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In the Matter of the Compensation of  
**ANTHONY D. CAYTON, Claimant**  
WCB Case No. 06-05262  
ORDER ON REVIEW  
Fontana & Takaro, Claimant Attorneys  
Law Offices Of Steven T Maher, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Mills' order that declined to assess penalties and attorney fees for the self-insured employer's allegedly unreasonable failure to timely pay his permanent disability award granted by an Order on Reconsideration in a lump sum. On review, the issues are jurisdiction, penalties and attorney fees.

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

Claimant has a compensable occupational disease claim for bilateral Raynaud's syndrome. (Ex. 1c-1). On March 22, 2006, the insurer closed the claim with an award of 54 percent scheduled permanent partial disability (PPD) for each hand. (Ex. 1b-5). The insurer requested reconsideration.

On June 20, 2006, the Appellate Review Unit (ARU) issued an Order on Reconsideration, reducing the scheduled PPD award to zero. (Ex. 2-3). On June 26, 2006, the ARU reconsidered its order, increasing the scheduled PPD award to 82 percent for each hand. (Ex. 3-2). On July 20, 2006, the ARU again reconsidered its order, adjusting/increasing the rate of claimant's PPD compensation. (Ex. 4-1).

On July 25, 2006, claimant filed a request for lump sum payment and a form 1174 application with the insurer. (Ex. 5-1, -2). On the form 1174, claimant signed an acknowledgment that such application waived his right to appeal the adequacy of the award. (*Id.*) The form 1174 also contained a section for the insurer's response, indicating that if it objected "to the payment of this award in a lump sum," that it was to respond within 14 days to the Workers' Compensation Division (WCD). (Ex. 5-2). The insurer did not respond within 14 days.

On August 22, 2006, claimant requested a hearing with the Board, seeking a penalty and attorney fees for the insurer's failure to pay his PPD award in a lump sum. (Ex. 5c). On August 30, 2006, before the scheduled hearing, the insurer made the lump sum payment. (Ex. 7B-1).

On September 13, 2006, claimant requested that the Compliance Section of the WCD impose a penalty for the insurer's failure to respond to his lump sum payment application within 14 days. (Ex. 8-3). On November 1, 2006, the Compliance Section assessed a \$250 civil penalty against the insurer. (Ex. 12-2).

The ALJ first determined that the Hearings Division had jurisdiction because claimant's request for enforcement of the lump sum payment was a "matter concerning a claim." See ORS 656.283(1). The ALJ then concluded that, despite the expiration of the 14 day application period, the insurer's 30-day appeal period remained. See ORS 656.268(6)(g). Reasoning that the "lump sum" requirements of ORS 656.230(1) had not been met, the ALJ found that the insurer's conduct was not unreasonable.

On review, claimant argues that the ALJ's determination of the penalty issue was incorrect. For the following reasons, we agree with the ALJ's disposition of this matter.

To begin, we adopt the ALJ's reasons for ruling that the Hearings Division had jurisdiction to address the issues arising from claimant's hearing request. We supplement those reasons as follows.

Pursuant to ORS 656.262(11), if penalties are the "sole" issue at hearing, jurisdiction rests with the Director. *Icenhower v. SAIF*, 180 Or App 297 (2002) (once a dispute was properly before the Hearings Division, any subsequent narrowing of the issues to solely a penalty issue did not divest the Hearings Division of jurisdiction over the dispute). However, here, the issue is not limited to penalties. Rather, claimant's hearing request extends to the *enforcement* of his application for lump sum payment. Although the ultimate responsibility for resolution of claimant's lump sum payment application rests with the Director, we agree with the ALJ's determination that the Hearings Division has jurisdiction to consider claimant's hearing request. In doing so, we note that claimant sought enforcement of his right to receive his PPD award, which was based on his interpretation of ORS 656.230(1), and, as such, constitutes a "matter concerning a claim." ORS 656.704(3)(a) (matters concerning a claim \* \* \* are those matters in which a worker's *right to receive compensation*, or the amount thereof, are directly in issue); see, e.g., *Loren L. Boll*, 58 Van Natta 3115, 3117 (2006) (request for hearing seeking enforcement of a final, unappealed reconsideration order's award of an "out-of-compensation" attorney fee constituted a "matter concerning a claim").

