In the Matter of the Compensation of
JOY M. WALKER, Claimant
WCB Case No. 09-06234
ORDER ON REVIEW
Fontana & Takaro, Claimant Attorneys
Scheminske et al, Defense Attorneys

Reviewing Panel: Members Lowell, Weddell, and Herman. Member Weddell dissents.

Claimant requests review of Administrative Law Judge (ALJ) Ogawa's order that declined to assess penalties and attorney fees for the self-insured employer's allegedly unreasonable delay/refusal to close her claim. On review, the issues are penalties and attorney fees. We affirm.

FINDINGS OF FACT

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

In April 2004, claimant filed a stress claim, which was denied by the employer. (Exs. 2, 3). Claimant was treated by Dr. Friedman, psychiatrist. On August 8, 2005, ALJ Mills set aside the employer's May 2004 denial. (Ex. 13). That order was affirmed by the Board and by the Court of Appeals. (Exs. 15, 17). *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. 21).

On August 20, 2007, claimant requested modification of the acceptance to include major depression and panic disorder without agoraphobia. (Ex. 20). The employer denied the omitted medical condition claim for major depression and panic disorder without agoraphobia. (Ex. 30). On September 9, 2008, ALJ Mills set aside the employer's denial and that order was affirmed by the Board on March 23, 2009. (Exs. 43, 53). *Joy M. Walker*, 61 Van Natta 739 (2009).

In light of the Board's March 23, 2009 order, claimant requested claim closure on March 25, 2009 and March 31, 2009, based on Dr. Friedman's reports. (Exs. 54, 55). 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. 56). The employer notified claimant of an independent medical examination (IME) on April 28, 2009 with Dr. Davies, psychologist. (Exs. 57, 60).

On April 10, 2009, the employer modified its acceptance to include "disabling anxiety and depression and acute major depression and panic disorder." (Ex. 58). 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 closing examination, requesting that the employer close the claim based on Dr. Friedman's existing reports. (Ex. 59).

Claimant's attorney instructed claimant not to attend the IME with Dr. Davies and she did not attend the April 28, 2009 examination. (Exs. 61, 62). On May 6, 2009, the employer requested the suspension of claimant's benefits for failure to attend the IME. (Exs. 62Aa, 62A, 62B, 62C, 62D. 62Dd). On May 26, 2009, the Workers' Compensation Division (WCD) issued an order denying the suspension request based on the employer's failure to comply with the administrative rules. (Ex. 62F).

The employer scheduled another IME with Dr. Davies for June 15, 2009. (Exs. 63, 64). Claimant's attorney instructed claimant not to attend the June 15, 2009 examination, asserting that Dr. Davies was not authorized to conduct IMEs pursuant to ORS 656.325. (Ex. 67). Claimant did not appear at the June 15, 2009 IME. (Ex. 69).

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. (Exs. 70, 72). 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. (Exs. 73, 77). Thereafter, claimant requested a hearing regarding the WCD suspension order. (Ex. 80A-4).

On September 24, 2009, Dr. Friedman responded to claimant's attorney's request to perform a new closing examination. (Ex. 79). On September 30, 2009, claimant requested claim closure based on Dr. Friedman's September 24, 2009 report. (Ex. 80).

The employer issued a Notice of Closure on November 5, 2009, explaining that the claim was reopened to process new conditions and was "being closed pursuant to Order Suspending Compensation Pursuant to ORS 656.325 dated

7-6-09." The Notice of Closure stated that claimant was not entitled to permanent disability "under the provisions of this administrative closure." (Ex. 82). Claimant requested reconsideration. (Ex. 83). A January 13, 2010 Order on Reconsideration awarded 35 percent unscheduled permanent partial disability (PPD), based on Dr. Friedman's report.[1] (Ex. 86).

Claimant requested a hearing regarding the employer's allegedly unreasonable refusal to close the claim under ORS 656.268(5)(b), requesting penalties under ORS 656.268(5)(d) and ORS 656.262(11), as well as attorney fees under ORS 656.382.

CONCLUSIONS OF LAW AND OPINION

In written closing arguments to the ALJ, the employer conceded that its decision not to close the claim within 10 days of claimant's September 30, 2009 request for claim closure constituted a "refusal to close" for purposes of ORS 656.268(5)(d). However, the employer argued that its conduct was not unreasonable for the following reasons: it had insufficient information to close the claim; Dr. Friedman rendered inconsistent opinions regarding claimant's impairment; and claimant failed to attend Mr. Davies' closing examination.

