

In the Matter of the Compensation of
JOY M. WALKER, Claimant
WCB Case No. 09-06234
ORDER ON REMAND
Ronald A Fontana, Claimant Attorneys
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Reviewing Panel: Members Lowell and Weddell.

This case is on remand from the Court of Appeals. *Walker v. Providence Health System Oregon*, 254 Or App 676 (2013). The court has reversed our prior order, *Joy M. Walker*, 63 Van Natta 517 (2011) (Member Weddell dissenting), that affirmed an Administrative Law Judge’s order that declined to assess penalties and attorney fees for the self-insured employer’s allegedly unreasonable delay/refusal to close claimant’s claim. Reasoning that we did not address the employer’s contention that its *de facto* refusal to close the claim was reasonable because it lacked sufficient information to close the claim, the court has remanded for reconsideration. Having considered the parties’ arguments, we now proceed with our reconsideration.

FINDINGS OF FACT

We continue to adopt the ALJ’s “Findings of Fact.” We summarize the relevant facts as follows.

In April 2004, claimant filed a mental disorder claim, which was denied by the employer. She was treated by Dr. Friedman, a psychiatrist. On August 8, 2005, a prior ALJ set aside the employer’s May 2004 denial. That order was affirmed by the Board and by the Court of Appeals. *Joy M. Walker*, 58 Van Natta 11 (2006), *aff’d without opinion*, 210 Or App 466 (2007). In July 2007, the employer accepted “anxiety with depression.”

In August 2007, claimant requested modification of the acceptance to include major depression and panic disorder without agoraphobia. The employer denied the omitted medical condition claim. In September 2008, a prior ALJ’s order set aside the employer’s denial and that order was affirmed by the Board in March 2009. *Joy M. Walker*, 61 Van Natta 739 (2009).

Following the Board’s March 2009 order, claimant requested claim closure on March 25, 2009, and March 31, 2009, based on Dr. Friedman’s reports. 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. The employer notified claimant of an employer-arranged medical examination (IME) on April 28, 2009 with Dr. Davies, a psychologist.

On April 10, 2009, the employer modified its acceptance to include "disabling anxiety and depression and acute major depression and panic disorder." 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.

Based on her attorney's instructions, claimant did not attend the April 28, 2009 IME. On May 6, 2009, the employer requested the suspension of claimant's benefits for failure to attend the IME. On May 26, 2009, the Workers' Compensation Division (WCD) issued an order denying the suspension request because the employer's request did not comply with the applicable administrative rules.

The employer scheduled another IME with Dr. Davies for June 15, 2009. Claimant's attorney again instructed claimant not to attend the examination, asserting that Dr. Davies was not authorized to conduct such an examination pursuant to ORS 656.325. Claimant did not appear at the June 15, 2009 IME.

On June 16, 2009, the employer requested the suspension of claimant's benefits for failure to attend the IME with Dr. Davies. On July 6, 2009, WCD suspended claimant's benefits, finding that her explanation for the failure to attend the examination was unreasonable. The order stated that it would terminate on closure of the claim. (Ex. 73-5). Thereafter, claimant requested a hearing regarding the WCD suspension order.

On September 24, 2009, Dr. Friedman responded to claimant's attorney's request to perform a new closing examination. On September 30, 2009, claimant requested claim closure based on Dr. Friedman's September 24, 2009 report. The employer did not respond to this request.

On October 27, 2009, 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.

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.” Claimant requested reconsideration. A January 13, 2010 Order on Reconsideration awarded 35 percent unscheduled permanent partial disability (PPD) based on Dr. Friedman’s report.

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 because it had insufficient information to close the claim; Dr. Friedman rendered inconsistent opinions regarding claimant’s impairment; and because claimant did not attend Dr. Davies’s IME.

CONCLUSIONS OF LAW AND OPINION

The ALJ reasoned that the employer’s obligation to close the claim during the pendency of the WCD’s 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.

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

In response, the employer argued 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 WCD’s July 6, 2009 suspension order.

