review on May 13, 2010, reversing the October 26, 2009 Opinion and Order, reinstating claimant's request for hearing, denying claimant's request for penalties, and awarding an attorney fee pursuant to ORS 656.382(1). (Ex. 4). Claimant requested reconsideration. (Ex. 5).

The Board issued an Order on Reconsideration on June 11, 2010 finding that, while ORS 656.262(11)(a) has been raised by claimant before the Hearings Division, claimant elected not to pursue the issue in his reply argument to the ALJ, and subsequently did not seek penalties or attorney fees under ORS 656.262(11)(a) on Board review. (Ex. 6).

On December 13, 2010, claimant filed a demand for penalties and attorney fees pursuant to ORS 656.262(11)(a) with the Workers' Compensation Division (WCD). (Ex. 7).

The WCD issued an Order Denying Assessment of a Penalty pursuant to ORS 656.262(11)(A) on the basis that claimant was not entitled to a penalty because there were “no amounts then due.” (Ex. 9). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

Claimant contends that the WCD has exclusive jurisdiction over his entitlement to penalties pursuant to ORS 656.262(11)(a) for delayed payment of compensation related to delayed claim closure, and asserts an entitlement to penalties under that statute. The insurer contends that the jurisdictional issue was resolved by the Board’s May 13, 2010 Order on Review and June 11, 2010 Order on Reconsideration, and thus, the WCD lacks jurisdiction to address claimant’s entitlement to penalties pursuant to ORS 656.262(11)(a).

ORS 656.262(11)(a) allows for a penalty and a penalty-related attorney fee in the event the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, and grants the director exclusive jurisdiction over proceedings regarding solely the assessment and payment of the additional amount and attorney fees.

Here, claimant initially raised an entitlement to a penalty under ORS 656.262(11)(a) before the Hearings Division of the Workers’ Compensation Board. (Ex. 1). The Board found that, because the proceeding did not pertain “solely” to a penalty and attorney fee under ORS 656.262(11)(a), jurisdiction rested with the Hearings Division. (Ex. 4-3). The Board then concluded that claimant was not entitled to a penalty pursuant to ORS 656.262(11)(a) on the basis that claimant had ultimately withdrawn his claim for penalties under that statute. (Ex. 6).

Claimant argues that because the Board failed to address the merits of his claim for a penalty pursuant to ORS 656.262(11)(a), on the basis that claimant withdrew his demand for penalties, he should not be precluded from pursuing an ORS 656.262(11)(a) penalty under the WCD’s jurisdiction. However, because this issue was previously raised before the Workers’ Compensation Board, I find that jurisdiction over claimant’s entitlement to penalties pursuant to ORS 656.262(11)(a) rests with the Workers’ Compensation Board, consistent with the language of OAR 436-060-0155(6) and the Board’s May 13, 2010 and June 11, 2010 orders.¹ Claimant’s withdrawal of the issue, as finally determined by the Board, constituted a waiver of the issue and continues to be binding on appeal or administrative review. *See Wright Suchart Harbor v.*

¹ OAR 436-060-0155(6) states:

“The director will only consider a penalty issue where the assessment and payment of additional amounts described in ORS 656.262(11) is the sole issue for any proceeding between the parties. If a proceeding on any other issue is initiated before the Hearings Division of the Workers’ Compensation Board between the same parties prior to the director issuing an order under this section, and the director is made aware of the proceeding, jurisdiction over the penalty proceeding before the director shall immediately rest with the Hearings Division and result in referral of the proceedings to the Hearings Division. If the director has not been made aware of the proceeding before the Hearings Division and issues a penalty order which become final, the penalty of the director will stand.”

Johnson, 133 Or App 680 (1995) (a waiver is an intentional and voluntary withdrawal of a known right).

Even assuming the WCD has jurisdiction over this matter, I find claimant's penalty demand barred by the doctrine of claim preclusion. Claim preclusion, also known as *res judicata*, bars a party from prosecuting an action, or raising a defense, that is "based on the same factual transaction that was at issue in the first [action], seeks a remedy additional to or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action." *Reenie v. Freeway Transportation*, 294 Or 319, 323 (1982). Claim preclusion does not require actual litigation of an issue of fact or law, or that the determination of the issue be essential to the final result of the action. *Drews v. EBI Co.*, 310 Or 134, 140 (1990). However, the opportunity to litigate the question to a final determination must be present. *Id.*

Here, claimant had the opportunity to litigate his entitlement to a penalty under ORS 656.262(11) before the Board. The Board found that claimant withdrew his penalty demand under this provision. The ORS 656.262(11)(a) penalty demand originally asserted before the Hearings Division, and, as determined by the Board's final order as subsequently withdrawn, was based on the same factual transaction, *i.e.* the carrier's delayed payment of compensation related to delayed closure of claimant's claim, seeks a similar remedy to the one sought earlier, and could have been pursued to final determination before the Board.

For the reasons explained above, I conclude that the May 13, 2010 and June 11, 2010 orders issued by the Board asserting jurisdiction over any issue related to ORS 656.262(11)(a) preclude the WCD from addressing claimant's entitlement to a penalty on the same grounds. Even assuming the WCD does have jurisdiction over this matter, I find claimant is precluded from pursuing the claim for penalties under ORS 656.262(11) under the doctrine of claim preclusion.

ORDER

Claimant's demand for a penalty pursuant to ORS 656.262(11)(a) is denied.