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In the Matter of the Compensation of  
**KAREN M. GRIFFIS, Claimant**  
WCB Case No. 15-03410  
ORDER ON REVIEW  
Colin Hackett Law PC, Claimant Attorneys  
Gress & Clark LLC, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Pardington's order that: (1) admitted documents that had been included in the Appellate Review Unit's (ARU's) reconsideration record; and (2) awarded claimant's counsel an \$8,000 employer-paid attorney fee under ORS 656.382(1) regarding the employer's unreasonable Notice of Closure. Claimant cross-requests review of that portion of the ALJ's order that declined to award a penalty under ORS 656.268(5)(d) for an unreasonable Notice of Closure. On review, the issues are the ALJ's evidentiary ruling, penalties, and attorney fees. We reverse in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary.

On January 5, 2014, claimant sustained a compensable right thumb injury. (Ex. 1). The employer ultimately accepted a "right thumb strain combined with preexisting, non-compensable right basilar joint thumb arthritis (effective 1/5/2013)." (Exs. 31, 67).

On September 22, 2014, the employer issued a "ceases" denial, asserting that the otherwise compensable injury had ceased to be the major contributing cause of the need for medical treatment and disability of the combined condition. (Ex. 68). Claimant did not request a hearing concerning the denial.

On October 14, 2014, Dr. Heitsch, claimant's attending physician, determined that claimant's condition was medically stationary with mild impairment. (Ex. 71). He also stated that a closing examination would be scheduled. (*Id.*)

On October 22, 2014, Dr. Heitsch performed a closing examination. He confirmed claimant's medically stationary status and documented impairment findings. (Ex. 74).

On January 5, 2014, the employer sent claimant a letter that stated that, according to its file, she had not received treatment since October 14, 2014 and, unless she resumed treatment or the reasons for not treating were outside her control, her claim would be closed under OAR 436-030-0034(1).<sup>1</sup> (Ex. 75).

On May 15, 2014, the employer issued a Notice of Closure that did not award permanent disability benefits. (Ex. 78). Claimant requested reconsideration, disagreeing with the rating of permanent impairment and work disability, and seeking an ORS 656.268(5)(d) penalty for unreasonable claim closure. (Exs. 78A, 79).

The June 15, 2015 Order on Reconsideration rescinded the Notice of Closure. In doing so, the ARU determined that the claim closure was improper because claimant's condition was medically stationary, as evidenced by Dr. Heitsch's October 14, 2014 report, and the employer was required to schedule a closing examination in order to establish permanent disability findings. (Ex. 80-2). Claimant moved for reconsideration based on Dr. Heitsch's October 21, 2014 chart note and October 22, 2014 closing examination report. (Ex. 81A-1). The employer's counsel's response to claimant's motion represented that the employer had not previously been provided with Dr. Heitsch's closing examination report. (Ex. 83-1).

The ARU abated and withdrew the June 15, 2015 Order on Reconsideration, and issued another Order on Reconsideration on July 14, 2015. (Exs. 82, 84).

The July 14, 2015 Order on Reconsideration rescinded the Notice of Closure. In doing so, the ARU considered the evidence submitted with claimant's reconsideration motion, found that the closing information was inadequate to determine the extent of permanent disability, and concluded that the claim did not qualify for closure under ORS 656.268(1)(a). (Ex. 84-1, -3).

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<sup>1</sup> OAR 438-030-0034(1) provides in part: "The insurer must close a claim when the worker is not medically stationary and the worker fails to seek treatment for more than 30 days without the instruction or approval of the attending physician or authorized nurse practitioner and for reasons within the worker's control."

Claimant requested a hearing, seeking penalties under various statutes (including ORS 656.268(5)(d)), as well as attorney fees. (Hearing File).

### CONCLUSIONS OF LAW AND OPINION

#### Evidentiary Ruling

At the scheduled hearing, the ALJ determined that claimant's proposed supplemental Exhibits A through 88 were not in the reconsideration record and did not admit those exhibits.<sup>2</sup> (Tr. 12). *See* ORS 656.283(6) (evidence not submitted at reconsideration not admissible at hearing). The hearing was continued for the parties' written closing arguments.

Thereafter, claimant submitted her written closing argument and proposed Exhibits 78A and 81A.<sup>3</sup> (Hearing File). Noting that Exhibit 81A-8 appeared to be the same document that had previously been excluded, the ALJ determined that claimant had submitted the document to the ARU as part of her reconsideration motion and that it was relevant to the dispute. Consequently, the ALJ admitted Exhibits 78A and 81A-8.

For the following reasons, we find no abuse of discretion in the ALJ's evidentiary ruling.

ORS 656.283(6) provides that the ALJ is not bound by common law or statutory rules of evidence and may conduct a hearing in any manner that will achieve substantial justice. That statute gives an ALJ broad discretion on determinations concerning the admissibility of evidence. *See Brown v. SAIF*, 51 Or App 389, 394 (1981).

We review the ALJ's evidentiary rulings for an abuse of discretion. *SAIF v. Kurcin*, 344 Or 399, 405 (2002). When an evidentiary ruling concerns a hearing request regarding an Order on Reconsideration, a factual finding concerning a

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<sup>2</sup> The employer's counsel objected to "all exhibits submitted under cover letter of October 19th." (Tr. 6). Those exhibits are not specifically described or available for our review.

