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In the Matter of the Compensation of  
**MARIA T. ARGUELLO, Claimant**  
WCB Case No. 15-00693  
ORDER ON REVIEW  
Schoenfeld & Schoenfeld, Claimant Attorneys  
Reinisch Wilson Weier, Defense Attorneys

Reviewing Panel: Members Curey, Weddell, and Somers. Member Weddell dissents.

Claimant requests review of Administrative Law Judge (ALJ) Riechers's order that: (1) declined to award a penalty under ORS 656.268(5)(d) for the self-insured employer's allegedly unreasonable refusal to close claimant's left shoulder injury claim; (2) declined to award an attorney fee under ORS 656.382(1) for allegedly unreasonable claim processing; and (3) declined to award penalties and attorney fees under ORS 656.262(11)(a) for an allegedly unreasonable resistance to the payment of compensation. On review, the issues are penalties and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation. On page one of the ALJ's order, we change the "Issues" reference to "ORS 656.268(5)(b)." Additionally, we supplement as follows.

The ALJ concluded that a penalty under ORS 656.268(5)(d) was not warranted. In doing so, the ALJ found that the employer's claim processor (Sedgwick) did not unduly delay contacting Dr. Woolley, either in its initial contact or with the follow-up questions. Therefore, the ALJ determined that Sedgwick's refusal to close the claim was not unreasonable. Claimant disputes that finding on review. For the following reasons, we affirm.

After a worker makes a written request for claim closure, the carrier must issue, within 10 days of receipt of the request, either a Notice of Closure, if the requirements for closure have been satisfied, or a Notice of Refusal to Close, if the requirements for closure have not been met. ORS 656.268(5)(b). A penalty shall be assessed against the carrier if it unreasonably closes or refuses to close a claim after such a request. ORS 656.268(5)(d).<sup>1</sup>

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<sup>1</sup> In 2015, the legislature amended ORS 656.268. Or Laws 2015, ch 144, § 1. In doing so, the legislature renumbered ORS 656.268(5)(d) to ORS 656.268(5)(f), and ORS 656.268(5)(b) to ORS 656.268(5)(d), but did not otherwise change the language of those sections in any substantive manner. *Id.* The amendments apply to Notices of Closure issued on or after May 21, 2015. *Id.* at § 3. Here, the Notice of Closure issued on March 3, 2015. (Ex. 156). Therefore, ORS 656.268 (2011) applies.

ORS 656.268(5)(d) provides that if a carrier has refused to close a claim, the correctness of that refusal is at issue in a hearing and a finding is made at the hearing that the refusal to close was not reasonable, a penalty of 25 percent of “all compensation determined to be then due the claimant” shall be assessed against the carrier. *Cayton v. Safelite Glass Corp.*, 232 Or App 454, 460 (2009); *Clarinda S. Keys*, 53 Van Natta 1592, 1595 (2001).

We must determine, through a factual inquiry into the reasonableness of the carrier’s refusal to close the claim under the particular circumstances, whether that conduct was unreasonable and subject to a penalty pursuant to ORS 656.268(5)(d). *Red Robin Int’l v. Dombrosky*, 207 Or App 476, 481 (2006). A penalty is not automatically imposed whenever the 10-day period under ORS 656.268(5)(b) is exceeded. There is no penalty available under ORS 656.268(5)(d), so long as the carrier acted reasonably in not responding to the request for closure within that period, even if the 10-day period under ORS 656.268(5)(b) is exceeded. *Fitzsimonds v. MJ Hughes Constr., Inc.*, 233 Or App 447, 454 (2010); *Anthony D. Cayton*, 63 Van Natta 54, 63 (2011) (on remand), *recons*, 63 Van Natta 266 (2011), *aff’d without opinion*, 248 Or App 480 (2012).

If a carrier had a legitimate doubt as to its liability, its actions were not unreasonable. *See Int’l Paper Co. v. Huntley*, 106 Or App 107, 110 (1991); *Robert E. Charbonneau*, 57 Van Natta 591, 602 (2005) (although the claim was prematurely closed, no ORS 656.268(5)(d) penalty was awarded because the carrier had a legitimate doubt about the propriety of the closure).

Here, on December 18, 2014, Dr. Woolley, the attending physician, declared claimant’s elbow condition medically stationary, provided range of motion and strength measurements, and indicated that she was back to work, lifting 25 pounds maximum. (Ex. 151). On the bottom left corner of his chart note, the date “1/12/2015” is printed, along with the claim number (186364427001). (*Id.*)

On January 13, 2015, the claim examiner wrote a “check the box” letter to Dr. Woolley, asking whether claimant had a permanent 25-pound lifting limit, and whether this was her only work limitation. (Ex. 154).

