

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF)
WORKERS' COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 11-3237
)
NATIONAL UNION FIRE INSURANCE)
COMPANY OF PITTSBURG, PA,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On January 10, 2012, a duly-noticed hearing was held in Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mary E. Ingley, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Kimberly J. Fernandes, Esquire
Kelley, Kronenberg, Gilmartin, Fichtel,
Wander, Bamdas, Eskalyo and Dunbrack
8201 Peters Road, Suite 4000
Fort Lauderdale, Florida 33324

STATEMENT OF THE ISSUE

The issue is whether Respondent failed to comply with provisions of the Workers' Compensation Law and implementing rules, and if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On May 17, 2011, Petitioner served a Notice of Imposition of Penalties and Notice of Rights on Respondent, alleging that Respondent had violated various provisions of the Workers' Compensation Law, chapter 440, Florida Statutes (2010),^{1/} and implementing rules. The notice incorporated the findings of Petitioner's audit and assessed a penalty. On June 24, 2011, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

After continuance, the case was noticed for final hearing on January 10, 2012, in Tallahassee, Florida. At hearing, a motion to amend the Notice of Imposition of Penalty was granted. Joint exhibits J-1 through J-10 were admitted into evidence, including stipulations and deposition testimony. Petitioner presented the testimony of a Workers' Compensation Specialist, Ms. Sharna Amos. Respondent's Exhibits R-1 and R-2 were admitted. Petitioner objected to the admission of Exhibit R-3, a deposition, on the grounds that much of the testimony consisted of legal conclusions and that it went beyond the scope of Respondent's responses to discovery. Exhibit R-3 was admitted, with the caveat that testimony as to ultimate facts would be accepted, but not testimony as to pure questions of law. Two worksheets offered as exhibits to the deposition were not admitted.

The one-volume Transcript of the proceedings was filed with the Division on January 23, 2012. Petitioner and Respondent submitted Proposed Recommended Orders, which were considered.

FINDINGS OF FACT

1. Petitioner is responsible for administering the Workers' Compensation Law in a manner which facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments.

2. Respondent National Union Fire Insurance Company of Pittsburgh, Pennsylvania, is a workers' compensation insurance carrier authorized to insure under the Workers' Compensation law. Chartis is a third-party administrator or servicing agent for Respondent.

3. Respondent is substantially affected by Petitioner's amended Notice of Imposition of Penalties.

4. Under the authority of section 440.525, Petitioner reviewed Respondent's workers' compensation benefit disbursement and claims handling practices in an audit performed March 14, 2011, through March 18, 2011. The audit addressed the timeliness and accuracy of workers' compensation payments, as well as other claims handling practices concerning certain claims files, for a five-year audit period from March 18, 2006, through March 18, 2011.

5. Respondent paid \$5,000.00 in penalties that were assessed for improper case management techniques in Petitioner's original Notice of Imposition of Penalties. The parties had no disagreement as to this portion of the fine assessed.

6. At issue is the remaining fine amount of \$9,200.00 assessed for improper benefit disbursement practices, as set forth in the Petitioner's Amended Notice of Imposition of Penalties, dated September 20, 2011, which incorporates the amended final audit report. This penalty reflected Petitioner's determination that there were 152 late payments out of a total of 807 indemnity payments due to injured workers. The Respondent agreed that the number of indemnity payments reviewed during the audit totaled 807, but disputed the number of late indemnity payments.

7. Respondent agreed that 25 payments related to workers' compensation claims files other than the file of R.D. were correctly identified as late by Petitioner. Respondent disputed the number of late payments made to R.D.

8. There was testimony that Respondent had notification of R.D.'s permanent total disability on February 22, 1989. Other testimony stated that R.D. was accepted as permanently and totally disabled as of February 23, 1989. Any discrepancy between these dates was not at issue in the Department's calculation of the biweekly payment schedule, as discussed

below. R.D. is entitled to biweekly indemnity payments for permanent total disability, as well as supplemental permanent total benefits.

9. No evidence was presented at hearing as to whether R.D.'s disability was immediate and continuous for eight calendar days or more after his injury, or in the alternative, if R.D.'s first 7 days of disability after his injury were nonconsecutive or delayed.

10. Joint Exhibit J-6, the indemnity pay out ledger, provided information from Respondent's records regarding payments made to R.D. It shows the amount of payment and "Trans Date" or transaction date for each payment. As a customary business practice, checks were mailed out one day after the transaction date, so the actual date of each payment is one day after the "Trans Date" shown. In addition, the records contain a column entitled "Service Date From-To" which associates a specific compensation period with the payment in that row. The "Service Date From-To" column is blank for all of the payments to R.D. beginning in 1988 until September of 1998. This column contains dates that Respondent considered to be the compensation period applicable to each payment from September of 1998 through the audit period.

