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In the Matter of the Compensation of  
**ANTHONY D. CAYTON, Claimant**  
WCB Case No. 06-00923  
ORDER ON REMAND  
Fontana & Takaro, Claimant Attorneys  
Maher & Tolleson LLC, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

This case is on remand from the Court of Appeals. *Cayton v. Safelite Glass Corporation*, 233 Or App 470 (2010). The court has reversed our order, *Anthony D. Cayton*, 59 Van Natta 293 (2007), that affirmed an Administrative Law Judge's (ALJ's) order that had declined to assess penalties and related attorney fees under ORS 656.268(5)(d) and ORS 656.262(11) for the self-insured employer's allegedly unreasonable refusal to close claimant's bilateral wrist claim. Citing *Cayton v. Safelite Corporation*, 232 Or App 454 (2009), the court has remanded.<sup>1</sup>

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

Claimant submitted several hearing requests in 2005 that were based on the employer's alleged unreasonable refusal to close the claim. Those hearing requests were acknowledged as WCB Case Nos. 05-03208 and 05-02541 (*Cayton 1*). A hearing was scheduled for January 6, 2006. The hearing did not convene, but rather the parties submitted written arguments based on the documentary record. The record closed on February 10, 2006.

On January 26, 2006 (while *Cayton 1* was pending), claimant again requested claim closure. When the employer did not close the claim, claimant requested another hearing, which was acknowledged as this case (*Cayton 2*). On March 22, 2006, while this case was pending a hearing, the employer issued a Notice of Closure.

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<sup>1</sup> The employer moves to strike claimant's supplemental reply brief as untimely filed. Claimant's reply brief was due on September 2, 2010, but was filed on September 3, 2010. Accordingly, claimant's reply brief was untimely filed. Moreover, no extraordinary circumstances warranting a waiver of our rules and acceptance of the untimely filed brief have either been asserted or found. *See* OAR 438-011-0030. Thus, we grant the employer's motion to strike.

In declining to assess penalties, the ALJ noted that the parties had previously litigated penalties under ORS 656.268(5)(d) and ORS 656.262(11)(a). Finding that the ALJ in *Cayton 1* had awarded penalties pursuant to ORS 656.268(5)(d), the ALJ declined to award an additional penalty. The ALJ further held that claimant was not entitled to a penalty pursuant to ORS 656.262(11) for the same reason. Citing *Richard W. Gallagher*, 56 Van Natta 3290 (2004), the ALJ reasoned that only one 25 percent penalty could be assessed on a single “amounts then due.” Although finding the employer’s conduct was unreasonable, the ALJ declined to assess additional penalties or attorney fees under ORS 656.268(5)(d) and ORS 656.262(11)(a).<sup>2</sup> Claimant requested review.

On review, we did not resolve whether the employer’s two month delay between claimant’s January 26th request and its March 22nd closure constituted an unreasonable refusal to close the claim. In other words, even if it was, we determined that an additional penalty and attorney fee were not appropriate.

We reasoned that, if claimant’s multiple requests were granted, we would essentially be assessing a total penalty exceeding the 25 percent statutory limitation, which would be inconsistent with both ORS 656.268(5)(d) and ORS 656.262(11)(a). Moreover, we declined 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). See *Anthony D. Cayton*, 59 Van Natta at 296.

As previously noted, the court has reversed our prior order and remanded for reconsideration in light of its decision in *Cayton*. 232 Or App at 454. In that case, the court reversed our order in *Cayton 1* that affirmed an ALJ’s order, which declined to assess multiple penalties for the employer’s refusals of, and sometimes failure to respond to, claimant’s multiple requests for claim closure. Without separately evaluating each request for claim closure, we had determined that the employer’s conduct had been unreasonable and assessed one penalty under ORS 656.268(5)(d) and one attorney fee award under ORS 656.382(1). Identifying the focal point of the statutory requirements for the imposition of a penalty under ORS 656.268(5)(d) as “reasonableness,” the court, however, found no limitation or restriction in the statute regarding how many penalties may be assessed during the processing of a claim if the predicates for a penalty assessment are satisfied. Because we had not evaluated each request for claim closure and the employer’s corresponding actions/inactions for reasonableness, the court remanded for reconsideration.

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<sup>2</sup> The ALJ awarded an attorney fee under ORS 656.382(1). That award was not contested on Board review. On remand, claimant does not allege an entitlement to penalties or attorney fees under ORS 656.262(11)(a).

