

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of Johnny A. Stacey,
Claimant.

Johnny A. STACEY,
Petitioner,

v.

CASCADE STEEL ROLLING MILLS -
SCHNITZER STEEL,
Respondent.

Workers' Compensation Board
2403920; A188693

Argued and submitted September 10, 2026.

Jodie Anne Phillips Polich argued the cause for petitioner. Also on the briefs was Law Offices of Jodie Anne Phillips Polich, P.C.

Christina Joseph argued the cause for respondent. Also on the brief were Rebecca Watkins and SBH Legal.

Before Tookey, Presiding Judge, Egan, Judge, and Kistler, Senior Judge.

EGAN, J.

Affirmed.

EGAN, J.

Claimant seeks judicial review of an Order on Review of the Workers' Compensation Board (the board) concerning an alleged overpayment of temporary disability benefits. After claimant returned to modified work, respondent, Cascade Steel Rolling Mills-Schnitzer Steel, continued to pay claimant total temporary disability benefits through its claims administrator, ESIS. Respondent notified claimant that it would recover the overpayment from claimant's future temporary partial disability benefits. Claimant challenged the overpayment and the Administrative Law Judge (ALJ) denied claimant's request for penalties and attorney fees. The board affirmed.

On appeal, claimant raises two assignments of error. First, claimant contends that the board lacked substantial evidence to conclude that respondent established the overpayment amount. Second, claimant alleges respondent failed to meet the notice requirement under ORS 656.262(4)(j)(A) and OAR 436-060-0015(7) before changing his temporary disability benefits, which precludes recovery of the overpayment. Because the record contains evidence supporting each material component of the board's determination and no statutory event triggered the notice requirement, we affirm.

I. BACKGROUND

Claimant was 49 years old at the time of the hearing. His workers' compensation claim was accepted for a disabling L5-S1 disc herniation arising from a July 8, 2023, injury. Claimant testified at the hearing that his job at the time of injury was crane operator. He further testified that, in September 2023, claimant bid into a position as a bundler operator, returning to part-time modified work in that position on May 5, 2024. He notified respondent's head of health and safety of his return to work.

The ESIS claims specialist responsible for claimant's claim, Ms. Meader, testified that claimant had been receiving temporary total disability benefits because he had not been released to return to his job at injury. She further testified that, after she became aware that claimant had returned to work, she began paying temporary partial disability benefits.

Meador explained that she initially continued paying temporary total disability benefits because she was unaware that claimant had returned to work. After receiving a chart note indicating that he was doing well back at work, Meader contacted respondent, which confirmed his return.

From May 5 through June 1, 2024, ESIS paid claimant \$4,869.08 in temporary total disability benefits. During that period, he had returned to part-time work and was receiving wages. After June 1, ESIS paid temporary partial disability benefits. The payment records and the parties' testimony document those payments and claimant's return to modified work.

On June 19, 2024, ESIS sent claimant a letter stating that he had returned to modified work in early May and that an audit had identified an overpayment of \$2,644.63 because he had continued to receive full temporary total disability benefits after his return. The letter stated that claimant's current temporary partial disability benefits would be reduced by 25 percent until the overpayment was recovered and that any remaining balance at claim closure would be recovered from an award of permanent impairment. The letter was sent to him and copied to his attorney.

In a separate letter dated the same day, ESIS informed claimant that it was ending his temporary total disability benefits because he had returned to modified duties. Meader testified that ESIS recovered a small amount of the asserted overpayment. Respondent and ESIS also submitted an indemnity payment ledger documenting temporary total and temporary partial disability payments and calculations concerning the asserted overpayment.

Claimant requested a hearing, raising issues concerning the overpayment, attorney fees, and penalties. The hearing occurred on November 18, 2024. Claimant testified about the timing of his return to work and the payment of temporary disability benefits, and Meader testified concerning the payments and the calculation of the asserted overpayment. The ALJ issued an Opinion and Order on December 18, 2024, denying claimant's requested relief.

The board affirmed in August 2025. Claimant seeks judicial review of the board's order.

II. ANALYSIS

Against that factual background, we turn to the two assignments of error. We first consider whether the board correctly determined that the employer established the asserted overpayment. Then, we address whether the notice requirements of ORS 656.262(4)(j)(A) and OAR 436-060-0015(7) applied to the circumstances presented here.

A. *Substantial Evidence of an Overpayment*

We review the board's order for errors of law and for substantial evidence and substantial reason supporting the board's factual findings and reasoning. ORS 183.482(8)(b), (c); *Luton v. Willamette Valley Rehabilitation Center*, 272 Or App 487, 490, 356 P3d 150 (2015). As to factual determinations, we do not decide whether we would have drawn the same inference from the record. Instead, we determine whether the record, viewed as a whole, supplies substantial evidence supporting the board's finding and whether the board's reasoning adequately explains the connection between its factual findings and its legal conclusions. *Cummings v. SAIF*, 197 Or App 312, 318, 105 P3d 875 (2005).

