In the Matter of the Compensation of
JAMES L. WILLIAMS, Claimant
WCB Case No. 13-05123
ORDER ON REVIEW
Ronald A Fontana, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey, Weddell, and Somers. Member Curey specially concurs. Member Weddell concurs in part and dissents in part.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Wren's order that: (1) assessed a penalty under ORS 656.268(5)(d) based on the increased compensation awarded by the ALJ's order; and (2) awarded a $1,000 attorney fee under ORS 656.382(1) for the SAIF Corporation's allegedly unreasonable claim closure. SAIF cross-requests review of those portions of the ALJ's order that: (1) awarded 20 percent whole person impairment for a right knee condition and 44 percent work disability, whereas an Order on Reconsideration had awarded 12 percent whole person impairment and 18 percent work disability; and (2) awarded the aforementioned penalty and attorney fee. On review, the issues are extent of permanent disability (impairment and work disability), penalties, and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

Impairment/Work Disability

We adopt and affirm the portions of the ALJ's order that awarded 20 percent whole person impairment and 44 percent work disability.[1]

[1] For the reasons explained in the ALJ's order, we conclude that the medical evidence establishes that claimant did not have a legally cognizable "preexisting" condition. In the absence of a legally cognizable preexisting condition, claimant's impairment should not have been apportioned. *See Schleiss v. SAIF*, 354 Or 637 (2013); *Joseph Wagner*, 66 Van Natta 485 (2014).

Penalty Regarding Correctness of Notice of Closure

Claimant compensably injured his right knee on February 24, 2011. Dr. Tesar performed surgery on January 24, 2012, repairing a right knee medial meniscus tear. (Ex. 10A). On January 17, 2013, Dr. Greenleaf performed a partial medial meniscectomy. (Ex. 27C). Claimant's attending physician was Dr. North.

On behalf of SAIF, Dr. Coletti examined claimant in September 2012 and Dr. Baldwin examined him in April 2013. (Exs. 24, 33).

SAIF accepted a right knee posterior horn medial meniscus tear and recurrent tear of the right knee posterior horn medial meniscus. (Exs. 9, 44-4).

An August 26, 2013 Notice of Closure awarded 10 percent whole person impairment and 28 percent work disability. (Ex. 44-1, -2). In determining impairment, SAIF included a 5 percent value for knee surgery and apportioned values for reduced right knee range of motion (ROM) (7 percent), loss of strength (10 percent), and a chronic condition (3 percent). (Ex. 44-2). SAIF calculated the 7 percent ROM finding based on a comparison of the contralateral joint. Regarding work disability, it relied on a social-vocational value of 18 percent. (*Id.*)

Claimant requested reconsideration. (Ex. 49). An October 9, 2013 Order on Reconsideration increased claimant's whole person impairment to 12 percent and his work disability award to 30 percent (based on a social/vocational value of 18 percent). (Ex. 61). In the Order on Reconsideration, the Appellate Review Unit (ARU) included impairment values for the surgery (5 percent), apportioned loss of strength (10 percent) and apportioned chronic condition (3 percent). (Ex. 61-3, -4). However, the ARU increased the value for right knee ROM, awarding an apportioned 10 percent value. (Ex. 61-3). In doing so, the ARU explained that the medical evidence established that claimant had a documented history of disease in the contralateral knee joint such that comparison of the contralateral joint was not appropriate. *See* OAR 436-035-0011(3). Claimant requested a hearing.

Finding that claimant's impairment should not be apportioned, the ALJ increased his permanent impairment award to 20 percent. Based on that increased impairment value, as well as an increased SVP value,[2] the ALJ increased

[2] The ALJ relied on a different Dictionary of Occupational Titles (DOT) code from that used by ARU.

claimant's work disability award to 44 percent. The ALJ also awarded a penalty under ORS 656.268(5)(d) based on "25 percent of the increased compensation awarded by this order." In doing so, the ALJ rejected SAIF's argument that ORS 656.268(5)(d) did not apply, explaining that the Board had previously held that such a penalty included unreasonable compensation awards granted by a Notice of Closure. *See Kerry Hagen*, 64 Van Natta 316, *recons*, 64 Van Natta 359 (2012) (a penalty under ORS 656.268(5)(d) includes unreasonable compensation awards granted by a Notice of Closure).[3] The ALJ reasoned that, because SAIF did not explain its miscalculation of claimant's ROM value, it acted unreasonably, and a penalty under ORS 656.268(5)(d) was warranted. The ALJ also awarded a $1,000 attorney fee under ORS 656.382(1).

On review, SAIF contends that a penalty should not have been awarded because it had a legitimate doubt as to whether the left knee had a "history of disease," and whether a contralateral comparison should be used to rate ROM impairment. Claimant responds that he is entitled to a penalty under ORS 656.268(5)(d) for SAIF's unreasonable Notice of Closure, asserting that the closure worksheet offered no explanation for its incorrect ROM calculation based on the same information that the ARU used.[4] Claimant also contends that we should not consider SAIF's argument that there was no history of disease of the left knee or that it had a legitimate doubt about that issue because it is being raised for the first time on review.

For the following reasons, we agree that SAIF acted unreasonably when it miscalculated the ROM value.[5] However, as discussed below, we conclude that the ORS 656.268(5)(d) penalty should be based only on the increased amount of permanent impairment/work disability due as a result of SAIF's unreasonable ROM calculation.

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[3] The parties do not dispute the ALJ's application of *Hagen*.

[4] Claimant also asserts that SAIF used the incorrect DOT and SVP value in determining his social/vocational factors and work disability. *See* OAR 436-035-0012. Because claimant did not raise this particular basis for his penalty request before the ALJ, we decline to deviate from our general practice of not considering issues raised for the first time on review. *See Stevenson v. Blue Cross*, 108 Or App 247 (1991) (Board can refuse to consider issues on review that are not raised at hearing); *Fister v. South Hills Health Care*, 149 Or App 214 (1997) (absent adequate reason, Board should not deviate from its well-established practice of considering only those issues raised by the parties at hearing); *Andrew A. Veluscek*, 64 Van Natta 686, *recons*, 64 Van Natta 1286 (2012) (declining to address issue that was first raised in the claimant's reply argument).

[5] Given this outcome, we need not decide whether SAIF's "history of disease" argument was timely raised because our consideration of that argument does not change the outcome of the case.

We first address whether SAIF's Notice of Closure was unreasonable. SAIF argues that because no physician explicitly stated that claimant's left knee was "diseased" or had a "history of disease," it had a legitimate doubt as to whether a contralateral comparison should be used to rate ROM impairment. We disagree.

ORS 656.268(5)(d) provides that if a carrier has closed a claim, the correctness of the Notice of Closure is at issue in a hearing, and a finding is made at the hearing that the Notice of Closure was not reasonable, a penalty of 25 percent of "all compensation determined to be then due the claimant" shall be assessed against the carrier. Whether SAIF's Notice of Closure was reasonable depends on whether, from a legal standpoint, it had a legitimate doubt as to its liability. *Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991); *Camron J. Horner*, 65 Van Natta 991, 992, *recons*, 65 Van Natta 1144 (2013).

Here, in increasing the impairment value for claimant's right knee ROM from that granted by the Notice of Closure, the ALJ explained that the medical evidence established that he had a documented history of disease in the contralateral knee joint and that, pursuant to OAR 436-035-0011(3),[6] comparison of the contralateral knee joint was not appropriate. (Ex. 61-3).

