

In the Matter of the Compensation of  
**ROBERT L. CANFIELD, Claimant**

WCB Case No. 11-02275

ORDER ON REVIEW

Moore Jensen & Lesh, Claimant Attorneys  
Ronald W Atwood PC, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Brown's order that: (1) did not increase the rate of his temporary disability benefits; and (2) did not assess penalties and attorney fees for the insurer's allegedly unreasonable claim processing. On review, the issues are rate of temporary disability, penalties, and attorney fees. We modify in part and affirm in part.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that the insurer properly calculated claimant's temporary disability rate by averaging his weekly earnings with the employer for the 52 weeks prior to the date of injury. *See* OAR 436-060-0025(5)(a)(A). On review, claimant contends that there are three alternative methods that would more appropriately calculate his temporary disability rate (as opposed to the one chosen by the insurer), one of which is based on employment through a "union hall call board." *See* OAR 436-060-0025(3)(b).

For the following reasons, we conclude that claimant's temporary disability rate should be calculated pursuant to OAR 436-060-0025(3)(b).<sup>1</sup> In other words, our review of the record establishes that when claimant was injured, he had obtained his work through a union call board.

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<sup>1</sup> Because we find claimant's "union hall call board" argument persuasive and dispositive, we do not address the other two methods of calculation proposed by claimant.

Pursuant to OAR 436-060-0025(3)(b) (WCD Admin Order 08-065; eff. January 1, 2009),<sup>2</sup> for “regularly employed” workers who are “employed through union hall call board,” carriers must “compute the rate of compensation on the basis of a five-day work week at 40 hours a week, regardless of the number of days actually worked per week.”<sup>3</sup> *See Concrete Cutting Co. v. Clevenger*, 191 Or App 157, 162-163 (2003) (“the wages for ‘regularly employed’ workers with irregular earnings who *did* obtain their employment through a union call board will typically be governed by paragraph (3)(b)”). The underlying purpose of OAR 436-060-0025 “is to determine or approximate, to the extent possible, the worker’s wage at the time of injury based on existing employment circumstances.” *Id.* at 162.

Here, claimant was called from a union hall call board to begin working for the employer on June 29, 2006. (Tr. 8, 13). He has worked for the employer on and off since that time. (Tr. 8) In general, when claimant was laid off from the employer, he would contact the union hall to register that he was laid off and make himself available for other work. He would also sign up for unemployment. (Tr. 8, 10, 15-16). Claimant explained that when he put his name on the union call board, he expected that the employer would call him or another job would become available. (Tr. 25).

After his June 2006 call from the union hall, claimant has been contacted directly by the employer when there is available work. (Tr. 13, 14). He has worked for other employers after being laid off from the employer. (Tr. 8-9, 19-20). Claimant explained that when he is called back to the employer after a layoff, he does not have an orientation each time he returns. (Tr. 14). He recalled one occasion where he had to sign new paperwork for the employer because it was “over a certain amount of time[.]” (Tr. 14, 16, 32).

Claimant was laid off from the employer after October 2008, and did not return to work for the employer until May 2009. (Exs. 4-4, 6; Tr. 9). He worked for the employer on a highway project through the end of October 2009. (Ex. 6-6;

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<sup>2</sup> We apply the version of OAR 436-060-0025 in effect at the time that claimant was injured on December 1, 2009. *See* OAR 436-060-0025(1) (rate of compensation shall be based on the wage of the worker at the time of injury); *Tye v. McFetridge*, 342 Or 61, 67 n 5 (2006).

<sup>3</sup> The record establishes that claimant was “regularly employed” because he was “actually employed” and “available” for employment. *See* ORS 656.210(2)(e) (“regularly employed” means “actual employment or availability for such employment”); OAR 436-060-0025(3) (same).

Tr. 9). After he was laid off in October 2009, his name returned to the union hall call board and he was available for work with other employers. (Tr. 10). Claimant believed that he received unemployment benefits for the month of November 2009. (*Id.*) After being contacted directly by the employer, he returned to work on December 1, 2009, when he was injured. (Tr. 9, 14).