Claimant asserts that ORS 656.230(1) and OAR 436-060-0060 required the insurer to pay the PPD award in a lump sum within 14 days from the date of his application. Because the insurer did not do so, claimant requests a penalty and attorney fee pursuant to ORS 656.262(11) and ORS 656.382(1). For the following reasons, we decline claimant's request.

To decide the penalty and attorney fee issue, we must interpret ORS 656.230(1), which describes the "lump sum payment" process as follows:

"(1) Where a worker has been awarded compensation for permanent partial disability, and the award has become final by operation of law or waiver of the right to appeal its adequacy, the insurer shall upon the worker's application pay all or any part of the remaining unpaid award to the worker in a lump sum, unless the insurer disagrees with payment, in which case the insurer, within 14 days, will refer the matter to the Director of the Department of Consumer and Business Services to determine whether all or part of the lump sum should be paid. The director's decision shall be final and not subject to review. Any remaining balance shall be paid pursuant to ORS 656.216."

In construing this statute, our task is to discern legislative intent. *See* ORS 174.020. We begin by examining the text and context of the statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). The context of a statute relevant at the first level of analysis may include other provisions of the same statute and related statutes, *id.* at 610-11, prior enactments and judicial interpretations of those and related statutes, *Owens v. Maass*, 323 Or 430, 435 (1996), and the historical context of the relevant enactments. *Goodyear Tire & Rubber Co. v. Tualatin Tire and Auto*, 322 Or 406, 415 (1995), *on recons*, 325 Or 46 (1997). If the legislature's intent is clear from those inquiries, further inquiry is unnecessary. *Id.* at 611.

We note that the opening clause of subsection (1) of ORS 656.230 establishes the conditions precedent to the payment of a lump sum. First, a worker must have been awarded compensation for PPD *and* the award has become final by operation of law *or* the right to appeal its adequacy has been waived. Thus, for the lump sum payment provision to apply, a PPD award must become final or the right to appeal the adequacy of the award must be waived.

Here, claimant's PPD award had not become final by operation of law when claimant filed his application for a lump sum payment. Thus, the issue is whether the right to appeal the adequacy of the award had been waived. This dispute raises two questions: (1) what does "its" refer to in ORS 656.230(1); and (2) does the "waiver" apply only to claimant or to both parties. We address each question in turn.

In determining what "its" refers to, *Home Builders Assoc. of Metropolitan Portland v. City of West Linn*, 204 Or App 655, 661, *rev den*, 341 Or 80 (2006), provides instruction. There, the court addressed interpretation of the pronoun "its" as follows:

"[A]ccording to common grammatical rules, one way to resolve an ambiguous pronoun is to conclude that the pronoun refers to the nearest antecedent noun, an equally valid resolution is to conclude that it (again, the pronoun) refers to the most prominent noun in the sentence: the subject. *See Landswick v. Lane*, 49 Ore. 408, 412, 90 P. 490 (1907) (discussing how 'the law of prominence' and 'the law of proximity' can each be used to resolve pronoun ambiguity)." *Id.* at 661.

Here, when the sentence refers to "its," the most prominent subject of the sentence is the "award." The sentence, up until that point, contains language indicating that PPD must have been "awarded." The sentence also references the "award" as becoming final. Then, the sentence states "the right to appeal *its* adequacy" must be waived. Thus, in interpreting "its" as it is used in this statute, we conclude that the pronoun refers to the most prominent noun in the sentence, *i.e.*, the "award."

We now turn to the determination of who "waives" the right to appeal the adequacy of the award. The statute itself does not specifically identify whether such "waiver" is limited to one party or the other. Therefore, although the text of the statutory provision itself is the starting point for interpretation, the context of a statute, including other provisions of the same statute and related statutes, is relevant to the first level of analysis. *PGE*, 317 Or at 610-11. Here, because the award in question concerns an Order on Reconsideration, we look to ORS 656.268(6)(g), which addresses requests for hearing from such orders.

ORS 656.268(6)(g) states, in part, that “If *any party* objects to the reconsideration order, the party may request a hearing under ORS 656.283 within 30 days from the date of the reconsideration order.” Therefore, the statute unambiguously declares that the right to appeal an Order on Reconsideration rests with “any party.” As such, consistent with the statutory scheme, “waiver” of the right to appeal the *award* rests not only with claimant, but also with the insurer.

