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In the Matter of the Compensation of  
WCB Case No. 15-00859  
**SILVIU V. MOISESCU**, Claimant  
ORDER ON REVIEW  
Ronald A Fontana, Claimant Attorneys  
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Weddell and Curey.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Marshall's order that: (1) declined to assess a penalty under ORS 656.268(5)(d) for an unreasonable claim closure; and (2) did not award an attorney fee under ORS 656.382(1). In its respondent's brief, the SAIF Corporation contests the ALJ's determination that its closure notice was unreasonable. On review, the issues are penalties and attorney fees. We reverse in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," and provide the following summary.

On September 19, 2014, claimant, a maintenance technician, compensably injured his neck and back. (Ex. 1). On October 7, 2014, he came under the care of Ms. Pierce, a nurse practitioner, who diagnosed neck and lumbar sprains, prescribed physical therapy, and released claimant to modified work. (Exs. 5, 6).

On October 28, 2014, SAIF accepted cervical and lumbar strains. (Ex. 9).

On December 12, 2014, Ms. Pierce assessed no significant change in claimant's condition. (Ex. 14-2). She directed him to return in two weeks and to continue physical therapy and modified work until he returned. (Ex. 14-2). Claimant did not keep the appointment. (Ex. 17).

On January 6, 2015, Dr. Thiessen, a physician, performed an examination.<sup>1</sup> Dr. Thiessen opined that claimant's lumbar and cervical strains were medically stationary with no permanent impairment. (Ex. 15-3).

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<sup>1</sup> The record does not indicate how claimant came to be seen by Dr. Thiessen.

On January 8, 2015, SAIF asked Ms. Pierce if claimant's lumbar and cervical strains were medically stationary and advised her that she would be required to either perform, or refer claimant for, a closing examination. (Ex. 16). In response, Ms. Pierce opined that claimant's lumbar and cervical strains were medically stationary as of January 8, 2015. (*Id.*) Subsequently, on January 13, 2015, in response to further inquiry from SAIF, Ms. Pierce released claimant to regular work as of January 8, 2015 and reported that claimant had not kept his follow-up appointment. (Ex. 17).

On January 22, 2015, SAIF issued a Notice of Closure that awarded temporary disability benefits through December 26, 2014 and no permanent disability. (Ex. 19).

Claimant requested reconsideration. Asserting that the claim had been closed prematurely or improperly, claimant sought temporary and permanent disability benefits, an ORS 656.268(5)(d) penalty, and an ORS 656.382(1) attorney fee. (Ex. 21).

A February 19, 2015 Order on Reconsideration rescinded the Notice of Closure for lack of sufficient impairment findings under OAR 436-030-0020(2). (Ex. 22-2). Claimant requested a hearing, seeking penalties and attorney fees under ORS 656.268(5)(d) and ORS 656.382(1), respectively.

### CONCLUSIONS OF LAW AND OPINION

The ALJ determined that the Notice of Closure was unreasonable because there was insufficient information to close the claim. Nevertheless, because claimant had been released to regular work, the ALJ reasoned that there were no amounts "then due" on which to base an ORS 656.268(5)(d) penalty and that an ORS 656.382(1) penalty-related attorney fee award was not warranted.

On review, claimant contends that an ORS 656.268(5)(d) penalty and attorney fees under ORS 656.382(1) and ORS 656.262(11)(a) are justified. In its respondent's brief, SAIF challenges the ALJ's finding that the closure notice was unreasonable. Specifically, SAIF argues that its reliance on Dr. Thiessen's "closing examination" in issuing the Notice of Closure was reasonable.

For the following reasons, we disagree with SAIF's contention. In addition, we award an ORS 656.268(5)(d) penalty and ORS 656.382(1) attorney fee.

Under ORS 656.268(5)(d), “a penalty shall be assessed against the insurer or self-insured employer and paid to the worker in an amount equal to 25 percent of all compensation determined to be then due the claimant” if: (1) the carrier “has closed a claim or refused to close a claim pursuant to [ORS 656.268]”; (2) the “correctness” of that closure or refusal to close is at issue in a hearing on the claim; and (3) “a finding is made at the hearing that the notice of closure or refusal to close was not reasonable.” ORS 656.268(5)(d); *Cayton v. Safelite Glass Corp.*, 232 Or App 454, 460 (2009).

