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In the Matter of the Compensation of  
**ANTHONY D. CAYTON, Claimant**  
WCB Case Nos. 05-03208, 05-02541  
ORDER ON REVIEW  
Fontana & Takaro, Claimant Attorneys  
Law Offices Of Steven T Maher, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

The self-insured employer requests, and claimant cross-requests, review of Administrative Law Judge (ALJ) Davis' order that: (1) assessed a penalty for the employer's allegedly unreasonable refusal to close claimant's bilateral wrist claim based on any permanent disability eventually awarded at claim closure; (2) declined to assess additional penalties for the employer's separate acts of refusing to close the claim; and (3) awarded a \$6,000 employer-paid attorney fee award under ORS 656.382(1). On review, the issues are penalties and attorney fees.<sup>1</sup>

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

ORS 656.268(5)(d) Penalty

In awarding a penalty pursuant to ORS 656.268(5)(d), the ALJ determined that the employer unreasonably refused to close the claim. However, the ALJ declined to award multiple penalties, reasoning that ORS 656.268(5)(d) provides for a "penalty."

On review, the employer asserts that it did not act "unreasonably" in refusing to close the claim as it was necessary to gather information and perform a vocational assessment (at claimant's request). In response, claimant contends that the employer's failure to respond to his requests for closure was not reasonable and that a penalty should be assessed. Claimant further argues that multiple

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<sup>1</sup> Claimant requested that this matter be consolidated for our review with WCB Case No. 06-00923. As a general rule, we will consolidate matters when the issues are so inextricably intertwined that substantial justice and administrative efficiency dictate that the cases be reviewed together. *See, e.g., Greg V. Tomlinson*, 47 Van Natta 1085 (1995), *aff'd without opinion, Cintex, Inc. v. Tomlinson*, 139 Or App 512 (1996), *rev den*, 323 Or 483 (1996). Because these appealed cases involve penalty and attorney fee issues concerning a series of attempts to close the claim during the same general time period, and because the parties were allowed to supplement their appellate arguments to address the court's holding in *Red Robin International v. Dombrosky*, 207 Or App 476 (2006), we have granted the consolidation request.

penalties should be assessed for the employer's failure to close the claim. Citing *Richard W. Gallagher*, 56 Van Natta 3290 (2004), the employer responds that multiple penalties under ORS 656.268(5)(d) are not justified. We consider these arguments below.

In *Red Robin International v. Dombrosky*, 207 Or App 476 (2006), the court discussed the requirements of ORS 656.268(5)(d). That statute provides that, if the employer has closed the claim or refused to close the claim, a penalty shall be assessed "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." *Id.* at 480. The *Dombrosky* court further reasoned that the penalty of ORS 656.268(5)(d) is implicated by an unreasonable closure or unreasonable refusal to close the claim and does not provide for a penalty for the failure to issue either type of notice. Thus, the court determined that the failure to timely comply with ORS 656.268(5)(b) can give rise to a penalty under ORS 656.268(5)(d), if that conduct constitutes a refusal to close the claim. *Id.* at 481. Thus, in the first instance, we are to consider whether the employer refused to close the claim.

Here, claimant requested claim closure on January 5, 2005, the day after a prior ALJ's order issued setting aside the employer's claim denial. (Exs. 35, 35A-1, -2). Because the employer did not respond within 10 days, claimant requests a penalty based on this inaction in January 2005. Assuming, without deciding, that the employer's lack of response in January 2005 amounted to a "refusal" to close the claim, its failure to do so was not unreasonable. *Dombrosky*, 207 Or App at 480 (ORS 656.268(5)(d) provides, in part, that if the employer has closed the claim or refused to close the claim, a penalty shall be assessed if that refusal to close was not reasonable). Our conclusion is based on the following reasoning.

The determination of what constitutes "unreasonable" delay is done on a case by case basis and must depend on the particular facts and circumstances of each case. *Lester v. Weyerhaeuser Co.*, 70 Or App 307, 310-311 (1984); *Barrett v. Coast Range Plywood*, 56 Or App 371 (1982). Here, the employer issued a Notice of Acceptance on February 1, 2005, within 30 days of the prior ALJ's compensability decision. A Notice of Closure issued eight days later on February 9, 2005. (Exs. 36, 38-1).