In *Lopez v. Agripac, Inc*., 154 Or App 149, *rev den*, 327 Or 583 (1998), the court interpreted *former* OAR 436-035-0007(22)[7] and concluded that it "requires that a 'history of injury or disease' to the contralateral joint be established by

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[6] OAR 436-035-0011(3) provides, in part: "The range of motion or laxity (instability) of an injured joint is compared to and valued proportionately to the contralateral joint except when the contralateral joint has a history of injury or disease or when either joint's range of motion is zero degrees or is ankylosed." Pursuant to OAR 436-035-0011(3)(b): "[w]hen the contralateral joint has a history of injury or disease, the findings of the injured joint are valued based upon the values established under these rules."

[7] *Former* OAR 436-035-0007(22) provided:

> "The range of motion or laxity (instability) of an injured joint shall be compared to and valued proportionately to the contralateral joint except when the contralateral joint has a history of injury or disease or when either joint's range of motion is zero or is ankylosed. * * *.
>
> "* * * * *.
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> "(b) When the contralateral joint has a history of injury or disease, the findings of the injured joint shall be valued based upon the values established under these rules." *Id.* at 153.

medical evidence." *Id*. at 154. The court noted that the rule did not require that the claimant currently have an injury or disease that affected the contralateral joint, but only that the claimant had a history of such injury or disease. *Id*. at 154 n 2. The court also explained that the medical evidence must be from, or ratified by, the attending physician or arbiter. *Id*. at 155.

Contrary to SAIF's argument, there is no requirement that a physician must explicitly state that claimant's left knee was "diseased" or had a "history of disease." In *Christopher S. Chizek*, 65 Van Natta 683 (2013), the carrier acknowledged that the medical record referred to the claimant's right knee complaints, but argued that there was no history of an injury or "direct diagnosis" of a disease. We explained that a "direct diagnosis" was not required, and that the attending physician's opinion was sufficient to establish that the claimant's right knee joint had a "history of injury or disease." *Id*. at 686.

Here, Dr. Baldwin diagnosed bilateral and congenital patellofemoral dysplasia and bilateral osteoarthritis of the patellofemoral joint. (Ex. 33-18, -19). Dr. North, claimant's attending physician, concurred with Dr. Baldwin's diagnoses. (Ex. 37-1). Based on those medical opinions, we are not persuaded that SAIF had a legitimate doubt as to whether a contralateral comparison should have been used in its rating of claimant's ROM impairment. Therefore, SAIF's Notice of Closure was unreasonable.

Next, we address whether the ALJ properly based the ORS 656.268(5)(d) penalty on 25 percent of the "increased compensation awarded by this order."

Claimant asserts that the ALJ miscalculated the penalty, arguing that the amount "then due" under ORS 656.268(5)(d) is the entire amount to which he was entitled, not merely the increased amount awarded by the ALJ's order. *See Walker v. Providence Health Sys. Oregon*, 254 Or App 676, 684 (2013). Specifically, he contends that the penalty should be based on the total permanent disability award less any overpayment existing as of the Notice of Closure. SAIF responds that, if a penalty under ORS 656.268(5)(d) is awarded, the "compensation determined to be then due" is only the *additional* compensation determined to be due as a result of its unreasonable ROM calculation. For the following reasons, we agree with SAIF's position.

In *Walker*, the carrier had unreasonably refused to close the claim. In assessing a penalty under ORS 656.268(5)(d) for that conduct, the court explained that the relevant time for deciding the "compensation determined to be then due"

under ORS 656.268(5)(d) "must be the time at which [the] unreasonable notice of closure or refusal to close was issued." *Id.* at 684; *see Liberty Northwest Ins. Corp. v. Olvera-Chavez*, 267 Or App 55 (2014) (applying *Walker*). Thus, in *Walker*, the entire award that should have been awarded by the Notice of Closure (but for the refusal to close) was subject to a penalty.

Walker and its progeny are distinguishable. Those cases concerned unreasonable refusals to close and unreasonable claim closures. As such, *all* compensation owing to the claimant by the Notice of Closure was delayed by the unreasonable conduct. Here, in contrast, the situation involves an unreasonable permanent impairment/work disability award calculation in the Notice of Closure due to the failure of the carrier to properly calculate one aspect of that award--claimant's ROM. Thus, the claim remains closed and the entire permanent disability award granted by the closure notice remains payable. In this situation, we conclude that a penalty under ORS 656.268(5)(d) should be assessed against the additional compensation determined to be due the claimant as a result of SAIF's *specific unreasonable conduct*.

Accordingly, under the present circumstances, the ORS 656.268(5)(d) penalty is based on the increased amount of permanent impairment/work disability due as a result of SAIF's unreasonable ROM calculation. This increased award is the amount that was "then due" at the time of the unreasonable Notice of Closure as determined at reconsideration (as modified by the ALJ's order and affirmed on review). Thus, the amount of compensation determined to be "then due" represents the difference between the permanent impairment calculated using the ROM value with a contralateral comparison (as determined by SAIF at closure) and that calculated without the contralateral comparison, as well as the increased portion of claimant's work disability award that is attributable to the corrected "ROM" impairment value. In this way, the penalty assessment is based on SAIF's unreasonable conduct; *i.e.*, its failure to properly rate claimant's ROM findings under the applicable Director standards. The ALJ's order is modified accordingly.

<u>Attorney Fee – ORS 656.382(1)</u>

The ALJ awarded a $1,000 attorney fee under ORS 656.382(1) for SAIF's unreasonable resistance to the payment of compensation based on its miscalculation of the ROM value. On review, claimant requests that the attorney fee award be increased to $6,125. SAIF responds that the fee should be reversed or, alternatively, that the ALJ's award was appropriate. Based on the following reasoning, we modify the ALJ's award.

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. *Huntley*, 106 Or App at 110.

In light of our conclusion that SAIF's miscalculation of the ROM was unreasonable, we agree with the ALJ's conclusion that an attorney fee award under ORS 656.382(1) is appropriate. However, 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 this unreasonable claim processing issue is $1,250, payable by SAIF.[8] In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the hearing record, claimant's counsel's statement of services, and SAIF's objections), 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. The ALJ's attorney fee award is modified accordingly.

Attorney Fee – ORS 656.382(2)

Because we have determined that the compensation awarded by the ALJ's order should not be reduced or disallowed, claimant's attorney is entitled to an assessed fee for services on review. 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 regarding the permanent disability issues is $4,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issues (as represented by claimant's reply brief, his counsel's statement of services, and SAIF's objections), the complexity of the issues, the values of the interest involved, and the risk that claimant's counsel might go uncompensated.

[8] Claimant's attorney is not entitled to a fee for services on review related to the penalty and attorney fee issues. *See Cayton v. Safelite Glass Corp*., 258 Or App 522, 525 (2013); *Saxton v. SAIF*, 80 Or App 631, *rev den*, 320 Or 159 (1986).

ORDER

The ALJ's order dated March 20, 2014 is affirmed in part and modified in part. In lieu of the ALJ's penalty assessment under ORS 656.268(5)(d), claimant is granted a penalty based on 25 percent of the additional permanent impairment/ work disability awarded between the Notice of Closure and the ALJ's order that is attributable to SAIF's unreasonable ROM impairment value calculation, payable as of the Order on Reconsideration. In lieu of the ALJ's $1,000 attorney fee award under ORS 656.382(1), claimant's counsel is awarded $1,250, to be paid by SAIF. The remainder of the ALJ's order is affirmed. For services on review regarding SAIF's cross-request for review, claimant's attorney is awarded an assessed fee of $4,000, payable by SAIF.

Entered at Salem, Oregon on April 17, 2015

Member Curey specially concurring.

