

In the Matter of the Compensation of  
**JOY M. WALKER, Claimant**  
WCB Case Nos. 09-04145, 09-02065  
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.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Riechers's order that: (1) affirmed a Director's order suspending her compensation pursuant to ORS 656.325(1)(a); (2) declined to award an attorney fee under ORS 656.386(1) for the self-insured employer's "pre-hearing" rescission of its *de facto* denial of claimant's omitted medical condition claim for major depression and panic disorder; (3) declined to assess penalties under ORS 656.268(5)(d) for the employer's allegedly unreasonable refusals to close claimant's claim; (4) declined to assess a penalty under ORS 656.262(11)(a) for the employer's unreasonable April 10, 2009 modified notice of acceptance; (5) declined to assess penalties and related fees for the employer's allegedly unreasonable failure to process the claim after March 23, 2009; and (6) declined to award an attorney fee under ORS 656.382(1) for the employer's allegedly unreasonable *de facto* denial of major depression and panic disorder. On review, the issues are the propriety of the suspension order, attorney fees, and penalties. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's findings of fact. We provide the following summary of the relevant facts.

In May 2004, the employer denied claimant's "stress/anxiety" claim. (Exs. 1-3). That denial was set aside by an ALJ's order, which we and the Court of Appeals affirmed. (Exs. 9, 10, 11); *Joy M. Walker*, 58 Van Natta 11 (2006), *aff'd without opinion*, 210 Or App 466 (2007).

On July 24, 2007, the employer accepted "anxiety with depression." (Ex. 12). On August 20, 2007, claimant requested modification of the acceptance to include major depression and panic disorder, as diagnosed by Dr. Friedman, claimant's treating physician, in July 2004. (Ex. 15). The employer denied that claim. (Ex. 19). That denial was set aside by an ALJ's order, which we affirmed on March 23, 2009. (Exs. 29, 37); *Joy M. Walker*, 61 Van Natta 739 (2009).

Claimant requested claim closure on March 25, 2009 and March 31, 2009, based on Dr. Friedman's reports. (Exs. 38, 38A). The employer issued a Notice of Refusal to Close on April 8, 2009, explaining that it needed to schedule an independent closing evaluation to determine the extent of any permanent impairment associated with claimant's accepted condition. (Ex. 39). The employer notified claimant of an independent medical examination (IME) on April 28, 2009, with Dr. Davies, a psychologist. (Ex. 40).

On April 10, 2009, the employer modified its acceptance to include "disabling anxiety and depression and acute major depression and panic disorder." (Ex. 41). On April 14, 2009, claimant objected to the acceptance of "acute major depression and panic disorder," explaining that the employer needed to accept "major depression and panic disorder" as previously ordered by the Board. Claimant also objected to the proposed IME and requested that the employer close the claim based on Dr. Friedman's existing reports. (Ex. 42).

On April 23, 2009, claimant again requested claim closure. (Ex. 42B). Meanwhile, claimant did not attend the April 28, 2009 IME, on advice from her attorney. (Exs. 42B, 43). Thereafter, the employer made several requests for a WCD suspension order. (Exs. 43B, 43BA, 43BB, 43BC, 43C). WCD denied those requests, based on the employer's failure to comply with the technical requirements of the administrative rules. (Exs. 44B, 47).

The employer rescheduled the IME with Dr. Davies for June 15, 2009 and provided notice to claimant. (Exs. 45, 46). Claimant's attorney objected to the proposed IME and advised claimant not to attend. (Exs. 45A, 48AA).

Claimant did not attend the June 15, 2009 IME. (Ex. 49). 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. 50). Claimant objected to the employer's request. (Ex. 52).

In the meantime, claimant requested claim closure on June 11, 2009, based on Dr. Friedman's findings. (Ex. 48AA).

On July 6, 2009, WCD suspended claimant's benefits, finding that her explanation for failing to attend the June 15, 2009 IME was unreasonable. (Ex. 53). Claimant requested reconsideration, which was denied. (Exs. 54, 55, 56, 57). Thereafter, claimant requested a hearing.

On September 24, 2009, Dr. Friedman responded to claimant's attorney's request to perform a new closing examination. (Ex. 63). On September 30, 2009, claimant requested claim closure based on Dr. Friedman's September 24, 2009 report. (Ex. 64).

On November 5, 2009, before the case was submitted to the ALJ on the written record, the employer accepted anxiety and depression and major depression and panic disorder. (Ex. 66). On the same date, the employer issued a Notice of Closure, explaining that claimant was not entitled to permanent disability "under the provisions of this administrative closure." (Ex. 67). Claimant requested reconsideration. (Ex. 70).

### CONCLUSIONS OF LAW AND OPINION

#### July 6, 2009 Suspension Order

The ALJ 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 review, claimant argues that the suspension order should be reversed because the employer's suspension request did not strictly comply with OAR 436-060-0095(8). She further contends that the employer's notices of the June 15, 2009 IME did not strictly comply with OAR 436-060-0095(1) because the IME was not "reasonably requested." Finally, she argues that she was justified in not attending the IME.

Addressing OAR 436-060-0095(8)(b), claimant contends that the employer had to specify all conditions that had been accepted and all conditions that were now claimed, but not yet accepted. According to claimant, the employer did not comply with OAR 436-060-0095(8)(b) because it only referred to the most recently accepted condition. Based on the following reasoning, we disagree with claimant's contention.

OAR 436-060-0095(2) (WCD Admin. Order 08-065; eff. January 1, 2009) provides that WCD "will consider requests to authorize suspension of benefits on accepted claims, deferred claims and on denied claims in which the worker has appealed the insurer's denial." The employer's suspension request must include, among other information, the "claim status and any accepted or newly claimed conditions[.]" OAR 436-060-0095(8)(b). OAR 436-060-0095(12) provides that "[f]ailure to comply with one or more of the requirements addressed in this rule may be grounds for denial of the insurer's request."

---

Here, the employer's June 16, 2009 suspension request explained, in part:

“On April 10, 2009, employer accepted and reopened the current claim for acceptance of new or omitted conditions described as ‘acute major depression and panic disorder.’ In accordance with OAR 436-060-0095(5), employer notified claimant of the June 15, 2009 [IME] on June 2, 2009.” (Ex. 50-2).

At the time of its June 2009 suspension request, the employer had most recently accepted “acute major depression and panic disorder” in April 2009. (Ex. 42). In issuing its suspension order, WCD referred to information in the employer's request that it had accepted and reopened the current claim for acceptance of a new or omitted condition described as “acute major depression and panic disorder” in accordance with OAR 436-060-0095(8)(b).” (Ex. 53-4).

