

In the Matter of the Compensation of  
**WARREN D. DUFFOUR, Claimant**  
WCB Case Nos. 12-05465, 12-04519  
ORDER ON REVIEW

Ronald A Fontana, Claimant Attorneys  
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Lanning and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Fulsher's order that: (1) declined to award penalties under ORS 656.268(5)(d) and attorney fees under ORS 656.382(1) for an allegedly unreasonable Notice of Closure; and (2) declined to award penalties and attorney fees under ORS 656.262(11)(a) for the self-insured employer's allegedly unreasonable "pre-closure" termination of claimant's temporary disability benefits. On review, the issues are penalties and attorney fees. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact.

CONCLUSIONS OF LAW AND OPINION

Claim Closure

The ALJ declined to award penalties under ORS 656.268(5)(d) and an attorney fee under ORS 656.382(1) for an allegedly incorrect August 2012 Notice of Closure, reasoning that those issues were not raised in the reconsideration proceedings resulting in the unappealed October 2012 Order on Reconsideration that set aside the closure notice as premature. On review, claimant argues that the ALJ's decision was incorrect, noting that, because the Director had no jurisdiction to award a penalty under ORS 656.268(5)(d), he was not required to raise that issue during the reconsideration proceedings. For the following reasons, we affirm.

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

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at the hearing that the notice of closure or refusal to close was not reasonable, a penalty shall be assessed against the insurer or self-insured employer and paid to the worker in an amount equal to 25 percent of all compensation determined to be then due the claimant.”

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

Here, there was a closure of the claim on August 29, 2012. Assuming that the closure notice was unreasonable, we find that the “correctness” of the closure was not at issue at the hearing on the claim.

The correctness of the August 2012 Notice of Closure was determined in the October 2012 Order on Reconsideration, which was not appealed and became final. We acknowledge that claimant was not required to raise the issue of a penalty under ORS 656.268(5)(d) during the reconsideration process because the Appellate Review Unit (ARU) cannot award a penalty pursuant to that statute. However, once that reconsideration order issued, the correctness of the Notice of Closure must be a viable issue at a hearing before a penalty may be assessed under ORS 656.268(5)(d). In other words, a party must have requested a hearing from the reconsideration order. Because neither party did so, the correctness of the notice of Closure was not an issue at the hearing. Therefore, the ALJ correctly declined to award a penalty under the statute.<sup>1</sup>

#### Termination of Temporary Disability

Claimant sought a penalty and a penalty-related attorney fee under ORS 656.262(11)(a), arguing that the employer unreasonably terminated payment of temporary disability on August 20, 2012. In declining claimant’s penalty and attorney fee request, the ALJ reasoned that this issue could have been raised in the reconsideration proceeding regarding the August 29, 2012 Notice of Closure, which terminated temporary disability on August 20, 2012.

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<sup>1</sup> We likewise decline claimant’s request for an attorney fee under ORS 656.382(1) because there has been no finding that the August 2012 Notice of Closure was unreasonable. Thus, there was no unreasonable resistance to the payment of compensation.

On review, claimant contends that a penalty/attorney fee was not awardable under ORS 656.262(11)(a) during the reconsideration proceeding and, as such, he was not precluded from raising that issue at the hearing. For the following reasons, we agree and grant claimant's request.

OAR 436-060-0155(6) provides that the Director will only consider a penalty issue where the assessment and payment of additional amounts described in ORS 656.262(11) is the sole issue of any proceeding between the parties. Here, during the reconsideration proceeding, the parties had raised the issues of premature claim closure, medically stationary date, temporary disability and permanent impairment. (Ex. 16-1). Therefore, even if claimant had, during the reconsideration proceeding, asserted entitlement to penalties and attorney fees under ORS 656.262(11), the ARU would not have addressed the issue pursuant to OAR 436-060-0155(6).

Under such circumstances, claimant's decision not to raise this issue during the reconsideration proceeding did not preclude him from raising it at the hearing level. Thus, we analyze the question of whether the employer's termination of temporary disability was unreasonable.

ORS 656.262(11)(a) provides for a penalty if a carrier unreasonably delays or unreasonably refuses to pay compensation. The standard for determining an unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. *Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991). If so, the refusal to pay is not unreasonable. "Unreasonableness" and "legitimate doubt" are to be considered in the light of all the evidence available. *Brown v. Argonaut Ins. Co.*, 93 Or App 588 (1988).

Here, the ARU has, in effect, awarded unpaid temporary disability from August 20, 2012 to August 29, 2012 by finding that the claim was prematurely closed and remanding the claim to the employer for further processing. The termination of temporary disability on August 20, 2012 was based on the former attending physician's opinion that claimant's condition was medically stationary on that date. (Ex. 12-1). However, that physician was no longer claimant's attending physician. (Exs. 11D-1, 16). Moreover, claimant had not been released to return to regular work, nor had he been offered modified work. *See* ORS 656.268(4)(b), (c).

Based on the aforementioned reasoning, find that the "pre-closure" termination of temporary disability was unreasonable. Therefore, we award a 25 percent penalty based on unpaid temporary disability between August 21 and August 29, 2012. ORS 656.262(11)(a).

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). Absent a finding of extraordinary circumstances, this carrier-paid attorney fee award shall not exceed \$3,236. *See* ORS 656.262(11)(a); OAR 438-015-0110(3); WCB Bulletin No. 1 (effective July 1, 2013).

Claimant's counsel requests attorney fees of nearly \$9,000 for services at hearing and on review. He does not assert, nor do we find "extraordinary circumstances" regarding the penalty issue. After considering the aforementioned factors in OAR 438-015-0110(1)(2), we find that a reasonable attorney fee under ORS 656.262(11)(a) for the employer's unreasonable conduct is \$1,500, payable by the employer.<sup>2</sup> In reaching this conclusion, we find this award proportionate to the benefit to claimant (eight days of temporary disability benefits), giving primary consideration to the results achieved and the time devoted to the case.<sup>3</sup>

### ORDER

The ALJ's order dated February 21, 2013 is reversed in part and affirmed in part. That portion of the ALJ's order that declined to award penalties and attorney fees under ORS 656.262(11)(a) is reversed. Claimant is awarded a 25 percent penalty based on unpaid temporary disability benefits payable between August 21 and August 29, 2012. Claimant's attorney is also awarded a \$1,500 penalty-related attorney fee, payable by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on September 5, 2013

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<sup>2</sup> Claimant's attorney is not entitled to attorney fees for services on review devoted to penalty and attorney fee issues. *See Cayton v. Safelite Glass Corp.*, 257 Or App 188, 195 (2013); *Anthony D. Cayton*, 63 Van Natta 54, 63, *recons.*, 63 Van Natta 266 (2011), *aff'd without opinion*, 248 Or App 480 (2012); *Amador Mendez*, 44 Van Natta 736 (1992).

<sup>3</sup> We also note that claimant's counsel's fee submission does not differentiate between this penalty and attorney fee issue and the one concerning the allegedly unreasonable Notice of Closure, an issue on which claimant has not prevailed.