In the Matter of the Compensation of
MIR ILIAIFAR, Claimant
WCB Case No. 03-03229
SECOND ORDER ON RECONSIDERATION
Rex Q Smith, Claimant Attorneys
James B Northrop, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Langer and Kasubhai.

The SAIF Corporation requests reconsideration of our July 13, 2005 Order on Reconsideration which affirmed an Administrative Law Judge's (ALJ's) order that awarded claimant temporary partial disability (TPD) benefits. SAIF contends that we erred in finding that claimant was not "with a new employer" under OAR 436-060-0030(3) when he was working as a taxi driver and that the evidence does not meet claimant's burden of proving his "post-injury" earnings for purposes of calculating his TPD benefits. Having received claimant's reply, we continue to find that claimant was entitled to TPD. However, we base our conclusion on the following reasoning.

If a worker "is with a new employer," and on the request of an insurer, the worker is required to provide documented evidence of the wages being earned.[1] OAR 436-060-0030(3). If the worker fails to do so, *the insurer may assume* that post-injury wages are the same as, or higher than, the worker's wages at the time of injury. *Id*.

Nonetheless, OAR 436-060-0030(3) does not require an *ALJ or the Board* to assume that a worker's post-injury wages are the same as or higher than the worker's wages were at the time of injury. Rather, it states that a worker's failure to provide documented evidence of wage earnings "shall be cause for the *insurer*[2] to" make such an assumption. OAR 436-060-0030(3) (emphasis added). As

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[1] OAR 436-060-0030(3) provides, in relevant part, that:

> "If a worker is with a new employer and upon request of the insurer to provide wage information, it shall be the worker's responsibility to provide documented evidence of the amount of any wages being earned. Failure to do *so shall be cause for the insurer to assume* that post-injury wages are the same as or higher than the worker's wages at time of injury." (emphasis added).

[2] OAR 436-060-0005(11) provides that in this context, "insurer" encompasses self-insured employers as well as the SAIF Corporation and insurers authorized under ORS Chapter 731 to transact workers' compensation insurance in Oregon.

such, the rule governs the carrier's processing of a claim, allowing the carrier to calculate a worker's TPD as zero if the circumstances described in the rule have not been satisfied.

OAR 436-060-0030(3), however, does not establish an evidentiary rule excluding non-documentary evidence from hearings under ORS 656.283(7) involving the calculation of TPD benefits. In a contested case, an ALJ has the authority to conduct the hearing regarding a worker's TPD benefits in any manner that would achieve substantial justice.[3] ORS 656.283(7). Accordingly, the ALJ's consideration of claimant's or other witnesses' testimony, as well as our review of such evidence, is not prohibited by OAR 436-060-0030(3).[4]

ORS 656.266(1) places the burden of proving the extent of any disability resulting from an injury or occupational disease on the worker. *See Seco O. Casares*, 51 Van Natta 1237 (1999) (TPD rate calculated as "zero" when the claimant presented no evidence that "post-injury" wages were less than "at-injury" wages). Therefore, the burden falls on the worker to overcome the carrier's assumption arrived at pursuant to OAR 436-060-0030(3). Claimant, even if he was "with a new employer," may carry his burden by any evidence admissible in a contested case hearing.

SAIF contends that claimant did not carry his burden of proof. Specifically, SAIF argues that claimant must establish entitlement to workers' compensation benefits to a "reasonable certainty," and that the evidence provided at hearing does not rise to the level of "reasonable certainty." We disagree.

Claimant's burden is to establish the extent of his disability by a preponderance of the evidence in the record. *See Raymond A. Graves*, 50 Van Natta 1520, 1527 (1998) (the preponderance of the record did not prove the TTD rates set forth in a closure notice were incorrect). The "preponderance of the evidence" means the greater weight of the evidence. *Riley Hill Gen. Contractor, Inc. v. Tandy Corp*., 303 Or 390, 394 (1987); *David D. Holbrook*, 50 Van Natta 977, 978 (1998). Therefore, claimant need not prove his contentions to a *high* degree of probability; he need only prove that his post-injury income was, *more likely than not*, $40 per day as he asserts.

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[3] This is in contrast to hearings about issues regarding a notice of closure. In such hearings, evidence that was not submitted at the reconsideration required by ORS 656.268 is not admissable. ORS 656.283(7).

[4] Our holding does not absolve claimant of his responsibility to provide the carrier with the information needed to process a claim, including information regarding earnings from self-employment. *Lee A. Austin*, 36 Van Natta 637, 638 (1984).

SAIF cites *Pearson v. Schmitt*, 259 Or 439 (1971), in which the Court held that a party's testimony, unsupported by other evidence, was insufficient to meet the standard of "reasonable certainty" applied to determine damages for lost profits. *Pearson*, 259 Or at 442. However, the Court later stated that the "reasonable certainty" standard merely requires a showing of probability. *Tadsen v. Praegitzer Indus., Inc.*, 324 Or 465 (1996). Further, *Pearson* dealt with damages for lost profits, rather than workers' compensation benefits. 259 Or at 442. SAIF cites no authority, and we are aware of none, that would support the application of a standard other than "preponderance of the evidence" to the calculation of TPD benefits.

Here, the record contains copies of claimant's bank statements and claimant's testimony and written explanation regarding the cash flow reflected in those bank statements as well as his statement of income on an earnings questionnaire and tardily completed tax returns. (Tr. V-85–89; Exs. 4; 5; 6A-8; 34; 61). The ALJ made a demeanor-based finding that claimant was credible. We generally defer to such findings because of the ALJ's opportunity to observe witnesses, and find no reason to do otherwise here. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991).

Under these circumstances, we find claimant's testimony persuasive. Further, after reviewing the record, including the evidence recited above, as well as testimony from Ms. Conklin, claimant's friend, and Ms. Manley, a CPA who testified on SAIF's behalf, we find that the preponderance of the evidence supports claimant's claimed post-injury earnings of $40 per day.

In conclusion, we find that claimant's post-injury earnings were, more probably than not, $40 per day. Consequently, on reconsideration, we continue to affirm the ALJ's order.

Claimant's attorney is entitled to an assessed fee for services on reconsideration. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on reconsideration is $1,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's response to SAIF's reconsideration motion), the complexity of the issue, and the value of the interest involved.

Accordingly, we withdraw our July 13, 2005 order. On reconsideration, as supplemented herein, we adhere to and republish our July 13, 2005 order. For services on reconsideration, claimant's attorney is awarded an assessed fee of $1,000, to be paid by SAIF. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on August 9, 2005