

In the Matter of the Compensation of
JOY M. WALKER, Claimant

WCB Case No. 09-00276

ORDER ON REVIEW

Fontana & Takaro, Claimant Attorneys
Scheminske et al, Defense Attorneys

Reviewing Panel: Members Weddell, Lowell, and Herman. Member Lowell concurs in part and dissents in part.

Claimant requests review of that portion of Administrative Law Judge (ALJ) McCullough's order that declined to award penalties and attorney fees for the self-insured employer's allegedly unreasonable claim processing. In its respondent's brief, the employer contests that portion of the ALJ's order that determined that it was required to reopen and process claimant's omitted medical condition claim pending its appeal of a prior ALJ's order that set aside its claim denial. On review, the issues are claim processing, penalties, and attorney fees. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the exception of the last paragraph of those findings on page four of the ALJ's order.

CONCLUSIONS OF LAW AND OPINION

ALJ McCullough determined that, under ORS 656.262(7)(c), the employer was required to reopen and process claimant's omitted medical condition claim for a mental disorder following ALJ Mills's September 2008 order that found the claim compensable. ALJ McCullough reached this conclusion even though the employer had requested review of ALJ Mills's order. ALJ McCullough, nevertheless, concluded that claimant was not entitled to penalties and attorney fees for allegedly unreasonable claim processing. ALJ McCullough reasoned that the employer had legitimate doubt regarding its obligations to reopen and process the claim pending its request for review.

On review, claimant contends that the ALJ should have assessed penalties and attorney fees under ORS 656.262(11)(a), ORS 656.268(5)(d) and ORS 656.382(1). The employer responds that, while ALJ McCullough correctly determined that its claim processing was not unreasonable, it was not required to reopen and process the claim pending its request for review of ALJ Mills's compensability determination. Before addressing the parties' contentions, we first briefly recount the procedural and factual background of the claim.

In April 2004, claimant filed a claim for psychological symptoms. The mental disorder claim was denied in May 2004. That denial was set aside in August 2005 by ALJ Mills's first order, which we affirmed. *Joy M. Walker*, 58 Van Natta 11 (2006). Our order was in turn affirmed by the Court of Appeals. *Providence Health System v. Walker*, 210 Or App 466 (2007).

In July 2007, following the court's decision, the employer accepted "disabling anxiety with depression." Claimant then requested that the acceptance be modified to include "major depression and panic disorder with agoraphobia." The employer denied that claim in October 2007. Claimant requested a hearing.

On September 9, 2008, ALJ Mills issued a second order, setting aside the employer's October 2007 denial, reasoning that the employer denied the same condition found compensable in the 2005 Opinion and Order, and remanded the claim to the employer for further processing. (Ex. 12-9). The employer requested Board review of ALJ Mills's order on September 12, 2008. (Ex. 13).

On October 9, 2008, claimant requested that the employer issue a Notice of Closure of the major depression and panic disorder claim, a request that the employer declined on October 17, 2008. (Exs. 15, 16). The employer advised that the claim had been previously closed in January 2008 and that no further processing would be performed until the September 2008 order became final. (Ex. 16). Claimant requested a hearing in January 2009, which resulted in ALJ McCullough's order.

We affirmed ALJ Mills's September 2008 order on March 23, 2009. *Joy M. Walker*, 61 Van Natta 739 (2009). On March 25, 2009, claimant requested that the employer issue a Notice of Closure. The employer advised on April 8, 2009 that it was scheduling a medical examination. It then issued a modified acceptance notice on April 10, 2009, stating that it was accepting "disabling anxiety and depression and acute major depression and panic disorder."

We first address whether ALJ McCullough correctly concluded that the employer was required to reopen and process claimant's omitted medical condition claim after its denial was set aside in September 2008. For the following reasons, we agree with ALJ McCullough's reasoning and conclusion.

ORS 656.262(7)(c) provides that "[i]f a condition is found compensable after claim closure, the insurer or self-insured employer shall reopen the claim for processing regarding that condition." The employer argues that the words "found

compensable” mean an express acceptance of a condition or final determination that a condition is compensable. Thus, it asserts that it was not required to process the mental disorder found compensable in ALJ Mills’s September 2008 order pending its request for review. We disagree.

