In the Matter of the Compensation of
**RAFAEL CORONA-GAMBINO, Claimant**
Own Motion No. 23-00005OM
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Dodge and Associates, Claimant Attorneys
Law Offices of Kathryn R Morton, Defense Attorneys

Reviewing Panel: Members Curey and Ceja.

Claimant requests review of the March 21, 2023, Own Motion Notice of Closure that awarded an additional 12 percent whole person impairment and 27 percent "work disability" for his "post-aggravation rights" new or omitted medical conditions (right knee osteoarthritis, re-torn right knee lateral meniscus, second re-tear right knee lateral meniscus, and parameniscal cyst).[1] In doing so, claimant contends that the claim was unreasonably prematurely closed. Alternatively, he seeks permanent total disability (PTD) benefits, as well as penalties and attorney fees for the insurer's allegedly unreasonable claim processing and discovery violations. Based on the following reasoning, we affirm the Notice of Closure, but award a penalty and penalty-related attorney fees for unreasonable delay in closing the Own Motion claim and failure to comply with the Board's discovery rules and records requests.

## FINDINGS OF FACT

Prior to the 2007 right knee injury claim in this case, claimant compensably injured his left knee on October 25, 2004. The 2004 claim was closed on August 12, 2005 with an award of permanent impairment for the left knee.

On July 31, 2012, the insurer reopened the 2004 claim in Own Motion for processing of "post-aggravation rights" new or omitted medical conditions (left knee sprain/strain and degeneration osteoarthritis). On January 30, 2013, the insurer issued an Own Motion Notice of Closure that regarding that claim granted claimant additional temporary disability benefits for the left knee.

[1] Claimant's August 27, 2007, injury claim was first closed on April 17, 2009. (Ex. 33). Thus, his aggravation rights expired on April 17, 2014. Therefore, when claimant sought reopening in September 2018, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On September 24, 2018, the insurer voluntarily reopened claimant's Own Motion claim for a new or omitted medical condition (right knee osteoarthritis). ORS 656.278(1)(b). On May 18, 2021, the insurer voluntarily reopened claimant's Own Motion claim for additional new or omitted medical conditions (retorn right knee lateral meniscus, second retear right knee lateral meniscus, and parameniscal cyst). On March 21, 2023, the insurer issued its Own Motion Notice of Closure.

Later, on May 18, 2021, the insurer reopened the 2004 Own Motion claim again for acceptance and processing of additional new or omitted medical conditions (chondromalacia of left knee medial meniscus, medial femoral condyle, synovitic leading edge anterior medial meniscus, tear of leading edge of the lateral meniscus). Based on available information at the time of this order, claimant's Own Motion claim for his left knee condition.

Turning to the claim on which this case is based, on August 27, 2007, claimant sustained a compensable right knee injury. (Ex. 1). The insurer accepted a right knee lateral meniscus tear. (Ex. 7). The claim was first closed on April 17, 2009, with an award of 6 percent whole person permanent impairment and 12 percent "work disability." (Ex. 33). Claimant's aggravation rights expired on April 17, 2014. (*Id.*)

On June 11, 2012, the insurer accepted "right knee degeneration" as a new or omitted medical condition. (Ex. 41).

On December 7, 2012, the insurer issued another Notice of Closure, awarding 8 percent whole person permanent impairment for the right knee and 23 percent "work disability." (Ex. 48). An Order on Reconsideration affirmed the Notice of Closure. (Ex. 52).

On September 24, 2018, the insurer accepted a "post-aggravation rights" new or omitted medical condition (right knee osteoarthritis) and voluntarily reopened claimant's Own Motion claim. (Ex. 89).

On May 18, 2021, the insurer accepted additional "post-aggravation rights" new or omitted medical conditions (retorn right knee lateral meniscus, second retear right knee lateral meniscus, and parameniscal cyst) and voluntarily reopened claimant's Own Motion claim. (Ex. 207-1).[2]

On November 3, 2022, claimant's attending physician, Dr. Puziss, opined that claimant was medically stationary and performed a closing examination. (Ex. 203-3).

