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In the Matter of the Compensation of  
**JOY M. WALKER, Claimant**  
WCB Case Nos. 10-00401, 10-00400  
ORDER ON REVIEW  
Fontana & Takaro, Claimant Attorneys  
Scheminske et al, Defense Attorneys

Reviewing Panel: Members Weddell, Lowell, and Herman. Member Weddell concurs in part and dissents in part. Member Lowell specially concurs in part.

The self-insured employer requests review of Administrative Law Judge (ALJ) Kekauoha's order that: (1) determined that the Workers' Compensation Division's (WCD's) suspension order did not preclude claimant's permanent disability award as granted by an Order on Reconsideration; (2) declined to address WCD's authority under ORS 656.325 to terminate the suspension of claimant's benefits upon claim closure; (3) affirmed an Order on Reconsideration that awarded 35 percent (112 degrees) unscheduled permanent disability for claimant's psychological condition; (4) assessed a penalty under ORS 656.268(5)(e); and (5) awarded an attorney fee under ORS 656.382(1) for the employer's allegedly unreasonable resistance to the payment of permanent disability. On review, the issues are claim processing, extent of unscheduled permanent disability, penalties, and attorney fees. We affirm in part and reverse in part.

#### FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following change. In the last paragraph on page 2, we change the second sentence to refer to "Dr. Friedman." We replace the last paragraph on page 6 and the first paragraph on page 7 with the following:

"ARU sought clarification from Dr. Friedman regarding the portion of claimant's impairment solely attributable to the newly accepted conditions. On December 29, 2009, Dr. Friedman responded that 100 percent of claimant's impairment was due to the newly accepted conditions and she clarified that her "diagnoses have been consistent since 2004 – 'major depression' and 'panic disorder.' (Ex. 99)."

We provide the following summary of the relevant facts.

In April 2004, claimant filed an occupational disease claim for mental stress. She was treated by Dr. Friedman, psychiatrist. After litigation regarding compensability and permanent disability issues, the employer has issued three acceptances.

In July 2007, the employer accepted “anxiety with depression.” (Ex. 31). A January 30, 2008 Notice of Closure did not award any permanent partial disability (PPD) for that condition. (Ex. 50). A March 26, 2008 Order on Reconsideration awarded 35 percent unscheduled PPD for claimant’s psychological condition based on Dr. Friedman’s reports, and assessed a penalty under ORS 656.268(5)(e). (Ex. 55). On October 14, 2008, ALJ Wren reduced the PPD award to zero, reasoning that Dr. Friedman had related her impairment findings to a major depression and panic disorder condition and that there was no medical evidence that attributed impairment to the accepted “anxiety with depression.” (Ex. 57A). On June 2, 2009, we affirmed that order. (Ex. 68A); *Joy M. Walker*, 61 Van Natta 1513 (2009).

In the meantime, on October 19, 2007, the employer denied claimant’s omitted condition claim for major depression and panic disorder. (Ex. 44). That denial was set aside by ALJ Mills’s order, which we affirmed on March 23, 2009. (Ex. 59); *Joy M. Walker*, 61 Van Natta 739 (2009).

On April 10, 2009, the employer modified the acceptance to include “acute major depression and panic disorder.” (Ex. 63; emphasis added). Claimant objected to the acceptance, requesting acceptance of “major depression and panic disorder” as previously requested and ordered. (Ex. 63A).

After claimant requested claim closure on March 31, 2009 (Ex. 60), the employer issued a notice of refusal to close, explaining that it was scheduling an independent medical examination (IME). (Ex. 61). The employer notified claimant of an April 28, 2009 IME with Dr. Davies, psychologist, to evaluate permanent impairment. (Ex. 62). Claimant’s attorney advised claimant not to attend the April 28, 2009 IME, and she did not attend. (Exs. 63C, 65).

The employer notified claimant of a rescheduled IME with Dr. Davies for June 15, 2009. (Exs. 67, 68). Claimant’s attorney objected to the proposed IME and advised claimant not to attend. (Exs. 67A, 69). Claimant did not attend the June 15, 2009 IME. (Ex. 70).

On June 16, 2009, the employer requested the suspension of claimant's benefits for failure to attend the June 15, 2009 IME with Dr. Davies. (Ex. 71). Claimant objected to the employer's request. (Ex. 74). On July 6, 2009, WCD suspended claimant's benefits, finding that her explanation for the failure to attend the June 15, 2009 IME was unreasonable. (Ex. 76). Claimant requested reconsideration, which was denied. (Exs. 78, 79, 80, 81). Claimant requested a hearing regarding the WCD suspension order, which was at issue in a hearing before ALJ Riechers, who affirmed the WCD order. We affirmed that decision. *Joy M. Walker*, 63 Van Natta 564 (2011).

On November 5, 2009, the employer modified its acceptance to include "major depression and panic disorder." (Ex. 87). A Notice of Closure of the same date did not award any PPD. (Ex. 88).

Claimant requested reconsideration and the parties provided written arguments to the Appellate Review Unit (ARU). (Exs. 89, 91, 92, 93, 94). A January 13, 2010 Order on Reconsideration awarded 35 percent unscheduled PPD based on Dr. Friedman's reports, but did not assess a penalty under ORS 656.268(5)(e). (Ex. 101).

Both parties requested a hearing. The employer appealed the PPD award and claimant appealed the portion of the reconsideration order that did not award a penalty under ORS 656.268(5)(e). The parties provided written arguments to the ALJ in lieu of a hearing.

### CONCLUSIONS OF LAW AND OPINION

The employer argued that ARU exceeded its statutory authority by ordering it to pay claimant the 35 percent unscheduled PPD award while the suspension of compensation remained in effect. Citing ORS 656.325(1)(a), the employer contended that WCD's suspension of compensation was still in effect because claimant had not yet attended the IME.

