

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

Frank R. Larsen, Claimant

Contested Case No: 14-010H

Administrative Order No: PA0003 14

PROPOSED & FINAL ORDER

March 18, 2016

PROVIDENCE HEALTH SYSTEM C/O SEDGWICK CLAIMS MANAGEMENT

SERVICES, Petitioner

FRANK R. LARSEN, Respondent

Before Keith Kekauoha, Administrative Law Judge

An Opinion and Order issued on March 4, 2016 that resolved the above-captioned matter. Because the March 4, 2016 order contained incorrect appeal rights for this particular matter, the order was abated on March 7, 2016. This corrected order is issued in its stead.

Hearing convened in Portland, Oregon on February 4, 2016 before Administrative Law Judge Keith Kekauoha. Claimant was present and represented by attorney Glen Shearer. The employer, Providence Health System, and the claims administrator, Sedgwick Claims Management Services, were represented by attorney Allen Lyons. The hearing was recorded by the Administrative Law Judge. Exhibits 1-62 and 61A were admitted into evidence. After recorded closing arguments, the record closed on February 4, 2016.

ISSUE

Penalties. The employer requested a hearing on the Director's February 10, 2014 Proposed and Final Order that assessed a penalty and related attorney fee for an unreasonable delay in paying a permanent disability award.

FINDINGS OF FACT

Claimant has an accepted injury claim that was originally accepted for a disabling cervical strain with a "date of injury" of October 18, 2011.¹ (Ex. 16).

On August 31, 2012, the employer issued a Notice of Closure that closed the claim with an award of 9 percent loss of the whole person for impairment to the neck.² The dollar value of the permanent disability award was \$7,582.68. (Ex. 30).

¹ The record establishes that claimant was actually injured on July 28, 2011, not October 18, 2011.

² After the accepted cervical strain claim was processed to the Notice of Closure on August 31, 2012, the employer modified the accepted condition to "disabling cervical strain which on October 18, 2011, combined with preexisting spondylosis and degenerative disc disease, resulting in C6 radiculopathy," and reopened the injury claim for processing of the newly accepted combined condition. (Ex. 36). However, for purposes of reconsideration and review of the August 31, 2012 closure notice, only the condition accepted at the time of that claim closure (cervical strain) is considered.

Claimant requested reconsideration of the Notice of Closure and a medical arbiter examination. (Ex. 31).

On October 31, 2012, a panel of physicians performed a medical arbiter examination and reported no findings of impairment related specifically to the cervical strain. (Exs. 37, 38).

On December 4, 2012, the Appellate Review Unit (ARU) of the Workers' Compensation Division issued an Order on Reconsideration. In the order, the ARU relied on the medical arbiter panel's findings and concluded that there is no objective evidence of impairment due to the accepted cervical strain and any direct medical sequelae; however, based on the erroneous assumption that the Notice of Closure did not award any permanent disability, the ARU affirmed the Notice of Closure. (Ex. 40). The Order on Reconsideration was not appealed and became final by operation of law.

On January 2, 2014, claimant, through his attorney, requested administrative review of the employer's failure to pay the permanent disability awarded by the Notice of Closure, and sought assessment of penalties. (Ex. 44).

On January 24, 2014, the employer issued a check to claimant for the amount of permanent disability benefits awarded in the Notice of Closure that was owed (\$5,222.15). (Ex. 46).

On February 10, 2014, the Sanctions Unit of the Workers' Compensation Division issued a Proposed and Final Order that found the employer unreasonably delayed payment of the permanent disability award in the Notice of Closure, and assessed a penalty in the amount of 25 percent of the permanent disability benefits paid on January 24, 2014, and an assessed attorney fee. (Ex. 48).

CONCLUSIONS OF LAW AND OPINION

The employer requested a hearing on the February 10, 2014 Proposed and Final Order. The employer contends that it was not obligated to pay the permanent disability award and, alternatively, that its delay in paying the award was not unreasonable. Claimant responds that the order is correct and should be affirmed. For the following reasons, I agree with claimant's position.

The employer first argues that the assessment of a penalty and fee is not appropriate because it was not obligated to pay the award. Citing the ARU's finding in the reconsideration order that claimant is not due an award for permanent disability, (Ex. 40-3), the employer argues that that finding became binding when the reconsideration order became final and, therefore, that no permanent disability was due under the order. Alternatively, the employer argues that, even assuming permanent disability was due under the reconsideration order, the order was ambiguous and inconsistent and, therefore, supported a legitimate doubt as to the employer's obligation to pay the award.

The employer's arguments are unpersuasive. Notwithstanding the ARU's finding in the reconsideration order, the ARU ultimately "order[ed]" that the "Notice of Closure dated August 31, 2012, is affirmed," (Ex. 40-3), and, although the order was based on the erroneous assumption that the closure notice did not award any permanent disability, the order itself was clear and unambiguous. If the employer wished to correct the error that led to the order, it could have appealed the order. It did not do so and the order became final, triggering the employer's obligation to pay the permanent disability awarded by the closure notice in accordance with Director's rules, OAR 436-060-0150(7) and (9). Because the employer did not pay the award in accordance with the rules (and, in fact, did not pay the award until more than a year after the first installment was due), I agree with the Director's finding that the employer unreasonably delayed payment of the award. Therefore, the Director's order will be affirmed.

Because the employer raised the penalty and attorney fee assessed by the Director as a separate issue in a request for hearing, and I have found that the penalty and fee should not be disallowed or reduced, claimant's attorney is entitled to an assessed attorney fee for his efforts in defending the penalty and fee. ORS 656.382(3); OAR 438-015-0065(2).³ After considering the factors set forth in OAR 438-015-0010(4), particularly the limited time devoted to the penalty and fee issue (as represented by the record), the below-average complexity of the issue, the value of the interest involved and the benefit secured for claimant (a 25 percent penalty, with a dollar value of approximately \$1,300), and the risk that claimant's attorney's services might have gone uncompensated, I find that a reasonable attorney fee is \$750.

ORDER

The employer's request for relief is denied, and the Proposed and Final Order dated February 10, 2014 is affirmed. Claimant's attorney is awarded an assessed attorney fee of \$750, to be paid by the employer.

³ Under the recent amendments to ORS 656.382 and OAR 438-015-0065, which apply to orders issued and attorney fees incurred on or after January 1, 2016, if a carrier raises attorney fees, penalties or costs as a separate issue in a request for hearing, and the Administrative Law Judge finds that the attorney fees, penalties or costs awarded to the claimant should not be disallowed or reduced, the Administrative Law Judge must award a reasonable assessed attorney fee for the claimant's attorney's efforts in defending the fee, penalty or costs. House Bill 2764 (2015); WCB Admin. Order 1-2015.