On remand, we applied ORS 656.268(5) and assessed multiple penalties for unreasonable refusals to close a claim because, despite the lack of sufficient information to close the claim, the reasons for that insufficiency were the employer's dilatory actions during the relevant times. *Anthony Cayton*, 63 Van Natta 64, *recons*, 63 Van Natta 266 (2011). After conducting our review, we did not consider the employer's actions in response to several of claimant's initial requests to constitute an unreasonable refusal to close the claim. In reaching that conclusion, we noted that these requests were either made shortly after an Order on Reconsideration had found insufficient information to close the claim or while the employer was making arrangements for a carrier-arranged medical examination.

However, after that examination was eventually conducted and a report had issued, we found that the employer had neither forwarded the report to claimant's attending physician for a response nor otherwise sought the attending physician's opinion regarding claimant's condition. Under such circumstances, we concluded that such conduct constituted an unreasonable refusal to close the claim. Consequently, we awarded penalties under ORS 656.268(5)(d), as well as attorney fees pursuant to ORS 656.382(1), based on each of these subsequent requests for claim closure.

In reaching our conclusion, we applied the reasoning expressed in *Oath Boun*, 60 Van Natta 411 (2008), which assessed a penalty under ORS 656.268(5)(d) when a carrier did not attempt to gather information from an attending physician until some two months after receiving a claimant's claim closure request and because the carrier had received information that the claimant had returned to the "at injury" job before it received the closure request.

Thus, based on the aforementioned reasoning, we may assess a penalty under ORS 656.268(5)(d) if the employer unreasonably refused to close the claim.<sup>3</sup> The employer argues, however, that there was no change in circumstances between claimant's December 8, 2005 request for claim closure in *Cayton 1* and the January 26, 2006 request for claim closure. Thus, the employer asserts that, if we apply the *Cayton* court's reasoning, no penalty may be assessed. We disagree.

In our remand order in *Cayton 1*, we addressed the employer's argument that the claimant must prove a "change of circumstances" between claim closure requests in order to receive a penalty under ORS 656.268(5)(d). In so arguing, the employer noted the court's illustrations of how the aforementioned statute operates and its statements that we "may" consider whether there was no change

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<sup>3</sup> Claimant does not seek a penalty under ORS 656.262(11)(a). In any event, no such penalty is available in addition to a penalty assessed under ORS 656.268(5)(d). *Cayton*, 232 Or App at 463.

in circumstances when multiple closure requests are made. *Cayton*, 232 Or App at 461 n 5. As we noted in our *Cayton* 1 remand order, the court's language made clear that our consideration of changed circumstances is discretionary, not mandatory. 63 Van Natta at 62 n 8. Thus, we do not agree that a change in circumstances must be present before a penalty may be awarded under ORS 656.268(5)(d).

Here, the employer did not timely respond to claimant's January 26, 2006 request for claim closure. Even though it had received the report of an examining physician, Dr. Duncan, by the time of claimant's request, it did not submit that report to the attending physician, Dr. Edwards, for his comments or concurrence. Instead, the employer closed the claim on March 22, 2006, nearly two months after claimant's closure request, based on existing information that existed when claimant requested closure in January 2006.

We, therefore, conclude that the employer's conduct in this case constitutes an unreasonable refusal to close the claim under ORS 656.268(5)(d). *See Cayton*, 63 Van Natta at 64; *Boun*, 60 Van Natta at 411 (penalty under ORS 656.268(5)(d) assessed when the carrier did not attempt to gather information from attending physician until some two months after receiving the claimant's claim closure request, and the carrier had received information that the claimant had returned to the "at injury" job before it received such request). Accordingly, given these particular circumstances, we find that claimant is entitled to a 25 percent penalty under ORS 656.268(5)(d). The penalty assessment under that statute is based on the compensation "determined to be then due" at the time of the Notice of Closure. *Herman G. Lovell*, 60 Van Natta 3087, 3093 (2008).<sup>4</sup>

Accordingly, on remand, the ALJ's order dated May 12, 2006 is reversed in part and affirmed in part. Claimant is awarded a 25 percent penalty under ORS 656.268(5)(d), to be based on the amount determined to be due at claim closure. The remainder of the ALJ's order is affirmed.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on March 25, 2011

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<sup>4</sup> The ALJ awarded claimant's counsel an attorney fee under ORS 656.382(1) for services at hearing. Claimant also requests an assessed attorney fee under the same statute for services on remand in securing a penalty under ORS 656.268(5)(d). We decline that request. As our remand orders in *Cayton* hold, a claimant's counsel is not entitled to an attorney fee award for services on remand in securing a penalty. *Cayton*, 63 Van Natta at 63, *recons* 63 Van Natta at 267. Moreover, neither of the aforementioned statutes authorizes assessment of an attorney fee for services rendered in obtaining a penalty under ORS 656.268(5)(d).