In *Fleetwood Homes of Oregon v. Vanwechel*, 164 Or App 637, 641 (1999), the court stated that the text and context of ORS 656.262(7)(c) are unambiguous. Accordingly, the *Vanwechel* court concluded that the statute required the carrier to reopen the claim for processing of newly accepted conditions. Granted, the mental disorder in this case was not voluntarily accepted, unlike the newly accepted conditions in *Vanwechel*. However a claim is considered accepted, albeit involuntarily, on the issuance of a litigation order that finds the claim compensable. *Thomas W. Clark*, 51 Van Natta 95, 97 (1999). Therefore, we conclude that the employer was required to reopen and process the mental disorder claim found compensable in ALJ Mills’s 2008 order.¹ Our conclusion is supported by relevant case law apart from *Vanwechel* and *Clark*.

In *Albert Avery*, 51 Van Natta 814 (1999), the claimant was compensably injured and the claim was accepted by the carrier for burns. Subsequently, the claimant filed a claim for memory loss. The carrier denied the claim and the claimant requested a hearing, arguing that the carrier had *de facto* denied a brain injury.

A prior ALJ set aside the carrier’s denial, finding that the parties were litigating compensability of the claimant’s dementia condition. The carrier requested Board review of the prior ALJ’s order and we affirmed. The carrier subsequently filed a petition for judicial review of our order.

The carrier began to process the claim pending the appeal. It issued a partial denial, asserting that the claimant’s hypoxic brain injury had combined with a preexisting condition and that the brain injury was no longer the major contributing cause of the claimant’s disability or need for treatment. The claimant requested a hearing regarding the denial.

¹ This conclusion is compatible with the text of ORS 656.262(7)(c), which requires processing of a claim “found compensable” after claim closure. *See State v. Gaines*, 346 Or 160, 171-172 (2009) (when interpreting a statute, to determine legislative intent, a court examines the text and context of the statute as well as pertinent legislative history proffered by a party). As the employer notes, “find” means to “to arrive at (a conclusion) : come to (a finding) : determine and declare (as a verdict in a judicial proceeding).” *Webster’s Third New Int’l Dictionary*, 852 (unabridged ed 2002). ALJ Mills’s determination that claimant’s mental disorder was compensable qualifies as a finding within the plain meaning of ORS 656.262(7)(c). There is nothing in the language of that statute that requires that a compensability finding be in a final order.

The ALJ set aside the denial, concluding that our prior order had already determined that there was no preexisting condition. The ALJ ordered the carrier to accept and process the claimant's dementia condition.

The carrier requested Board review of the ALJ's decision. Citing *SAIF v. Mize*, 129 Or App 636 (1994), the carrier sought modification of that portion of the ALJ's order that required it to accept the claimant's dementia condition. The carrier argued that acceptance of the dementia condition would render its petition for judicial review regarding compensability of the condition moot and result in dismissal of its appeal. We rejected that argument.

We noted that, to the extent that the carrier argued that mere references in the ALJ's order to the dementia condition as being "accepted" were contrary to *Mize*, we disagreed. We noted our previous holdings that, on the issuance of a litigation order finding a claim compensable, the claim is considered accepted, albeit involuntarily, and the carrier is obligated to process the claim as an accepted injury pending appeal. We cited *SAIF v. Maddox*, 295 Or 448 (1983) and *Clark* and also observed that the dementia condition was considered an accepted condition pending appeal of the prior ALJ's order regarding compensability. As such, we emphasized that the claim for that condition must continue to be processed as an accepted condition unless and until the court reversed our prior order. 51 Van Natta at 815; *see also Anthony Grebisz*, 54 Van Natta 1380 (2002) (affirming an ALJ's order that directed the carrier to reopen and process claim for a condition found compensable after claim closure).

Accordingly, *Avery* holds that a condition found compensable after initial acceptance of a claim must be processed as an accepted condition unless and until the compensability determination is subsequently overturned on appeal. Likewise, in this case, the employer was also required to reopen and process the omitted medical condition found compensable by ALJ Mills's 2008 order. As further support for this conclusion, we rely on the court's analysis of ORS 656.313 in *Maddox*, which was cited in *Avery*.