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[2] Although the insurer was instructed by the Board to submit all relevant documents to the dispute, the exhibits submitted by the insurer did not include its May 18, 2021, Notice of Voluntary Reopening. The insurer's failure to provide the Notice of Voluntary Reopening did not comply with the Board's request for submission of relevant documents, and such omissions, if found unreasonable, may result in the imposition of penalties and attorney fees. *See* OAR 438-012-0017(1); OAR 438-012-0110(1).

On January 5, 2023, a work capacity evaluation (WCE) was completed by Ms. Berkovitch, a physical therapist. (Ex. 204). Based on the new or omitted medical conditions accepted in the Own Motion claim, she considered claimant to be unable to return to his job-at-injury (bagel production). (Ex. 204-6). However, Ms. Berkovitch concluded that claimant would be able to meet the physical demands of a light duty muffin line packaging position with the employer. (*Id.*)

On March 6, 2023, the insurer sent the WCE report to Dr. Puziss to request his concurrence with the report. (Ex. 205). On March 8, 2023, Dr. Puziss concurred with the report, but noted that claimant should "walk seldom." He also queried whether he needed to review "the job descriptions." (*Id.*)

On March 21, 2023, the insurer issued an Own Motion Notice of Closure that awarded 20 percent whole person impairment and 50 percent "work disability," which included an additional 12 percent whole person impairment and 27 percent work disability since the last claim closure. (Exs. 48, 52, 207).

Following the Own Motion Notice of Closure, claimant requested a hearing, asserting entitlement to additional temporary disability, penalties, and attorney fees.

On March 2, 2023, the Board acknowledged claimant's hearing request as a request for Own Motion relief because claimant's aggravation rights had expired. In doing so, the Board instructed the insurer to provide an exhibit list of relevant documents within 14 days. *See* OAR 438-012-0017(1).

On April 3, 2023, the Board informed the parties that the requested documents and exhibit list had not been received, and instructed the insurer to immediately provide the requested documents.

On April 7, 2023, claimant formally requested Board review of the Own Motion Notice of Closure, contending that the closure was premature and, alternatively, that he was permanently and totally disabled. Additionally, claimant requested penalties and penalty-related attorney fees for the insurer's alleged failure to provide documents and failure to pay attorney fees under OAR 438-015-0080.

On April 12, 2023, claimant submitted an affidavit stating that he was unable to continue in his job-at-injury, and that constant pain and medication issues interfered with his social functioning, sleep, and caused his hands to shake.

On April 18, 2023, the insurer wrote to the Board requesting additional time to fulfill its discovery obligations due to complexity related to an additional open Own Motion claim for claimant's left knee. On April 20, 2023, the Board granted the insurer's extension request. On April 25, 2023, the insurer mailed the requested documents and exhibit list to the Board.

## CONCLUSIONS OF LAW AND OPINION

Claimant contends that the claim was prematurely closed or, alternatively, he is entitled to a PTD award. Based on the following reasoning, we affirm the Own Motion Notice of Closure, but award a penalty and penalty-related attorney fees for the insurer's unreasonable delay in closing the Own Motion claim, and failure to comply with the Board's discovery directives.

### Premature Closure

Under ORS 656.278(6) and OAR 438-012-0055, the propriety of the closure depends on whether claimant's accepted conditions and any direct medical sequelae were medically stationary at the time of the March 21, 2023, Own Motion Notice of Closure. *See* ORS 656.268(1); *Sullivan v. Argonaut Ins. Co.*, 73 Or App 694 (1985); *Manley v. SAIF*, 181 Or App 431, 438 (2002) (when determining whether claim closure was premature, the Board considers the medically stationary status only of the accepted conditions at the time of claim closure and any direct medical sequelae); *Matthew D. Gorbett*, 74 Van Natta 403, 405-6 (2022) (Own Motion Notice of Closure was limited to the new or omitted medical condition for which it was opened); *Arvin D. Lal*, 55 Van Natta 816, 823 (2003) (an Own Motion claim closure pertains to those conditions for which the claim was reopened). A claim may not be closed unless the claimant's condition is medically stationary. *See* OAR 438-012-0055(1).

