

In the Matter of Failure to Make Timely Payment of Compensation

Cindy D. Buckner, Claimant

Contested Case No: 14-059H

Administrative Order No: PA 0080 14

FINAL ORDER

May 6, 2016

CINDY D. BUCKNER, Petitioner

VT GOLDEN MORTUARY C/O BROADSPIRE, Respondent

Before Louis Savage, Workers' Compensation Division Administrator

Claimant appeals the Proposed and Final Order issued on April 2, 2015, by Administrative Law Judge Gregory J. Naugle. Claimant challenges whether that order correctly determined the amount of penalties and attorney fees claimant is entitled to receive as a result of the insurer's failure to pay temporary disability benefits in a timely manner. On review, I affirm.

ISSUES

1. Claimant's entitlement to additional penalties and attorney fees pursuant to ORS 656.262(11)(a).

FACTUAL AND PROCEDURAL SUMMARY

On May 30, 2014, claimant was injured in a car accident while "on call" and "heading to work" while employed by V T Golden Mortuary Inc. Ex. 3-3. Claimant worked for V T Golden Mortuary as a "Funeral Director/Embalmer." *Id.* V T Golden Mortuary ("employer") first knew of the accident on May 31, 2014. Ex. 3-1. On June 1, 2014, claimant was provided medical authorization to be excused from work due to the injuries arising from her accident. Ex. 3-4.

Claimant first filed a motor vehicle accident claim with Farmers Insurance. Ex. 3-1. Farmers accepted the claim and paid part of her medical bills and partial wage loss from June 2, 2014, through July 1, 2014. *Id.* Claimant did not complete a workers' compensation claim form until July 29, 2014. Ex. 3-3. The portion of the claim form that was completed by employer indicated it knew of the claim on July 31, 2014. Ex. 3-3. The claim was then forwarded to Broadspire Services Inc. ("Broadspire"), the claim administrator for the workers' compensation insurance carrier, Employers Preferred Insurance Company ("insurer"). On August 12, 2014, Broadspire received claimant's medical authorization for temporary disability benefits for the period of June 1, 2014, through August 20, 2014. Broadspire began making temporary disability payments on August 19, 2014, and finally accepted the claim on September 29, 2014. Exs. 1-2, 3-2.

On October 6, 2014, claimant's attorney requested penalties and attorney fees pursuant to ORS 656.262(11)(a) for alleged late payment of temporary disability benefits between June 1, 2014, and September 2, 2014. Ex. 1. Broadspire paid claimant's disability benefits as follows:

Payment Period

Date Paid

6/1/2014 – 6/20/2014	8/19/2014
6/21/2014 – 7/9/2014	8/19/2014
7/14/2014 – 8/12/2014	8/19/2014
8/13/2014 – 8/20/2014	9/2/2014
8/21/2014 – 9/2/2014	9/14/2014

On November 5, 2014, the Workers' Compensation Division (WCD) issued Proposed and Final Order No. PA 0080. Ex. 4. The order determined that the first payment of temporary disability compensation was due 14 days from July 31, 2014, and that on two occasions temporary disability was paid late. Ex. 4-3. Broadspire, on behalf of insurer, offered no reason for the delayed payment, as such the order concluded that insurer unreasonably delayed payment of the worker's temporary disability benefits. Ex. 4-3. Pursuant to ORS 656.262(11)(a) and OAR 436-060-0155, insurer was ordered to pay claimant a penalty of an additional 5 percent of the amount due for temporary disability for the period of July 31, 2014, through August 7, 2014, and 20 percent of the amount due for temporary disability for the period of August 21, 2014, through August 26, 2014. Ex. 4-4. The amount of penalties awarded was calculated based on Appendix B to OAR Division 060. Insurer was also ordered to pay claimant's attorney a \$350.00 assessed attorney fee. Ex. 4-4.

