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In the Matter of the Compensation of  
**ELISEO SALES-PARRA, DCD, Claimant**  
WCB Case Nos. 14-06195, 14-03021  
ORDER ON REVIEW  
Lourdes Sanchez PC, Claimant Attorneys  
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

Claimant<sup>1</sup> requests review of that portion of Administrative Law Judge (ALJ) Ogawa's order that found that there were no amounts "then due" on which to base a penalty when the SAIF Corporation rescinded its unreasonable denial of claimant's injury claim. SAIF cross-requests review of those portions of the ALJ's order that awarded multiple penalties, which were allegedly based on the same amounts "then due," and multiple penalty-related attorney fees for allegedly unreasonable conduct. On review, the issues are penalties and attorney fees. We reverse in part, modify in part, and affirm in part.

FINDINGS OF FACT

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

On December 18, 2013, the deceased worker was fatally injured while working for Ms. Hoagland, a sole proprietor doing business as C&R Towing. (Ex. 3-26). The injury occurred while the decedent was preparing to tow a motor vehicle to Zamora Auto. (Ex. 3-31).

On January 7, 2014, claimant filed a claim with C&R Towing. (Ex. 2). C&R Towing did not have workers' compensation insurance coverage. (Ex. 3-31).

On March 4, 2014, the Workers' Compensation Division (WCD) concluded that the decedent was a subject worker of C&R Towing, C&R Towing was a noncomplying employer (NCE), and Zamora Auto, insured by SAIF, was the responsible employer under ORS 656.029. (*Id.*) On March 11, 2014, the WCD referred the claim to SAIF. (Ex. 3-1).

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<sup>1</sup> Claimant is Olivia Elizabeth Cortes Pimental, the surviving cohabitant of the deceased worker, Eliseo Sales-Parra, and the mother of their two minor children. (Ex. 3-9).

On March 12, 2014, SAIF received a written statement, which Ms. Hoagland had signed on June 14, 2013. (Ex. A). Ms. Hoagland stated that the deceased worker helped her when she needed cars towed, but as an independent contractor, not as an employee of her business. (*Id.*) SAIF's adjustor directed an investigator to interview Ms. Hoagland about the relationship between C&R Towing and the decedent. (Ex. 4). The investigator did not interview Ms. Hoagland. Instead, the investigator interviewed the owners of Zamora Auto, who acknowledged using C&R Towing in December 2013, but stated that the deceased worker was not a Zamora Auto employee. (Ex. 5-2, -3).

On May 9, 2014, SAIF denied the claim, asserting that the deceased worker was not a subject worker of Zamora Auto. (Ex. 6). Claimant requested a hearing and raised issues concerning penalties and penalty-related attorney fees for an unreasonable denial, delayed claim processing, and resistance to the payment of compensation. (Hearing File).

On May 29, 2014, the WCD referred the claim to Sedgwick, the statutory assigned claims agent for NCE-related claims. *See* ORS 656.054(1); (Ex. 7). On July 10, 2014, Sedgwick denied responsibility for the claim, asserting that Zamora Auto was responsible under ORS 656.029. (Ex. 8).

On September 8, 2014, claimant asked the WCD to designate a paying agent under ORS 656.307. (Ex. 9). On September 17, 2014, or shortly thereafter, SAIF learned that Ms. Hoagland planned to testify that the decedent was her employee. (Tr. 123, 124, 128).

On September 19, 2014, the WCD asked SAIF to clarify whether compensability remained at issue, which would prevent the designation of a paying agent. (Ex. 9). On September 25, 2014, SAIF informed the WCD that "compensability" remained at issue. (Ex. 10).

On October 1, 2014, the WCD issued an "Order Designating Paying Agent Pursuant to ORS 656.307." (Ex. 12). In doing so, the WCD determined that "justice require[d] waiver of the procedural rules." (*Id.*) The WCD referred the matter to the Hearings Division to take evidence and make findings regarding responsibility and appointed Sedgwick to pay compensation until the responsible party was determined by an ALJ. (*Id.*) Claimant also filed a hearing request to contest SAIF's alleged *de facto* denial, raising issues concerning responsibility, penalties, and attorney fees. (Hearing File).

On November 19, 2014, about three weeks before a rescheduled hearing, SAIF rescinded its denial. (Ex. 13). On November 26, 2014, SAIF paid death benefits for the period from December 18, 2013 through September 30, 2014.<sup>2</sup> (Ex. 17-3).

