

In the Matter of the Compensation of  
**GAYLEN J. KILTOW, Claimant**  
WCB Case No. 14-01336  
ORDER ON REVIEW  
Ronald A Fontana, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Fisher's order that: (1) awarded additional temporary disability (TTD) benefits payable from the scheduled beginning date of claimant's authorized training program (ATP) until the effective date of its termination of the ATP; and (2) awarded penalties and a \$5,400 insurer-paid attorney fee for allegedly unreasonable claim processing. On review, the issues are temporary disability, offset, penalties, and attorney fees. We modify in part and reverse in part.

FINDINGS OF FACT

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

Claimant's left foot was compensably injured on February 7, 2008. (Ex. 2). SAIF issued a Notice of Closure on April 1, 2011. (Ex. 11).

On May 26, 2011, SAIF informed claimant that an authorized training program (ATP) had been approved to begin May 31, 2011. (Ex. 12-1). On June 9, 2011, SAIF reopened claimant's claim for the ATP. (Ex. 13).

In a June 14, 2011, Order on Reconsideration, the Appellate Review Unit (ARU) rescinded the April 1, 2011 Notice of Closure. (Ex. 14-3).

Claimant participated in the ATP through December 22, 2011. (Exs. 14I-2, 16A). On December 27, 2011, he was restricted from participating in the ATP for medical reasons. (Ex. 14K-1-2).

On January 6, 2012, a prior ALJ set aside the June 14, 2011 Order on Reconsideration and reinstated the April 1, 2011 Notice of Closure. (Ex. 15-8). We affirmed that portion of the ALJ's order and affirmed the April 1, 2011 Notice of Closure. *Gaylen J. Kiltow*, 64 Van Natta 1136, *recons*, 64 Van Natta 1296 (2012).

On October 23, 2012, Dr. Baum, claimant's attending physician, opined that work retraining was no longer recommended and that claimant was totally disabled. (Ex. 19). On September 18, 2013, Dr. Baum opined that claimant was permanently incapacitated from regularly performing work at a gainful and suitable occupation due to his accepted conditions and direct sequelae, and including preexisting disability. (Ex. 19C-9).

On December 12, 2013, Dr. Baum opined that claimant's accepted conditions were medically stationary as of October 23, 2012. (Ex. 20).

On December 19, 2013, SAIF issued a Notice of Training End and a Notice of End of Eligibility for Vocational Assistance. (Exs. 21, 22). The notices stated that, effective December 19, 2013, claimant's ATP had ended and he was not entitled to further training or eligible for further vocational assistance. (Exs. 21, 22).

On December 20, 2013, SAIF notified claimant that it had calculated an overpayment based on temporary disability that had been paid after his medically stationary date from October 24, 2012 through December 2, 2013. (Ex. 23). On December 23, 2013, SAIF issued a Notice of Closure that awarded temporary disability from June 9, 2011 through October 23, 2012, and permanent total disability (PTD) benefits beginning October 24, 2012. (Ex. 26-1).

On January 2, 2014, SAIF notified claimant that it had miscalculated temporary disability for the period from December 21, 2011 through May 16, 2012 and had overpaid temporary disability from October 24, 2012 through December 16, 2013, resulting in an overpayment. (Exs. 27, 27A). On January 14, 2014, SAIF notified claimant that it would recover its overpayment. (Ex. 28).

Claimant requested reconsideration of the December 23, 2013 Notice of Closure. (Ex. 29). He raised the issues of entitlement to TTD benefits through the date of the Notice of Closure, SAIF's assertion of an overpayment, penalties, and attorney fees (Ex. 29).

On March 4, 2014, SAIF issued an Amended Notice of Training End, which stated that claimant was no longer enrolled and actively engaged in training as of October 27, 2011. (Ex. 32-2). The notice stated that claimant's eligibility for services had ended as of December 19, 2013. (*Id.*)

On March 18, 2014, an Order on Reconsideration modified the Notice of Closure to award temporary disability from May 31, 2011 through October 27, 2011, based on the dates of training stated by the March 4, 2014 Amended Notice of Training End. (Ex. 33-2). Claimant requested a hearing.

### CONCLUSIONS OF LAW AND OPINION

Reasoning that the December 19, 2013 vocational eligibility notices had become final, the ALJ concluded that SAIF lacked the authority to issue the March 2014 Amended Notice of Training End. Consequently, the ALJ concluded that the ARU's reliance on that notice to modify claimant's temporary disability award was erroneous.

