

In the Matter of the Compensation of
TIMOTHY R. GILBERT, Claimant

WCB Case Nos. 10-02522, 10-01072

ORDER ON REVIEW

Hooton Wold & Okrent LLP, Claimant Attorneys
Holly O'Dell, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Otto's order that: (1) upheld the SAIF Corporation's denial of his new/omitted medical condition claim for bilateral inguinal hernias; and (2) declined to award penalties or attorney fees for SAIF's allegedly unreasonable offset. On review, the issues are compensability, penalties, and attorney fees. We affirm.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following change and supplementation. In the third full paragraph on page 3, we replace the second and third sentences with the following: "As of March 28, 2011, SAIF's overpayment was \$69.31. (Ex. 153)." We do not adopt the second finding of ultimate fact.

We provide the following summary of facts pertaining to the penalty and attorney fee issues.

After claimant was compensably injured on October 23, 2003, SAIF accepted a lumbar strain. (Ex. 10). That claim was closed on April 30, 2004, without a permanent disability award. (Ex. 18).

On July 6, 2004, SAIF modified the acceptance to include an L4-5 disc herniation. (Ex. 25). On October 11, 2004, Dr. Brett performed a right L4-5 lumbar laminectomy and discectomy. (Ex. 31).

A January 21, 2005 Notice of Closure awarded claimant 34 percent unscheduled permanent partial disability (PPD) for his low back condition. (Ex. 34). That Notice of Closure was affirmed on reconsideration, at hearing, and on review. (Exs. 41, 42, 57, 58).

Claimant began an authorized training program (ATP) on August 8, 2005, which was completed on March 31, 2006. (Exs. 50, 51).

In March 2006, claimant had low back symptoms and Dr. Brett recommended surgery. (Exs. 45, 49). However, the Medical Review Unit (MRU) determined that the L4-5 fusion proposed by Dr. Brett was not appropriate for claimant's compensable condition. (Ex. 62).

A March 29, 2007 Notice of Closure awarded 37 percent unscheduled PPD for claimant's low back condition. The Notice of Closure explained that the total value of the unscheduled PPD award was \$3,081.60, and stated that the medically stationary date was January 18, 2007. (Ex. 69-1). The worksheet explained that claimant had been previously awarded 34 percent unscheduled PPD and was awarded an additional 3 percent (\$3,081.60). (Ex. 69-2).

A March 29, 2007 Claim Audit explained that there was an overpayment of \$3,332.37, which consisted of 36 days of temporary disability benefits paid past the medically stationary date of January 18, 2007. (Exs. 71, 72, 73).

The March 29, 2007 Notice of Closure was corrected on April 27, 2007, in order to change the date that claimant's aggravation rights ended. (Ex. 77).

Claimant requested reconsideration of the March 29, 2007 Notice of Closure. An August 16, 2007 Order on Reconsideration changed the medically stationary date from January 18, 2007, to January 4, 2005. (Ex. 82-2). Claimant's unscheduled PPD award was reduced to 28 percent and his temporary disability award was modified. (Ex. 82-2, -3, -4).

An August 28, 2007 Claim Audit determined that there was an overpayment of 187 days of temporary disability paid past the end of the training program (May 3, 2006 through January 18, 2007). (Ex. 83). SAIF notified claimant of an overpayment of \$17,263.14. (Exs. 84, 85).

A January 7, 2008 Opinion and Order regarding the August 16, 2007 Order on Reconsideration increased claimant's unscheduled PPD award to 29 percent. (Ex. 87). SAIF adjusted claimant's overpayment in accordance with that order. (Ex. 88).

On April 1, 2009, SAIF reopened the claim due to an aggravation of the L4-5 disc herniation. (Exs. 102, 104). Dr. Brett performed a second low back surgery on May 19, 2009, which included a posterior interbody fusion at L4-5. (Ex. 111).

On February 16, 2010, claimant's aggravation claim was closed with a 35 percent unscheduled PPD award for his low back condition. (Ex. 126). A May 14, 2010 Order on Reconsideration increased claimant's unscheduled PPD award to 39 percent.¹ (Ex. 143).

CONCLUSIONS OF LAW AND OPINION

Compensability

We adopt and affirm the portion of the ALJ's order that upheld SAIF's denial of claimant's new/omitted medical condition claim for bilateral inguinal hernias.

Penalties/Attorney Fees

At hearing, claimant argued that SAIF withheld \$5,683.30 in temporary disability benefits between July 2009 and February 2010 based on an alleged overpayment of permanent disability, but that such an overpayment did not exist and was not recoverable because he was substantively entitled to the benefits at the time they were paid. SAIF contended that claimant was barred from litigating this issue and that, even if he was not barred, he failed to prove that SAIF incorrectly calculated his overpayment.

The ALJ found no conclusive evidence that SAIF deducted alleged overpaid permanent disability benefits from claimant's temporary disability award. The ALJ concluded that claimant failed to establish that SAIF improperly withheld temporary disability benefits due to an alleged overpayment of permanent disability benefits. The ALJ also determined that, even if claimant was correct, the calculations were so complex that SAIF would have had a reasonable doubt regarding its liability for any late payment of benefits. The ALJ declined to assess a penalty or an attorney fee.