The employer bears the initial burden of establishing an overpayment. *Metro Machinery Rigging v. Tallent*, 94 Or App 245, 248, 764 P2d 974 (1988) (describing the insurer's burden to prove particular amount of an overpayment). The employer is required to establish that the worker received benefits to which the worker was not entitled. *Fazzolari v. United Beer Distributors*, 91 Or App 592, 595, 757 P2d 857, *adh'd to on recons*, 93 Or App 103, 761 P2d 6, *rev den*, 307 Or 236 (1988); *Bledsoe v. City of Lincoln City*, 301 Or App 11, 16-17, 455 P3d 587 (2019). Thus, the question before us is not whether respondent, the employer in this case, submitted a particular type of documentary evidence. Rather, the question is whether, under the applicable burden of proof, the evidence in this record was sufficient to permit the board to find that claimant received temporary disability benefits that exceeded the amount to which he was entitled and to establish the amount of the overpayment.

Here, the record contains substantial evidence of the overpayment. The Board had evidence that claimant returned to modified work on May 5, 2024, while continuing to receive temporary total disability benefits. Claimant himself testified concerning his return to work. Meader testified that she continued paying temporary total disability benefits because she did not initially know that claimant had returned to work. When she learned of his return, she obtained wage information from respondent and used that information to calculate the overpayment.

The documentary evidence supplied the remaining components of that calculation. The record included the indemnity payment ledger, the audit and calculation, and the June 19 overpayment letter. Those materials showed that ESIS had paid claimant \$4,869.08 in temporary total disability benefits from May 5 through June 1, while the record also reflected post-injury wages of \$1,177.56 for May 5 through May 18 and \$2,792.91 for May 19 through June 1. Those materials support respondent's calculation of \$2,644.63 as the difference between the temporary total disability benefits paid and the temporary disability benefits to which claimant was entitled after accounting for his post-injury earnings.

Claimant's principal contention is that respondent failed to meet its burden because it did not introduce the underlying wage information itself. The board's dissent adopted that view, reasoning that although Meader testified that respondent had provided claimant's actual earnings and that she had used those earnings to calculate the overpayment, the record did not contain the earnings information provided by respondent or separate documentation of claimant's actual earnings.

That argument, however, conflates the sufficiency of the evidence with the form that evidence must take. Nothing in the authorities identified by the parties establishes a categorical requirement that an employer prove an overpayment based on pay stubs or other underlying wage documents. Indeed, *SAIF v. Iliaifar*, 217 Or App 104, 108, 174 P3d 1055 (2007), recognizes that the board may consider evidence other than wage documentation in determining post-injury earnings.

More importantly for purposes of our substantial evidence review, this record contained more than respondent's assertion that an overpayment had occurred. The board had the payment records, the audit and calculation, the overpayment letter, claimant's testimony concerning his return to modified work, and Meader's testimony concerning both the timing of the payments and the information she used to calculate the overpayment. Therefore, the evidence provided a basis from which the board reasonably could find both that claimant received temporary total disability benefits after returning to modified work and that the amount of those benefits exceeded the amount he was entitled to receive in light of his post-injury earnings.

The board stated that, "in the absence of rebuttal evidence," it found that the employer had met its burden. Standing alone, that formulation might suggest that the board regarded claimant as having the burden to disprove the asserted overpayment. But the board's order must be considered as a whole. The record shows that the board considered the employer's affirmative evidence establishing the overpayment—including the overpayment letter, audit, payment ledger, and testimony—and then noted that claimant had offered no evidence undermining that evidence. That is the correct application of the appropriate burden. Respondent first had to produce evidence that was sufficient to establish the overpayment and, once it did so, the absence of evidence from claimant contradicting that proof was relevant to the board's evaluation of the record.

Because the record contains evidence supporting each material component of the board's determination, and because the board's reasoning explains why it regarded that evidence as sufficient, we conclude that the board's determination is supported by substantial evidence and substantial reason.

B. Notice Requirement under ORS 656.262(4)(j)(A)

We now turn to claimant's second assignment of error, which concerns whether respondent was required to provide notice under ORS 656.262(4)(j)(A) before recovering the overpayment.

The board's factual findings are not disputed in any material respect. Claimant returned to modified work in early May 2024. ESIS nevertheless continued paying temporary total disability benefits through June 1. After learning of claimant's return to work and obtaining information concerning his post-injury earnings, ESIS calculated the temporary partial disability benefits to which claimant was entitled and determined that the difference between those benefits and the temporary total disability already paid constituted an overpayment. The question before us is what legal consequence follows from those facts under ORS 656.262(4)(j)(A).

