In the Matter of the Compensation of
KENT L. KROUSE, Claimant
WCB Case No. 13-00465
ORDER ON REVIEW
Ronald A Fontana, Claimant Attorneys
Maher & Tolleson LLC, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell. Member Weddell concurs.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Fisher's order that declined to award a penalty under ORS 656.268(5)(d) and an attorney fee under ORS 656.382(1) for an allegedly unreasonable Notice of Closure. On review, the issues are penalties and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation.

In January 2013, the self-insured employer closed claimant's left shoulder injury claim. Both parties requested reconsideration. Claimant asked that the closure notice be set aside as premature and that its issuance be found unreasonable. (Ex. 62B-2).

A January 25, 2013 Order on Reconsideration rescinded the closure notice on the ground that it was prematurely issued. The order made no determination regarding the reasonableness of the closure notice. (Ex. 72). Claimant subsequently requested a hearing, seeking procedural temporary disability, as well as penalties and attorney fees under ORS 656.268(5)(d), ORS 656.262(11)(a) and ORS 656.382(1).

Claimant did not check the box on the hearing request form regarding a reconsideration order. (Ex. 74A-2). In addition, in written closing arguments to the ALJ, claimant did not assert that he was contesting the reconsideration order.

In declining to award a penalty under ORS 656.268(5)(d) and attorney fee under ORS 656.382(1), the ALJ reasoned that the "correctness" of the Notice of Closure was not at issue, but rather the "correctness" of the closure notice was determined by the January 2013 reconsideration order, which had become final. *See Kerry Hagen*, 64 Van Natta 316 (2012), *recons*, 64 Van Natta 359 (2012). On review, claimant argues that the correctness of the closure notice was placed at issue by the filing of his hearing request. He further asserts that the Notice of Closure was unreasonable and seeks a penalty under ORS 656.268(5)(d) and an attorney fee under ORS 656.382(1).[1] For the following reasons, we disagree.

[1] Claimant acknowledges, however, that he did not appeal the Order on Reconsideration. (App. Br., p. 8).

In *Warren D. Duffour*, 65 Van Natta 1744 (2013), the claimant requested a hearing seeking a penalty under ORS 656.268(5) after a reconsideration order rescinding a Notice of Closure as premature had become final. We concluded that the "correctness" of the closure notice was not an issue at the hearing, as required under the above statute, because the reconsideration order had not been timely appealed. Thus, we declined to award a penalty under ORS 656.268(5)(d) and an attorney fee under ORS 656.382(1). *Duffour*, 65 Van Natta at 1745.

Here, unlike in *Duffour*, claimant filed a hearing request within 30 days of the reconsideration order. However, his hearing request did not place the reconsideration order at issue and his written argument did not refer to an appeal of the reconsideration order. Moreover, on review, he expressly acknowledged that he did not appeal the Order on Reconsideration. (App. Br., p. 8).

Claimant argues that, by seeking a penalty under ORS 656.268(5)(d), he necessarily placed the correctness of the closure notice at issue at a hearing. Nonetheless, *Duffour* holds that, in the absence of an appeal of a reconsideration order, a request for a "268(5)(d)" penalty is insufficient to place the "correctness" of a Notice of Closure at issue in a hearing. Therefore, because the correctness of the Notice of Closure was not an issue at the hearing level, there was no entitlement in this case to a penalty under ORS 656.268(5)(d). Likewise, an attorney fee award under ORS 656.382(1) would not be warranted.

In sum, we agree with the ALJ's conclusion that the Hearings Division lacked statutory authority to grant the relief requested by claimant. Therefore, we affirm.

ORDER

The ALJ's order dated May 29, 2013, as reconsidered on July 8, 2013, is affirmed.

Entered at Salem, Oregon on December 26, 2013

Member Weddell concurring.

I agree with the lead opinion's application of *Warren D. Duffour*, 65 Van Natta 1744 (2013), and its conclusion that the correctness of a Notice of Closure was not at issue in the hearing. Therefore, I concur with the outcome of this case. However, I write separately to express doubts regarding certain language from *Duffour*.

