

In the Matter of the Compensation of  
**STEVEN R. HOLMES, Claimant**  
WCB Case No. 08-06902  
**ORDER ON RECONSIDERATION**  
Fontana & Takaro, Claimant Attorneys  
Hitt et al, Defense Attorneys

Reviewing Panel: Members Biehl, Lowell, and Herman.

On July 30, we abated our July 7, 2010 order that reversed that portion of an Administrative Law Judge's (ALJ's) order that: (1) declined to assess penalties and attorney fees for the self-insured employer's untimely payment of temporary disability benefits following the rescission of a Notice of Closure; and (2) affirmed another portion of the ALJ's order that declined to assess penalties and attorney fees for the employer's failure to pay temporary disability following the premature termination of his Authorized Training Program (ATP). Contesting our determination that the employer had a legitimate doubt for its failure to reinstate his temporary disability benefits after the termination of the ATP, claimant seeks reconsideration of our decision. The employer has responded, requesting that we adhere to our previous decision. Based on the following reasons, we adhere to our prior decision, as supplemented below.

In support of his position, claimant asserts that the record lacks evidence establishing that the employer had a "legitimate doubt" for its failure to pay temporary disability benefits once his ATP had been terminated. Moreover, claimant challenges our reasoning that the absence of case precedent on the precise situation addressed by the applicable administrative rule (OAR 436-060-0040(4)) provided the employer with a legitimate doubt regarding its liability for reinstating his "post-ATP" temporary disability. Based on the following reasoning, we adhere to our decision.

The issues presented at the hearing level (among others) concerned: (1) claimant's entitlement to temporary disability benefits following termination of his ATP for missing two consecutive days and failing, without reasonable cause, to notify his vocational insurer or the carrier; and (2) penalties/attorney fees for the employer's allegedly unreasonable failure to reinstate his temporary disability benefits. In defense of its position, the employer contended that, because the ATP had been terminated because of claimant's conduct, he was not entitled to a reinstatement of temporary disability benefits and its claim processing had not been unreasonable.

After analyzing OAR 436-060-0040(4), and case law interpreting that rule (*Atchley v. GTE Metal Erectors*, 149 Or App 581, *rev den*, 326 Or 133 (1997) and *Claude A. Benson*, 54 Van Natta 2553 (2002)), the ALJ determined that claimant was entitled to “post-ATP” temporary disability benefits. Nevertheless, the ALJ reasoned that the circumstances surrounding the termination of the ATP and the employer’s interpretation of the applicable rule governing this specific situation provided it with a legitimate doubt regarding claimant’s entitlement to temporary disability benefits. Therefore, the ALJ did not consider the employer’s conduct to have been unreasonable.

On review, we agreed with the ALJ’s decision that the employer’s conduct was not unreasonable. In doing so, we noted that the case precedent applying the administrative rule in question had concerned “post-ATP” temporary disability benefits following the “completion” of the ATP, not entitlement to those benefits where the ATP had ended prematurely (as in the case at hand). Considering this absence of case precedent interpreting the particular section of the rule in question, we affirmed the ALJ’s finding that the employer had a legitimate doubt regarding its liability for “post-ATP” temporary disability benefits. *See, e.g., Robert E. Charbonneau*, 57 Van Natta 591, 602 (2005) (carrier had a legitimate doubt about its continued liability for TTD benefits when there was no legal precedent interpreting the applicable administrative rules); *Michael A. Ditzler*, 56 Van Natta 1819, 1823 (2004) (carrier’s position was not unreasonable because, at the time of its denial, there was no legal precedent interpreting the applicable statute); *Maria R. Porras*, 42 Van Natta 2625, 2627 (1990) (penalty not appropriate where carrier’s reliance on a former rule was reasonable because, at the time of its decision, no case had addressed the validity of the former rule).

In seeking reconsideration, claimant contends that the record lacks evidence supporting our “legitimate doubt” finding. Yet, it is undisputed that the employer did not pay “post-ATP” temporary disability benefits based on the proposition that claimant was not entitled to such benefits because the ATP was prematurely terminated because of his conduct. It is similarly uncontested that the employer interpreted OAR 436-060-0040(4) as not applying to a “premature termination/misconduct” situation. Under such circumstances, the resolution of the “legitimate doubt” question is not an evidentiary one, but rather is premised on whether the employer’s interpretation of the controlling points and authorities provided it with a legitimate doubt regarding its liability for reinstating claimant’s temporary disability. Consequently, as presently developed, we consider the record sufficient for us to resolve the determinative “legitimate doubt” question.

Finally, claimant asserts that our decision improperly permits noncompliance with a specific and unambiguous rule where case precedent interpreting a particular part of that rule is absent. Claimant misunderstands our reasoning, which was intended to supplement the ALJ's determination. In other words, although the absence of case precedent addressing the precise portion of the rule in question was a component of our rationale, it was not the only ground. Rather, the unresolved question of whether the rule's reference to the "ending of training" encompassed the situation where an ATP has been prematurely terminated based on a claimant's conduct also provided a significant basis for our conclusion that the employer had a legitimate doubt concerning its liability for the payment of temporary disability benefits. Consequently, we do not agree with claimant's assessment that the rule in question was unambiguous as it pertained to this situation.

In conclusion, as stated in our previous decision, the parties do not challenge the ALJ's determination that claimant was entitled to "post-ATP" temporary disability benefits. Nonetheless, based on the rationale expressed by the ALJ, as well as the reasons set forth in our previous decision, and as supplemented herein, we do not consider the employer's failure to pay such benefits to have been unreasonable.

Accordingly, on reconsideration, as supplemented, we republish our July 7, 2010 order. 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 10, 2010