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In the Matter of the Compensation of  
**RICKY J. MORIN, Claimant**  
WCB Case No. 14-06240  
ORDER ON REVIEW  
Jodie Phillips Polich, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning. Member Lanning specially concurs.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Spangler's order that awarded additional temporary disability benefits. Claimant cross-requests review of that portion of the ALJ's order that declined to assess penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are temporary disability, penalties, and attorney fees. We affirm in part and reverse in part.

STATEMENT OF FACTS

On October 28, 2013, claimant, a truck driver, was compensably injured when he lost control of his employer's truck and drove off the road. (Ex. 1).

On October 31, 2013, the employer told claimant in a telephone call, "We'll have to let you go \* \* \* due to the investigation of the accident." (Tr. 6, 8). On the same day, the employer also sent claimant a letter "confirming" that his employment had been terminated. (Ex. 5A). The letter did not provide a reason for the termination.<sup>1</sup>

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<sup>1</sup> The employer's policies stated that employment was "subject to termination \* \* \* at any time for any reason." (Ex. B-1). The policies further provided that the employer might "choose to apply progressive discipline when [it] deems this an appropriate means of correcting employee misconduct or improving job performances," but that progressive discipline would not be applied "for incidents that [the employer,] in its sole discretion, believe warrant immediate dismissal." (*Id.*)

With regard to motor vehicle accidents, the employer's policies stated that a "major preventable accident or an accident determined after investigation to be caused by misconduct will result in a formal written warning, safety training and suspension while [the] event is being investigated. Suspension and/or termination may follow after thorough review of the event \* \* \*. A major preventable accident with a prior minor accident may result in termination." (Ex. B-2).

The policies defined a "major preventable accident" as "a preventable accident with damages in excess of \$10,000." (*Id.*) An "accident" was defined as involving "property damage to the vehicle, bodily injury potential or risk to human life or property." (*Id.*)

On November 13, 2013, Dr. Swan, claimant's attending physician, opined that claimant was able to perform a modified job in a clerical or a "competitor traffic tally/marketing analyst" position. (Ex. 7).

In a November 15, 2013 "memo to file," the employer stated that it would have offered claimant a modified job as a traffic tally coordinator or clerical worker, beginning November 18, 2013, had he not been terminated for "violation of company policy on 10/31/13." (Ex. 9).

SAIF paid temporary total disability (TTD) benefits from October 31, 2013 through November 17, 2013. (Exs. 6, 11). SAIF paid temporary partial disability (TPD) benefits from November 18, 2013 through March 24, 2014. (Exs. 17, 39).

Claimant requested a hearing, seeking TTD benefits, penalties, and attorney fees.

At the hearing, Mr. Brallier, an employer representative, testified that claimant was terminated because the repair cost of the accident was determined to be over \$10,000. (Tr. 11). He explained that, because "severe" accidents pose an "actuarial" risk for additional accidents, the employer had drawn a "baseline that when the severity of an accident exceeds \$10,000 or more from a cost standpoint for vehicle repair, bodily injury, anything that may be associated with that accident, if it's over \$10,000, it is an automatic termination." (*Id.*)

### CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that claimant was terminated because he was involved in a compensable accident, not for a violation of a work rule or other disciplinary reason. Accordingly, the ALJ awarded the disputed TTD benefits. On review, SAIF contends that it was authorized to convert claimant's TTD benefits to TPD benefits under ORS 656.325(5)(b) because he was terminated for a work rule violation. For the following reasons, we disagree with SAIF's contentions.

Termination of employment for "violation of work rules or other disciplinary reasons" is a condition precedent to conversion of TTD to TPD benefits under ORS 656.325(5)(b).<sup>2</sup> *See Robert P. Krise*, 54 Van Natta 911, 915

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<sup>2</sup> ORS 656.325(5)(b) provides:

"If the worker has been terminated for violation of work rules or other disciplinary reasons, the insurer or self-insured employer shall cease payments pursuant to ORS 656.210 and commence payments pursuant to ORS 656.212 when the attending physician or nurse practitioner

(2002), *aff'd on other grounds*, *SAIF v. Krise*, 196 Or App 608 (2004). While we are not authorized to resolve the propriety of a termination,<sup>3</sup> we are required to examine the factual reasons for the termination to determine whether the claimant was, in fact, terminated for a work rule violation or other disciplinary reason. *Id.*

Thus, where we have found a work rule violation or other disciplinary reason for a termination, we have declined to award TTD benefits. *See Marvin W. Cross*, 53 Van Natta 1404 (2001) (where the claimant was terminated for driving at excessive speed, the carrier properly ceased payment of TTD benefits). Conversely, we have awarded TTD benefits where we have not found a work rule violation. *See Ronald L. Jewell*, 57 Van Natta 2339 (2005) (awarding TTD benefits where the claimant was found to be in substantial compliance with the employer's written post-accident procedures).