Citing *Holdren v. SAIF*, 186 Or App 443 (2003), *SAIF v. Coburn*, 159 Or App 413, *rev den*, 329 Or 527 (1999), and *Atchley v. GTE Metal Erectors*, 149 Or App 581, *rev den*, 326 Or 133 (1997), claimant argues that permanent disability to which the worker was substantively entitled on the basis of a final determination

¹ On review of that order, claimant's unscheduled PPD award for his low back condition was increased to 43 percent. *Timothy R. Gilbert*, 64 Van Natta 58 (2012).

of unscheduled permanent disability cannot become the basis for an overpayment. According to claimant, the entirety of the January 21, 2005 Notice of Closure should have been paid out by SAIF before the issuance of the March 29, 2007 Notice of Closure. He notes that the vocational program ended on March 31, 2006, a year before the March 29, 2007 Notice of Closure.

SAIF responds that *Atchley, Holdren, and Coburn* only prevented it from recovering any of the \$16,529.47 that was actually paid pursuant to the January 21, 2005 Notice of Closure, before the subsequent closure. Citing *Fox v. Ross Bros. & Co., Inc.*, 175 Or App 265 (2001), SAIF argues that if a permanent disability award is lawfully redetermined before the payment of that balance, the balance is not substantively owed.²

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).

For the following reasons, we conclude that a penalty or an attorney fee are not warranted. ORS 656.268(9) (2003)³ provides, in part:

² Claimant is not asserting that he is entitled to any additional permanent or temporary disability compensation. Rather, he contends that SAIF prematurely recovered an “overpayment,” which he argues did not exist and therefore, SAIF’s actions were unreasonable.

³ ORS 656.268(9) has been amended since claimant was injured in October 2003, but those amendments do not apply to this case. The 2003 legislature amended ORS 656.268(9), with the amendments applying either to injuries occurring on or after January 1, 2005, or on or after January 1, 2008. Or Laws 2003, ch 657, §§ 7, 8, 13, 14, 15, 16. Thus, the 2003 amendments do not apply to claimant’s date of injury, which is October 23, 2003. Similarly, although the 2007 legislature amended ORS 656.268(9), those amendments apply to injuries occurring on or after January 1, 2008. Or Laws 2007, ch 274, §§ 4, 8. The 2011 legislature renumbered the statute to “ORS 656.268(10),” but that amendment applies to requests for reconsideration made in or after the effective date, which was January 1, 2012. Or Laws 2011, ch 99, §§ 1, 5. This case does not involve a request for reconsideration on or after January 1, 2012.

“If, 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 under the closure shall be suspended, and the worker shall receive temporary disability compensation while the worker is enrolled and actively engaged in the training. When the worker ceases to be enrolled and actively engaged in the training, the insurer or self-insured employer shall again close the claim pursuant to this section if the worker is medically stationary or if the worker’s accepted injury is no longer the major contributing cause of the worker’s combined or consequential condition or conditions pursuant to ORS 656.005 (7). The closure shall include the duration of temporary total or temporary partial disability compensation. Permanent disability compensation shall be redetermined for unscheduled disability only.”

The key to this case is the change in claimant’s medically stationary status. The March 29, 2007 Notice of Closure stated that the medically stationary date was January 18, 2007, which was after claimant had completed the ATP on March 31, 2006. (Ex. 69-1). However, the August 16, 2007 Order on Reconsideration changed the medically stationary date to January 4, 2005. (Ex. 82-2).

Because SAIF did not consider claimant’s condition to be medically stationary until January 18, 2007, it was authorized to continue paying temporary disability benefits after the ATP ended. OAR 436-060-0040(4) (WCD Admin. Order No. 06-056; eff. July 1, 2006) provides:

“The insurer must stop temporary disability compensation payments and resume any 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 award payment remains due, temporary disability compensation payments must continue pending a subsequent claim closure.”⁴ (Emphasis added).

⁴ OAR 436-060-0040(4) was amended in April 2011 (WCD Admin. Order No. 11-052; eff. April 1, 2011) to change “ORS 656.268(9)” to “ORS 656.268(10),” but the relevant language remains the same.

When claimant completed the ATP on March 31, 2006, Dr. Brett had recommended further surgery and stated that his condition was not medically stationary. (Exs. 49, 54). However, the MRU determined that the L4-5 fusion proposed by Dr. Brett was not appropriate for claimant's compensable condition. (Ex. 62). On January 18, 2007, Dr. Brett determined that claimant's condition was medically stationary. (Ex. 66). Because claimant's condition was not deemed to be medically stationary when he completed the ATP, SAIF was not required to resume any permanent disability award payments that had been suspended under ORS 656.268(9). *See* OAR 436-060-0040(4).

