In the Matter of the Compensation of
JAMES L. WILLIAMS, Claimant
WCB Case No. 12-00363
ORDER ON REVIEW
Ronald A. Fontana, Claimant Attorneys
David Runner, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Weddell, Langer and Herman.

Claimant requests review of Administrative Law Judge (ALJ) Fulsher's order that: (1) found that claimant was not entitled to supplemental disability benefits; and (2) declined to assess penalties and attorney fees for the SAIF Corporation's allegedly unreasonable claim processing. On review, the issues are supplemental disability, penalties, and attorney fees. We reverse in part and affirm in part.

FINDINGS OF FACT

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

Claimant was employed in two jobs when he was compensably injured on February 24, 2011. (Ex. 7A-2). His wage at his primary job was $1,000 per month, and his wage at his secondary job was $800 per month.[1] (Exs. 29, 30). He continued to work, and earn full wages, at his secondary job after his compensable injury until December 22, 2011, when that employment ended.[2] (Ex. 29).

Beginning January 4, 2012, Dr. Tesar, claimant's attending physician, imposed work restrictions. (Ex. 23). These restrictions limited his ability to perform both his primary and secondary jobs.

SAIF calculated claimant's weekly wage and temporary disability benefits based solely on his wage at his primary job. (Exs. 26, 27). Claimant requested a hearing, challenging SAIF's calculation.

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[1] In this context, a "primary job" means the job at which the injury occurred, and a "secondary job" is any other job held by a worker in Oregon subject employment at the time of injury. OAR 436-060-0035(1)(b), (c).

[2] Claimant does not dispute that his secondary job ended for reasons that were unrelated to the compensable injury.

CONCLUSIONS OF LAW AND OPINION

Reasoning that the end of the secondary job was not related to the compensable injury, the ALJ concluded that no supplemental disability benefits were due under OAR 436-060-0035(12). Therefore, the ALJ concluded that SAIF had properly determined that claimant was not entitled to supplemental disability benefits.

On review, claimant contends that he is entitled to supplemental disability after December 22, 2011, because ORS 656.210(2)(a)(B) requires his weekly wage to be based on his "at-injury" wages at both his primary job and his secondary job. As explained below, we agree.

Supplemental Disability

It is undisputed that claimant was "employed in more than one job at the time of injury." Therefore, ORS 656.210(2)(a)(B) requires that his weekly wage be calculated by "adding all earnings [he] was receiving from all subject employment."[3] Thus, based on this unambiguous text, claimant's weekly wage is calculated by adding his secondary job earnings to his primary job earnings.[4]

SAIF contends that his secondary wages should not be considered because his "post injury" wages from the secondary job were equal to his secondary wages at the time of injury. *See* OAR 436-060-0035(12).[5] For the following reasons we disagree with that proposition.

Following his injury, claimant initially continued to receive wages from both his primary and secondary jobs. Nevertheless, when he eventually became totally disabled from his compensable injury and his entitlement to temporary/supplemental disability benefits was triggered, he was not receiving wages from his secondary job. Therefore, when claimant's temporary/ supplemental disability claim arose, there were no "post injury" wages from his secondary job to preclude his receipt of supplemental disability benefits.

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[3] Consistent with the statute, OAR 436-060-0035(8) provides that a worker's "combined disability rate" is based on the total wages from all employers. Thus, claimant's combined disability rate includes supplemental disability based on his secondary wages, as well as temporary disability based on his primary wages.

[4] We are unaware of legislative history that would prompt us to disregard the unambiguous text of ORS 656.201(2)(a)(B). *State v. Gaines*, 346 Or 160, 171-72 (2009).

[5] That rule provides, "If the worker receives post injury wages from the secondary job equal to or greater than the secondary wages at the time of injury, no supplemental disability is due."

SAIF also contends that the compensable injury did not cause any loss of income from claimant's secondary job because that employment had ended for reasons unrelated to the compensable injury. It relies on *SAIF v. Vivanco*, 216 Or App 210 (2007), *Dawes v. Summers*, 118 Or App 15 (1993), and *Safeway Stores v. Owsley*, 91 Or App 475 (1988).

We disagree with SAIF's contention. The issue does not involve claimant's entitlement to supplemental disability benefits resulting from the end of his secondary employment on December 22, 2011. Instead, the issue concerns his entitlement to such benefits attributable to his attending physician's medical verification on January 4, 2012, that he was unable to work due to his accepted condition. There is no contention that claimant had voluntarily left the work force at the time of his physician's time loss authorization. To the contrary, SAIF effectively acknowledged his presence in the work force by paying TTD benefits based on his primary job.

