
In the Matter of the Compensation of
RODOLFO AREVALO, Claimant
WCB Case No. 15-00901
ORDER ON REVIEW
Randy M Elmer, Claimant Attorneys
Kenneth R Searce, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Naugle's order that: (1) found that his temporary total disability (TTD) rate should be calculated based on his wages during the 52 weeks preceding his injury; (2) did not award temporary disability benefits between October 18, 2014 through February 9, 2015; and (3) awarded a \$1,000 penalty-related attorney fee for the insurer's allegedly unreasonable claim processing. The insurer cross-requests review of those portions of the ALJ's order that awarded a penalty and the aforementioned attorney fee for allegedly unreasonable claim processing. On review, the issues are temporary disability, TTD rate, penalties, and attorney fees. We reverse in part, modify in part, and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" and provide the following summary.

Claimant periodically worked as a laborer for the employer beginning in 2010. (Tr. 13). The employer hired laborers for specific projects and, after completing each project, would lay off approximately 90 percent of the employees. (Tr. 33-34). Claimant's first job with the employer was for three weeks, 12 hours a day, at \$15 per hour. (Tr. 15). He generally worked on four or five projects each year. (Tr. 17).

In December 2013, claimant began working for a different employer, an excavation company. (Tr. 27). However, in January 2014, the current employer asked him to work a one-week emergency job. (*Id.*) Claimant was granted a week off work from the excavation company to work for the current employer, where he expected to earn higher wages by working overtime. (*Id.*) Claimant, and both employers, understood that the emergency job would only last for one week, after which he would return to his excavation work.

On January 30, 2014, claimant sustained an arm injury while working for the current employer. (Tr. 11). He sought medical treatment on January 31, 2014 and was released to modified work “until cleared.” (Ex. 1).

In March 2014, the insurer accepted a nondisabling “crush injury to the left elbow/left forearm.” (Ex. 6).

In April 2014, Ms. Marik, a nurse practitioner, restricted claimant to modified duty through April 15, 2014. On April 15, 2014, Ms. Marik diagnosed left lateral epicondylitis and restricted claimant to modified work until May 9, 2014. (Ex. 8-2, -5, -6). Claimant returned to work with the excavation company until July 2014. (Tr. 28).

In September 2014, claimant requested reclassification of his claim to disabling status. (Ex. 9).

On September 19, 2014, claimant was evaluated by Dr. Knight, who recommended physical therapy and an injection. (Ex. 16-4). He restricted claimant to modified work through October 17, 2014. (Ex. 16-6, -7). Dr. Knight performed an injection on September 24, 2014, commenting that claimant would be considered for surgery if his condition did not improve. (Ex. 16-10).

In October 2014, claimant was evaluated by Dr. Bald at the insurer’s request. (Ex. 11). He diagnosed a “likely” partial thickness extensor tendon origin tear, which he considered to be causative of claimant’s “clinical” lateral epicondylitis condition. (Ex. 11-8). Dr. Bald considered the work injury to be the major contributing cause of the extensor tendon tear, and of the resulting medical treatment/disability. (*Id.*)

On October 11, 2014, Dr. Knight noted that claimant’s left arm condition had not improved, and that he would be scheduled for surgery. (Ex. 16-11, -13).

In January 2015, the Workers’ Compensation Division (WCD) directed the insurer to reclassify the claim as disabling. (Ex. 13). The insurer then reclassified the claim as disabling. (Ex. 14).

In February 2015, the insurer advised claimant that his average weekly wage (AWW) had been calculated based on 52 weeks of earnings preceding the work injury. (Exs. 20, 21). The insurer paid TTD benefits from February 10, 2015 through May 5, 2015. (Ex. 21A).

Claimant requested a hearing, challenging the insurer's calculation of his TTD rate and the periods of payment of his temporary disability benefits. He also sought penalties and attorney fees for unreasonable claim processing.