"Medically stationary" means that no further material improvement would reasonably be expected from medical treatment or the passage of time. ORS 656.005(17). The term "medically stationary" does not mean that there is no longer a need for continuing medical care. *Maarefi v. SAIF*, 69 Or App 527, 531 (1984); *Pennie Rickerd-Puckett*, 61 Van Natta 336 (2009). The issue of claimant's medically stationary status is primarily a medical question to be decided based on competent medical evidence, not limited to the opinion of the attending physician. *Harmon v. SAIF*, 54 Or App 121, 125 (1981); *Michael J. Oliver*, 63 Van Natta 728, 730 (2011).

Here, on November 3, 2022, Dr. Puziss examined claimant and determined that he was medically stationary. (Ex. 203-3). Moreover, Dr. Puziss concurred with the WCE report "in its entirety" with the exception that claimant should be limited to walking "seldom." (Exs. 204, 205). Dr. Puziss's determination is uncontradicted by any other medical evidence.

Accordingly, the record supports a conclusion that the March 21, 2023, Own Motion Notice of Closure was not premature. *See Gorbett*, 74 Van Natta at 406 (the claimant was medically stationary when the record unequivocally established that no further improvement in the accepted condition would reasonably be expected from medical treatment or the passage of time); *Dwayne L. Minner*, 67 Van Natta 2006, 2010 (2015).

Permanent Total Disability

Because we have determined that the March 21, 2023, Own Motion Notice of Closure was not premature, we proceed with our analysis of claimant's claim for PTD benefits. For the following reasons, we conclude that claimant has not established his entitlement to PTD benefits.

Claimant's 2007 injury claim was reopened for processing of "post-aggravation rights" new or omitted medical conditions (right knee osteoarthritis, retorn right knee lateral meniscus, second retear right knee lateral meniscus, and parameniscal cyst). Such claims may qualify for payment of permanent disability compensation, including PTD. ORS 656.278(1)(b); *Goddard v. Liberty Northwest Ins. Corp.*¸ 193 Or App 238, 244 (2004); *James S. Daly*, 58 Van Natta 2355, 2359 (2006); *Sherlee M. Samel*, 56 Van Natta 931, 938 (2004).

Here, the March 2023 Own Motion Notice of Closure issued under ORS 656.278(6), not ORS 656.206 or ORS 656.268. Nevertheless, where consistent with the provisions of ORS 656.278, the 2005 amendments to ORS 656.206 apply to Own Motion Notices of Closure that issue on or after January 1, 2006. *David C. Drader*, 58 Van Natta 3093, 3098 (2006). Thus, because this Own Motion Notice of Closure issued after January 1, 2006, the 2005 amendments to ORS 656.206 apply. *Boyd W. Jensen*, 65 Van Natta 2156, 2162 (2012).

Claimant has the burden of proving PTD status. ORS 656.206(3). ORS 656.206(1)(d) provides that PTD means, "notwithstanding ORS 656.225, the loss, including preexisting disability, of use or function of any portion of the body which permanently incapacitates the worker from regularly performing work at a

gainful and suitable occupation." "'Regularly performing work' means the ability of the worker to discharge the essential functions of the job" and "'suitable occupation' means one that the worker has the ability and the training or experience to perform, or an occupation that the worker is able to perform after rehabilitation." ORS 656.206(1)(e), (f).

In *Daly*, we awarded the claimant PTD for a "post-aggravation rights" new or omitted medical condition. 58 Van Natta at 2374. Our analysis of ORS 656.206, in conjunction with ORS 656.278, resulted in the following conclusions.

First, disability for a previously accepted condition is considered as it existed at the last claim closure that preceded the expiration of a claimant's five-year aggravation rights. *Id.* at 2361. Second, any disability that predates the initial compensable injury is also considered. *Id.* at 2364-65. Third, when such disabilities exist, they are considered with any disability from the "post-aggravation rights" new or omitted medical conditions to determine whether the claimant has established entitlement to PTD. *Id.* at 2371.