The employer closed the claim approximately 34 days after the closure request (or 35 days from the date its denial was set aside by the prior ALJ's order). OAR 436-060-0150(5)(h) provides that, once a litigation order becomes final, "retroactive" TTD due prior to the date of the litigation order must be paid within 14 days *after* the date the litigation order becomes final, *i.e.*, within 44 days from the order's date of its issuance. *Janet T. Berhorst*, 51 Van Natta 1008 (1999); *Christopher L. Camara*, 50 Van Natta 335 (1998). Here, the employer accepted the claim 28 days after the prior ALJ's compensability decision. Moreover, within 8 days thereafter, it closed the claim. Finally, all of these actions were taken within 35 days of the compensability decision. Under such circumstances, we do not consider the employer's conduct to have been unreasonable. *See Bryan E. Johnson*, 52 Van Natta 1365 (2000) (no penalty warranted for unreasonable delay in processing claim to closure when the insurer issued a Notice of Closure within 47 days from date attending physician requested "closing/ rating" exam).

However, the ARU rescinded the Notice of Closure on March 8, 2005 and the claim did not re-close until March 2006.<sup>2</sup> (Exs. 42, 48). For the following reasons, we find that the employer refused to close the claim and that such refusal to close was unreasonable.

Starting on March 9, 2005, and continuing until March 2006, claimant made numerous requests to close the claim.<sup>3</sup> (*See, e.g.*, Exs. 43, 45A, 49A, 52, 52A, 54A).<sup>4</sup> Some of these closure requests were expressly refused within the 10 day period under ORS 656.268(5)(b), others were not. (*See, e.g.*, Exs. 47, 50, 54, 56). In any event, this record establishes that the employer refused to close the claim.

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<sup>2</sup> In rescinding the Notice of Closure, the ARU reasoned that the medical evidence from claimant's attending physician, Dr. Edwards, did not clarify claimant's condition at the time of claim closure. (Ex. 42-1). The ARU noted that the Notice of Closure indicated that claimant's medically stationary date was March 20, 2002, the date of claimant's first treatment. (Ex. 42-2). The ARU further determined that adequate information was not obtained in accordance with OAR 436-030-0020(1) through (4). (WCD Admin Order 04-063, eff. January 1, 2005). The employer asserted that the rule changes in OAR 436-030-0020(1) through (4) did not apply to this claim. (Ex. 53). Lacking clarifying evidence regarding claimant's medically stationary status and permanent impairment from Dr. Edwards at claim closure, the ARU rescinded the Notice of Closure.

<sup>3</sup> In determining the reasonableness of the employer's actions, we also take into consideration that, on March 9, 2005, claimant requested that the ARU reconsider their decision to rescind the Notice of Closure. (Ex. 44). On March 15, 2005, the ARU denied claimant's request. (Ex. 48).

<sup>4</sup> On March 31, 2005, claimant's counsel provided the employer's claim processor with claimant's personnel file which included, among other things, wage and prior employment information. (*See* Ex. 52).

Because we have determined that the employer has refused to close the claim, we must then determine whether that conduct was reasonable based on a factual inquiry into the reasonableness of the employer's refusal to close the claim under the circumstances. *Dombrosky*, 207 Or App at 481; *see, e.g., Tri-Met, Inc. v. Wolfe*, 192 Or App 556 (2004); *Lester v. Weyerhaeuser Co.*, 70 Or App at 310-311 (1984).

In its efforts to obtain sufficient information to close the claim, the employer scheduled claimant for a medical examination with Dr. Duncan. (Ex. 56). Dr. Duncan examined claimant on May 25, 2005 (more than two months after the Order on Reconsideration rescinded the Notice of Closure), determining that his condition was medically stationary and finding permanent impairment. (Ex. 57). The employer received Dr. Duncan's report on June 3, 2005. (Ex. 57-1).

The employer also referred claimant for a vocational assessment on July 1, 2005.<sup>5</sup> (Ex. 58A). On July 21, 2005, the vocational consultant reported that additional evidence was necessary from the attending physician. (*Id.*) On August 17, 2005, the vocational consultant indicated that claimant's eligibility determination would be completed "as timely as possible." (Ex. 59A-2). However, in November 2005, the vocational consultant again reported that information was still being sought from claimant's physician. (Ex. 61F).

The record does not establish, and the employer does not assert, that Dr. Edwards, claimant's attending physician, was forwarded a copy of Dr. Duncan's report. Likewise, the record is silent regarding what, if any, efforts were made to contact Dr. Edwards concerning the vocational assessment. Because Dr. Duncan's report determined claimant's medically stationary status and provided impairment findings, it could have provided the requisite information for claim closure had it been forwarded to Dr. Edwards for concurrence. OAR 436-035-0007(6); OAR 436-010-0280(4).