Finding that claimant was entitled to temporary disability for the duration of the ATP (from May 31, 2011 through December 19, 2013), the ALJ awarded temporary disability for that period. Although acknowledging that SAIF had voluntarily begun PTD benefits effective October 24, 2012, the ALJ declined to modify the Notice of Closure's PTD award to prevent a "double recovery" or to grant SAIF's requested offset of an overpayment. Finally, determining that the Notice of Closure's temporary disability award was unreasonable, the ALJ awarded a penalty and attorney fee.

On review, SAIF contends that claimant should not receive temporary disability benefits and PTD benefits for the same period, and that it should be allowed to recover an overpayment. SAIF also asserts that the Notice of Closure's temporary disability award was not unreasonable. Based on the following reasoning, we agree with SAIF's contentions.

#### Temporary Disability/PTD

"Permanent total disability" means "the loss, including preexisting disability, of use or function of any portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation." ORS 656.206(1)(d). A claimant is entitled to PTD wage replacement benefits during the period of such disability. ORS 656.206(2).

"Temporary total disability" means that "a worker meets the test of being totally disabled but that it cannot be said that the disability is permanent." *Gwynn v. SAIF*, 304 Or 345, 351 (1987); *see also* ORS 656.210(1) (providing for TTD benefits "[w]hen the total disability is only temporary"). A claimant is

entitled to TTD wage replacement benefits during the period of such disability, which are calculated at the same rate as PTD benefits. ORS 656.206(2); ORS 656.210(1).

A worker may not be both permanently totally disabled and temporarily disabled, because “permanent” and “temporary” are mutually exclusive categories of disability based on the duration of the disability. *Gwynn*, 304 Or at 350-51; *SAIF v. Grover*, 152 Or App 476, 480 (1998). Therefore, a worker may not receive PTD and temporary disability benefits for the same period, even if the worker is permanently totally disabled, but otherwise entitled to temporary disability benefits. *Grover*, 152 Or App at 480-81.

Here, SAIF concedes that claimant’s disability entitles him to uninterrupted wage replacement benefits, in the form of either temporary disability or PTD compensation, beginning with the commencement of his ATP. However, SAIF argues that, regardless of the dates for which claimant is entitled to temporary disability benefits, the start date of PTD benefits must coincide with the end date of temporary disability benefits.

Claimant responds that SAIF did not timely raise the issue of when his PTD award should commence before the ARU and did not raise the issue at the hearing until closing arguments, which was untimely. Based on the following reasons, we disagree with claimant’s timeliness arguments.

Under ORS 656.268(9) and ORS 656.283(6), a party may not raise an issue at a hearing if the issue was not raised on reconsideration, unless the issue arises out of the reconsideration order itself. Further, when a case is presented on the written record, we do not consider issues raised for the first time in written closing arguments. *See Anthony D. Cayton*, 63 Van Natta 54, 66 (2011); *Cindy M. Penturf*, 50 Van Natta 1718, 1719 (1998). Here, the record establishes that the date the PTD award should begin can be considered.

OAR 436-030-0115(5) states that “[o]nce the reconsideration proceeding is initiated, issues must be raised and further evidence submitted within the time frames allowed for processing the reconsideration request.” Here, during the reconsideration proceeding, after claimant filed the reconsideration request contending that he was entitled to temporary disability through December 23, 2013, SAIF responded by arguing that a modification of temporary disability award’s end date should be accompanied by a corresponding modification of the PTD award’s beginning date. (Exs. 29-3, 30-3). Thus, SAIF expressly raised the

issue of the beginning date of claimant's PTD award within the context of the issue of claimant's entitlement to temporary disability after October 23, 2012, an issue for which claimant had requested reconsideration.

The Order on Reconsideration did not extend claimant's temporary disability award to include any period for which the Notice of Closure had awarded PTD benefits. (Ex. 33-2). Instead, it reduced claimant's temporary disability award to May 31, 2011 through October 27, 2011. (*Id.*) Thus, it disposed of the temporary disability issue, which claimant had raised, in a manner that did not require it to address SAIF's contention regarding modification of the PTD award.

