
In the Matter of the Compensation of
MARIA D ALVARADO-DEPINEDA, Claimant
WCB Case No. 17-03539
ORDER ON REVIEW
Dale C Johnson, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Woodford.

The SAIF Corporation requests review of those portions of Administrative Law Judge (ALJ) McWilliams's order that: (1) affirmed an Order on Reconsideration's penalty award under ORS 656.268(5)(g);¹ and (2) awarded an insurer-paid attorney fee under ORS 656.382(3). In her respondent's brief, claimant contests the calculation of the penalty award. On review, the issues are penalties and attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as summarized and supplemented below.

In a March 6, 2017, closing examination, Dr. Abraham, claimant's attending physician, reported completion of a "Job Analysis RTW" form "releasing [claimant] to work the housekeeping position which is at the light physical demand level." (Ex. 101-2). Dr. Abraham also concurred with Dr. Kitchel's "findings and measurements," noting that Dr. Kitchel "recommended [claimant] not lift over 10 pounds with her right arm" and "avoid overhead lifting." (*Id.*)

Subsequently, Dr. Abraham reviewed a February 2, 2017, work capacity evaluation (WCE), which stated that claimant demonstrated the ability to engage in repetitive movement patterns and the capacity to return back to her job at injury as a housekeeper. (Ex. 100-6, -7). After doing so, Dr. Abraham specifically concurred with the "physical capacities and recommendations outlined in the 2/2/17 WCE for purposes of establishing [claimant's] work release." (Ex. 102-1-2).

¹ The ALJ's order refers to *former* ORS 656.268(5)(e), which has been renumbered ORS 656.268(5)(g). 2015 Or Laws 144.

On March 22, 2017, a Notice of Closure awarded 11 percent whole person permanent impairment for the right shoulder and right knee, but did not award work disability. (Ex. 103). Claimant requested reconsideration of the Notice of Closure. (Ex. 106-3).

On May 23, 2017, in response to claimant's counsel's letter seeking clarification of her work release, Dr. Abraham opined that: "Per the WCE and Dr. Kitchel's report, [claimant] is limited to modified housekeeping work, which will exclude any work activities that require her to lift more than 10 pounds with her right dominant arm above waist level or to use her right arm above shoulder level." (Ex. 107-2).

In June 2017, the Appellate Review Unit (ARU) requested information from Dr. Abraham regarding claimant's ability to repetitively use her right shoulder and her residual functional capacity. (Exs. 108, 109). In response, Dr. Abraham opined that claimant was able to lift 10 pounds to her waist two-thirds of the time and was able to lift 10 pounds "waist to shoulder" less than one-third of the time, no lifting over the shoulder, and her residual functional capacity was the light physical demand level. (Ex. 109-1, -2).

In August 2017, an Order on Reconsideration awarded work disability benefits because claimant was "not capable of performing all duties of her job at injury due to limitations attributed to the accepted conditions and direct medical sequelae." (*Id.*) The ARU reasoned that, at the time of closure, Dr. Abraham had concurred with the WCE's opinion that claimant was capable of performing her job at injury despite having some limitations. However, ARU determined that Dr. Abraham's "post-closure" reports established that claimant was not capable of performing the duties of her job at injury, which entitled claimant to a work disability award. Finding that SAIF could reasonably have obtained the information in Dr. Abraham's "post-closure" reports by seeking clarification of claimant's work release before claim closure, the reconsideration order awarded a penalty under ORS 656.268(5)(g).

Initially, SAIF requested a hearing, challenging the Order on Reconsideration's work disability award, as well as the penalty awarded under ORS 656.268(5)(g). Before hearing, SAIF clarified that the only issue was the propriety of the penalty awarded under ORS 656.268(5)(g). (Hearing File).

CONCLUSIONS OF LAW AND OPINION

The ALJ affirmed the Order on Reconsideration's award of an ORS 656.268(5)(g) penalty, finding that the increase in compensation of more than 25 percent was based on information that SAIF could reasonably have obtained before claim closure. The ALJ reasoned that, because Dr. Abraham had concurred with both the WCE and Dr. Kitchel's report, he had not unambiguously released claimant to return to her job-at-injury and, therefore, SAIF reasonably should have sought clarification. The ALJ disagreed with SAIF's contention that Dr. Abraham's clarification of claimant's work release was a "post-closure" change of opinion, representing new information unavailable at the time of claim closure.

On review, SAIF asserts that the additional work disability benefits awarded in the Order on Reconsideration was based on information that it could not reasonably have obtained before claim closure. For the following reasons, we agree.

