

In the Matter of the Compensation of  
**ASHLEY A. REHFELD, Claimant**

WCB Case No. 13-04380

**ORDER ON REVIEW**

M & L Legal Attorneys, Claimant Attorneys  
Michael G Bostwick LLC, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Jacobson's order that: (1) declined to award temporary disability benefits; (2) declined to award a penalty against Sedgwick Claims Management Services (Sedgwick), the statutory claims agent for the noncomplying employer (NCE); and (3) awarded a \$2,500 penalty-related attorney fee for Sedgwick's unreasonable claim processing. On review, the issues are TTD rate, penalties, and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

Temporary Disability

We modify the ALJ's order to award temporary disability benefits from August 17, 2008 through November 21, 2008, based on a temporary total disability (TTD) rate of \$50. We reason as follows.

In a prior order, we determined that claimant was a "subject worker" pursuant to ORS 656.005(28). *Ashley A. Rehfeld*, 63 Van Natta 2515 (2011). In doing so, we found that, although claimant had not been paid at the time of her injury, she had the expectation of receiving commission for advertising sales. *Id.* At 2518-19. As such, we held that she was a "worker" under ORS 656.005(30) because she was engaged to furnish services for a remuneration. *Id.* The court affirmed our order without opinion. *Sedgwick Claims Mgt. Servs. v. Rehfeld*, 255 Or App 512 (2013). Therefore, claimant is a "worker" as a matter of law.

Pursuant to OAR 436-060-0025(5), “[t]he rate of compensation for workers regularly employed, but paid on other than a daily or weekly basis, or employed with unscheduled, irregular or *no earnings* shall be computed on the wages determined by this rule.” (Emphasis added). OAR 436-060-0025(5)(j) provides:

“For workers paid by commission only or commission plus wages insurers must use the worker’s average commission earnings for previous 52 weeks, if available. For workers without 52 weeks of earnings, insurers must use the assumed wage on which premium is based. Any regular wage in addition to commission must be included in the wage from which compensation is computed.”

The record establishes that claimant was to receive a 30 percent commission for advertising sales. (Ex. 15-3-4). Because she did not have 52 weeks of earnings, and the NCE did not pay an insurance premium, we are unable to determine her average weekly wage (AWW). Moreover, there is no dispute that claimant had not been paid at the time of her August 17, 2008 work injury. Therefore, we agree with the ALJ’s determination that claimant’s AWW is zero.

Nonetheless, pursuant to ORS 656.210(1), a worker’s TTD rate is “equal to  $66\frac{2}{3}$  percent of wages, but not more than 133 percent of the [AWW] nor less than the amount of 90 percent of wages a week or the amount of \$50 a week, whichever amount is less.” Accordingly, claimant’s TTD rate is the statutory minimum of \$50. ORS 656.210(1). Therefore, we modify the ALJ’s order to award temporary disability benefits from August 17, 2008 through November 21, 2008, based on a TTD rate of \$50.

For services at hearing and on review, claimant’s attorney is awarded 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.

### Penalty/Attorney Fee

The parties do not dispute the ALJ’s determination that Sedgwick unreasonably failed to process the claim pursuant to our prior order that found claimant’s claim to be compensable. ORS 656.262(11)(a). Reasoning that there were no “amounts then due” for temporary disability benefits based on a TTD rate of zero, the ALJ did not assess a penalty for Sedgwick’s unreasonable claim processing.

However, as explained above, claimant is entitled to the statutory minimum TTD rate of \$50 for temporary disability benefits payable between August 17, 2008 through November 21, 2008.<sup>1</sup> Therefore, we modify the ALJ's penalty award, and assess a 25 percent penalty based on the "amounts then due" resulting from this order.

Finally, the ALJ awarded a \$2,500 penalty-related attorney fee for Sedgwick's unreasonable claim processing. Because claimant is entitled to a penalty based on the unpaid temporary disability benefits, and because the attorney fee assessed under ORS 656.262(11)(a) "shall be proportionate to the benefit to the injured worker," we modify the ALJ's attorney fee award.

Considering the proportionate benefit to claimant, as well as the factors set forth in OAR 438-015-0010(4) and giving primary consideration to the results achieved and to the time devoted to the case, we find that a reasonable attorney fee for Sedgwick's unreasonable claim processing to be \$3,000. OAR 438-015-0110(1), (2); *Bradford White*, 59 Van Natta 2483, 2493 (2007). Therefore, in lieu of the ALJ's \$2,500 penalty-related attorney fee award, we award an assessed fee of \$3,000, payable by Sedgwick, on behalf of the NCE.<sup>2</sup>

### ORDER

The ALJ's order dated December 27, 2013, as corrected on January 9, 2014, is affirmed in part and modified in part. Sedgwick is directed to recalculate claimant's temporary disability benefits using a TTD rate of \$50 for temporary disability benefits payable from August 17, 2008 through November 21, 2008. 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. Claimant is also awarded a 25 percent penalty based on the "amounts then due" awarded by this order. In lieu of the ALJ's \$2,500 penalty-related attorney fee, claimant's counsel is awarded a \$3,000 assessed fee, payable by Sedgwick, on behalf of the NCE. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on June 5, 2014

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<sup>1</sup> The parties do not dispute that temporary disability benefits were authorized during this period.

<sup>2</sup> Claimant's attorney is not entitled to a fee for services on review related to the penalty and attorney fee issues. See *Cayton v. Safelite Glass Corp.*, 258 Or App 522, 525 (2013); *Lynda S. Sinnott*, 66 Van Natta 346, 353 n 6 (2014).