Here, there was a closure of the claim on January 22, 2015 and the “correctness” of that action was an issue in the hearing on the claim. The remaining issue is whether the Notice of Closure was reasonable.

The reasonableness of the Notice of Closure must be evaluated based on the information available to SAIF at the time of the closure. *David J. Morley*, 66 Van Natta 2052, 2055 (2014). If that information supported a reasonable belief that the requirements for claim closure had been met, SAIF’s closure was not unreasonable. *See Robert E. Charbonneau*, 57 Van Natta 591, 602 (2005) (although the claim was prematurely closed, no ORS 656.268(5)(d) penalty was awarded because the carrier had a legitimate doubt about the propriety of the closure).

The requirements for claim closure are set forth in ORS 656.268(1)(a); *i.e.*, a claim is to be closed when the claimant “has become medically stationary and there is sufficient information to determine permanent disability.” Accordingly, OAR 436-030-0020(1)(a) provides for claim closure when “[m]edical information establishes there is sufficient information to determine the extent of permanent disability under ORS 656.245(2)(b)(C), and indicates the worker’s compensable condition is medically stationary.” OAR 436-030-0020(1)(a) (WCD Admin. Order 11-058; eff. January 1, 2012).

“Sufficient information” means “an authorized nurse practitioner’s \* \* \* or attending physician’s written statement that clearly indicates there is no permanent impairment, residuals, or limitations attributable to the accepted condition(s),” or a closing examination report. OAR 436-030-0020(2)(a), (b). A nurse practitioner must refer the worker to an “attending physician” to do a closing exam if there is likelihood that the worker has permanent impairment. ORS 656.245(2)(b)(D)(iii); OAR 436-010-0280(1) (Admin. Order 14-053; eff. April 1, 2014).

Here, claimant was under the care of an authorized nurse practitioner, Ms. Pierce, when his condition became medically stationary. Accordingly, “sufficient information” to close the claim required that Ms. Pierce either submit a “no impairment” statement or refer claimant to an “attending physician” to do a closing exam. OAR 436-030-0020(2)(a), (b). Ms. Pierce did neither.

While Dr. Thiessen performed an examination on January 6, 2015, two days before Ms. Pierce assessed claimant’s condition as being medically stationary, the record does not indicate that Ms. Pierce referred claimant to Dr. Thiessen for the purpose of making impairment findings to evaluate permanent impairment disability or that he was claimant’s “attending physician” at the time of claim closure. (Exs. 15, 16). *See* ORS 656.005(12)(b) (“attending physician” means a provider “who is primarily responsible for the treatment of a worker’s compensable injury”).

In the absence of evidence satisfying the aforementioned “claim closure” requirements, the record does not establish that there was “sufficient information” to close the claim on January 22, 2015. Moreover, given the express and unambiguous requirements of the statute, and applicable administrative rules, regarding “sufficient” claim closing information, we agree with the ALJ’s conclusion that the issuance of the closure notice was unreasonable.

We turn to the penalty and attorney fee issues. Relying on *Gary Fallis, Jr.*, 66 Van Natta 1938, 1942 (2014), the ALJ found that, because claimant had been released to regular work, no temporary disability benefits were due on January 22, 2015. Thus, the ALJ determined that there were no amounts “then due” on which to base a penalty.

On review, claimant argues that the penalty should have been assessed. We agree for the following reasons.

As discussed above, the three predicates for assessing a penalty under ORS 656.268(5)(d) were met. That being the case, ORS 656.268(5)(d) does not allow the ALJ or Board discretion in assessing a penalty; rather, a penalty “*shall* be assessed \* \* \* in an amount equal to 25 percent of all compensation determined to be then due the claimant.”

The relevant point in time for determining the amount “then due” is the time at which the unreasonable notice of closure was issued. *Liberty Northwest Ins. Corp. v. Olvera-Chavez*, 267 Or App 55, 65 (2014) (ORS 656.268(5)(d) penalty

should be based on the amount of compensation due as of the date of the premature notice of closure); *Walker v. Providence Health System*, 254 Or App 676, 685 (2013) (the “amount due” was the amount the claimant was entitled to be paid at the time of the unreasonable premature closure); *Fallis*, 66 Van Natta at 1942 (citing *Walker* and *Olvera-Chavez* in determining that the ORS 656.268(5)(d) penalty should be based on the temporary disability compensation determined to be due as of the date of the premature closure). Because the amount of compensation due claimant as of the date of the unreasonable Notice of Closure (January 22, 2015) is unknown (because the Notice of Closure was set aside), we find that the determination of the penalty amount is a matter of claim processing and will be based on the eventual calculation of claimant’s compensation at the subsequent valid claim closure. See *Guy E. Bales*, 64 Van Natta 231, *recons*, 64 Van Natta 1599 (2012), *aff’d without opinion*, 263 Or App 755 (2014) (rejecting a carrier’s argument that an ORS 656.268(5)(d) penalty should be rescinded because there was no compensation “then due”). We find that claimant is entitled to a penalty on those amounts then due, if any.

