

In the Matter of the Compensation of  
**VERN A. TANNER, Claimant**  
WCB Case No. 11-03894  
ORDER ON REVIEW  
Dale C Johnson, Claimant Attorneys  
Holly O'Dell, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Weddell, Langer, and Herman. Member Weddell dissents in part.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Donnelly's order that: (1) declined to increase his temporary total disability (TTD) rate; (2) found that the SAIF Corporation correctly determined an underpayment of temporary disability benefits; and (3) found that SAIF timely accepted his omitted medical condition claim for a left posterior horn medial meniscus tear. In its respondent's brief, SAIF contests those portions of the ALJ's order that: (1) assessed a penalty and a \$500 insurer-paid attorney fee for an alleged discovery violation; and (2) assessed a penalty and a \$500 insurer-paid attorney fee for its allegedly unreasonable claim processing. On review, the issues are TTD rate, claim processing, jurisdiction, penalties and attorney fees. We affirm in part, and modify in part.

### FINDINGS OF FACT

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

### CONCLUSIONS OF LAW AND OPINION

#### TTD Rate

Claimant began working for SAIF's insured, a temporary service provider, on July 16, 2009. (Ex. 5). Before his compensable September 2, 2010 left knee injury, there were three gaps in claimant's employment: a one-week gap from September 13 to September 19, 2009; a one-week gap from May 30 to June 5, 2010; and a seven-week gap from June 27 to August 14, 2010. (Exs. 25, 60A-3-4). During the seven-week gap, claimant collected unemployment benefits. (Tr. 9-10).

In December 2010, SAIF determined claimant's average weekly wage (AWW) to be \$289.31. (Exs. 25, 28, 29). In doing so, it used claimant's gross earnings for the 52 weeks prior to the date of injury as provided by its insured, noting that "all gaps included as normal and inherent." (Ex. 25).

The ALJ found that SAIF properly calculated claimant's AWW because the seven-week gap (from June 27, 2010 through August 14, 2010) was not an "extended gap." In doing so, the ALJ reasoned that: (1) claimant was a temporary worker; (2) he testified that, when he was hired, he assumed there would be "gaps" in employment; and (3) Ms. Cox (the employer representative) testified that potential employees were advised during the hiring process that they were not required to accept every assignment, and there were times when work was not available.

On review, claimant argues that the seven-week gap is an "extended gap" and should be excluded from the AWW calculation. Thus, according to claimant, his AWW should be based on the 45 "actual weeks" of his employment (the 52 weeks prior to the date of injury, less the seven-week "extended gap"). For the following reasons, we disagree.

Claimant has the burden of proving the extent of his temporary disability. ORS 656.266; *Donald L. Vanwormer*, 64 Van Natta 1591, 1592 (2012). Therefore, he has the burden of proving the requirements for an "extended gap." OAR 436-060-0025(5)(a)(A). We apply the version of the rule (WCD Admin. Order 09-057 (eff. January 1, 2010)) in effect at the time that claimant was injured on September 2, 2010. *See Tye v. McFetridge*, 342 Or 61, 67 n 5 (2006); *Donald L. Ivie*, 61 Van Natta 1037, 1041 n 7 (2009).

OAR 436-060-0025(5)(a)(A) provides, in pertinent part:

"Insurers must use the worker's average weekly earnings with the employer at injury for the 52 weeks prior to the date of injury. \* \* \* For workers employed less than 52 weeks or where extended gaps exist, insurers must use the actual weeks of employment (excluding any extended gaps) with the employer at injury \* \* \*. For the purpose of this rule, gaps shall not be added together and must be considered on a claim-by-claim basis; the determination of whether a gap is extended must be made in light of its length and of the circumstances of the individual employment relationship itself, including whether the parties contemplated that such gaps would occur when they formed the relationship."<sup>1</sup>

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<sup>1</sup> Claimant does not dispute that OAR 436-060-0025(5)(a)(A) and (b) apply. OAR 436-060-0025(5)(b) provides:

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In *SAIF v. Frias*, 169 Or App 345, 350 (2000), the court explained:

“‘Gap’ means ‘a break in continuity: INTERVAL, HIATUS.’ ‘Extended’ means ‘drawn out in length,’ ‘lengthy,’ ‘protracted,’ or ‘prolonged.’ Finally, ‘drawn-out’ means ‘stretched to great or greater length \* \* \* [;] made to seem or be longer than desirable or normal.’” (Citations omitted).