Here, claimant was terminated because the repair cost of the accident was determined to be over \$10,000. (Tr. 11). The employer testified that his termination was "automatic" in such circumstances; *i.e.*, when "the severity of an accident exceeds \$10,000 or more from a cost standpoint for vehicle repair, bodily injury, anything that may be associated with that accident[.]" (*Id.*) Yet, the employer's policies did not provide for "automatic" termination following such an event.<sup>4</sup> (Ex. B). Rather, "Suspension and/or termination may follow after thorough review of the event." (Ex. B-2; Tr. 11). Furthermore, the policies do not describe what circumstances would lead to a termination following the review (*i.e.*, the policy does not identify repair costs in excess of \$10,000 as a circumstance that will result in termination).<sup>5</sup> We acknowledge that claimant's employment was

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authorized to provide compensable medical services under ORS 656.245 approves employment in a modified job that would have been offered to the worker if the worker had remained employment, provided that the employer has a written policy of offering modified work to injured workers."

<sup>3</sup> Unlawful employment practices are governed by other laws, including the provisions of ORS Chapter 659A and the procedures set forth in the administrative rules promulgated by the Bureau of Labor and Industries.

<sup>4</sup> Mr. Brallier acknowledged that the written employment policies did not provide for "automatic" termination. (Tr. 14).

<sup>5</sup> We also question the validity of such a rule for workers' compensation purposes. By its terms, the so-called rule would effectively preclude any worker involved in any compensable, "preventable" accident, with costs in excess of \$10,000, from receiving TTD benefits.

“at will” and subject to termination “at any time for any reason.” (Ex. B-1). However, a termination “at any time for any reason” would not necessarily be for violation of a work rule or other disciplinary reason.

After reviewing the employer’s policies and the employer’s testimony, we are not persuaded that claimant’s employment was terminated for the violation of a work rule or other disciplinary reason. Consequently, the record does not establish that the statutory prerequisite for ceasing claimant’s TTD benefits was present. *See Krise*, 196 Or App at 613-14 (after reviewing the employer’s manual and supplemental materials, the court concluded that the reasons for the claimant’s termination were unclear); *Jewell*, 57 Van Natta at 2341 (where the claimant was terminated for failing to contact the employer’s workers’ compensation coordinator immediately after he was injured, the Board determined that he had not been terminated for violation of work rules where he was in substantial compliance with the employer’s written accident procedures, which did not provide for termination).

Accordingly, claimant remained entitled to TTD benefits during the processing of this claim to its closure. Consequently, claimant is awarded TTD benefits for the disputed periods.

We turn to claimant’s request for a penalty and a penalty-related attorney fee. In declining to award a penalty and attorney fee under ORS 656.262(11)(a), the ALJ reasoned that SAIF’s termination of claimant’s TTD benefits did not constitute unreasonable claim processing. Based on the following reasoning, we conclude that a penalty and a penalty-related attorney fee are warranted.

If a carrier unreasonably refuses to pay compensation, the carrier is liable for a penalty of up to 25 percent of the amounts “then due,” plus an attorney fee. ORS 656.262(11)(a). The standard for determining an unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. *Int’l Paper Co. v. Huntley*, 106 Or App 107, 110 (1991). “Unreasonableness” and “legitimate doubt” are to be considered in light of all the evidence available to the carrier. *Brown v. Argonaut Ins.*, 93 Or App 588, 591 (1988).

SAIF asserts that its conversion of claimant’s TTD to TPD benefits was based on “information it possessed regarding the circumstances of claimant’s termination;” *i.e.*, information that he was terminated for a violation of a work rule. (Cross-Resp. Br. at 2). Nonetheless, SAIF does not specifically identify,

and the record does not establish, what it learned or what information it possessed regarding claimant's termination. In any event, the employer's knowledge/conduct regarding claimant's termination is imputed to SAIF. *See Anfilofieff v. SAIF*, 52 Or App 127, 135 (1981) (penalties assessed for an unreasonable denial where the employer's misconduct and misinformation contributed to the carrier's denial); *Peggy J. Baker*, 49 Van Natta 40 (1995) (the carrier was legally imputed with the employer's knowledge and conduct regarding the reasons for the claimant's employment termination).

