

In the Matter of the Compensation of
ERICA L. TALLERDAY, Claimant

WCB Case No. 12-05617

ORDER ON REVIEW

Dale C Johnson, Claimant Attorneys
Law Offices of Kathryn R Morton, Defense Attorneys

Reviewing Panel: Members Langer, Lanning, and Somers. Member Langer dissents.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Donnelly's order that found that the insurer had properly calculated the rate of her temporary total disability (TTD) benefits. On review, the issue is TTD rate. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," and provide a summary of the pertinent facts.

Claimant began working for the employer in March 2005 as a laborer on an asphalt crew. (Ex. A). Before her compensable September 26, 2012 right shoulder injury, there were three extended "off-work" periods: a 23-week gap between October 31, 2009 and April 3, 2010; a 12-week gap between December 18, 2010 and March 5, 2011; and a 10-week gap between January 14, 2012 and March 16, 2012. (Ex. B). Claimant collected unemployment benefits during these off-work periods. (Tr. 11).

In October 2012, the insurer calculated claimant's average weekly wage (AWW) based on her earnings for the 52-week period before the date of injury. (Ex. 9A). The insurer did not eliminate any "extended gaps" in employment for this 52-week period. (Exs. 11, 12, 15). Claimant requested a hearing, contesting the insurer's calculation.

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that the insurer properly calculated claimant's AWW, finding that the 10-week "lay-off" period (from January 8, 2012 to March 16, 2012) was not an "extended gap." Consequently, the ALJ declined to increase claimant's TTD rate.

On review, claimant argues that the disputed 10-week period is an “extended gap” and should be excluded from the AWW calculation. Instead, she asserts that her AWW should be based on the 42 “actual weeks” of her employment (the 52 weeks before the date of injury, less the 10-week “extended gap”). Based on the following reasoning, we agree with claimant’s assertion.

Claimant has the burden of proving the extent of her temporary disability. ORS 656.266; *Donald L. Vanwormer*, 64 Van Natta 1591, 1592 (2012). Therefore, she must establish the requirements for an “extended gap.” OAR 436-060-0025(5)(a)(A). We apply the version of the rule (WCD Admin. Order 11-052 (eff. April 1, 2011)) in effect at the time that claimant was injured on September 26, 2012. See *Tye v. McFetridge*, 342 Or 61, 67 n 5 (2006); *Donald L. Ivie*, 61 Van Natta 1037, 1041 n 7 (2009).

OAR 436-060-0025(5)(a)(A) provides, in pertinent part:

“Insurers must use the worker’s average weekly earnings with the employer at injury for the 52 weeks prior to the date of injury. * * * For workers employed less than 52 weeks or where extended gaps exist, insurers must use the actual weeks of employment (excluding any extended gaps) with the employer at injury * * *. For the purpose of this rule, gaps shall not be added together and must be considered on a claim-by-claim basis; the determination of whether a gap is extended must be made in light of its length and of the circumstances of the individual employment relationship itself, including whether the parties contemplated that such gaps would occur when they formed the relationship.”

In *SAIF v. Frias*, 169 Or App 345, 350 (2000), the court explained:

“‘Gap’ means ‘a break in continuity: INTERVAL, HIATUS.’ ‘Extended’ means ‘drawn out in length,’ ‘lengthy,’ ‘protracted,’ or ‘prolonged.’ Finally, ‘drawn-out’ means ‘stretched to great or greater length * * * [;] made to seem or be longer than desirable or normal.’” (Emphasis in original); (Citations omitted).

Here, we examine the 10-week gap (January 8 to March 16, 2012) to determine whether it was “extended.” In doing so, we also look to the individual employment relationship itself, including whether the parties contemplated that such gaps would occur when they formed the relationship. OAR 436-060-025(5)(a)(A); *Frias*, 169 Or App at 353.

Claimant testified that she was not told that the job was seasonal. Instead, she stated that she was told there would be some “downtime in the winter, but not much * * *.”¹ (Tr. 9, 13). Mr. Johnson, the employer’s representative, testified that, although work often continued into the winter (depending on the weather and the type of contract work available), it is considered a seasonal job.² (Tr. 26). Mr. Johnson, however, was not involved with claimant’s hiring interview, and testified that he had not had any conversations with her about job specifics. (Tr. 19). Therefore, we do not consider his testimony determinative.

In *Vern A. Tanner*, 64 Van Natta 2100 (2012), we found that the claimant’s seven-week period of unemployment (while working for a temporary worker agency) was not an “extended gap” because the record did not persuasively establish that such a gap was not contemplated when the parties formed the employment relationship. *Id.* at 2102. There, the employer’s representative testified that employees were told during the hiring process that the company did not have control of its available job assignments, and that there were times when no work was available. Moreover, we reasoned that the claimant acknowledged that, because the employer was a temporary agency, there would be gaps in his job assignments.

In contrast to *Tanner*, the evidence here is not as definitive regarding the understanding between the parties concerning contemplated gaps in employment. In other words, as described above, claimant testified that it was her impression there would “not [be] much” winter downtime. Furthermore, the employer’s representatives who participated in claimant’s hiring interview did not testify.