CONCLUSIONS OF LAW AND OPINION

The ALJ found that temporary disability benefits were authorized from January 31, 2014 through May 9, 2014, and from September 19, 2014 through October 17, 2015.¹ However, the ALJ concluded that the record lacked an attending physician authorization for temporary disability benefits from October 18, 2014 through February 9, 2015. Determining that the insurer's failure to pay temporary disability benefits during the authorized periods was unreasonable, the ALJ awarded a penalty and a \$1,000 penalty-related attorney fee. *See* ORS 656.262(11)(a). The ALJ concluded, based on OAR 436-060-0025(5)(a)(A), that the insurer correctly calculated the TTD rate based on the 52 weeks before the work injury.

TTD Rate

Claimant has the burden of proving the extent of his temporary disability. ORS 656.266(1); *Donald L. Vanwormer*, 64 Van Natta 1591, 1592 (2012). We apply the version of the rule (WCD Admin. Order 11-052 (eff. April 1, 2011)) in effect when claimant was injured on January 30, 2014. *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:

“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 with multiple employers at the time of injury who qualify under ORS 656.210(2)(b) and OAR 436-060-0035, insurers shall average all earnings 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 or all earnings, if the worker qualifies under ORS 656.210(2)(b) and OAR 436-060-0035,

¹ The parties agree that the ALJ's order should have awarded temporary disability benefits from September 19, 2014 through October 17, 2014.

up to the previous 52 weeks. 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. For workers employed less than four weeks, insurers shall use the intent of the wage earning agreement as confirmed by the employer and the worker. For the purpose of this section, the wage earning agreement may be either oral or in writing.”

Relying on *Tye*, claimant contends that, while he had multiple periods of work for the employer over the 52 weeks before the work injury, only the period of his most recent assignment should be considered to determine which portion of OAR 436-060-0025(a)(A) applies. Because that period of employment was less than four weeks, claimant contends that the intent of the wage earning agreement must be used to determine his TTD rate. *See* OAR 436-060-0025(a)(A); *Teresa Hansen*, 66 Van Natta 2080, 2081 (2014). In response, relying on *Garcia v. SAIF*, 194 Or App 504 (2004), the insurer argues that claimant’s employment was longer than 52 weeks and, therefore, his AWW should be based on the 52 weeks preceding his compensable injury without excluding any periods as extended gaps. Based on the following reasoning, we agree with claimant’s position.

In *Hansen*, we compared the *Tye* and *Garcia* cases. 66 Van Natta at 2081. We explained that the central consideration was whether the claimant and the employer intended the employment to be continuous. We reasoned that the claimant’s employment in *Garcia* was considered to be continuous because the parties expected that he would resume work when the employer obtained a new contract. *Id.* In contrast to the claimant in *Garcia*, we noted that the claimant in *Tye* worked “off and on” in a seasonal pattern, resulting in the implementation of a seasonal “layoff,” which created a period of unemployment, rather than a continuing employment relationship. *Id.*

In *Hansen*, we acknowledged that the claimant in *Tye* had multiple periods of employment within the 52-week period, but the *Tye* court held that his TTD rate was to be calculated using only the most recent period of employment without consideration of any “extended gaps.” *Id.* We explained that:

“[A]s *Garcia* and *Tye* illustrate, a pattern of seasonal work spanning several years may show either that employment terminated at the end of the season, and new employment began with the next season, as in *Tye*, or that the employment was continuous, despite seasonal lack of work, as in *Garcia*.” *Id.*

With this rationale in mind, we proceed to consider whether claimant’s employment relationship with the employer was continuous, despite regular periods without work, or whether the employment relationship terminated at the conclusion of each period of work. That determination will establish the proper method of calculating claimant’s TTD rate. *Id.*

Claimant testified that he had worked for the employer on and off for approximately four years. (Tr. 13). He generally worked four or five separate projects per year. (Tr. 17). In between projects, claimant did not consider himself to be an employee of the employer. (Tr. 16).

Before the January 2014 job, claimant received a call from the employer offering a work project of seven days involving 12-hour shifts. (Tr. 13). Claimant had previously informed the employer that he had taken a permanent job with another employer (the excavation company) and that he would not be available for more temporary jobs. (Tr. 26). He did so because he considered it to be “the correct thing to do,” *i.e.*, a courtesy to the former employer. (Tr. 27). However, after receiving the January 2014 job offer, claimant made arrangements with the excavation company to work the seven-day job. (*Id.*)

Claimant had no guarantee or agreement with the employer establishing that he would return for another job after he finished the seven-day job. (Tr. 21). The employer confirmed that, at the end of its projects, its laborers, including claimant, were “let go” without any guarantee of future employment. (Tr. 39).