In *Maddox*, the Supreme Court relied on ORS 656.313 (Or Laws 1983, ch 809, § 2) to hold that the compensability of a claim need not be finally determined before the extent of disability may be determined and litigated. According to the *Maddox* court, ORS 656.313 (1983) removed the carrier's obligation to pay compensation pending appeal, but it did not absolve the carrier of its ongoing claim processing obligations. 295 Or at 454.

We addressed the *Maddox* rationale in *Robert E. Wolford*, 45 Van Natta 573 (1993). There, the insurer contended that the 1990 amendments to ORS 656.313 (Or Laws 1990, ch 2, § 23) absolved it of any statutory obligation to close a claim while a reclassification issue was pending review. Contrary to the insurer's contentions, we reasoned that ORS 656.313 (1990) did not reverse the underlying policy of *Maddox* that obligated an insurer to process a claim pending appeal. Noting that the Supreme Court relied on prior version of ORS 656.313 to hold that the compensability of a claim need not be finally determined before the extent of disability may be determined and litigated, we further reasoned that ORS 656.313 (1990) removed the insurer's obligation to pay compensation pending appeal, but it did not absolve the insurer of its ongoing claim processing obligations. We found that, as in *Maddox*, the extent of disability, if any, may be determined before the underlying reclassification issue is finally determined. 45 Van Natta at 574.

Having considered these decisions, we again conclude that ALJ McCullough properly determined that the employer was required to reopen and process the omitted medical condition found compensable by ALJ Mills's 2008 order.² Thus, we affirm this portion of ALJ McCullough's order.³ We now address the issue of whether the employer's claim processing was unreasonable. For the following reasons, we find claimant entitled to penalties and attorney fees.

The standard for determining 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). If so, the refusal to pay is not unreasonable.

² OAR 436-060-0140(9) also provides that when an insurer accepts a new or omitted condition on a closed claim, the insurer must reopen the claim and process it to closure under ORS 656.262 and 656.267. The administrative rule, in conjunction with our holding in *Clark* that equates voluntary and involuntary acceptances, provides further support for our conclusion that ORS 656.262(7)(c) requires processing of conditions found compensable after claim closure, even though the compensability finding may be in a nonfinal order. Our interpretation of ORS 656.262(7)(c) is also consistent with ORS 656.262(6)(c), which authorizes denials of accepted combined or consequential conditions (whether the acceptance was voluntary or by judgment or litigation order).

³ The employer argues that the legislature must have intended to avoid an overpayment that would arise should a carrier be required to process a "post-closure" new/omitted medical condition claim, but is then successful on appeal (mooting the claim processing). However, that same argument could be made for the processing of initial claims. There is no question that a carrier must process an initial claim after a finding of compensability. See ORS 656.313; *Maddox*, 295 Or at 454. Nothing in the statutory scheme persuades us that a distinction should be drawn between initial and "post-closure" compensability decisions. To the contrary, the most reasonable interpretation of ORS 656.262(7)(c) is that it requires a carrier to process a "post-closure" new/omitted medical condition claim after it is found compensable, even if that compensability finding is appealed.

Here, in concluding that the employer had a legitimate doubt regarding its claim processing obligations pending an appeal, ALJ McCullough noted that ORS 656.262(7)(c) did not expressly require claim reopening after a non-final compensability determination and that there was no explicit case law on that specific point. However, considering our *Avery* and *Wolford* decisions and the court's *Maddox* decision, we conclude that the employer did not have legitimate doubt regarding its claim processing obligations pending its request for review of ALJ Mills's September 2008 order.⁴

Under ORS 656.262(11)(a), if an insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amount "then due."

However, the record does not indicate that there are any "amounts then due" upon which to base a penalty. Therefore, no penalty is warranted under ORS 656.262(11)(a). *Peter D. Bass*, 60 Van Natta 2936, 2940 (2008); *Bradford White*, 57 Van Natta 1162, 1172 (2005). Nevertheless, an attorney fee under ORS 656.262(11)(a) is not contingent on the assessment of a penalty. *Bass*, 60 Van Natta at 2940; *Nancy Ochs*, 59 Van Natta 1785, 1793 (2007).