Thus, WCD did not interpret OAR 436-060-0095(8)(b) to require the employer to list every accepted and denied condition. WCD's order also included information regarding claimant's other accepted and denied conditions (Ex. 53-1, -2), confirming that it was aware that the “acute major depression and panic disorder” was not claimant's only accepted condition. Finally, in requesting reconsideration, claimant asserted that the employer's suspension request did not include all accepted conditions and those that had been requested but not yet accepted. (Ex. 54). Yet, in response to that request, WCD declined to reconsider or modify the suspension order. (Ex. 57).

We conclude that the employer's June 16, 2009 suspension request complied with OAR 436-060-0095(8)(b) for the following reasons. That rule required the employer's suspension request to include, among other information, the “claim status and any accepted *or* newly claimed conditions[.]” (Emphasis added). Because OAR 436-060-0095(8)(b) is written in the disjunctive (accepted *or* newly claimed conditions), we find that information regarding accepted conditions alone (rather than accepted *and* newly claimed conditions) is sufficient. Such a conclusion is also consistent with WCD's interpretation of its own rule, because it suspended claimant's compensation based on the employer's request.<sup>1</sup>

---

<sup>1</sup> OAR 436-060-0095(12) further provides that a failure to comply with the requirements of the rule *may* be grounds for denial of the suspension request. Thus, the rule does not mandate denial of a suspension request for noncompliance with the rule.

Furthermore, OAR 436-060-0095(1) pertains to the suspension of benefits “during or for the period when the worker refuses or fails to submit to an IME reasonably requested by the employer.” Thus, the information required in the employer’s suspension request is most reasonably interpreted to apply to the “claim status and any accepted or newly claimed conditions” at the time of the requested IME. OAR 436-060-0095(8)(b).

Claimant also argues that WCD’s suspension order incorrectly stated that the “employer accepted the newly claimed conditions of major depression and panic disorder on April 10, 2009[.]” (Ex. 53-5). In doing so, she notes that the employer did not actually accept that particular condition until November 5, 2009, after the suspension order had issued. (Ex. 66). That error, however, pertains to the WCD suspension order and not the employer’s suspension request. In any event, the WCD suspension order also accurately referred to the April 2009 accepted condition as “anxiety and depression and acute major depression and panic disorder.” (Ex. 53-2; *see* Ex. 41). Furthermore, claimant has not explained why any error in the WCD suspension order should result in a finding that the employer did not comply with the technical requirements of OAR 436-060-0095 or a finding that she was justified in not attending the IME.

Claimant also contends that the employer’s notices of the June 15, 2009 IME did not strictly comply with OAR 436-060-0095(1) because the IME was not “reasonably requested.” Yet, claimant did not challenge WCD’s finding regarding the technical requirements regarding the June 2, 2009 IME notice in her written arguments to the ALJ. Because the issue of whether the June 2, 2009 IME notice technically complied with OAR 436-060-0095(1)<sup>2</sup> was raised for the first time on review, we decline to address it. *See Stevenson v. Blue Cross*, 108 Or App 247, 252 (1991) (Board may refuse to consider issues on review that were not presented at hearing).

To the extent that claimant’s argument pertains to the merits of the employer’s suspension request, we disagree with her contention that the IME was not “reasonably requested.”<sup>3</sup> We reason as follows.

---

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

<sup>3</sup> The employer’s May 27, 2009 IME notice indicated that copies were sent to “Attending physician or Authorized Nurse Practitioner” and “Employee,” rather than listing their names. (Ex. 45). WCD did not address the technical requirements of the May 27, 2009 IME notice. Because the employer issued another IME notice on June 2, 2009, we decline to address the propriety of the May 27, 2009 IME notice.

In claimant's response to the employer's WCD suspension request, she argued that Dr. Davies was not a physician or medical doctor and was therefore not authorized to conduct IMEs under ORS 656.325. (Ex. 52-3). Claimant contended that the employer's purpose in requesting the IME was to seek an expert opinion on which to base another denial. (*Id.*)

WCD rejected claimant's argument, concluding that Dr. Davies was licensed as a psychologist as required under OAR 436-010-0265(13)(A) and had completed the criteria to be included on the Director's list of authorized providers to perform IMEs pursuant to OAR 436-010-0265(13)(B). (Ex. 53-5). In addition, WCD determined that, because the employer had accepted new conditions on April 10, 2009, and was obligated to separately process the conditions to closure, it could schedule an IME as part of its claim processing obligation. (*Id.*) WCD concluded that claimant's explanation for her failure to attend the June 15, 2009 IME was unreasonable.

The ALJ affirmed WCD's suspension order, explaining that Dr. Davies was a licensed psychologist and satisfied the criteria required in the rules to be included on the Director's list of authorized providers. In addition, the ALJ determined that claimant's argument that the employer intended to use the IME report to deny compensability of her claim was speculative.

On review, claimant argues that she was justified in not attending the IME because ORS 656.325(1) requires submission to a "medical examination," but Dr. Davies was a psychologist, not a medical doctor. We do not consider claimant's non-attendance at the IME to be justified.

ORS 656.325(1)(b) provides: "When a worker is requested by the director, the insurer or self-insured employer to attend an independent medical examination, the examination must be conducted by a physician selected from a list of qualified physicians established by the director under ORS 656.328." Similarly, ORS 656.328(1) provides that the Director "shall maintain a list of providers that are authorized to perform independent medical examinations."

Thus, the issue is whether Dr. Davies was on the Director's list of "qualified physicians." The record supports a conclusion that Dr. Davies was a medical service provider on the Director's list authorized to perform IMEs. (Ex. 53-4, -5). Under these circumstances, we are not persuaded that claimant was justified in not attending the IME because Dr. Davies was not a medical doctor.

Claimant also contends that she was justified in not attending the IME because the IME findings could not and would not be used to determine her impairment because there was no reason to believe that Dr. Friedman would concur with the findings of Dr. Davies. Yet, ORS 656.325(1)(a) provides that “[a]ny worker entitled to receive compensation under this chapter” is required, if requested by the Director or the carrier, “to submit to a medical examination at a time reasonably convenient for the worker as may be provided by the rules of the director.” If the worker refuses to submit to any such examination, “the rights of the worker to compensation shall be suspended” with the consent of the Director. *Id.* Similarly, OAR 436-060-0095(1) provides, in part: “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).”

In essence, claimant is asking us to infer that Dr. Friedman would not have concurred with Dr. Davies’s findings under any circumstances. We agree with the ALJ’s conclusion that claimant’s argument is speculative.