The ALJ reasoned that, by its terms, WCD's suspension order terminated upon claim closure and was therefore no longer in effect when the reconsideration order issued. Because the suspension order consented to suspension only until claimant submitted to an examination or the claim was closed, the ALJ concluded that upon closure, the employer no longer had the requisite consent to continue its suspension of benefits under ORS 656.325(1)(a). The ALJ declined to address the employer's argument that WCD lacked authority under ORS 656.325 and the

rules to “prospectively” terminate its consent of suspension upon claim closure, explaining that the issue regarding the suspension order was not within his jurisdiction, but was instead within the jurisdiction of ALJ Riechers, before whom the parties were litigating the propriety of the suspension order. (WCB Case Nos. 09-02065 and 09-04145). Based on Dr. Friedman’s findings, the ALJ affirmed the Order on Reconsideration’s PPD award. In addition, the ALJ assessed a penalty under ORS 656.268(5)(e) and an attorney fee pursuant to ORS 656.382(1).

### WCD Suspension Order

On review, the employer argues that the reconsideration order incorrectly directed it to pay compensation because WCD’s suspension of compensation was still in effect. The employer contends that the ALJ incorrectly interpreted WCD’s suspension order as terminating consent to the suspension upon claim closure. Further, the employer argues that WCD exceeded its statutory authority by “prospectively and arbitrarily” terminating its consent for the employer’s suspension of compensation upon claim closure.

To begin, because WCD’s suspension order is not before us in this particular proceeding (but rather has been affirmed in a prior proceeding), we are not inclined to address the employer’s challenges to that portion of the WCD order that terminated the suspension of claimant’s benefits upon claim closure. In any event, we do not consider WCD’s order contrary to the statutory scheme.<sup>1</sup> We reason as follows.

In its suspension order, WCD determined that claimant’s explanation of her failure to attend the June 15, 2009 IME was unreasonable and warranted the suspension of her benefits under ORS 656.325 and OAR 436-060-0095. (Ex. 76-5). WCD further explained

“OAR 436-060-0095(9) provides that if the division consents to suspend compensation, the suspension shall be effective from the date the worker fails to attend an examination or such other date the division deems appropriate until the date the worker undergoes an examination scheduled by the insurer

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<sup>1</sup> Under these circumstances, it is unnecessary to address the employer’s argument that its contentions concerning WCD’s suspension order were not “ripe” when the suspension order issued and during the prior proceeding.

or director. Compliance Section notes the self-insured employer's June 2, 2009 appointment notice and the June 16, 2009 suspension request complied with the administrative rules requirements. Therefore, in this case, Compliance Section concludes the appropriate effective date for suspension of the worker's benefits should [be] the date the worker failed to attend the June 15, 2009, IME.

“ORDER It is THEREFORE ORDERED that [the employer] be granted consent to suspend the worker's compensation benefits as of June 15, 2009.

*“The suspension shall continue until such time as the worker has notified the insurer of agreement to be examined and, in fact, submits to an examination by a physician designated by them.*

“If the worker has not made an effort to have compensation benefits reinstated within 60 days of the date of this order, the insurer may close the claim. This order will then terminate upon closure of the claim.” (*Id.*; emphasis in original).

The employer contends that the ALJ's interpretation of the suspension order is inconsistent with ORS 656.325(1)(a). According to the employer, the law does not provide any basis for terminating a suspension of compensation prior to claimant's attendance at an IME. We disagree.

ORS 656.325(1)(a) provides, in part:

“Any worker entitled to receive compensation under this chapter is required, if requested by the Director of the Department of Consumer and Business Services, the insurer or self-insured employer, to submit to a medical examination at a time reasonably convenient for the worker as may be provided by the rules of the director. No more than three independent medical examinations may be requested except after notification to and authorization by the director. If the worker refuses to submit to any such examination, or obstructs the same, the rights of the worker to compensation shall be suspended with the consent of the director until the

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examination has taken place, and no compensation shall be payable during or for account of such period. The provisions of this paragraph are subject to the limitations on medical examinations provided in ORS 656.268.”

*See also* OAR 436-060-0095(1) (WCD Admin Order 08-065; eff. January 1, 2009).<sup>2</sup>

The employer contends that ORS 656.325(1)(a) plainly states that the suspension of compensation continues until claimant attends the required medical examination. Viewed in isolation, that text provides support for the employer’s position because ORS 656.325(1)(a) states that “the rights of the worker to compensation shall be suspended with the consent of the director until the examination has taken place, and no compensation shall be payable during or for account of such period.”

Yet, the employer’s argument isolates the phrase from its context. We do not construe statutes in isolation; rather, they must be examined in context. *E.g., Suchi v. SAIF*, 238 Or App 48, 54 (2010); *Vsetecka v. Safeway Stores, Inc.*, 337 Or 502, 508 (2004) (ordinarily, the text of a statute “should not be read in isolation but must be considered in context”). Statutory context includes other provisions of the same statute and related statutes. *Hale v. Klemp*, 220 Or App 27, 32 (2008). Also considered part of the broader context of a statute is the legislative history of related statutes. *Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto*, 322 Or 406, 415-16 (1995), *modified on recons*, 325 Or 46 (1997).

ORS 656.325(1)(a) provides that the suspension shall continue “until the examination has taken place,” but it also states that the “provisions of this paragraph are subject to the limitations on medical examinations provided in ORS 656.268.” Similarly, OAR 436-060-0095(3) provides that “[e]xaminations

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<sup>2</sup> OAR 436-060-0095(1) provides, in part:

“The division will suspend compensation by order under conditions set forth in this rule. The worker must have the opportunity to dispute the suspension of compensation prior to issuance of the order. The worker is not entitled to compensation during or for the period of suspension when the worker refuses or fails to submit to, or otherwise obstructs, an independent medical examination reasonably requested by the insurer or the director under ORS 656.325(1). Compensation will be suspended until the examination has been completed. \* \* \*”

after the worker's claim is closed are subject to limitations in ORS 656.268(7)." OAR 436-060-0095(11) provides that if the worker makes no effort to reinstate compensation in an accepted claim within 60 days of the date of the consent to suspend order, "the insurer must close the claim under OAR 436-030-0034(7)."

The sentence in ORS 656.325(1)(a) explaining that the "provisions of this paragraph are subject to the limitations on medical examinations provided in ORS 656.268" was added in 1990 as part of Senate Bill 1197 (Or Laws 1990, ch 2, § 25). In Senate Bill 1197, the legislature also amended ORS 656.245(3) to provide that "Except as otherwise provided in this chapter, only the attending physician at the time of claim closure may make findings regarding the worker's impairment for the purpose of evaluating the worker's disability." ORS 656.245(3)(b)(B) (1990); Or Laws 1990, ch 2, § 10.