11. The indemnity pay out ledger also indicates that after Respondent was notified of R.D.'s permanent total disability in

1989, over 250 payments were made to R.D. until September of 1998. On average, this was about 28 payments per year or slightly more often than biweekly. Counsel for Petitioner elicited deposition testimony from Ms. Margorit Constantine, Complex Claim Director for Chartis, that Respondent's records indicated that the initial permanent total disability payment covered 2-22-1989 through 3-7-1989, but this information was evidently not relied upon by Petitioner.

12. Ms. Sharna Amos, Workers' Compensation Specialist at the Division, testified that the Division determines the specific biweekly time period applicable to a permanent total claim based upon the date the first payment went to the injured worker, even if this first payment is a retroactive payment covering an earlier time period.

13. However, Petitioner presented no evidence that the biweekly payment schedule established by Ms. Amos for purposes of the audit of R.D.'s file coincided in any way with a biweekly schedule based upon the date the first installment of compensation for total disability was paid to him. In fact, as Ms. Amos testified, the biweekly payment schedule created for the audit was based upon dates being used by the Respondent for biweekly payments during the fall of 1998, the first payments for which the Respondent identified service dates.

14. Ms. Amos testified at hearing that she established the biweekly payment schedule for the audit of R.D.'s file as follows:

Um, based on the information that was provided to me, um, the pay history that was given to me, um, the first one with the, um, service dates of 9/2 to 9/15, August, all of the other payments were lump sum because they had gotten a new computer or something. Uh, so I started from that time period and ran the bi -- oh, sorry, on the right -- on this left side, I ran the biweekly periods from 9/2/1998 until -- I ran them all the way through, um, 7/9/2011.

15. It was not made clear at hearing why Petitioner considered over 250 nearly biweekly payments that had been paid to R.D. for over nine years prior to September 1998 to be "lump sum" simply because the Respondent was unable to provide the service dates it associated with them. Petitioner has no rules defining "lump sum" in this context, and it is not clear what significance such a determination would have in the calculation of a payment schedule. Ms. Amos did testify that typically with permanent total disability claims the employee is "accepted permanent total" retroactively back to a given date and the biweekly payments are established after a lump sum payment covering the intervening period is made. However, no evidence was presented that R.D. was retroactively accepted as permanently totally disabled in 1998 and the first installment was made to him at that time as a lump sum payment; to the

contrary, the evidence indicated he was accepted as permanently totally disabled in 1989.

16. It appears rather that Ms. Amos established the biweekly period for purposes of the audit based on the service dates being used by Respondent in September of 1998 simply because these were the first "service dates" available. However, there was no evidence to show that the service dates being used by Respondent in September of 1998 bore any relationship to the first installment of compensation for total disability paid to R.D. In fact, the evidence would suggest no such connection. The payments made to R.D. prior to September were generally biweekly, but somewhat irregular. The payments made after September of 1998 were generally biweekly, but somewhat irregular. Consistent with Respondent's interpretation of the statute, Respondent presented deposition testimony that while they generally tried to make biweekly payments, they made no attempt to strictly make the payments on the anniversary of the first installment, but would occasionally start new biweekly periods for various reasons. It is ironic that after basing the audit payment schedule on Respondent's service dates in September of 1998 rather than on the date of the first installment as required by the statute, that Petitioner went on to categorically reject all of Respondent's subsequent service dates as inconsistent with statutory requirements.

17. It was similarly unclear as to why Petitioner concluded that Respondent's acquisition of a new computer would have any effect on the determination of the applicable biweekly payment schedule, because payment data from before that time was available. As Ms. Constantine testified, some data on the indemnity pay out ledger was information entered earlier from check copies and "green cards" that were manual records.

18. The Division used the biweekly payment schedule established by Ms. Amos to determine which payments were late. Had the Division begun its biweekly payment schedule on another date, it would have created a different schedule of due dates, and would then have determined that an entirely different number of payments to R.D. were late.

19. As noted, Respondent paid its biweekly payments in a different manner. No evidence was presented that Respondent's occasionally-adjusted biweekly periods for total disability payments were consistent with the date that the first installment of compensation had been paid to R.D., or what that date was. Respondent did not adhere to a fixed biweekly schedule, but did generally adhere to biweekly payments. Adjustments in payment due dates were made from time to time. For example, evidence indicated that adjustments were made at the beginning of a new calendar year or when errors were discovered, in which case a new biweekly pattern of payments

would begin after the adjustment, without regard to the dates of any previous biweekly payments. This method, while not intrinsically unreasonable, is not consistent with the statute.