We reach the same conclusion regarding claimant’s argument that she was justified in not attending the IME because the employer intended to use the IME to manufacture another denial. After the employer accepted the new/omitted condition in April 2009, it was obligated to process that condition to claim closure. ORS 656.325(1)(a) allowed the employer to request an IME as part of its claim processing obligation. On this record, we disagree with claimant that the employer’s IME request was not “reasonably requested,” *see* OAR 436-060-0095(1), and we find it speculative that the employer did not intend to use the IME for claim closure. We therefore affirm that portion of the ALJ’s order that affirmed WCD’s suspension order.

#### ORS 656.386(1) Attorney Fee - De Facto Denial

On March 23, 2009, we previously concluded that the parties had already litigated the compensability of major depression and panic disorder and that the employer was precluded from denying those conditions. (Ex. 37); *Walker*, 61 Van Natta at 739. On April 10, 2009, the employer modified its acceptance to include “disabling anxiety and depression and acute major depression and panic disorder.” (Ex. 41). On April 14, 2009, claimant objected to the acceptance of “acute major depression and panic disorder,” explaining that the employer needed to accept “major depression and panic disorder” as previously ordered by the Board. (Ex. 42). The employer did not accept or deny the new/omitted medical condition claim within 60 days. *See* ORS 656.262(6)(a).

On June 25, 2009, claimant requested a hearing regarding the employer's *de facto* denial of "major depression and panic disorder." On November 5, 2009, before the case was submitted to the ALJ on the written record, the employer amended the acceptance to include "major depression and panic disorder." (Ex. 66).

The ALJ determined that, because the employer accepted "acute major depression and panic disorder" after the Board's March 23, 2009 order, rather than the condition litigated, the employer "*de facto*" denied claimant's request to accept "major depression and panic disorder." The ALJ noted that claimant had asked for a fee under ORS 656.386(1) in her opening argument, but the ALJ declined to address that issue because claimant had not requested that fee in her June 25, 2009 request for hearing.

Claimant argues that she is entitled to an attorney fee under ORS 656.386(1), because among other reasons, she raised the issue of the fee under ORS 656.386 in her opening written argument and the employer did not object. The employer responds that claimant is not entitled to a fee under ORS 656.386(1) for overcoming the *de facto* denial because she failed to preserve that issue.

As noted above, claimant requested a hearing regarding the *de facto* denial on June 25, 2009 and she requested an attorney fee, citing ORS "656.382, -.262." In lieu of a hearing, the parties submitted written closing arguments. In claimant's opening argument, she raised issues including the *de facto* denial of her major depression and panic disorder, as well as an attorney fee under ORS 656.386 for "successfully overcoming" that *de facto* denial. (Claimant's initial closing argument at 1, 9-10).

In response, the employer contested claimant's assertion that there had been a denial. However, the employer did not object to the ORS 656.386(1) fee request on the basis that it had not been properly raised. Under these circumstances, claimant's attorney fee request can be addressed. *See John A. Silvey, 57 Van Natta 1221, 1223, n 2 (2005)* (because carrier did not object to the claimant's procedural challenge to a denial in written closing arguments, but rather responded to the issue, parties implicitly agreed to litigate the issue).

We turn to the merits of the attorney fee issue. When the employer did not accept or deny the April 14, 2009 omitted condition claim within 60 days, it *de facto* denied that claim. *See* ORS 656.262(6)(a). ORS 656.386(1)(a) provides that "[i]n such cases involving denied claims where an attorney is instrumental in

obtaining a rescission of the denial prior to a decision by the Administrative Law Judge, a reasonable attorney fee shall be allowed.” When the employer accepted “major depression and panic disorder” on November 5, 2009, it rescinded its *de facto* denial of that condition before the ALJ issued the May 3, 2010 order.

We conclude that claimant is entitled to an assessed attorney fee under ORS 656.386(1) for her counsel’s efforts regarding the rescission of the *de facto* denial. We therefore reverse that portion of the ALJ’s order that declined to award an attorney fee under ORS 656.386(1).

Claimant’s attorney is entitled to an assessed fee for services in obtaining a rescission of the employer’s *de facto* denial of major depression and panic disorder. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this issue, we find that a reasonable fee for claimant’s attorney’s services is \$4,000, payable by the employer.<sup>4</sup> In reaching this conclusion, we have particularly considered the time devoted to the denial issue (as represented by the hearing record, claimant’s counsel’s statement of services, and the employer’s objections),<sup>5</sup> the complexity of the issue, the value of the interest involved and benefit secured, and the risk that counsel may go uncompensated.<sup>6</sup>

In addition, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in obtaining a rescission of the employer’s *de facto* denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

---

<sup>4</sup> At the hearing level, claimant’s attorney submitted a statement of services, requesting a total fee of \$9,350 for services at hearing under ORS 656.382(1), ORS 656.386(1), and ORS 656.262(11)(a). Claimant’s attorney did not provide a specific fee request related to services concerning the *de facto* denial. The employer objected to the fee request, arguing that the requested fee was excessive.

<sup>5</sup> The ALJ also awarded a \$3,000 attorney fee under ORS 656.262(11)(a) in connection with the employer’s failure to accept “major depression and panic disorder” in its April 10, 2009 modified notice of acceptance.

<sup>6</sup> Claimant’s counsel is not entitled to an attorney fee award for services on review devoted to the attorney fee issue. *Anthony D. Cayton*, 63 Van Natta 54, 63, *recons* 63 Van Natta 266 (2011); *Amador Mendez*, 44 Van Natta 736 (1992).

---

Refusals to Close - Penalties/Fees

At the hearing level, claimant requested penalties under ORS 656.268(5)(d) and attorney fees under ORS 656.382(1) for the employer's allegedly unreasonable failures to close the claim after her requests for closure on five occasions: March 25, 2009 (Ex. 38); March 31, 2009 (Ex. 38A); April 14, 2009 (Ex. 42); April 23, 2009 (Ex. 42B), and June 11, 2009 (Ex. 48AA).

The ALJ reasoned that when claimant requested closure in March 2009, the reports from Dr. Friedman were over a year old and it was understandable that the employer would want more current information. The ALJ determined that, to obtain that information, the employer scheduled IMEs with Dr. Davies, which claimant did not attend. The ALJ concluded that the employer's refusals to close the claim were not unreasonable and declined to assess a penalty under ORS 656.268(5)(d) or an attorney fee under ORS 656.382(1).

On review, claimant requests a penalty under ORS 656.268(5)(d) for each of the employer's unreasonable refusals to close the claim, based on the compensation ultimately awarded on reconsideration of the Notice of Closure. For the following reasons, we deny claimant's request.