In addition, the 1990 legislature amended ORS 656.268 in several respects. The legislature added a requirement that a party seek reconsideration by the department of a disability award in order for the party to request a hearing on the award with the Board. Or Laws 1990, ch 2, § 16. The legislature also added ORS 656.268(7), which pertains to medical arbiter examinations. Or Laws 1990, ch 2, § 16. ORS 656.268(7) (1990) provided that if the basis for the objection to a notice of closure or determination order was disagreement with the impairment used in rating of the worker's disability, the director "shall refer the claim to a medical arbiter appointed by the director." The findings of the medical arbiter would be submitted to the department during the reconsideration procedure and ORS 656.268(7) further provided that "no subsequent medical evidence of the worker's impairment is admissible before the department, the board or the courts for purposes of making findings of impairment on the claim closure."

ORS 656.245(2)(b)(C) also provides:

"Except as otherwise provided in this chapter, only a physician qualified to serve as an attending physician under ORS 656.005 (12)(b)(A) or (B)(i) who is serving as the attending physician at the time of claim closure may make findings regarding the worker's impairment for the purpose of evaluating the worker's disability."

When ORS 656.325(1)(a) is read in context with ORS 656.268(7) and ORS 656.245, we find that after the employer closed the claim in November 2009, it was no longer entitled to the IME it had requested in June 2009 because the

employer's stated purpose of that examination was to "evaluate permanent impairment." (Exs. 67, 68). The July 6, 2009 suspension order referred to the employer's stated purpose in the IME notices (Ex. 76-2, -3), and explained that the employer had accepted newly claimed conditions on April 10, 2009 and was "obligated to separately process the newly claimed conditions to closure; therefore, the self-insured employer can schedule the worker for an IME as part of their claim processing obligation, pursuant to ORS 656.325(1)(a)."<sup>3</sup> (Ex. 76-5). Similarly, in the employer's arguments to ARU, it explained that the IME was scheduled "specifically to determine the relationship between claimant's impairment and the newly accepted, work-related conditions." (Ex. 91-6).

However, once the claim was closed on November 5, 2009 (Ex. 88), the employer was no longer entitled to an IME in order to determine claimant's impairment. Instead, after claim closure, for purposes of determining a claimant's impairment, the statutory scheme allows a medical arbiter examination. *See* ORS 656.268(7); OAR 436-060-0095(3) ("[e]xaminations after the worker's claim is closed are subject to limitations in ORS 656.268(7)"). Claimant's suspension of compensation necessarily depended upon the employer's right to an IME for purposes of determining impairment, but the employer no longer had that right after it closed the claim.<sup>4</sup>

Furthermore, OAR 436-060-0095(11) provides that if the worker makes no effort to reinstate compensation in an accepted claim within 60 days of the date of the consent to suspend order, "the insurer must close the claim under OAR 436-030-0034(7)." Based on the aforementioned statutory and regulatory provisions, we conclude that WCD had the authority to terminate the suspension order upon closure of the claim. (Ex. 76-5).

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<sup>3</sup> Page 5 of the suspension order incorrectly referred to the April 10, 2009 accepted conditions as "major depression and panic disorder" because the employer did not accept those conditions until November 2009. (Exs. 76-5, 87). However, page 2 of the suspension order referred correctly to the conditions accepted in April 2009 as "acute major depression and panic disorder." (Ex. 76-2).

<sup>4</sup> We acknowledge that there may be situations in which a carrier may require a claimant to attend an IME *after* claim closure. *See* OAR 436-010-0265(1) (WCD Admin Order 09-051; eff. July 1, 2009) ("The insurer may obtain three medical examinations of the worker by medical service providers of its choice for each opening of the claim. These examinations may be obtained prior to or after claim closure."). In *Robinson v. Nabisco, Inc.*, 331 Or 178, 187 (2000), the court provided some examples of how an IME might be used to protect a carrier's legal position on a claim, such as "challenging the continuing compensability of the injury or disease, the extent of any resulting disability, or the nature of medical or psychological treatment that the claimant may require." Here, however, the employer's stated purpose for the IME with Dr. Davies was to evaluate impairment.

Our interpretation of ORS 656.325(1)(a) as applied to this case is consistent with the legislative history of the 1990 amendments to ORS 656.268 and ORS 656.245, which indicated that the goals were to reduce the costs created by IMEs, eliminate Board reliance on IMEs as a basis for evaluating PPD, require the Board to consider the attending physician's findings in evaluating disability, eliminate the "dueling doctors," and provide a nonlitigious, less costly forum for resolving extent of disability issues. *See Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994), *Daniel L. Bourgo*, 46 Van Natta 2505 (1994), *aff'd*, *Tinh Xuan Pham Auto v. Bourgo*, 143 Or App 73 (1996).

The employer's conclusion that WCD had no authority to terminate the suspension of benefits upon claim closure is inconsistent with the statutory scheme, as described above. Based on the employer's interpretation, it would still be entitled to the IME with Dr. Davies, even though it has closed the claim. But after claim closure, Dr. Davies's IME report could not have been used to evaluate claimant's impairment, even assuming that Dr. Friedman concurred with the IME findings. After claim closure, the only medical examination that may be considered for rating impairment is a medical arbiter examination. *See* ORS 656.268(7)(h) (after reconsideration, "no subsequent medical evidence of the worker's impairment is admissible before the director, the Workers' Compensation Board or the courts for purposes of making findings of impairment on the claim closure"); OAR 436-060-0095(3) ("[e]xaminations after the worker's claim is closed are subject to limitations in ORS 656.268(7)").

In summary, we agree with the ALJ's conclusion that WCD's suspension of claimant's compensation terminated upon claim closure and, therefore, the suspension order did not preclude the ARU's permanent disability award. Accordingly, the ARU had statutory authority to order payment of compensation.

### Permanent Disability

We adopt and affirm the ALJ's reasoning and conclusion regarding claimant's 35 percent unscheduled permanent disability award.

