

In the Matter of the Compensation of  
**ANTHONY D. CAYTON, Claimant**  
WCB Case No. 06-05262  
**ORDER ON REMAND**  
Fontana & Takaro, Claimant Attorneys  
Maher & Tolleson LLC, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

This case is before the Board on remand from the Court of Appeals. *Cayton v. Safelite Glass Corp.*, 231 Or App 644 (2009). The court has reversed our prior order, *Anthony D. Cayton*, 59 Van Natta 1455 (2007), that affirmed an Administrative Law Judge's (ALJ's) order that had declined to assess penalties and attorney fees against the self-insured employer for allegedly unreasonable claim processing. In reaching our conclusion, we had found that the employer's failure to timely pay an Order on Reconsideration's scheduled permanent partial disability (PPD) award in a lump sum (when claimant waived his right to appeal the award) was not unreasonable because the employer had not also waived its right to appeal the reconsideration order. Reasoning that the phrase "waiver of the right to appeal its adequacy" in ORS 656.230(1) (2005) logically applies only to a claimant and does not also extend to a carrier, the court concluded that we erred in our construction of the statute. Consequently, the court has remanded for reconsideration of our denial of claimant's request for penalties and attorney fees.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following supplementation.

Claimant has a compensable occupational disease claim for bilateral Raynaud's syndrome. (Ex. 1c). A March 22, 2006 Notice of Closure awarded 54 percent scheduled PPD for each hand. (Ex. 1b). The employer requested reconsideration.

Ultimately, on July 20, 2006, the Appellate Review Unit (ARU) issued an Order on Reconsideration, increasing the scheduled PPD award to 82 percent for each hand. (Ex. 4).

On July 25, 2006, claimant filed an 1174 Form requesting that the employer pay his PPD award in a lump sum, and waiving his right to appeal the adequacy of the award. (Exs. 5, 5A). The employer did not respond to claimant's request. However, the employer paid the August 2006 monthly installment on August 19, 2006. (Exs. 1-2, 1A, 9-1).

Neither party requested a hearing regarding the Order on Reconsideration within 30 days of its issuance. *See* ORS 656.268(6)(g). On August 22, 2006, claimant filed a request for hearing, requesting penalties and attorney fees for the employer's failure to pay the PPD award in a lump sum, or object to such payment as required by OAR 436-060-0060 (WCD Admin. Order 06-056, eff. July 1, 2006). (Exs. 5C, 7A). On August 30, 2006, the employer paid the remaining balance of the PPD award to claimant in a lump sum. (Exs. 1A, 7B, 7C).

In September 2006, claimant requested that the Compliance Section of the Workers' Compensation Division (WCD) review the employer's failure to respond to his request for lump sum payment, either by paying or filing an objection to the Director, within the 14-day statutory time period. (Ex. 8). On November 1, 2006, the Compliance Section found that, regardless of whether the Order on Reconsideration was final, the employer was required to respond to claimant's lump sum request by submitting the application to the Director with the reason for its disagreement to the Director within 14 days of the receipt of the signed application. (Ex. 12-2). Thus, the Compliance Section assessed a civil penalty against the employer for violation of OAR 436-060-0060 (2006). (Ex. 12).

#### CONCLUSIONS OF LAW AND OPINION

The ALJ reasoned that, because the employer still had its right to appeal the July 20, 2006 Order on Reconsideration pursuant to ORS 656.268(6)(g), and because the reconsideration order was not final until the 30-day statutory appeal period expired, the employer was not obligated to pay the PPD award in a lump sum within 14 days of claimant's July 25, 2006 request. Thus, the ALJ declined to assess a penalty and attorney fee for the employer's allegedly unreasonable conduct. ORS 656.262(11)(a).

We affirmed the ALJ's order. *Cayton*, 59 Van Natta at 1455. In doing so, we agreed with the ALJ's determination that, because ORS 656.268(6)(g) declares that the right to appeal an Order on Reconsideration rests with "any party," the "waiver" of the right to appeal the adequacy of the award under ORS 656.230(1) (2005) rests not only with claimant, but also with the carrier. *Id.* at 1459. Consequently, we found that, because the employer had not waived its right to appeal the adequacy of the reconsideration order's award, its conduct in failing to make lump sum payment of the award within 14 days of claimant's request was not unreasonable. *Id.* at 1462.

