

In the Matter of the Failure to Make Timely Payment of Compensation

**Francisco Salinas Flores, Claimant**

Contested Case No: 15-061H

Administrative Order No: P 0064 15

**PROPOSED & FINAL ORDER**

April 8, 2016

FRANCISCO SALINAS FLORES, Petitioner

AMERICAN ZURICH INSURANCE COMPANY, Respondent

Before Nicolas M. Sencer, Administrative Law Judge

---

Pursuant to notice, a hearing was scheduled to convene on February 8, 2016 in Portland, Oregon before the undersigned Administrative Law Judge. By agreement of the parties, the case was submitted for decision based on the admitted exhibits and written closing arguments. Steven M. Schoenfeld represents claimant. Steven T. Maher represents the employer, Harris Rebar Seattle Inc., and its processing agent, Sedgwick CMS. Exhibits 1 through 6 are admitted into the record. The record closed on March 10, 2016 upon my receipt of claimant's reply argument.

### ISSUES

Claimant challenges the October 6, 2015 Order of the Sanctions Unit, Resolution Section, Workers' Compensation Division, that denied his request for a penalty and assessed attorney fee pursuant to ORS 656.262(11)(a).

### FINDINGS OF FACT

On July 8, 2015 Dr. Gentile sent a fax to the processing agent requesting authorization to perform surgery. When the processing agent did not respond, Dr. Gentile re-sent the fax on July 22, 2015. Pursuant to OAR 436-010-0250(3), on July 24, 2015 the processing agent responded to Dr. Gentile with a form 3228 advising that it was scheduling an independent medical examination for the worker with Dr. Bald.

On July 28, 2015, Claimant's attorney wrote to the Workers' Compensation Division requesting an order "stating that the insurer is barred from denying the surgery" pursuant to OAR 436-010-0250(5), because it did not issue the form 3228 within seven days of its receipt of the July 8, 2015 request from Dr. Gentile.

Claimant's request for an order resulted in the September 30, 2015 Administrative Order TX 15-0568, titled "In the Matter of ORS 656.327 Treatment Dispute." (Ex 3). The order, which was not appealed, ordered that the surgery proposed on July 8, 2015 was appropriate and that the insurer was liable for the costs of surgery if provided. Claimant's attorney was awarded a fee in the amount of \$2,250. (Ex 3, p 5). Of note, the order provided "that the insurer violated the requirements of OAR 436-010-0250 and is consequently barred from disputing whether the surgery proposed by Dr. Gentile is excessive, inappropriate, or ineffectual, and is liable for payment should the worker chose to proceed with this surgery." (Ex 3, pp 4-5). The order then provided that at claimant's request it was submitting a copy of the order "to the Sanctions Unit,

to determine whether American Zurich unreasonably refused or delayed compensation. *See* ORS 656.262(11) or ORS 656.745.” (Ex 3, p 5).

On October 6, 2015, the Sanctions Unit, Resolution Section, Workers’ Compensation Division issued Order No. P 0064 15, in which it denied claimant’s request for a penalty and further attorney fee. (Ex 4). This order, which is the subject of claimant’s request for hearing, concluded that there were “‘no amounts then due’ upon which to assess a penalty and attorney fee.” (Ex 4, p 3).

### CONCLUSIONS OF LAW AND OPINION

The scope of review is *de novo*. OAR 436-001-0225(1). The initial question for my determination is whether the insurer acted unreasonably in attempting to deny the requested surgery, when it had failed to issue a form 3228 within seven days of its receipt of Dr. Gentile’s July 8, 2015 request. If I conclude that the insurer’s conduct was unreasonable, then the remaining issue concerns whether claimant is entitled to a penalty and attorney fee.

The insurer concedes that the disputed medical services constitute compensation; it argues that its action were not unreasonable. (Argument, p 1). The standard for determining unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the insurer had a legitimate doubt as to its liability. *International Paper Company v. Huntley*, 106 Or 107 (1991). If so, the refusal to pay is not unreasonable. Unreasonableness and legitimate doubt are to be considered in light of all the evidence available. *Brown v. Argonaut Insurance Company*, 93 Or App 588 (1988).

The insurer argues that there were technical defects in Dr. Gentile’s July 8, 2015 request, which created a legitimate doubt concerning its duty to respond. However, the unappealed September 30, 2015 Order concluded that the July 8, 2015 request was sufficient. Moreover, the record before me appears incomplete with respect to Dr. Gentile’s July 8, 2015 request; all that is included is the fax cover sheet. (Ex 1, p 28). Consequently, I am unable to evaluate the merits of the insurer’s argument. In any event, the insurer’s argument begs the question, why did it not seek clarification from Dr. Gentile if it found his initial request to be incomplete? Rather than seek clarification, or otherwise acknowledge receipt of the request, the insurer took no action until Dr. Gentile resubmitted his request on July 22, 2015.

The applicable administrative rule provides that when an insurer fails to issue a form 3228 within seven days of receipt of a request to approve elective surgery, it is barred from challenging the appropriateness of the surgery. OAR 436-010-0250(5). The insurer knew, or certainly should have known of this requirement. I conclude that having failed to timely respond to Dr. Gentile’s July 8, 2015 request, the insurer did not have a legitimate doubt about its liability for the surgery. Consequently, its subsequent actions in challenging the surgery constitute an unreasonable resistance to the payment of compensation.

Both parties concede that in the absence of “amounts then due” there is no basis on which to award a penalty. That is the case here. However, even in the absence of a penalty, when unreasonable conduct has been established, claimant’s attorney is entitled to an assessed fee. *See*

*SAIF v. Traner*, 270 Or App 67, 75 (2015). Based on the results achieved and the time devoted to this issue, I award an assessed fee in the amount of \$2,000.

**ORDER**

IT IS HEREBY ORDERED that pursuant to ORS 656.262(11), the insurer is assessed an attorney fee in the amount of \$2,000, to be paid directly to claimant's attorney.