Claimant's attorney is entitled to an assessed fee for services on review regarding the PPD issue. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$3,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the PPD issue (as represented by claimant's respondent's brief), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

ORS 656.268(5)(e)

ARU awarded claimant 35 percent unscheduled PPD for her psychological condition, but it did not assess a penalty under ORS 656.268(5)(e). ARU referred to the previously accepted condition and “unrelated factors reflected in the record *potentially* contributing” to claimant’s impairment and explained that the employer had attempted to clarify PPD due “*solely*” to the newly accepted conditions by scheduling IMEs. (Ex. 101-3; emphases in original). ARU reasoned that given claimant’s failure to attend the required IMEs, “the evidence demonstrates the insurer could not have reasonably been able to determine the extent of [PPD] by a consulting provider, with attending physician concurrence under OAR 436-035-0007(6), due to the newly accepted condition alone at the time of claim closure.” (Ex. 101-4).

At the hearing level, claimant requested a penalty under ORS 656.268(5)(e). The ALJ did not agree with ARU that the employer could not reasonably have known that Dr. Friedman had rated claimant’s impairment due to the newly accepted major depression and panic disorder conditions as class 2, moderate. The ALJ assessed a penalty under ORS 656.268(5)(e) and awarded a penalty-related attorney fee under ORS 656.382(1).

On review, the employer contends that claimant is not entitled to a penalty under ORS 656.268(5)(e) because ARU increased the PPD award after receiving Dr. Friedman’s post-closure response to its inquiry regarding apportionment. (Exs. 98, 99). The employer argues that, based on the pre-closure record, it could not have reasonably known that 100 percent of claimant’s impairment was attributable to the newly accepted conditions. In its written arguments to ARU, the employer also argued that it had relied on WCD’s suspension order as justification not to award impairment. (Ex. 91-6, -10).

Claimant relies on the ALJ’s analysis and responds that there is no reasonable basis for the employer’s position that any portion of Dr. Friedman’s impairment finding was attributable to the originally accepted “anxiety with depression” condition. She argues that it is the “law of the case,” based on the prior litigation with ALJ Wren, that Dr. Friedman’s finding of class 2 impairment was only for major depression and panic disorder and not for “anxiety with depression.”

The “law of the case” doctrine is a general principle of law that when a ruling or decision has been made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review. *Sandra E. Rickon*, 61 Van Natta 311, 314 n 1 (2009), citing *Blanchard v. Kaiser Found. Health Plan*, 136 Or App 466, 470 (1995), *rev den*, 322 Or 362 (1995).

We disagree with claimant that it is the “law of the case” that Dr. Friedman’s finding of class 2 impairment was “only” for major depression and panic disorder. In the prior litigation before ALJ Wren, the issue involved a March 26, 2008 Order on Reconsideration that had awarded 35 percent unscheduled PPD for claimant’s “anxiety with depression” condition. After reviewing the record, we agreed with ALJ Wren that the medical evidence did not attribute claimant’s impairment to the accepted condition of “anxiety with depression.” (Exs. 57A, 68A); *Walker*, 61 Van Natta at 1513. In reaching our conclusion, we emphasized that the employer had only closed claimant’s accepted claim for “anxiety with depression,” which did not include the denied conditions of “major depression and panic disorder without agoraphobia.” *Walker*, 61 Van Natta at 1514. We explained that if any conditions were found compensable after the claim closure, the employer would be obligated to reopen the claim for separate processing of those conditions. *Id.* Thus, contrary to claimant’s contention, we did not determine that Dr. Friedman’s finding of class 2 impairment was “only” for major depression and panic disorder.

We turn to the penalty under ORS 656.268(5)(e), which provides:

“If, upon reconsideration of a claim closed by an insurer or self-insured employer, the director orders an increase by 25 percent or more of the amount of compensation to be paid to the worker for permanent disability and the worker is found upon reconsideration to be at least 20 percent permanently disabled, a penalty shall be assessed against the insurer or self-insured employer and paid to the worker in an amount equal to 25 percent of all compensation determined to be then due the claimant. *If the increase in compensation results from information that the insurer or self-insured employer demonstrates the insurer or self-insured employer could not reasonably have known at the time of claim closure, from new information obtained through a medical arbiter examination*

or from a determination order issued by the director that addresses the extent of the worker's permanent disability that is not based on the standards adopted pursuant to ORS 656.726 (4)(f), the penalty shall not be assessed." (Emphasis added).

There is no dispute that ARU increased claimant's PPD by the amount required in ORS 656.268(5)(e). (Ex. 101). This case did not involve a medical arbiter examination or a determination order issued by the director. Therefore, if the increase in compensation awarded at reconsideration resulted from information that the employer could not reasonably have known at the time of claim closure, no penalty under ORS 656.268(5)(e) is warranted.

The employer contends that Dr. Friedman's pre-closure opinion was insufficient to determine that the extent of claimant's impairment was due solely to the newly accepted conditions. The employer relies in part on Dr. Friedman's February 22, 2008 letter to claimant's attorney, which asked her to explain whether and why she concluded that claimant's symptoms in 2007 and those in existence as of the January 30, 2008 claim closure remained due to the major depression and panic disorder she diagnosed as work-related in 2004. Dr. Friedman replied:

"The initial onset of [claimant's] symptoms of anxiety and depression was in the context of her on-the-job stress in April of 2004. She had no prior history of similar psychiatric symptoms. I remain convinced that her work situation at the time constituted the largest stressor in her life at the time and precipitated her symptoms. Having thus experienced a major depressive episode and anxiety with panic attacks [claimant] became more prone to the symptoms continuing or recurring. In fact she has not done well when she has not had access to the medication, which was started after her April of 2004 work incident. *Unfortunately, the adversarial manner in which this claim has been handled over the last four years has contributed to exacerbation and perpetuation of [claimant's] anxiety and depressive symptoms.*" (Ex. 51-2; emphasis added).