After a worker makes a written request for claim closure, the carrier must issue, within 10 days of receipt of the request, either a Notice of Closure, if the requirements for closure have been satisfied, or a Notice of Refusal to Close, if the requirements for closure have not been met. ORS 656.268(5)(b). A penalty shall be assessed against the carrier if it unreasonably closes or refuses to close a claim after such a request. ORS 656.268(5)(d).

We must determine, through a factual inquiry into the reasonableness of each of the employer's refusals to close the claim under the particular circumstances, whether that conduct was unreasonable and subject to a penalty pursuant to ORS 656.268(5)(d). *Red Robin Int'l v. Dombrosky*, 207 Or App 476, 481 (2006). In doing so, we evaluate whether the legislative policy of the statute to encourage the timely closure of claims is promoted by an award of a penalty. *Cayton v. Safelite Glass Corp.*, 232 Or App 454, 461-62 (2009). A penalty is not automatically imposed whenever the 10-day period is exceeded. There is no penalty available under ORS 656.268(5)(d), so long as the carrier acted reasonably in not responding to the request for closure within that period, even if the 10-day period under ORS 656.268(5)(b) is exceeded. *Fitzsimonds v. MJ Hughes Constr., Inc.*, 233 Or App 447, 454 (2010); *Anthony D. Cayton*, 63 Van Natta 54, 57, *recons*, 63 Van Natta 266 (2011) (on remand).

---

### March 2009 Refusals to Close

On March 23, 2009, we affirmed the ALJ's order in the second round of compensability litigation, concluding that the parties had already litigated the compensability of major depression and panic disorder. We set aside the employer's denial of that condition and remanded the claim to the employer for processing. (Ex. 37); *Walker*, 61 Van Natta at 739.

On March 25, 2009, claimant requested claim closure based on the existing reports from Dr. Friedman. (Ex. 38). Claimant again requested closure on March 31, 2009, based on Dr. Friedman's reports. (Ex. 38A). The employer issued a Notice of Refusal to Close on April 8, 2009, explaining that it needed to schedule an independent closing evaluation to determine the extent of any permanent impairment associated with claimant's accepted condition. (Ex. 39). The employer stated that it was scheduling an independent closing evaluation and would forward that to Dr. Friedman for her opinion. (*Id.*) On April 9, 2009, the employer notified claimant of an IME with Dr. Davies on April 28, 2009 for the purpose of evaluating permanent impairment. (Ex. 40).

In *Cayton*, 232 Or App at 461 n 5, the court explained that if a claimant makes multiple requests for closure where there are no changes in circumstances, we may take those facts into account in considering whether a carrier acted reasonably each time it refused to close a claim. On remand in *Cayton*, we noted that as the court's language makes clear, our consideration of changed circumstances is discretionary, not mandatory. *Anthony D. Cayton*, 63 Van Natta 54, 62 n 8, *recons* 63 Van Natta 266 (2011). As such, we reasoned that a change of circumstances need not be present before a penalty may be awarded under ORS 656.268(5)(d).

Here, the employer did not respond to claimant's March 25, 2009 request for closure within 10 days of claimant's request. That failure to respond constituted a *de facto* refusal to close. The employer issued a Notice of Refusal to Close in response to claimant's March 31, 2009 request for claim closure.

Claimant argues that the employer's refusals to close in response to her March 2009 requests for closure were unreasonable because the employer had sufficient information to determine impairment and close the claim under ORS 656.268. She contends that the employer was not free to refuse to close the claim while it sought an IME because it had made no efforts to seek clarification from Dr. Friedman, who had already provided impairment findings. Claimant reasons

that the statutes and administrative rules do not allow a carrier to refuse to close a claim in order to obtain an IME to contradict the attending physician's findings. She contends that if an employer is not satisfied with an attending physician's findings, its remedy is to close the claim based on those findings and then request reconsideration and a medical arbiter examination. *See* ORS 656.268(5)(c).

The employer replies that its refusals to close the claim in response to claimant's March 25 and March 31, 2009 requests for closure were not unreasonable because, at that time, the most recent information from Dr. Friedman was her February 22, 2008 report and March 4, 2008 deposition. (Exs. 25, 26). Explaining that it needed to schedule an IME to determine the extent of claimant's impairment, the employer intended to forward that report to Dr. Friedman for her opinion. (Ex. 39).

After considering these circumstances, we do not find that the employer unreasonably refused to close the claim. In requesting the IME with Dr. Davies, the employer was exercising a statutory right granted under ORS 656.325(1)(a). Based on the information from Dr. Friedman as of March 2009, we are not persuaded that it was unreasonable for the employer to request updated information before closing the claim.<sup>7</sup>

Considering the totality of the circumstances surrounding the employer's refusals to close in response to claimant's March 2009 requests for closure, we conclude that employer did not act unreasonably in refusing to close the claim. *See Cayton*, 63 Van Natta at 60 (no penalty awarded under ORS 656.268(5)(d) where the record established that the employer had considered the impairment findings of the attending physician to be vague and consequently, it arranged an IME). We conclude that claimant is not entitled to a penalty under ORS 656.268(5)(d).

Furthermore, claimant's attorney is not entitled to an attorney fee under ORS 656.382(1). For the reasons expressed above, we are not persuaded that the employer unreasonably delayed or unreasonably resisted the payment of compensation. *Compare Onecimo Duran-Escalante*, 62 Van Natta 1980, 1983 (2010) (although it was reasonable for the employer to conclude that it had

---

<sup>7</sup> In this regard, we note that Dr. Friedman's February 2008 report rated claimant's impairment, but she also explained that the adversarial manner of the claim had "contributed to exacerbation and perpetuation of [claimant's] anxiety and depressive symptoms." (Ex. 25-2). Such a comment suggests some confusion about the percentage of claimant's impairment related to the accepted conditions, compared with intervening events.

insufficient information to determine impairment, because it did not obtain that additional information until five months later, the employer's conduct unreasonably resisted the payment of compensation).

#### April 2009 Refusals to Close

After our March 23, 2009 order, the employer modified its acceptance on April 10, 2009 to include "acute major depression and panic disorder." (Ex. 41). On April 14, 2009, claimant objected to that acceptance and requested an amended acceptance of "major depression and panic disorder" as previously requested. Claimant also objected to the employer's proposed IME, arguing that Dr. Friedman's reports included sufficient information to close the claim. In addition, claimant requested claim closure based on Dr. Friedman's August 2007 and February 2008 reports. (Ex. 42).

On April 23, 2009, claimant again requested claim closure. The employer did not respond to claimant's April 14, 2009 or April 23, 2009 refusals to close within 10 days of receipt.