We examine the seven-week gap (June 27 to August 14, 2010) to determine whether it was “extended.” In doing so, we also look to the individual employment relationship itself, including whether the parties contemplated that such gaps would occur when they formed the relationship. OAR 436-060-0025(5)(a)(A); *Frias*, 169 Or App at 353.

Here, the seven-week gap (June 27 to August 14, 2010) was longer than the two week-long gaps (September 13 to September 19, 2009, and May 30 to June 5, 2010). However, considering claimant’s individual employment relationship itself, the record does not persuasively establish that such a gap was not contemplated when the parties formed that relationship. In other words, we do not find the seven-week gap to be “extended,” (*i.e.*, “drawn out in length” or “longer than desirable”). *Frias*, 169 Or App at 350. We reason as follows.

The evidence regarding whether the parties contemplated that such gaps would occur when they formed the relationship is sparse. According to claimant, the gaps between assignments were usually only three-to-five days in length. (Tr. 9, 12, 13). Yet, he acknowledged that he was told that the seven-week gap was due to a “slump” in job availability, although he did not recall previously having a seven-week gap. (Tr. 9).

Claimant also testified that, “there was no specifications on just how long the gaps would be, you know, how long or how short they might be.” (Tr. 13). However, he also acknowledged that, because the employer was a temporary agency, there would be gaps in his job assignment. (Tr. 9, 10, 12-14). Moreover, Ms. Cox, the employer representative, testified that employees are told during the

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“For workers employed through a temporary service provider on a ‘temporary basis,’ or a worker-leasing company as defined in OAR 436-050, insurers will determine the weekly wage by the method provided in subsection (a) of this section. However, each job assignment shall not be considered a new wage earning agreement.”

hiring process that the company does not have control of what job assignments may be available, and that there are times when there is no work available. (Tr. 19-20).

Under such circumstances, particularly considering the employer's representative's un rebutted testimony about informing employees of the unpredictability of work assignments for a temporary service worker, we are not persuaded that claimant has established that such gaps (*i.e.*, the seven-week "slump") were not contemplated by the parties when they formed their relationship. ORS 656.266; OAR 436-060-0025(5)(a)(A); *Pedro Frias*, 52 Van Natta 2246 (2000) (on remand). Consequently, we affirm the ALJ's conclusion that claimant's TTD rate was properly calculated.

### Jurisdiction

In assessing a penalty and associated attorney fee for SAIF's alleged discovery violations under OAR 436-060-0017, the ALJ found that the Hearings Division and the Board had jurisdiction to address the issue. We agree with the ALJ's conclusion, and offer the following supplementation to address SAIF's jurisdictional argument.

The Hearings Division and the Board have jurisdiction over "matters concerning a claim," which are defined as "matters in which a worker's right to receive compensation, or the amount thereof, are directly in issue." ORS 656.704(1), (3)(a). Here, on August 4, 2011, claimant requested a hearing challenging the TTD rate, as well as penalties and attorney fees under ORS 656.262(11) for "unreasonable processing, delay in discovery, delay in acceptance, delay in compensation." (Hearing File).<sup>2</sup> The alleged discovery violation pertained to SAIF's conduct *before* claimant's August 4, 2011 hearing request. (Exs. 27, 32, 35, 36, 42, 54, 56, 57, 60, 60A, 61A).<sup>3</sup>

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<sup>2</sup> In an October 2011 letter to the ALJ, claimant submitted a supplemental request for hearing (related to the alleged *de facto* denial) and clarification of issues.

