
In the Matter of the Compensation of
CARL W. HAMILTON, Claimant
WCB Case No. 12-01235
ORDER ON RECONSIDERATION
Ronald A Fontana, Claimant Attorneys
Radler Bohy et al, Defense Attorneys

Reviewing Panel: Members Lanning, Langer, and Herman. Member Langer specially concurs.

On May 21, 2013, we affirmed that portion of an Administrative Law Judge's (ALJ's) order that declined to assess penalties and attorney fees under ORS 656.262(11)(a) for the self-insured employer's allegedly unreasonable claim processing. Claimant requests reconsideration, renewing his contention that a penalty and attorney fee award are warranted. Based on the following reasoning, we adhere to our prior order.

In our prior order, we found that the employer did not receive Dr. Baltins's November 2011 ongoing "open-ended" time loss authorization until April 23, 2012, *i.e.*, after it already reinstated temporary total disability (TTD) payments retroactive to February 27, 2012. Moreover, noting that the Workers' Compensation Division (WCD) had affirmed the employer's disapproval of Dr. Baltins as claimant's attending physician on April 26, 2012, we reasoned that, after that time, the employer had a legitimate doubt regarding its further responsibility for paying TTD benefits based on Dr. Baltins's authorization.

Citing *Brown v. Argonaut Insurance*, 93 Or App 588, 591 (1988), claimant contends, however, that the determination of whether the employer's conduct in ceasing to pay TTD was unreasonable must be based on the information on which the employer based its conduct at the time it ceased to pay TTD benefits. Claimant argues that the sole reason the employer gave for its claim processing decision was that it had ended Dr. Baltins's role as attending physician; *i.e.*, it did not contend that Dr. Baltins had not continued to authorize temporary disability. In support of this contention, claimant refers to a November 1, 2011 claim examiner note, which records that Dr. Baltins had found that claimant "remains disabled" and required additional physical therapy. (Ex. 145-1). Claimant further observes that the employer continuously paid TTD after that date through February 26, 2012. (Exs. 145, 150).

Notwithstanding the aforementioned notation, the record establishes that the employer's receipt of written medical verification from Dr. Baltins concerning claimant's inability to work as a result of his accepted left knee condition did not occur until April 23, 2012. The employer's receipt of such written medical verification initiates its obligation to commence the payment of TTD benefits. *See* ORS 656.262(4)(a), (g); *Sandra D. Holmstedt*, 65 Van Natta 370 (2013). The employer's notation acknowledges that Dr. Baltins stated that claimant "remained disabled." Nonetheless, in the absence of written medical verification from the attending physician in the employer's possession confirming that reference, we find that the employer had a legitimate doubt regarding its obligation to pay TTD benefits.

Moreover, pursuant to *Brown*, "unreasonableness" and "legitimate doubt" are to be considered in the light of *all the evidence* available to the carrier. 93 Or App at 591. Thus, as the fact-finder, our determination of the employer's reasonableness depends upon an evaluation of all the evidence available to it when it acted. *See also Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991). Such an analysis is independent of the employer's stated reason for why it acted. As we have previously held, when a carrier acts in accordance with a validly enacted rule or statute (even though it does not expressly rely on that particular point or authority), such an action can be justified. *See, e.g., Darcine L. Fox*, 44 Van Natta 1 (1992); *Mary E. Weaver*, 43 Van Natta 2618, 2619 (1991) ("As a general rule, we do not in such circumstances, assess a penalty; for to do so would penalize the insurer for complying with a valid administrative rule.").

Finally, claimant contends that we did not "clearly address" his request for an ORS 656.262(11)(a) penalty and attorney fee for the employer's late payment of TTD on May 15, 2012. Specifically, he asserts that the May 15 payment was made in violation of OAR 436-060-0150(6), which requires payments to be made at least every 14 days.

However, as noted above, WCD's April 26, 2012 decision affirming its disapproval of Dr. Baltins as claimant's attending physician provided the employer with legitimate doubt regarding its ongoing responsibility for paying TTD benefits.¹ Although we have ultimately found claimant entitled to the disputed TTD, such a conclusion does not mean that the employer's claim processing actions were unreasonable.

¹ This is the case even though the employer had begun paying TTD benefits (even after the WCD decision).

Consequently, we continue to conclude that the employer's claim processing actions were not unreasonable. Therefore, we adhere to our previous determination that penalties and related attorney fees are not warranted.

Accordingly, our May 21, 2013 order is withdrawn. On reconsideration, as supplemented herein, we republish our May 21, 2013 order. The parties' 30-day statutory rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on June 17, 2013

Member Langer specially concurring.

Consistent with the principles of *stare decisis*, I continue to follow the lead opinion's decision for the reasons expressed in my original special concurrence.