Claimant requested judicial review. After analyzing the legislature's use of the term "adequacy" in ORS 656.230(1) (2005), the court reasoned that the phrase "waiver of the right to appeal [the award's] adequacy" logically only applies to the claimant. The court also determined that the language in ORS 656.230(1) (2005) and OAR 436-060-0060 (2006) that requires an employer to pay a claimant's PPD award in a lump sum, or state its reason for objecting to such payment, does not conflict with an employer's right to appeal the Order on Reconsideration under ORS 656.268(6)(g). As an example, the court explained that the employer could have informed the director within 14 days of receipt of claimant's request that it objected to the payment of the lump sum award because it intended to appeal the award or was still considering to do so. Consequently, the court has remanded for reconsideration whether penalties and attorney fees under ORS 656.262(11)(a) are warranted. We now proceed with our analysis.

Under ORS 656.262(11)(a), if an insurer or self-insured employer unreasonably delays or unreasonably 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. *Int'l Paper Co. v. Huntley*, 106 Or App 107, 110 (1991); *Katrina Miller*, 60 Van Natta 1307, 1309 (2008). If so, the refusal to pay, or the delay in payment, is not unreasonable. "Unreasonableness" and "legitimate doubt" are to be considered in the light of all the evidence available to the carrier. *Brown v. Argonaut Ins.*, 93 Or App 588, 591 (1988).

ORS 656.230(1) (2005) provides, in pertinent part:

"Where a worker has been awarded compensation for [PPD], 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."

If the insurer agrees with the worker's request for lump sum payment of a PPD award in excess of \$6,000, it must make the lump sum payment within 14 days of receipt of the signed application. OAR 436-060-0060(4) (2006). If the

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insurer disagrees with the worker's request for lump sum payment of a PPD award in excess of \$6,000, it must submit the lump sum application with the reason for disagreement to the director within 14 days of receipt of the signed application. OAR 436-060-0060(5) (2006).

Claimant argues that the employer unreasonably failed to either pay the balance of his PPD award, or refer the matter to the Director with the reason for its disagreement, within 14 days of receipt of his July 25, 2006 lump sum application. ORS 656.230(1) (2005); OAR 436-060-0060 (2006). The employer responds that its conduct was not unreasonable because of the apparent conflict between ORS 656.230(1) (2005), ORS 656.268(6)(g), and OAR 436-060-0060(1) (2006). Relying on *James A. Bradley*, 56 Van Natta 2001 (2004), it also contends that it had a legitimate doubt that claimant's lump sum request was premature and that it was not required to respond to his request. For the following reasons, we find that the employer's claim processing was unreasonable.

OAR 436-060-0060(1) (2006) provides, in pertinent part:

“When the award for [PPD] 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.”

The employer argues that, unlike the above-quoted administrative rule, ORS 656.230(1) (2005) does not limit the “waiver of the right to appeal” the award's adequacy to the worker. It also contends that, because both parties have the right to appeal an Order on Reconsideration within 30 days under ORS 656.268(g), it reasonably believed that ORS 656.230(1) (2005) required a “waiver” of both parties.

We agree that the employer's *refusal* to pay claimant's PPD award in a lump sum was not unreasonable because it had a legitimate doubt that ORS 656.230(1) (2005) required “waiver” by both parties, and because it had a legitimate doubt that it was still within its 30-day statutory appeal period under ORS 656.268(g).<sup>1</sup>

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<sup>1</sup> Before the court's decision that reversed our prior order, there was a “legitimate doubt” as to whether the “waiver” under ORS 656.230(1) (2005) included the carrier's “waiver,” and whether OAR 436-060-0060 (2006) conflicted that statute and ORS 656.268(6)(g). The court has now resolved that question.

Nevertheless, we find that the employer's failure to either submit the lump sum application to the Director, or to pay the lump sum, within 14 days of receipt of claimant's application represents an unreasonable *delay* in the payment of compensation. We reason as follows.

Here, on July 25, 2006, the employer received claimant's lump sum application, which included an acknowledgment that he "waive[d] the right to appeal the adequacy of the award." (Exs. 5, 5A). If the employer *agreed* with the request for lump sum payment, it was *required* to make such payment, and do so within 14 days of receipt of claimant's application. ORS 656.230(1) (2005); OAR 436-060-0060(4) (2006). There is no ambiguity or conflict between the applicable statutes or administrative rules.

If, on the other hand, the employer *disagreed* with the request for lump sum payment, it was *required* to refer the matter to the Director, *i.e.*, submit the lump sum application with the reason for disagreement, within 14 days of the receipt of the signed application. ORS 656.230(1) (2005); OAR 436-060-0060(5) (2006). Thus, if the employer disagreed with lump sum payment on the basis that either *it* did not waive its right to appeal the adequacy of the award, or because the order was not final by operation of law and *it* was still within its statutory appeal period, the employer was still required to refer the matter to the Director. There is no ambiguity or inconsistency in the applicable statutes or administrative rules regarding a carrier's requisite response if it *disagrees* with the request for lump sum payment.