I agree with the lead opinion's decisions regarding claimant's permanent disability awards, as well as its determinations that SAIF unreasonably calculated his range of motion (ROM) value, and that the assessment of a penalty should be based solely on the amount then due as a result of that unreasonable ROM calculation. I further acknowledge that the continuing viability of the *Hagen* rationale has not been contested on review, and under the principle of *stare decisis*, deference to existing Board case precedent is generally given.

Here, I abide by that principle, subject to the following qualification. Because it is possible that one (or possibly both) of these parties will seek judicial review of today's decision, I offer the following analysis of the relevant statutes. To be clear, but for the *Hagen* holding, and were I writing on a clean slate, the following rationale would represent my analysis of the controlling statutes and their respective application to this dispute. Thus, I offer this special concurrence.

As recognized in the lead opinion, in *Kerry Hagen*, 64 Van Natta 316, *recons*, 64 Van Natta 359 (2012), the Board held that a penalty under ORS 656.268(5)(d) was awardable for an unreasonable calculation of a permanent disability award granted in a Notice of Closure. Relying on other statutory amendments, as well as legislative history, the *Hagen* Board reasoned that the intent behind ORS 656.268(5)(d) was to provide for penalties where, *inter alia*, a carrier incorrectly and unreasonably "undervalued" or improperly "rated" a

disability award in a Notice of Closure. *Id.* at 322. My analysis of the text and context of the statute in question, as well as its legislative history, leads to a different conclusion.

After examining the text and context of a statute, we may consider legislative history, even if no ambiguity is perceived in the statute's text, where that history appears useful to the analysis. *State v. Gaines*, 346 Or 160 172-73, 177-78 (2009). Nevertheless, the extent of consideration of that history, and the evaluative weight that it is given, is for us to determine. *Id.* at 172-73. Legislative history "may be used to confirm seemingly plain meaning and even to illuminate it; a party also may use legislative history to attempt to convince a court that superficially clear language actually is not so plain at all--that is, that there is a kind of latent ambiguity in the statute." *Id.* I find that there is indeed a latent ambiguity in ORS 656.268(5)(d).

I begin with a review of the text and context. The determinative issue is what the legislature intended by requiring that the "correctness" of a Notice of Closure be at issue for a penalty under ORS 656.268(5)(d) to be available.[9] The question posed at this time is whether that statute was intended to provide a penalty solely related to the closure itself, or lack thereof (refusal to close or unreasonable closure), or whether the statute was also intended to provide for a penalty where a carrier's closure calculation(s) resulted in an unreasonable award. This question must be asked in light of the fact that there already exists a specific statute that allows for the latter penalty.

Here, the unreasonable conduct was the carrier's calculation error, equating to a total of a 3 percent difference in the whole person impairment award. Thus, the question is, does ORS 656.268(5)(d) provide for a penalty on the "entire amount" of the PPD award, or only upon the unreasonable calculation error of 3 percent? It makes no sense to me that a claimant would gain a windfall simply because a carrier made an unreasonable error in calculation of the extent of permanent disability. It makes complete sense, however, that where a carrier refuses to close a claim, or unreasonably closes the claim, that the entire award is subject to a penalty because no award had yet been made.

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[9] Claimant does not argue that SAIF's act of *closing* the claim was unreasonable or that it *delayed* in processing the claim. Rather, he contends that the *award* of permanent disability given by the closure (due to miscalculated ROM) was "incorrect."

"Correctness" is defined as "the quality or state of being correct." *Webster's Third New Int'l Dictionary* 511 (unabridged ed 1993). "Correct," in turn, means "conforming to or agreeing with fact: ACCURATE." *Id.* With that definition in mind, we must focus on the statutory language.

Based on its text, the statute's reference to "correctness" would most reasonably pertain to whether the issuance of the closure itself was "accurate," *i.e*. proper (the requirements of ORS 656.268(1) were satisfied). Support for this interpretation is found in the opening clause of ORS 656.268(5)(d), which states, "If the insurer * * * has closed a claim or refused to close a claim pursuant to this section." Such a reference indicates that the statute is exclusively focused on the act of closing the claim (or the refusal to do so).[10] Moreover, "this section," refers to ORS 656.268, which, in general, is a procedural statute that governs the process of closing claims.

Additional support is found in the second clause of ORS 656.268(5)(d), which provides, in part, that "if the correctness of that notice of closure or refusal to close is at issue in a hearing on the claim * * *." Consistent with the opening clause, this clause is directed at the closure notice itself or the refusal to close the claim, and nothing more. Further, the statute provides that, "if a finding is made at the hearing that the notice of closure or refusal to close was not reasonable * * *." Once again, the focus is on the closure notice itself and the carrier's action or inaction toward closure of the claim, and nothing more.

Of further note, the text of ORS 656.268(5)(d) never mentions an "award" or "calculation" of compensation or "disability" (permanent or otherwise). Yet, the statute refers to "all" compensation when assessing the penalty. Use of the term "all" is consistent with an interpretation that the statute focuses on the *acts* of premature closure or refusal to close, because such actions/inactions (if deemed unreasonable) effect the *entire* compensation impacted by the unreasonable

[10] When considered within the context of a "refusal to close," which represents a carrier's failure to issue a closure, it is logical that a symmetrical "Notice of Closure" is limited to the act of issuing that closure--that way, both items refer to processing actions that have relevant similarities, *i.e.*, acting or not acting in closing a claim. *See White v. Jubitz Corp.*, 219 Or App 62, 75, *rev allowed*, 345 Or 175 (2008) ("Under the principle of *noscitur a sociis*, terms in a list are considered to share the same quality or common characteristics."); *King City Rehab, LLC v. Clackamas County*, 214 Or App 333, 341 (2007) (under the rule *noscitur a sociis*, the scope of a disputed word is determined by considering the "common characteristics" of other enumerated words in the series).

conduct; *i.e.*, when issuance of a closure or refusal to close is unreasonable, the result is that "all" compensation to which the claimant is entitled will become due when the unreasonable act is remedied.[11]

Hagen's rationale, in effect, interprets ORS 656.268(5)(d) to include the term "award" or "compensation" when referring to what needs to be "correct." Such an interpretation results in unintended and absurd consequences. *See* ORS 174.010 (when interpreting statutes, we must not insert what has been omitted or omit what has been inserted). If the legislature had intended to require that the correctness of the compensation awarded within the Notice of Closure be at issue for a penalty under ORS 656.268(5)(d), it could easily have written the statute to say so. *See, e.g.*, ORS 656.268(5)(e) ("If, upon reconsideration * * *, the director orders an increase by 25 percent or more of the *amount of compensation* to be paid to the worker * * *." (emphasis added)).

The context of the statute also supports my interpretation. Of importance, when the original version of ORS 656.268(5)(d) was adopted in 1979,[12] and when the statute was amended in 1987,[13] a worker already had a penalty remedy under ORS 656.262 (*former* subsections (8) and (10), respectively),[14] for unreasonable calculation of permanent and temporary disability awards contained in a Notice of Closure (which would amount to an unreasonable delay or refusal to pay compensation). However, because a penalty under *former* ORS 656.262(8) or (10) was based on "amounts then due" at the time of the unreasonable action, there was no basis for a penalty for an unreasonably issued claim closure because such a closure would be set aside and there would be no amounts "then due."[15] The enactment of ORS 656.268(5)(d) (*formerly* ORS 656.268(3)) provided that remedy by allowing the assessment of a "future" penalty based on *all* compensation (both

[11] In contrast, interpreting the statute as in *Hagen* to include calculation errors in all disability awards in their entirety in an otherwise reasonable claim closure can create a "windfall penalty." This particular case is a perfect example of such a windfall because only a small portion (*e.g.*, ROM value) of an otherwise extensive permanent disability award has been miscalculated unreasonably.

