

In the Matter of the Compensation of  
**PHILLIP A. CASCIATO, Claimant**  
WCB Case No. 15-05354  
ORDER ON RECONSIDERATION  
Ronald A Fontana, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning. Member Lanning specially concurs.

On December 16, 2016, we withdrew our November 23, 2016 order that affirmed an Administrative Law Judge's (ALJ's) order that, among other decisions, declined to assess penalties and attorney fees under ORS 656.268(5)(f) for the SAIF Corporation's allegedly unreasonable Notice of Closure. We took this action to consider claimant's request for reconsideration, which renewed his contention that a penalty and attorney fee award are warranted. After considering the parties' positions, we adhere to our prior order.

Claimant seeks a penalty under ORS 656.268(5)(f), contending that SAIF's calculation of his base functional capacity (BFC) value was incorrect and, as such, the work disability award granted in the Notice of Closure was unreasonable. In its response, SAIF contends that it acted reasonably when it determined that the Dictionary of Occupational Titles (DOT) Code for a "Crane Operator," with a BFC of "medium," appropriately described claimant's "at-injury" job duties based on the employer's job description.

For the reasons expressed in our prior order, we find that, despite our affirmance of the Order on Reconsideration (which increased claimant's work disability award (BFC value)), SAIF had a legitimate basis for its calculation of work disability using a BFC of "medium," which was based on its review of the employer's job description (including consideration of claimant's affidavit) and comparing claimant's "at-injury" job with the DOT code for "Crane Operator." We continue to find that the Appellate Review Unit (ARU)'s determination that claimant's BFC was "heavy," utilizing a combination of DOT titles for a "Crane Operator" and an "Iron worker," under OAR 436-035-0012(9)(a), does not automatically lead to a conclusion that SAIF's calculation of claimant's work disability award (based on a DOT code for a "Crane Operator" only) was unreasonable.

Claimant contends that we incorrectly relied on *Christina Song*, 67 Van Natta 445 (2015), because, in that case, we determined that a penalty was not warranted under *former* ORS 656.268(5)(d) (now ORS 656.268(5)(f)) where the medical records relied on by the ARU to increase the claimant's permanent disability award were created after the Notice of Closure had issued. However, our citation to *Song* simply referred to a case where the carrier's conduct was not considered unreasonable, even though its calculation of permanent disability benefits was ultimately determined to have been incorrect, not because *Song* was factually indistinguishable.

We also disagree with claimant's assertion that *James F. McClintock*, 66 Van Natta 744 (2014), which was also cited in our earlier decision, supports a penalty/attorney fee award. In that case, the carrier had offered no explanation for neglecting to rate the claimant's residual functional capacity (RFC) as "light," the category consistent with his work restrictions. Under such circumstances, we held that the carrier's Notice of Closure award was unreasonable.

Here, in contrast to *McClintock*, the record provides an explanation for SAIF's calculation of claimant's BFC as "medium." Specifically, after considering the employer's job description (as well as claimant's affidavit), SAIF determined that the duties of claimant's "at-injury" job were comparable to the DOT code for a "Crane Operator." Although we have ultimately affirmed the ARU's calculation of claimant's BFC as "heavy" on the basis of a combination of DOT codes, we continue to conclude that SAIF did not act unreasonably in using the DOT code of "Crane Operator" based on the employer's job description/analysis (including claimant's affidavit challenging portions of the employer's job description).

Claimant also challenges our reliance on the reasoning of *Rick Loucks*, 65 Van Natta 628 (2013), to conclude that SAIF had provided an accurate job description before claim closure. In *Loucks*, we concluded that the employer had complied with *former* OAR 436-030-0020(2)(b)(A) (now OAR 436-030-0020(2)(c)(A)) by providing the worker with a job description of the "at-injury" job, even though the employer did not send a revised job description addressing the worker's "corrections" to the initial job description. 65 Van Natta at 633.

Here, SAIF sent the employer's job description (based on the employer's understanding of the "at-injury" job) to claimant and he responded by affidavit with his "corrections" to that job description. We do not interpret OAR

436-030-0020(2)(c)(A) to require SAIF to modify the employer's job description to comport with claimant's affidavit. Instead, we find it reasonable for SAIF to have relied on the employer's job description, despite claimant's affidavit. Although the ARU ultimately determined, based on claimant's affidavit in conjunction with the employer's job description, that a combination of two DOT codes better described his "at-injury" job duties, that determination does not establish that SAIF's reliance on the employer's job description to have been unreasonable.