Mr. Broadsword, who has worked for the employer for 27 years, explained that the employer is a civil construction company that has individual, temporary projects. (Tr. 29). He explained that the employer's availability of work was based on competitive bidding, as well as the weather, and that the employer has periodic layoffs. (Tr. 29, 32). He testified that the employer generally calls back the same crew to work year after year, depending on the job and the skills that are needed, and that workers are not considered new employees each time they return after a layoff. (Tr. 30-31, 33, 34). Mr. Broadsword stated that the employer had a regular list of people who are called, rather than taking the first person from the union hall call board. (Tr. 31). He confirmed that the employer had negotiated with the union to allow the employer to contact workers directly. (Tr. 33).

Based on this evidence, we reach the following conclusions. Claimant initially obtained his employment with the employer through a union hall call board. After that time, although the employer called him directly when there was work available, it did so based on an agreement with the union that it could contact workers directly, rather than taking the first person from the union hall call board. (Tr. 31, 33). Moreover, after claimant was laid off from the employer, he returned his name to the union hall call board and was available for work with other employers. (Tr. 8, 10, 15-16). When he put his name on the union call board, he expected that the employer would call him or he would obtain another job. (Tr. 25). Claimant has worked for other employers since the employer's 2006 call. (Tr. 8-9, 19-20).

Under these circumstances, we are persuaded that claimant was "employed through union hall call board" pursuant to OAR 436-060-0025(3)(b). Therefore, the insurer must compute his rate of compensation on the basis of a five-day work week at 40 hours a week, regardless of the number of days actually worked per

week. OAR 436-060-0025(3)(b); *see Rose E. Venetucci*, 51 Van Natta 1451 (1999) (on remand) (because the claimant was employed through a union hall call board and was available for full-time work through the union hall call board, the carrier should have calculated TTD based on the "union hall call board" rule).

This case is distinguishable from *Clevenger*. In that case, the claimant was not a union member when he was hired by the employer. Seven years later, the employer signed a union contract, making the claimant a member of the union. The local union operated a call board through which unemployed union members could place their names on a list for referral on a rotating basis to potential employers. The claimant never used the call board service, but rather continued to work for the employer, on a continuous basis, until he was injured. Based on those facts, the court held that OAR 436-060-0025(5) applied to the claimant's circumstances because that subsection "appeared to be more applicable to 'regularly employed' workers with irregular earnings who have not obtained their employment through a call board than does paragraph (3)(b)." 191 Or App at 163. Here, in contrast, we have found that claimant *did* obtain his employment through a union hall call board.

Accordingly, we modify that portion of the ALJ's order that declined to recalculate claimant's temporary disability.

Because our order results in increased compensation, claimant's counsel 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. ORS 656.386(4); OAR 438-015-0055(1).

We turn to the penalty issue. At hearing and on review, claimant requested a penalty and related attorney fee for the employer's allegedly unreasonable claim processing.

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 amount "then due." The standard for determining an unreasonable resistance to 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 (1991); *Katrina Miller*, 60 Van Natta 1307, 1309 (2008). If so, the refusal to pay is not unreasonable. "Unreasonableness" and "legitimate doubt" are to be considered in light of all the evidence available to the carrier. *Brown v. Argonaut Ins.*, 93 Or App 588, 591 (1988); *Miller*, 60 Van Natta at 1309.

Here, the particular method for calculating claimant's TTD rate has not been conclusively resolved in prior cases pertaining to the specific facts at issue here. Under such circumstances, we find that the insurer had a legitimate doubt

regarding its calculation of claimant's TTD rate. *See Mary T. Robinett*, 61 Van Natta 692 (2009) (no penalty assessed where the proper calculation was not clear and the carrier's audit specialist provided a reasonable explanation for its method of calculation); *Miller*, 60 Van Natta at 1309-10 (because the employer's positions presented novel issues that had not been conclusively resolved, the employer had a legitimate doubt regarding its calculation of the claimant's TTD rate). Accordingly, we affirm that portion of the ALJ's order that did not assess penalties and attorney fees.

### ORDER

The ALJ's order dated September 2, 2011 is modified in part and affirmed in part. The claim is remanded to the insurer for recalculation of claimant's temporary disability rate in accordance with OAR 436-060-0025(3)(b). Claimant's attorney is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased temporary disability compensation resulting from this order, not to exceed \$5,000, payable by the insurer directly to claimant's counsel. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on March 14, 2012