The hearing was rescheduled for February 19, 2015 to determine penalty and attorney fee issues.

### CONCLUSIONS OF LAW AND OPINION

The ALJ determined that Ms. Hoagland's June 2013 statement (that she considered claimant to be an independent contractor) did not provide SAIF a legitimate doubt for its "subject worker" denial. The ALJ further found that SAIF's unreasonable denial prevented the issuance of a ".307" order until the WCD "waived its rules." The ALJ also concluded that SAIF unreasonably delayed rescinding its denial after learning that Ms. Hoagland planned to recant her prior statement and testify that the decedent was her employee. Finally, the ALJ held that SAIF failed to conduct a reasonable investigation regarding the employment relationship between the decedent and Ms. Hoagland.

Accordingly, the ALJ assessed three separate penalties against SAIF, which were based on the following grounds: (1) an unreasonable "subject worker" denial (25 percent penalty based on the amounts due when SAIF rescinded its denial); (2) an unreasonable delay in rescinding the "subject worker" denial (another 25 percent penalty based on the amounts due when SAIF rescinded its denial); and (3) an unreasonable claim investigation (15 percent penalty based on the amounts due at the time of the February 19, 2015 hearing). Reasoning that "interim compensation" had been paid, the ALJ further determined that there were no "amounts then due" on which to base a penalty for SAIF's unreasonable continuation of its denial. The ALJ also awarded four penalty-related attorney fees on the following bases: (1) for an unreasonable "subject worker" denial, \$3,462 under ORS 656.262(11)(a); (2) for an unreasonable resistance to the issuance of a ".307" order, \$2,000 under ORS 656.382(1); (3) for an unreasonable delay in rescinding the "subject worker" denial, \$2,000 under ORS 656.382(1); and (4) for an unreasonable claim investigation, \$1,500 under ORS 656.262(11)(a).<sup>3</sup>

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<sup>2</sup> Pursuant to the ".307" order, Sedgwick had paid death benefits for the period from October 1, 2014 through November 30, 2014. (Ex. 16-1).

<sup>3</sup> The ALJ's order awarded claimant's counsel a \$20,000 attorney fee for his services in obtaining a pre-hearing rescission of SAIF's denial.

On review, the parties agree that there were “amounts then due” (*i.e.*, unpaid death benefits) when SAIF rescinded its denial. Therefore, we modify that portion of the ALJ’s order that determined that there were no “amounts then due.” *See Weyerhaeuser Co. v. Knapp*, 100 Or App 615, 618-19 (1990) (the “amounts then due” for purposes of assessing a penalty for an unreasonable denial were the amounts due when the denial was set aside). Accordingly, we affirm the ALJ’s assessment of a 25 percent penalty for SAIF’s unreasonable denial, which is based on the amounts due when SAIF rescinded its denial.<sup>4</sup>

In its cross-request for review, SAIF contends that the total penalty on the same “amounts then due” for the various instances of unreasonable claim processing may not exceed 25 percent.<sup>5</sup> We agree.

Under ORS 656.262(11)(a), only one 25 percent penalty may be assessed based on a single “amount then due.” *See Sue J. Brock*, 67 Van Natta 2066, 2067 (2015). As noted above, the ALJ’s order awarded a 25 percent penalty for an unreasonable denial and a 25 percent penalty for an unreasonable delay in rescinding the denial, based on the same “amounts then due” when SAIF rescinded its denial. Because only one 25 percent penalty may be assessed on a single “amount then due,” we reverse the ALJ’s penalty assessment for SAIF’s unreasonable delay in rescinding the denial.<sup>6</sup>

We turn to the 15 percent penalty assessed for unreasonable claim processing; *i.e.*, an unreasonable claim investigation. Where there are separate unreasonable acts, two penalties based on different “amounts then due” may be assessed. *See Robert L. Shelton*, 56 Van Natta 823, 825 (2004) (where there are separate unreasonable acts that result in different “amounts then due,” separate penalties may be based on the different “amounts then due”).

Here, the ALJ assessed a 15 percent penalty for unreasonable claim processing (*i.e.*, SAIF did not conduct a reasonable investigation in ascertaining whether to deny the claim) based on “amounts then due” at the time of hearing.

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<sup>4</sup> The penalty is to be paid to claimant, on her behalf as the surviving cohabitant, as well as on behalf of the minor children.

