

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
WEST PALM BEACH DISTRICT OFFICE

Deborah Porter,
Employee/Claimant,

OJCC Case No. 17-023592TAH

vs.

Accident date: 6/30/2017

Sonata Senior Living/MEMIC Indemnity
Company,
Employer/Carrier/Servicing Agent.

Judge: Thomas A. Hedler

_____ /

FINAL COMPENSATION ORDER

This matter came before the undersigned Judge of Compensation Claims on April 4, 2018 to adjudicate the petition for benefits filed on October 6, 2017. The Claimant was represented by David Benn, Esq. The Employer/Carrier was represented by Beth Koller, Esq.

The following stipulations have been reached between the parties:

1. The undersigned has jurisdiction of the parties and of the subject matter.
2. Venue properly lies in Palm Beach County, Florida.
3. A mediation conference was held on January 24, 2018.
4. There was an employer/employee relationship at the time of the accident/claim.
5. The employer was properly insured with workers' compensation coverage at the time of the accident/claim.
6. The accident was accepted as compensable.
7. Notice of final hearing was timely given to the parties.
8. The average weekly wage is \$816.70.

Claims

1. Interest for late payment of temporary indemnity benefits. Specifically, the claimant contends interest in the amount of \$5.00 is due for late payment of TTD for the period of 11/14/17-11/27/17.
2. Attorney's fees and costs.

Defenses

1. Interest is not due or owing as no benefits were paid late.
2. Attorney's fees and costs are not due or owing.

Exhibits

Judge:

1. Petition for benefits filed on October 6, 2017 [Docket#1].
2. Order setting pretrial stipulation filing date and final hearing entered on January 26, 2018 [Docket#19].
3. Uniform Pretrial Stipulation filed on and Order Approving Pretrial Stipulation entered on February 20, 2018 [Docket#20, 21].
4. Claimant's trial memorandum [Docket#33] and Employer/Carrier's trial memorandum [Docket#35] were accepted for argument purposes only.

Joint:

1. Payout ledger, attached to claimant's trial memorandum [Docket#33].

Claimant:

None

Employer/Carrier:

1. Emails attached to employer/carrier's trial memorandum [Docket#35].
The claimant objects on the basis the records were not timely identified on the pre-trial stipulation; hearsay; and authenticity. I sustain the objection as to authenticity and hearsay.

Live Witnesses

Claimant:

1. Judith Provencher, adjuster.

Employer/Carrier:

None

I have taken the time to carefully review and consider all of the evidence presented to me, including the documentary evidence and live testimony. While I do not recite in explicit detail each piece of evidence/testimony, I have attempted to resolve any and all conflicts in the testimony and evidence. The stipulations of the parties are adopted and shall become part of the findings of fact herein. The undersigned has jurisdiction of the parties and subject matter. Based upon the stipulations of the parties, evidence presented and legal review, I make the following findings of ultimate facts and conclusions of law.

Findings of Fact and Conclusions of Law

The relevant facts are not in dispute. The claimant suffered a compensable industrial accident for which she was paid temporary indemnity benefits beginning on October 3, 2017. Judith Provencher is the assigned adjuster and has been the individual who has issued all temporary indemnity benefits on the claim. The adjuster issued all temporary indemnity benefits according to a diary, and has sent all checks to the same address. The payment at issue concerns the temporary total disability check for 11/14/17-11/27/17. The payment was initially issued on November 27, 2017, according to the testimony of Ms. Provencher and as documented on the payout ledger. Ms. Provencher testified she first became aware the claimant had not received a check on December 1, 2017 via e-mail from claimant's counsel, Stacey Issacs. Ms. Provencher testified that she put a 'stop payment' on the check after Ms. Isaacs requested same and after she was specifically advised which payment was in question. Ms. Provencher re-issued the TTD check for 11/14/17-11/27/17 on December 15, 2017. At some point, Ms. Provencher was advised the original check was found, to which she

reported the stop payment was issued and the new check was en route. Ms. Provencher testified the re-issued check was sent in a timely manner from when the stop payment was confirmed by the bank. The carrier's timeliness in putting a stop payment on the check in question and re-issuance wasn't factually disputed by the claimant. I accept Ms. Provencher's testimony that she acted with due diligence and issued payments in the manner recited herein.

The claimant contends the facts in the instant case mirror the facts in Pupo v. City of Hialeah, 91 So.3d 925 (Fla. 1st DCA 2012). In Pupo, the First District Court of Appeal noted a statutory distinction regarding payment of penalties and interest. Florida Statute 440.20(6) provides for payment of a 20% penalty if the E/C pays an installment of compensation more than seven days after it becomes due, though this penalty "shall not apply for late payments resulting from conditions over which the employer or carrier had no control." However, Florida Statute 440.20(8) provides for payment of interest (the greater of the amount at the rate of 12% per year or \$5¹) if any installment of compensation is not paid when it becomes due. As stated by the Pupo court, there is no provision for an exception with regard to late payment of interest. Accordingly, Pupo held that if the payment is late regardless of the circumstances, interest is due.

The employer/carrier contends Pupo is factually distinguishable from the instant case. Specifically, the employer/carrier contends the initial payment made in Pupo was not timely. Upon review and analysis of Pupo, I find the facts are substantively on point with the facts presented in the instant case. In Pupo, it was determined the checks were issued timely though one payment was not received and thus, a stop payment was placed and the check was re-issued. It was further determined the carrier had no control over the late payment, and the denial of penalties was affirmed. However, the denial of interest was reversed, again, as there is no statutory provision for analysis of the conditions surrounding the late payment. Again, I find the facts in Pupo are not distinguishable.

The employer/carrier further argues that because the adjuster acted with due diligence, and had no control over the conditions, interest should not be due since

¹ The parties do not dispute the applicable interest amount, if awarded, is \$5.

payment of interest may result in sanctions from the State of Florida. Of course, this office is without jurisdiction to make policy or equity decisions. The legislature has established a distinction between penalties and interest, and specifically has provided an exception for penalties without providing an exception for interest. While Ms. Provencher may well have responded in a timely manner, there is no dispute the payment processed by the claimant was issued on December 15, 2017, which is after it was due. I conclude that based upon section 440.20(8), as interpreted by Pupo, the claimant is due \$5 in interest for the late payment of TTD for the period of 11/14/17-11/27/17.

WHEREFORE, it is **ORDERED and ADJUDGED** that:

1. The claim for \$5 interest for late payment of TTD for 11/14/17-11/27/17 is **GRANTED**.
2. The claim for attorney's fees and costs is **GRANTED**.

DONE AND SERVED this 5th day of April, 2018, in West Palm Beach, Palm Beach County, Florida.



Thomas A. Hedler
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