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In the Matter of the Compensation of  
**DOUGLAS E. MCINTOSH, Claimant**  
WCB Case No. 03-01271  
ORDER ON REVIEW  
Claimant Unrepresented  
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Claimant, *pro se*, requests review of those portions of Administrative Law Judge (ALJ) Peterson's order that: (1) did not award interim compensation (temporary disability) from December 2, 2002 to December 20, 2002; and (2) declined to assess penalties against the insurer for allegedly unreasonable claim processing. On review, the issues are jurisdiction, temporary disability, claim processing, and penalties.

We adopt and affirm the ALJ's order with the following supplementation.

The ALJ upheld the insurer's denials, finding there was no medical evidence establishing the compensability of claimant's alleged bilateral ear and upper respiratory conditions. In doing so, the ALJ further determined claimant was not entitled to the payment of his medical bills or time loss.

On review, claimant contends that he is entitled to the payment of disability benefits from December 2, 2002 through December 20, 2002 because the employer failed to provide him with the Form 801 on December 2, 2002, as he requested. Claimant further argues that because the employer admitted fault in not providing claimant with the Form 801 (in an unrelated proceeding), that the employer should be required to pay a penalty.

"Interim compensation" is due and payable beginning 14 days after the date upon which the employer receives notice or knowledge of the claim *and* verification from the attending physician as to the worker's injury-related inability to work. ORS 656.264(4)(a); *Marvin J. Gregory*, 49 Van Natta 1253 (1997). "Interim compensation" is due and payable if the carrier does not accept or deny a claim within 14 days of notice or knowledge of a claim, whether or not the claim eventually is found to be compensable. *E.g. Jones v. Emanuel Hospital*, 280 Or 147 (1977); *Connie J. Barrs*, 51 Van Natta 1338, *on recon*, 51 Van Natta 1500 (1999). To trigger a claimant's entitlement to interim compensation, the attending physician's authorization must relate the claimant's inability to work

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to a job-related injury or occupational disease. *Teri L. Bernloehr*, 52 Van Natta 144 (2000).

In this circumstance, claimant went to the doctor on December 20, 2002. A review of the record reveals no authorization for time loss for the period claimant seeks, December 2, 2002 to December 20, 2002. Furthermore, Dr. Naito indicated there was no time loss due to a work related injury. (*See Ex. 4*). Therefore, claimant is not entitled to interim compensation from December 2, 2002 through December 20, 2002.

### Penalty

Claimant has requested the insurer/employer be penalized because they unreasonably refused to provide him with the Form 801. The Board and the ALJ can address an employer's and its insurer's conduct insofar as it pertains to unreasonable processing of the claim. ORS 656.262(11)(a); *see also* ORS 656.704(1) and (3)(a) (the Hearings Division and the Board have jurisdiction over "matters concerning a claim," which are defined as "matters in which a worker's right to receive compensation, or the amount thereof, are directly in issue.")

Under ORS 656.262(11)(a), if an insurer or self-insured employer unreasonably delays or refuses to pay compensation, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amount "then due." 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. *International Paper Co. v. Huntley*, 106 Or App 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 to the insurer. *Brown v. Argonaut Ins.*, 93 Or App 588, 591 (1988).

Here, even if we were to find unreasonable claim processing actions, we can only assess penalties based on amounts "then due." ORS 656.262(11)(a). As there are no "amounts due" on which to base a penalty, we are not authorized to assess a penalty. *See Metin Basmaci*, 54 Van Natta 465 (2002), *aff'd Basmaci v. The Stanley Works*, 187 Or App 337 (2003); *Lloyd A. Humpage*, 49 Van Natta 1784 (1997).

Finally, to the extent that claimant wishes to pursue review of the employer's conduct regarding its processing of workers' compensation claims

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and its compliance with such laws, that is a matter for the Director and not the Board/Hearings Division.<sup>1</sup> ORS 656.745.

ORDER

The ALJ's order dated May 27, 2003 is affirmed.

Entered at Salem, Oregon on October 3, 2003

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<sup>1</sup> Inasmuch as claimant is unrepresented, he may wish to consult the Workers' Compensation Ombudsman, whose job it is to assist injured workers in such matters. He may contact the Workers' Compensation Ombudsman, free of charge, at 1-800-927-1271, or write to:

WORKERS' COMPENSATION OMBUDSMAN  
DEPT OF CONSUMER & BUSINESS SERVICES  
PO BOX 14480  
SALEM, OR 97309-0405