The only evidence in the record as to what kind of gaps were contemplated when claimant was hired consists of her testimony and a copy of the job posting, which characterized the job as “seasonal” from “May to November.” (Ex. A).

¹ The three individuals who initially hired claimant in 2005 did not testify.

² Mr. Johnson explained that the public contracts, specifically, with the Oregon Department of Transportation (ODOT), were limited to certain times of the year because of ODOT’s rules as to when, and in what weather conditions, asphalt may be laid. (Tr. 19). He also stated that private contractors’ rules were less restrictive concerning weather conditions. *Id.*

We give little weight to the job posting because, from the onset of her employment in 2005, the record shows that claimant worked in all seasons, and often worked during the months of December through April. (Ex. B). In addition, claimant's testimony that there was little "downtime" at the job was not refuted by the employer. Accordingly, claimant's testimony is consistent with what she experienced during the period from her March 2005 hiring to her September 2012 work injury.

The rule regarding "extended gaps" is not solely premised on what the parties contemplated at the time of hire. Rather, the rule also takes into account, on a case-by-case basis, the circumstances of the individual employment relationship itself. OAR 436-060-0025(5)(a)(A); *Ivie*, 61 Van Natta at 1042 (where the record did not establish that a three-week gap was customary or that the parties contemplated that the claimant would be off work for approximately 3 weeks due to surgery for an off-the-job injury, the gap was an "extended gap"). Thus, in accordance with the applicable rule, our focus is not confined to what the parties contemplated at the time the employment relationship began. Instead, consistent with the rule, our determination of whether a gap is extended "must be made in light of its length and of the circumstances of the individual employment relationship itself." OAR 436-060-0025(a)(A).

Here, claimant acknowledged that she had expected some "downtime" in her employment, but "not much." Consistent with that acknowledgement, she does not assert that her three-week downtime in April 2012 should be considered an "extended gap." However, the record shows that, between 2005 and 2012, there were only two other gaps in employment that were longer than the currently disputed 10-week gap; *i.e.*, 23 weeks in 2009-10, and 12 weeks in 2010-11. (Ex. B).

Under such circumstances, we find that the disputed 10-week gap constitutes an "extended gap." Accordingly, the insurer must recalculate claimant's AWW and TTD without consideration of this "extended gap." Thus, we reverse.

For services at hearing and on review, claimant's attorney 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.

ORDER

The ALJ's order dated June 17, 2013 is reversed. The employer is directed to recalculate claimant's AWW and TTD rate without consideration of the "extended gap." Claimant is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by this order, not to exceed \$5,000, payable directly to claimant's counsel. The remainder of the order is affirmed.

Entered at Salem, Oregon on January 16, 2014

Member Langer dissenting.

The majority finds that claimant's 10-week gap in employment during the calendar year before her compensable injury is an "extended gap" that should be excluded when calculating her AWW for TTD purposes. Because I disagree with this finding, I respectfully dissent.

Claimant's job was identified as being "seasonal," and she was on notice that there would be some periods without work. As the employer's witness, Mr. Johnson, testified, it would be standard procedure to explain to new hires the seasonal workload adjustments due to weather conditions. He also noted that the employer's business is subject to the success of its bidding process for contracts. (Tr. 20). Therefore, the record persuades me that, at the time of hiring, extended gaps in employment were contemplated.

In addition, as the majority has noted, we must look not only at what was contemplated by the parties at the commencement of employment, but also examine the circumstances of the individual employment relationship itself. OAR 436-060-0025(a)(A). Here, although claimant initially worked much of the winter period in 2006, 2007, and 2008, things changed in 2009, when she did not work from mid-October through early April 2010 (23 weeks). (Ex. B-4). It was the same in 2010-11 when claimant was off from early December through early March (12 weeks). (Ex. B-3). Claimant's current alleged "extended gap" mirrors these prior "winter season" layoffs, extending from mid-January 2012 to mid-March 2012.

The employer's witness, Mr. Johnson, explained that the job changed with the state's economic environment: "Our workload has gone from what used to be a split of about 65 percent public work and 35 percent private, to 92 percent public work. So, it's totally different market we're in right now than what we were in 2005 or '06 or '07." (Tr. 21, 22).

Although I believe that "extended gaps" were contemplated by the parties from the outset, even if that was not true in 2005, the "new normal" for claimant after the 2008 recession was that there were longer periods of unemployment in the winter season, when ODOT rules did not allow for road construction, and due to the lack of private contracts. Because claimant remained with the employer throughout this period, these "post-recession" circumstances are part of claimant's employment relationship.

Therefore, pursuant to OAR 436-060-0025(a)(A), and focusing on the disputed gap "in light of its length and of the circumstances of the individual employment relationship itself," I conclude that the gap was not "extended." In fact, the 10-week period was shorter than the gaps of the two previous years. Moreover, considering the nature of the employer's construction business (which is subject to contracts, weather, and the economy), and the reality of the "downtimes" claimant has experienced for the past three years, what was contemplated when she was hired in 2005 is outweighed by her "post-recession" employment relationship.

Therefore, I am not persuaded that claimant has met her requisite burden of proving that her TTD rate should be increased. Because the majority reaches a different conclusion, I respectfully dissent.