

In the Matter of the Compensation of
EDUARDO C. SOLORIO, Claimant

WCB Case No. 05-03804

ORDER ON REVIEW

Swanson Thomas & Coon, Claimant Attorneys
Alice M Bartelt, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell and Kasubhai.

Claimant requests review of Administrative Law Judge (ALJ) Brazeau's order that: (1) declined to award additional temporary total disability (TTD); and (2) declined to assess penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are temporary disability, penalties and attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

Claimant, a freight handler, suffered a compensable injury on December 31, 2004. The SAIF Corporation accepted a disabling right wrist fracture on January 19, 2005. Dr. Rand, claimant's attending physician, released claimant to modified duty on January 24, 2005, restricting claimant from use of his right upper extremity. Claimant returned to work.

On February 16, 2005, Dr. Rand signed a job description which had been prepared by claimant's former attorney based on information provided by claimant. However, the job description did not indicate whether the modified job required use of only the left hand, and Dr. Rand did not indicate that the job was appropriate for claimant. Instead, Dr. Rand specified that claimant should not use his right upper extremity or, if no light duty job without right upper extremity use was available, claimant should not work. (Ex. 18).

Claimant's employer terminated his employment on February 17, 2005. On April 1, 2005, Dr. Rand released claimant to work without restriction. SAIF did not provide TTD for the period from February 17, 2005 through April 1, 2005. Claimant requested a hearing, contending that he was entitled to TTD through April 1, 2005, the date he was released to regular work.

Reasoning that claimant's attending physician had approved claimant's modified job, and that claimant's employment had been terminated for violation of the employer's work rules, the ALJ found that SAIF was entitled to cease TTD payments under ORS 656.325(5)(b). The ALJ also found that SAIF properly processed the claim and, therefore, declined to assess a penalty.

On review, claimant contends that SAIF was not entitled to cease TTD payments because the employer had not notified Dr. Rand of the specific duties to be performed in claimant's modified employment. Further, claimant argues that he is entitled to a penalty because SAIF failed to timely produce discovery. For the following reasons, we agree.

Temporary Disability

If a worker has been terminated for violation of work rules or other disciplinary reasons, and the employer has a written policy of offering modified work to injured workers, the carrier shall cease TTD payments and commence temporary partial disability (TPD) payments "when the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 approves employment in a modified job that would have been offered to the worker if the worker had remained employed." WCD Admin. Order No. ORS 656.325(5)(b). This statute is implemented by OAR 436-060-0030(6), which sets forth the following conditions for the cessation of TTD payments if the worker was terminated from employment for violation of work rules or other disciplinary reasons. That rule provides the following conditions for such cessation:

"(a) The employer has a written policy of offering modified work to injured workers;

"(b) The insurer has written documentation of the hours available to work and the wages that would have been paid if the worker had returned to work in order to determine the amount of temporary partial disability compensation under section (1);

"(c) The attending physician or authorized nurse practitioner has been notified by the employer or insurer of the physical tasks to be performed by the injured worker; and

"(d) The attending physician or authorized nurse practitioner agrees the employment appears to be within the worker's capabilities."

There is insufficient evidence that Dr. Rand agreed that the job description was appropriate for claimant's one-handed work release. Dr. Rand did not check the "yes" box on the form and specified that claimant should not work if the job involved use of the right upper extremity. (Ex. 18). Thus, the conditions for SAIF to cease the payment of TTD under ORS 656.325(5)(b) did not exist. *See SAIF v. Robertson*, 120 Or App 1, 6 (1993) ("when a rule specifically and unambiguously requires the employer to follow a certain procedure, substantial compliance is not sufficient").

SAIF argues that it was entitled to cease payment of TTD benefits by ORS 656.268(4), which provides:

"Temporary total disability benefits shall continue until whichever of the following events first occurs:

(a) The worker returns to regular or modified employment.

"* * * * *"

Because claimant had returned to work prior to his termination, SAIF argues that it was entitled to cease payment of TTD at that point. However, we rejected such an argument in *Fidel Vivanco*, 58 Van Natta 1677 (2006). In that case, the carrier cited *Viking Industries v. Gilliam*, 118 Or App 183 (1993), which interpreted former ORS 656.268(3)(c) (1990) (since modified and renumbered to ORS 656.268(4)(a)–(c)(A)–(F). Or Laws 2003, ch 811, § 11 (Spec Sess)). The *Viking Industries* court held that the carrier was entitled to terminate TTD benefits after the worker had returned to modified work.