Considering those factors, claimant must establish that: (1) he is completely physically disabled and, therefore, precluded from gainful employment; or (2) his physical impairment, combined with a number of social and vocational factors, effectively prevents gainful employment under the "odd lot" doctrine. *Id.* at 2368; *see also Guild v. SAIF*, 291 Or App 793, 796 (2018) (PTD may be established by showing that the claimant is completely physically disabled or that gainful employment is precluded due to a combination of physical impairment and social and vocational factors); *Clark v. Boise Cascade*, 72 Or App 397, 399 (1985); *Richard L. Elsea*, 66 Van Natta 493, *recons*, 66 Van Natta 727 (2014), *aff'd*, *Elsea v. Liberty Mutual Ins.*, 277 Or App 475 (2016); *Drader*, 58 Van Natta at 3099. Under the "odd lot" doctrine, a disabled person capable of performing work of some kind may still be permanently disabled due to a combination of their physical condition and certain non-medical factors, such as age, education, adaptability to nonphysical labor, mental capacity, and emotional conditions. *See Welch v. Banister Pipeline*, 70 Or App 699, 701 (1984); *Clark*, 72 Or App at 399; *Stephen H. Johnson*, 55 Van Natta 3074, 3078 (2003).

The determination of claimant's PTD status based on his physical disabilities must be based on medical evidence. *Joseph P. Hapka*, 61 Van Natta 1148, 1159-61 (2009). Regardless of whether claimant seeks to establish PTD under the "odd lot" doctrine or by proving that he is "completely physically disabled," only the *Daly* factors may be considered in the evaluation of his

physical disability or impairment. *Timothy C. Guild*, 70 Van Natta 1207 (2018) (on remand); *Daly*, 58 Van Natta at 2368. Disability is to be evaluated as of the date of the Own Motion Notice of Closure. *Elsea*, 277 Or App at 478.

We begin by determining whether claimant had any "preexisting disability" that may be considered in determining his entitlement to PTD. Resolution of that issue turns on whether the record establishes that claimant had an illness, injury or condition that caused "disabling effects" before his 2007 compensable injury. *Fimbres v. SAIF*, 197 Or App 613 (2005); *Daly*, 58 Van Natta at 2365. In *Fimbres*, the court explained that the ordinary meaning of "disability" includes a "physical or mental illness, injury, or condition that incapacitates in any way." 197 Or App at 617 n 1 (quoting *Lecangdam v. SAIF*, 185 Or App 276, 282 n 4 (2002) (internal quotations omitted)).

Here, the record indicates that, before the 2007 compensable injury, claimant had a preexisting left knee injury and was awarded permanent impairment for the resulting left knee disability.[3] Therefore, we find that claimant's preexisting left knee condition had "disabling effects" before the 2007 compensable right knee injury. Thus, his preexisting left knee disability may be considered. *See* OAR 436-035-0230(5)(d); *Daly*, 58 Van Natta at 2366.

Additionally, the record reflects that claimant had left knee disability after the 2007 compensable injury. (Ex. 68-2). However, only the left knee disability as it existed at the time of the 2007 compensable injury may be considered. *See Fimbres*, 197 Or App at 617-18 (disability that develops as a result of a preexisting conditions after the compensable injury, but not as a result of the employment, may not be considered in determining entitlement to PTD benefits); *Daly*, 58 Van Natta at 2364.

Regarding claimant's right knee, the record does not establish preexisting disability before the 2007 compensable injury. (Ex. 38-13).

As noted above, the December 7, 2012, claim closure was the last claim closure for a new or omitted medical condition (right knee degeneration) that was accepted before the expiration of claimant's five-year "aggravation rights" on April 17, 2014. (Exs. 41, 48). The Notice of Closure increased claimant's whole

[3] Claimant was awarded permanent impairment for the 2005 left knee injury before the occurrence of the 2007 right knee injury. Specifically, the left knee claim was first closed with an award of permanent impairment on August 12, 2005. At this time, based on information available to the Board, the left knee Own Motion claim remains open as of May 18, 2021.

person permanent impairment award to 8 percent for the right knee. (Ex. 48). Therefore, claimant's disability for the previously accepted conditions as they existed at the time of the December 7, 2012, claim closure may also be considered.