On January 20, 2015, claimant’s counsel requested claim closure. A date stamp of “1/23/2015” (along with the claim number) appears on the lower left corner of the letter. (Ex. 153).

On February 13, 2015, the claim examiner sent another “check the box” letter to Dr. Woolley, asking whether claimant was significantly limited in the repetitive use of her left arm and whether the shoulder findings provided in Dr. Laycoe’s May 7, 2014 employer-arranged medical examination could be used for rating shoulder impairment. (Ex. 155). The date shown on the lower left corner of this document is February 23, 2015, and answers to the examiner’s questions appear on the letter. Sedgwick closed the claim on March 3, 2015. (Ex. 156).

For the reasons discussed in the ALJ’s order, we agree, under these circumstances, that Sedgwick’s refusal to close was not unreasonable. In this regard, we share the ALJ’s assessment that Sedgwick received Dr. Woolley’s December 18, 2014 chart note on January 12, 2015, based on the date stamp and claim number on that document. (Ex. 151). We decline to assume that the reference to Sedgwick’s fax number on the chart note is proof it was actually faxed, or in fact received by it, on December 18, 2014.

We also note that while Sedgwick wrote to Dr. Woolley on January 13, 2015, the response it received is not dated and did not contain a signature from Dr. Woolley. (Ex. 154). The February 13, 2015 letter from Sedgwick to Dr. Woolley is noted to be “ESIGNED CT WOOLLEY<MD,” but it too is undated. (Ex. 155).

We find that the preponderance of the evidence reflects that Dr. Woolley declared claimant’s condition medically stationary on December 18, 2014, Sedgwick received that chart note on January 12, 2015, and the following day (January 13, 2015), sought to clarify closing information. Furthermore, after Sedgwick requested further information on February 13, 2015, and, received such information on February 23, 2015, it closed the claim eight days later (on March 3, 2015). Given such circumstances, we do not find Sedgwick’s actions unreasonable.

Claimant cites *French-Davis v. Grand Cent. Bowl*, 186 Or App 280 (2003), for the proposition that the court’s characterization of a carrier’s refusal to respond to a closure request as “affirmative inaction” should be interpreted as requiring an “automatic penalty as affirmative inaction is unreasonable in and of itself.” (Appellant’s Brief, p. 3). We disagree that *French-Davis* stands for such a proposition. In that case, the issue was whether the claimant’s request for a hearing to challenge the carrier’s failure to close her claim was timely. The court concluded that a request for hearing based on a carrier’s failure to process

a claim must be filed within two years “after the alleged \* \* \* inaction occurred” under ORS 656.319(6). *Id.* at 286. The court determined that the “inaction” contemplated by the statute must be an “affirmative inaction,” *i.e.*, a failure to perform a time-specific, discrete duty, request, or obligation. *Id.* at 285.

By contrast, this case involves the issue of whether Sedgwick’s so-called “affirmative inaction” (*i.e.*, its refusal to close under ORS 656.268(5)(b)) was reasonable. That specific statutory question was addressed in *Dombrosky*. There, the court explained that a failure to issue either type of notice required by ORS 656.268(5)(b) was not a basis for a penalty. Rather, the determination of whether a carrier’s conduct was reasonable must be based on a factual inquiry into the reasonableness of its refusal to close under the circumstances. 207 Or App at 480-81; *Adrienne L. Dombrosky*, 60 Van Natta 185 (2008) (on remand). As discussed, here, such an inquiry reveals that Sedgwick’s refusal to close was reasonable. Accordingly, we affirm.

#### ORDER

The ALJ’s order dated June 8, 2015 is affirmed.

Entered at Salem, Oregon on February 5, 2016

Member Weddell dissenting.

The majority affirms the ALJ’s conclusion that Sedgwick’s failure to comply with ORS 656.268(5)(b) should not result in assessment of a penalty under ORS 656.268(5)(d). For the following reasons, I dissent.

ORS 656.268(5)(b) provides:

“If the insurer of self-insured employer has not issued a Notice of Closure, the worker may request closure. Within 10 days of receipt of a written request from the worker, the insurer \*\*\* shall issue a notice of closure if the requirements of this section have been met or a notice of refusal to close if the requirements of this section have not been met. A notice of refusal to close shall advise the worker of the decision not to close; of the right of the worker to request a hearing pursuant to ORS 656.283

within 60 days of the date of the notice of refusal to close the claim; of the right to be represented by an attorney; and of such other information as the director may require.” (Emphasis supplied).

