
In the Matter of the Compensation of
DAVID A. FULCER, Claimant
WCB Case No. 12-02005
ORDER ON REVIEW
Dale C Johnson, Claimant Attorneys
Julie Masters, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lowell and Lanning.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) McWilliams's order that awarded additional temporary partial disability (TPD) benefits. On review, the issue is TPD. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following supplementation.

SAIF closed the claim on November 2, 2011. (Ex. 155-5). The Notice of Closure awarded temporary total disability (TTD) and temporary partial disability (TPD) benefits for various periods from October 30, 2006 through July 17, 2008, as well as permanent whole person impairment and work disability. (*Id.*) The Notice of Closure stated, "We may deduct overpaid workers' compensation benefits from any current or future workers' compensation benefits you are due under ORS 656.268." (*Id.*) The accompanying 1503 form, an "Insurer Notice of Closure Summary," stated the total amount of TTD and TPD paid since the date of injury. (Ex. 155-9). SAIF checked a box on the 1503 form stating that it was "aware of an overpayment of time-loss benefits." (*Id.*)

On November 4, 2011, SAIF requested reconsideration of the Notice of Closure. Consistent with ORS 656.268(5)(c), the request stated that the only issue for which a carrier could request reconsideration concerned impairment findings used to determine permanent disability.

On November 14, 2011, SAIF submitted a "Supplemental Reconsideration Request," which included a request for "permission to offset any overpayments as allowed by law." (Ex. 157).

On March 22, 2012, the Appellate Review Unit (ARU) issued an Order on Reconsideration, which stated, "The issues raised by the parties are disagreement with impairment findings used." (Ex. 161-2). The reconsideration

order determined that the claim was not prematurely closed. (Ex. 161-3) Further, based on a medical arbiter's impairment findings and the value (10) granted by the Notice of Closure for social/vocational factors, the Order on Reconsideration reduced claimant's permanent whole person impairment and work disability awards. (Exs. 155-7, 161-3). Finally, the Order on Reconsideration stated, "The deduction from this amount of any overpaid temporary disability benefits or previously paid permanent partial disability benefits is authorized." (Ex. 161-4).

Claimant requested a hearing regarding the Order on Reconsideration. The parties submitted their positions based on the documentary record. Claimant sought additional temporary disability benefits. SAIF objected, asserting that claimant had not disputed the Notice of Closure's temporary disability award on reconsideration.

We do not adopt the second sentence of the first paragraph of the ALJ's "Findings of Ultimate Fact."

CONCLUSIONS OF LAW AND OPINION

The ALJ reasoned that the temporary disability issue had been raised by SAIF's request during the reconsideration proceeding for permission to offset overpayments, and by the Order on Reconsideration's statement that SAIF was authorized to deduct "any overpaid temporary disability benefits" from claimant's permanent disability award. Turning to the merits of the temporary disability issue, the ALJ awarded TPD from July 18, 2008 through January 12, 2011.¹

On review, SAIF contends that the ALJ's TPD award should be reversed because the temporary disability issue had not been raised on reconsideration, and therefore was not properly before the ALJ. As explained below, we agree with SAIF's contention.

ORS 656.268(5)(c) requires a party who objects to a Notice of Closure to first seek reconsideration by the Director. Issues not raised by a party to the reconsideration may not be raised at hearing unless the issue arises out of the reconsideration order itself. ORS 656.268(9); ORS 656.283(6). "Taken together, those statutes preclude a claimant from raising an issue at hearing if that issue stems from an objection to a Notice of Closure that was not preserved by

¹ The ALJ also awarded additional permanent disability benefits. That portion of the ALJ's order is not contested on review.

mandatory reconsideration.” *Venetucci v. Metro*, 155 Or App 559, 563 (1998). If an issue is not manifest in the Notice of Closure, mandatory reconsideration does not preclude later review of that issue. *Id.* at 564.

In *SAIF v. Coburn*, 159 Or App 413, 419, *rev den*, 329 Or 527 (1999), the court explained that there is no statutory definition of “overpayment,” but “the pertinent statutory and administrative provisions imply the obvious: that an overpayment occurs when an amount is paid in excess of the compensation to which the worker is entitled.” *See Justin D. Rhodes*, 58 Van Natta 3011, 3017 (2006). A carrier “may offset any compensation payable to the worker to recover an overpayment from a claim with the same insurer or self-insured employer.” ORS 656.268(14)(a). A carrier is statutorily authorized to recover overpaid compensation from a claimant’s future benefits without prior authorization. *See* ORS 656.268(14)(a); *Dan L. Prociw*, 62 Van Natta 1041, 1043 (2010); *Melvin R. Johnson*, 59 Van Natta 2155, 2161 n 6 (2007); *Kenneth Pray*, 55 Van Natta 4253, 4256 n 2 (2003).