Claimant requested a hearing, asserting that the WCD's order erred in determining the amount of penalties and attorney fees to be awarded because the WCD incorrectly found that employer first had knowledge of the claim on July 31, 2014, when employer received claimant's workers' compensation claim form. Ex. 6. Rather, claimant contended that employer first had knowledge of the claim on May 31, 2014, when it first knew of claimant's car accident. Claimant further asserted that if May 31, 2014, was the date employer first had knowledge of the claim, that five additional temporary disability payments were untimely. Accordingly, claimant argued that all temporary disability payments from June 1, 2014, through July 19, 2014, should be assessed a penalty of 25 percent, and that the time periods from July 20, 2014, through August 2, 2014, from August 14, 2014, through August 16, 2014, and from August 21, 2014 through August 30, 2014, should be assessed a penalty of at least 10 percent. Finally, claimant asserted that if it is determined that claimant is entitled to additional penalties, then additional attorney fees must be assessed pursuant to ORS 656.262(11)(a) or ORS 656.382(1).

ALJ Naugle issued a Proposed and Final Order on April 2, 2015, affirming the WCD's administrative order. The ALJ reasoned that the employer's awareness of the accident on May 31, 2014, did not constitute knowledge of its potential liability for a "compensable injury." Accordingly, the ALJ found that the WCD's administrative order did not err in determining that employer first had knowledge of the "claim" on July 31, 2014, and that the first payment of temporary disability compensation was therefore due 14 days from July 31, 2014. As such, no additional penalties were due and there was no basis under ORS 656.262(11)(a) or ORS 656.382(1) to award an additional attorney fee.

CONCLUSIONS OF LAW

The sole issue on review is whether claimant is entitled to additional penalties and attorney fees for unreasonable delay in the payment of temporary disability compensation. As a result, jurisdiction lies with the director and I review *de novo*. ORS 656.262(11)(a); OAR 436-001-0225(1).

The WCD's administrative order and the Hearing Division's proposed order each concluded that claimant is not entitled to additional penalties because the first payment of temporary disability compensation was due 14 days from July 31, 2014—the date employer received claimant's written claim for compensation. Claimant contends that those orders erred because she asserts that employer first had knowledge of the claim on May 31, 2014, when it first knew of claimant's accident. Consequently, claimant asserts that the timeliness of all temporary disability payments should be gauged from that date, and that five additional temporary disability payments should have therefore been deemed untimely. Employer responds that the Hearing Division's proposed order correctly concluded that the employer's awareness of claimant's injury was not equivalent to knowledge of a "claim."

I affirm the WCD's administrative order and the Hearing Division's proposed order, and deny claimant's request for additional penalties and attorney fees, because I find that the delay in the payment of claimant's temporary disability compensation was not unreasonable.

If an insurer unreasonably delays or unreasonably refuses to pay compensation, attorney fees or costs, the insurer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees. ORS 656.262(11)(a).¹ The standard for determining an unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. *Hamilton v. Pac. Skyline, Inc.*, 266 Or App 676, 680 (2014); *Cayton v. Safelite Glass Corp.*, 257 Or App 188, 192 (2013); *Brown v. Argonaut Insurance Company*, 93 Or App 588, 591 (1988). "Unreasonableness" and "legitimate doubt" are to be considered in light of all evidence available at the time of the insurer's action (or inaction). *Brown*, 93 Or App at 591.

In this case, claimant alleges unreasonable delay in the payment of temporary disability benefits. Timely payment of temporary disability benefits means payment has been made no later than the 14th day after the date of the employer's "notice or knowledge of the claim," provided the attending physician or authorized nurse practitioner has authorized the worker to miss work as a result of his or her injury. ORS 656.262(4)(a); OAR436-060-0150(5)(a).² A "claim" is

¹ ORS 656.262(11)(a) was amended by House Bill 2764. That amendment is applicable to orders issued and attorney fees incurred on or after January 1, 2016. 2015 Oregon Laws Ch. 521 (H.B. 2764).

² ORS 656.262(4)(a) provides:

"The first installment of temporary disability compensation shall be paid no later than the 14th day after the subject employer has notice or knowledge of the claim, if the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 authorizes the payment of temporary disability compensation. Thereafter, temporary disability compensation shall be paid at least once each two weeks, except where the Director of the Department of Consumer and Business Services determines that payment in installments should be made at some other interval."

defined by statute as a written request for compensation, or any compensable injury of which a subject employer has notice or knowledge. ORS 656.005(6). Thus, if an attending physician or authorized nurse practitioner has authorized the worker to miss work as a result of his or her injury, an insurer must begin payment of temporary disability benefits no later than the 14th day after the date of the employer's receipt of a written request for compensation, or any compensable injury of which a subject employer has notice or knowledge. A "compensable injury" is an accidental injury arising out of and in the course of employment requiring medical services or resulting in disability or death. ORS 656.005(7)(a).