The text of ORS 656.268(5)(b) is unambiguous. It imposes explicit mandatory requirements on a carrier following receipt of a request for closure. Here, Sedgwick plainly did not satisfy them. It issued neither a Notice of Closure nor a Notice of Refusal to Close within the 10-day period.

The next question is whether ORS 656.268(5)(d) authorizes imposition of a penalty for Sedgwick’s statutory violation. ORS 656.268(5)(d) provides that if a carrier has refused to close a claim, the correctness of that refusal is at issue in a hearing, and a finding is made at the hearing that the refusal to close was not reasonable, a penalty of 25 percent of “all compensation determined to be then due the claimant” shall be assessed against the carrier.

Under the particular facts of this case, I would hold that Sedgwick’s delay in issuing a Notice of Closure was unreasonable.

Dr. Laycoe examined claimant at Sedgwick’s request on May 7, 2014. He opined that claimant’s condition was medically stationary and performed a closing examination. (Ex. 132). On May 15, 2014, Dr. Woolley, claimant’s attending physician, stated that he would “review this IME,” and that claimant required further treatment. (Ex. 135).

On December 18, 2014, Dr. Woolley declared claimant’s elbow condition medically stationary, provided range of motion and strength measurements, and indicated that claimant was back to work, lifting 25 pounds maximum. (Ex. 151). On the bottom left corner of the chart note, the date “1/12/2015” is printed, along with the claim number (186364427001). (*Id.*)

On January 13, 2015, the claim examiner wrote a “check the box” letter to Dr. Woolley, asking whether claimant had a permanent 25-pound lifting limit, and whether this was her only work limitation. (Ex. 154).

On January 20, 2015, claimant’s counsel asked Sedgwick to close the claim. A date stamp of “1/23/2015” (along with the claim number) appears on the lower left corner of the letter. (Ex. 153).

On February 13, 2015, the claim examiner sent another “check the box” letter to Dr. Woolley, asking whether claimant was significantly limited in the repetitive use of her left arm and whether the shoulder findings provided in Dr. Laycoe’s May 7, 2014 report could be used for rating shoulder impairment. (Ex. 155). The date shown on the lower left of this document is February 23, 2015, and answers to the examiner’s questions appear on the letter.

A Notice of Closure issued on March 3, 2015. (Ex. 156). Thus, Sedgwick closed the claim more than 40 days after claimant requested closure.

First, I do not find that the record unambiguously establishes that Sedgwick actually received Dr. Woolley’s December 18, 2014 chart note for the first time on January 12, 2015. Dr. Woolley’s December 18, 2014 chart note begins “Sedgwick CMS, Fax +1-859-550-2731 (186364427001).” (Ex. 151). At the conclusion of the chart note is the common business notation, “CTW/pwt,” which means that Dr. Woolley dictated the chart note and it was transcribed by “pwt.” Following that notation, the chart note states, “Cc: Sedgwick CMS/186364427001/FAX + 1-859-550-2731,” which is a common business notation meaning a copy was sent. (*Id.*) This implies to me that Dr. Woolley instructed that a copy of the chart note be faxed to Sedgwick and that “pwt” complied with that instruction on December 18, 2014.

By the time of the hearing, Sedgwick was aware of the issues to be litigated and understood that when it received Dr. Woolley’s chart note was a key fact in deciding the issues. However, despite the ambiguity in the documentary evidence regarding that fact, Sedgwick did not offer the claim examiner’s testimony or any evidence of why the claim examiner was unavailable to testify. Rather, it relied on weaker and less satisfactory evidence. Because stronger and more satisfactory evidence was within the control of Sedgwick, I distrust the weaker evidence.

In any event, I need not conclusively resolve these issues because, even assuming that Dr. Woolley’s December 18, 2014 chart note was received by Sedgwick on January 12, 2015, I would still find its claim processing unreasonable. Sedgwick did not solicit sufficient information from Dr. Woolley until February 13, 2015, a month after it allegedly received his chart note. Although it sent a request to Dr. Woolley on January 13, 2015, that request was not complete. Sedgwick has provided no valid reason for the month delay between its inquiries, or for why it did not request complete information when it first wrote to Dr. Woolley on January 13, 2015 (*i.e.*, whether he concurred with Dr. Laycoe’s

May 2014 findings). That fact, together with Sedgwick's failure to process in accordance with the unambiguous requirements of ORS 656.268(5)(b), amounted to an unwarranted and unreasonable delay in closing the claim.

Considering such circumstances, I would find that a penalty under ORS 656.268(5)(d) and an attorney fee pursuant to ORS 656.382(1) are warranted. Because the majority concludes otherwise, I respectfully dissent.