[12] *See* Or Laws 1979, ch 839, § 4.

[13] *See* Or Laws 1987, ch 884, § 10.

[14] The first version of ORS 656.262(8) was enacted in 1965. *See* Or Laws 1965, ch 285, § 30.

[15] Similarly, there were no amounts "then due" when the carrier unreasonably refused to close a claim.

temporary and permanent disability) determined due at the time of the proper closure, which was not available under the then-existing penalty provision in ORS 656.262.[16]

Moreover, if ORS 656.268(5)(d) applied to unreasonable permanent and temporary disability calculations in Notices of Closure, ORS 656.262(11)(a) would have no application or be rendered redundant. Such situations clearly satisfy ORS 656.262(11)(a)'s requirements of an unreasonable delay or refusal in paying compensation. Interpreting ORS 656.268(5)(d) as applying only to refusals to close claims/unreasonable claim closures keeps ORS 656.262(11)(a) alive to apply to a carrier's unreasonable claim processing in miscalculating a disability award granted in a Notice of Closure. In this way, the two provisions would be harmonized to give effect to both.[17] *See* ORS 174.010 ("where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all").

Thus, under the statutory scheme as it exists currently and when prior versions of ORS 656.268(5)(d) were first enacted, ORS 656.262(11)(a) was and is a readily available remedy if the calculation of the entirety, or a portion

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[16] A holding that ORS 656.268(5)(d) only applies to the issuance of closure notices or refusals to close is also consistent with *Walker v. Providence Health Sys. Oregon*, 254 Or App 676 (2013), *rev den*, 353 Or 714 (2013), and its progeny. In *Walker*, it was determined that the carrier had unreasonably refused to close the claim. In assessing a penalty under ORS 656.268(5)(d) for that conduct, the court explained that the relevant time for deciding the "compensation determined to be then due" under ORS 656.268(5)(d) "must be the time at which [the] unreasonable notice of closure or refusal to close was issued." *Id.* at 684; *see Liberty Northwest Ins. Corp. v. Olvera-Chavez*, 267 Or App 55 (2014) (based on *Walker*, ORS 656.268(5)(d) penalty for the carrier's unreasonable premature claim closure was based on "all compensation determined to be then due" at the time the unreasonable closure issued, which included permanent disability, work disability, and temporary disability awards (even though the penalty was assessed for the carrier's unreasonable failure to pay temporary disability benefits to which the claimant was entitled at the time of closure)). Therefore, the entire closure award was subject to the penalty.

Walker and its progeny concerned unreasonable refusals to close and unreasonable claim closures. As such, *all* compensation owing to the claimant by the Notice of Closure was delayed by the unreasonable conduct. *Hagen* extends *Walker* beyond its facts to apply to a situation, such as here, where there was an unreasonable *calculation* of the permanent impairment/work disability *award* in the Notice of Closure. I do not agree that such an extension is proper or supported, and such a result provides another basis for disavowal of the *Hagen* rationale.

[17] This interpretation of ORS 656.268(5)(d) is also consistent with discussions in prior cases where a penalty under that provision was at issue. *See Raymond L. Mackey*, 47 Van Natta 1 (on remand), *partially rev'd on other grounds*, 137 Or App 151 (1995); *Michael R. Wickstrom*, 46 Van Natta 906 (1994) (on remand).

of, a permanent or temporary disability award in a Notice of Closure was/is unreasonable. Furthermore, application of ORS 656.262(11)(a) to unreasonable calculations in a Notice of Closure would allow the "penalty to fit the crime," which is a palatable result. As noted above, the "all compensation due" method of penalty calculation under ORS 656.268(5)(d) would clearly result in a windfall to claimant. *See Wacker Siltronic Corp. v. Satcher*, 91 Or App 654, 658 (1988) (a penalty should bear "a reasonable relationship to the wrong done[.]"); *Harold L. Lester*, 37 Van Natta 745, 747 (1985) ("the reasoning behind the 'amounts then due' language of [former] ORS 656.262(10) is to provide a means by which to make the punishment fit the crime * * *.). I do not believe that any such windfall was contemplated or intended by the legislature. It is, therefore, important to pay close attention to what conduct is being penalized and to apply the appropriate statute to assess penalties and penalty-related fees.[18]

Additionally, application of the *Hagen* rationale necessarily includes in the ORS 656.268(5)(d) penalty assessment both the temporary disability award and portions of the permanent disability award that were neither disputed nor unreasonably calculated. I consider it illogical to interpret the statutory scheme in a manner that would award a penalty based on those uncontested and reasonable portions of claimant's awards as granted by the August 2013 Notice of Closure.[19]

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[18] Under the *Hagen* rationale, claimant's penalty award for SAIF's unreasonable ROM calculation due to a contralateral comparison (which was a 3 percent impairment error) would equal 25 percent of $43,427.14, or $10,856.79. In contrast, a penalty award for this unreasonable calculation under ORS 656.262(11)(a) would be based on $2,867.83, which is the precise effect the 3 percent impairment miscalculation had on claimant's permanent impairment and work disability awards after the unreasonable error was corrected. A penalty based on 25 percent of $2,867.83 is $716.96. Because it was not unreasonable for SAIF to have initially apportioned the impairment or to have not awarded the increased SVP value for work disability, the ORS 656.262(11)(a) penalty would be calculated using apportionment and the original SVP value as determined at closure and affirmed on reconsideration.

[19] *Hagen's* analysis of ORS 656.268(5)(d) requires a claimant to request a hearing from an Order on Reconsideration, even though he/she does not disagree with the reconsideration order's award. *See Warren D. Duffour*, 65 Van Natta 1744, 1745 (2013). The basis for such reasoning is the statutory requirement that the "correctness" of the Notice of Closure "is at issue in a hearing on the claim * * *." Thus, under the *Hagen* rationale, a claimant must potentially place the Order on Reconsideration award at risk to attempt to obtain a penalty under ORS 656.268(5)(d), despite the fact that the claimant has no objection to the permanent disability award.

In contrast to the aforementioned scenario created by *Hagen's* unnecessary extension of the scope of ORS 656.258(5)(d) to include unreasonable Notice of Closure disability awards, ORS 656.262(11)(a) would not require a hearing request from an Order on Reconsideration to obtain a penalty for a Notice of Closure containing an unreasonable award. Rather, the claimant could simply seek a penalty from the Director under ORS 656.262(11)(a) when he/she requested reconsideration of the Notice of Closure or, more likely, file a penalty request with the Director once the Order on Reconsideration's increased permanent disability award became final.

Regarding legislative history, I acknowledge that portions of the 1987 legislative history could be considered as support for the statutory interpretation expressed in *Hagen*. However, most of that history focused on a carrier's "premature closure" or "refusal to close" decision. I believe the legislative history is inconclusive as to the scope of ORS 656.268(5)(d)'s intended application. First, more than one statute was addressed in the legislative history. The proposed bill also included the penalty provision that would eventually become ORS 656.268(5)(e). That penalty was also mentioned during the legislative discussions. *See, e.g.*, Tape Recording, Senate Committee on Labor, HB 2900, June 9, 1987, Tape 204, Side A.

In addition, a review of the legislative history reflects a noticeably absent discussion of the availability of the existing penalty statute of ORS 656.262(11)(a) to address the facts of this case, *i.e.*, miscalculation of the permanent disability benefits award in a Notice of Closure. I doubt that had it been expressly discussed or otherwise brought to their attention that there was already an existing statute that addressed penalties for calculation errors, the legislators would have considered it necessary to extend the scope of the proposed statutory penalty under ORS 656.268(5)(d) beyond that of an unreasonable "premature closure" decision or an unjustified "refusal to close" decision (situations for which a penalty under ORS 656.262 would be available).