We have previously determined that the statutory prerequisite for ceasing TTD benefits was not present; *i.e.*, the record does not support the proposition that claimant was terminated for the violation of a work rule or other disciplinary reason. Thus, by converting claimant's TTD to TPD benefits in the absence of the statutory prerequisite, SAIF unreasonably resisted the payment of compensation. Accordingly, we assess a 25 percent penalty based on the additional temporary disability benefits awarded by the ALJ's order. *See Baker*, 49 Van Natta at 40 (penalties assessed for unreasonable failure to pay TTD benefits where the employer provided incorrect information about the reasons for the claimant's termination).

In addition, claimant's attorney is entitled to a penalty-related attorney fee under ORS 656.262(11)(a) for services at the hearing level and on review. *See Stanley T. Castle*, 67 Van Natta 2055, 2057 (2015) (assessing a penalty-related attorney fee under ORS 656.262(11)(a) where the claimant successfully appealed the ALJ's order that had declined to find the carrier's claim processing unreasonable, citing *SAIF v. Traner*, 273 Or App 310 (2015)).

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 that 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). The attorney fee awarded may not exceed \$4,000, absent a showing of extraordinary circumstances. ORS 656.262(11)(a); OAR 438-015-0110(3) (WCB Admin. Order 1-2015, eff. Jan. 1, 2016).

Accordingly, taking into consideration the factors set forth in OAR 438-015-0010(4), and giving primary consideration to the results achieved and the time devoted to the case (as represented by the record and claimant's cross-appellant and cross-reply briefs), we find that a reasonable attorney fee for claimant's attorney's services at hearing and on review regarding the penalty issue, proportionate to the benefit to claimant, is \$1,500, to be paid by SAIF.

Claimant's attorney is also entitled to an assessed attorney fee for services on review regarding the successful defense of the ALJ's temporary disability award. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review regarding this issue is \$3,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

### ORDER

The ALJ's order dated April 16, 2015 is affirmed in part and reversed in part. Claimant is awarded a 25 percent penalty based on the additional temporary disability benefits awarded by the ALJ's order (which we have affirmed). For services at hearing and on review regarding this penalty issue, claimant's counsel is awarded a \$1,500 penalty-related attorney fee, payable by SAIF. For services on review regarding the successful defense of the ALJ's temporary disability award, claimant's counsel is awarded \$3,500, payable by SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on July 20, 2016

Member Lanning specially concurring.

I agree that claimant remained entitled to TTD benefits after his employment was terminated and that SAIF's conversion of TTD to TPD was unreasonable. *See* ORS 656.325(5)(b). I write separately to address the employer's "automatic termination" policy and SAIF's advancement of that policy in converting claimant's temporary disability benefits. (Tr. 11).

ORS Chapter 659A prohibits discrimination against workers who pursue workers' compensation benefits. *See* ORS 659A.040. Here, the employer terminated claimant's employment pursuant to a policy that made termination "automatic" when a worker was involved in an accident that cost more than \$10,000 for vehicle repair, bodily injury, or other accident-related costs. (Tr. 11). A policy that terminates injured workers based on the expense of their accident-related injuries may indicate discriminatory intent.

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Furthermore, express objectives of the Workers' Compensation Law are to provide, "regardless of fault, \* \* \* fair, adequate and reasonable income benefits to injured workers and their dependents; \* \* \* [and] \* \* \* a fair and just administrative system for delivery of \* \* \* financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceedings, to the greatest extent practicable \* \* \* ." *See* ORS 656.012(2)(a), (b). Certainly, a policy that terminates injured workers based on the expense of their accident-related injuries runs counter to these objectives.

ORS Chapter 656 requires employers/insurers to provide injured workers with modified work or temporary disability benefits, so long as the worker's inability to perform regular work is injury-related (subject to certain exceptions and limitations not relevant here). *See* ORS 656.262(4)(a); ORS 656.268(4)(a). In addition, the Director has a mandate in ORS 656.745(1) to assess civil penalties against an insurer who intentionally or repeatedly makes it necessary for claimants to resort to proceedings against their employers to secure compensation due.

I believe that an insurer's conversion of temporary disability benefits under ORS 656.325(5)(b), in the absence of specific information verifying that the termination was, in fact, for violation of work rules or other disciplinary reasons, violates the objectives of the Workers' Compensation Law and the specific proscription against forcing claimants to resort to proceedings against their employers to obtain due compensation. Therefore, I specially concur.