<sup>5</sup> SAIF does not challenge that portion of the ALJ’s order which found that its “subject worker” denial was unreasonable and that there were “amounts then due” on which to base a penalty for such conduct.

<sup>6</sup> We adopt that portion of the ALJ’s order that found that SAIF’s delay in rescinding its denial was unreasonable.

We agree with the ALJ's reasoning and conclusion that SAIF failed to conduct a reasonable investigation. However, the ALJ determined that it was unreasonable for SAIF to both deny the claim based on Ms. Hoagland's written statement and to fail to interview Ms. Hoagland. We consider SAIF's investigatory actions to be encompassed within the analysis of whether its denial was based on a legitimate doubt. In other words, SAIF's unreasonable claim investigation has been considered as a component of our determination that its denial was unreasonable. Consequently, we reverse the ALJ's separate 15 percent penalty assessment regarding SAIF's unreasonable claim investigation.

We turn to the penalty-related attorney fee awards. SAIF argues that the attorney fee awards for unreasonable resistance to a ".307 order," unreasonable delay in rescinding the denial, and unreasonable claim processing (*i.e.*, unreasonable claim investigation) were based on the same conduct as the penalty-related attorney fee award for an unreasonable denial. SAIF also asserts that it still had legitimate doubt about the compensability of the claim (*i.e.*, claimant's "subject worker" status) after learning about Ms. Hoagland's planned testimony and that it conducted a reasonable investigation before denying the claim. For the following reasons, we affirm the penalty-related attorney fee awards for unreasonable resistance to a ".307" order and unreasonable delay in rescinding the denial, but reverse the penalty-related attorney fee award for unreasonable claim processing (*i.e.*, an unreasonable claim investigation).<sup>7</sup>

Claimant's counsel is not entitled to attorney fee awards under both ORS 656.262(11)(a) and ORS 656.382(1) for the same unreasonable conduct. *See Cayton v. Safelite Glass Corp.*, 232 Or App 454, 463 (2009) (penalties under both ORS 656.262(11)(a) and ORS 656.268(5)(d) are not available for the same conduct); *Silviu V. Moisescu*, 68 Van Natta 244, 248 (2016) (a claimant's counsel is not entitled to attorney fee awards under both ORS 656.262(11)(a) and ORS 656.382(1) for the same misconduct, citing *Cayton*). It follows that separate attorney fee awards may be based on separate claim processing infractions. *See Andrew A. Veluscek*, 64 Van Natta 686, 693, *recons*, 64 Van Natta 1286 (2012) (awarding penalty-related attorney fees under ORS 656.262(11)(a) and ORS 656.382(1) for separate acts of misconduct); *Kerry K. Hagen*, 64 Van Natta 316, 318, *recons*, 64 Van Natta 358 (2012) (same).

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<sup>7</sup> We adopt that portion of the ALJ's order that awarded a penalty-related attorney fee under ORS 656.262(11)(a) for SAIF's unreasonable "subject worker" denial.

Here, the ALJ identified four instances of misconduct by SAIF: (1) an unreasonable denial of “compensability” (*i.e.*, claimant’s “subject worker” status); (2) an unreasonable resistance to the issuance of a “.307” order; (3) an unreasonable delay in rescinding the denial after SAIF obtained new information; and (4) an unreasonable investigation in ascertaining whether to deny the claim.

As noted above, we adopt the ALJ’s reasoning and conclusion regarding SAIF’s unreasonable denial of claimant’s “subject worker” status.

We also adopt the ALJ’s reasoning and conclusion that SAIF’s attempt to foreclose a “.307 order” constituted a separate act of unreasonable resistance to the payment of compensation. A compensability denial generally prevents the issuance of a “.307 order.” ORS 656.307(1)(a) (providing for a “.307” order where the carriers agree that the claim is otherwise compensable). Here, although the WCD ultimately issued a “.307” order, SAIF’s initial response to the “.307” request (that “compensability” remained at issue) delayed the issuance of the order and the payment of interim death benefits by the designated statutory claims agent. We have affirmed that portion of the ALJ’s order that awarded a penalty-related attorney fee under ORS 656.262(11)(a) for SAIF’s unreasonable “subject worker” denial. Therefore, an assessed penalty-related attorney fee award under ORS 656.382(1) for SAIF’s separate instance of misconduct in forestalling the issuance of the “.307” order is justified. *Veluscek*, 64 Van Natta at 693; *Hagen*, 64 Van Natta at 318. Accordingly, we affirm that portion of the ALJ’s order that awarded a \$2,000 penalty-related attorney fee under ORS 656.382(1) for SAIF’s unreasonable resistance to a “.307” order.