In determining whether the employer unreasonably delayed payment of compensation under ORS 656.262(11)(a), the significant occurrence is the employer's "disagree[ment] with *payment*" of claimant's lump sum request. ORS 656.230(1) (2005) (emphasis added). Because the employer disagreed with the lump sum *payment* on the basis that either it did not waive its right to appeal the adequacy of the award, or because the order was not final by operation of law and it was still within its statutory appeal period, the employer was still required to refer the matter to the Director within 14 days of receipt of claimant's lump sum request. ORS 656.230(1) (2005); OAR 436-060-0060(5) (2006).

The employer also argues that, based on its reliance on *Bradley*, it reasonably believed that it was not required to *respond* to claimant's "premature" lump sum request. In *Bradley*, the issue was whether penalties and attorney fees were appropriate for the carrier's unexplained late payment of monthly PPD benefits. 56 Van Natta at 2001. In a footnote, we observed that the claimant's

May 14, 2003 and May 16, 2003 requests for lump sum payment were premature because the PPD award did not become final until 30 days after our *prior* October 9, 2003 Order on Review, which ultimately determined the claimant's PPD award. *Id.* at 2003 n 5.

We find that the employer's reliance on *Bradley* is misplaced. At the time the claimant in *Bradley* filed his May 2003 requests for lump sum payments, he was *already* involved in litigation affecting his PPD award. *See James A. Bradley*, 55 Van Natta 3425, 3428 (2003) (reversing an ALJ's May 15, 2003 order which, on the claimant's hearing request from an Order on Reconsideration, had increased the claimant's PPD award). Moreover, in noting that the claimant's requests for lump sum payment were "premature," we did not address whether the carrier had *responded* to the claimant's requests. 56 Van Natta at 2002-03. Under such circumstances, our references to the claimant's "premature" lump sum payment requests in *Bradley* are not instructive in regarding this employer's obligations to respond to claimant's July 25, 2006 request for lump sum payment, particularly considering the specific directives prescribed in OAR 436-060-0060(4) and (5) (2006). Thus, *Bradley* is inapposite.

Based on the aforementioned reasoning, we find that the employer had no legitimate doubt that it was required to refer the lump sum matter to the Director within 14 days of claimant's lump sum request. ORS 656.230(1) (2005); OAR 436-060-0060(5) (2006); *Huntley*, 106 Or App at 110; *Brown*, 93 Or App at 591. Therefore, we find that the employer unreasonably delayed the payment of compensation. ORS 656.262(11)(a). Accordingly, we reverse those portions of the ALJ's order that declined to award a penalty and penalty-related attorney fee.

Here, the employer was required to pay claimant's PPD award in a lump sum, or refer the matter to the Director if it disagreed with such payment, by August 8, 2006, which was 14 days from its receipt of claimant's July 25, 2006 lump sum request. ORS 656.230(1)(2005); OAR 436-060-0060(4), (5) (2006). On August 19, 2006, it paid the August 2006 monthly installment of the PPD award. (Exs. 1-2, 1A, 9-1). On August 30, 2006, the employer paid the remaining balance of claimant's PPD award in a lump sum. (Exs. 1A, 7B, 7C). These payments, made after August 8, 2006, were untimely. Accordingly, for its unreasonable conduct, the employer is assessed a penalty equal to 10 percent of the "amounts then due" at the time of its unreasonable conduct, *i.e.*, claimant's unpaid PPD award as of August 8, 2006, which he was eventually untimely paid. ORS 656.262(11)(a).

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Claimant's attorney is also entitled to a "penalty-related" attorney fee. An attorney fee shall be in a reasonable amount that is proportionate to the benefit to the claimant, and takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and the time devoted to the case. OAR 438-015-0110(1), (2). The attorney fee awarded may not exceed \$3,070.38, absent a showing of extraordinary circumstances. ORS 656.262(11)(a) (WCB Bulletin No. 1-2010, eff. July 1, 2010).

After considering those factors and applying them to this case, we award \$1,500, to be paid by the employer. In doing so, we have given primary consideration to the benefit to claimant, the results achieved, and the time devoted to the case (as represented by the record, which includes claimant's counsel's statement of services).

Accordingly, on remand, the ALJ's order dated January 9, 2007 is reversed in part. That portion of the ALJ's order that declined to award a penalty and penalty-related attorney fee is reversed. Claimant is awarded a penalty equal to 10 percent of the "amounts then due" as of August 8, 2006, when the employer unreasonably failed to fully pay claimant's PPD award in a lump sum. Claimant's counsel is awarded a "penalty-related" attorney fee in the amount of \$1,500, payable by the employer. The remainder of the ALJ's order is affirmed.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on May 10, 2011