The ALJ explained that, pursuant to the July 6, 2009 Suspension Order, the employer administratively closed the claim on November 5, 2009. The ALJ reasoned that the employer was required to "[r]ate all permanent disability apparent in the record (e.g., irreversible findings) at the time of claim closure" pursuant to OAR 436-030-0034(1)(e), which meant that the employer was not required to have "sufficient information" from Dr. Friedman in order to administratively close the claim. The ALJ found that the employer failed to provide an explanation (other than the lack of specific rules) for its delay in issuing the administrative claim closure. Nevertheless, the ALJ reasoned that the employer's obligation to close the claim during the pendency of the Suspension Order was unclear and that the employer had a legitimate doubt about its obligation to close the claim because the Suspension Order was ambiguous as to when the suspension of benefits ended. The ALJ concluded that the employer had a legitimate doubt about its obligation to close the claim. Consequently, the ALJ declined to assess penalties and attorney fees.

[1] The employer states that both parties have requested a hearing regarding the January 13, 2010 Order on Reconsideration.

On review, claimant contends that the WCD suspension order did not suspend the employer's obligation to process the claim. She argues that, pursuant to OAR 436-060-0095(11), the employer was required to close the claim as of September 4, 2009. Claimant contends that, pursuant to OAR 436-030-0034(1)(d), the employer was required to rate her permanent impairment based on Dr. Friedman's findings.

The employer argues that its refusal to close the claim was not unreasonable because the record did not include sufficient information to determine permanent disability related to the newly accepted conditions and because it had a legitimate doubt as to its liability due to the July 6, 2009 suspension order.

We begin with the employer's argument concerning the suspension order because we find it dispositive. ORS 656.268(5)(b) provides, in part:

> "If the insurer or self-insured employer has not issued a notice of closure, the worker may request closure. Within 10 days of receipt of a written record request from the worker, the insurer or self-insured employer shall issue a notice of closure if the requirements of this section have been met or a notice of refusal to close if the requirements of this section have not been met."

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."

At issue is claimant's September 30, 2009 request for closure, which was based on Dr. Friedman's September 24, 2009 report. (Ex. 80). The employer does not dispute that it received claimant's request on September 30, 2009. Therefore, pursuant to ORS 656.268(5)(b), the employer was required to issue a notice of closure or a notice of refusal to close within 10 days after receiving the request for closure, *i.e.*, by October 10, 2009. The employer concedes that there was a *de facto* refusal to close the claim.

We must determine, through a factual inquiry into the reasonableness of the employer's refusal 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).

Here, as of September 30, 2009, when claimant requested closure, the WCD July 6, 2009 suspension order was still in effect. On June 16, 2009, the employer had requested the suspension of her benefits for failure to attend the June 15, 2009 IME with Dr. Davies. (Exs. 70, 72).

On July 6, 2009, WCD issued an order suspending claimant's benefits, explaining that her explanation for the failure to attend the June 15, 2009 IME was unreasonable. (Exs. 73, 77). Citing OAR 436-060-0095(9),[2] the order explained that the appropriate effective date for suspension of claimant's benefits was the date she failed to attend the June 15, 2009 IME. (Ex. 73-5). The order further explained:

> "*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*.
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> "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).

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[2] OAR 436-060-0095(9) (WCD Admin. Order 08-065; eff. January 1, 2009) provides, in part:

> "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 or director. Any delay in requesting consent for suspension may result in authorization being denied or the date of authorization being modified."

The record does not indicate that claimant submitted to an IME after July 6, 2009 or that she made an effort to have compensation benefits reinstated within 60 days of the date of the suspension order. Instead, on July 22, 2009, claimant requested a hearing regarding the WCD suspension order.[3] (Ex. 80A-4). Thus, when claimant requested claim closure on September 30, 2009, she was, in effect, simultaneously contesting the propriety of the suspension order.

For the following reasons, we find that the July 6, 2009 suspension order apparently included inconsistent information regarding its duration. The 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. 73-5; italics in original). Based on that language, because claimant had not consented to an IME as of September 30, 2009, the suspension was still effective.