We addressed the employer's argument concerning the suspension order because we found it dispositive. *Walker*, 63 Van Natta at 520. After considering the particular circumstances, we were 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. Moreover, we found no case precedent interpreting the administrative rules in connection with a request for claim closure under ORS 656.268(5)(b) and a WCD suspension order under ORS 656.325(1)(a). Considering this absence of case precedent, we did not consider the employer's *de facto* refusal to close the claim to be unreasonable.¹

Claimant requested judicial review. Following its review, the court has reversed our decision and remanded for further proceedings to address the employer's argument that it lacked sufficient information to close the claim. We now proceed with our reconsideration.

ORS 656.268(1)(a) provides that a carrier shall close the worker's claim and determine the extent of the worker's permanent disability when "[t]he worker has become medically stationary and there is sufficient information to determine permanent disability[.]" Under OAR 436-030-0020(2)(b), "sufficient information" requires:

"A closing medical examination and report when there is a reasonable expectation of loss of use or function, changes in the worker's physical abilities, or permanent impairment attributable to the accepted condition(s) based on evidence in the record or the physician's opinion. The closing medical examination report must describe in detail all measurements and findings regarding any permanent impairment, residuals, or limitations attributable to the accepted condition(s) * * *.

Here, the employer contends that it was not required to close the claim because the record lacked sufficient information to determine the extent of permanent disability when claimant requested claim closure on September 30, 2009. Specifically, the employer asserts that the record lacked sufficient information to determine permanent disability due to the newly accepted major depression and panic disorder, as opposed to unrelated and intervening factors. For the following reasons, we disagree.

¹ We also reasoned that the employer's conduct was not unreasonable based on ambiguity in the WCD suspension order, which was unclear as to whether the carrier was obligated to close the claim where the claimant had refused to attend an IME.

Claimant requested claim closure on September 30, 2009 based on Dr. Friedman's September 24, 2009 report that found claimant's condition and impairment unchanged from that documented in a 2008 closing report. (Ex. 79). The employer contends that Dr. Friedman's September 24, 2009 report did not describe impairment attributable to the newly accepted major depression and panic disorder or to the 2004 stress claim. The employer further asserts that it was not obligated to seek clarification from Dr. Friedman regarding claimant's impairment. Even assuming that the employer's contentions are correct, we would still find the employer's refusal to close the claim to have been unreasonable.

Sixty days after issuance of the July 6, 2009 suspension order, the employer could have administratively closed the claim pursuant to the terms of the suspension order.² (Ex. 73-5). However, the employer waited approximately two more months after the suspension order authorized claim closure and five weeks after claimant's September 30, 2009 request for claim closure to administratively close the claim on November 5, 2009. (Ex. 82). Moreover, the November 5, 2009 Notice of Closure closed the claim with the very same information that the employer had on September 30, 2009, when claimant requested claim closure. The employer does not explain why it could not have issued a similar closure notice within 10 days of claimant's September 30, 2009 closure request under ORS 656.268(5)(b).

Under such circumstances, we conclude that the employer's *de facto* refusal to close the claim was unreasonable.³

The employer notes, however, that ORS 656.268(5)(d) requires that a finding be made "at the hearing" that a refusal to close a claim was not reasonable before a penalty may be assessed under that statute. The employer asserts that because the ALJ made no such finding *at the hearing* a penalty may not be assessed in this case. We disagree.

² We recognize that the court held that the suspension order was not relevant to the issue of whether the refusal to close was unreasonable. However, our reference to the order highlights one of the options available to the employer for claim closure as it delayed issuance of the closure notice for more than two months after expiration of the suspension order's 60-day period.

³ In its January 2010 reconsideration order, the ARU rejected claimant's request for a penalty under ORS 656.268(5)(e) for the employer's failure to rate permanent disability at claim closure. The ARU noted that the employer had scheduled multiple examinations to clarify permanent disability due to newly accepted conditions. (Ex. 86-3). However, the penalty issue determined by the reconsideration order involved a different statute (ORS 656.268(5)(e)) from the one at issue here (ORS 656.268(5)(d)). The ARU's findings concerned whether the employer should have reasonably known that the attending physician's findings pertained to the accepted conditions. *See* ORS 656.268(5)(e). By contrast, here, the issue concerns whether the employer was unreasonable in refusing to close the claim based on an assertion that there was insufficient information to do so.

