

In the Matter of the Compensation of
BRUCE FRITZ, Claimant
WCB Case No. 08-07062
ORDER ON REVIEW
Fontana & Takaro, Claimant Attorneys
Scheminske et al, Defense Attorneys

Reviewing Panel: Members Langer, Weddell, and Herman. Member Langer concurs in part.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Brazeau's order that: (1) determined it was required to reopen and process a new or omitted medical condition found compensable after claim closure; (2) concluded that the employer unreasonably failed to close the claim pending its appeal of a prior ALJ's order that found the new or omitted medical condition compensable; and (3) awarded an attorney fee under ORS 656.382(1). Claimant cross-requests review of those portions of the ALJ's order that: (1) declined to award penalties or attorney fees under ORS 656.262(11)(a); (2) declined to award a penalty under ORS 656.268(5)(d) for an allegedly unreasonable refusal to close the claim; and (3) awarded a \$2,000 attorney fee under ORS 656.382(1). In his cross-appellant's brief, claimant asserts that, should a penalty be awarded under ORS 656.268(5)(d), an attorney fee should also be awarded for services at hearing and on review in securing the penalty assessment. On review, the issues are claim processing, penalties, and attorney fees. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

In August 2006, claimant compensably injured his right third finger. The employer accepted a right third finger contusion, tuft fracture, nail bed laceration and nail avulsion. The claim was subsequently closed in August 2007. Extent of permanent disability was litigated, which concluded with ALJ Riechers's final order issued in May 2008 that affirmed an Order on Reconsideration that awarded one percent impairment for vascular impairment.

On November 29, 2007, claimant requested that the employer accept “cold intolerance or Raynaud’s Syndrome or Reynaud’s phenomena.” When the employer declined to do so, claimant requested a hearing. On September 11, 2008, ALJ Davis found the new/omitted medical condition compensable and remanded the claim to the employer for acceptance and processing.

On October 16, 2008, claimant requested that the claim be closed, a request that the employer declined on October 22, 2008. The employer advised that it would not close the claim because it had appealed ALJ Davis’s order. Claimant requested a hearing.

ALJ Brazeau first determined that the employer was required under ORS 656.262(7)(c) to reopen and process the new/omitted medical condition claim that ALJ Davis found compensable. ALJ Brazeau, however, declined to award penalties or attorney fees under ORS 656.262(11), reasoning that the employer’s refusal to reopen the claim under ORS 656.262(7)(a) did not constitute a delay or refusal to pay compensation because there was no evidence of compensation due because of the refusal to reopen the claim. Although finding that the employer unreasonably refused to close the claim under ORS 656.268(5)(b), ALJ Brazeau also declined to award a penalty under ORS 656.268(5)(d) because there was no evidence of compensation due on which to base a penalty. ALJ Brazeau, nevertheless, awarded a \$2,000 attorney fee under ORS 656.382(1).

On review, the employer argues that it was not required to process the new or omitted medical condition claim while its appeal of ALJ Davis’s order was pending. It further contends that it did not unreasonably refuse to close the claim when it was not required to process the claim pending its appeal. Finally, it asserts that ALJ Brazeau incorrectly awarded a \$2,000 attorney fee. Claimant contends, on the other hand, that ALJ Brazeau should have awarded penalties and attorney fees under ORS 656.262(11)(a) and ORS 656.268(5)(d). Claimant further asserts that he is entitled to an attorney fee award for services rendered in obtaining a penalty under ORS 656.268(5)(d) and that ALJ Brazeau’s \$2,000 attorney fee award was inadequate.

Claim Processing

In *Joy M. Walker*, 62 Van Natta 520 (March 2, 2010), a decision issued after ALJ Brazeau’s order, we affirmed an ALJ’s determination that a carrier was required under ORS 656.262(7)(c) to reopen and process an omitted medical condition found compensable by a prior ALJ’s order, even though the carrier had

requested review of the prior ALJ's decision. In reaching this conclusion, we reasoned that the plain language of the statute was compatible with such a conclusion, as were relevant cases such as *Fleetwood Homes of Oregon v. Vanwechel*, 164 Or App 637 (1999), *Albert Avery*, 51 Van Natta 814 (1999), and *Thomas W. Clark*, 51 Van Natta 95 (1999).

As was true in *Walker*, this claim also presents the issue of whether a carrier must process a new or omitted medical condition previously found compensable while an ALJ's order regarding the disputed claim is pending Board review. Consistent with *Walker*, we likewise hold that it must do so. Accordingly, we affirm that portion of the ALJ's order that determined that the employer must reopen and process the new/omitted medical condition claim pending its appeal of ALJ Davis's order.

Penalties/Attorney Fees

In *Walker*, we determined that the carrier did not have "legitimate doubt" regarding its claim processing obligations pending its appeal of the prior ALJ's order that found the omitted medical condition compensable. Accordingly, we determined that the carrier's claim processing was unreasonable. 62 Van Natta at 525. In light of this determination, we analyzed the carrier's liability for penalties and attorney fees under various statutory provisions.