The suspension order also stated that where, as here, "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*.) That language in the suspension order gave the employer the discretion to close the claim if claimant did not make an effort to have compensation benefits reinstated within 60 days of the July 6, 2009 suspension order. Based on that language, as of claimant's September 30, 2009 request for closure, the employer had the discretion to close the claim 60 days after July 6, 2009 (*i.e*., after September 4, 2009), and upon claim closure, the suspension order would then terminate.

OAR 436-060-0095(11) (WCD Admin. Order 08-065; eff. January 1, 2009) provides:

> "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)*." (Emphasis added).

Pursuant to OAR 436-060-0095(11), because there is no evidence that claimant made an effort to reinstate compensation within 60 days after the July 6, 2009 suspension order, the employer was required to close the claim "under

[3] On May 3, 2010, ALJ Riechers affirmed the July 6, 2009 suspension order. (WCB 09-02065 and 09-04145). The propriety of the suspension order is not before us in this proceeding. Our review of ALJ Riechers's order in that case is currently pending.

OAR 436-030-0034(7)." Nevertheless, OAR 436-060-0095(11) does not prescribe *when* (after the expiration of the 60-day period with no effort by claimant to reinstate compensation) the employer must do so.[4]

We turn to OAR 436-030-0034(7) (WCD Admin. Order 08-054; eff. 7-1-08), which 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."

Thus, OAR 436-060-0095(11) provides that if the worker makes no effort to reinstate compensation within 60 days of the suspension order, the insurer must close the claim under OAR 436-030-0034(7). In turn, OAR 436-030-0034(7) provides that when the Director has issued a suspension order, "the date the claim qualifies for closure is the date of the suspension order." Thus, pursuant to OAR 436-030-0034(7), the claim "qualified for closure" on July 6, 2009, the date of the suspension order. But neither OAR 436-060-0095(11) nor OAR 436-030-0034(7) mandates *when* (after the expiration of the 60-day period with no effort by claimant to reinstate compensation) the employer must close the claim, even if it "qualified for closure" on July 6, 2009.

Claimant argues that OAR 436-030-0034(3) required the employer to close the claim when she failed to attend a "mandatory closing examination." OAR 436-030-0034(3) provides:

> "A claim must be closed when the worker is not medically stationary, and the worker fails to attend a mandatory closing examination for reasons within the worker's control, and the insurer has notified the worker, by certified letter, at least 10 days prior to the mandatory examination, that claim closure will result for failure to attend a mandatory closing examination.

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[4] WCD's suspension order is consistent with our interpretation of this rule. WCD's order suspended claimant's compensation until such time as she notified the carrier of her agreement to be examined and was, in fact, examined. Moreover, in the absence of claimant's effort to reinstate her suspended compensation within 60 days of the suspension order, WCD stated that the carrier "may close the claim," at which time the order "will terminate." Such language supports the proposition that, upon expiration of the aforementioned "cooperation" period, the carrier has the discretion to close the claim. Further, in the event that the carrier exercised such an option, it was required by OAR 436-060-0095(11) to do so under OAR 436-030-0034(7), at which time the suspension order would terminate. Based on this reasoning, we disagree with the dissent's interpretation that the carrier was mandated to close the claim once the 60-day period expired.

> The notification letter must inform the worker of the worker's responsibility to attend the mandatory closing examination and of the consequences for failing to do so, including but not limited to claim closure and the possible loss or reduction of a disability award."

Here, OAR 436-030-0034(3) arguably does not apply because claimant's condition was medically stationary. (Ex. 25-3; *see* Ex. 41-2). In any event, however, OAR 436-030-0034(3) does not explain that it pertains to situations involving a suspension order.

Claimant also contends that, pursuant to OAR 436-030-0034(1)(d), the employer was required to rate her permanent impairment based on the existing findings from Dr. Friedman.

OAR 436-030-0034(1) provides, in part:

> "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. In order to close a claim under this rule, the insurer must:
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> "* * * * *
>
> "(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." *See* ORS 656.268(1)(c).

