

In the Matter of the Compensation of
GUY E. BALES, Claimant

WCB Case No. 11-00815

ORDER ON REVIEW

Ronald A Fontana, Claimant Attorneys
Bruce A Bornholdt, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Dougherty's order that: (1) did not award a penalty under ORS 656.268(5)(d) for the SAIF Corporation's allegedly unreasonable claim closure; and (2) did not award an attorney fee under ORS 656.382(1) for SAIF's allegedly unreasonable claim processing. On review, the issues are penalties and attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

In declining to award penalties and attorney fees, the ALJ determined that, although SAIF improperly issued a Notice of Closure while claimant was actively engaged in an authorized vocational training program, an award of penalties and attorney fees for unreasonable conduct was not warranted. On review, claimant contends that SAIF's conduct was unreasonable, justifying a penalty under ORS 656.268(5)(d) and attorney fees under ORS 656.382(1). For the following reasons, we agree.

ORS 656.268(5)(d) 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 *Cayton v. Safelite Glass Corp.*, 232 Or App 454, 460 (2009), the court explained that there are three predicates to the assessment of a penalty under ORS 656.268(5)(d): (1) there must be a closure of a claim or a refusal to close a claim; (2) the “correctness” of that action must be at issue in a hearing on the claim; and (3) there must be a finding that the notice of closure or the refusal to close was not reasonable.

Here, there was a closure of a claim and the “correctness” of that action was at issue at a hearing on the claim. Moreover, contrary to the ALJ’s determination, we find that the third predicate was satisfied in that the January 4, 2011 claim closure was not reasonable.

There is no dispute that SAIF closed the claim while claimant was actively enrolled in an ATP in violation of ORS 656.268(1), which provides that a carrier shall close a claim provided the worker is not enrolled and actively engaged in training. SAIF has provided no explanation for doing so. Under such circumstances, we find that the Notice of Closure was unreasonably issued. Accordingly, claimant is entitled to a penalty of 25 percent to be based on all compensation eventually determined to be then due claimant once the claim is properly closed. *Herman G. Lovell*, 60 Van Natta 3087, 3093 (2008).

Moreover, we find that SAIF unreasonably resisted the payment of compensation under ORS 656.382(1). *See Richard W. Gallagher*, 56 Van Natta 3290, 3297 (2004). Thus, claimant is entitled to an attorney fee under that statute.

After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable attorney fee for claimant’s attorney’s services at the hearing level under ORS 656.382(1) is \$3,685, payable by SAIF.¹ In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the hearing record and his counsel’s uncontested attorney fee statement), the complexity of the issue, the value of the interest involved, and the risk that claimant’s counsel might go uncompensated.

¹ Claimant seeks an attorney fee under that statute for services on Board review. We decline that request. *See Anthony D. Cayton*, 63 Van Natta 1096 (2011).

ORDER

The ALJ's order dated July 14, 2011 is reversed in part and affirmed in part. Claimant is awarded a 25 percent penalty under ORS 656.268(5)(d), to be based on all compensation determined to be due at claim closure. Claimant's attorney is also awarded \$3,685 as a reasonable fee under ORS 656.382(1), payable by SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on February 3, 2012