Claimant asserts that the term “adequacy” implies an intent by the legislature to limit the “right to appeal” to the worker. However, to interpret the statute as claimant suggests would require inserting language into the statute. Specifically, the statute would have to be read to provide “*claimant’s* waiver of the right to appeal its adequacy.” In statutory construction, we are not permitted to “insert what has been omitted, or to omit what has been inserted.” ORS 174.010.

Furthermore, “adequacy” is defined as “the quality or state of being adequate: sufficiency for a purpose.” *Webster’s Third New Int’l Dictionary*, 25 (unabridged ed. 1993). “Adequate” is defined as “equal to, proportionate to, or fully sufficient for a specified or implied requirement.” *Id.* Thus, “adequacy” is the quality or state of being equal to, proportionate to, or fully sufficient for a specified or implied requirement.

Applying the plain meaning of the word “adequacy” in this context results in an interpretation inconsistent with claimant’s argument. *PGE*, 317 Or at 611 (we interpreted the text of a statute giving “words of common usage \*\*\* their plain, natural and ordinary meaning”). The statute references a “waiver” of the right to appeal whether the quality or state of the PPD award is equal or proportionate to the specified requirements, here, the Division 35 rules. Either party may assert error in the ARU’s application of the Division 35 rules in determining a PPD award. ORS 656.268(6)(g); *see, e.g., Marvin Wood Products v. Callow*, 171 Or App 175 (2000) (the party challenging an Order on Reconsideration bears the burden of establishing error in the reconsideration process). Therefore, we disagree that the use of the term “adequacy” necessarily implies that the “waiver” is limited to claimant.

Moreover, to do so would render ORS 656.268(6)(g) meaningless. ORS 174.010; *PGE*, 317 Or at 611 (where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to

all). The statutory scheme does not support a finding that ORS 656.230(1) was meant to eliminate or supplant the application of ORS 656.268(6)(g) in situations where the PPD award exceeds \$6,000.<sup>1</sup>

Here, claimant was awarded PPD via Order on Reconsideration. (Ex. 4-1). Within 5 days of that order, claimant requested payment of his PPD award in a lump sum. In doing so, he waived his right to appeal the PPD award. Yet, when claimant filed his “lump sum” application, the insurer was still within its 30-day statutory right to appeal the Order on Reconsideration’s PPD award pursuant to ORS 656.268(6)(g).<sup>2</sup> Therefore, because the PPD award had not become final by

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<sup>1</sup> ORS 656.230(2) states:

“In all cases where the award for permanent partial disability does not exceed \$6,000, the insurer or the self-insured employer shall pay all of the award to the worker in a lump sum.”

Thus, in situations where the award is less than \$6,000, a “lump sum payment” automatically applies, even in the absence of an application for such payment.

<sup>2</sup> We acknowledge that OAR 436-060-0060(1) and (5) (WCD Admin. Order 06-056, eff. July 1, 2006) state in pertinent part:

“When the award for permanent partial disability exceeds \$6,000, the insurer or director may approve an application of the worker for lump sum payment when the order has become final by operation of law *or the worker* has waived their right to appeal the adequacy of the award.

“\* \* \* \* \*

“(5) If the insurer disagrees with the worker's request for lump sum payment of a permanent partial disability award in excess of \$ 6,000, the insurer must submit the lump sum application with the reason for disagreement to the director within 14 days of receipt of the signed application. The insurer must simultaneously copy the worker and the worker's attorney, if represented, of the disagreement and submission to the division.” (Emphasis supplied).

Thus, subsection (1) of the aforementioned rule limits the “waiver” referenced in ORS 656.230(1) to “the worker,” where the statute does not set forth such a limitation. Moreover, limiting the “waiver” requirement for appeals of reconsideration order PPD awards to only a claimant would conflict with ORS 656.268(6)(g), which expressly authorizes “any party” to appeal the Order on Reconsideration. Under such circumstances, we decline to interpret OAR 436-060-0060(1) in a manner that would be inconsistent with the statutory scheme. *Cook v. Workers' Compensation Department*, 306 Or 134, 138 (1988) (an agency may not alter, amend, enlarge or limit the terms of a statute by rule); *Julio C. Garcia-Caro*, 50 Van Natta 160 (1998) (in the event that there is a conflict between an administrative rule and a statute, it is the statute rather than the rule that controls).