<sup>3</sup> Before the filing of a hearing request, the Workers' Compensation Division's (WCD's) rules regarding a carrier's discovery responsibilities apply. OAR 436-060-0017; OAR 438-005-0011; *O'Leary v. Valley View Cutting*, 107 Or App 103, 106 (1991); *Steven R. Lowell*, 64 Van Natta 68 (2012); *Mike Reman*, 60 Van Natta 1298, 1299 (2008). The Board's discovery rule applies to cases that are "pending before the Hearings Division." OAR 438-005-0011. Therefore, it does not apply until a request for hearing has been filed. *O'Leary*, 107 Or App at 106.

Because TTD rate is a matter in which claimant's right to receive compensation, or the amount thereof, is directly in issue, it is a "matter concerning a claim" and as such, the ALJ and Board have the authority to address such matters. ORS 656.283(1); ORS 656.704(1), (3)(a); OAR 436-060-0025(4); *see Icenhower v. SAIF*, 180 Or App 297, 305 (2002) (if a claimant's initial hearing request raised "matters concerning a claim," any subsequent narrowing of the issues to only the penalty issue for an allegedly unreasonable denial does not divest the Hearings Division or Board of jurisdiction to decide the penalty issue). Consequently, we agree with the ALJ's conclusion that the Hearings Division had jurisdiction to address the discovery issue.

### Underpayment/Penalty

On September 3, 2010, claimant and a claim manager for SAIF's insured signed an 801 form, which listed claimant's AWW as \$284.75. (Ex. 5). That same day, his attending physician approved, and claimant accepted, a modified job beginning September 7, 2010, for total earnings of \$288 per week. (Exs. 6, 7).

On November 24, 2010, claimant was taken off work for right knee surgery. (Exs. 22, 23). Thereafter, his attending physician approved, and claimant accepted, a modified job offer beginning November 29, 2010, for total earnings of \$288 per week. (Exs. 21, 24).

On December 2, 2010, SAIF determined claimant's AWW to be \$289.31. (Exs. 25, 28, 29). On December 6, 2010, SAIF paid claimant \$38.58 for one day of temporary total disability (November 24). (Exs. 29, 70A, 71).

A March 29, 2011 Notice of Closure determined claimant's medically stationary date to be March 24, 2011, and awarded temporary partial disability (TPD) from September 3, 2010 to November 23, 2010, and TTD for November 24, 2010. (Ex. 49). Claimant requested reconsideration of the closure notice. (Ex. 55).

On June 28, 2011, a reconsideration order awarded temporary disability from September 3, 2010, to February 24, 2011, less time worked. (Ex. 59). That order was not appealed and became final by operation of law.

On July 28, 2011, SAIF performed a claim audit and found an underpayment of \$494.61. (Ex. 67). On August 2, 2011, SAIF issued a check to claimant in that amount for the underpayment. (Exs. 68, 70A, 71).

The ALJ found that SAIF properly calculated the underpayment of temporary disability benefits to be \$494.61, using the “4-hour rule.”<sup>4</sup> (Ex. 67). ORS 656.210(4); ORS 656.212(2); OAR 436-060-0030(1). The ALJ also found that SAIF’s payment of \$494.61 on August 2, 2011 was untimely. Therefore, the ALJ assessed a 25 percent penalty and \$500 associated attorney fee for SAIF’s unreasonable delay in payment of the \$494.61 underpayment of temporary disability benefits.

We agree with the ALJ’s determination that, based on an AWW of \$289.31, SAIF correctly calculated the underpayment of temporary disability benefits. We offer the following supplementation to address SAIF’s argument that the penalty and associated attorney fee for untimely payment of temporary disability should not be based on the entire underpayment amount.<sup>5</sup> For the following reasons, we agree with SAIF’s contention.

SAIF argues that a penalty and associated attorney fee should not be assessed based on the temporary disability compensation awarded for the period from February 4, 2011 to February 24, 2011, as determined by the June 28, 2011 reconsideration order. It asserts that it was not unreasonable when it did not pay temporary disability while the claim was open during that period because Dr. Abraham’s work release could reasonably have been interpreted as a release to regular work. We agree.

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<sup>4</sup> The “4-hour rule” is contained in ORS 656.210(4), which provides:

“When an injured worker with an accepted disabling compensable injury is required to leave work for a period of four hours or more to receive medical consultation, examination or treatment with regard to the compensable injury, the worker shall receive temporary disability benefits calculated pursuant to ORS 656.212 for the period during which the worker is absent, until such time as the worker is determined to be medically stationary.”