Shortly before claimant requested closure on September 30, 2009, Dr. Friedman had examined her on September 24, 2009. (Ex. 79). In any event, OAR 436-030-0034(1) does not indicate that it applies to an administrative closure based on a suspension order. The employer further notes that OAR 436-030-0034(1)(c) provides that the carrier must "[d]etermine whether claim closure is appropriate based on the information provided by the worker or absence thereof."

After considering the particular circumstances of this case, we are not persuaded that the legislative policy of ORS 656.268(5)(d) to encourage the timely closure of claims would be promoted by an award of a penalty here. *See Cayton*,

232 Or App at 462. We find no case precedent interpreting the aforementioned administrative rules in connection with a request for closure under ORS 656.268(5)(b) and a suspension order. Considering this absence of case precedent, we do not agree with claimant that the employer's *de facto* refusal to close the claim was unreasonable. *See, e.g.*, *Steven R. Holmes*, 62 Van Natta 1728, *on recons*, 62 Van Natta 2040 (2010) (carrier had a legitimate doubt about its liability for temporary disability benefits given the absence of case precedent interpreting the section of the administrative rule at issue); *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).

Furthermore, we agree with the ALJ's reasoning that no penalty is available under ORS 656.268(5)(d) because there were no amounts due at the time of closure. The November 5, 2009 Notice of Closure did not award permanent disability or any additional temporary disability. (Ex. 82). For purposes of this case, where the application of ORS 656.268(5)(d) concerns a refusal to close the claim, the penalty assessment under ORS 656.268(5)(d) is based on the amount "determined to be then due " at the time of the Notice of Closure. *Gerald L. Lacy*, 60 Van Natta 1260, 1267 n 6 (2008); *Francis House*, 60 Van Natta 787, 788 (2008); *Anthony Cayton*, 60 Van Natta 653 (2008); *see also Johnson v. SAIF*, 219 Or App 82 (2008) (penalty pursuant to ORS 656.268(5)(d) based on the amount due as a result of a Notice of Closure, which awarded permanent disability, less an offset for overpaid temporary disability).[5] Therefore, because the Notice of Closure did not award any permanent disability, there was no "amount determined to be then due" upon which to assess a penalty.

Attorney Fees

At hearing, claimant argued that, in the absence of a basis for a penalty, her counsel was entitled to an attorney fee under ORS 656.382(1) for the employer's allegedly unreasonable resistance to the payment of compensation by delaying closure of the claim. The ALJ declined claimant's request, concluding that there had not been an unreasonable resistance to the payment of compensation.

[5] We decline claimant's invitation to disavow the aforementioned Board case precedent.

On review, claimant argues that the employer's refusal to timely close the claim delayed the payment of compensation. Asserting that the suspension of compensation ended as soon as the claim was closed, she contends that there was compensation due based on the January 13, 2010 Order on Reconsideration, which awarded substantial PPD. (Ex. 86). Based on the following reasoning, we conclude that an attorney fee is not warranted.

Unreasonable resistance to the payment of compensation encompasses conduct that unreasonably delays the processing of a claim and thereby postpones, counteracts, or strives against the payment of compensation. *Tri-Met, Inc. v. Wolfe*, 192 Or App 556, 562 (2004).

Here, even if we assume that the employer's conduct constitutes a "resistance to the payment of compensation," we do not consider its actions to have been unreasonable. For the reasons described above, the ambiguous language in the WCD suspension order and the apparent inconsistencies with the corresponding administrative rules, combined with the lack of case precedent addressing this particular factual scenario, provided a legitimate doubt regarding the employer's claim processing obligations. Consequently, we do not find the employer's conduct to constitute an unreasonable resistance to the payment of compensation. Therefore, we agree with the ALJ's conclusion that claimant's counsel is not entitled to an attorney fee award under ORS 656.382(1).

ORDER

The ALJ's order dated April 2, 2010 is affirmed.

Entered at Salem, Oregon on March 10, 2011

Member Weddell dissenting.

The majority concludes that the employer's *de facto* refusal to close the claim was not unreasonable based on the lack of case precedent interpreting the administrative rules in connection with a request for closure under ORS 656.268(5)(b) and a suspension order. Notwithstanding the lack of case precedent, claimant is entitled to a penalty under ORS 656.268(5)(d), as well as an attorney fee under ORS 656.382(1). I respectfully dissent.