We are not persuaded that the employer's *de facto* refusals to close the claim in response to claimant's April 2009 requests for closure were unreasonable. At that time, the most recent information from Dr. Friedman was her February 22, 2008 report and March 4, 2008 deposition. (Exs. 25, 26). Although the employer could have requested new information from Dr. Friedman, we do not find it unreasonable for it to schedule an IME to determine the extent of claimant's impairment and then forward that report to Dr. Friedman.

Considering the totality of the circumstances surrounding the refusals to close in response to claimant's April 2009 requests for closure, we conclude that employer did not act unreasonably in refusing to close the claim. *See Cayton*, 63 Van Natta at 61-62 (employer did not act unreasonably in obtaining an IME for purposes of clarifying permanent impairment; no penalty awarded under ORS 656.268(5)(d)). We conclude that claimant is not entitled to a penalty under ORS 656.268(5)(d) or an attorney fee under ORS 656.382(1) regarding the employer's April 2009 *de facto* refusals to close the claim.

#### June 11, 2009 Refusal to Close

On June 11, 2009, claimant again requested claim closure based on Dr. Friedman's findings. (Ex. 48AA). Because the employer did not respond to the June 11, 2009 refusal to close within 10 days, the employer *de facto*

refused to close the claim. The basic circumstances remained the same as the aforementioned refusals to close in that the most recent information from Dr. Friedman was her February 22, 2008 report and March 4, 2008 deposition. (Exs. 25, 26). Under these circumstances, we do not find it unreasonable for the employer to schedule an IME to obtain updated information and determine the extent of claimant's impairment.

Moreover, the employer had scheduled an April 28, 2009 IME to evaluate claimant's impairment, but claimant did not attend. In addition, as of claimant's June 11, 2009 request for closure, the employer had scheduled another IME for June 15, 2009, which claimant also did not attend. Thus, notwithstanding the employer's attempts to schedule an IME to determine claimant's impairment, it was unable to accomplish that goal because claimant did not attend the IME.

Considering the totality of the circumstances surrounding the employer's refusals to close in response to claimant's June 11, 2009 request for closure, we conclude that employer did not act unreasonably in refusing to close the claim. Consequently, claimant is not entitled to a penalty under ORS 656.268(5)(d) or an attorney fee under ORS 656.382(1) regarding the employer's June 2009 *de facto* refusal to close the claim.

#### Other Penalties and Fees

The ALJ determined that, based on our March 23, 2009 order setting aside the employer's denial of "major depression and panic disorder," the employer should have accepted those conditions when it issued its April 10, 2009 acceptance. Because the employer did not provide an adequate explanation for its failure to accept the claim as we directed, the ALJ concluded that the employer's April 2009 modified acceptance was unreasonable. The ALJ found that there were no amounts due on which to base a penalty under ORS 656.262(11)(a). However, based on *Nancy Ochs*, 59 Van Natta 1785 (2007), the ALJ awarded a \$3,000 attorney fee under ORS 656.262(11)(a).

On review, claimant argues that the ALJ erred by declining to assess a penalty under ORS 656.262(11)(a). She contends that penalties should have been assessed based on the amount ultimately awarded for permanent disability after the employer accepted "major depression and panic disorder" in November 2009. Claimant argues that our award of a penalty under ORS 656.268(5)(d) in *Walker*, 62 Van Natta at 520, would support a finding that there were "amounts then due" for purposes of assessing a penalty under ORS 656.262(11)(a). We disagree.

Under ORS 656.262(11)(a), if a carrier unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the carrier shall be liable for an additional amount up to 25 percent of the “amounts then due,” plus “penalty-related” attorney fees.

We find that claimant’s reliance on *Walker*, 62 Van Natta at 520, is misplaced. In that case, we awarded an attorney fee under ORS 656.262(11)(a), but not a penalty under that statute because there were no “amounts then due” upon which to base a penalty. *Id.* at 525. We assessed a penalty under ORS 656.268(5)(d) for the employer’s unreasonable refusal to close the claim. We explained that the penalty would be “based on compensation determined at claim closure.” *Id.* at 527. We also found that the employer’s claim processing was unreasonable pursuant to ORS 656.262(11)(a). However, because the record did not indicate that there were any “amounts then due” upon which to base a penalty, we did not assess a penalty under ORS 656.262(11)(a). Nevertheless, we awarded an attorney fee under ORS 656.262(11)(a), citing *Ochs*, 59 Van Natta at 1793. *Walker*, 62 Van Natta at 525.

Here, we agree with the ALJ’s conclusion that claimant is not entitled to a penalty under ORS 656.262(11)(a) because there were no “amounts then due.” In *Walker*, we explained that the ORS 656.268(5)(d) penalty was to be “based on compensation determined at claim closure.” 62 Van Natta at 527. However, the November 5, 2009 Notice of Closure did not award permanent disability or any additional temporary disability. (Ex. 67).

We turn to the ALJ’s decision that claimant was not entitled to a penalty or fee for the employer’s allegedly unreasonable refusal to process the claim after our March 23, 2009 order.

The ALJ explained that the employer amended its acceptance on April 10, 2009, fewer than 30 days after our March 23, 2009 order. The ALJ reasoned that ORS 656.262(7)(c) did not specify a time within which a carrier must issue an amended acceptance following a litigation order that directed the carrier to accept additional conditions and, therefore, the employer was not required to issue an amended acceptance before April 10, 2009. The ALJ concluded that claimant did not establish entitlement to a penalty or fee on the basis of “refusal to process” the claim.

On review, claimant argues that the flaw in the ALJ’s reasoning is that the employer did not accept the condition it was ordered to accept on March 23, 2009 until November 2009, almost eight months later. She contends that an eight month delay in accepting the conditions ordered accepted by the Board is not reasonable.

The employer responds that claimant is not entitled to a penalty for the alleged failure to process the claim because no statute, rule, or precedent required it to accept and process the claim before our March 23, 2009 order became final. The employer contends that, even if it was required to accept the omitted conditions before our order became final, the failure to do so was not unreasonable because it issued the April 10, 2009 acceptance within a reasonable time after the March 23, 2009 order. We disagree with the employer's contention.

The employer raised a similar argument in *Walker*, 62 Van Natta at 520, which we rejected. We reach a similar conclusion here. On March 23, 2009, we affirmed an ALJ's order that set aside the employer's denial of the omitted condition claim for "major depression and panic disorder" and remanded the claim to the employer for processing. (Ex. 37-4, -5). However, the employer decided to accept "acute major depression and panic disorder" on April 10, 2009. (Ex. 41; emphasis added). On April 14, 2009, claimant objected to the acceptance of "acute major depression and panic disorder, explaining that the employer needed to accept "major depression and panic disorder" as previously ordered by the Board. (Ex. 42). The employer eventually accepted "major depression and panic disorder" on November 5, 2009. (Ex. 66).