Furthermore, while the record as a whole (including the job duties and physical demands of the relevant job) is considered when determining a work disability award, OAR 436-035-0012(9)(a) requires that the strength category for the "at-injury" job be determined by the category assigned in the DOT, a specific job analysis, or a job description agreed upon by the parties. *See Lavonne L. Hauser*, 52 Van Natta 883, 883 n 5 (2000); *Gloria J. Wiley*, 50 Van Natta 781 (1998); *Kathryon D. Parsons*, 45 Van Natta 954 (1993). A claimant's affidavit may also be considered, but only for purposes of corroborative evidence of either a DOT description or a specific job analysis, or for determining what DOT description applies, or whether a DOT description or specific job analysis is more accurate. *Charles L. Chase*, 67 Van Natta 1205, 1207 (2015), *aff'd without opinion*, 282 Or App 369 (2016); *Gaylen J. Kiltow*, 64 Van Natta 1296, 1299 n 2 (2012) (on reconsideration).

Applying such principles to the present record, we disagree with claimant's assertion that his affidavit necessarily proved that the employer's job description was "inaccurate." The primary difference (related to the BFC calculation) between claimant's affidavit and the employer's job description concerned the maximum weight that he was required to carry without assistance. According to the employer's job description, claimant's job required a maximum carry weight of 50 pounds, with carrying over 50 pounds performed with two or more people or with lift devices. (Ex. 81-1). In his affidavit, claimant described occasionally lifting 100 pounds without assistance, such as when he had to "reposition an I-beam," or when he lifted "4x4 boards" that, when "wet or fresh," could weigh in excess of 100 pounds. (Ex. 87-1-2).

The DOT code for "Crane Operator" (921.663-062) describes job duties such as operating a crane to lift and move materials and objects, driving a truck to a work site, directing activities of a laborer, and hoisting and placing blocks and outriggers to prevent capsizing when lifting heavy loads. The DOT code for "Iron Worker" (801.361-014) describes job duties such as raising, placing, and uniting

girders, columns, and other structural-steel members to form structures, and pulling, pushing, or prying steel members into position while the members are supported by hoisting.

Considering the duties of these two positions, we do not consider SAIF's conclusion, that claimant's "at-injury" job (which was described as loading steel onto trucks, unloading steel off of carts, using overhead crane to move bridge girders, driving semi truck around facility, moving trailers, and operating forklift (Ex. 81-1)) more closely resembled the DOT for "Crane Operator," which has a BFC of "medium," to have been unreasonable. In reaching our conclusion, we acknowledge that claimant's affidavit indicated that the physical demands of his "at-injury" job exceeded those mentioned in the job description. Nonetheless, this record establishes that most of the duties of claimant's "at-injury" job were consistent with those described for a "Crane Operator," rather than those of an "Iron Worker" (whose primary functions were actually physically maneuvering steel girders and other structures). Thus, although ARU ultimately determined that a combination of the DOT codes was appropriate for rating claimant's BFC, we do not consider SAIF's decision to base claimant's BFC on the "Crane Operator" DOT code to have been unreasonable.

As another basis for his penalty/attorney fee request, claimant asserts that SAIF neglected to obtain an "accurate" job analysis/description and did not mail (by certified mail) that analysis to claimant. *See* OAR 436-030-0020(2)(c)(A). Yet, even assuming that SAIF had neglected to strictly comply with these Workers' Compensation Division (WCD) rule requirements, the record does not establish that any such omissions played a role in the allegedly unreasonable Notice of Closure award.

As confirmed in his affidavit, claimant received and reviewed the employer's job analysis/description and addressed what he considered to be its deficiencies in his affidavit. (Ex. 87-1). Further, SAIF calculated claimant's work disability award (based on his BFC value) *after* considering his "affidavit" response to the employer's "at-injury" job description.

Thus, the record establishes that, before issuance of its Notice of Closure, SAIF had an opportunity to consider claimant's "affidavit" response in conjunction with his "at-injury" work duties set forth in the employer's job description in calculating the work disability award (BFC value). As reasoned above, although SAIF's calculation was ultimately found incorrect, its calculation was not unreasonable, considering the various "DOT" codes and claimant's "at-injury"

---

duties noted in the employer's job description. Therefore, under these particular circumstances, any alleged violations of WCD rules by SAIF did not lead to an unreasonable Notice of Closure work disability award. Consequently, a penalty award under ORS 656.268(5)(f) is not warranted.

Finally, to the extent claimant relies on ORS 656.262(11)(a) for a separate penalty/attorney fee for SAIF's alleged WCD rule violations, the record does not establish that any such violations resulted in a refusal or a delay in paying compensation. Under such circumstances, a penalty/attorney fee award under ORS 656.262(11)(a) is not justified.

Consequently, based on the aforementioned reasoning, as well as that expressed in our prior decision and the ALJ's order, we continue to conclude that SAIF's claim processing actions were not unreasonable. Therefore, we adhere to our previous determination that penalties and related attorney fees are not warranted.

Accordingly, on reconsideration, as supplemented herein, we republish our November 23, 2016 order. The parties' 30-day statutory rights of appeal shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on January 24, 2017

Member Lanning specially concurring.

Consistent with the principles of *stare decisis*, I continue to follow the lead opinion's decision for the reasons expressed in my original special concurrence.