The *Hagen* majority relied heavily upon Senator Hill's comments in the legislative history. I do not find that his testimony, alone, supports the outcome of *Hagen*. It is unclear whether Senator Hill really intended to have this statute act as a secondary penalty statute for the same unreasonable conduct as already covered by an existing penalty statute. Nor should we rely solely upon Senator Hill's comments to support the proposition that more than one penalty provision for unreasonable disability calculations is necessary or anticipated.

In conclusion, as explained above, were I addressing this statutory interpretation question on a clean slate, I would analyze ORS 656.268(5)(d) in the manner detailed above. As discussed, I would interpret the text and context of ORS 656.268(5)(d) as supporting a finding that the statute was designed to penalize a carrier for an unreasonable refusal to close a claim or an unreasonable claim closure, and not for an unreasonable award calculation. The legislative

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The aforementioned reasoning further demonstrates that, based on the context of the statutory scheme, a penalty under ORS 656.268(5)(d) is not designed to apply to allegedly unreasonable calculations of permanent and/or temporary disability awards in a Notice of Closure.

history is not inconsistent with this interpretation. It is also of great significance that a statute allowing for a penalty-related fee for unreasonable award calculations has been in existence since 1965, well before the enactment of the first version of ORS 656.268(5)(d). Thus, the basis for a penalty for SAIF's unreasonable ROM calculation in the August 26, 2013 Notice of Closure would not be ORS 656.268(5)(d). Instead, because SAIF unreasonably resisted the payment of compensation when it miscalculated claimant's ROM value at closure, a penalty (and attorney fee) under ORS 656.262(11)(a) would be appropriate.[20] This penalty would be based on the amount due as a result of the unreasonable ROM calculation; *i.e.*, the difference between permanent impairment calculated using the ROM value with a contralateral comparison (as determined by SAIF at closure) and that calculated without the contralateral comparison, as well as the increased portion of claimant's work disability award that is attributable to the corrected "ROM" impairment value.

Nonetheless, because I adhere to the *Hagen* rationale under the principles of *stare decisis*, I offer this special concurrence agreeing with the majority's opinion.

Member Weddell concurring in part and dissenting in part.

I agree with the majority's finding regarding claimant's permanent disability awards. I further agree that claimant is entitled to a penalty under ORS 656.268(5)(d) for SAIF's unreasonable August 26, 2013 Notice of Closure. However, because I disagree with the majority's conclusion regarding the amount of compensation upon which to base the penalty, I respectfully dissent. In addition, given that Members Curey and Johnson[21] have questioned the analysis of *Kerry Hagen*, 64 Van Natta 316, *recons*, 64 Van Natta 359 (2012), on their own volition, I offer my own assessment of ORS 656.268(5)(d) and the *Hagen* decision.

First, I agree with claimant that the amount "then due" under ORS 656.268(5)(d) is the *entire* amount to which he is entitled under the August 2013 Notice of Closure, and not merely the increased amount awarded by the ALJ or only the amount pertaining to the unreasonable ROM calculation as determined by

[20] Likewise, the penalty-related attorney fee would be available under ORS 656.262(11)(a), not ORS 656.382(1), as reasoned by *Hagen*.

[21] *See Christina Song*, 67 Van Natta 445 (2015).

the majority opinion. Thus, I conclude that the ORS 656.268(5)(d) penalty should be based on the total permanent disability award (less any overpayment existing as of the August 26, 2013 Notice of Closure). I reason as follows.

As presented, this case turns on the interpretation of the phrase "all compensation determined to be then due" as used in ORS 656.268(5)(d).[22] In *Walker v. Providence Health System Oregon*, 254 Or App 676, 684 (2013), *rev den*, 353 Or 714 (2013), the court addressed the "then due" part of that phrase, and determined that the relevant date for determining amounts then due under ORS 656.268(5)(d) "must be the time at which [the] unreasonable notice of closure or refusal to close was issued." Thus, here, in line with the *Walker* rationale, the relevant date for determining amounts "then due" under ORS 656.268(5)(d) is the time at which the unreasonable Notice of Closure was issued (August 26, 2013). *See* 254 Or App at 684. The majority opinion does not dispute that rationale, and agrees that the proper time frame for determining what compensation was "then due" is August 26, 2013.

However, the next question under ORS 656.268(5)(d), which *Walker* did not expressly deal with, is what is meant by "all compensation." The majority's interpretation that a penalty under ORS 656.268(5)(d) should be assessed only against the *additional* compensation determined to be then due the claimant as a result of SAIF's specific unreasonable conduct ignores the plain and unambiguous use of the term "all" in the statute. The plain and unambiguous meaning of the word "all" is "every." *Rash v. McKinstry Co.*, 331 Or. 665, 672 (2001) (relying on *Webster's Third New Int'l Dictionary*, 55 (unabridged ed 1993), defining "all," in part, as "every member or individual component of"). By limiting the basis of the penalty to only the "additional" compensation, the majority's interpretation inserts language into the statute that it does not contain. *See* ORS 174.010 (in construing a statute, we are "simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted").[23]

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[22] ORS 656.268(5)(d) provides that, if a carrier has closed a claim or refused to close a claim, if the correctness of that notice of closure or refusal to close is at issue in a hearing, and if a finding is made at the hearing that the notice of closure or refusal to closure was not reasonable, a penalty shall be assessed against the insurer "in an amount equal to 25 percent of all compensation determined to be then due the claimant."

[23] I also find *Johnson v. SAIF*, 219 Or App 82 (2008), instructive. In *Johnson*, the insurer failed to issue either a Notice of Closure or a notice of refusal to close a claim within 10 days after receiving the claimant's request for claim closure, although the insurer did close the claim a few weeks later. In that late Notice of Closure, the insurer awarded $28,211.20 in permanent partial disability and offset that

Thus, while the majority distinguishes the facts of this case from *Walker*, it does not reconcile the express statutory language of "all compensation" with its conclusion. Based on the plain wording of the statute, a penalty under ORS 656.268(5)(d) is based on the entire award that was "then due" to claimant at the time of the closure, not the difference between what was awarded and what should have been awarded. Therefore, consistent with the express language of ORS 656.268(5)(d) and *Walker*, I conclude that claimant's penalty under that statute should be based on the *entire* permanent disability award (20 percent impairment and 44 percent work disability) as determined to be then due at the time of the unreasonable August 2013 Notice of Closure.

I next address the *Hagen* decision. The concurring opinion concludes that *Hagen* should be disavowed, and that a penalty is not awardable under ORS 656.268(5)(d) for SAIF's unreasonable ROM calculation in the August 2013 Notice of Closure. First, I note that, on review, neither party has asked the Board to revisit *Hagen* or has otherwise endorsed the interpretation reached by the concurring opinion. As a policy matter, I would decline to address the issue. In any event, as noted above, because the concurrence has provided an unsolicited interpretation of ORS 656.268(5)(d) and *Hagen*, I find it necessary to respond to that analysis and to provide my own interpretation of the statue and the reasons why I find *Hagen* controlling.