The employer has not offered a persuasive explanation for its nearly seven-month delay. We find that the employer's delay in accepting "major depression and panic disorder" as it was directed to do on March 23, 2009 constitutes an unreasonable delay in the acceptance of a claim under ORS 656.262(11)(a). We distinguish the delay in accepting the omitted condition claim from the employer's unreasonable acceptance of "acute" major depression and panic disorder on April 10, 2009, which we find constitutes a separate act of conduct. *See SAIF v. Batey*, 153 Or App 634, 639, *recons*, 155 Or App 21 (1998), *rev den*, 328 Or 330 (1999) (carrier's actions were considered separate acts of misconduct under ORS 656.262(11)(a) because they involved separate processing requirements). Even assuming that the employer's acceptance of "acute" major depression and panic disorder on April 10, 2009 was a simple typographical error, claimant noted the mistake on April 14, 2009 and reminded the employer that it should accept "major depression and panic disorder" as previously ordered by the Board. (Ex. 42). We conclude that the employer's more than seven month delay in accepting the appropriate condition after our March 23, 2009 order is unreasonable.

Although 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) 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).

After considering the aforementioned factors, we find that a reasonable attorney fee under ORS 656.262(11)(a) for the employer's unreasonable delay for services at the hearing level is \$2,000, payable by the employer.<sup>8</sup> In reaching this conclusion, we find this award proportionate to the benefit to claimant, giving primary consideration to the results achieved and the time devoted to the case (as represented by the record, claimant's counsel's statement of services, and the employer's objections).<sup>9</sup>

Claimant also argues that she is entitled to an attorney fee under ORS 656.382(1) for the employer's unreasonable *de facto* denial of "major depression and panic disorder." She contends that ORS 656.382(1) allows an attorney fee where an employer "otherwise unreasonably resists the payment of compensation."

We are not persuaded that the employer's unreasonable *de facto* denial of "major depression and panic disorder" constitutes separate misconduct from the employer's unreasonable delay in accepting "major depression and panic disorder," for which we have already assessed an attorney fee under ORS 656.262(11)(a). Consequently, claimant is not entitled to an attorney fee under ORS 656.382(1).

### ORDER

The ALJ's order dated May 3, 2010 is affirmed in part and reversed in part. That portion of the ALJ's order that declined to assess an attorney fee under ORS 656.262(11)(a) for the employer's delay in accepting "major depression and

---

<sup>8</sup> As we explained earlier, claimant's attorney submitted a statement of services at hearing, requesting a total fee of \$9,350 for services at hearing under ORS 656.382(1), ORS 656.386(1), and ORS 656.262(11)(a). Claimant's attorney did not provide a specific fee request related to services concerning the employer's unreasonable delay in the acceptance of the omitted condition claim. The employer objected to the fee request, arguing that the requested fee was excessive.

<sup>9</sup> The ALJ also awarded a \$3,000 attorney fee under ORS 656.262(11)(a) in connection with the employer's failure to accept "major depression and panic disorder" in its April 10, 2009 modified Notice of Acceptance. Furthermore, claimant is not entitled to an attorney fee for services on review related to the attorney fee issue. See *Anthony D. Cayton*, 63 Van Natta 54, 63, *recons* 63 Van Natta 266 (2011); *Amador Mendez*, 44 Van Natta 736 (1992).

panic disorder” is reversed. Claimant’s attorney is awarded \$2,000 under ORS 656.262(11)(a), payable by the employer. For services in obtaining a rescission of the employer’s *de facto* denial of major depression and panic disorder, claimant’s attorney is awarded an assessed fee of \$4,000, payable by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in obtaining a rescission of the employer’s *de facto* denial, to be paid by the employer. The remainder of the ALJ’s order is affirmed.

Entered at Salem, Oregon on March 15, 2011

Member Weddell concurring in part and dissenting in part.

For the following reasons, I dissent from those portions of the majority’s opinion regarding the propriety of the suspension order, as well as attorney fees and penalties related to the employer’s unreasonable refusals to close.

#### July 6, 2009 Suspension Order

The majority affirms WCD’s July 6, 2009 suspension order, finding that the employer strictly complied with the administrative rules and rejecting claimant’s argument that she was justified in not attending the IME. I disagree with both conclusions for the following reasons.

WCD’s suspension order should be reversed because the employer’s suspension request did not strictly comply with OAR 436-060-0095(8)(b), which required the employer to include the “claim status and any accepted or newly claimed conditions.” The employer’s June 16, 2009 suspension request referred only to its April 10, 2009 acceptance. (Ex. 50-2). But OAR 436-060-0095(8)(b) required the employer to specify all conditions that had been accepted and all conditions that were now claimed, but not yet accepted. “Any” in this context is synonymous with “every.” See *Fleming v. United Servs. Auto. Ass’n*, 329 Or 449, 456 (1999), *modified on recons*, 330 Or 62 (2000) (in context, “any” is synonymous with “every”); *Dickinson v. Leer*, 255 Or 274, 276-77 (1970) (“any” is an adequate term to express “every”).

The employer’s June 16, 2009 suspension request did not comply with OAR 436-060-0095(8)(b) because it did not refer to the previously accepted “anxiety with depression” or the conditions requested by claimant, but which were not yet accepted, *i.e.*, “major depression and panic disorder.” (Ex. 50). In addition, the employer’s suspension request did not mention that claimant had

---

requested claim closure or that the employer had refused to close the claim. I also note that WCD's suspension order incorrectly referred to the employer's April 10, 2009 acceptance as "major depression and panic disorder" (Ex. 53-5), when that condition was not accepted until November 2009.

Notice given by a carrier must be in strict compliance with the applicable rule for an administrative closure to be proper. *Paniagua v. Liberty Northwest Ins. Corp.*, 122 Or App 288 (1993) (Board must first determine whether carrier's notice complied with applicable rules); *Jim D. Edwards Jr.*, 59 Van Natta 2332, 2336 (2007).

Here, because the employer's suspension request did not strictly comply with the requirements of OAR 436-060-0095(8)(b), WCD's suspension order should be reversed. *See* OAR 436-060-0095(12) (failure to comply with one or more of the requirements in the rule may be grounds for denying the carrier's suspension request). OAR 436-060-0095(8)(b) was not intended to allow the carrier to choose what information it wanted to give to WCD. Moreover, the employer's suspension request was misleading in its omissions. I would find that WCD erred when issuing the suspension order because the employer did not strictly comply with OAR 436-060-0095(8)(b).