ORS 656.268(5)(g) provides that: "If, upon reconsideration of a claim * * * the director orders an increase by 25 percent or more of the amount of compensation to be paid," and claimant is more than 20 percent permanently disabled, a penalty shall be assessed in an amount equal to 25 percent of all compensation determined to be then due the claimant. However, ORS 656.268(5)(g) also provides that "If the increase in compensation results from information that the [carrier] demonstrates it could not reasonably have known at the time of claim closure," the penalty shall not be assessed.

The parties dispute whether SAIF could reasonably have known at the time of claim closure that claimant had not been released to her regular job-at-injury and, thus, entitled to work disability. SAIF has the burden of "demonstrating" that it could not reasonably have known of the information in Dr. Abraham's "post-closure" reports before claim closure. ORS 656.268(5)(g). Based on the following reasoning, we are persuaded that SAIF has met that burden.

Here, claimant's entitlement to a work disability award was established by Dr. Abraham's "post-closure" reports obtained by claimant's counsel and the ARU. (Exs. 107, 108, 109). In those "post-closure" reports, Dr. Abraham restricted claimant from lifting more than 10 pounds "waist to shoulder," with no lifting above the shoulder. (Exs. 107-2, 108-2-3, 109). However, before claim closure, Dr. Abraham had released claimant to her "job at injury as a housekeeper." (Ex. 101-2). Dr. Abraham's "post-closure" reports, which included work restrictions that prevented claimant from performing the regular duties of her housekeeping job-at-injury, did not exist at claim closure.

Under such circumstances, we conclude that the reconsideration order's increase in permanent disability compensation, (*i.e.*, the work disability award), resulted from findings in "post-closure" reports that SAIF could not reasonably have known before claim closure. *See Scot T. Campbell*, 61 Van Natta 1818, 1832 (2009) (declining to award a penalty under *former* ORS 656.268(5)(e), renumbered to ORS 656.268(5)(g), where the increased compensation resulted from findings in a "post-closure" medical report that the carrier could not reasonably have known at the time of claim closure); *Tyrel Albert*, 66 Van Natta 1212, 1219 (2014) (same). Accordingly, we conclude that a penalty under ORS 656.268(5)(g) was not warranted.

Claimant relies on *Anita Ferrer*, 67 Van Natta 5 (2015), in support of the Order on Reconsideration's penalty award under ORS 656.268(5)(g). However, we find *Ferrer* distinguishable. In that case, the carrier had not given a job description to the claimant's attending physician before it closed the claim. *Id.* at 8-9. We reasoned that, if the attending physician had been given an accurate job description, he would not have released the claimant to her job at injury. *Id.* Under those circumstances, we affirmed a reconsideration order's penalty award under ORS 656.268(5)(g).

Here, despite the job description provided by SAIF and analyzed in the WCE (Exs. 50-2 and 100-5), Dr. Abraham unambiguously released claimant to her "housekeeping position which is at the light physical demand level." (Ex. 101-2). He also expressly concurred with the "WCE findings in regards to her return to work." (*Id.*) Finally, after representing that the WCE documented claimant's ability to return to her job at injury as a housekeeper, SAIF asked Dr. Abraham whether he concurred with "the physical capacities and recommendations outlined in the [WCE] for purposes of establishing [claimant's] work release?," and Dr. Abraham checked the "yes" box. (Ex. 107-2).

Thus, the record establishes that, in response to SAIF's "preclosure" inquiries, Dr. Abraham confirmed his release of claimant to her housekeeping job at injury. Furthermore, the record does not explain Dr. Abraham's "post-closure" change of opinion regarding claimant's ability to perform her housekeeping job at injury. As such, this situation is distinguishable from *Ferrer*.

In sum, based on the aforementioned reasoning, we reverse that portion of the ALJ's order affirming the Order on Reconsideration's penalty award under

ORS 656.268(5)(g).² Because we have reversed the penalty award, it likewise follows that the ALJ's attorney fee award under ORS 656.382(3) is reversed.³

ORDER

The ALJ's order dated December 28, 2017, as amended on February 13, 2018, is affirmed in part and reversed in part. The penalty and \$6,000 attorney fee awards are reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on August 3, 2018

² In light of our decision, it is unnecessary to address claimant's argument concerning the calculation of the penalty.

³ ORS 656.382(3) provides:

“If an employer or insurer raised attorney fees, penalties or costs as a separate issue in a request for hearing, request for review, appeal or cross-appeal * * * and the attorney fees, penalties or costs awarded should not be disallowed or reduced, the Administrative Law Judge, board or court shall award reasonable additional attorney fees for the claimant for efforts in defending the fee, penalty or costs.”