

---

In the Matter of the Compensation of  
**CAMRON J. HORNER, Claimant**  
WCB Case Nos. 12-04179, 12-00099  
**ORDER ON RECONSIDERATION**  
Ronald A Fontana, Claimant Attorneys  
James B Northrop, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Lowell.

On May 23, 2013, we reversed that portion of an Administrative Law Judge's (ALJ's) order that had declined to award additional temporary disability benefits. Specifically, claimant was awarded temporary disability benefits payable from April 12, 2012 until claim closure, with his counsel receiving an "out-of-compensation" attorney fee payable from such benefits. Representing that the claim was subsequently reopened (with temporary disability benefits reinstated) on June 18, 2012, the SAIF Corporation contends that claimant's counsel's "out-of-compensation" fee should be limited to the temporary disability benefits paid between April 12, 2012 and June 18, 2012. Consequently, SAIF seeks clarification of our order.

Claimant also requests reconsideration of our order, seeking: (1) a penalty under ORS 656.268(5)(d) and an attorney fee under ORS 656.382(1) for SAIF's issuance of an allegedly incorrect Notice of Closure (NOC); (2) a penalty and associated "extraordinary" attorney fee for SAIF's allegedly unreasonable assertion of a \$8677.76 overpayment; (3) an increased penalty under ORS 656.262(11)(a) based on SAIF's allegedly unreasonable cessation of temporary disability; and (4) an increased penalty-related attorney fee under ORS 656.262(11)(a). For the following reasons, we modify our previous temporary disability award and related "out-of-compensation" attorney fee, but otherwise adhere to our prior order with the following supplementation.

In our previous order, applying ORS 656.268(5)(d), we held that SAIF's issuance of an April 23, 2012 (NOC) following its April 20, 2012 vocational ineligibility decision was not unreasonable, even though the vocational ineligibility decision was subsequently reversed by a Workers' Compensation Division (WCD) order. After the WCD overturned SAIF's prior vocational ineligibility decision in January 2012, SAIF subsequently issued another vocational ineligibility decision on April 20, 2012. Before taking that action, SAIF consulted with a WCD vocational reviewer. Based on that vocational ineligibility decision, SAIF issued the April 23, 2012 NOC. Following an Order on Reconsideration's affirmance of the NOC, a WCD decision again reversed the SAIF's vocational ineligibility decision.

---

The ALJ found the claim was prematurely closed by the April 23, 2012 NOC, but declined to find the NOC to have been unreasonably issued.<sup>1</sup> Claimant requested review, contending that SAIF had unreasonably closed the claim and, as such, he was entitled to penalties and attorney fees under ORS 656.268(5)(d) and ORS 656.382(1).

We disagreed with claimant's contention. Citing ORS 656.268(5)(d), we stated that if the correctness of a NOC is an issue at hearing and a finding is made that the NOC was not reasonable, a penalty based on 25 percent of all compensation determined to be then due shall be assessed. Relying on *International Paper Co. v. Huntley*, 106 Or App 107 (1991), we noted that the reasonableness of a carrier's conduct depends on whether it had a legitimate doubt as to its liability. Turning to the case at hand, we found that SAIF's vocational ineligibility decision had been based on consultations with WCD's vocational reviewer. Moreover, citing ORS 656.268(1), we noted that claim closure is mandated when a worker is no longer enrolled and actively engaged in vocational training.

Under such circumstances, we concluded that SAIF's issuance of the April 2012 NOC was not unreasonable. However, we determined that SAIF had unreasonably failed to reinstate claimant's temporary disability (TTD) benefits following the termination of his Authorized Training Program (ATP) until the issuance of the NOC. In doing so, we noted that, following the ATP, the SAIF had granted claimant's request for a lump sum payment of a previously suspended permanent disability award. Once that payment was made, we reasoned that the carrier's obligation to reinstate claimant's TTD benefits was triggered, which would continue until the issuance of a NOC. *See Atchley v. GTE Metal Erectors*, 149 Or App 581 (1997), *rev den*, 326 Or 133 (1997). Because SAIF had not resumed claimant's TTD benefits during that period, we considered such claim processing to be unreasonable and assessed penalties and attorney fees under ORS 656.262(11)(a).