After reviewing this record, we acknowledge that claimant’s report to the employer could be construed as evidence of an ongoing employment relationship. Nevertheless, the testimony of claimant and the employer regarding claimant’s employment status between jobs persuasively weighs against finding an ongoing employment relationship. Consequently, we are not persuaded that claimant’s employment was continuous. Moreover, because claimant had been employed

less than four weeks when he was injured, the insurer must calculate his TTD rate according to the wage earning agreement as confirmed by claimant and the employer. See OAR 436-060-0025(a)(A); *Tye*, 342 Or at 74.²

Temporary Disability (October 18, 2014 - February 9, 2015)

The ALJ awarded temporary disability benefits between September 19, 2014 and October 17, 2014, reasoning that Dr. Knight's work restrictions (starting September 19, 2014) were limited to four weeks, and did not extend to the date of claimant's surgery (February 10, 2015).

Claimant seeks temporary disability benefits from October 18, 2014 through February 9, 2015, asserting that he was not released to regular work. He reasons that because medical records indicated that his condition had not improved and he was being scheduled for surgery, Dr. Knight's work restrictions (effective September 19, 2014) remained in effect during the disputed period. (Ex. 16-6, -7, -10, -11, -13). Based on the following reasoning, we disagree.

Pursuant to ORS 656.262(4)(g), temporary disability is due and payable only for those periods authorized by the attending physician. We cannot infer entitlement to temporary disability in the absence of such authorization. See *Thomas R. Sledd*, 54 Van Natta 5 (2002); *Tamitha A. Barendrecht*, 53 Van Natta 1135, 1136-37 (2001); *Kerry Nguyen*, 52 Van Natta 688, 689 (2000). However, a carrier's obligation to pay temporary disability begins when an objectively reasonable carrier would understand contemporaneous medical reports to signify such approval. *Lederer v. Viking Freight, Inc.*, 193 Or App 226, *modified on recons*, 195 Or App 94 (2004).

Here, Dr. Knight expressly restricted claimant to modified duty for four weeks starting on September 19, 2014. (Ex. 16-6, -7). Although he subsequently noted a lack of improvement, Dr. Knight did not expressly implement further work restrictions after the aforementioned four-week period until February 11, 2015, the day after claimant's surgery. (Exs. 16-6, -7, -10, -13, -19).

² Because our order awards increased temporary disability benefits and issues after January 1, 2016, claimant is entitled to a reasonable attorney fee for his counsel's efforts at hearing and on review regarding this temporary disability issue. ORS 656.383(2), (Or Laws 2015, ch 521, §§ 10, 11). We determine the amount of a reasonable attorney fee for these services in a later section of this order.

Under similar circumstances, we have declined to infer an attending physician's authorization of temporary disability benefits. For example, in *Jason Osborne*, 67 Van Natta 1410, 1413 (2015), the claimant received work restrictions from an emergency room physician before being referred to another physician for surgery. After the expiration of his initial work restrictions (by reason of the emergency room provider's limited authority to authorize time loss under ORS 656.245(2)(b)(B)), the claimant was evaluated and scheduled for surgery, but his surgeon did not indicate that he had any work restrictions or otherwise discuss his work status. *Id.* We declined to conclude that the claimant's pending surgery would indicate to an objectively reasonable carrier that he was excused from work. *Id.*

Here, likewise, we do not consider Dr. Knight's chart notes following his September 19, 2014 "4-week" work restrictions sufficient to constitute an authorization of further temporary disability benefits. (Ex. 16-8, -11). On the contrary, those records do not address claimant's work restrictions or work status. Accordingly, we are persuaded that Dr. Knight expressly limited the duration of claimant's work restrictions to four weeks, and did not continue his work restrictions thereafter. Consequently, we agree with the ALJ's determination that temporary disability benefits are not due between October 18, 2014 and February 9, 2015. *See Osborne*, 67 Van Natta at 1413.