An attorney fee under ORS 656.262(11)(a) shall be awarded in a reasonable amount that is proportionate to the benefit to claimant and takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and to the time devoted to the case. OAR 438-015-0110(1), (2). Absent a showing of extraordinary circumstances, an attorney fee award under ORS 656.262(11)(a) shall not exceed \$3,000.

⁴ In reaching this conclusion, we acknowledge that, while we affirmed the ALJ's order in *Grebisz* that required the carrier to reopen and process a claim for a condition found compensable after claim closure, there was no appeal of the compensability decision in that claim. We stated in *Grebisz* that, if the carrier disagreed with the ALJ's order, its remedy was to request review of that order. *Grebisz*, however, does not hold that, had there been an appeal, the carrier would not have been required to process the claim. To the contrary, our comment about the carrier's remedy was in response to its argument that, before the ALJ's latest order, it was never directed to reopen and process the claimant's additional neck condition. 54 Van Natta at 1381. Therefore, *Grebisz* addressed the issue of whether an ALJ's order must specifically order processing of a condition found compensable after claim closure. Moreover, our comment regarding the carrier's remedy was made directly after we noted that the ALJ's order had set aside the carrier's denial and had awarded an attorney fee. Accordingly, our comment pertained to potential disagreement with the merits of the ALJ's compensability decision and does not support an interpretation that a carrier is not obligated to process a "post-closure" claim for a condition found compensable by an ALJ if that ALJ's order has been appealed. Furthermore, considering that the *Avery*, *Clark*, and *Wolford* cases expressly support claim processing under these circumstances, we do not find that the employer had legitimate doubt regarding its duty to process the omitted medical condition claim after it was found compensable in September 2008.

After considering the aforementioned factors, we find that a reasonable attorney fee under ORS 656.262(11)(a) for the employer's unreasonable claim processing is \$3,000, payable by the employer. In reaching this conclusion, we have given primary consideration to the benefit to claimant, (in particular through the extensive efforts by her counsel, confirmation that the employer's delay in processing her claim was contrary to its statutory claim processing obligations) the results achieved, and the time devoted to the case (as represented by the record).

Claimant also seeks a penalty for an unreasonable refusal to close the claim under ORS 656.268(5)(d), which provides:

“If an insurer or self-insured employer has closed a claim or refused to close a claim pursuant to this section, if the correctness of that notice of closure or refusal to close is at issue in a hearing on the claim and if a finding is made at the hearing that the notice of closure or refusal to close was not reasonable, a penalty shall be assessed against the insurer or self-insured employer and paid to the worker in an amount equal to 25 percent of all compensation determined to be then due the claimant.”

In *Wolford*, the carrier had been found in a prior proceeding to have unreasonably classified a claim as nondisabling. The claimant also requested a penalty based on the carrier's allegedly unreasonable refusal to close the claim pending its appeal of the earlier classification decision. We affirmed the ALJ's decision to award such a penalty under ORS 656.268(4)(f), *renumbered as* ORS 656.268(5)(d) (2001), and an attorney fee under ORS 656.382(1) based on the carrier's unreasonable refusal to close the claim. 45 Van Natta at 574.

Wolford involved two distinct acts of misconduct: an unreasonable classification of and an unreasonable refusal to close a disabling claim. Here, by contrast, the unreasonable conduct of the employer was based on the assertion that it was not required to reopen the omitted medical condition claim until the compensability decision had become final and therefore there was no requirement to close an already closed claim. Nevertheless, consistent with *Wolford*, a finding that the employer unreasonably delayed accepting the omitted medical condition claim by not processing it as required by ORS 656.262(7)(c) does not preclude the

assessment of a penalty under ORS 656.268(5)(d) for unreasonable refusal to close the claim.⁵ This is particularly true when the basis for the employer's refusal to close is identical to its reason for not reopening the claim.