In interpreting statutes, the intentions of the legislature are ascertained by examining the text of the statute in its context, along with any relevant legislative history, and, if necessary, relevant canons of statutory construction. *State v. Gaines*, 346 Or 160, 171-73, (2009). "There is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes." *Id.* at 171. This is so because "[o]nly the text of a statute receives the consideration and approval of a majority of the members of

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award by $8,405.12 in overpaid temporary disability benefits, paying the claimant a net $19,806.08 in benefits. *Id.* at 85. The claimant was awarded a penalty under ORS 656.268(5)(d), and a dispute arose regarding the amount of the compensation "then due." The Court of Appeals eventually held that the "the amount 'due'" under ORS 656.268(5)(d) "is the amount that [the] claimant was entitled to be paid, and not * * * the amount 'awarded.'" *Id.* at 86. Thus, the court affirmed the Board's conclusion that "compensation determined to be then due the claimant" under ORS 656.268(5)(d) means "the compensation award less the amount of any authorized offset for an overpayment." Accordingly, the court held that the penalty should equal 25 percent of $19,806.08 (the amount of benefits paid after the insurer offset the temporary disability that it had previously overpaid), not 25 percent of the $28,211.20 permanent partial disability benefits awarded. In line with *Johnson*, here, the amount that claimant was entitled to be paid when the August 26, 2013 Notice of Closure issued was the *entire* permanent disability award ultimately determined to be due (less any overpayment existing as of the Notice of Closure).

the legislature, as required to have the effect of law." *Id.* Thus, "[t]he formal requirements of lawmaking produce the best source from which to discern the legislature's intent, for it is not the intent of the individual legislators that governs, but the intent of the legislature as formally enacted into law." *Id.*

ORS 656.268(5)(d) provides that if a carrier has closed (or refused to close) a claim and the "correctness" of that Notice of Closure (or refusal to close) is at issue in a hearing, then if a finding is made at the hearing that the Notice of Closure (or refusal to close) was not reasonable, "a penalty shall by assessed against the [carrier] * * * in an amount equal to 25 percent of all compensation determined to be then due the claimant."

Here, there is no dispute that SAIF closed claimant's claim on August 26, 2013. Therefore, the first predicate of ORS 656.268(5)(d) is satisfied. I also agree with the majority and concurring opinions that SAIF's August 2013 Notice of Closure was not reasonable. However, contrary to the concurring opinion, I find *Hagen* to be consistent with the statutory language and legislative history. Thus, because *Hagen* controls the circumstances of this case, I conclude that the "correctness" of SAIF's August 2013 Notice of Closure was "at issue in [the] hearing." ORS 656.268(5)(d).

According to the concurring opinion, for a penalty under ORS 656.268(5)(d) to be awardable, a "premature closure" (as opposed to a "Notice of Closure") must be at issue, incorrect, and unreasonable. The concurring opinion reaches that result based on a statutory "text and context" analysis. However, the "text and context" reasoning is not dispositive, given that less than two years ago, the Board in *Hagen* looked at the legislative history and concluded that the "text and context" supported the exact opposite conclusion from that found by the concurring opinion. I would not disturb that precedent.

In any event, if "text and context" were dispositive, I would conclude that such an analysis reveals that "correctness" includes the amount of a permanent or temporary disability award. My reasoning in that regard is as follows.

The enacted legislative language of the second predicate for an ORS 656.268(5)(d) penalty merely requires that "the correctness of that notice of closure * * * [be] at issue in a hearing on the claim." "Correctness" is defined as "the quality or state of being correct." *Webster's Third New Int'l Dictionary*, 511 (unabridged ed 1993). "Correct" means "conforming to or agreeing with fact : ACCURATE <have a ~ answer to the problem> conforming to logical or proven principles or agreeing with known truth <it would be ~ to call it the best possible

treaty> <the ~ way to hold the tool" and "conforming to or agreeing with a set figure (as the price established for an article of merchandise) <sent the ~ return postage> syn ACCURATE, EXACT, PRECISE, NICE, RIGHT: CORRECT means hardly more than freedom from fault or error, often as judged by some conventional or acknowledged standard * * *." *Id.*

Thus, if the "accuracy," "exactness," "precision," "rightness" or "correctness" of a "notice of closure" is "at issue" in the hearing, the second predicate of ORS 656.268(5)(d) is satisfied. "At issue" means "in a state of controversy : at variance : at a point where opposing viewpoints are held : in disagreement <for years they remained at issue with each other>. *Id.* at 1201. *See also Bryan A. Garner*, A Dictionary of Modern Legal Usage 2nd ed 470 (1995) (defining "at issue" as "(of matters or questions) in dispute; under discussion; in question <the allegations at issue>.").

Under ORS 656.268(5)(a), a "Notice of Closure" must, *inter alia*, include: the amount of any further compensation, including permanent disability compensation to be awarded; the duration of temporary total or temporary partial disability compensation; the right of the worker to request reconsideration by the director within 60 days of the date of the Notice of Closure; the right of the insurer or self-insured employer to request reconsideration by the director under this section within seven days of the date of the Notice of Closure; aggravation rights; and "such other information as the director may require." Thus, a "Notice of Closure" constitutes more than informing a worker of the decision that a claim has been closed. To the contrary, it includes monetary calculations of permanent and temporary disability benefits. ORS 656.268(5)(a). Consequently, the "correctness" of a "Notice of Closure," necessarily includes the required contents that comprise such a notice.

Therefore, as applied here, because the "correctness" of the ROM calculation included in the disputed Notice of Closure was "at issue" in the hearing before the ALJ, and because the Notice of Closure was not "reasonable," all of the penalty predicates of ORS 656.268(5)(d) have been satisfied. Contrary to the concurring opinion's determination, the text of the statute itself says nothing about limiting the availability of a ORS 656.268(5)(d) penalty to the "issuance" of a "Notice of Closure."

Moreover, I do not find that the historical "context" of ORS 656.268(5)(d) supports the concurring opinion's interpretation. Specifically, the legislative amendments in 1987, which resulted in the language currently in dispute, indicate a legislative intent to expand the scope of penalties under ORS 656.268(5)(d)

commensurate with the expanded closure powers afforded to carriers. Before 1979, carriers were not permitted to close claims; however, with the passage of SB 48, carriers were permitted, in limited circumstances to close a claim, without a "determination order by the Evaluation Division." *See* Or Laws 1979, ch 839, § 4. That legislative amendment provided, in relevant part:

> "When the medical reports indicate * * * that the worker's condition has become medically stationary and the [carrier] decides that the claim is nondisabling or is disabling but without permanent disability, the claim may be closed * * *." The [carrier] shall issue a notice of closure of such a claim to the worker and to the Workers' Compensation Department. The notice must inform the worker of the decision that no permanent disability results from the injury; of the amount and duration of temporary total disability compensation; [and] of the right of the worker to request a determination order from the Evaluation Division within one year of the date of the notice of claim closure * * *. Within one year of the date of that notice of closure, "a determination order subsequently shall be issued on the claim at the request of the claimant or may be issued by the Evaluation Division upon review of the claim if the division finds that the claim was closed improperly. If [a carrier] has closed a claim pursuant to this subsection and thereafter decides that the claim has permanency, the [carrier] shall request a determination order * * *. If [a carrier] has closed a claim pursuant to this subsection, if the reasonableness of that closure decision is at issue in a hearing on the claim and if a finding is made at the hearing that the closure decision was not supported by substantial evidence, a penalty shall be assessed against the [carrier] * * *." *Id.*

Thus, broadly speaking, the 1979 legislative amendments of SB 48 permitted the carrier to close a claim that was nondisabling or only temporarily disabling, subject to objections from a worker or the Evaluation Division. If the "reasonableness of that closure decision [was] at issue in a hearing on the claim," a penalty would be assessed "if a finding [was] made at the hearing that the closure decision was not supported by substantial evidence." *Id.*

SB 48 represented a fairly dramatic structural change in the closing of claims in that it authorized carriers, in certain circumstances, to issue a Notice of Closure, which included the amount and duration of any TTD compensation. *Id.* The legislative history indicates that there were serious concerns about giving carriers that authority, and that a penalty provision was necessary to prevent any abuse or improper closure of a claim. *See, e.g.*, Minutes, Senate Committee on Labor, Consumer and Business Affairs, SB 48, April 3, 1979; *see also id.*, April 10, 1979, April 12, 1979, April 17, 1979, May 1, 1979, June 12, 1979. The legislative history does not establish a legislative intent to only provide for a penalty for the premature closing of a claim. However, even if there was such an intent, that would not be decisive here because: (1) carriers had limited closure authority in 1979; and (2) the penalty provisions were subsequently amended, as described below.