The remaining factor that may be considered in determining whether claimant has established entitlement to PTD is disability from the "post-aggravation rights" new or omitted medical conditions (right knee osteoarthritis, retorn right knee lateral meniscus, second re-tear right knee lateral meniscus, and parameniscal cyst). *Daly*, 58 Van Natta at 2371.

In his November 2022 evaluation, Dr. Puziss opined that he did not "foresee" claimant returning to "any type of reasonable work." (Ex. 203-3). He stated that claimant was "permanently and totally disabled because of the right knee and of course the left knee," while noting that the left knee disability was under a separate claim. (*Id.*) However, in March 2023, Dr. Puziss concurred with the WCE report by Ms. Berkovitch, which found that claimant was physically capable of returning to work in a modified duty position with the employer in a light duty muffin line packaging position. (Exs. 204-6, 205-1). Dr. Puziss's opinion that he could not "foresee" claimant returning to "any type of reasonable work" was not consistent with his later concurrence with the WCE, which determined that claimant would be capable of performing modified duty work for the employer. (Exs. 203-3, 204-6, 205-1). In the absence of an explanation regarding this apparent inconsistency, Dr. Puziss's opinion does not persuasively establish that claimant was precluded from gainful employment. *See James P. Suter*, 73 Van Natta 105, 114 (2021) (inconsistent and ambiguous opinion regarding the claimant's ability to perform work did not establish that the claimant was entitled to PTD).

Additionally, in the context of this record, Dr. Puziss's opinion did not distinguish between disability that may be considered in evaluating claimant's PTD status under *Daly*, and the effects/disability from issues that may not be considered in addressing the basis for claimant's inability to return to work. In particular, Dr. Puziss stated generally that claimant was "permanently and totally disabled" due to his right and left knees. (Ex. 203-3). Yet, in doing so, he did not distinguish disability from the left knee that occurred after the 2007 compensable injury (which may not be considered), from left knee disability as it existed at the time of the 2007 compensable right knee injury (which may be considered). (*Id.*); *see Suter*, 73 Van Natta at 114-15. Moreover, Dr. Puziss noted that claimant had "some form of pain syndrome" affecting the right knee. (Ex. 203-2). However, a pain syndrome condition of the right knee has not been accepted for the 2007

compensable injury. *See, e.g., Gina L. Pennington*, 56 Van Natta 2180 (2004) (disability due to a potential noncompensable condition did not support the claimant's entitlement to PTD benefits). Also, the medical record does not establish that the pain syndrome condition was a direct medical sequelae of the new or omitted medical conditions subject to this Own Motion claim reopening. *See Roy Jackson*, 59 Van Natta 3013, 3016 (2007).

Under these circumstances, the record does not establish claimant's entitlement to PTD benefits under the "odd lot" doctrine or by proving that he is "completely physically disabled." *See Guild*, 70 Van Natta at 1210; *see also Shakur Shabazz*, 65 Van Natta 1551, 1557 (2013) (physician's opinion did not establish PTD because it did not distinguish between disability that may be considered in evaluating a claimant's PTD status under *Daly* and disability from other causes).[4]

Consequently, we affirm the March 21, 2023, Own Motion Notice of Closure.[5]

Penalties/Attorney Fees For Voluntary Reopening of Own Motion Claim

Claimant argues that his attorney was instrumental in obtaining the voluntary reopening of his Own Motion claim for "post-aggravation rights" new or omitted medical conditions (right knee osteoarthritis, re-torn right knee lateral meniscus, second retear right knee lateral meniscus, and parameniscal cyst) that resulted in temporary disability compensation.[6] OAR 438-015-0080(2); *see, e.g., Ronald D. Raines*, 70 Van Natta 815, 816 (2018) (awarding an "out-of-

[4] To be eligible for PTD benefits, a worker must satisfy the additional technical requirement of being "in the work force" under ORS 656.206(3). *SAIF v. Stephen*, 308 Or 41, 46 (1989); *Elsea*, 277 Or App at 482. However, as a result of our decision, we need not address the "work force" element, including whether claimant has established that he is "willing to seek regular gainful employment" and has "made reasonable efforts to obtain such employment" (unless seeking such work would have been futile). *See, e.g., Patrick S. Holman*, 65 Van Natta 1044, 1052 n 6 (2013).