There is no dispute that the employer *de facto* refused to close the claim within 10 days of claimant's September 30, 2009 request for claim closure. To decide whether claimant is entitled to a penalty under ORS 656.268(5)(d), we must consider the reasonableness of the employer's actions under the particular circumstances of the case. *Red Robin Int'l v. Dombrosky*, 207 Or App 476, 481 (2006); *Anthony D. Cayton*, 63 Van Natta 54, 57, *recons*, 63 Van Natta 266 (2011) (on remand) (evaluating all relevant circumstances regarding each closure request). In reaching our conclusion, we must also 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).

Here, it is important to evaluate the employer's actions regarding this particular refusal to close in light of its pattern of conduct during the entire claim. After we found claimant's initial claim compensable and the court affirmed our order, *Joy M. Walker*, 58 Van Natta 11 (2006), *aff'd without opinion*, 210 Or App 466 (2007), the employer accepted "anxiety with depression" on July 24, 2007. (Exs. 15, 17, 21). Shortly thereafter, claimant requested modification of the acceptance to include major depression and panic disorder without agoraphobia, which was diagnosed by Dr. Friedman in July 2004. (Ex. 26). The employer denied the claim, however, asserting that those conditions did not arise out of the accepted condition or claimant's employment. (Ex. 30). 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. 53); *Joy M. Walker*, 61 Van Natta 739, 742 (2009).

Despite the fact that we set aside the employer's denial of the omitted condition claim for "major depression and panic disorder" (Ex. 53-4, -5), the employer decided to accept "disabling anxiety and depression and *acute* major depression and panic disorder." (Ex. 58; 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. 59). The employer eventually accepted that condition on November 5, 2009. (Ex. 81).

In the meantime, 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, claimant's attending physician. (Exs. 25, 37). 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. 41). 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. 47, 65); *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.

The employer's obstruction tactics continued. After we issued our March 23, 2009 order regarding the second round of compensability litigation (the preclusion issue), claimant requested claim closure on two occasions in March 2009. (Exs. 53, 54, 55). Those requests for closure are not at issue in this proceeding. The employer responded by refusing to close the claim, asserting that it needed to schedule an independent closing evaluation to determine the extent of permanent impairment associated with claimant's accepted condition. (Ex. 56). The employer notified claimant of an independent medical examination (IME) with Dr. Davies, psychologist. (Exs. 57, 60).

But the employer already had the necessary information from Dr. Friedman to rate claimant's impairment. I agree with claimant that Dr. Davies had no role to play in determining the extent of her impairment. Rather, it appears to me that the employer planned to use Dr. Davies's report for other purposes.

Under these questionable circumstances, claimant's attorney instructed claimant not to attend Dr. Davies's examinations and she did not do so. (Exs. 61, 62, 63, 69). Claimant explained to the employer that there was no reason why it could not close the claim based on Dr. Friedman's existing reports. (Ex. 61). Claimant pointed out that if the employer felt that it needed updated information, it could request that information from Dr. Friedman.[6] (*Id.*)

Instead of requesting updated information from Dr. Friedman, the employer chose to request the suspension of benefits for claimant's failure to attend the IME exam with Dr. Davies. (Exs. 62Aa, 62Dd, 70). On July 6, 2009, the Workers' Compensation Division (WCD) suspended claimant's benefits, finding that claimant's explanation for the failure to attend the June 15, 2009 IME was unreasonable. (Exs. 73, 77). Thereafter, claimant requested a hearing regarding the WCD suspension order. (Ex. 80A-4). The propriety of the suspension order is not before us in this proceeding.

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[6] As claimant's attending physician, Dr. Friedman's impairment findings would be the only "ratable" findings at claim closure.

After the suspension order was issued, claimant's attorney requested a new closing report from Dr. Friedman, which was issued on September 24, 2009. (Ex. 79). The employer finally responded to claimant's September 30, 2009 request for closure on November 5, 2009, five weeks later, when it issued a Notice of Closure. (Ex. 82). As claimant points out, nothing changed between her September 30, 2009 request for closure and the November 5, 2009 closure. For the following reasons, I agree with claimant that the employer's refusal to timely close the claim in response to her September 30 request was unreasonable.