<sup>3</sup> Exhibit 78A is claimant's counsel's May 27, 2015 cover letter to the ARU enclosing claimant's request for reconsideration, the May 20, 2015 closure notice, and a signed attorney retainer and describing the issues on reconsideration. (Ex. 78A). Exhibit 81A is claimant's counsel's June 26, 2015 faxed letter to the ARU requesting reconsideration and enclosing Dr. Heitsch's October 22, 2014 closing examination, a fax confirmation (described as being from Dr. Heitsch's office to the employer's corporate services office), and Dr. Heitsch's October 21, 2014 chart note. (Ex. 81A).

document's presence in the reconsideration record is determinative regarding an ALJ's ruling on its admissibility. *See David S. Lund*, 61 Van Natta 1254, 1254 (2009), *aff'd on other grounds, Roseburg Forest Prods. v. Lund*, 245 Or App 65 (2011). Thus, as a practical matter, an ALJ's "discretion" in admitting or excluding proposed evidence concerning a reconsideration record is extremely narrow. *Id.* If an ALJ admits a document that was not contained in the reconsideration record, or excludes a document that was contained in the reconsideration record, the ALJ's evidentiary ruling will likely be overruled on Board review as legal error. *Id.* at 1255. Nonetheless, because an ALJ's decision concerns an evidentiary matter, the appropriate review standard for any such ruling remains an examination of whether the ruling constitutes an abuse of discretion, even though in these "reconsideration record" situations, an ALJ's discretion is statutorily limited. *Id.*

Here, in admitting the disputed exhibit, the ALJ determined that the document had been submitted to the ARU with claimant's reconsideration motion and was, therefore, in the reconsideration record. Our review of the record confirms the ALJ's finding. Specifically, the July 14, 2015 Order on Reconsideration stated that claimant's counsel submitted evidence "including an office note and closing report from the worker's attending physician, dated October 21, 2014, and October 22, 2014, respectively, as well as a fax confirmation sheet[.]" (Ex. 84-1). The ARU also stated that this information would be considered in the reconsideration proceeding. (*Id.*)

Under such circumstances, we find no abuse of discretion in the ALJ's admission of Exhibits 78A and 81A, specifically Exhibit 81A-8.

#### ORS 656.268(5)(d) Penalty

In declining to award a penalty under ORS 656.268(5)(d), the ALJ determined that the "correctness" of the Notice of Closure was not at issue because the Notice of Closure had been rescinded. Nonetheless, for purposes of assessing an ORS 656.382(1) attorney fee, the ALJ found that the Notice of Closure was unreasonable.

On review, claimant seeks an ORS 656.268(5)(d) penalty, citing *Silviu V. Moisescu*, 68 Van Natta 244 (2016), which is a decision that issued after the ALJ's order. For the following reasons, we conclude that claimant is entitled to a penalty under ORS 656.268(5)(d).

Under ORS 656.268(5)(d), “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” if: (1) the carrier “has closed a claim or refused to close a claim pursuant to [ORS 656.268]”; (2) the “correctness” of that closure or refusal to close is at issue in a hearing on the claim; and (3) “a finding is made at the hearing that the notice of closure or refusal to close was not reasonable.” *Cayton v. Safelite Glass Corp.*, 232 Or App 454, 460 (2009).

Here, on May 15, 2014, there was a closure of the claim. Moreover, claimant’s hearing request (from the reconsideration order rescinding the closure notice on the basis that the closing information was inadequate to determine the extent of permanent disability) put the “correctness” of the Notice of Closure at issue. *See Moisescu*, 68 Van Natta at 246 (the “correctness” of a notice of closure was at issue where the claimant requested a hearing from a reconsideration order rescinding the closure notice for lack of sufficient impairment findings); *cf. Warren D. Duffour*, 65 Van Natta 1744, 1745 (2013) (declining to award an ORS 656.268(5)(d) penalty where the “correctness” of a Notice of Closure was determined by a reconsideration order, which was not appealed and became final). Finally, the ALJ made a finding that the closure was unreasonable, which is supported by the record and is not contested by the employer.

Therefore, because the three predicates for assessing a penalty under ORS 656.268(5)(d) were met, a penalty “shall be assessed \* \* \* in an amount equal to 25 percent of all compensation determined to be then due the claimant.” ORS 656.268(5)(d).

The relevant point in time for determining the amount “then due” is the time at which the unreasonable Notice of Closure was issued. *Liberty Northwest Ins. Corp. v. Olvera-Chavez*, 267 Or App 55, 65 (2014); *Walker v. Providence Health System*, 254 Or App 676, 685 (2013); *Moisescu*, 68 Van Natta at 247-48.

Here, the amount of compensation due claimant as of the date of the unreasonable Notice of Closure (May 15, 2014) is unknown (because the Notice of Closure was rescinded). Under such circumstances, the determination of the penalty amount is a matter of claim processing, based on the eventual calculation of claimant’s compensation at the subsequent valid claim closure. *Moisescu*, 68 Van Natta at 248. Claimant is entitled to a 25 percent penalty on those amounts then due, if any.

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Attorney Fees

We adopt and affirm the ALJ's attorney fee award under ORS 656.382(1).

Finally, claimant's counsel is entitled to an attorney fee award for services on review regarding the employer's request for review, payable by the employer. ORS 656.382(2), (3). 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 and on review is \$3,750, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief, his counsel's fee submission, and the employer's objection), the complexity of the issues, the value of the interests involved, and the risk that claimant's counsel might go uncompensated.

ORDER

The ALJ's order dated December 15, 2015 is reversed in part and affirmed in part. Claimant is awarded a penalty equal to 25 percent of all compensation determined to be due as of May 15, 2014, based on the eventual proper Notice of Closure. Claimant's attorney is awarded a reasonable fee under ORS 656.382(2), (3) of \$3,750, payable by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on August 31, 2016