[5] Claimant's total award to date is 20 percent whole person permanent impairment for the loss of use or function of the right leg (knee) and 30 percent "work disability."

[6] Following the insurer's September 14, 2018, acceptance and voluntary reopening of claimant's Own Motion claim for right knee osteoarthritis, claimant requested Board review seeking an "out-of-compensation" fee for obtaining the reopening. However, finding that claimant's counsel was not "instrumental" in obtaining reopening of the Own Motion claim for the right knee osteoarthritis condition, we denied claimant's request. *See Rafael Corona-Gambino*, 71 Van Natta 1190, 1193 (2019).

compensation" attorney fee for the claimant's attorney's services in obtaining reopening of the Own Motion claim).[7] Claimant further asserts that the insurer has unreasonably refused to pay such attorney fees, such that a 25 percent penalty and a penalty-related attorney fee are warranted. ORS 656.262(11)(a).

However, the record neither supports, nor does claimant's counsel advance, an argument that his services were instrumental in obtaining a reopening of the Own Motion claim. Consequently, under these circumstances, we decline to award an "out-of-compensation" attorney fee pursuant to OAR 438-015-0080(2). Likewise, we find no unreasonable claim processing concerning this issue. *See* ORS 656.262(11)(a).

Penalty/Attorney Fees for Delayed Claim Closure

Claimant contends that the insurer unreasonably delayed the processing of his Own Motion claim when it waited over two months to obtain the attending physician's concurrence to the WCE conducted by Ms. Berkovitch. Based on the following reasoning, we agree.

A carrier is liable for a penalty and penalty-related attorney fee when it unreasonably delays or unreasonably refuses to pay compensation. *See* ORS 656.262(11)(a); *Larry D. Higgins*, 71 Van Natta 808, 813-14 (2019) (applying ORS 656.262(11)(a) to the carrier's unreasonable delay in the payment of compensation in an Own Motion claim). The standard for determining unreasonableness is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. *See Int'l Paper Co. v. Huntley*, 106 Or App 107, 110 (1991). "Unreasonableness" and "legitimate doubt" are to be considered based on the evidence available at the time of the carrier's claim processing action/inaction. *See Liberty Northwest Ins. Corp. v. Hughes*, 197 Or App 533, 558 (2005); *Daren L. Johnson*, 65 Van Natta 2006, 2013-14 (2013) (the carrier unreasonably failed to pay temporary disability benefits after a prior Board order directed the carrier to process the claimant's Own Motion claim); *Billy J. Arms*, 59 Van Natta 2927, 2929 (2007) (the carrier unreasonably delayed claim closure by waiting four weeks before sending the attending physician a report from a carrier-request medical examination).

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[7] OAR 438-015-0080(2) provides:

> "If an attorney is instrumental in obtaining a voluntary reopening of an Own Motion claim that results in increased temporary disability compensation, the Board shall approve a fee of 25 percent of the increased compensation, to be paid out of the increased temporary disability compensation resulting from the voluntary reopening."

Here, Dr. Puziss, the attending physician, considered claimant to be medically stationary on November 3, 2022. (Ex. 203). The insurer scheduled a WCE evaluation with Ms. Berkovitch that was conducted on January 5, 2023. (Ex. 204). Then, on March 6, 2023, the insurer provided the WCE report to Dr. Puziss for his concurrence, which he completed two days later. (Ex. 205). Thereafter, on March 21, 2023, the insurer closed the Own Motion claim. (Ex. 207).

The insurer offers no explanation for the two-month delay in providing the WCE report to Dr. Puziss, which was a necessary step in closing the Own Motion claim. As such, the insurer's unexplained delay was unreasonable. *See Arms*, 59 Van Natta at 2929.

Accordingly, claimant is awarded a penalty of 25 percent of the "amounts then due" at the time the carrier closed the Own Motion claim (*i.e.*, the additional 12 percent whole person permanent impairment and 27 percent "work disability"). *See* ORS 656.262(11)(a); *Arms*, 59 Van Natta at 2929.