Claimant argues that the “4-hour rule” is contained in ORS 656.210, which governs TTD benefits, and therefore, does not apply in determining TPD benefits, which is governed by ORS 656.212. However, ORS 656.210(4) applies to instances when an injured worker “is required to *leave work* for a period of four hours or more,” in which case, temporary disability benefits are “calculated pursuant to *ORS 656.212.*” (Emphases added). Therefore, we disagree with claimant’s contention that the “4-hour rule” does not apply in determining TPD.

<sup>5</sup> SAIF does not dispute that a penalty and attorney fee should be assessed for untimely payment of temporary disability benefits (\$212.20), as a result in the difference in AWW and claimant’s actual earnings during the “open period” of the claim.

On February 3, 2011, Dr. Abraham stated that he filled out a form that released claimant to full duty without restrictions. (Ex. 40). He also signed a work release the same date that indicated that claimant could return to work without restrictions. (Ex. 41). While the June 2011 reconsideration order ultimately awarded temporary disability for this period, we cannot say that SAIF's failure to pay temporary disability was unreasonable. *See Int'l Paper Co. v. Huntley*, 106 Or App 107, 110 (1991) (an employer's refusal to pay is not unreasonable if it has a legitimate doubt about its liability).

Consequently, we conclude that the 25 percent penalty should be based on the amounts then due as of August 2, 2011, the date SAIF paid the underpayment (less temporary disability payable between February 3, 2011 and February 24, 2011). The ALJ's penalty assessment is modified accordingly. Based on such reasoning, we also modify the ALJ's penalty-related attorney fee award. Our reasoning is as follows.

An attorney fee under ORS 656.262(11)(a) shall be awarded in a reasonable amount that is proportionate to the benefit to claimant and takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and to the time devoted to the case. ORS 656.262(11)(a); OAR 438-015-0110(1), (2). After considering those factors and applying them to this case, we find that a reasonable attorney fee for services at the hearing level under ORS 656.262(11)(a) is \$250. In reaching this conclusion, we find this award proportionate to the benefit to claimant, giving primary consideration to the results achieved and the time devoted to the case (as represented by the record).<sup>6</sup>

### ORDER

The ALJ's order dated November 21, 2011 is affirmed in part and modified in part. In lieu of the ALJ's penalty and \$500 attorney fee for late payment of temporary disability, claimant is awarded a 25 percent penalty based on the underpayment paid by SAIF on August 2, 2011 (less temporary disability payable between February 3, 2011 and February 24, 2011) and a penalty-related attorney fee of \$250, to be paid by SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on November 2, 2012

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<sup>6</sup> Claimant's attorney is not entitled to an attorney fee for services on review related to the penalty and attorney fee issues. *Saxton v. SAIF*, 80 Or App 631, *rev den*, 302 Or 159 (1986); *Dotson v. Bohemia, Inc.*, 80 Or App 233 (1986).

Member Weddell dissenting in part.

The ALJ and majority rely on the hearing testimony to find that the SAIF Corporation correctly calculated claimant's temporary total disability (TTD) rate based on an average weekly wage (AWW) using claimant's gross earnings for the 52 weeks prior to his September 2, 2010 date of injury. Because I disagree with that conclusion, I respectfully dissent in part.

Claimant began working for SAIF's insured, a temporary service provider, on July 16, 2009. (Ex. 5). Before his September 2, 2010 work injury, there were three gaps in claimant's employment: a one-week gap from September 13 to September 19, 2009; a one-week gap from May 30 to June 5, 2010; and a seven-week gap from June 27 to August 14, 2010. (Exs. 25, 60A-3-4).

On review, claimant argues that the seven-week gap is an "extended gap" and should be excluded from the AWW calculation. Thus, according to claimant, his AWW should be based on the 45 "actual weeks" of his employment (the 52 weeks prior to the date of injury, less the seven-week "extended gap"). Claimant also contends that SAIF's calculation of his TTD rate was unreasonable. For the following reasons, I agree with claimant's contentions.