In 1987, the statute was amended to grant carriers broader authority in the claim closure process. *See* Or Laws 1987, ch 884, § 10. Generally speaking, those amendments permitted a carrier to also close claims that were permanently disabling, and instructed carriers to rate the extent of any disability under "the same standards as used by the Evaluation Division." *Id.* The amendments also permitted: (1) a worker to request that a carrier issue a Notice of Closure; (2) a carrier to issue a Notice of Closure if the worker was medically stationary; or (3) a carrier to issue a refusal to close if the worker was not medically stationary. *Id.*

With respect to the at-issue penalty provision, the language was modified as follows (new material in bold and deleted material in italics and brackets):

> "If an insurer or self-insured employer has closed a claim **or refused to close a claim** pursuant to this subsection, if the [*reasonableness*] **correctness** of that [*closure decision*] **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 [*decision*] **or refusal to close** was not [*supported by substantial evidence*] **reasonable**, a penalty shall be assessed against the insurer or self-insured employer in an amount equal to 25 percent of all compensation determined to be [*owing between the date of original closure and the date upon which the claim is closed by determination order*] **then due the claimant**. The penalty shall not be less than [*$500*] **$1,000**." *Id.*

Thus, as relevant here, the 1987 penalty provision amendments: (1) added the refusal to close a claim as a potential penalty predicate; (2) changed "reasonableness" of a "closure decision" to "correctness" of a "notice of closure or refusal to close"; (3) changed "supported by substantial evidence" to "reasonable"; (4) changed "owing between the date of original closure and the date upon which the claim is closed by determination order" to "then due the claimant"; and (5) increased the mandatory minimum penalty amount. *Id.*

Because of the increased closure powers granted to carriers, the legislature also amended what needed to be included in a "notice of closure." *See* Or Laws 1987, ch 884, § 10. Specifically, Notices of Closure now needed to inform the worker of the "amount of any further compensation, including permanent disability compensation to be awarded," as well as the amount and duration of temporary partial disability compensation. *Id.*

If the concurring opinion were correct in its interpretation that a penalty may only be assessed for a decision to close or refusal to close, there would have been no need for the legislature to change "closure decision" to "notice of closure or refusal to close." Moreover, the 1987 legislature changed "closure decision" to "notice of closure" *and* simultaneously added what was required to be included in a "notice of closure," including the amount of permanent and temporary disability awards. *See* Or Laws 1987, ch 884, § 10. Thus, I find that the context of the legislative amendments supports a conclusion consistent with the text of the statute--*i.e.*, that a penalty shall be awarded for an unreasonable Notice of Closure (as opposed to just a premature "closure decision" or refusal to close), which would include unreasonable permanent and temporary disability awards that are required to be included in such a notice.

I next look to the relevant legislative history of ORS 656.268(5)(d). *See Gaines*, 346 Or at 172-73, 177-78 (even if no ambiguity is perceived in the statute's text, it is appropriate to consider legislative history where that history appears useful to the analysis). That history refutes the concurring opinion's conclusion that the legislature only intended to provide a penalty for an unreasonable refusal to close or premature closure.

On May 27, 1987, the Senate Committee on Labor convened to discuss HB 2900. In that meeting, the chair of the committee, Chairman Hill, introduced amendments that were prepared at his request by staff counsel. Tape Recording, Senate Committee on Labor, HB 2900, May 27, 1987, Tape 178, Side A. Chairman Hill explained that, broadly speaking, the amendments were designed to

provide for increased carrier closures by way of "modified carrier closure," while at the same time preventing workers from being "starved out." *Id.* at Side A, Side B. Chairman Hill noted that the "Advisory Committee" came to the conclusion that "full carrier closure can be the source of extensive abuse unless [there were] very strong controls over how it's implemented and very strong standards on how permanent partial disabilities are measured." *Id.* at Side A.

With respect to the penalty provision at issue, Chairman Hill introduced the following language:

> "If an insurer or self-insured employer has closed a claim or refused to close a claim pursuant to this subsection, if the [reasonableness] correctness of that [closure decision] notice of closure is at issue in a hearing on the claim and if a finding is made at the hearing that the notice of closure [decision] was not [supported by substantial evidence] 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 [owing between the date of original closure and the date upon which the claim is closed by determination order] then due the claimant. The penalty shall not be less than [$500] $1,000." *Id.* at Exhibit A, p. 5.

Thus, with the exception of subsequently adding a second "refusal to close" phrase, the language submitted by Chairman Hill is identical to that ultimately enacted. Chairman Hill explained that the purpose of the penalty provision was to provide a "disincentive to premature closure or closure that is unreasonable or abusive to the employee's rights. We're trying to include incentives for fair closure or reasonable closure." *Id.* at Tape 178, Side A.

Later in that session, the committee members discussed the difficulty in carriers learning how to "accurately" close claims. *Id.* at Tape 179, Side B. The members then discussed a potential "training" or "certification" for carriers to help them "successfully" close claims. *Id.* Senator Kerans then noted the penalty provision, which he described as being for when a carrier closure was not "proper." *Id.* He observed that a "competency test" might be effective in this regard because carriers were going to be required to close claims by the same standards as the Evaluation Division when rating disability awards. *Id.*

On June 9, 1987, the committee again discussed the at-issue penalty provisions, which still contained the same language submitted on May 29. *See* Exhibit C, Senate Committee on Labor, HB 2900, June 9, 1987. Chairman Hill described the provision as being for when "somebody is upset about the closure of a claim * * * and they feel that the correctness of the notice of closure is * ** an issue in the case, and a finding is made that the notice of closure was not reasonable." Tape Recording, Senate Committee on Labor, HB 2900, June 9, 1987, Tape 204, Side A. He stated that the penalty was designed "to prevent abuse of the carrier closure process" and "to try and encourage reasonable closure, not perfect, but reasonable closure." *Id.*

Senator Hannon asked whether a "clerical error" or an unknowing "goof" would result in a penalty. Chairman Hill responded that such a penalty should not be imposed in such a situation. He explained that if the carrier was "following the rules," or committed a "clerical error" or "honest mistake," such actions should not constitute an "unreasonable closure." *Id.* Chairman Hill added, however, that carriers should be encouraged to be "accurate." *Id.* Chairman Hill added that his intent, and the intent of "the other folks that suggested 'reasonable,'" was for that term to be "flexible." *Id.*

Senator Kerans noted the proposed minimum increase in the penalty amount from $500 to $1,000. *Id.* He questioned whether the existing penalty had ever been assessed, reasoning that increasing the amount would not be an incentive if such penalties were not assessed. *Id.* Chairman Hill responded that the then-current penalty only applied to "closure decisions" on nondisabling claims, whereas the amended penalty would apply to disabling claims. *Id.* He stated that "bad" or "abusive" decisions in disabling claims would likely result in the penalty provision being more frequently raised. *Id.*