Third, the continuation of a denial becomes unreasonable if new evidence “destroys any legitimate doubt about liability.” *Brown v. Argonaut Ins. Co.*, 93 Or App 588, 592 (1988). SAIF asserts that information that Ms. Hoagland planned to testify that the decedent was her employee was not dispositive of the issue and did not destroy “other bases” for maintaining its denial. SAIF further argues that its independent analysis of the evidence satisfied the factors for an “independent contractor” relationship. SAIF also contends that it had reasonable doubt that ORS 656.029 applied to its insured. Based on the following reasoning, we disagree with SAIF’s assertions.

SAIF’s claim adjuster testified that the denial was based on Ms. Hoagland’s written statement that the decedent was an independent contractor and that the denial was rescinded because the chances of winning were very low. (Tr. 71).

SAIF's legal counsel (who advised the claim adjuster) testified that SAIF looked at a “variety of different factors” in deciding to rescind the denial, but identified only the new information that Ms. Hoagland planned to testify that the decedent was her employee. (Tr. 123, 124).

After considering this evidence, we conclude that SAIF’s denial was based on Ms. Hoagland’s written statement and was rescinded based on information about her planned testimony. SAIF received the new information on September 17, 2014, or shortly thereafter. (Tr. 123, 124, 128). Yet, SAIF did not rescind its denial until November 19, 2014. (Ex. 13). Because SAIF maintained its denial for two months after receiving the aforementioned information (which destroyed the basis for its denial), we conclude that the delay was unreasonable and constitutes a separate act of resistance to the payment of compensation. Therefore, we affirm that portion of the ALJ’s order that awarded a \$2,000 penalty-related attorney fee under ORS 656.382(1) for SAIF’s unreasonable delay in rescinding its denial.

Finally, we turn to the ALJ’s \$1,500 penalty-related attorney fee award for unreasonable claim processing/investigation. As previously explained, we consider SAIF’s investigatory actions to be encompassed within the analysis of whether its denial was based on legitimate grounds. Therefore, we consider a separate “unreasonable claim investigation” finding to be duplicative. Consequently, we reverse that portion of the ALJ’s order that awarded a \$1,500 penalty-related attorney fee for unreasonable claim processing (*i.e.*, unreasonable claim investigation).

Claimant is entitled to an attorney fee for his counsel’s services at the hearing level and on review in establishing that there were “amounts then due” upon which to base the 25 percent penalty assessment. He is also entitled to an attorney fee for his counsel’s services on review in successfully defending the penalty-related attorney fee awards concerning the resistance to a “.307” order and delay in rescinding the denial. *See* ORS 656.262(11)(a) (which may not exceed \$4,000 absent a showing of extraordinary circumstances); ORS 656.382(3); OAR 438-015-0070(2); *SAIF v. Traner*, 273 Or App 310 (2015); *Stanley T. Castle*, 67 Van Natta 2055, 2057 (2015). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we award a reasonable attorney fee for claimant’s counsel’s services on review regarding these issues of \$5,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the aforementioned issues (as represented by the hearing record and claimant’s appellate briefs), the complexity of the issues, the value of the interest involved, and the risk of claimant’s counsel going uncompensated.

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ORDER

The ALJ's order dated July 22, 2015 is modified in part, reversed in part, and affirmed in part. That portion of the ALJ's order that determined that there were no "amounts then due" at the time SAIF rescinded its denial is modified. The claim is remanded to SAIF for determination and payment of the 25 percent penalty for an unreasonable denial as specified in this order. Those portions of the ALJ's order that awarded a 25 percent penalty for SAIF's unreasonable delay in rescinding its denial and a 15 percent penalty for unreasonable claim processing (*i.e.*, claim investigation) are reversed. That portion of the ALJ's order that awarded a \$1,500 penalty-related attorney fee is also reversed. The remainder of the ALJ's order is affirmed. Claimant is awarded an assessed fee of \$5,000, payable by SAIF, for efforts in defending the penalty and penalty-related fees.

Entered at Salem, Oregon on May 5, 2016