Thus, Dr. Friedman apparently attributed at least some of claimant's symptoms to a cause other than the newly accepted major depression and panic disorder, *i.e.*, the claim processing had contributed to "exacerbation and perpetuation" of claimant's symptoms. Dr. Friedman was deposed on March 4,

2008, and discussed causation of claimant's condition, but she did not clarify that none of claimant's impairment findings were related to the claim processing.<sup>5</sup> (Ex. 52). See OAR 436-035-0007(1) (a worker is entitled to a value under the rules "only for those findings of impairment that are permanent and were caused by the accepted compensable condition and direct medical sequela"); *Khrul v. Foreman's Cleaners*, 194 Or App 125, 131-32 (2004) (physician's opinion that the claimant's current symptoms were likely caused by the stress of the ongoing claim and that with treatment the impairment may resolve within three months of claim closure was ambiguous as to whether the impairment was due to the compensable condition or to the stress of claim processing; substantial evidence supported the Board's finding that the claimant did not establish permanent impairment due to the compensable condition).

Instead, we find that the extent of the permanent impairment issue was not clarified until Dr. Friedman's post-closure response that 100 percent of claimant's impairment was due to the newly accepted conditions.<sup>6</sup> (Ex. 99). See *Scot T. Campbell*, 61 Van Natta 1818, 1831 (2009) (declining to award an ORS 656.268(5)(e) penalty where the increased compensation resulted from findings in a "post-closure" medical report that the carrier could not reasonably have known at the time of claim closure). As ARU explained, the employer had attempted to determine the extent of claimant's permanent impairment by requesting her attendance at an IME, whose report would have then been submitted to Dr. Friedman. (Ex. 101-3, -4); see OAR 436-035-0007(6) (objective findings made by a consulting physician or other medical providers at the time of closure may be used to determine impairment if the worker's attending physician concurs with the findings). However, claimant failed to attend the required IMEs. Under these circumstances, we find that the employer has demonstrated that it could not reasonably have known at the time of claim closure of Dr. Friedman's "post-closure" information that resulted in claimant's increased compensation, as awarded by the reconsideration order.

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<sup>5</sup> When Dr. Friedman was asked if the fact that claimant's claim had been "up in the air" for years (*i.e.*, whether it would be accepted) had "any affect on keeping that issue alive[.]" Dr. Friedman responded: "I'm sure it did." (Ex. 52-22).

<sup>6</sup> ARU sought clarification from Dr. Friedman and asked her to rate the percentage of permanent impairment due to the newly accepted conditions of "acute major depression and panic disorder/major depression and panic disorder conditions[.]" (Ex. 99-2). Dr. Friedman responded that 100 percent of claimant's permanent impairment was due to the newly accepted conditions. (*Id.*) In addition, Dr. Friedman clarified that her "diagnoses have been consistent since 2004 – 'major depression' and 'panic disorder.'" (Ex. 99-1). When read as a whole, we find that Dr. Friedman attributed 100 percent of claimant's permanent impairment to the major depression and panic disorder.

Alternatively, even if we assume that Dr. Friedman's preclosure reports were sufficient to determine the extent of PPD due to the newly accepted conditions, we find that the increase in compensation awarded at reconsideration resulted from other information that the employer could not reasonably have known at the time of claim closure. We reason as follows.

In the employer's written arguments to ARU on reconsideration, it explained that it "closed the claim administratively, relying on the WCD's suspension order as justification not to award impairment." (Ex. 91-6). The employer also stated that claimant was "not entitled to any permanent disability under the WCD Sanction Unit's existing order suspending compensation." (Ex. 91-10). The July 6, 2009 suspension order stated that the "suspension shall continue until such time as the worker has notified the insurer of agreement to be examined and, in fact, submits to an examination by a physician designated by them." (Ex. 76-5). But the suspension order also stated that if claimant had not made an effort to have compensation benefits reinstated within 60 days of the suspension order, the employer "may close the claim. This order will then terminate upon closure of the claim." (*Id.*)

We find that the suspension order language that provided that the suspension "shall continue" until claimant attended an IME provided a reasonable basis for the employer's position that she was not entitled to permanent disability. Notwithstanding the apparent ambiguity in the suspension order, we find that the employer could not have reasonably known at the time of closure that the suspension order did indeed terminate upon claim closure, as we have determined in this proceeding.

Furthermore, the administrative rules did not clearly instruct the employer how to rate and close a claim when a suspension order is in effect. OAR 436-035-0095(11) provides that if the worker makes no effort to reinstate compensation in an accepted claim within 60 days of the date of suspension order, "the insurer must close the claim under OAR 436-030-0034(7)." OAR 436-030-0034(7) in turn, provides: "When the director has issued a suspension order, under OAR 436-060-0095 or OAR 436-060-0105, the date the claim qualifies for closure is the date of the suspension order."

However, OAR 436-030-0034 does not explain how the carrier is to rate PPD in a suspension case. OAR 436-030-0034 pertains to claim closure when the worker is *not* medically stationary. Because Dr. Friedman had concluded that claimant's condition was medically stationary in August 2007 (Ex. 36), OAR

436-030-0034 arguably does not apply. In any event, however, OAR 436-030-0034 does not provide adequate guidance on how to rate disability when a suspension order is in effect. OAR 436-030-0034(1) provides that the insurer must close a claim if a worker fails to seek treatment for more than 30 days without the instruction or approval of the attending physician or authorized nurse practitioner and, in order to close a claim under the rule, the insurer must, among other things, “(d) Rate any permanent disability apparent in the record (e.g., irreversible findings) at the time claim closure is appropriate, regardless of receiving a response from the worker.” However, this case did not involve claimant’s failure to seek treatment for more than 30 days. Moreover, the record does not include evidence that claimant had “irreversible” permanent disability findings related to her major depression and panic disorder. *See* OAR 436-035-0005(9) (defining “irreversible findings” for purposes of the disability rules).

Under these circumstances, we find that the increase in compensation resulted from information that the employer could not reasonably have known at the time of claim closure. Accordingly, we reverse that portion of the ALJ’s order that assessed a penalty under ORS 656.268(5)(e).

For the same reasons, we do not find that the employer’s failure to award permanent disability at claim closure constituted an unreasonable resistance to the payment of compensation. We therefore also reverse the ALJ’s \$1,300 attorney fee award under ORS 656.382(1).

#### ORS 656.268(5)(d)

Before the ALJ, claimant contended that the employer should be assessed a penalty under ORS 656.268(5)(d) for issuing an unreasonable notice of closure, but she asserted that penalty in the alternative, *i.e.*, only if a penalty was not assessed under ORS 656.268(5)(e). Because the ALJ assessed a penalty under ORS 656.268(5)(e), he did not address the issue regarding a penalty under ORS 656.268(5)(d) or a penalty-related attorney fee.

