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In the Matter of the Compensation of  
**ANTHONY D. CAYTON, Claimant**  
WCB Case Nos. 05-03208, 05-02541  
**SECOND ORDER ON REMAND**  
Fontana & Takaro, Claimant Attorneys  
Maher & Tolleson LLC, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

In our January 12, 2011 Order on Remand, we awarded penalties and attorney fees based on our findings that the self-insured employer's conduct regarding some of claimant's requests for claim closure was unreasonable and declined to grant such awards for the employer's conduct concerning other requests because we did not find its actions unreasonable. Claimant requests reconsideration, seeking clarification of our penalty assessments and contending that additional penalty and attorney fee awards should be granted.

To begin, although we found the employer to have unreasonably refused to close the claim in response to four of claimant's claim closure requests (June, August, September, and December 2005), the conclusion of our order only referred to penalties based on three of those requests (the August, September, and December 2005 requests). Consistent with our previous findings, we modify our prior decision to clarify that the employer is assessed four penalties under ORS 656.268(5)(d) (based on claimant's June, August, September, and December 2005 requests).

Next, claimant asserts that our findings that the employer's conduct was unreasonable regarding the four aforementioned claim closure requests were "based substantially on employer's failure to seek clarification of [claimant's attending physician's] report of his January 2005 closing exam." Claimant argues that such reasoning is likewise applicable to the carrier's conduct in response to his March, April, and May 2005 claim closure requests. Consequently, claimant also seeks penalties and attorney fees for the employer's conduct regarding these requests.

Claimant misinterprets our rationale. Our "unreasonable refusal to close the claim" determinations were primarily based on the employer's failure to refer the employer-arranged medical examination (IME) report to claimant's attending physician for concurrence or comments. Although claimant relied on the employer's failure to seek clarification of the attending physician's report from the physician as a significant basis for its "unreasonable refusal to close" contention, our reasoning was not substantially based on such conduct.

Furthermore, we have already explained why we did not consider the employer's conduct in response to claimant's March, April, and May requests to constitute unreasonable refusals to close the claim. Thus, even considering the vagueness of the attending physician's report, we do not find the employer's conduct regarding these particular requests to represent unreasonable refusals to close the claim. Consequently, we decline claimant's request for additional penalties.

Finally, claimant argues that we improperly restricted his attorney fee awards under ORS 656.382(1) to his counsel's services at the hearing level. Specifically, he asserts that his counsel's services expended throughout his appeals before the Board and court, as well as on remand to the Board, have successfully resulted in determinations that the employer's conduct was unreasonable. Therefore, claimant contends that his attorney is entitled to a fee award for efforts performed before each appellate forum.

Claimant's argument essentially springs from the assumption that his counsel is entitled to an attorney fee for "finally prevailing" on his penalty and attorney fee requests. If claimant's request was based on ORS 656.386(1) and ORS 656.388(1), we would concur with his assertion. Under those statutes, a claimant's counsel is expressly entitled to an attorney fee for services provided before all prior forums in finally prevailing over a carrier's claim denial.

Here, in contrast, the applicable statute is ORS 656.382(1), which provides for an attorney fee for a carrier's unreasonable resistance to the payment of compensation. That statute does not refer to "finally prevailing" over a penalty or attorney fee request at appellate levels. Thus, to award an attorney fee for such appellate services would effectively add language to the statute that the legislature did not include. Moreover, the allegedly unreasonable conduct concerns the employer's "pre-hearing" conduct; it does not include the employer's conduct on appeal of the ALJ's decisions regarding the penalty and attorney fee issues. That conduct, if allegedly unreasonable, would presumably be the basis for a sanction request under ORS 656.390. Claimant made no such contention.

Claimant contests our citation to several Board decisions in limiting his counsel's fee to services at the hearing level. Although some of our case citations concerned statutes other than ORS 656.382(1), each of these cases support the proposition that, when the issue on appeal pertains to penalty or attorney fees, a claimant's counsel is not entitled to an attorney fee award for services rendered on appeal in successfully obtaining that penalty or attorney fee. Such a proposition

equally applies to this current situation and is consistent with our statutory rationale expressed above. Therefore, based on the aforementioned reasoning, we adhere to our previous determination regarding claimant's attorney fee awards under ORS 656.382(1).

Accordingly, we withdraw our January 12, 2011 order. On reconsideration, as supplemented and modified herein, we republish our January 12, 2011 order. The parties' 30-day rights of appeal shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on February 7, 2011