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operation of law, nor had the insurer waived its right to appeal the adequacy of the award, the conditions necessary for the application of ORS 656.230(1) had not occurred.

Claimant further asserts, however, that if the insurer contested the lump sum payment because it retained the right to appeal, it could have so notified the Director and, according to claimant, was required to do so within 14 days. The second phrase of the first sentence of ORS 656.230(1) reads as follows:

“\* \* \* the insurer shall upon the worker’s application pay all or any part of the remaining unpaid award to the worker in a lump sum, *unless the insurer disagrees with payment*, in which case the insurer, within 14 days, will refer the matter to the Director of the Department of Consumer and Business Services to determine whether all or part of the lump sum should be paid.” (Emphasis supplied.)

This portion of ORS 656.230(1) refers to whether the insurer disagrees with a lump sum *payment*. In *Reynolds v. Hydro Tech Inc.*, 182 Or App 488 (2002), the court explained that the terms “award” and “payment” are not synonymous. The court reasoned that when the legislature intended a distinction between the payment and award of compensation, it makes that distinction, and when the legislature intends that both acts should have like effect, it uses them together. *Id.* at 493. With regard to ORS 656.230, the *Reynolds* court stated as follows:

“In yet other circumstances, the *award* of compensation is the significant occurrence. *See, e.g.*, ORS 656.230 (‘Where a worker has been *awarded* compensation for permanent partial disability, and the award has become final by operation of law or waiver of the right to appeal its adequacy, the insurer shall upon the worker’s application *pay* all or any part of the remaining unpaid award to the worker in a lump sum[.]’)” *Id.* at 492; emphasis in original.

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While the Director is reasonably authorized to require a carrier to respond to a lump sum application within 14 days, as noted in subsection (5), the insurer’s failure to respond cannot statutorily result in a waiver of its right to appeal the award. Likewise, as with our interpretation of subsection (1), we decline to interpret subsection (5) in a manner contrary to the statutory scheme.

Here, the insurer did not contest the method of “payment” within 14 days. ORS 656.230(1) expressly provides that if the insurer objects to the “payment,” it must notify the Director within 14 days. Furthermore, the statute does not mandate that “payment” be made within 14 days.<sup>3</sup> Thus, although the insurer did not submit claimant’s lump sum “payment” application to the Director within 14 days, we decline to interpret such inaction as a waiver of its statutory right under ORS 656.268(6)(g) to contest the “award” granted by the reconsideration order.

Finally, claimant cites *Steven Irving*, 56 Van Natta 1065 (2004), in which we observed that it is a claimant who “waives” his/her right to appeal the award. In *Irving*, we held that, under our Own Motion jurisdiction pursuant to ORS 656.278, we had no involvement in the processing, granting, or denying of requests for lump sum payment of PPD benefits for “post-aggravation rights” new or omitted medical conditions. In doing so, we reasoned that such matters must be submitted to the Director pursuant to ORS 656.230(1). We acknowledge that our order only referred to the waiver of the right to appeal under ORS 656.230(1) by the *claimant*. However, because we recognized in *Irving* our lack of authority over the substantive decision regarding the claimant’s lump sum payment application, our reference to claimant’s “waiver” of the right to appeal was *dicta* and is not controlling. In any event, consistent with the reasoning expressed above, the aforementioned reference is inconsistent with the statutory scheme.

In conclusion, the insurer did not unreasonably resist the payment of compensation since it was still within its right to appeal the amount of the “award.” *International Paper Co. v. Huntley*, 106 Or App 107 (1991); *Brown v. Argonaut Insurance Company*, 93 Or App 588, 591 (1988) (carrier’s refusal to pay compensation is not unreasonable if it has legitimate doubt about its liability). Accordingly, we affirm.

### ORDER

The ALJ’s order dated January 9, 2007 is affirmed.

Entered at Salem, Oregon on June 13, 2007

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<sup>3</sup> We further note that OAR 436-060-0150(7) governs the “Timely Payment of Compensation,” and states that PPD benefits must be paid no later than the 30th day after the date any litigation authorizing permanent PPD becomes final.