Accordingly, based on the reasoning previously expressed, we conclude that the employer's explanation for refusing to close the claim was based on an unreasonable premise that it was not required to reopen the claim pending its appeal of ALJ Mills's 2008 compensability decision. Consequently, we find that the employer unreasonably refused to close the claim. Therefore, claimant is entitled to a 25 percent penalty under ORS 656.268(5)(d), which shall be based on compensation determined at claim closure. *See Michael W. Johnson*, 58 Van Natta 1174 (2006).

Moreover, pursuant to *Wolford*, claimant is entitled to an attorney fee under ORS 656.382(1) based on the employer's unreasonable resistance to the payment of compensation. Considering the factors set forth in OAR 438-015-0010(4) as applied to the particular circumstances of this case, we find that \$3,000 is a reasonable attorney fee. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record), the complexity of the issue, the value of the interest involved and benefit secured, the nature of the proceedings, and the risk that claimant's counsel might go uncompensated. Claimant is not entitled to an attorney fee for services on review regarding the penalty and attorney fee issues. *See Deborah L. Rettmann*, 60 Van Natta 1849 (2008); *Amador Mendez*, 44 Van Natta 736 (1994).

ORDER

The ALJ's order dated June 11, 2009 is reversed in part and affirmed in part. That portion of the ALJ's order that declined to award penalties and attorney fees is reversed. Claimant's attorney is awarded \$3,000 under ORS 656.262(11)(a) and \$3,000 under ORS 656.382(1), payable by the employer. Claimant is awarded a 25 percent penalty under ORS 656.268(5)(d) based on the compensation determined to be due at claim closure. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on March 2, 2010

⁵ The employer argues that its refusal to close the claim was not unreasonable because it lacked sufficient information to determine permanent disability. *See* ORS 656.268(1)(a). However, to the extent the record lacked such information, that deficiency is attributable to the employer's position that it had no responsibility to process the claim until the claim was finally determined to be compensable after all appeals had ended. Under these circumstances, the lack of sufficient information is the result of the employer's failure to process the claim. Because the employer's position was unreasonable, its refusal to close the claim was likewise unreasonable.

Member Lowell concurring in part and dissenting in part.

I agree with the majority that the self-insured employer was required by ORS 656.262(7)(c) to reopen and process the omitted medical condition claim after its denial was set aside in September 2008, even though the matter had been appealed. I disagree, however, with the majority's conclusion that the employer's refusal to reopen and process the claim was unreasonable. Thus, I dissent in part.

As noted by the majority, the standard for determining 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). If so, the refusal to pay is not unreasonable. In concluding that the employer had a legitimate doubt regarding its claim processing obligations pending an appeal, the ALJ noted that ORS 656.262(7)(c) did not expressly require claim reopening after a non-final compensability determination and that there was no explicit case law on that specific point.

I agree with the ALJ's reasoning. Although the majority cites a number of cases applying ORS 656.313 in support of its decision, none of them precisely addressed the issue of whether a carrier must reopen and process after a non-final compensability determination under ORS 656.262(7)(c). Under similar circumstances, we have declined to penalize a carrier's claim processing. *See Darryl R. Harris*, 56 Van Natta 3176, 3181 (2004) (carrier's denial was reasonable where no legal precedent addressed the claimant's particular situation when it issued its denial); *Michael A. Ditzler*, 56 Van Natta 1819 (2004) (carrier's denial was not unreasonable because, when it issued its denial, there was no legal precedent interpreting the applicable statute); *Maria R. Porras*, 42 Van Natta 2625 (1990) (penalty not appropriate where carrier's reliance on a former rule was reasonable because, at the time of its decision, no case had addressed the validity of the former rule).

Moreover, despite the majority's explanation of *Anthony Grebisz*, 54 Van Natta 1380 (2002), I conclude that it provided the employer with legitimate doubt. In other words, the employer could have reasonably interpreted that decision as implying that, had the carrier appealed in that case, it would not have been obliged to process the claim pending the appeal.

Because I am unable to conclude that the employer's claim processing was unreasonable, I must respectfully dissent from that portion of the majority opinion penalizing the employer.