
In the Matter of the Compensation of
JUSTIN A. SWINT, Claimant
WCB Case No. 17-01519
ORDER ON REVIEW
Moore & Jensen, Claimant Attorneys
Richard J Cantwell, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

The self-insured employer requests review of those portions Administrative Law Judge (ALJ) Kekauoha's order that: (1) found that claimant's hearing request concerning its calculation of the rate of his temporary disability benefits was not untimely filed under ORS 656.319(6); (2) directed it to recalculate claimant's temporary disability rate; and (3) awarded a penalty and \$2,500 penalty-related attorney fee for allegedly unreasonable claim processing. On review, the issues are timeliness of claimant's hearing request, temporary disability rate, penalties, and attorney fees. We vacate the ALJ's order and dismiss claimant's hearing request.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which we summarize as follows.

On September 18, 2014, claimant, a police officer, suffered a compensable injury to his left lower extremity. (Exs. 2-4). On September 26, 2014, he was released to light duty and subsequently returned to modified work. (Exs. 10, 11).

On October 8, 2014, the claim administrator sent a Notice of Wage Calculation letter to claimant, advising him that his temporary total disability (TTD) rate was calculated as \$830.43, based on an average weekly wage (AWW) of \$1,245.59, but that the employer had elected to provide "wage continuation" in lieu of paying temporary disability benefits.¹ The notice explained that the AWW/TTD

¹ Pursuant to ORS 656.262(4)(b), if a self-insured employer pays a disabled injured worker "the same wage at the same pay interval that the worker received at the time of injury, such payment shall be deemed timely payment of temporary disability payments pursuant to ORS 656.210 and ORS 656.212 during the time the wage payments are made." In addition, OAR 436-060-0025(2) (WCD Admin Order 11-052, eff. April 1, 2011) provides:

"[A] self-insured employer may continue the same wage with normal deductions withheld (e.g. taxes, medical, and other voluntary deductions) at the same pay interval that the worker received at the time of injury. If the pay interval or amount of wage changes (excluding wage increases),

information was being provided because any work disability award, if determined to be due at the time of closure, would be based upon that wage calculation. The notice further advised that if claimant disagreed with the wage calculation, he must immediately notify the claim administrator of his disagreement. (Ex. 14).

Subsequently, in lieu of temporary disability benefit payments, the employer continued to pay claimant his regular base pay plus incentives (*e.g.*, contributions to his retirement account and medical and dental insurance) in two-week intervals. (Ex. 6). The first payment was made to him on October 10, 2014, for the period of September 21, 2014 through October 4, 2014. (Ex. 6-1). The payroll information accompanying the check indicates that an hourly rate of \$31.14 was used to calculate wages, which was claimant's regular hourly base pay rate. (*Id.*)

Wage-continuation payments continued to be paid every two weeks until February 28, 2017, when claimant was released to regular work without restrictions. (Exs. 6, 54).

On April 7, 2017, claimant requested a hearing to challenge the employer's processing of his temporary disability benefits. In response, among other objections, the employer contended that claimant's hearing request was untimely filed under ORS 656.319(6).

CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that claimant's April 7, 2017, hearing request was timely filed under ORS 656.319(6). In doing so, the ALJ reasoned that the employer's October 8, 2014, Notice of Wage Calculation letter was not the claim processing "action" that triggered the two-year period under the statute. Rather, the ALJ concluded that each of the employer's wage-continuation payments that were made in lieu of paying temporary disability benefits were separate processing actions that tolled the statute. Because the employer made wage-continuation payments to claimant until he was released to regular work in February 2017, and claimant filed his hearing request within two years of those payments, the ALJ found the hearing request timely under ORS 656.319(6).

the worker must be paid temporary disability as otherwise prescribed by the workers' compensation law. The claim shall be classified as disabling. The rate of temporary total disability that would have otherwise been paid had continued wages not occurred and the period of disability will be reported to the division."

On review, the employer contends that claimant's April 7, 2017, hearing request is untimely. It reasserts its argument that the October 8, 2014, Notice of Wage Calculation letter, explaining that it would provide wage continuation in lieu of temporary disability payments, was the action that triggered the two-year limitation period under ORS 656.319(6). In response, claimant asserts that each wage-continuation payment constituted a separate act of claim processing, such that each payment within two years of the April 7, 2017, hearing request is subject to our review.

Although we disagree with the employer's contention that the Notice of Wage Calculation letter tolled the two-year limitation in ORS 656.319(6), we still conclude that claimant's hearing request was not timely filed. We reason as follows.