Here, SAIF’s request for reconsideration specified that the only issue was the matter of impairment findings used to determine permanent disability. (Ex. 156-1). This statement is consistent with ORS 656.268(5)(c), which provides that a request for reconsideration by a carrier “may be based only on disagreement with the findings used to rate impairment.”² Thus, SAIF’s request for reconsideration did not raise a temporary disability issue.

During the reconsideration proceeding, SAIF subsequently requested “permission to offset any overpayments as allowed by law.” Nonetheless, in doing so, it did not assert disagreement with the Notice of Closure’s temporary disability award, nor the statement in its Notice of Closure that it intended to recover any overpaid temporary disability benefits. The statement was consistent with an expectation that an overpayment of permanent disability benefits could exist if the ARU subsequently reduced claimant’s permanent disability award from the Notice of Closure, which, consistent with ORS 656.268(5)(c), was the only issue that SAIF had raised. Thus, SAIF’s request for “permission to offset any overpayments” did not raise the temporary disability issue.

² The reconsideration request indicated that the “appropriateness of the closure under ORS 656.268” would automatically be reviewed. (Ex. 156-1). Nevertheless, that statement addressed the requirements for claim closure under ORS 656.268(1), rather than claimant’s entitlement to temporary disability. *See* OAR 436-030-0115(5) (on reconsideration, the Director “will review those issues raised by the parties and the requirements under ORS 656.268(1)”).

Likewise, the Order on Reconsideration's statement that SAIF was authorized to deduct "any overpaid temporary disability benefits or previously paid permanent partial disability benefits" did not address the merits of the Notice of Closure's temporary disability award, or even whether an overpayment of temporary disability benefits existed. Rather, consistent with ARU's reduction of the Notice of Closure's permanent disability award, the "offset" statement authorized SAIF to offset any overpayment, if it existed, against claimant's permanent disability award as granted by the reconsideration order. Thus, the temporary disability issue did not arise out of the Order on Reconsideration.

Claimant contends, however, that the Order on Reconsideration addressed the temporary disability issue because the work disability issue necessarily addressed whether he was released to regular work, and thus his entitlement to TPD. However, there was no dispute on reconsideration that claimant was entitled to work disability because he had not returned, or been released, to regular work as of the date of the Order on Reconsideration. *See* ORS 656.214(2) (Or Laws 2005, ch 653, §§ 3, 5); ORS 656.726(4)(f)(E) (Or Laws 2005, ch 653, §§ 1, 5). Thus, the Order on Reconsideration addressed work disability only insofar as the modification in whole person impairment also modified the work disability award.³ (Ex. 161-3). In doing so, the Order on Reconsideration did not examine whether claimant had been released to regular work during the disputed period, from July 18, 2008 through January 12, 2011.

Finally, claimant notes, based on the Notice of Closure and accompanying 1503 form, that SAIF had indicated that it was aware of the overpayment at the time of closure. Claimant concedes that he received TPD benefits for dates beyond those awarded by the Notice of Closure. Because the overpayment, and SAIF's right to recover it, was manifest in the Notice of Closure, claimant was required to raise that issue at reconsideration. *Danny R. Dickson*, 61 Van Natta 830, 832 (2009).⁴

³ Permanent disability is determined as of the date of the reconsideration order. ORS 656.283(6). Therefore, even if the Order on Reconsideration addressed claimant's entitlement to work disability, that inquiry would not have implicated his entitlement to temporary disability from July 18, 2008 through January 12, 2011. *See Samantha K. Holtti*, 59 Van Natta 2456 (2007) (the claimant was entitled to work disability because she was not released to regular work on the date of the reconsideration order, although she had earlier been released to regular work).

⁴ Computation of temporary disability benefits is a claim processing matter, and the amount of a temporary disability award is therefore not determined solely by the dates for which temporary disability is awarded. *Derrick Urquhart*, 61 Van Natta 1091, 1093 (2009). Thus, if an overpayment was not manifest in a Notice of Closure, the claimant is not required to raise the issue at the reconsideration proceeding. *See SAIF v. Fitzsimmons*, 159 Or App 464, 467 (1999); *Venetucci*, 155 Or App at 563.

Thus, we conclude that the temporary disability issue was not raised in the reconsideration proceeding and, as such, claimant was precluded from raising such an issue at the hearing level. Accordingly, we reverse the ALJ's TPD award.

ORDER

The ALJ's order dated November 29, 2012 is affirmed in part and reversed in part. That portion of the ALJ's order that awarded temporary disability benefits from July 18, 2008 through January 12, 2011 is reversed. The ALJ's "out-of-compensation" attorney fee related to the increased temporary disability compensation is also reversed. The remainder of the ALJ's order is affirmed.

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Here, however, the overpayment dispute is limited to claimant's contention that his entitlement to TPD continued beyond the dates awarded by the Notice of Closure. Therefore, the dispute was manifest in the Notice of Closure, and claimant's failure to raise the issue during the reconsideration proceeding precludes him from doing so at hearing. *Dickson*, 61 Van Natta at 832.