Furthermore, even assuming that the employer complied with OAR 436-060-0095(8)(b), claimant was justified in not attending the June 15, 2009 IME. OAR 436-060-0095(1) provides that a worker is not entitled to compensation when the worker refuses or fails to submit to an IME "reasonably requested" by the carrier. Based on the employer's pattern of conduct in this case, I would find that the June 15, 2009 IME with Dr. Davies was not "reasonably requested."

The employer's June 15, 2009 IME notice to claimant stated that the purpose of the IME was "to evaluate permanent impairment." (Ex. 46). But Dr. Friedman, claimant's attending physician, had already provided impairment findings. *See* ORS 656.245(2)(b)(C) ("[e]xcept 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").

At least by February 22, 2008, the employer had sufficient information to close the claim based on information from Dr. Friedman. (Exs. 14, 25). In fact, Dr. Friedman's findings were found sufficient to award claimant permanent partial disability (PPD) in the March 26, 2008 Order on Reconsideration. (Ex. 28). However, in subsequent litigation, the PPD award was reduced to zero because the only condition subject to closure at that time was "anxiety with depression" and there was no medical evidence that attributed impairment to that particular condition, which never should have been accepted in the first place. (Exs. 33, 46A); *Joy M. Walker*, 61 Van Natta 1513 (2009). If the employer had accepted the appropriate conditions that had been litigated, claimant's claim could have been closed much earlier.

On March 23, 2009, we concluded that the parties had already litigated the compensability of major depression and panic disorder and that the employer was precluded from denying those conditions. (Ex. 37); *Joy M. Walker*, 61 Van Natta 739, 742 (2009). On April 8, 2009, the employer refused to close the claim, asserting that it needed to schedule an independent closing evaluation to determine claimant's impairment. (Ex. 39). Why? Dr. Friedman had already provided impairment findings. If the employer needed updated information, it could have sought clarification from Dr. Friedman, but it did not do so. I agree with claimant that the IME with Dr. Davies was not "reasonably requested" as required by OAR 436-060-0095(1).

Claimant further contends that the reason for the IME with Dr. Davies was to provide an opinion that the employer's acceptance of "acute" depression, which never should have been accepted, had resolved without impairment and that claimant's current impairment was due to events unrelated to the 2004 work incident. She argues that the employer planned to use the purported IME closure to deny further responsibility for the claim, much as it had done in 2007 after the IMEs with Drs. Glass and Wicher. (Exs. 13, 16, 17, 18, 19).

Claimant's argument is supported by the employer's letter to Dr. Davies, which explained, in part:

"The notes of Dr. Friedman indicate claimant has had significant personal problems unrelated to the industrial injury. Employer believes that any residual impairment is attributable to those personal issues. Drs. Glass and Wicher have agreed with this previously. Dr. Friedman has not. This examination has been scheduled for purposes of trying to sort out those issues."  
(Ex. 42A-2).

What was there to sort out? For the purpose of rating claimant's PPD, only the opinions of claimant's attending physician at the time of claim closure, or any findings with which he or she concurred, and a medical arbiter's findings may be considered. *See* ORS 656.245(2)(b)(C); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty N.W. Ins. Corp.*, 125 Or App 666 (1994). The employer's letter to Dr. Davies was not simply asking for updated information. Rather, the employer was specifically inviting Dr. Davies to provide information to support its contention that claimant's impairment is attributable to her personal issues. Dr. Friedman had already rejected that conclusion. The record provides no support for the conclusion that Dr. Friedman would concur with Dr. Davies's findings. In light of the employer's pattern of conduct throughout this claim, I agree with claimant that the IME with Dr. Davies was not reasonably requested. Claimant was justified in not attending the IME and the suspension order should be reversed.

#### Refusals to Close - Penalties/Fees

The majority concludes that claimant is not entitled to penalties under ORS 656.268(5)(d) or attorney fees under ORS 656.382(1) concerning claimant's five requests for closure. By not awarding penalties or fees, the majority is effectively condoning the employer's outrageous claim processing in this case, which is contrary to the statutory scheme.

It is important to evaluate the employer's actions regarding these five refusals to close the claim in light of the totality of circumstances and the employer's questionable conduct during the entire claim, which I summarize as follows. After the initial compensability litigation, the employer accepted "anxiety with depression" in July 2007, which had not been diagnosed by Dr. Friedman. (Ex. 12). The employer denied claimant's request to modify the acceptance to include major depression and panic disorder, which was diagnosed by Dr. Friedman in July 2004. (Exs. 15, 19). On September 9, 2008, ALJ Mills set aside the denial, finding that it was precluded by prior litigation. (Ex. 29). Claimant requested claim closure on October 9, 2008. (Ex. 32). On October 17, 2008, the employer declined to do so, explaining that no further processing would be performed until there was a "final determination" regarding ALJ Mills's September 9, 2008 order. (Ex. 35).

Claimant requested a hearing regarding the employer's refusal to close the claim in response to her October 9, 2008 request for closure, which resulted in a June 11, 2009 order from ALJ McCullough. (Ex. 48). That order was appealed

---

and we issued our order on March 2, 2010. *Joy M. Walker*, 62 Van Natta 520 (2010). Among other things, we concluded that the employer's explanation for refusing to close the claim was based on an unreasonable premise that it was not required to reopen the claim pending its appeal of ALJ Mills's 2008 compensability decision. We concluded that the employer unreasonably refused to close the claim and awarded a penalty under ORS 656.268(5)(d), as well as a related attorney fee under ORS 656.382(1). *Id.* at 526-27.

In reaching our conclusion, we rejected the employer's argument that its refusal to close the claim was not unreasonable because it lacked sufficient information to determine permanent disability. We explained that, to the extent the record lacked such information, that deficiency was attributable to the employer's position that it had no responsibility to process the claim until the claim was finally determined to be compensable after all appeals had ended. We concluded that the lack of sufficient information was the result of the employer's failure to process the claim and that, because the employer's position was unreasonable, its refusal to close the claim was likewise unreasonable. *Id.* at 527 n 5.

In the meantime, on March 23, 2009, we affirmed ALJ Mills's September 2008 order, concluding that the parties had already litigated the compensability of major depression and panic disorder and that the employer was precluded from denying those conditions. (Ex. 37); *Walker*, 61 Van Natta at 739.

Despite the fact that we expressly set aside the employer's denial of the omitted condition claim for "major depression and panic disorder" (Ex. 37-4, -5), the employer decided to accept "*acute* major depression and panic disorder." (Ex. 41; emphasis added). On April 14, 2009, claimant appropriately objected to the acceptance of "acute major depression and panic disorder," explaining that the employer needed to accept "major depression and panic disorder" as previously ordered by the Board. (Ex. 42). The employer eventually accepted that condition on November 5, 2009. (Ex. 66).