In addition, claimant's counsel is awarded a penalty-related attorney fee for the carrier's unreasonable delay in closing the claim. *See* ORS 656.262(11)(a); OAR 438-015-0110. That attorney fee shall be in a reasonable amount that is proportionate to the benefit to claimant and takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and the time devoted to the case. *See* OAR 438-015-0110(1), (2). Based on the time devoted to the "unreasonable claim processing" issue (as represented by the record), we award $1,000, as a reasonable penalty-related attorney fee, payable by the insurer.

<u>Penalties/Attorney Fees for Discovery Violation</u>

Claimant requests a penalty and penalty-related attorney fee regarding the insurer's alleged discovery violations. In doing so, claimant notes that the insurer did not timely comply with the Board's requests to submit documents relevant to this Own Motion dispute. We agree with claimant's contention for the following reasons.

The parties are obligated to timely comply with Board rules and requests. *See* OAR 438-012-0017(1); OAR 438-012-0110(1). Within 14 days after notification from the Board, the carrier must submit all evidence regarding the dispute, marked as exhibits, arranged in chronological order, and accompanied by an exhibit list. *See* OAR 438-012-0060(3). A carrier's failure to timely comply

with a Board rule or request, if found unreasonable or unjustified, may result in the imposition of penalties and attorney fees under ORS 656.262(11). *See* OAR 438-012-0110(1); *Doug R. Cooley*, 70 Van Natta 1072, 1079-80 (2018).

Here, the insurer did not comply with the Board's March 2, 2023, and April 3, 2023, requests to submit relevant documents regarding the dispute. In the Board's March 2, 2023, letter, the insurer was instructed to submit the requested documents by March 16, 2023. After the Board received no response from the insurer, it wrote again on April 3, 2023, directing the insurer to immediately comply with the Board's record request. Even after the April 3, 2023, record request, the insurer did not request an extension until April 18, 2023 (15 days after the Board's directive to submit the requested documents immediately). In submitting its extension request, the insurer stated that it was dealing with complications of claimant also having an open Own Motion claim from his 2004 work injury for the left knee. Ultimately, the Board granted the insurer's extension request and the insurer submitted the requested documents on April 25, 2023.

Under such circumstances, we find that the insurer had no legitimate doubt regarding its discovery obligations pursuant to the Board's rules and its March 2, 2023, and April 3, 2023, directives. *See* OAR 438-012-0017(1); OAR 438-012-0110(1). Therefore, we conclude that the insurer's failure to timely comply with the Board's discovery rules and requests was unreasonable. *See* OAR 438-012-0110(1).

However, the record establishes that when the insurer submitted the requested documents (April 25, 2023), there were no "amounts then due" other than the balance of claimant's permanent impairment and "work disability" awards, which we have already determined is subject to a penalty for the insurer's delay in closing the claim. Under such circumstances, a second penalty based on the same "amount then due" is not warranted. *See Sean S. Edmunson*, 72 Van Natta 485, 489-90 (2020) (ORS 656.262(11)(a) penalty was not assessable when the record did not establish "amounts then due" at the time of the unreasonable conduct); *Sue J. Brock*, 67 Van Natta 2066, 2067 (2015) (only one 25 percent penalty under ORS 656.262(11)(a) may be assessed on a single "amount then due").

Nevertheless, claimant's counsel is entitled to a penalty-related attorney fee for services regarding the insurer's failure to timely comply with the Board's discovery rules and requests. *See* ORS 656.262(11)(a); OAR 438-012-0110(1); *SAIF v. Traner*, 273 Or App 310, 320-22 (2015) (ORS 656.262(11)(a) does not

require compensation or "amounts then due" to award a penalty-related attorney fee); *Michael Inskeep*, 67 Van Natta 522, 523 (2015) (although there were no "amounts then due" on which to base a penalty regarding an Own Motion claim, an attorney fee was awarded under ORS 656.262(11)(a)). That attorney fee shall be in a reasonable amount that is proportionate to the benefit to claimant and takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and the time devoted to the case. *See* OAR 438-015-0110(1), (2). Based on our review of the record and considering these factors, we award $750, as a reasonable penalty-related attorney fee regarding the "discovery" issue, to be paid by the insurer.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on December 12, 2023