20. It is reasonable that missing data, calendar changes, advance payments, or other irregularities in the payment of indemnity might create confusion in the construction of the proper payment schedule, or in the reconstruction of the proper payment schedule for purposes of an audit. The correct and consistent way to deal with such factors is not always addressed by statute. The Department has adopted no administrative rules on this subject.

21. The statute's requirement of a fixed biweekly schedule that cannot thereafter be changed is not followed by many who regularly administer these payments. Ms. Amos testified in deposition that many of her audits involve carriers who are making biweekly payments covering time periods that are misaligned with the proper schedule as determined by the Department, and that she is frequently asked to go back in time to identify for the carrier the date when the problem started. At another point, Ms. Amos noted that in dealing with payments at the end of a calendar year, "a lot of adjusters in the industry . . . would pay the injured workers 12/22/2006 to 12/31/2006 and then restart the clock, just pay those few days and then restart the clock in January, starting their next

payment at January 1." Mr. Bottjer, holder of workers' compensation and all lines adjusting licenses, and Compliance Reviewer for Chartis, testified in deposition that prior to the audit he was unaware that it was the Department's position that a biweekly period could not be adjusted after a carrier "goofed" and had caught the injured worker up (and stated that he still does not agree that this is required by the statute).

Ms. Constantine testified in deposition that she had never seen a bulletin, gone to a conference, or had any information indicating to her that biweekly payments could not be altered.

22. R.D. was consistently overpaid in his permanent total disability and supplemental benefits, based upon errors unrelated to the issue in this hearing. Additionally, various adjustment payments were made to R.D. from time to time which included penalties and interest. R.D. has received all of the indemnity payments to which he was entitled during the period of the audit and has not been harmed by any late payments at issue here.

23. Petitioner proved by clear and convincing evidence that 25 payments related to workers' compensation claims files other than the file of R.D. were paid late, as stipulated. This constitutes about 3.1 per cent of the 807 indemnity payments that were the subject of the audit.

24. Petitioner proved by clear and convincing evidence the dates on which R.D. was paid his biweekly total disability payments during the audit period.

25. Petitioner failed to prove by clear and convincing evidence the date that the first installment of compensation for total disability was paid to R.D. or the dates by which R.D.'s biweekly total disability payments needed to be paid to him.

26. Petitioner failed to prove by clear and convincing evidence that Respondent was late in paying R.D. his total disability payments.

27. Mr. Bottjer, Respondent's witness, testified that he believed that "as many as 14" payments to R.D. might have been late. Mr. Bottjer based this conclusion on due dates that appear to bear no relation to the date of payment of the first installment of payments for total disability. Even if 14 additional late payments were added to the 25 late payments that were stipulated, the total number of late payments would be 39, or about 4.8 per cent of the 807 indemnity payments that were audited.

28. Based upon the number of late payments proved by clear and convincing evidence, the timely payment performance standard during the period of the audit was in excess of 95 percent.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties in this case under sections 120.569 and 120.57(1), Florida Statutes (2011).

30. Under section 440.525, Petitioner has the responsibility to examine and investigate the performance of Respondent as to its obligations under the Workers' Compensation Law, and may impose penalties to ensure compliance.

31. Respondent demonstrated standing and entitlement to hearing on the Notice of Imposition of Penalties.

32. Under section 440.220(8)(b), the payment practices of Chartis are deemed to be the payment practices of Respondent for the purposes of assessing penalties against Respondent.

33. Petitioner has the burden to prove the disputed late payments and penalty by clear and convincing evidence. Dep't of Banking and Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). The case of In re Davey, 645 So. 2d 398, 404 (Fla. 1994), described clear and convincing evidence by stating, "[t]his intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy."

34. Section 440.20(2)(a) provides:

The carrier must pay the first installment of compensation for total disability or death benefits or deny compensability no later than the 14th calendar day after the employer receives notification of the injury or death, when disability is immediate and continuous for 8 calendar days or more after the injury. If the first 7 days after disability are nonconsecutive or delayed, the first installment of compensation is due on the 6th day after the first 8 calendar days of disability. The carrier shall thereafter pay compensation in biweekly installments or as otherwise provided in s. 440.15, unless the judge of compensation claims determines or the parties agree that an alternate installment schedule is in the best interests of the employee.

35. Biweekly payments of permanent total disability are mandated by section 440.20(2)(a). There is no evidence in this case that a judge of compensation claims determined otherwise or that R.D. and the other parties agreed that an alternative installment schedule was in his best interest.

36. The statute prescribes two possible dates by which the "first installment of compensation" for total disability must be paid. When the disability is immediate and continuous for eight calendar days after the injury, the first installment is due no later than the 14th calendar day after the employer received notification of the injury or death. In this circumstance, the first installment of compensation is not due on the date of injury, not on the date the employer received notification, but

on a date not later than 14 days after the employer's notification. The first installment could therefore timely be paid six days after notification, ten days after, or any number of days after, up to 14 days. In the alternative, if the disability is not continuous for the first 7 days, then the statute provides that the first installment is due on the 6th day after the first eight days of disability. This second circumstance does not require reliance upon the date of notification of the employer at all, but computes the due date for the first installment from the eighth day of total disability.