Penalties/Attorney Fees

The ALJ determined that the insurer's failure to pay temporary disability benefits from January 31, 2014 through May 9, 2014, and from September 19, 2014 through October 17, 2014, was unreasonable. Consequently, the ALJ awarded a penalty and \$1,000 attorney fee under ORS 656.262(11)(a). Based on the following reasoning, we affirm the ALJ's penalty award, increase the ALJ's penalty-related fee award, award a fee for the defense of the ALJ's penalty and fee awards, and assess a separate penalty and related fee for the insurer's unreasonable calculation of claimant's TTD rate.

Due to the recent passage of House Bill (HB) 2764 (2015), Or Laws 2015, chapter 521, regarding amendments to relevant attorney fee provisions, we proceed to consider which version of the statutes governs the attorney fee awards granted by this order.

HB 2764 provides that the statutory changes apply to "orders issued and attorney fees incurred on or after the effective date of this 2015 Act [January 1, 2016], regardless of the date on which the claim was filed." Or Laws 2015,

ch 521, § 11. Because this order has issued after the effective date of the statutory amendments, we must determine whether the attorney fees awarded by this order were “incurred” before or after January 1, 2016.³ Among other definitions, “incur” means to “become liable or subject to.” *See Menasha Forest Prods. Corp. v. Curry County Title, Inc.*, 350 Or 81, 89 (2011) (citing *Webster’s Third New Int’l Dictionary*, 1146 (unabridged ed 2002)). “Liable” means “bound or obligated according to law or equity: RESPONSIBLE, ANSWERABLE.” *Id.* (citing *Webster’s* at 1302). Based on the following reasoning, we conclude that the fees awarded by this order were “incurred” on the effective date of this order.

Based on the above definitions, the relevant consideration is not when claimant’s counsel performed services that led to the award of attorney fees. Rather, the proper consideration is when claimant became entitled to an award of attorney fees, and the insurer, consequently, became liable for them.

Here, because of the contingent nature of claimant’s attorney’s fee agreement, claimant’s counsel’s entitlement to receive an attorney fee for services rendered does not arise until the “contingency” occurs. *See* ORS 656.388(1) (no claim for fees by an attorney representing a claimant is valid unless approved by an ALJ, the Board, or a court). Claimant “finally prevail[ed]” regarding the disputed TTD rate issue upon the issuance of this order. ORS 656.383(2). Accordingly, we conclude that claimant’s counsel’s attorney fees awarded on the disputed TTD rate and penalty issues are “incurred” on the date of this order. Thus, because this order issues, and the attorney fees awarded concerning the disputed TTD rate and penalty issues by this order are “incurred,” after January 1, 2016, we apply the HB 2764 amendments to our attorney fee awards.⁴

³ Claimant’s reply/cross-respondent’s brief was filed on December 14, 2015.

⁴ Our implementation of HB 2764 does not retroactively apply its provisions. In reaching this assessment, we draw on the Supreme Court’s reasoning in *Fromme v. Fred Meyer, Inc.*, 308 Or 588 (1988).

In *Fromme*, the Supreme Court addressed the scope of the effective date of 1987 statutory amendments concerning a carrier’s right to recover court costs from the claimant. 306 Or at 562.

The effective date of the amendments was September 27, 1987. *Id.* at 561. However, the court noted, the amendments were silent on which cases they were intended to govern and did not specify an effective date. *Id.* The Court recognized that the claimant’s appeal had been pending before the 1987 amendments. Nonetheless, because the order determining the prevailing party issued after the effective date of the statutory amendments, the court determined that the amendments applied. *Id.* at 562. Reasoning that the legal right to recover costs could only be created by the court’s determination of a prevailing party, the court explained that its application of the 1987 amendments was prospective, because it only effected legal rights and obligations that came into existence after the effective date of the amendments.