The board correctly concluded that the notice requirement in ORS 656.262(4)(j)(A) was not triggered because claimant's temporary disability benefits did not end. ORS 656.262(4)(j)(A) provides that an "insurer or self-insured employer may not end temporary disability benefits until written notice has been mailed or delivered to the worker and the worker's attorney, if the worker is represented. The notice must state the reason that temporary disability benefits are no longer due and payable." *See also* OAR 436-060-0015(7) (same). The applicable statutes and regulations do not require a separate termination notice every time the amount of temporary disability benefits changes while temporary disability benefits continue to be payable. ORS 656.262(4)(j)(A). Rather, all that is required in those circumstances is notice of the change in rate of compensation and benefit amounts, as applicable. OAR 436-060-0015(5).

Temporary disability benefits can take different forms, including temporary total disability, ORS 656.210, and temporary partial disability, ORS 656.212. A worker who returns to modified employment but remains unable to return to the job at injury may receive temporary partial disability based on the difference between the worker's post-injury wages and the wage used to calculate temporary total disability. Therefore, the fact that the worker returns to work does not necessarily end temporary disability benefits. Rather, the nature and amount of those benefits may change. ORS 656.268(4) provides that temporary disability benefits continue until specified events occur, including

the worker's return to regular or modified employment, the worker's release to regular employment, or another event that lawfully suspends, withholds, or terminates the benefits. *Morales v. SAIF*, 196 Or App 693, 697-98, 103 P3d 654 (2004), *aff'd* 339 Or 574, 124 P3d 1233 (2005). And, as the statutory scheme recognizes, temporary partial disability may vary according to the worker's post-injury earnings. ORS 656.212.

Claimant's temporary disability benefits did not end but, rather, changed in form and amount. The record demonstrates precisely that transition. Claimant had not returned to his job at injury. Instead, he returned to modified work in a different position. The payment ledger shows that, after claimant returned to work, ESIS paid temporary partial disability benefits in amounts corresponding to his post-injury earnings. The board, therefore, did not err in reasoning that, rather than ending, claimant's benefits changed in amount and character.

Claimant contends that the statutory reference to ending benefits must reasonably encompass the circumstances here because the amount of his temporary disability payment changed substantially. But that argument conflates the amount of the benefit with the existence of the benefit. ORS 656.212 expressly contemplates that temporary partial disability will vary according to post-injury earnings. As a result, the amount payable may be substantially less than temporary total disability. *See Hernandez v. SAIF*, 178 Or App 82, 86-88, 35 P3d 1099 (2001) (explaining that a worker was entitled to temporary partial disability and that the applicable rate could be zero or another amount depending on the modified work available). The mere fact that the calculation produces a lower payment does not establish that temporary disability benefits have ended. *See Madrigal v. J. Frank Schmidt & Son*, 172 Or App 1, 6-7, 17 P3d 555 (2001) (recognizing that the amount of temporary partial disability payable depends on the worker's modified employment).

Claimant also relies on ORS 656.210(4), which expressly states that the notice requirement under ORS 656.262(4)(j) does not apply to temporary disability benefits paid under that subsection. He reasons that the legislature's

express creation of that exception demonstrates that the notice requirement otherwise applies to all temporary disability benefits. We do not read the provision so broadly. The existence of a specific exception for the benefits described in ORS 656.210(4) does not alter the triggering language of ORS 656.262(4)(j)(A), which requires notice when temporary disability benefits “end.” Neither the statutory text nor its context suggests that a change in the amount or type of temporary disability benefits constitutes an end of those benefits.

The same conclusion follows from the nature of the overpayment at issue. ORS 656.268(14)(a) permits an insurer to recover an overpayment by offsetting compensation otherwise payable to the worker. Respondent’s June 19, 2024, letter identified the overpayment as \$2,644.63 and explained that the amount would be recovered from claimant’s then-current temporary partial disability benefits. Hence, the letter did not treat claimant as having left the temporary disability system altogether. To the contrary, it expressly recognized that claimant was then receiving temporary partial disability benefits and proposed to reduce those benefits to recover the overpayment.

Claimant points to a separate letter sent the same day in which ESIS stated that it was ending his temporary disability benefits because he had returned to modified work. That letter does not change our analysis. The board determined that claimant’s temporary disability benefits had not ended but changed from temporary total disability to temporary partial disability, and the record allowed that determination. The question presented by this assignment is whether the statutory notice requirement applies to that change in the form and amount of temporary disability benefits. On this record, the board correctly determined that it does not.

The board’s conclusion therefore rests on both substantial evidence and substantial reason, that is, a legally sufficient explanation. The evidence establishes that claimant returned to modified work, that his post-injury earnings affected the amount of temporary disability to which he was entitled, and that he continued to receive temporary partial

disability benefits after the return to work. The board reasonably concluded from those facts that temporary disability benefits had not ended within the meaning of ORS 656.262(4)(j)(A). Because the statutory event that triggers the notice requirement did not occur, the absence of a termination notice did not preclude recovery of the overpayment. The board, therefore, did not err in rejecting claimant's challenge to the overpayment on notice grounds.

Affirmed.