Claimant has the burden of proving the extent of his temporary disability. ORS 656.266; *Donald L. Vanwormer*, 64 Van Natta 1591, 1592 (2012). Therefore, he has the burden of proving the requirements for an "extended gap" under OAR 436-060-0025(5)(a)(A) (WCD Admin. Order 09-057 (eff. January 1, 2010)). "Gap" means "a break in continuity: INTERVAL, HIATUS." "Extended" means "drawn out in length," "lengthy," "protracted," or "prolonged." Finally, "drawn-out" means "stretched to great or greater length"; "made to seem or be longer than desirable or normal." *See SAIF v. Frias*, 169 Or App 345, 350 (2000).

I disagree with the majority's determination that the testimony establishes that the *seven-week* gap is not an "extended gap." Here, there is no dispute that the parties contemplated that there would be "gaps" in employment, *i.e.*, "a break in continuity." (Tr. 9-15, 19-20). Given the nature of working for a temporary agency, claimant understood that there would be gaps between job assignments. (Tr. 9, 10, 12-14). According to claimant, the usual gaps in employment were only three-to-five days in length. (Tr. 9, 12, 13).

The majority observes claimant's testimony that "there was no specifications on just how long the gaps would be, you know, how long or how short they might be." (Tr. 13). The majority also cites the testimony of Ms. Cox (the employer

representative) that employees are informed during the hiring process that the company does not have control of what job assignments may be available and that there are times when there is no work available. (Tr. 19-20). Considering that such testimony establishes that the occurrence and length of “gaps” in employment are variable and unpredictable, the majority concludes that the seven-week “gap” in employment does not constitute an “extended gap.”

However, claimant does not assert that the two week-long gaps constitute “extended gaps.” Instead, he contends that the seven-week gap (June 27 to August 14, 2010) is an “extended gap.”

Whether a gap of a certain length is extended will depend in part on the circumstances of the employment relationship. *Frias*, 169 Or App at 353. Therefore, I look at the seven-week gap *independently* to determine whether it was “extended,” in light of its length, the individual employment relationship itself, and whether the parties contemplated that such a gap (*i.e.*, a seven-week “slump”) would occur when they formed the relationship. *Id.*; OAR 436-060-0025(5)(a)(A).

As an employee of a temporary service agency, claimant understood that there would be some gaps in employment, and he “assumed that going in.” (Tr. 12-13). Claimant further explained:

“Well, I understand [that the employer is a temporary agency and that sometimes there are going to be gaps in employment] because naturally a[n] assignment’s gonna begin and end. And there’s going to be a period where I have to be reassigned. Now, nothing was discussed on how long it was going to take to get reassigned to another position. And most of the time it was a very short period. So I assumed that was the norm.” (Tr. 13).

Claimant did not recall having any discussion with the employer (either at the time he was hired, or any other time during his employment) about the length of gaps between job assignments, or being told that the summer months would be slower. (Tr. 10, 13, 14). He testified that his usual “gaps” were only three-to-five days, and that he was told the seven-week gap was due to a “slump” in job availability. (Tr. 9, 12, 13). Because job assignments “came so quickly and so often,” he never questioned the length of gaps between job assignments. (Tr. 10). Claimant did not recall previously having a seven-week gap. (Tr. 9). During the seven-week gap, claimant collected unemployment benefits. (Tr. 9-10).

Although Ms. Cox acknowledged that employees were informed that there would be times where there was no work available, she did not address whether the duration of “gaps” (such as the seven-week “slump”) were discussed at the time of hire. (Tr. 20). She also had no knowledge regarding what claimant was told at the time of hire. (Tr. 22).

I recognize that the parties contemplated that there would be “gaps” in employment. Based on the testimony of claimant and Ms. Cox, I would find that the parties contemplated that such *week-long* gaps would occur when they formed the employment relationship. However, considering claimant’s roughly 59-week employment period, particularly compared to the two week-long gaps (September 13 to September 19, 2009, and May 30 to June 5, 2010), I find that the seven-week gap (June 27 to August 14, 2010) is “drawn out in length” (“stretched to great or greater length; made to seem or be longer than desirable or normal”), “lengthy,” or “prolonged.”

