
In the Matter of the Compensation of
DUSTIN E. HALL, Claimant
WCB Case Nos. 15-02765, 15-01900
ORDER ON RECONSIDERATION
Hollander & Lebenbaum et al, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell.

The SAIF Corporation requests reconsideration of that portion of our September 12, 2016 Order on Review that affirmed an Administrative Law Judge's (ALJ's) award of a penalty and a penalty-related attorney fee pursuant to ORS 656.262(11)(a). SAIF contends that our decision conflicts with Board case precedent. For the following reasons, we adhere to our previous decision.

In awarding a penalty and related attorney fee, the ALJ concluded that claimant's employment termination was not primarily for the violation of work rules or other disciplinary reasons. After completing our review, we were not persuaded that claimant was terminated for violation of the employer's work rules or other disciplinary reasons.

Accordingly, we found that the statutory prerequisite for ceasing temporary total disability (TTD) benefits under ORS 656.325(5)(b) was not present. Finally, because the record did not identify any other basis for terminating claimant's TTD benefits, we concluded that SAIF unreasonably resisted the payment of compensation and affirmed the ALJ's penalty and attorney fee awards. In doing so, we relied on *Anfilofieff v. SAIF*, 52 Or App 127 (1981).

SAIF asserts that our analysis conflicts with our holdings in *Keith J. Wiggins*, 65 Van Natta 1592 (2013), *Efrain Rios*, 55 Van Natta 1477 (2003), and *Oren D. Hawksford*, 54 Van Natta 2237, *recons*, 54 Van Natta 2645 (2002). SAIF also argues that ORS 656.262(11)(a) only provides for a penalty against the carrier for its own conduct, and not for the conduct of its insured employer. For the following reasons, we disagree with SAIF's arguments.

We acknowledge that *Wiggins*, *Rios*, and *Hawksford* contain *dicta* suggesting that the employer's mere assertion that a worker's employment was terminated for work rule violations or other disciplinary reasons would be sufficient to avoid a penalty assessment against its carrier. Yet, the court has imputed the employer's conduct/knowledge to the insurer in assessing penalties and attorney fees for the insurer's unreasonable claim processing. See *Nix v. SAIF*,

80 Or App 656, *rev den* 302 Or 158 (1986) (penalties assessed against the carrier where compensation was unreasonably delayed by the employer's failure to report the accident); *Anfilofieff*, 52 Or App at 135 (penalties assessed against the carrier for unreasonable denial where the employer misrepresented the cause of the injury and its relationship with the claimant).

Moreover, in *Peggy J. Baker*, 49 Van Natta 40 (1995), we rejected a carrier's assertion that it had a legitimate doubt as to its liability because it understood from the employer that the claimant was terminated for reasons unrelated to her claim. In that case, the record supported a determination that the claimant was terminated in part because of her inability to perform her regular work activity due to her compensable injury and that she was not terminated because of violation of work rules or other disciplinary reasons. We acknowledged that the employer may not have accurately reported the reasons for the claimant's termination. Nevertheless, citing *Nix*, we concluded that the carrier was legally imputed with the employer's knowledge and unreasonable conduct. Based on the employer's provision of incorrect information to the carrier that led to a resistance to the payment of compensation, we awarded penalties under ORS 656.262(11).

In *Wiggins*, *Rios*, and *Hawksford*, regardless of any *dicta* to the contrary, we did not solely rely on the carriers' assertions regarding the reason for the termination of the workers' employments. In *Rios*, the claimant had a regular work release when his employment was terminated. Therefore, ORS 656.325(5)(b) was not ultimately applicable. Furthermore, *Hawksford* and *Wiggins* presented "credibility" disputes between the claimant and the employer, which required assessment from an ALJ regarding the reliability of competing versions of events.¹ In those circumstances, we concluded that the carrier had a legitimate doubt as to its liability for TTD benefits.

¹ In *Hawksford*, the employer terminated the claimant's employment, asserting that he had falsified work hours and failed to provide adequate notification of time off work. We affirmed the ALJ's findings that there was no persuasive evidence that the claimant falsified work hours, the claimant's testimony (that he always "checked in" with his supervisor) was credible, and the employer's testimony was not credible.

In *Wiggins*, the claimant understood that he had been released to modified work and told the employer as much. The carrier then told the employer that the claimant had been released to full duty work and faxed the employer the attending physician's full-duty work release. The employer determined that the claimant had misrepresented his work status and, on that basis, terminated his employment. The employer testified that the claimant admitted that he had a full duty work release, but did not feel ready to return to full duty work. The claimant denied admitting that he had been released to regular work. The attending physician subsequently admitted that the full-duty work release was in error. Under those circumstances, we concluded that the claimant was not dishonest when he told the employer that he had been released to modified work and, therefore, he had not been terminated for violation of work rules.

Here, unlike *Hawksford* and *Wiggins*, the events leading to claimant's employment termination were not in dispute. The reason identified for the termination was claimant's absenteeism. The record establishes his multiple absences. Yet, as explained in our previous decision, the employer had initiated a process in response to claimant's absenteeism, which it did not follow in terminating claimant's employment.² Moreover, the employer stated that an employee's remaining home with a sick child was not a violation of work rules. (Tr. 47). In the absence of an explanation for these discrepancies, we found that the record did not support the employer's assertion that claimant's employment termination was for a violation of work rules or other disciplinary reasons.

Based on the aforementioned case precedent, the employer's knowledge and conduct in terminating claimant's employment is imputed to SAIF. Because the statutory prerequisite for ceasing TTD benefits under ORS 656.325(5)(b) was not shown to be present, SAIF's resistance to the payment of compensation was unreasonable.

Accordingly, we withdraw our September 12, 2016 order. On reconsideration, as supplemented herein, we republish our September 12, 2016 order. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on October 7, 2016

² On January 13, 2015, the employer issued a written warning notice for "absenteeism" following claimant's "no call no show for scheduled shift" on January 9, 2015. (Ex. 3). The notice directed claimant to be on time and at work for all scheduled shifts or, if he was sick or late, to "call" 30 minutes before the start of the shift. (*Id.*) The notice also stated that further infractions would result in a second warning. (*Id.*)

In February and March 2015, claimant was absent from work for several days, due to his illness and his child's illness. (Ex. G-21, -23).

The employer terminated his employment on March 16, 2015. The employer identified the reason for the termination as claimant's repeated absences. (Tr. 48). Yet, the employer did not contend that claimant's absences after January 13, 2015, were deemed to be "further infractions" or explain why it terminated claimant's employment in lieu of a second warning.