With that background in mind, I turn to claimant's March 25, and March 31, 2009 requests for claim closure, based on Dr. Friedman's reports. (Exs. 38, 38A). The employer de facto refused to close the claim based on claimant's March 25 request and issued a Notice of Refusal to Close on April 8, 2009, explaining that it needed to schedule an IME to determine the extent of impairment and stated that it would forward the IME to Dr. Friedman for her opinion. (Ex. 39).

On review, the employer recycles its argument from the previous litigation, *Walker*, 62 Van Natta at 520, that claimant had no authority to request claim closure. In that case, the employer argued that the words “found compensable” in ORS 656.262(7)(c)<sup>10</sup> meant an express acceptance of a condition or final determination that a condition is compensable. *Id.* at 521-22. We rejected that argument, explaining that a claim is considered accepted, albeit involuntarily, on the issuance of a litigation order that finds the claim compensable. *Id.* at 522. Therefore, we concluded that the employer was required to reopen and process the mental disorder claim found compensable in ALJ Mills’s 2008 order. *Id.*

Here, claimant’s omitted condition claim for “major depression and panic disorder” was found compensable by ALJ Mills on September 9, 2008, and in turn by us on March 23, 2009. Thus, as of September 9, 2008, that claim was considered accepted. *Id.* at 522. The employer’s arguments that claimant had no “authority” to request closure and that it had not yet “accepted” the new conditions at the time of claimant’s March 2009 requests for closure are without merit and provide no basis for refusing to close the claim.

Furthermore, I disagree with the majority’s conclusion that claimant is not entitled to a penalty because it was not unreasonable for the employer to obtain updated information before closing the claim. The record indicates that at least by February 22, 2008, the employer had sufficient information to close the claim based on information from Dr. Friedman. (Exs. 14, 25). WCD determined that those findings were sufficient to award claimant PPD in the March 26, 2008 Order on Reconsideration. (Ex. 28). But the PPD award was reduced to zero because the only condition subject to closure at that time was “anxiety with depression.” (Exs. 33, 46A). If the employer had accepted the appropriate conditions that had been litigated, claimant’s claim could have been closed much earlier.

If the employer believed that it needed more current information from Dr. Friedman, or if it had any real doubt whether Dr. Friedman’s findings were due to the accepted conditions, it would have requested such information from her. The employer made no such efforts and had not requested any information from Dr. Friedman since the March 2008 deposition.

---

<sup>10</sup> ORS 656.262(7)(c) provides that “[i]f a condition is found compensable after claim closure, the insurer or self-insured employer shall reopen the claim for processing regarding that condition.”

Instead, the record establishes that the employer sought an IME to *contradict* Dr. Friedman's opinion because it did not agree with her impairment findings. As discussed earlier, claimant contends that the reason for the IME with Dr. Davies was to provide an opinion that the employer's acceptance of "acute" depression, which never should have been accepted, had resolved without impairment and that her current impairment was due to events unrelated to the 2004 work incident. She argues that the employer planned to use the purported IME closure to deny further responsibility for the claim.

The employer's letter to Dr. Davies provides support for claimant's arguments. The employer informed Dr. Davies that there was "currently some dispute as to whether the major depression should be classified as 'acute.'" (Ex. 42A-1). But there is no evidence in the record of any such dispute because no medical provider had diagnosed "acute major depression." The employer further stated that "[i]t is employer's belief that claimant suffered no residual permanent impairment as a result of the stress claim" and further stated that it believed that claimant's "residual impairment" was attributable to her personal issues. (Ex. 42A-2). I agree with claimant that the purpose of the IME was for goals other than simply obtaining information to close the claim.

If the employer was not satisfied with Dr. Friedman's findings and wanted to challenge them, the employer's remedy was to close the claim based on those findings and then request reconsideration and a medical arbiter examination. *See* ORS 656.268(5)(c).<sup>11</sup> By allowing a carrier to request reconsideration of its closure, the legislature anticipated situations in which a carrier might disagree with the attending physician's findings. ORS 656.268(5)(c) is consistent with the legislative policy of ORS 656.268(5)(d), which is to promote the timely closure of claims. *See Cayton*, 232 Or App at 460, 462.

Rather than following the statutory scheme, the employer asserted that it needed Dr. Davies's opinion to evaluate claimant's impairment. For the purpose of rating claimant's PPD, however, only the opinions of claimant's attending physician at the time of claim closure, or any findings with which he or she concurred, and a medical arbiter's findings may be considered. The employer chose not to seek a remedy via ORS 656.268(5)(c), which would have allowed a medical arbiter examination. The only way that Dr. Davies's opinion could be

---

<sup>11</sup> ORS 656.268(5)(c) provides, in part: "A request for reconsideration by an insurer or self-insured employer may be based only on disagreement with the findings used to rate impairment and must be made within seven days of the date of the notice of closure."

---

considered for purposes of rating claimant's disability would be if Dr. Friedman concurred with his findings. But the employer specifically invited Dr. Davies to provide information to support its contention that claimant's impairment was attributable to her personal issues. Dr. Friedman has already rejected that conclusion. Based on this record, there is no reasonable basis for concluding that Dr. Friedman would concur with Dr. Davies's findings.

Considering the totality of circumstances, I would find that the employer's refusals to close the claim in response to claimant's March 2009 requests for closure were unreasonable. Claimant is entitled to a penalty under ORS 656.268(5)(d) and an attorney fee under ORS 656.382(1). The legislative policy of ORS 656.268(5)(d) to encourage the timely closure of claims would be promoted by these penalties. *See Cayton*, 232 Or App at 462.

I reach a similar conclusion regarding the employer's refusals to close the claim in response to claimant's April 14 and April 23, 2009 requests for closure. The record does not include new information after claimant's March 2009 requests for closure that would provide a justification for the employer's refusals to close the claim. For the reasons discussed above, I conclude that the employer's conduct was unreasonable and that claimant is entitled to a penalty under ORS 656.268(5)(d) and an attorney fee under ORS 656.382(1).

Likewise, because the employer did not respond to claimant's June 11, 2009 request for closure within 10 days, the employer *de facto* refused to close the claim. Because the record does not provide a sufficient justification for the employer's continued refusal to close the claim, I would again award a penalty under ORS 656.268(5)(d) and an attorney fee under ORS 656.382(1) regarding claimant's June 11, 2009 request for closure.

The majority alternatively reasons that no penalty is available under ORS 656.268(5)(d) because there were no amounts due at the time of the November 5, 2009 Notice of Closure, which did not award permanent disability or any additional temporary disability. (Ex. 82). However, I agree with claimant that the penalty assessment under ORS 656.268(5)(d) should be based on claimant's permanent disability ultimately awarded on reconsideration. (Ex. 86).