Finally, as of the March 2006 hearing, one year after ARU rescinded the February 2005 Notice of Closure, nearly nine months after Dr. Duncan's examination, and approximately seven months after the vocational consultant's initial report, the employer had still not closed the claim. In light of the foregoing

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<sup>5</sup> This assessment occurred nearly two months after claimant's May 3rd request for a vocational services evaluation. (Ex. 54A). The employer received the vocational consultant's report on August 3, 2005.

circumstances, we find that the employer acted unreasonably in refusing to close the claim. Accordingly, we affirm that portion of the ALJ's order that awarded a 25 percent penalty pursuant to ORS 656.268(5)(d).

We further agree with the ALJ's conclusion that claimant is not entitled to multiple penalties under ORS 656.268(5)(d). This conclusion is based on the following reasoning.

Citing *Georgia-Pacific v. Piwowar*, 305 Or 494 (1988) and *Beverly J. Hills-Wood*, 58 Van Natta 1058 (2006), claimant seeks multiple penalties for the same conduct. In *Piwowar* and *Hills-Wood*, the carriers were assessed a 25 percent penalty based on the same amounts "then due." However, in both decisions, each penalty was based on a failure to comply with a separate order directing the carrier's compliance with claim processing requirements.

In *Piwowar*, the first penalty was based on the carrier's failure to pay benefits awarded by a Determination Order, whereas the second penalty was based on the carrier's failure to comply with a subsequent final Board order directing the payment of such benefits. Likewise, in *Hills-Wood*, a carrier was previously assessed a penalty based on its failure to pay temporary disability benefits awarded by an Order on Reconsideration. When the carrier subsequently failed to pay such benefits after the issuance of the court's appellate judgment affirming the Board's order regarding that temporary disability award, it was assessed another penalty based on its noncompliance with the court's judgment.

Here, in contrast to *Piwowar* and *Hills-Wood*, there has not been a final litigation order directing the carrier's compliance with claim processing requirements. Rather, claimant has requested multiple penalties for the employer's failure to respond to his various requests to close his claim. However, these multiple penalty requests are based on the same conduct; *i.e.*, the employer's unreasonable refusal to close the claim. Thus, we conclude that multiple penalties under ORS 656.268(5)(d) are not warranted.

#### ORS 656.262(11) Penalty

At hearing, claimant argued that a separate penalty was warranted under ORS 656.262(11) for the employer's allegedly unreasonable refusal to close his claim. The ALJ concluded that no penalty was due under ORS 656.262(11) for the same conduct that was the basis for a penalty under ORS 656.268(5)(d).

On review, claimant cites *Piwowar* and *Hills-Wood* in support of his contention that he is entitled to two penalties for the same conduct. For the reasons stated above, we find that claimant is not entitled to two penalties for the same conduct.

Furthermore, if claimant's request was granted, we would essentially be assessing a total penalty of 50 percent of the amount due at claim closure, which would be inconsistent with both ORS 656.268(5)(d) and ORS 656.262(11)(a). See *Richard W. Gallagher*, 56 Van Natta at 3296 (no penalty assessed under ORS 656.262(11)(a) for the same conduct for which a penalty was assessed under ORS 656.268(5)(d)). Finally, unlike *Piwowar* and *Hills-Wood*, claimant does not argue that the penalty under ORS 656.268(5)(d) and the penalty under ORS 656.262(11) are for *different* conduct. Thus, we decline to assess a penalty under ORS 656.262(11)(a) for the same conduct for which we assessed a penalty under ORS 656.268(5)(d).

#### Attorney Fees

We adopt the ALJ's findings and conclusion.<sup>6</sup>

#### ORDER

The ALJ's order dated March 14, 2006, as reconsidered on April 7, 2006, is affirmed.

Entered at Salem, Oregon on February 6, 2007

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<sup>6</sup> Claimant's counsel is not entitled to a fee for services on Board review regarding the penalty and attorney fee issues. *Saxton v. SAIF*, 80 Or App 631, 633-34, *rev den*, 302 Or 159 (1986); *Dotson v. Bohemia, Inc.*, 80 Or App 233, 236, *rev den*, 302 Or 35 (1986).