ORS 656.319(6) provides: "A hearing for failure to process or an allegation that the claim was processed incorrectly shall not be granted unless the request for hearing is filed within two years after the alleged action or inaction occurred." In applying the statute, we first identify what specific action or inaction amounted to the alleged failure to process or incorrectly process the claim so as to begin the two-year time limitation period under ORS 656.319(6). *See French-Davis v. Grand Central Bowl*, 186 Or App 280, 284 (2003); *Terrizino D. Williams*, 58 Van Natta 1487, 1489 (2006). Then, we identify when that action/inaction occurred. *Id.*

In *French-Davis*, the carrier accepted a new/omitted medical condition claim in December 1997, but took no further action. On October 26, 1998, the claimant requested that the claim be processed to closure. The carrier did not respond and more time passed. On April 10, 2000, the claimant again requested closure of the claim, and the carrier again failed to respond. On June 13, 2000, the claimant requested a hearing to challenge that failure. 186 Or App at 282. On review, we held that the request was not timely under ORS 656.319(6), because the triggering date for the two-year limitation period began when the carrier formally accepted the post-closure condition in December 1997, which prompted its statutory obligation to reopen the claim for processing, and the request occurred in June 2000. *Id.* at 284.

On appeal, the court reversed. Finding that the case involved a claim processing "inaction" for purposes of ORS 656.319(6), the court reasoned that "inaction" refers to something that does not occur, and, therefore, lacks a beginning or an end. The court concluded that the purpose of the statute would be frustrated if the two-year period was deemed to be triggered simply by the absence of the required action. *Id.* at 286. Therefore, the court determined that

the “inaction” contemplated by the statute must be an “affirmative inaction,” *i.e.*, a failure to perform a time-specific, discrete duty, request, or obligation. *Id.* at 285. The court concluded that such an action could not be sending an acceptance notice, but, more logically, occurred when the claimant requested claim closure. *Id.* at 287. Therefore, because the closure request imposed an obligation on the carrier to respond within 10 days by issuing either a notice of closure or refusal to close, as required by ORS 656.268(5)(b), the court concluded that the carrier’s failure to perform that obligation constituted the “inaction” that began the two-year period in ORS 656.319(6). *Id.* Because the claimant’s hearing request occurred within two years of that inaction, the court held that the request was timely. *Id.* at 287-88.

We distinguish *French-Davis*. Here, claimant is not alleging a failure to process the claim, but rather is alleging that the employer processed the claim incorrectly by not including consideration of overtime in his “same wage” calculation for wage continuation purposes. In other words, the issue in this case is not an alleged failure to process, as was the case in *French-Davis*, but rather concerns an alleged incorrect claim processing.² Thus, we are required to determine the date of the alleged “action” (as opposed to “inaction,” as was the case in *French-Davis*) that triggered the two-year period under ORS 656.319(6).

To resolve that question, we find *Williams* instructive. In *Williams*, the carrier allegedly did not include supplemental temporary disability benefits in the claimant’s temporary disability payment. That alleged shortage first occurred on February 12, 2003, the date temporary disability payments began. Despite the claimant’s assertion that he was owed more money (which occurred around the time he received his first check), the alleged underpayment was not corrected. On August 21, 2003, a Notice of Closure awarded temporary disability benefits from January 22, 2003 through July 2, 2003. On February 23, 2005, the claimant requested a hearing challenging the lack of supplemental temporary disability benefits. 58 Van Natta at 1487-88.³

² In *Armando Morin*, 68 Van Natta 1760 (2016), we held that the statutory two-year limitation for filing a hearing request regarding a carrier’s failure to pay TTD benefits following its acceptance of a new/omitted medical condition claim (after a prior ALJ’s compensability decision) applied to *each* of the carrier’s ongoing claim processing obligations to provide two-week installments of TTD benefits. *Id.* at 1763. However, as with *French-Davis*, *Morin* involved a failure to process, as opposed to incorrect claim processing, and is distinguishable from the present case on that basis.

³ On review, the claimant in *Williams* contended that the February 12, 2003 payment did not toll the two-year limitation because neither party complied with the administrative rules regarding calculation of supplemental temporary disability payments. However, we explained that the threshold issue was not whether the carrier was required to calculate supplemental temporary disability benefits; instead, it was whether the claimant was entitled to a hearing on that issue. *Id.* at 1488.

We held that the claimant's request for hearing was untimely under ORS 656.319(6). In doing so, we found that the two-year limitation period under ORS 656.319(6) was triggered by the carrier's February 12, 2003, "action" of not correctly including the claimant's supplemental temporary disability benefits in his temporary disability payment. *Id.* at 1490. Because that action did not occur within two years of the claimant's February 23, 2005, hearing request, we concluded that the request was time-barred "with respect to the period of temporary disability regarding the initial opening of the claim that commenced on February 2003."⁴ *Id.* Of note, temporary disability benefit payments in *Williams* from February 23, 2003 through July 2, 2003, if considered individually, would have been within two years of the request for hearing. However, our decision did not address each payment, but, as mentioned, focused on the commencement of the incorrect processing as the "action" triggering ORS 656.319(6).⁵