We first observe that the employer did not previously raise this argument. Thus, we are not inclined to address an issue first raised on remand. *See Karen M. Godfrey*, 58 Van Natta 2892 (2006) (on remand), *aff'd*, *Fred Meyer Stores v. Godfrey*, 218 Or App 496 (2008); *see also Stevenson v. Blue Cross*, 108 Or App 247 (1991) (Board can refuse to consider issues on review that are not raised at hearing). Nevertheless, even if we did address the “at the hearing” issue, we would reject it.

While the ALJ did not find that the employer’s refusal to close the claim was unreasonable, we have previously held that, pursuant to our review authority, we may find that a carrier’s refusal to close a claim is unreasonable. *See Indalecio Gonzalez*, 54 Van Natta 1164, 1170 (2002). The employer argues that our decision was incorrect and should be disavowed. However, after further consideration of this issue, we decline to disavow *Gonzalez*. *See Red Robin Int’l v. Dombrosky*, 207 Or App 476, 495 (2006) (remanding to the Board to determine whether the carrier’s failure to issue a timely notice closing or refusing to close was a refusal to close the claim and whether the employer’s claim processing was unreasonable under ORS 656.268(5)(d)).

The employer also contends that at the time of its October 2009 *de facto* refusal to close the claim there were no amounts “then due” on which to base a penalty because all compensation had been suspended pursuant to the WCD’s July 6, 2009 suspension order. Again, we disagree with the employer’s contention.

In remanding the case, the court specifically stated that any penalty must be based on the 35 percent permanent disability award in the Order on Reconsideration, not on the earlier denial of benefits reflected in the Notice of Closure. *Walker*, 254 Or App at 685. Accordingly, we conclude that there are amounts then due on which to base a penalty under ORS 656.268(5)(d).⁴

Claimant requests that we award an attorney fee under ORS 656.382(1) because the employer unreasonably resisted the payment of compensation.⁵

⁴ We further note that the July 2009 suspension order stated that the order would “terminate” upon claim closure. (Ex. 73-5). Therefore, when the claim was closed in November 2009, claimant once more became entitled to compensation.

⁵ ORS 656.382(1) provides for an attorney fee if a carrier “unreasonably resists the payment of 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, 110 (1991).

Given our conclusion that the employer unreasonably refused to close the claim and delayed payment of compensation, we agree that an attorney fee award is appropriate under that statute.

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 hearing level regarding the penalty issue is \$6,450, payable by the employer.⁶ In reaching this conclusion, we have particularly considered the time devoted to the penalty issue (as represented by the hearing record and claimant's counsel's uncontested fee submission), the complexity of the issue, the value of the interest involved, the nature of the proceedings, and the risk that claimant's counsel might go uncompensated.

Accordingly, on remand, the ALJ's order dated April 2, 2010 is reversed. Claimant is awarded a 25 percent penalty to be based on the 35 percent unscheduled permanent disability award granted by the January 13, 2010 Order on Reconsideration. Claimant's attorney is also awarded a \$6,450 attorney fee under ORS 656.382(1), payable by the employer.

IT IS SO ORDERED.

Entered at Salem, Oregon on February 21, 2014

⁶ Claimant's counsel is not entitled to an attorney fee for services on appeal seeking penalties and attorney fees. In *Cayton v. Safelite Glass Corp.*, 258 Or App 522 (2013), we had denied the claimant's request for additional attorney fees under ORS 656.382(1) for services on Board review, before the court and on remand. We reasoned that the claimant's counsel was not statutorily entitled to attorney fees for services rendered at the appellate levels in securing a penalty.

The claimant requested judicial review, asserting that we erred in concluding that we were not authorized by ORS 656.382(1) to award attorney fees for counsel's services in procuring a penalty under ORS 656.268(5)(d). The *Cayton* court noted that ORS 656.382(1) provides that attorney fees shall be awarded "[i]f an insurer or self-insured employer refuses to pay compensation due under an order of an Administrative Law Judge, board or court, or a carrier's otherwise unreasonably resistance to the payment of compensation * * *." Consequently, the *Cayton* court reasoned that ORS 656.382(1) is contingent on a carrier's refusal to pay "compensation" awarded by an ALJ, Board, or court order or a carrier's otherwise unreasonable resistance to the payment of "compensation." Reiterating that penalties are not "compensation" under the Workers' Compensation Law, the court held that the claimant's success in securing a penalty on appeal did not entitle him to additional attorney fees under ORS 656.382(1). 258 Or App at 525. We reach a similar conclusion in this case.