

In the Matter of the Compensation of
CAMRON J. HORNER, Claimant
WCB Case Nos. 12-04179, 12-00099
ORDER ON REVIEW

Ronald A Fontana, Claimant Attorneys
James B Northrop, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Lowell.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Naugle's order that: (1) declined to assess penalties and related attorney fees for the SAIF Corporation's allegedly unreasonable Notice of Closure; (2) declined to award additional temporary disability benefits; and (3) declined to assess penalties and attorney fees for SAIF's allegedly unreasonable claim processing. On review, the issues are temporary disability, penalties, and attorney fees. We affirm in part and reverse in part.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that SAIF prematurely closed claimant's claim on April 23, 2012, finding that claimant was enrolled and actively engaged in vocational training when the closure notice was issued. *See* ORS 656.268(1) (stating that a carrier shall close a claim provided that the worker is not enrolled and actively engaged in training). The ALJ, however, did not find the claim closure to have been unreasonable, concluding that SAIF's intent in ending claimant's training effective January 18, 2012 was to preserve his temporary disability and training timelines for a revised training plan.

On review, SAIF does not contest the ALJ's finding that the April 2012 closure notice was premature. Claimant, however, argues that SAIF's claim closure was unreasonable, entitling him to a penalty under ORS 656.268(5)(d) and an attorney fee under ORS 656.382(1) based on an alleged unreasonable resistance to the payment of compensation. For the following reasons, we disagree.

ORS 656.268(5)(d) provides that if a carrier has closed a claim, the correctness of the Notice of Closure is at issue in a hearing, and a finding is made at the hearing that the Notice of Closure was not reasonable, a penalty of 25 percent of all compensation determined to be then due the claimant shall be assessed against the carrier. *Cayton v. Safelite Glass Corp.*, 232 Or App 454, 60 (2009). Whether SAIF's conduct was reasonable depends on whether, from a legal standpoint, it had a legitimate doubt as to its liability. *Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991); *Steven R. Holmes*, 64 Van Natta 643 (2012).

Here, we conclude that SAIF had legitimate doubt as to its liability. In February 2012, the Director overturned SAIF's previous end of vocational training and end of vocational eligibility decisions. (Ex. 14). This was two months before the April 2012 Notice of Closure. Assuming that the Director's February 2012 decision established that claimant was re-enrolled and actively engaged in training once more, SAIF issued another "Notice of Training End" on April 20, 2012. (Ex. 19). This notice was issued after consultations with a vocational reviewer from the WCD. (Ex. 18). Thus, there was a valid Notice of End of Training in effect when the closure notice issued three days later on April 23, 2012.

Apparently, this "End of Training" notice was rescinded in August 2012, when a Director's order set aside SAIF's January 18, 2012 end of training decision. (Ex. 38 A).¹ Nevertheless, the question is whether the April 23, 2012 Notice of Closure unreasonably closed the claim.

Given that the April 2012 Notice of End of Training was issued after consultation with the WCD's vocational reviewer, and that ORS 656.268(1) mandates closure of a claim when a worker is no longer enrolled and actively engaged in vocational training, we conclude that issuance of the April 2012 Notice of Closure was not unreasonable. Accordingly, we affirm the ALJ's decision declining to assess a penalty under ORS 656.268(5)(d) and to award an attorney fee under ORS 656.382(1).

¹ Although the ALJ admitted the Director's order into the hearing record, that order was not in the reconsideration record. We have previously declined to take administrative notice of a Director's order setting aside a carrier's termination of a claimant's vocational program, and reinstating the claimant's return to work plan and eligibility for vocational assistance. *See Christian R. Lundblad*, 65 Van Natta 28 (2013). However, because no party objected to the admission of the Director's order into the hearing record, it has been considered. *See Fister v. South Hills Health Care*, 149 Or App 214 (1997), *rev den*, 326 Or 389 (1998).

On May 29, 2012, SAIF asserted an overpayment of \$8,677.76, based on its payment of temporary disability from January 19, 2012 through April 11, 2012. Although determining that SAIF had prematurely closed the claim on April 23, 2012, because claimant was still actively engaged in vocational training when the closure notice was issued, the ALJ nevertheless rejected claimant's argument that the asserted overpayment was unreasonable because the closure notice was not unreasonably issued. Claimant contests the ALJ's conclusion.

Given our finding that SAIF's issuance of the April 23, 2012 Notice of Closure was not unreasonable, we find that its assertion of an overpayment, although substantively incorrect, was not unreasonable. Thus, we decline to assess a penalty or related attorney fee based on the asserted overpayment.

Claimant also asserts that SAIF improperly terminated temporary disability on April 11, 2012, in light of the ALJ's unchallenged determination that claimant was actively engaged in vocational training when the closure notice was issued on April 23, 2012. Citing *Atchley v. GTE Metal Erectors*, 149 Or App 581 (1997), *rev den*, 326 Or 133 (1997), claimant argues that he was entitled to temporary disability until the claim was properly closed.

Under *Atchley*, claimant was entitled to temporary disability. Therefore, we award temporary disability from April 12, 2012 until the claim is properly closed. Claimant's counsel is also awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased temporary disability compensation resulting from this order, not to exceed \$5,000, payable directly to claimant's attorney. ORS 656.386(4); OAR 438-015-0055(1).

Finally, claimant seeks penalties and attorney fees for unreasonable resistance to the payment of compensation based on SAIF's termination of temporary disability payments on April 11, 2012. We grant that request.

SAIF suspended permanent disability payments while claimant was engaged in vocational training. Claimant eventually applied for a lump sum payment of the permanent disability award, which SAIF paid on April 18, 2012. At that time, its obligation to resume temporary disability payments was triggered. Because SAIF did not pay temporary disability from April 18, 2012 until the April 23, 2012 Notice of Closure, we conclude that SAIF's conduct was unreasonable during that period.

Under such circumstances, we find that a 25 percent penalty against SAIF for unreasonable resistance to the payment of compensation is warranted. ORS 656.262(11)(a). This penalty shall be based on the temporary disability benefits between April 18, 2012 and April 23, 2012.

Finally, 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. OAR 438-015-0110(1), (2).

After considering the aforementioned factors, we find that a reasonable attorney fee under ORS 656.262(11)(a) for the insurer's unreasonable conduct is \$500, payable by SAIF. 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.

ORDER

The ALJ's order dated December 17, 2012 is reversed in part and affirmed in part. Claimant is awarded temporary disability from April 12, 2012 until the claim is properly closed. Claimant's attorney is awarded 25 percent of this increased compensation, not to exceed \$5,000, payable by SAIF directly to claimant's counsel. Claimant is awarded a 25 percent penalty under ORS 656.262(11)(a) based on temporary disability due from April 18, 2012 to April 23, 2012. Claimant's attorney is awarded a penalty-related attorney fee in the amount of \$500 under ORS 656.262(11)(a), payable by SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on May 23, 2013