37. The word "thereafter" in the final sentence of section 440.20(2)(a) refers to the date the first installment of compensation is timely paid, or if not timely paid, when due. The statute requires total disability payments to be made pursuant to a fixed installment schedule, with biweekly payments due every two weeks from the date of the first installment, in a schedule that never changes. This statutory requirement is simple, and leads to consistent and predictable time periods. Once the date of the first installment of compensation for total disability is known, no further information is needed, a mechanical calculation can determine all future due dates. The reference in the final sentence of section 440.20(2)(a) to "alternate installment schedule" makes clear that the direction

of the statute to pay benefits biweekly after the first payment of compensation constitutes an installment "schedule."

38. Once the biweekly payment schedule is established, the due date for any given biweekly period is the final day, that is the 14th day, of that period, though it may be paid earlier. Any payment for a biweekly period that is paid after the final day of that period is late. Citrus Co. Sch. Bd. v. Dep't of Fin. Servs., 67 So. 3d 1127, 1129 (Fla. 1st DCA 2011).

39. The statute's strict requirements can be violated for a great many consecutive weeks if a new biweekly payment period is established after an error is made, even though the payment to the injured worker is "made up" with penalties and interest, because every payment made after the error may still be late under the original schedule. A carrier acting in good faith could unwittingly make hundreds of late payments based upon a single mistake, even though the injured worker is not harmed. While the need for consistent record-keeping is clear, this is a high penalty.

40. Assuming Petitioner possesses the requisite statutory authority, rules might clarify the statute's requirements, provide clearer standards for compliance when irregularities occur, and aid auditors and enforcement efforts. As Judge Smith noted, "Florida's APA has the purpose, uniformly endorsed by students of the modern administrative process, of encouraging

agencies by rulemaking 'to close the gap between what the agency and its staff know about the agency's law and policy and what an outsider can know.'" McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 580 (Fla. 1st DCA 1977) (citing K. Davis, Discretionary Justice 102 (1969)).

41. Respondent failed to meet its burden of proof with respect to the alleged late payments to R.D. While the dates that payments were actually made to R.D. during the audit period were clearly established, the evidence presented as to the dates the payments were due was unclear. Without proving the due date, it is impossible to prove that a payment is late.

42. Petitioner did not prove by clear and convincing evidence that any payments of compensation for total disability made to R.D. were late.

43. Petitioner's selection of a biweekly period on which to establish the due date for purposes of the audit was arbitrary. Petitioner established the due date based upon Respondent's "service dates," not the date of the first installment of compensation.

44. Imposition of a penalty under the statute requires proof, by clear and convincing evidence, of the date of the first installment of compensation for disability. The many payments that were made to R.D. prior to September of 1998 were biweekly installments made just as consistently as the payments

made by Respondent after 1998. Petitioner's dismissal of all these earlier payments as "lump-sum," and the conclusion that a payment made in 1998 therefore constituted the first installment, was not convincing.

45. Petitioner proved by clear and convincing evidence that 25 payments related to workers' compensation claims files other than the file of R.D. were paid late, in violation of the Workers' Compensation Law.

46. Section 440.20(8)(b) provides in relevant part:

The office shall impose penalties for late payments of compensation that are below a minimum 95 percent timely payment performance standard. The carrier shall pay to the Workers' Compensation Administration Trust Fund a penalty of:

1. Fifty dollars per number of installments of compensation below the 95 percent timely payment performance standard and equal to or greater than a 90 percent timely payment performance standard.

2. One hundred dollars per number of installments of compensation below a 90 percent timely payment performance standard.

47. The 25 late payments constitute about 3.1 per cent of the 807 indemnity payments that were the subject of the audit. This means that the Department failed to prove that the 95 percent timely payment performance standard was not met, and no penalties for improper benefit disbursement practices should be assessed under the statute.

RECOMMENDATION

Upon consideration of the above findings of fact and conclusions of law, it is

RECOMMENDED:

That the Department of Financial Services, Division of Workers' Compensation enter a final order finding that Respondent paid 25 payments late during the audit period and imposing no fines for improper benefit disbursement practices.

DONE AND ENTERED this 8th day of February, 2012, in Tallahassee, Leon County, Florida.

F. Scott Boyd

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of February, 2012.

ENDNOTE

^{1/} Except as otherwise indicated, all references to statutes and rules are to versions in effect in 2010, which contain the text applicable throughout the audit period relevant to this hearing.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.