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In the Matter of the Compensation of  
**MICHAEL J. CARLSON, Claimant**  
WCB Case No. 16-00145  
ORDER ON REVIEW  
Moore & Jensen, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Smith's order that: (1) awarded additional temporary total disability (TTD) benefits; and (2) assessed penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are rate of temporary disability, penalties, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation regarding the penalty and attorney fee issues.

Determining that claimant's work with SAIF's insured as a logger was not a continuous employment relationship that spanned seasonal layoffs, the ALJ found that claimant's relevant employment began when he agreed to work for the employer around June 1, 2013. Thus, the ALJ concluded that claimant had been employed for fewer than four weeks on the date of injury, June 10, 2013, and that, under OAR 436-060-0025(5)(a)(A),<sup>1</sup> his average weekly wage (AWW) was to be

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<sup>1</sup> 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, 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.”

determined by “the intent of the wage earning agreement as confirmed by the employer and the worker.” Based on the 801 form completed by the parties, as well as SAIF’s 1502 form, the ALJ found that claimant’s AWW as of his injury date was \$1,350. Concluding that SAIF’s TTD rate calculation (which, on December 10, 2015,<sup>2</sup> it began paying at a lesser rate than it had previously calculated) was unreasonable, the ALJ assessed a penalty based on those reduced temporary disability benefits and a \$4,000 penalty-related attorney fee. *See* ORS 656.262(11)(a).

On review, SAIF asserts that it had a legitimate doubt regarding its TTD rate/AWW calculation. Based on the following reasoning, we disagree.

If a carrier unreasonably delays or unreasonably refuses to pay compensation, the carrier shall be liable for an additional amount up to 25 percent of the amounts “then due.” *See* ORS 656.262(11)(a). 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); *Katrina Miller*, 60 Van Natta 1307, 1309 (2008). If so, the refusal to pay is not unreasonable. “Unreasonableness” and “legitimate doubt” are to be considered in light of all the evidence available to the carrier at the time of the allegedly unreasonable conduct. *Brown v. Argonaut Ins.*, 93 Or App 588, 591 (1988); *Miller*, 60 Van Natta at 1309.

In support of a legitimate doubt regarding its calculation of claimant’s TTD rate/AWW, SAIF cites *Garcia v. SAIF*, 194 Or App 504 (2004). In *Garcia*, the claimant had worked seasonally as a tree planter for the employer for approximately two years. *Id.* at 506. His work depended on contracts secured by his employer and on the weather; he could not work during the winter, during parts of the summer, and for certain other periods when there was no contract or when work was unavailable. *Id.*

In *Garcia*, the court determined that the substance of the relationship (which was based on the claimant’s previous pattern of working for the employer and contacting the employer at the conclusion of each job to learn of future work, and the assumption of the parties that the claimant would continue working for the employer) was of continuing employment. *Id.* Thus, rather than establishing a

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<sup>2</sup> For claimant’s missed work before December 10, 2015, SAIF had calculated claimant’s TTD rate based on an AWW of \$1,350. (Exs. 18, 20, 25). For claimant’s missed work beginning on December 10, 2015, SAIF calculated claimant’s TTD rate based on an AWW of \$142.06. (Exs. 23-1, 25).

new employer/employee relationship each time the claimant secured a contract with the employer, the court concluded that each agreement merely served to clarify the expectations and details of work to be performed under a particular contract. *Id.*

In *Tye v. McFetridge*, 342 Or 61 (2006), the court dealt with whether there was a continuous employment relationship that spanned a seasonal layoff period. The claimant had, for several years, worked for the employer “off and on, in a ‘seasonal pattern’ involving a period of work followed by ‘employer’s annual seasonal layoff.’” *Id.* at 74. The *Tye* court reasoned that a “‘layoff,’ in common parlance, is a period of *unemployment*” and the claimant “filed for unemployment compensation during the layoff period, listing [the] employer as his first, second, and third most recent employers.” *Id.* (emphasis in original). Thus, the court concluded that the claimant had viewed the employment relationship as having been terminated by the layoff. *Id.* Further, the *Tye* court noted that the record did not suggest that the claimant and the employer “had entered into any sort of contractual arrangement, oral or written, that either would have *entitled* claimant to return to work at the end of the seasonal layoff or *required* the employer to put claimant to work again.” *Id.* (emphasis in original).

Thus, as *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*. See *Sheila M. Williams*, 65 Van Natta 1850, 1853 (2013). In *Williams*, based in part on the claimant’s testimony and other evidence indicating that she and both of her employers considered the employment relationship to be continuing, we found that her employment was continuous, rather than seasonal. *Id.* at 1854-55.

Here, as in *Tye*, the record does not support an ongoing employment relationship, as opposed to a pattern of seasonal work followed by periods of seasonal layoffs. We reason as follows.

Claimant’s tax records do not support continuous or ongoing employment, but rather a “seasonal pattern” involving a period of work followed by a seasonal layoff. (Exs. 2 through 8, 10 through 12). As in *Tye*, claimant filed for unemployment compensation during his seasonal layoffs. (Tr. 19-20; Exs. 4, 8-2, 10-1, 11, 12). Moreover, as in *Tye*, the record does not suggest there was any sort of contractual agreement, oral or written, that either would have entitled claimant to return to work at the end of the “layoff” or required the employer to return him to work again.

In our view, the records available to SAIF at the time it calculated claimant's TTD/AWW rate established that claimant began his most recent employment with the employer on June 1, 2013, and that there was not an ongoing continuous employment relationship at the time of his June 10, 2013 compensable injury. *See Mary T. Robinett*, 61 Van Natta 692, 694 (2009) (where the claimant had worked for the employer as an instructional assistant for less than 52 weeks before the date of injury, but previously had worked for the employer as a volunteer coordinator for more than a year before the injury, her AWW was calculated using her actual weeks of employment as an instructional assistant because the record did not establish that the employment relationship was to be continued on an ongoing basis or presumptively renewed, (*i.e.* the claimant was free to work for any other employer and neither party was bound by any employment agreement)); *cf. Williams*, 65 Van Natta at 1853 (despite the claimant's primarily seasonal employment, the record established a continuing employment relationship under *Garcia* because the claimant expected to return to work, continued to act in support of her job responsibilities, had continued access to the employer's facilities, and had verbal contracts for her continued work the next summer).

Thus, we find that, in light of the information available to SAIF when it calculated claimant's AWW/TTD rate following his June 10, 2013 injury for missed work beginning on December 10, 2015 (as well as the prevailing case precedent existing at that time), it did not have a legitimate doubt about the proper calculation of such benefits. Accordingly, we affirm the ALJ's assessment of a penalty and related attorney fee.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2), (3) (Or Laws 2015, ch 521, §§ 5, 11); *see also SAIF v. Traner*, 273 Or App 310, 320-21 (2015); *Rodolfo Arevalo*, 68 Van Natta 1142, 1148-9, 1151 (2016). 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 a reasonable fee for claimant's attorney's services on review is \$4,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and his counsel's uncontested submission), the complexity of the issues, the values of the interests involved, the risk that claimant's counsel might go uncompensated, and the contingent nature of the practice of workers' compensation law.

ORDER

The ALJ's order dated May 19, 2014 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,000, to be paid by SAIF.

Entered at Salem, Oregon on November 3, 2016