In *Fox*, 175 Or App at 267, the claimant's condition became medically stationary in June 1996, and a determination order awarded him 38 percent PPD. On reconsideration, the award was reduced to 13 percent. An ALJ increased the award to 51 percent and that award became final in September 1997. The carrier refused to pay the 51 percent award because, at the time the ALJ issued it, the claimant was enrolled in an ATP. Shortly after the claimant finished the ATP, the carrier re-evaluated him and issued a Notice of Closure that reduced his PPD to 34 percent, and the carrier paid that amount. While the claimant was enrolled in the ATP, he requested a hearing before an ALJ seeking to compel the carrier to pay the 51 percent award, and also sought attorney fees and a penalty against the carrier for unreasonably refusing to pay the award.

The court concluded that the 51 percent PPD award was due under the original determination order, but that ORS 656.268(9) (1995) authorized the carrier to suspend payments of that award. *Id.* at 271. The court rejected the claimant's arguments that the 51 percent award was due when it became final during his ATP and that the carrier had no authority to suspend payments. *Id.* at 270. Furthermore, the court determined that the carrier had authority under ORS 656.268(9) to redetermine the claimant's claim. *Id.* at 271; *see Coburn*, 159 Or App at 417 ("pursuant to ORS 656.268(9), there *must* be a reevaluation of the worker's extent of disability upon completion of an ATP, even if the original award has become final") (emphasis in original); *SAIF v. Sweeney*, 121 Or App 142, 144-45 (1993) ("We adhere to that portion of our earlier opinion that holds that an employer may re-evaluate a permanent disability award after the completion of [an ATP].").

The court explained that when the claimant completed the ATP on February 28, 1998, ORS 656.268(9) required redetermination of the claim. Because payment of the 51 percent award was only "suspended" by operation of ORS 656.268(9), the carrier had an obligation to pay the award once the ATP

ended. However, that obligation did not ripen until 30 days after the end of the suspension, pursuant to OAR 436-060-0150. The court concluded that, because the new Notice of Closure issued on March 11, 1998, before the carrier was obligated to pay the 51 percent award, the Board did not err in holding that the claimant could not enforce the 51 percent award. *Fox*, 175 Or App at 272-73.

Thus, based on the *Fox* rationale, if the “pre-ATP” PPD payments have been lawfully suspended, they need not be paid and are subsumed in the post-ATP PPD award, which redetermines the PPD. Likewise, if these “pre-ATP” PPD payments were lawfully suspended, claimant was not substantively entitled to such benefits when his PPD was redetermined at the “post-ATP” Notice of Closure and subsequent Order on Reconsideration. Should that be the case, the *Holdren*, *Coburn*, and *Atchley* holdings are distinguishable.

Here, after claimant’s ATP ended on March 31, 2006, SAIF was authorized under OAR 436-060-0040(4) to continue paying temporary disability and to continue to suspend the permanent disability payments due on the pre-ATP January 21, 2005 Notice of Closure because the medical evidence indicated that claimant’s condition was not medically stationary. However, at the time of the August 16, 2007 Order on Reconsideration, the Appellate Review Unit determined that claimant’s condition was medically stationary as of January 4, 2005. (Ex. 82). Under such circumstances, SAIF was authorized to recover the “overpayment” against the current permanent disability granted by the post-ATP March 29, 2007 Notice of Closure, as modified by the August 16, 2007 Order on Reconsideration.⁵ *See Natalie M. Zambrano*, 48 Van Natta 1812, 1815 (1996) (where the “post-ATP” Determination Order issued before the insurer became obligated to continue the monthly payments of permanent disability, and the Determination Order reduced the award, the insurer was effectively excused from the remaining payments of the original permanent disability award).

In any event, we find that OAR 436-060-0040(4) provided SAIF with a reasonable basis for concluding that it was entitled to claim an overpayment under the circumstances of this case. Claimant does not cite prior Board or court cases applying OAR 436-060-0040(4) to situations in which a claimant’s condition was not medically stationary at the time the ATP ended. Under these circumstances, we conclude that claimant is not entitled to a penalty or an attorney fee for SAIF’s

⁵ If SAIF had determined that claimant’s condition was medically stationary when the ATP ended on March 31, 2006, SAIF would have been required to stop paying temporary disability and resume the PPD award payments suspended under ORS 656.268(9), pursuant to OAR 436-060-0040(4).

allegedly unreasonable offset.⁶ *See Steven R. Holmes*, 62 Van Natta 1728, *recons*, 62 Van Natta 2040 (2010) (considering the absence of case precedent interpreting OAR 436-060-0040(4) when the ATP ended prematurely, the employer had a legitimate doubt regarding its liability for “post-ATP” temporary disability benefits); *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).

ORDER

The ALJ’s order dated August 17, 2011 is affirmed.

Entered at Salem, Oregon on May 2, 2012

⁶ Alternatively, claimant argues that if SAIF was entitled to recover a portion of the overpaid PPD, it would be limited to the increased compensation in the March 29, 2007 Notice of Closure and could not drop below the \$26,156.80 awarded on January 21, 2005. Even assuming that claimant is correct on that point, we would still find that SAIF had a reasonable basis for concluding that it was entitled to claim an overpayment under the circumstances of this case.