Applying the above provisions to the present case, the plain language of ORS 656.262(4)(a) ("The first installment of temporary disability compensation shall be paid no later than the 14th day after the subject employer has notice or knowledge of the claim...") and the definition of a "claim" at ORS 656.005(6) ("Claim" means ... any compensable injury of which a subject employer has notice or knowledge...") together provide that claimant's first installment of temporary disability compensation was due no later than the 14th day after May, 31, 2014, if employer had notice or knowledge of a "compensable injury" as of that date.³ Moreover, based on the definition of a "compensable injury" at ORS 656.005(7)(a), knowledge of a "compensable injury" means that the employer knew or should have known that: (1) an accidental injury occurred; (2) the accidental injury arose out of and in the course of employment; and (3) the accidental injury required medical treatment or resulted in disability or death. Pursuant to ORS 656.005(6), such knowledge of a "compensable injury" would constitute knowledge of a "claim," and trigger the insurer's liability for payment of temporary disability benefits under ORS 656.262(4)(a).

Claimant cites *Safeway Stores, Inc. v. Angus*, 200 Or App 94 (2005), *Argonaut Ins. Co. v. Mock*, 95 Or App 1 (1989), and *Baldwin v. Thatcher Construction*, 49 Or App 421 (1980), for the proposition that an employer has knowledge of a "claim" under ORS 656.262(4)(a) when the employer has enough facts to reasonably conclude that workers' compensation liability is a possibility. However, those cases address whether an employer's "knowledge of the injury" under ORS 656.265(4)(a)⁴ is sufficient to defeat a contention that a worker's claim should be barred because the worker did not give notice within 90 days of the accidental injury. This dispute, by contrast, addresses whether an employer's "notice or knowledge of the claim" under ORS 656.262(4)(a) is sufficient to trigger an insurer's duty to begin payment of interim temporary disability compensation. While similar, the two statutory provisions are distinguishable: ORS 656.262(4)(a) relates to knowledge of a "claim"; ORS 656.265(4)(a) relates to knowledge of an "injury." As a defined term, the definition given the term "claim" at ORS 656.005(6) must govern its construction as used in ORS 656.262(4)(a). See ORS 656.003

³ In their briefings, petitioner and respondent discuss whether employer's knowledge of a claim is imputed to insurer. I find that issue to be irrelevant to my inquiry. ORS 656.262(4)(a) simply states that the insurer's duty to begin payment of temporary disability compensation is triggered once the *employer* has notice or knowledge of the claim.

⁴ ORS 656.265(4)(a) provides:

"(4) Failure to give notice as required by this section bars a claim under this chapter unless the notice is given within one year after the date of the accident and:

(a) The employer had knowledge of the injury or death;

***"

(“Except where the context otherwise requires, the definitions given in this chapter govern its construction.”).

Instead, I agree with employer that *Praxedis Alvarez-Barrera*, 65 Van Natta 183 (2013), is more applicable to this dispute. In that case, the Workers’ Compensation Board (“Board”) reasoned that an employer’s knowledge of potential liability for a “compensable injury” may be sufficient to constitute “notice or knowledge of the claim” under ORS 656.262(6)(a),⁵ and thereby trigger an insurer’s duty to formally accept or deny the worker’s claim. *Id.* at 185. Thus, as in the current dispute, the relevant standard turned on an employer’s “notice or knowledge of the claim” and related to an insurer’s duty to take a particular claims processing action (payment of interim temporary disability benefits under ORS 656.262(4)(a); acceptance or denial of a claim under ORS 656.262(6)(a)). Finally, similar to my analysis of the interaction of ORS 656.262(4)(a), 656.005(6), and 656.005(7)(a), above, the Board concluded that the employer’s knowledge was insufficient to trigger the insurer’s duty to take action if the employer did not and should not know that the worker’s accident met the basic factual pre-requisites of a “compensable injury.” *Id.* (Based on the definition of a “compensable injury” at ORS 656.005(7)(a), the Board concluded that knowledge of potential liability for a “compensable injury” requires knowledge that the workplace injury required medical treatment.).

