

---

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

Reviewing Panel: Members Biehl and Lowell.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Rissberger's order that declined to assess a penalty or attorney fee for the self-insured employer's allegedly unreasonable resistance to the payment of temporary disability. On review, the issues are penalties and attorney fees. We reverse in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's findings of fact. We provide a summary of the relevant facts.

Claimant was compensably injured in October 1999. The employer accepted a lacerated scrotum, left femoral artery laceration, mid thigh, left mid thigh leg amputation, left inferior pubicrami fracture, and major depressive disorder. (Ex. 3).

Claimant was awarded permanent disability, found eligible for vocational assistance, and completed a training program. (Exs. 4, 5, 5A, 6-4). In June 2007, he was found eligible for a new authorized training program (ATP). (Ex. 6-3, -5). The new ATP began March 19, 2008 and was projected to end on December 18, 2008. (Ex. 6-1).

By letter dated August 18, 2008, the employer notified claimant that his vocational eligibility ended pursuant to OAR 436-120-0350(10) because he had missed two consecutive days of training and failed, without reasonable cause, to notify his vocational counselor of his absence. (Exs. 12, 26-2; *see* Exs. 8-11).

Claimant requested review and the Workers' Compensation Division (WCD) set aside the employer's end-of-eligibility decision, finding that claimant had obtained permission from his employer to take a break from training. (Exs. 13, 14, 15, 26). WCD was not persuaded that claimant had failed to comply with his ATP and concluded that he was not required to notify his vocational counselor or

the employer of his absence. (Ex. 26-6). The employer appealed that decision and the Director affirmed.<sup>1</sup>

Claimant requested a hearing, arguing that he remained entitled to temporary total disability (TTD) benefits following the termination of his ATP on August 18, 2008. Claimant also requested penalties and attorney fees for the employer's allegedly unreasonable failure to pay TTD.

### CONCLUSION OF LAW AND OPINION

The parties do not challenge the ALJ's determination that claimant was entitled to additional TTD following the termination of his ATP. However, concerning claimant's request for penalties and attorney fees, the ALJ concluded that the employer had a legitimate doubt about its obligation to pay further TTD after claimant was terminated from his ATP.

On review, relying on OAR 436-060-0040(3) and case law interpreting that rule, claimant contends that the employer had no legitimate doubt that it was required to continue paying TTD after the ATP ended. Based on the following reasoning, we disagree.

Under ORS 656.262(11)(a), if a carrier unreasonably delays or unreasonably refuses to pay compensation, the carrier shall be liable for an additional amount up to 25 percent of the amounts "then due." The standard for determining an unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. *Int'l Paper Co. v. Huntley*, 106 Or App 107, 110 (1991). If so, the refusal to pay is not unreasonable. "Unreasonableness" and "legitimate doubt" are to be considered in the light of all the evidence available to the insurer. *Brown v. Argonaut Ins.*, 93 Or App 588, 591 (1988).

Pursuant to ORS 656.268(9), "[i]f, after the notice of closure issued pursuant to this section, the worker becomes enrolled and actively engaged in training according to rules adopted pursuant to ORS 656.340 and 656.726, any permanent disability payments due for work disability under the closure shall be suspended, and the worker shall receive temporary disability compensation and any permanent disability payments due for impairment while the worker is enrolled and actively engaged in the training."

---

<sup>1</sup> The ALJ also issued a Proposed and Final Order on November 30, 2009, affirming WCD's order. The Director affirmed the ALJ's Proposed and Final Order on February 9, 2010. *Steven R. Holmes*, 15 CCHR 22 (2010).

Under OAR 436-060-0040 (WCD Admin. Order No. 07-064; eff. January 1, 2008), a carrier must resume any work disability award payments suspended under ORS 656.268(9) upon the worker's completion or ending of the training, unless the worker is not then medically stationary. If no work disability award payment remains due, temporary disability compensation payments must continue pending a subsequent claim closure. *Id.*

Thus, ORS 656.268(9) provides that the worker shall receive temporary disability compensation while he or she is "enrolled and actively engaged in the training." OAR 436-060-0040(4) directs a carrier to continue to pay temporary disability benefits upon the worker's "completion or ending of the training" until a subsequent claim closure, if the worker's condition is medically stationary and if no permanent disability award payment remains due.