On review, claimant argues that she is entitled to a penalty under ORS 656.268(5)(d) and related attorney fee for the employer’s allegedly unreasonable award of zero PPD in the November 5, 2009 Notice of Closure. She contends that the suspension order did not relieve the employer of its obligation to process the claim to closure and to award the compensation due based on Dr. Friedman’s findings.

ORS 656.268(5)(d) provides:

“If an insurer or self-insured employer has closed a claim or refused to close a claim pursuant to this section, 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, a penalty shall be assessed against the insurer or self-insured employer and paid to the worker in an amount equal to 25 percent of all compensation determined to be then due the claimant.”

In *Cayton v. Safelite Glass Corp.*, 232 Or App 454, 460 (2009), the court explained that there are three predicates to the assessment of a penalty under ORS 656.268(5)(d): (1) there must be a closure of a claim or a refusal to close a claim; (2) the “correctness” of that action must be at issue in a hearing on the claim; and (3) there must be a finding that the notice of closure or the refusal to close was not reasonable.

The employer argues that ORS 656.268(5)(d) does not apply because the “correctness” of the November 5, 2009 Notice of Closure is not at issue.<sup>7</sup> The employer contends that the “correctness” of claim closure is not the same issue as a determination of permanent disability. Alternatively, the employer contends that it did not issue the Notice of Closure unreasonably because the suspension order remained in effect.

We need not decide the precise meaning of “correctness” in ORS 656.268(5)(d) because even assuming that the “correctness” of the November 5, 2009 Notice of Closure was at issue at hearing, we do not agree with claimant that the employer’s award of zero PPD in the November 5, 2009 Notice of Closure was unreasonable. We reason as follows.

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<sup>7</sup> The employer also argues that ORS 656.268(5)(d) does not apply because there was no finding of unreasonableness “at hearing.” In *Indalecio Gonzalez*, 54 Van Natta 1164, 1170 (2002), we assessed a penalty under ORS 656.268(5)(d), explaining that even though the ALJ did not make a finding “at hearing” that the employer’s refusal to close was not reasonable, we had *de novo* review under ORS 656.295(6), and pursuant to that authority, we found that the employer’s refusal to close the claim was unreasonable.

The November 5, 2009 Notice of Closure explained, in part: “Your claim was reopened to process new conditions. Your claim is being closed pursuant to Order Suspending Compensation Pursuant to ORS 656.325 dated 7-6-09.” (Ex. 88-1). The Notice of Closure stated that claimant was “entitled to no [PPD] under the provisions of this administrative closure.” (*Id.*)

As we discussed above, in the employer’s written arguments to ARU on reconsideration, it explained that it “closed the claim administratively, relying on the WCD’s suspension order as justification not to award impairment.” (Ex. 91-6, -10). The July 6, 2009 suspension order provided, in part, that the “suspension shall continue until such time as the worker has notified the insurer of agreement to be examined and, in fact, submits to an examination by a physician designated by them.” (Ex. 76-5). The employer also argued to ARU that Dr. Friedman’s opinion was not persuasive and could not be relied upon to rate claimant’s impairment. (Ex. 91-7 to -10).

Although we have determined that the suspension order did indeed terminate upon claim closure, we find that the employer had a legitimate basis to believe that the suspension of compensation was still in effect based on the language stating that the suspension would continue until claimant attended the IME. (Ex. 76-5). Considering the absence of case precedent interpreting a similar suspension order or the related statutory scheme, we are not persuaded that the employer’s award of zero PPD in the November 5, 2009 Notice of Closure was unreasonable. *See, e.g., Steven R. Holmes*, 62 Van Natta 1728, *recons*, 62 Van Natta 2040 (2010) (based on the absence of case precedent interpreting the administrative rule, the employer had a legitimate doubt regarding its liability for “post-ATP” temporary disability benefits); *Robert E. Charbonneau*, 57 Van Natta 591, 602 (2005) (carrier had a legitimate doubt about its continued liability for TTD benefits when there was no legal precedent interpreting the applicable administrative rules); *Michael A. Ditzler*, 56 Van Natta 1819, 1823 (2004) (carrier’s position was not unreasonable because, at the time of its denial, there was no legal precedent interpreting the applicable statute).

Moreover, because the November 5, 2009 Notice of Closure did not award any permanent disability, there was no “amount determined to be then due” upon which to assess a penalty under ORS 656.268(5)(d). *See Francis House*, 60 Van Natta 787, 788 (2008); *Anthony Cayton*, 60 Van Natta 653 (2008). Accordingly, we conclude that claimant is not entitled to a penalty under ORS 656.268(5)(d) or a related attorney fee under ORS 656.382(1).

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ORDER

The ALJ's order dated June 7, 2010 is affirmed in part and reversed in part. The portions of the ALJ's order awarding a penalty under ORS 656.268(5)(e) and a related attorney fee of \$1,300 are reversed. The remainder of the ALJ's order is affirmed. For services on review regarding the PPD issue, claimant's attorney is awarded \$3,000, payable by the employer.

Entered at Salem, Oregon on June 8, 2011

Abigail L. Herman, Board Chair

Member Weddell concurring in part and dissenting in part.

I agree with the lead opinion, except for that portion of the order reversing claimant's penalty under ORS 656.268(5)(e). For the following reasons, I would affirm the ALJ's decision to assess a penalty under ORS 656.268(5)(e).

The employer chose to close this claim "administratively"<sup>8</sup> and not award PPD, rather than rating impairment based on Dr. Friedman's reports. If the employer did not agree with Dr. Friedman's impairment findings, it could have requested reconsideration of its Notice of Closure, where it could have requested a medical arbiter examination. *See* ORS 656.268(5)(c). The employer explained to ARU that it closed the "claim administratively, relying on the WCD's suspension order as justification not to award impairment." (Ex. 91-6, -10). The employer acknowledged that the administrative closure did *not* determine claimant's impairment. (Ex. 91-6).

