

In the Matter of the Compensation of
JOSE L. OLVERA-CHAVEZ, Claimant

WCB Case No. 13-01457

ORDER ON REVIEW

Ronald A Fontana, Claimant Attorneys
Law Offices of Kathryn R Morton, Defense Attorneys

Reviewing Panel: Members Lanning and Langer.

The insurer requests review of those portions of Administrative Law Judge (ALJ) Jacobson's order that: (1) determined that the claimant's low back injury claim was prematurely closed; and (2) awarded penalties and attorney fees for the insurer's allegedly unreasonable claim processing. On review, the issues are premature claim closure, penalties, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation.

The ALJ found that a February 2013 Notice of Closure was prematurely issued. Thus, the ALJ reversed a March 2013 Order on Reconsideration that had affirmed the Notice of Closure. The ALJ further assessed penalties and attorney fees, finding the insurer's claim processing to have been unreasonable.

On review, the insurer argues that we should defer to the Appellate Review Unit's (ARU's) "interpretation" of its own rules and reinstate the claim closure. In support, the insurer cites *Don't Waste Oregon Comm. v. Energy Facility Siting Council*, 320 Or 132 (1994). For the following reasons, that case is distinguishable.

In *Don't Waste Oregon Comm.*, the court reasoned that it should uphold an agency's "plausible interpretation" of its own rule that is not "inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law." *Id.* at 142; see *SAIF v. Donahue-Birran*, 195 Or App 173, 180–81 (2004) (holding that a plausible interpretation by the ARU of a rule used to assess work-related impairment was entitled to deference). Unlike those cases, however, which involved "interpretation" of an agency's own rule, here, the ARU's affirmation of the insurer's Notice of Closure did not involve an "interpretation" of its rules. (Ex. 99-2).

Accordingly, after conducting our review, we agree with the ALJ's conclusion that the claim was prematurely closed. Therefore, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review concerning the premature closure issue.¹ ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review concerning that issue is \$2,000, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated August 9, 2013, as reconsidered on October 31, 2013, is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$2,000, payable by the insurer.

Entered at Salem, Oregon on March 26, 2014

¹ Claimant's attorney is not entitled to an attorney fee for services on review related to the penalty and attorney fee issues. *Saxton v. SAIF*, 80 Or App 631, *rev den*, 302 Or 159 (1986); *Dotson v. Bohemia, Inc.*, 80 Or App 233 (1986).