When claimant requested a hearing on the Order on Reconsideration, he again identified the issues as including entitlement to temporary disability through December 23, 2013. Thus, claimant raised the issue of his entitlement to temporary disability during a period for which SAIF had argued that such an award would require the modification of the PTD award. Consistent with its position articulated during the reconsideration proceeding, SAIF asserted in its written closing argument that the start date of claimant's PTD award should be consistent with any modification of the end date of his temporary disability award (if the ALJ chose to grant claimant's request). Under these particular circumstances, we do not consider SAIF to have raised a "new issue" during the closing argument phase of the proceeding. Therefore, we address SAIF's contention regarding the modification of the starting date of claimant's PTD award.

Claimant argues that his entitlement to temporary disability through December 23, 2013, the date of claim closure, is substantive and does not result in an overpayment. *See* ORS 656.268(10) (the worker shall receive temporary disability compensation during a "post-closure" ATP); OAR 436-060-0040(4) (if no award payment was suspended under ORS 656.268(10) and remained due at the end of training, temporary disability compensation payments continue pending subsequent claim closure); *Atchley v. GTE Metal Erectors*, 149 Or App 581, *rev den*, 326 Or 133 (1997) ("post-closure" ATP-related temporary disability benefits are "substantive" because they result from an explicit entitlement, and do not depend on the claimant's "medically stationary" status). Claimant also asserts that he was entitled to PTD benefits beginning October 23, 2012 because Dr. Baum's opinion establishes that he was permanently totally disabled as of that date. Thus, claimant argues that he is entitled to both temporary disability benefits and PTD benefits from October 23, 2012 through December 23, 2013.

We agree with claimant's contention, with which SAIF does not specifically disagree, that he is entitled to temporary disability benefits from May 31, 2011 through December 23, 2013. We reason as follows.

The ALJ awarded temporary disability through December 19, 2013, because ORS 656.268(10) explicitly entitles claimant to temporary disability benefits during his ATP. We agree with the ALJ's conclusion that claimant is entitled to "ATP-related" temporary disability benefits from May 31, 2011 through December 19, 2013 under ORS 656.268(10).

Claimant contends that he is also entitled to temporary disability benefits from December 20, 2013 through December 23, 2013 under OAR 436-060-0040(4). Upon the end of an ATP, temporary disability compensation continues until subsequent claim closure, unless an award payment was suspended under ORS 656.268(10) and remains due.<sup>1</sup> OAR 436-060-0040(4). If an award had been suspended under ORS 656.268(10) and remained due, SAIF would have been required to resume payment of such an award upon the end of the ATP. *Id.*

SAIF does not assert that an award payment was suspended under ORS 656.268(10) and remained due when training ended. Further, SAIF's audit results do not indicate that it resumed payment of such an award. (Ex. 27A). Under such circumstances, we conclude that claimant's entitlement to temporary disability benefits continued from the end of training through December 23, 2013, the date of the subsequent closure.

However, the determination that claimant was entitled to temporary disability through December 23, 2013 necessarily includes the determination that claimant's disability during that period was "only temporary." *See* ORS 656.210(1). Because claimant's disability was "only temporary" in duration through December 23, 2013, he was not "permanently" totally disabled until December 24, 2013. *See Gwynn*, 304 Or at 351; *Grover*, 152 Or App at 480.

We acknowledge that Dr. Baum made statements supporting the conclusion that claimant was permanently totally disabled before December 24, 2013. (Exs. 19, 19C-9). However, whether a claimant is permanently and totally disabled is a legal conclusion of which medical evidence is only one part. *Morris v. Denny's Restaurant*, 50 Or App 533, *mod*, 53 Or App 863, 867 (1981).

---

<sup>1</sup> ORS 656.268(10) provides that during a "post-closure" ATP, permanent disability benefits due for work disability under the closure shall be suspended.

The effective date of a PTD award is the earliest date that it is proved that all elements necessary to PTD status existed. *Adams v. Edwards Heavy Equipment, Inc.*, 90 Or App 365, 370 (1988); *Morris*, 53 Or App at 867; *Barrett Behurst*, 58 Van Natta 453 (2006).

Here, despite Dr. Baum's medical opinion that claimant's total disability was permanent before December 24, 2013, claimant's disability was, under ORS 656.268(10) and OAR 436-060-0040(4), "temporary" before that date. However, when SAIF issued the December 23, 2013 Notice of Closure, claimant's total disability ceased to be "temporary," and became "permanent." Accordingly, we conclude that the "effective date" for claimant's entitlement to PTD benefits began December 24, 2013.