Senator Hannon asked about changing the word "reasonableness" to "correctness." *Id.* Chairman Hill asked Lynn Crider, a staff administrator, to address that question. *Id.*; *see also* Minutes, Senate Committee on Labor, June 9, 1987. Ms. Crider explained that there were two aspects to the penalty provision: (1) whether the Notice of Closure was "correct"; and is that Notice "so unreasonable that a penalty should be assessed." Tape Recording, Senate Committee on Labor, HB 2900, June 9, 1987, Tape 204, Side A. She added that "reasonableness" was the standard used in another, more commonly used statutory penalty provision. *Id.*

Senator Hannon then noted that carriers would be moving into a "new area" of closing disabling claims, and that he would assume that there would be some "errors" in "working out the bugs in the new system." *Id.* He worried that assessing penalties in such situations would amount to a "penalty for learning." *Id.*

Chairman Hill explained that "if there's no penalty, and we allow carrier closure, there's nothing to provide an incentive for the carrier to correctly value the disability." *Id.* He further observed that "it would be worth more to deny a claim or to undervalue, put the money in the bank, collect the interest, and then wait to see if the case is ever won." *Id.* At that point, Chairman Hill noted, the carrier could then "pay the proper PPD" while "sav[ing] the interest." *Id.*

After further discussion about how to provide for an effective penalty, Senator Bradbury asked if the proposed language would be the "only penalty for an unreasonable closure." *Id.* Chairman Hill responded:

> "There's one other later in the bill and that is if the PPD was so inaccurate that, later on, the award is increased by at least 25 percent and the individual claimant's total PPD is 20 percent or more disability, then there's a penalty which amounts to the attorney fees for the claimant so the claimant doesn't have to pay for attorney fees out of the increased award." *Id.*; *see also* Or Laws 1987, ch 884, § 34.

In response to a question from Senator Bradbury about creating a system that had a "fair closure of claims" and holding carriers accountable, Chairman Hill identified the penalty provision as one tool to accomplish that, as well as a carrier having to pay for attorney fees outside of the award, if the carrier "was so out of line" in the rating of PPD. Tape Recording, Senate Committee on Labor, HB 2900, June 9, 1987, Tape 204, Side A.

Senator Kerans then expressed a concern that, under the proposed language, penalties would not be assessed, much like the testimony before the committee that penalties had not been assessed under the prior version of the statute. *Id.* at Tape 205, Side A. Mr. Johnson, a representative from SAIF, responded that due to the limited closure options available to carriers under the current statute, a carrier's work would have to be "pretty sloppy" to have incurred a penalty. *Id.* He added that the new proposed closure responsibilities were a "different animal" that required a "different category of expertise." *Id.* He provided an example of a

carrier attempting to determine "a 15 percent impairment versus a 20 percent impairment." *Id.* Thus, Mr. Johnson thought that the proposed language made it "easier to assess penalties" by changing "substantial evidence" to "reasonableness" while simultaneously making the carrier's "determination more complicated." *Id.*

Mr. Edmunson, from the Oregon Trial Lawyers Association, agreed that it would be "somewhat easier" to prove "unreasonableness" than to show that there was no "substantial evidence." *Id.* Mr. Edmunson cautioned, however, that "in many ways," it would still be difficult to establish "unreasonableness"--*i.e.*, that there was "no valid explanation for why they did something in the closure." *Id.*

Senator Kerans then noted that under the proposed language, the phrase "refusal to close" did not appear a second time, as did "notice of closure." After a discussion with Chairman Hill, Senator Kerans moved to insert "or refusal to close" on lines 24 and 25; there were no objections to that motion, and that language was added to reflect what was ultimately enacted. *Id.*; *see also* Or Laws 1987, ch 884, § 10.

Simply put, the legislative history shows that the very purpose of the amendment was to expand the penalty commensurate with the increased responsibilities of carrier closure, *i.e.*, from being able to just close nondisabling claims to closing and rating disabling claims. Because of that increased power and responsibility, the legislature wanted to ensure that carriers did not abuse their position by unreasonably issuing "lowball" disability awards. In instances where carriers so egregiously underrated PPD awards for a claimant with at least 20 percent permanent disability, the legislature provided for an additional "penalty" by requiring the payment of attorney fees. Although that "attorney fee" penalty was thereafter modified to be a strict penalty payable to a claimant (*see* Or Laws 1990, special session, ch 2, § 16, currently codified at ORS 656.268(5)(e)), that subsequent modification does not undo the legislative intent of ORS 656.268(5)(d) or impact its scope.

In sum, the legislative history shows that, in enacting ORS 656.268(5)(d), the legislature intended that the "correctness" of a "notice of closure" included a carrier's disability calculation, with the goal of encouraging "accuracy" "correctly valu[ing]" disability awards, and providing a deterrent for carriers to "undervalue" claims. *See* Tape Recording, Senate Committee on Labor, June 9, 1987, Tape 204, Side A. Moreover, honest mistakes or miscalculations would not be the type of conduct that would typically be considered "unreasonable" and deserving of a penalty. *Id.* The legislature intended to expand the penalty provisions of ORS

656.268(5)(d) and make it "easier" for such penalties to be awarded. *Id.*; *see also id.* at Tape 205, Side A. Thus, the legislative history corroborates the textual language of the statute--*i.e.*, that a penalty would be available for incorrect Notices of Closure, so long as the Notice of Closure was unreasonable. Indeed, the legislative history shows that, in enacting ORS 656.268(5)(d), the legislature was primarily concerned with incorrect disability award calculations, with only occasional references to premature closures or unreasonable refusals to close.

The concurring opinion also dismisses the legislative history cited by *Hagen* because it purportedly comes from a "single" legislator. I disagree with the concurring opinion's summary dismissal of Chairman Hill's statements. "In the case of statements of individual legislators," greater weight is accorded to an "author, sponsor, or carrier of a bill," or one in "some other leadership position." *State v. Kelly*, 229 Or App 461, 467 (2009) (citing *Bobo v. Kulongoski*, 338 Or 111, 117–18 (2005) (relying on comments of the Joint Committee on Ways and Means cochair about the meaning of "kicker" legislation); *O'Donnell–Lamont and Lamont*, 337 Or 86, 105 n 9 (2004), *cert den*, 543 US 1050 (2005) (statement of bill sponsor in committee). As Chairman Hill's title suggests, his responses to questions from legislative colleagues in the Senate Committee on Labor on the intended meaning behind the 1987 legislative amendments are entitled to greater due than that granted by the concurring opinion.

Moreover, the legislative history shows that the at-issue amendments were prepared at Chairman Hill's request, and that he worked with staff counsel in drafting the language for those amendments. Tape Recording, Senate Committee on Labor, HB 2900, May 27, 1987, Tape 178, Side A; *see also* Exhibit A, Senate Committee on Labor, May 27, 1987. Thus, it is unsurprising that his colleagues would question him concerning the intent of the amendments, and that his responses should be given greater weight than the isolated extemporaneous observations of an anonymous legislator.

The legislative history further shows that other committee members shared the understanding that the penalty provision would apply to the contents/ calculations in the Notice of Closure, as opposed to just the issuance of the Notice of Closure. Tape Recording, Senate Committee on Labor, HB 2900, May 27, 1987, Tape 179, Side A, Side B, June 9, 1987, Tape 204, Side A, Tape 205, Side A. Finally, the language proposed and explained by Chairman Hill was ultimately adopted by the committee and the legislature.

In sum, I find, in line with *Hagen*, that the "correctness" of SAIF's August 2013 Notice of Closure was "at issue" in the hearing before the ALJ, and that a penalty under ORS 656.268(5)(d) is warranted. Contrary to the majority, however, I conclude that such a penalty shall be based on *all* the compensation determined to be due at the closure. Therefore, I respectfully dissent from that portion of the majority's opinion. In addition, for the reasons expressed above, I would not endorse the concurring opinion's unsolicited disavowal of *Hagen*.