ORS 656.268(5)(d) provides for a penalty if the correctness of a Notice of Closure, or refusal to close, is at issue in a hearing on the claim and a finding is made at the hearing that the Notice of Closure, or refusal to close, was not

reasonable. *Duffour* held that where neither party requested a hearing from a reconsideration order that had set aside a notice of closure as premature, no ORS 656.268(5)(d) penalty was available because the correctness of that Notice of Closure was not at issue in the hearing. 65 Van Natta at 1745. I agree with that analysis, and find it controlling in this case.

However, in *Duffour*, the claimant had argued that the he was not required to raise the ORS 656.268(5)(d) penalty issue during the reconsideration proceeding because the Director had no jurisdiction to award such a penalty, and the Board "acknowledge[d]" the correctness of that argument. *Id*. I have doubts regarding the Board's statement regarding the Director's jurisdiction and claimant's ability to raise the ORS 656.268(5)(d) penalty issue for the first time after the reconsideration proceeding.

I first note that this portion of the *Duffour* opinion was not necessary to, or even supportive of, the Board's holding that no ORS 656.268(5)(d) penalty was available. Accordingly, I consider it *dicta*.

Such reasoning also conflicts with other statutory provisions. *Duffour* states claimant is not required to raise the issue of a penalty under ORS 656.268(5)(d) during the reconsideration proceeding. However, ORS 656.268(9) unequivocally bars the litigation at hearing of "any issue that was not raised and preserved before the director at reconsideration." Only issues arising out of the reconsideration process are excepted from this preservation principle.

Whether a carrier was reasonable in closing a claim is not an issue that would arise out of a reconsideration order, but one that regards the correctness of its actions before the reconsideration process commenced. Thus, ORS 656.268(9) would not permit a claimant to raise the issue of an ORS 656.268(5)(d) penalty at the hearing level if it had not been raised and preserved before the Director.

Further, if a claimant does not raise the penalty issue at reconsideration, the carrier would not be on notice regarding whether the reasonableness of the notice of closure would be challenged at a subsequent hearing. Yet, the carrier would not be allowed to supplement the reconsideration record at hearing to defend its actions. *See* ORS 656.283(6). Such a process runs afoul of the legislative objectives of a fair and just administrative system. *See* ORS 656.012.

I also question whether, if a claimant succeeds in overturning a Notice of Closure but has not raised the ORS 656.268(5)(d) penalty issue on reconsideration, the claimant would be an aggrieved party who could request a hearing. Such a claimant would already have received all relief requested during

the reconsideration proceedings. *See Justin Morris*, 64 Van Natta 1586 (2012) (since the appellant had prevailed in the order that it was appealing, the appellant was not an aggrieved party and, therefore, the appellant's request for review was dismissed); *Dennis P. Jones*, 58 Van Natta 892 (2006); *Orville L. Carlson*, 37 Van Natta 30 (1985) (same).

It would be my preferred approach to require claimant to raise penalties at the reconsideration proceeding, allowing the parties to develop the reconsideration record regarding the reasonableness of the employer's actions in closing the claim. Then the ARU, in its review, would determine in the first instance whether it was statutorily authorized to assess a penalty under ORS 656.268(5)(d), and the issue would be preserved for further litigation under ORS 656.268(9).

I acknowledge that the text of ORS 656.268(5)(d), which addresses its application to circumstances in which "the correctness of that Notice of Closure or refusal to close is at issue in a hearing on the claim," suggests that the penalty would only be available at a hearing before an ALJ. However, it is not the only possible interpretation of the statute.

ORS 656.268(5)(d) was enacted at a time when a Notice of Closure was directly reviewable by the Hearings Division and before the creation of the mandatory reconsideration process. ORS 656.268(5)(d) provides for a penalty for an unreasonable Notice of Closure, but the current statutory framework requires a party who objects to the Notice of Closure to first request reconsideration, and prevents any party from raising at hearing issues that were not raised on reconsideration and did not arise from the reconsideration process. It is logical to interpret this statutory framework as including the ORS 656.268(5)(d) penalty in the reconsideration process. Therefore, the ARU could reasonably conclude that it has jurisdiction to award such a penalty.

Finally, *Duffour* did not state that a claimant could not *raise* the ORS 656.268(5)(d) penalty issue on reconsideration. Thus, even if the ARU lacks jurisdiction over the issue, it may behoove claimants to raise the issue on reconsideration, even if only to preserve it for further litigation.