The employer argues on review that its refusal to close the claim was not unreasonable because the record did not include sufficient information to determine permanent disability related to the newly accepted conditions and because it had a legitimate doubt as to its liability due to the July 6, 2009 suspension order. The majority focuses on the suspension order, finding that the employer's *de facto* refusal to close the claim was not unreasonable based on the lack of case precedent regarding a request for closure under ORS 656.268(5)(b) and a suspension order.

Claimant is correct that the suspension order did not suspend the employer's obligation to *process* the claim. In fact, 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)." (Emphasis added). Therefore, based on OAR 436-060-0095(11), the employer was required to close the claim on September 4, 2009, 60 days after issuance of the July 6, 2009 suspension order. The majority acknowledges that, because there was no evidence that claimant made an effort to reinstate compensation within 60 days after the July 6, 2009 suspension order, OAR 436-060-0095(11) required the employer to close the claim under OAR 436-030-0034(7). But the majority reasons that neither OAR 436-060-0095(11) nor OAR 436-030-0034(7) prescribed *when* the employer must close the claim.

Unlike the majority, I would interpret OAR 436-060-0095(11) consistent with its expressed intent, which is that the carrier "must close the claim" under OAR 436-030-0034(7) 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. In other words, as of September 4, 2009, the employer was required to close the claim. The employer's failure to do so, particularly after claimant's September 30, 2009 request for closure, was unreasonable and she is entitled to a penalty under

ORS 656.268(5)(d). The legislative policy of ORS 656.268(5)(d), which is to encourage the timely closure of claims, would be promoted by an award of a penalty in this case. *See Cayton*, 232 Or App at 461-62.

I also agree with claimant that the employer's obligation to *pay* a permanent disability award during the pendency of the suspension order does not excuse the employer from its claim processing duties under ORS 656.268(1) and (5), OAR 436-030-0015, OAR 436-030-0017, OAR 436-030-0020, and OAR 436-060-0095(11). For example, claim processing is still required when a carrier is contesting compensability. *See Bruce Fritz*, 62 Van Natta 1032 (2010) (carrier must process a new or omitted medical condition previously found compensable while an ALJ's order regarding the disputed claim is pending Board review); *Joy M. Walker*, 62 Van Natta at 520 (same).

Furthermore, the employer's argument that its refusal to close the claim was not unreasonable because the record did not include sufficient information to determine permanent disability related to the newly accepted conditions has no merit. Claimant correctly notes that an administrative closure does not depend on "sufficient findings" to determine disability. Even assuming a lack of sufficient information, that cannot excuse a failure to close the claim because the employer was required by OAR 436-030-0034(1)(d) to "[r]ate any permanent disability apparent in the record[.]"

In any event, the employer's argument that it lacked sufficient information makes no sense here because it had Dr. Friedman's prior closing reports, which were previously determined to be sufficient to rate claimant's impairment (Exs. 25, 37, 41), as well as her September 24, 2009 report that explained claimant was "essentially unchanged" since February 2008. (Ex. 79). Assuming arguendo that those reports from Dr. Friedman did not provide "sufficient information" to close the claim, the reason for the lack of that information is that the employer failed to clarify the impairment findings from Dr. Friedman or obtain updated information from her. *See Cayton*, 63 Van Natta at 63-64 (acknowledging that the employer did not have sufficient information to close the claim, but awarding a penalty under ORS 656.268(5)(d) because the reason for the lack of sufficient information was the employer's failure to clarify impairment findings from the claimant's attending physician or obtain the attending physician's concurrence with an examining physician's report).

On this record, there is no legitimate reason why the employer could not have closed the claim within 10 days of claimant's September 30, 2009 request for closure. Consequently, claimant is entitled to a 25 percent penalty under ORS 656.268(5)(d).

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 the permanent disability ultimately awarded on reconsideration. (Ex. 86).

Based on the aforementioned reasoning for assessing a penalty under ORS 656.268(5)(d), I would also assess an attorney fee under ORS 656.382(1) based on the employer's unreasonable resistance to the payment of compensation. *See Cayton*, 63 Van Natta at 64; *Kevin Lineberger*, 58 Van Natta 1921 (2006) (awarding an attorney fee under ORS 656.382(1) where the carrier had failed to either seek impairment findings from the claimant's attending physician or obtain the attending physician's concurrence with another report supporting permanent impairment). Because the majority concludes otherwise, I dissent.