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In the Matter of the Compensation of  
**GUY E. BALES, Claimant**  
WCB Case No. 11-00815  
**ORDER ON RECONSIDERATION**  
Ronald A Fontana, Claimant Attorneys  
James B Northrop, SAIF Legal Salem, Defense Attorneys

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

On February 24, 2012, we abated our February 3, 2012 order that awarded claimant a penalty under ORS 656.268(5)(d) for the SAIF Corporation's allegedly unreasonable claim closure and an attorney fee under ORS 656.382(1) for its allegedly unreasonable claim processing. We took this action to address SAIF's motion for reconsideration. Having received claimant's response, we proceed with our reconsideration.

Contending that there was no compensation then due, SAIF seeks rescission of our penalty and attorney fee awards. For the following reasons, we adhere to our prior order with the following modifications.

In our previous order, we determined that SAIF unreasonably issued a Notice of Closure on January 4, 2011, while claimant was actively participating in an authorized training program (ATP). We then assessed a penalty under ORS 656.268(5)(d), based on all compensation eventually determined to be due once the claim was properly closed.

Noting that the claim will not likely be closed until June 2012, SAIF asserts that the compensation eventually awarded could not be considered "then due" for purposes of ORS 656.268(5)(d) when it will be determined 17 months after the improper claim closure. Although we continue to find that a penalty under ORS 656.268(5)(d) is appropriate, we modify our reasoning regarding the compensation on which the penalty should be based.

SAIF does not contest our finding that the January 4, 2011 closure notice (including the compensation awarded therein) was unreasonably issued. When a denial is found to have been unreasonably issued, a penalty is generally based on all compensation "then due" as of the date of the hearing or record closure resulting from the unreasonable denial being set aside. *See, e.g., Stephen B. Briggs*, 56 Van Natta 472, 476 (2004). In this case, instead of an unreasonable denial, an unreasonable closure notice was issued. Nevertheless, the situation is analogous to that of an unreasonable denial. Where an unreasonable Notice of

Closure has been set aside, we conclude that the penalty should be based on all compensation “then due” as a result of the setting aside of the Notice of Closure, as of the date of the hearing/closure of the record. In this case, that date is June 14, 2011.

Accordingly, we continue to conclude that claimant is entitled to a 25 percent penalty based on temporary disability. However, that penalty should be based on all temporary disability compensation “then due” as of the date of the record closure (June 14, 2011).<sup>1</sup>

SAIF also contests our award of an attorney fee under ORS 656.382(1), as well as the amount of the fee. We adhere to our prior decision that claimant’s attorney is entitled to such an award. However, some of claimant’s counsel’s services were devoted to permanent impairment and work disability rather than to the “unreasonable claim processing/penalty” issue. Moreover, our prior penalty assessment has been modified.

Under such circumstances, we find that our previous attorney fee award under ORS 656.382(1) should be modified. After considering the factors in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable attorney fee for claimant’s attorney for services at the hearings level regarding the penalty issue is \$2,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the penalty issue, the complexity of the issue, the value of the interest involved, and the risk that claimant’s counsel might go uncompensated.

Therefore, on reconsideration, as supplemented and modified herein, we adhere to and republish our February 3, 2012 order. The parties’ rights of appeal shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on August 24, 2012

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<sup>1</sup> On January 6, 2011, SAIF issued a “Notice of Authorizing Training” letter. (Ex. 27B). Pursuant to that letter, claimant was advised that his “time-loss benefits will continue between those dates [1-3-11 and to end 6-15-12].” (Ex. 27B-1).

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Member Weddell concurring in part and dissenting in part.

Although I agree with the majority that claimant is entitled to a 25 percent penalty, I differ with respect to the compensation on which the penalty should be based. I reason as follows.

As the majority observes, SAIF does not contest our finding that the January 4, 2011 closure notice (including the compensation awarded therein) was unreasonably issued. But for SAIF's unreasonable conduct, which consisted of issuing the closure notice during an ATP instead of two days earlier before the training program had started, claimant would have been entitled to receive a "pre-ATP" compensation award. Unfortunately, because of SAIF's unreasonable claim processing, any Notice of Closure must now await the eventual termination of the ATP.

Under these circumstances, I remain persuaded that it would serve the apparent purpose of the statute, which is to penalize unreasonable claim closures, to find that claimant is entitled to the penalty provided by the statute. In reaching this conclusion, I note that such reasoning is consistent with the assessment of penalties under ORS 656.268(5)(d) in other unreasonable claim processing cases. *See Anthony D. Cayton*, 63 Van Natta 54 (2011) (on remand), *recons*, 63 Van Natta 266 (2011), *aff'd without opinion*, 248 Or App 480 (2012) (awarding a 25 percent penalty under ORS 656.268(5)(d) with respect to multiple claim closures to be based on the amount determined to be due at claim closure); *Francis House*, 60 Van Natta 787, 788 (2008) (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); *Richard Gallagher*, 56 Van Natta 3290, 3295 (2004) (awarding penalty under ORS 656.268(5) (d) based on 25 percent of all compensation determined to be due the claimant at the time of claim closure).

However, unlike the majority, which would base the penalty on compensation "then due" as of the date of the record closure, I would, consistent with the aforementioned case law, adhere to our original order and base the 25 percent penalty on compensation determined to be eventually due once the claim is properly closed.<sup>2</sup> Because I disagree with the majority's decision to modify our original order, I write separately.

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<sup>2</sup> SAIF also contests our award of an attorney fee under ORS 656.382(1), as well as the amount of the fee. I would adhere to the reasoning in our prior order and award the same amount.