Under such circumstances, the cases on which SAIF relies are inapposite.[6] *See Jamey E. Tonkin*, 60 Van Natta 3254 (2008) (notwithstanding quitting his job for reasons unrelated to the work injury, the claimant was entitled to temporary disability benefits based on the attending physician's subsequent work restrictions); *Sheila A. Cress*, 42 Van Natta 216, 217 (1990) (where the claimant left work for reasons unrelated to her compensable injury, but her attending physician subsequently determined that she was unable to perform her regular work, she was entitled to TTD benefits); *Michael J. Harvey*, 41 Van Natta 980 (1989) (the claimant was entitled to reinstatement of temporary disability benefits where, although he was not working for reasons unrelated to his compensable injury at the time his physician concluded that he was unable to perform his regular work, there was no evidence that he had withdrawn from the work force), *aff'd*, *Hallmark Fisheries v. Harvey*, 100 Or App 657 (1990); *cf. Owsley*, 91 Or App at 479-80 (carrier not obligated to reinstate the claimant's temporary disability benefits after she was fired for reasons unrelated to the compensable injury, where she was receiving her regular wage before she was fired and there was no subsequent authorization from an attending physician stating that she was unable to perform her regular work).

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[6] Although the carrier in *Vivanco* successfully contended that it was not required to pay additional temporary disability benefits as a result of the termination of the claimant's employment, it paid such benefits when the claimant subsequently underwent surgery for his accepted condition. 216 Or App at 213.

In conclusion, claimant is entitled to supplemental disability benefits beginning January 4, 2012, when his attending physician imposed work restrictions due to his compensable injury. Consequently, SAIF is directed to recalculate claimant's combined disability benefit, including supplemental disability, based on his combined wage at the time of injury. ORS 656.210(2)(a)(B); OAR 436-060-0035(8).

Penalties/Attorney Fees

Claimant requests penalties and attorney fees for allegedly unreasonable claim processing. We decline that request.

Under ORS 656.262(11)(a), if a carrier unreasonably delays or unreasonably refuses to pay compensation, it "shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fee assessed under this section." Similarly, ORS 656.382(1) provides for an attorney fee if a carrier "unreasonably resists the payment of compensation." 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). "Legitimate doubt" does not depend solely on the absence of controlling case law, but may exist where a relevant statute is susceptible to more than one interpretation and existing case law does not resolve the question. *Cf. Walker v. Providence Health Sys.*, 254 Or App 676 (2013) (no "legitimate doubt" created by lack of controlling precedent where the relevant statute was unambiguous); *Providence Health Sys. v. Walker*, 252 Or App 489, 506-07 (2012) ("legitimate doubt" existed where the relevant statute was "susceptible to more than interpretation" and existing case law did not resolve the question).

Here, ORS 656.210(2)(a) provides for the inclusion of claimant's secondary wages at the time of injury in the calculation of his weekly wage. Nevertheless, in disputing claimant's entitlement to supplemental disability benefits, SAIF also argued that claimant's "post injury" secondary wages barred him from receiving such benefits. Moreover, analogizing this situation to existing case precedent, SAIF further asserted that supplemental disability benefits were not warranted because claimant had left the secondary job for reasons unrelated to the compensable injury. These arguments, if successful, would have excluded claimant's entitlement to supplemental disability benefits.

Thus, until the issuance of today's decision addressing the aforementioned contentions, there was no contrary controlling case law on this subject. Considering such circumstances, we conclude that SAIF had legitimate doubt regarding its liability for supplemental disability benefits. Consequently, its claim processing was not unreasonable and, as such, penalties and attorney fees are not warranted.

Finally, because our order results in increased compensation, claimant's counsel is entitled to an "out-of-compensation" attorney fee equal to 25 percent of the increased temporary disability compensation created by this order, not to exceed $5,000, payable directly to claimant's counsel. ORS 656.386(4); OAR 438-015-0055(1).

ORDER

The ALJ's order dated October 3, 2012 is reversed in part and affirmed in part. Claimant is awarded supplemental disability benefits beginning January 4, 2012, which shall continue until such benefits may be terminated according to law. The claim is remanded to SAIF for processing in accordance with this order. Claimant's attorney is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation resulting from this order, not to exceed $5,000, payable by SAIF directly to claimant's counsel. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on July 3, 2013