Here, there is no dispute regarding claimant's medically stationary status and the record indicates that claimant's permanent disability award was paid in full. (Exs. 5B, 5C). Relying on *Atchley v. GTE Metal Erectors*, 149 Or App 581, *rev den*, 326 Or 133 (1997) and *Claude A. Benson*, 54 VN 2553 (2002), claimant contends that the employer's failure to resume his TTD payments after the ATP ended was unreasonable. Yet, both cases involved situations where the claimant had completed the ATP, not where the ATP had ended prematurely as occurred here.

Under such circumstances, we find that the employer had a legitimate doubt about its continued liability for "post-ATP" TTD 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). We therefore affirm that portion of the ALJ's order that declined to assess penalties and attorney fees for the employer's "post-ATP" claim processing.

Claimant also seeks penalties and attorney fees for the employer's untimely payment of temporary disability benefits following the rescission of the "post-ATP" Notice of Closure. For the following reasons, we grant claimant's request.

After the ATP ended, the employer issued a Notice of Closure on April 24, 2009. (Ex. 29). A July 30, 2009 Order on Reconsideration rescinded the closure. (Ex. 30). On September 1, 2009, the employer paid claimant TTD from April 24, 2009, the date of the Notice of Closure that was rescinded, until August 26, 2009. (Ex. 31).

OAR 436-060-0150(5)(g) (WCD Admin. Order 08-065; eff. January 1, 2009) provides that timely payment of temporary disability benefits means payment has been made no later than the 14th day after the “date a notice of closure is set aside by a reconsideration order[.]” Thus, pursuant to OAR 436-060-0150(5)(g), the employer was required to commence TTD benefits within 14 days of the July 30, 2009 Order on Reconsideration. The employer does not explain why it did not pay those TTD benefits until September 1, 2009.

Under these circumstances, we find that the employer unreasonably delayed the payment of claimant’s TTD for the period in question (April 24, 2009 through August 19, 2009). Accordingly, we assess a penalty equal to 25 percent of the aforementioned untimely TTD benefits, payable by the employer to claimant. *See* ORS 656.262(11)(a).

In addition, after considering the factors set forth in OAR 438-015-0110 and OAR 438-015-0010(4), we find that a reasonable attorney fee under ORS 656.262(11)(a) for the aforementioned unreasonable conduct, proportionate to the benefit to claimant, is \$2,000, payable by the employer.<sup>2</sup> In reaching this conclusion, we have given primary consideration to the benefit to claimant, the results achieved, and the time devoted to the case (as represented by the record and claimant’s counsel’s statement of services).<sup>3</sup>

---

<sup>2</sup> We note that claimant was only partially successful in his quest for a determination that the employer’s conduct was unreasonable. In addition, claimant’s counsel is not entitled to an attorney fee for services on review devoted to seeking a penalty and attorney fee. *Eric V. Orchard*, 58 Van Natta 2574 (2006), *aff’d without opinion*, 218 Or App 229 (2008); *Richard Gallagher*, 56 Van Natta 3290, 3297 (2004); *Amador Mendez*, 44 Van Natta 736 (1992); *Ernest C. Richter*, 44 Van Natta 101 (1992).

<sup>3</sup> Because we award an attorney fee under ORS 656.262(11)(a), we are not authorized to also award a fee pursuant to ORS 656.382(1) based on the same conduct. *Corona v. Pacific Resource Recycling*, 125 Or App 47, 50 (1993); *Oliver v. Norstar, Inc.*, 116 Or App 333, 336 (1992).

ORDER

The ALJ's order dated November 30, 2009 is reversed in part and affirmed in part. That portion of the ALJ's order that declined to award a penalty and attorney fee under ORS 656.262(11)(a) is reversed. Claimant is awarded a penalty equal to 25 percent of the temporary disability benefits due between April 24, 2009 and August 19, 2009. Claimant's counsel is awarded a \$2,000 penalty-related attorney fee, to be paid by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on July 7, 2010