Instead of following the statutory procedure of requesting reconsideration under ORS 656.268(5)(c), the employer argued to ARU that if its administrative closure erred by not determining impairment, the Director should schedule a medical arbiter examination pursuant to ORS 656.268(7)(b).<sup>9</sup> (Ex. 91-6, -7).

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<sup>8</sup> The November 5, 2009 Notice of Closure stated that the claim was reopened to process new conditions and that the "claim is being closed pursuant to Order Suspending Compensation Pursuant to ORS 656.325 date 7-6-09." The Notice of Closure explained that claimant was "entitled to no [PPD] under the provisions of this administrative closure." (Ex. 88-1).

<sup>9</sup> ORS 656.268(7)(b) provides: "If neither part requests a medical arbiter and the director determines that insufficient medical information is available to determine disability, the director may refer the claim to a medical arbiter appointed by the director."

Not surprisingly, ARU declined that request, explaining that the employer did not timely appeal under ORS 656.268(5)(c) and further finding that Dr. Friedman's reports were sufficient to determine claimant's disability. (Ex. 101-2).

In the employer's reply argument to the ALJ, it explained that the November 5, 2009 Notice of Closure "was based exclusively on the WCD-SU's July 6, 2009 consent order and claimant's failure to cooperate with [it] 60 days thereafter." (Employer's reply argument to the ALJ at 2). But the employer also relied on ARU's reasoning that it could not have determined the extent of claimant's impairment due to the newly accepted conditions based on the record at the time of closure. (*Id.* at 9-10).

The ARU and the lead opinion focus on Dr. Friedman's reports and do not adequately consider the fact that the employer chose to *ignore* Dr. Friedman's impairment findings and simply close the claim without any PPD, relying on the suspension order as justification for zero PPD. The suspension order provided no such justification and neither do the statutes or the administrative rules.

ORS 656.268(1)(c) provides that the carrier "shall close the worker's claim, as prescribed by the Director of the Department of Consumer and Business Services, and determine the extent of the worker's permanent disability" when, among other things, the "worker fails to attend a closing examination, unless the worker affirmatively establishes that such failure is attributable to reasons beyond the worker's control[.]" ORS 656.268(5)(a) provides that "[f]indings by the insurer or self-insured employer regarding the extent of the worker's disability in closure of the claim shall be pursuant to the standards prescribed by the director."

OAR 436-060-0095(11) (WCD Admin Order 08-065; eff. January 1, 2009) provides that if the worker makes no effort to reinstate compensation in an accepted claim within 60 days of the date of suspension order, "the insurer must close the claim under OAR 436-030-0034(7)." OAR 436-030-0034(7) (WCD Admin Order 08-054; eff. July 1, 2008), in turn, provides: "When the director has issued a suspension order, under OAR 436-060-0095 or OAR 436-060-0105, the date the claim qualifies for closure is the date of the suspension order." *See also* OAR 436-030-0034(3)(b) (where the worker fails to attend a mandatory closing examination for reasons within the worker's control, the date the claim qualifies for closure is the date of the failed mandatory closing examination).

I am not aware of any statutes or rules that provided authority for the employer *not* to determine claimant's impairment when it closed this claim. To the contrary, OAR 436-030-0034(1) provides that in an administrative closure,

the insurer must, among other things, “(d) Rate any permanent disability apparent in the record (e.g., irreversible findings) at the time claim closure is appropriate, regardless of receiving a response from the worker.” Similarly, OAR 436-030-0020(1)(d) provides that the insurer must issue a Notice of Closure on an accepted disabling claim within 14 days when the “worker fails to attend a mandatory closing examination for reasons within the worker’s control and the worker has been notified of pending action(s) in accordance with these rules.” OAR 436-030-0020(3) provides: “When determining disability and issuing the Notice of Closure, the insurer must apply all statutes and rules consistent with their provisions, particularly as they relate to major contributing cause denials, worker’s failure to seek treatment, worker’s failure to attend a mandatory examination, medically stationary status, temporary disability, permanent partial and total disability, review of permanent partial and total disability.”

Based on ORS 656.268 and the aforementioned rules, because the employer chose to close the claim, it was required to rate disability based on the impairment findings from Dr. Friedman, not simply rate claimant’s PPD as zero.

On review, the employer now argues that claimant is not entitled to a penalty under ORS 656.268(5)(e) because it could not have determined the extent of impairment attributable to the newly accepted conditions based on the record at closure. The employer contends that Dr. Friedman’s pre-closure opinion was insufficient to determine the extent of impairment due solely to the newly accepted conditions.

Thus, the employer is now arguing that the increase in PPD resulted from information it “could not reasonably have known at the time of claim closure” pursuant to ORS 656.268(5)(e). But the employer did not rely on *any* impairment findings in closing this claim. The employer has not established that it could not “reasonably have known” that information at closure since it did not rely on Dr. Friedman’s findings in closing the claim in the first place. Rather, the employer stated that the Notice of Closure “was based exclusively on the WCD-SU’s July 6, 2009 consent order and claimant’s failure to cooperate with [it] 60 days thereafter.” (Employer’s reply argument to the ALJ at 2).

In any event, although the employer now claims that Dr. Friedman’s impairment findings were inadequate, there is no evidence that it sought to obtain any clarification from her. Moreover, ARU previously determined that Dr. Friedman’s reports through February 22, 2008 were sufficient to award claimant 35 percent unscheduled PPD. (Ex. 55). The employer’s belated attempt at arguing that Dr. Friedman’s reports were inadequate is not persuasive.

For the reasons explained by the ALJ, I agree that there was no reasonable basis for the employer's position that any portion of Dr. Friedman's impairment findings were attributable to the originally accepted "anxiety with depression" condition. Dr. Friedman consistently diagnosed claimant's condition as major depression and panic disorder, which are the newly accepted conditions at issue in this claim closure. Dr. Friedman did not diagnose "anxiety with depression."