In sum, insurer shall be liable for an additional penalty up to 25 percent of the amounts then due plus any attorney fees if insurer unreasonably delayed payment of claimant’s temporary disability compensation. ORS 656.262(11)(a). In addition to the two payments for which insurer has already been penalized, claimant contends that five more payments were untimely paid and unreasonably delayed because employer had notice or knowledge of a “claim” on May 31, 2014, when employer first had knowledge of claimant’s accident. Insurer unreasonably delayed payment of those five additional payments if, as of May 31, 2014, insurer did not have a legitimate doubt as to its liability for payment of temporary disability compensation. *Hamilton v. Pac. Skyline*, 266 Or App at 680; *Cayton v. Safelite Glass Corp.*, 257 Or App at 192; *Brown v. Argonaut*, 93 Or App at 591. Insurer was liable for payment of temporary disability compensation within 14 days of that date if its client employer had knowledge of (1) an accidental injury; (2) that arose out of and in the course of employment; and (3) required medical treatment or resulted in disability or death. ORS 656.262(4)(a); 656.005(6); 656.005(7)(a).

Ultimately, I find that insurer’s delay in the payment of the five additional temporary disability payments cited by claimant was not unreasonable because insurer had legitimate doubt as to its liability. Specifically, based on the facts available, insurer could have reasonably concluded that its client employer did not have knowledge of an accidental injury arising out of and in the course of employment.

The requirement that the injury occur “in the course of” the employment relates to the time, place, and circumstances of the injury. *Krushwitz v. McDonald's Restaurants*, 323 Or. 520 (1996). An employee’s “on call” status may, when combined with other circumstances, be sufficient to meet the “in the course of” employment requirement. *American Medical Response*

⁵ ORS 656.262(6)(a) provides:

“Written notice of acceptance or denial of the claim shall be furnished to the claimant by the insurer or self-insured employer within 60 days after the employer has notice or knowledge of the claim.”

v. Gavlik, 189 Or App 294 (2003), *rev den*, 336 Or 376 (2004). However, based on the circumstances of the accident and the nature of claimant's work duties, I find that insurer could have reasonably concluded that claimant was "heading to work" and not yet performing the work of a "Funeral Director/Embalmer" at the time she was injured. See *Claudia M. Tacy*, 57 Van Natta 668, 670 (2005) (on call medical/ambulance driver was not performing any of her work duties when she slipped and fell on an icy driveway while heading to work to perform an ambulance transport).

I also find that insurer could have reasonably concluded that its client employer did not have knowledge of an injury that "arose out of" claimant's employment. An injury arises out of employment if the risk of injury results from the nature of the work or when it originates from some risk to which the work environment exposes the worker. *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 601 (1997). Here, insurer could have reasonably concluded that the risk that claimant would have a car accident on her way to work was not a risk distinctly associated with being a funeral director/embalmer. Rather, insurer could have reasonably concluded that it was a risk that existed whenever, and for whatever reason, claimant was driving. See *Halsey Shedd RFPD v. Leopard*, 180 Or App 332, 339 (2002) (connection between risk of slipping and falling in worker's own driveway and his work activities as firefighter was coincidental, not causal); *Claudia M. Tacy*, 57 Van Natta at 671 (connection between risk of slipping and falling in worker's own driveway and her work activities as medical/ambulance driver was coincidental, not causal).

Thus, I conclude that knowledge of an "injury" under ORS 656.265(4)(a) does not equate to knowledge of a "claim" or "compensable injury" under ORS 656.262(4)(a). Further, based on the facts of this case, I conclude that insurer had legitimate doubt as to its liability for payment of temporary disability benefits as of May 31, 2014, when employer became aware of claimant's accident. Accordingly, insurer's delay in making the five additional payments of temporary disability compensation cited by claimant was not unreasonable under ORS 656.262(11)(a) and claimant is therefore not entitled to additional penalties or attorney fees.

IT IS HEREBY ORDERED

1. The Hearing Division's Proposed and Final Order, dated April 2, 2015, is affirmed;
2. Claimant's request for additional penalties pursuant to ORS 656.262(11) is denied; and
3. Claimant's request for additional attorney fees pursuant to ORS 656.262(11) and/or 656.382(1) is denied.