Having summarized the procedural background of the claim, we now address the parties' arguments on reconsideration.

SAIF contends that we incorrectly awarded TTD from April 12, 2012 until the claim is properly closed. The record establishes that temporary disability benefits were reinstated on June 18, 2012, when claimant started a revised training

---

<sup>1</sup> SAIF did not challenge the ALJ's premature claim closure finding on review.

---

program. (Exs. 34, 39-2). Under such circumstances, we modify our prior order to award TTD benefits from April 12, 2012 through June 18, 2012. Our “out-of-compensation” attorney fee is modified accordingly.

Claimant argues that we did not address his entitlement to a penalty under ORS 656.268(5)(d) and to an attorney fee under ORS 656.382(1) based on the alleged “incorrect” TTD award in the April 23, 2012 NOC. Claimant asserts that he raised this issue at hearing. However, on review, his arguments were limited to the reasonableness of SAIF’s decision to close the claim, not to the TTD awarded by the NOC. Under such circumstances, we decline to address this argument on reconsideration. *See Vogel v. Liberty Northwest Ins. Corp.*, 132 Or App 7, 13 (1994) (Board has discretion not to address issues raised for the first time on reconsideration).

Claimant also asserts that our order lacks substantial reason, arguing that we did not explain our conclusion that SAIF’s April 23, 2012 NOC was reasonable, given our finding that claimant was still involved in vocational training when the April 23, 2012 NOC issued and given the various Director’s orders that set aside SAIF’s attempts to end vocational training in December 2011, January 2012 and April 2012. We disagree.

The propriety of SAIF’s various notices that ended claimant’s training is not at issue.<sup>2</sup> Rather, the issue on review concerned the reasonableness of SAIF’s April 23, 2012 NOC. As explained in our prior order, that notice was issued after consultations with a WCD vocational reviewer. On that basis, SAIF had legitimate doubt when it closed the claim. As further explained in our order, ORS 656.268(1) requires claim closure when vocational training ends. Based on the consultation with the WCD vocational reviewer, SAIF issued its April 20, 2012 eligibility decision. Although that decision was ultimately overturned, that does not necessarily lead to the conclusion that the April 23, 2012 NOC was unreasonably issued.

Claimant further argues that our order lacks substantial reason regarding our conclusion that SAIF’s assertion of an overpayment was reasonable.<sup>3</sup> Claimant cites the fact that the April 2012 NOC and the April 2012 notice ending claimant’s

---

<sup>2</sup> That issue would be within the exclusive jurisdiction of the Director. *See* ORS 656.340(16)(b).

<sup>3</sup> To the extent that claimant is arguing that SAIF is continuing to assert an improper overpayment, such an issue is a matter to be resolved in a different proceeding. If claimant disputes SAIF’s “post-ALJ/Board order” claim processing, he may request a hearing disputing those actions.

---

vocational training were set aside. Again, the issue is the reasonableness of SAIF's assertion of an overpayment based on its NOC. As we have explained, the NOC, while prematurely issued, was not unreasonably issued because it was based on a vocational eligibility decision made after consultation with the WCD vocational reviewer. SAIF's assertion of an overpayment based on that claim closure decision was likewise not unreasonable.

Finally, claimant seeks an increased penalty and attorney fee based on SAIF cessation of TTD on April 18, 2012. We decline claimant's request.

The temporary disability benefits that were unreasonably withheld concerned only a period of five days from April 18, 2012 to April 23, 2012, when the NOC issued. The attorney award (\$500) was proportionate to the benefit and the time devoted to that particular issue. See ORS 656.262(11)(a).

Accordingly, on reconsideration, as supplemented and modified herein, we adhere to and republish our prior 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 20, 2013