Citing *Morales v. SAIF*, 339 Or 574, 581 (2005), we rejected the carrier's argument, reasoning that, whereas the *Viking Industries* court did not address the carrier's obligations under ORS 656.325(5), the *Morales* court specifically held that "ORS 656.325(5) unambiguously conditions both the obligation to stop paying temporary total disability and the obligation to begin paying temporary partial disability on the attending physician's approval of employment in a modified job." We noted that adopting the carrier's position would deprive workers who voluntarily return to work of at least one of the procedural protections offered by ORS 656.325, namely that the job be approved by the worker's physician before benefits can be terminated. *Vivanco*, 58 Van Natta at 1682. We further concluded that such a result would contravene the legislature's intent as expressed in that statute. *Id.*

Consistent with *Vivanco*, we reject SAIF's argument here. The requirement that ORS 656.325(5)(b) imposes, that the modified job that would have been offered to claimant be approved by his attending physician or nurse practitioner, is unambiguous. Therefore, despite claimant's earlier return to work, SAIF was not entitled to continue paying TPD when claimant ceased working. *Vivanco*, 58 Van Natta at 1681–82.

In conclusion, because Dr. Rand did not approve the physical tasks to be performed by claimant, the requisite conditions for the cessation of TTD compensation under ORS 656.325(5)(b) did not exist prior to April 1, 2005.¹ Accordingly, we need not address claimant's contention that his employment was terminated in retaliation for his workers' compensation claim rather than for violation of work rules or other disciplinary reasons.

Penalties and Attorney Fees

SAIF did not provide to claimant a copy of the employer's written return-to-work policy (Exhibit A) until October 28, 2005, approximately six weeks after the hearing. Claimant contends that this constituted a discovery violation and an unreasonable delay in the payment of compensation, justifying the assessment of a penalty pursuant to ORS 656.262(11)(a).

On Exhibit A is a stamp indicating that it was received by SAIF Legal Division on October 27, 2005. Based on this stamp, SAIF argues that it provided a copy of the exhibit only one day after it was received.² However, the operations manager for the employer, Mr. Blondeau, testified at the September 15, 2005 hearing that he provided SAIF with a copy of the return-to-work policy several weeks before the hearing. (Tr. 66). SAIF offers no explanation for this discrepancy.

¹ In light of this conclusion, we do not address claimant's alternative argument based on OAR 436-060-0030(8) and ORS 656.325(5)(a).

² SAIF also argues that claimant failed to timely raise the discovery violation issue at the hearings level and, therefore, may not do so now. However, the discovery issue surfaced during the hearing, before which claimant was unaware of the discovery violation. (Tr. 66). Thereafter, claimant's written closing argument included a request for "a 25% penalty on amounts due based upon SAIF's violation of discovery provisions of OAR 438-007-0015(8) for its failure to produce documents pertinent to the claim closure prior to hearing." In response, SAIF did not specifically address the "penalty/discovery" issue, but rather asserted that claimant was not entitled to further temporary disability or relief.

Ordinarily we do not address an issue raised for the first time during closing arguments. See *Lawrence E. Millsap*, 47 Van Natta 2112, 2112–13 (1995). However, under these particular circumstances, we conclude that the issue was not first raised during closing arguments and, as such, we can consider it.

In light of these facts, we conclude that SAIF failed to provide claimant with the employer's written return-to-work policy within seven days of its receipt of the document as required by OAR 438-007-0015(4). Therefore, such conduct constituted unreasonable resistance to the payment of compensation. OAR 438-007-0015(8); *Sheila R. Hendrick*, 56 Van Natta 1670, 1677 (2004).

Because our order results in payment of temporary disability, there are "amounts then due" upon which to base a penalty. *Steven D. Surber*, 56 Van Natta 2014, 2015 (2004). Accordingly, we impose a penalty of 25 percent of "amounts then due" as a result of this order as of October 28, 2005, the date on which SAIF untimely disclosed the requested document. *Id.*

Further, claimant is entitled to a penalty-related attorney fee under ORS 656.262(11)(a). After considering the factors set forth in OAR 438-015-0110, and particularly considering the results achieved and the time devoted to the issue (as represented by the hearing record), we award a \$1,000 attorney fee, to be paid by SAIF.

Because our order results in increased compensation, claimant's attorney is entitled to an "out-of-compensation" attorney fee equal to 25 percent of the increased temporary total disability compensation created by this order, not to exceed \$5,000, payable directly to claimant's counsel. ORS 656.386(2); OAR 438-015-0055(1).

ORDER

The ALJ's order dated February 8, 2006 is reversed. Claimant is awarded temporary total disability payable from February 17, 2005 through April 1, 2005. Claimant is awarded a 25 percent penalty based on any amounts then due as of October 28, 2005. Claimant's counsel is awarded an assessed penalty-related attorney fee of \$1,000, payable by SAIF. Claimant's counsel also is entitled to an "out-of-compensation" attorney fee equal to 25 percent of the increased temporary disability compensation created by this order, not to exceed \$5,000, payable directly to claimant's counsel by SAIF.

Entered at Salem, Oregon on October 3, 2006