Therefore, we modify claimant's temporary disability and PTD awards as follows. Claimant is awarded temporary disability benefits from May 31, 2011 through December 23, 2013. Claimant is awarded PTD benefits beginning December 24, 2013. SAIF may offset any compensation payable to claimant to recover any overpaid PTD benefits for the period before December 24, 2013. *See* ORS 656.268(14)(a). That overpayment may be recovered in the manner prescribed by OAR 436-060-0170.

Our order results in an increase in claimant's temporary disability award from December 20, 2013 through December 23, 2013. Thus, in lieu of the ALJ's "out-of-compensation" attorney fee award, claimant's counsel is awarded 25 percent of the temporary disability compensation granted from October 28, 2011 through December 23, 2013, not to exceed \$1,500, payable directly to claimant's attorney.

### Penalties

The ALJ awarded a penalty under ORS 656.268(5)(d), which provides:

"If an insurer or self-insured employer has closed a claim or refused to close a claim pursuant to this section, if the correctness of that notice of closure or refusal to close is at issue in a hearing on the claim and if a finding is made at the hearing that the notice of closure or refusal to close was not reasonable, a penalty shall be assessed against the insurer or self-insured employer and paid to the worker in an amount equal to 25 percent of all compensation determined to be then due the claimant."

We have applied ORS 656.268(5) to award a penalty for an unreasonable disability award in a Notice of Closure. *Kerry K. Hagen*, 64 Van Natta 316, 319 (2014).<sup>2</sup> The reasonableness of the Notice of Closure must be evaluated based on the information available to the carrier at the time of the closure. *David J. Morley*, 66 Van Natta 2052, 2056 (2014).

As discussed above, we have found that claimant's disability continued to be "temporary" through December 23, 2013, and only became "permanent" as of December 24, 2013. Nevertheless, SAIF's conclusion that claimant was permanently totally disabled as of October 24, 2012 was reasonably based on the available medical evidence. (Exs. 19, 19C-9). Further, claimant has consistently contended that his disability was "permanent" as of October 24, 2012.

Under these circumstances, we conclude that SAIF's award of PTD benefits, beginning October 24, 2012, was reasonable. Likewise, because a claimant may not be simultaneously permanently totally disabled and temporarily disabled, SAIF's award of temporary disability benefits through October 23, 2012 was also reasonable. Further, longstanding case precedent discourages the "double recovery" of benefits, which would include overlapping awards of TTD and PTD benefits.<sup>3</sup> See *Schultz v. Springfield Forest Prods.*, 151 Or App 727, 733 (1992) (double recovery inconsistent with legislative policy); *Merrell D. Case*, 65 Van Natta 1884, 1886 (2013); *Larry D. Schutte*, 46 Van Natta 2359, 2361 (1994).

Consequently, we conclude that the Notice of Closure was not unreasonable. Accordingly, we reverse the ALJ's penalty award under ORS 656.268(5)(d). Likewise, we reverse the ALJ's \$5,400 penalty-related attorney fee award.

---

<sup>2</sup> Member Johnson has expressed serious reservations regarding the analysis of the statutory scheme expressed in *Hagen*. See *Christina Song*, 67 Van Natta 445, 449 (2015) (Member Johnson concurring). Given our disposition of the penalty issue, it is unnecessary to address those reservations in this case.

<sup>3</sup> ORS 656.018(6) provides that a carrier is not prohibited from paying benefits in excess of the compensation required to be paid under ORS Chapter 656. Nonetheless, particularly in light of the reasoning expressed above, the failure to pay such "excess" benefits does not constitute an unreasonable resistance to the payment of compensation for purposes of a penalty/attorney fee assessment under ORS 656.262(11)(a).

ORDER

The ALJ's order dated August 13, 2014, as reconsidered on September 26, 2014, is modified in part and reversed in part. In lieu of the Order on Reconsideration's and ALJ's temporary disability awards, claimant is awarded temporary disability from May 31, 2011 through December 23, 2013. In lieu of the ALJ's "out-of-compensation" attorney fee award, claimant's counsel is awarded 25 percent of the temporary disability benefits granted from October 28, 2011 through December 23, 2013, not to exceed \$1,500, payable directly to claimant's attorney. In lieu of the Notice of Closure's PTD award, claimant is awarded PTD beginning December 24, 2013. SAIF is authorized to recover an overpayment of PTD benefits paid from October 24, 2012 through December 23, 2013 in the manner prescribed by ORS 656.268(14)(a). The ALJ's awards of a penalty under ORS 656.268(5)(d) and a \$5,400 penalty-related attorney fee are reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on April 14, 2015