Furthermore, I agree with the ALJ's reasoning that Dr. Friedman's pre-closure reports explained that claimant's impairment was due to her major depression and panic disorder. (Exs. 36, 51, 84). The lead opinion relies on Dr. Friedman's February 22, 2008 response to claimant's attorney where she indicated that the claim processing had contributed to exacerbation and perpetuation of claimant's anxiety and depressive symptoms. (Ex. 51-2). In a March 4, 2008 deposition, Dr. Friedman explained that claimant's major depressive disorder resulted in a chronic predisposition to a continuation or recurrence of symptoms and need for treatment. (Ex. 52-28 to -30). Dr. Friedman agreed that because of claimant's major depressive disorder, she became more symptomatic at times when she was not on medication and she could be subject to other stressors that she might have been able to deal with previously. (Ex. 52-29). Dr. Friedman did not believe that there was something other than the work exposure that was the more important cause of claimant's condition. (Ex. 52-28). I do not interpret Dr. Friedman's pre-closure opinion to attribute claimant's impairment to a cause or condition other than the major depression and panic disorder.

In any event, as mentioned above, if the employer was confused by Dr. Friedman's reports, it could have attempted to contact her to obtain clarification. Moreover, even if Dr. Friedman's post-closure report provided further clarification regarding claimant's impairment, that information does not explain the employer's failure to include *any rating at all* for her accepted conditions. *Cf. Robert A. Voss*, 60 Van Natta 3208, 3215, *recons*, 60 Van Natta 3492 (2008) (although the "post-closure" information provided clarification regarding residual limitations for the right shoulder, such information did not explain the carrier's failure to include a rating for the claimant's distal clavicle resection surgery).

The employer has provided no adequate explanation as to why it did not rate impairment based on Dr. Friedman's findings and then request reconsideration of the Notice of Closure, where it could have requested a medical arbiter examination. *See* ORS 656.268(5)(c).

ORS 656.268(5)(e) provides that the employer must demonstrate that the increase in compensation resulted from information that the employer could not reasonably have known at the time of claim closure. Based on this record, the employer has not sustained its burden. I would affirm the ALJ's penalty assessment under ORS 656.268(5)(e) and the related attorney fee under ORS 656.382(1).<sup>10</sup> Because the lead opinion concludes otherwise, I dissent.

Member Lowell, specially concurring.

I agree with the majority's conclusion that WCD's suspension order did not preclude the ARU's permanent disability award. I write separately, however, because it is not necessary to interpret ORS 656.325(1)(a) to decide this issue. Instead, I would find that the employer's challenge to the suspension order is not properly before us. I reason as follows.

After WCD issued the suspension order (Ex. 76), claimant requested reconsideration with WCD. (Ex. 78). The employer responded to claimant's request for reconsideration, arguing that WCD had "correctly suspended" claimant's compensation and urging WCD to decline claimant's request. (Ex. 79). The employer did not raise any arguments regarding the suspension order language, which it now contends is ambiguous and contradictory and exceeds WCD's authority. After receiving claimant's reply, WCD declined to reconsider the suspension order. (Exs. 80, 81).

Claimant then requested a hearing on issues that included the suspension order, which was held before ALJ Riechers. On May 3, 2010, ALJ Riechers determined that the employer met the requirements of OAR 436-060-0095(8)(b) and rejected claimant's argument that she was justified in not attending the IME. Consequently, the ALJ affirmed the suspension order. On March 15, 2011, we affirmed that portion of ALJ's Riechers's order. *Joy M. Walker*, 63 Van Natta 564, 566-70 (2011).

In the current litigation, the employer, in essence, contests the validity of WCD's suspension order, specifically its directive that "[t]his order will then terminate upon closure of the claim." But the propriety of the suspension order is not at issue in this proceeding. If the employer disagreed with the suspension order language, it should have raised that issue in the hearing before ALJ Riechers.

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<sup>10</sup> In light of my conclusion regarding the ORS 656.268(5)(e) penalty, I do not address claimant's argument that the employer should be assessed a penalty under ORS 656.268(5)(d) for issuing an unreasonable notice of closure. Claimant asserted the ORS 656.268(5)(d) penalty in the alternative, *i.e.*, only if a penalty was not assessed under ORS 656.268(5)(e).

Pursuant to WCD's suspension order, the employer was authorized to suspend claimant's compensation until she attended the requested IME. The suspension order stated that the employer "may close the claim" (Ex. 76-5), but it did not state that the employer was required to do so. When the employer chose to close the claim without obtaining an IME, however, consistent with the suspension order's directive, the suspension to claimant's compensation terminated.

The employer is raising its challenge to the suspension order in a proceeding that does not concern the propriety of that order. Because the validity and propriety of the suspension order are not at issue in this proceeding, I would decline to address those issues on review. In other words, if the employer disagreed with the suspension order language, the employer's remedy was to seek reconsideration from WCD and, if it did not agree with the response, to request a hearing or at least raise that issue in response to claimant's request for hearing regarding the suspension order. Because the employer chose not to do so, we do not have the authority to provide that remedy now. Even if I assume that the disputed suspension language resulted from an erroneous exercise of WCD's authority, the suspension order was effective unless and until it was reversed on appeal. *See SAIF v. Roles*, 111 Or App 597, 601, *rev den*, 314 Or 391 (1992).<sup>11</sup>

Alternatively, although the employer argues that the facts and legal issues in this case were not ripe for decision at the time the suspension order issued, I would conclude that, consistent with our previous interpretation of the WCD suspension order and the administrative rules, the suspension order lawfully terminated once the employer chose to close the claim. *See Walker*, 63 Van Natta at 566-70.

In summary, I agree with the majority's conclusion that the WCD suspension order did not preclude the PPD award. However, because my analysis is limited to finding that the employer has raised its challenge to the suspension order language in the wrong proceeding, I offer this concurring opinion.

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<sup>11</sup> In *Roles*, a carrier failed to comply with an ALJ's order modifying Determination Orders that had become final as a matter of law. The carrier argued that, because the appeal of the Determination Orders had not been timely, the ALJ lacked jurisdiction to set aside the Determination Orders. 111 Or App at 600. The court explained that a judgment is void only when the tribunal rendering it has no jurisdiction over the parties or the subject matter. *Id.* at 601. The court further explained that subject matter jurisdiction exists when a statute authorizes the tribunal to make an inquiry about the dispute. The court concluded that, even though the ALJ may have erroneously exercised his authority, that erroneous exercise of that authority did not deprive him of subject matter jurisdiction. *Id.* at 602. Thus, the court ultimately concluded that the carrier had an obligation to comply with the ALJ's order until and unless it was overturned.