Therefore, I would find that the seven-week gap is an “extended gap.” OAR 436-060-0025(5)(a)(A); *Frias*, 169 Or App at 350-53; *Gerardo Alanis*, 54 Van Natta 2050, 2052 (2002) (on remand). Moreover, given the circumstances of this particular employment relationship and the aforementioned testimony, I am not persuaded that the parties contemplated that *such* a gap (*i.e.*, a seven-week “slump”) would occur when they *formed* the relationship. OAR 436-060-0025(5)(a)(A); *Frias*, 169 Or App 353.

Based on the foregoing reasons, I would find that the seven-week gap is an “extended gap” that should be excluded in the determination of claimant’s AWW. I would also find that SAIF’s calculation of claimant’s TTD rate was unreasonable.

The processing of claims and providing compensation for a worker shall be the responsibility of the insurer or self-insured employer, and all employers shall assist their insurers in processing claims as required in this chapter. ORS 656.262(1).

Here, Ms. Lane, SAIF’s claims auditor, calculated claimant’s AWW using his gross earnings for the 52 weeks before the date of injury. When calculating AWW for an injured worker generally, Ms. Lane would review the file, speak with the claim adjuster, and consider the injured worker’s status and the particular employer. (Tr. 52-57).

In determining that “extended gaps” did not exist in claimant’s claim, Ms. Lane testified that she reviewed the file, was familiar with the particular employer, spoke with the adjuster, and relied on claimant’s status as a temporary worker. (Tr. 55, 58, 63). Ms. Lane stated, “when [temporary workers working for its insured] are hired, they are hired knowing that they’re going to have multiple job assignments and that those will be short, long, doesn’t matter really, and that they’ll have gaps in between those.” (Tr. 52). She further testified that “[claimant] is a temporary worker,” and that he “knows when he’s hired that he has down time and that he’s going to have multiple assignments.” (Tr. 56). According to Ms. Lane, she “always” used gross earnings for the 52 weeks before the date of injury for temporary workers “no matter what,” and never made exceptions. (Tr. 53-54).

As noted above, the determination of whether a gap is extended must be made in light of its length and of the circumstances of the *individual* employment relationship itself, including whether the parties contemplated that such gaps would occur when they formed the relationship. OAR 436-060-0025(5)(a)(A). Furthermore, “gaps must be considered on a *claim-by-claim* basis.” *Id.* (Emphasis added).

Here, Ms. Lane expressly stated that her calculation of claimant’s AWW was not based on any particular information received or reviewed about claimant *specifically*. (Tr. 63). In fact, Ms. Lane testified that she did not know if there was a statement taken from claimant, did not talk to claimant personally, and did not know if an auditor talked to claimant. (Tr. 58). There is no evidence in the record of any statement from claimant or SAIF’s insured.<sup>7</sup>

In light of the rule’s mandate that gaps must be considered on “a claim-by-claim basis” and “the circumstances of the individual employment relationship itself,” and especially considering Ms. Lane’s testimony, I find SAIF’s AWW calculation to be unreasonable. *See Keith L. Nutting*, 43 Van Natta 183, 184 (1991) (finding carrier’s conduct to be unreasonable where the carrier did not contact the claimant to determine the intent of the employment relationship); *see also Gavino Chavez*, 43 Van Natta 2300 (1991) (awarding penalty and attorney fee for unreasonable calculation of TTD rate because the employer’s knowledge of the claimant’s work hours imputed to the carrier).

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<sup>7</sup> Ms. Cox testified that an adjuster spoke with claimant, and that the conversation did not raise any “red flags” because claimant was a temporary worker. (Tr. 55, 57). Yet, the record does not contain, and SAIF did not offer, evidence of the conversation.

In conclusion, I would find that claimant has established that the seven-week gap in employment constitutes an “extended gap.” I would also find that SAIF’s calculation of his TTD rate was unreasonable. Because the majority concludes otherwise, I respectfully dissent.