Although finding no amounts then due on which to base a penalty under ORS 656.262(11)(a) (Or Laws 2009, ch 526, §§ 1, 6), we nevertheless awarded an attorney fee under that statute, citing *Nancy Ochs*, 59 Van Natta 1785, 1793 (2007). *Id.* Moreover, we assessed a 25 percent penalty under ORS 656.268(5)(d) for the carrier's unreasonable refusal to close the claim and an attorney fee under ORS 656.382(1) based on the carrier's unreasonable resistance to the payment of compensation. We cited *Robert E. Wolford*, 45 Van Natta 573(1993). *Id.* at 526.

Here, we find, as we did in *Walker*, that the employer's refusal to process the new/omitted medical claim was unreasonable. While we agree with the ALJ that there are no "amounts then due" on which to base a penalty under ORS 656.262(11)(a) (2009), an attorney fee is available under that statute. *See Ochs*, 59 Van Natta at 1793.

An attorney fee under ORS 656.262(11)(a) (2009) shall be awarded in a reasonable amount that is proportionate to the benefit to claimant and takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary

consideration to the results achieved and to the time devoted to the case. OAR 438-015-0110(1) (2). Absent a showing of extraordinary circumstances, an attorney fee award under ORS 656.262(11)(a) (2009) shall not exceed \$3,000.

After considering the aforementioned factors, we find that a reasonable attorney fee under ORS 656.262(11)(a) (2009) for the employer's unreasonable claim processing is \$1,500, payable by the employer. In reaching this conclusion, we have given primary consideration to the benefit to claimant, the results achieved, and the time devoted to the case (as represented by the record).¹

We next address claimant's entitlement to a penalty under ORS 656.268(5)(d). On October 16, 2008, claimant requested that the new or omitted medical condition claim be closed. On October 22, 2008, the employer responded that it would not close the claim because it had already done so and was not required to do further processing pending its appeal of ALJ Davis's order. We agree with the ALJ's reasoning and determination that the employer unreasonably refused to close the claim as required by ORS 656.268(5)(b). The ALJ, however, declined to award a penalty for lack of evidence of amounts of compensation then due.

In *Walker*, we also determined that the carrier's failure to close the claim was unreasonable. However, we assessed a 25 percent penalty based on compensation determined at claim closure, citing *Michael W. Johnson*, 58 Van Natta 1174 (2006). 62 Van Natta at 527. We likewise conclude in this case that claimant is entitled to a 25 percent penalty based on compensation determined at claim closure under ORS 656.268(5)(d).

Finally, the ALJ awarded a \$2,000 attorney fee under ORS 656.382(1). Based on our reasoning in *Walker*, we agree that claimant is entitled to such a fee. Considering the factors set forth in OAR 438-015-0010(4) as applied to the particular circumstances of this case, we find that \$2,000 is a reasonable attorney fee.² In reaching this conclusion, we have particularly considered the time devoted

¹ We must award a reasonable attorney fee, irrespective of a specific objection to a claimant's counsel's attorney fee request. See *Daniel M. McCartney*, 56 Van Natta 460 (2004). Moreover, we note our affirmance of the ALJ's \$2,000 employer-paid attorney fee award for the employer's unreasonable resistance to the payment of compensation.

² Claimant's attorney states that he sought a \$3,500 attorney fee at hearing pursuant to ORS 656.382(1). His statement of services, however, indicates that such a fee was sought under both ORS 656.382(1) and ORS 656.262(11)(a) (2009).

to the case (as represented by the record), the complexity of the issue, the value of the interest involved and benefit secured, the nature of the proceedings, and the risk that claimant's counsel might go uncompensated. Claimant is not entitled to an attorney fee for services on review regarding the penalty and attorney fee issues. *See Deborah L. Rettmann*, 60 Van Natta 1849 (2008); *Amador Mendez*, 44 Van Natta 736 (1994).

ORDER

The ALJ's order dated May 12, 2009 is reversed in part and affirmed in part. That portion of the ALJ's order that declined to award penalties and attorney fees under ORS 656.262(11)(a) (2009) and ORS 656.268(5)(d) is reversed. Claimant's attorney is awarded \$1,500 under ORS 656.262(11)(a) (2009), payable by the employer. Claimant is awarded a 25 percent penalty under ORS 656.268(5)(d) based on the compensation determined to be due at claim closure. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on April 19, 2010

Member Langer concurring in part

I agree with the majority's reasoning that the self-insured employer was required under ORS 656.262(7)(c) to reopen and process the new/omitted medical condition found compensable after claim closure. I also acknowledge that, with respect to the determination of claimant's entitlement to penalties and attorney fees, I am required by the doctrine of *stare decisis* to follow the Board's holding in *Joy M. Walker*, 62 Van Natta 520 (2010) (2003). However, for the reasons expressed in Member Lowell's dissent in *Walker*, on a clean slate, I would find that the employer had a legitimate doubt regarding its duty to reopen and process the new/omitted medical condition claim. It was not until *Walker* issued that a carrier's obligation to process such a claim was explicitly determined. Accordingly, but for *Walker*, I would not find the employer's claim processing to have been unreasonable.