Applying the *Williams* rationale to the present case, we do not evaluate each individual wage-continuation payment separately as an "action" under ORS 656.319(6).⁶ Rather, we conclude that the claim processing "action" that triggered

⁴ The claimant's hearing request was found timely with respect to a second period of temporary disability benefits (which did not include supplemental temporary disability benefits) that began in conjunction with an October 2003 aggravation claim. *Id.*

⁵ Similarly, in *Daryl R. Gabriel, DCD*, 61 Van Natta 2366 (2009), assuming a carrier's March 21, 2006 cessation of monthly survivor benefits could be characterized as an "action" within the meaning of ORS 656.319(6), we reasoned that, consistent with *Williams*, the September 16, 2008, request for hearing was untimely because it was filed more than two years from that action. In reaching this conclusion, we did not consider each month after the cessation (when a payment was not made) individually for purposes of analyzing timeliness under ORS 656.319(6). Rather, as in *Williams*, we focused on when the incorrect processing first occurred (*i.e.*, the March 21, 2006, cessation of those payments).

⁶ We find further support for our conclusion in *Howard E. Benjamin*, 65 Van Natta 215 (2013), and *Jesse G. Ayala, Jr.*, 66 Van Natta 1845 (2014). While those cases dealt with situations where more than two years had elapsed since *any* payment of temporary disability benefits had been made, for purposes of determining whether the time limitation in ORS 656.319(6) applied, we looked to when the incorrect processing "action" first took place.

In *Benjamin*, the allegedly improper action of paying temporary disability benefits at an incorrect rate first occurred on November 6, 2006, when the carrier made its first payment of disability benefits. On November 30, 2006, the claimant's attorney requested an explanation of how the benefits were calculated, but nothing was changed. 65 Van Natta at 215. Sometime before April 2007, the carrier recalculated the TTD rate, but the claimant's attorney again communicated that the claimant believed his time loss had been miscalculated. *Id.* at 216. The claimant then completed an authorized training program on August 28, 2010, and a closure awarded temporary disability from January 2009 through August 2010. *Id.* In analyzing ORS 656.319(6), we distinguished *French-Davis* for reasons similar to that in *Williams*, *i.e.*, the claimant was not alleging a failure to process (inaction), but was asserting that the carrier did not process the claim correctly by miscalculating his temporary disability (an "action" as in *Williams*). *Id.* at 218. Accordingly, as in *Williams*, we did not apply the court's interpretation of ORS

the two-year limitation in ORS 656.319(6) occurred on October 10, 2014 (the date of the first wage-continuation payment), when the employer allegedly did not include overtime when calculating claimant's "same wage." (Ex. 6-1). That is when the employer's allegedly incorrect processing of the wage replacement began. Because that action triggered the running of the two-year time limitation, claimant's April 7, 2017, request for hearing was untimely filed and thus time-barred.

In sum, neither the Hearings Division nor the Board on review of the ALJ's order has jurisdiction over this dispute. Accordingly, we vacate the ALJ's order and dismiss claimant's request for hearing.

ORDER

The ALJ's order dated August 8, 2017 is vacated. The ALJ's awards of temporary disability benefits and penalties, as well as \$5,500 and \$2,500 employer-paid attorney fees, are vacated. Claimant's request for hearing is dismissed.

Entered at Salem, Oregon on April 3, 2018

656.319(6) with regard to a claim processing "inaction." Because the claimant's February 3, 2011, hearing request was filed more than two years after the carrier's claim processing actions in 2006 (when it started paying at the incorrect rate) and 2007 (when it recalculated at an incorrect rate), we determined that the hearing request was found untimely. *Id.*

In *Ayala, Jr.*, the carrier converted the claimant's TTD benefits to TPD benefits (calculating them at zero) beginning on August 2, 2010, and continued to do so through November 2, 2010, when the claimant was released to regular work. 66 Van Natta at 1849. The carrier issued a Notice of Closure on February 8, 2011, which awarded TPD benefits for that period. *Id.* The claimant did not appeal the closure notice or challenge the carrier's TPD calculation until he sought recalculation of his TTD/TPD benefits on February 28, 2013. Thereafter, the claimant requested a hearing on April 12, 2013. *Id.* at 1850. Citing *Benjamin* and *Williams*, we distinguished *French-Davis* because the claimant was alleging that the carrier processed the claim incorrectly by converting his TTD to TPD. Thus, we reasoned that the case involved an "action" and not an "inaction." *Id.* We concluded that, whether the claimant's challenge was interpreted as contesting the carrier's "action" of calculating his TTD as TPD starting August 2010, or its "action" of awarding such benefits in the February 8, 2011, closure, such a challenge was not made until April 12, 2013, when the claimant requested a hearing. Because that request was more than two years after the carrier's "action," we held that it was untimely under ORS 656.319(6). *Id.*