Turning to the ALJ's award of a penalty and attorney fee regarding the insurer's non-payment of certain periods of temporary disability, we note that under ORS 656.262(11)(a), when a carrier unreasonably delays or refuses to pay compensation, the carrier shall be liable for an additional amount up to 25 percent of the amount then due. 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 (1991). If so, the refusal to pay is not unreasonable. "Unreasonableness" and "legitimate doubt" are to be considered in the light of all the evidence available to the carrier at the time of the allegedly unreasonable conduct. *Brown v. Argonaut Ins. Co.*, 93 Or App 588, 591 (1988).

On review, the insurer contests the ALJ's penalty award under ORS 656.262(11)(a) for its failure to pay temporary disability benefits as authorized. The insurer argues that it had a reasonable basis not to pay temporary disability benefits because claimant told the employer that he had returned to work for the excavation company.⁵ However, such knowledge would not excuse the insurer's responsibility to continue to process the claim and determine whether temporary partial disability (TPD) benefits were due. *See* ORS 656.212; OAR 436-060-0030(3).⁶ Because the insurer did not proceed with its claim processing obligations concerning claimant's entitlement to TPD benefits, we agree with the ALJ's conclusion that the insurer's actions were unreasonable and that a penalty is warranted. Accordingly, we affirm that portion of the ALJ's order that awarded a penalty.

Here, unlike the statutory amendments in *Fromme*, HB 2764 expressly provides that its provisions apply to "orders issued and attorney fees incurred on or after" January 1, 2016, "regardless of the date on which the claim was filed." Or Laws 2015, ch 521, §11. However, the *Fromme* reasoning is instructive in considering when claimant's attorney fees were "incurred," and is in keeping with the dictionary definition of "incurred," *i.e.*, becoming "liable or subject to." Furthermore, similar to the court's application of the 1987 amendments, our award of attorney fees applies HB 2764 prospectively, not retrospectively, because the attorney fee entitlement is created by this order (which has issued after the effective date of HB 2764).

⁵ Claimant explained that he did not provide his work restrictions to the employer because he gave them to the excavation company, which he considered to be his current employer at the time. (Tr. 24).

⁶ OAR 436-060-0030(3) provides, in pertinent part, "An insurer shall cease paying temporary total disability compensation and start paying temporary partial disability compensation under section (1) from the date an injured worker begins wage earning employment, prior to claim closure, unless the worker refuses modified work * * *."

Claimant contends that the ALJ's \$1,000 penalty-related attorney fee award, related to the insurer's unreasonable failure to pay temporary disability, should be increased. Based on the following reasoning, we agree.

We determine a penalty-related attorney fee in an amount that is proportionate to the benefit to claimant and takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and the time devoted to the case as well as the proportionate benefit to the claimant. *See* ORS 656.262(11)(a); OAR 438-015-0110(1), (2). Based on our review of the record and considering these factors, we conclude that a reasonable penalty-related attorney fee regarding the unpaid temporary disability benefits is \$3,000, to be paid by the insurer. We consider such an attorney fee award to be more proportionate to the benefit to claimant (*e.g.*, more than three months of temporary disability benefits). Therefore, the ALJ's attorney fee award is modified.

We apply the amended attorney fee provisions of HB 2764 (*eff.* January 1, 2016) to the following attorney fee awards created by this order.

Claimant's attorney is entitled to an assessed fee for services on review regarding the insurer's unsuccessful challenge to the ALJ's penalty and attorney fee award. ORS 656.382(3) (Or Laws 2015, ch 521, §§ 5, 11); *see also SAIF v. Traner*, 273 Or App 310, 320-21 (2015). After considering the factors set forth in OAR 438-015-0010(4) and OAR 438-015-0110 and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review concerning the aforementioned issue is \$1,000, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the issue posed by the insurer's cross-appellant's brief (as represented by claimant's cross-respondent's brief), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

Further, claimant's counsel is entitled to an assessed fee for services at hearing and on review for prevailing on the disputed TTD rate issue. ORS 656.383(2), (Or Laws 2015, ch 521, §§ 10, 11). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services at the hearing level and on review is \$3,000, payable by the insurer. In reaching this conclusion, we have particularly

considered the time devoted to the TTD rate issue (as represented by the record and claimant's appellate briefs), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.⁷

Finally, we turn to claimant's contention that the insurer's calculation of his TTD rate was unreasonable.⁸ Based on the following reasoning, we conclude that a penalty and attorney fee under ORS 656.262(11)(a) are warranted.