We turn to claimant’s request for attorney fee awards under ORS 656.262(11)(a) and ORS 656.382(1). Claimant’s counsel is not entitled to attorney fee awards under both ORS 656.262(11)(a) and ORS 656.382(1) for the same conduct. See *Cayton v. Safelite Glass Corp.*, 232 Or App 454, 463 (2009) (penalties under both ORS 656.262(11)(a) and ORS 656.268(5)(d) are not available for the same conduct); *Corona v. Pacific Resource Recycling*, 125 Or App 47 (1993) (attorney fee awards under both ORS 656.262(11)(a) and ORS 656.382(1) are available only if there are two separate acts of unreasonable conduct); *Andrew A. Veluscek*, 64 Van Natta 686, 692, *recons*, 64 Van Natta 1286 (2012) (same). Furthermore, in cases involving unreasonable claim closure, or unreasonable failure to close a claim, the applicable attorney fee is provided under ORS 656.382(1). See *Herman G. Lovell*, 60 Van Natta 3087, 3089 (2008) (in cases involving unreasonable failure to close a claim, the assessment of a penalty and penalty-related attorney fee are more appropriately governed by ORS 656.268(5)(d) and ORS 656.382(1), rather than ORS 656.262(11)(a)).

ORS 656.382(1) provides for an attorney fee if a carrier “unreasonably resists the payment of compensation.” Whether there was resistance to the payment of compensation does not depend on compensation being due or a nonpayment of compensation. The statute requires only that there be a “resistance” to the payment of compensation. See *Tri-Met, Inc. v. Wolfe*, 192 Or

App 556, 560 (2004) (the carrier's conduct in delaying acceptance resisted the payment of compensation where there were outstanding medical bills even though the bills did not become "due" until after the claim was accepted).

Here, SAIF's issuance of the Notice of Closure, in the absence of sufficient closing information, constitutes a resistance to the payment of compensation; *i.e.*, an evaluation of the claim that was not based on the sufficient information necessary to rate claimant's permanent impairment attributable to his compensable injury. *See Fallis*, 66 Van Natta at 1942 (where there was no attending physician to provide impairment findings, the carrier's Notice of Closure was unreasonable and the claimant was awarded an ORS 656.268(5)(d) penalty); *Kevin Lineberger*, 58 Van Natta 1921, 1928 (2006) (by failing to seek impairment findings from the attending physician, the carrier delayed the closure of the claim and unreasonably resisted the payment of compensation, citing *Wolfe*).

The standard for determining whether the resistance to the payment of compensation was unreasonable is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability when it issued the Notice of Closure. *See Int'l Paper Co. v. Huntley*, 106, Or App 107, 110 (1991).

Based on the aforementioned reasoning regarding the penalty issue, we conclude that SAIF unreasonably resisted the payment of compensation in closing the claim without sufficient closing information. Therefore, an attorney fee for services at the hearing level under ORS 656.382(1) is warranted. *See Cayton v. Safelite Glass Corp.*, 257 Or App 188, 195 (2013); *Roger D. Samples*, 67 Van Natta 1672, 1678 (2015) (awarding a penalty under ORS 656.268(5)(d) and an assessed fee under ORS 656.382(1) for unreasonable claim closure).

After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable attorney fee under ORS 656.382(1) for claimant's attorney's services at the hearing level is \$4,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the hearing record), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

### ORDER

The ALJ's order dated August 18, 2015 is affirmed in part and reversed in part. Claimant is awarded a penalty equal to 25 percent of all compensation determined to be due at the time the premature January 22, 2015 Notice of Closure

issued as based on the eventual proper Notice of Closure. Claimant's attorney is also awarded a reasonable attorney fee under ORS 656.382(1) of \$4,500, payable by SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on February 17, 2016