At hearing, the employer's office manager agreed that claimant's employment was on a "temporary" and "as-needed" basis, such that his employment was not continuous. Moreover, as explained above, the record indicates that claimant had a continuous working relationship with the excavating company and was performing this one-week job for the employer with the understanding that he would return to the excavating job after completion of the one-week job. Such knowledge on the part of the employer is imputed to the insurer. *See, e.g., Anfilofieff v. SAIF*, 52 Or App 127, 134 (1981); *Gavino Chavez*, 43 Van Natta 2300, 2301 (1991) (awarding penalty and attorney fee for unreasonable calculation of TTD rate because the employer's knowledge of the claimant's work hours imputed to the carrier).

Under such circumstances, particularly in light of existing case precedent, (*i.e.*, the *Tye* decision) we consider it unreasonable for the insurer to have calculated claimant's TTD rate based on his previous 52 weeks of "pre-injury" earnings (rather than on his specific wage earning agreement). *See Hansen*, 66 Van Natta at 2083 (penalties and attorney fees justified when the carrier unreasonably calculated the claimant's TTD rate in contravention of applicable case law). Accordingly, a penalty is awarded based on 25 percent of the amounts due as a result of the insurer's improper calculation of claimant's TTD rate.

⁷ Claimant's counsel is not entitled to an attorney fee award for services rendered regarding claimant's unsuccessful request for temporary disability benefits between October 18, 2014 and February 9, 2015.

⁸ The insurer contends that claimant did not raise the issue of penalties regarding its TTD rate calculation at hearing. However, the record establishes that claimant raised the issue of penalties with respect to both the issue of the TTD rate and the insurer's non-payment of the disputed temporary disability benefits in his statement of the issues at the outset of the hearing. (Tr. 4). While claimant's written closing argument did not separately discuss his positions regarding the multiple penalties, raising the issue in his statement of the issues was sufficient to preserve the issue. *See, e.g., Francisco D. Pardo*, 55 Van Natta 2785, 2788 (2003) (the claimant's failure to expressly address a previously raised issue in his closing argument did not result in waiver of the issue). Additionally, the record does not indicate that claimant expressly waived the penalty issue. *See Drews v. EBI Cos.*, 310 Or 134, 150-51 (1990) (waiver is the intentional relinquishment of a known right).

Claimant's attorney is also entitled to a penalty-based attorney fee for services rendered at hearing and on Board review regarding the insurer's unreasonable TTD rate calculation. ORS 656.262(11)(a); *Traner*, 273 Or App at 322; *Stanley T. Castle*, 67 Van Natta 2055, 2057 (2015). That attorney fee shall be in a reasonable amount that is proportionate to the benefit to claimant and takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and the time devoted to the case. See OAR 438-015-0110(1), (2). Based on our review of the record and considering these factors, we award \$3,000 as a reasonable penalty-related attorney fee regarding the insurer's unreasonable calculation of claimant's TTD rate.

ORDER

The ALJ's order dated September 9, 2015, is reversed in part, modified in part, and affirmed in part. The insurer is directed to calculate claimant's TTD rate in the manner described in this order. Claimant is awarded a penalty equal to 25 percent of the increased temporary disability benefits created by this order. For a penalty-related attorney fee regarding the insurer's unreasonable calculation of claimant's TTD rate, claimant's counsel is awarded \$3,000, payable by the insurer. In lieu of the ALJ's \$1,000 penalty-related attorney fee award, for services at the hearing level regarding the insurer's unreasonable claim processing, claimant's attorney is awarded \$3,000, payable by the insurer. For services on Board review regarding the successful defense of the ALJ's penalty award, claimant's counsel is awarded \$1,000, payable by the insurer. For services at the hearing level and on Board review in obtaining claimant's increased TTD rate, claimant's counsel is awarded \$3,000, to be paid by the insurer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on July 27, 2016