

**FILED: November 19, 2014**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Jose L. Olvera-Chavez, Claimant.

LIBERTY NORTHWEST INSURANCE CORP.; and HALLMARK INNS &  
RESORTS, INC.,  
Petitioners  
Cross-Respondents,

v.

JOSE L. OLVERA-CHAVEZ,  
Respondent  
Cross-Petitioner.

Workers' Compensation Board  
1103936

A152550

Submitted on July 22, 2014.

David O. Wilson filed the brief for petitioners-cross-respondents.

Ronald A. Fontana and Ronald A. Fontana, P.C., filed the brief for respondent-cross-petitioner.

Before Sercombe, Presiding Judge, and Hadlock, Judge, and Tookey, Judge.

TOOKEY, J.

Affirmed on petition; on cross-petition, remanded for redetermination of penalty under ORS 656.268(5)(d) based on all compensation due as of the May 25, 2011, premature closure; otherwise affirmed.

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**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Respondent on petition; Cross-Petitioner on cross-petition

No costs allowed.

Costs allowed, payable by Petitioners on petition; Cross-Respondents on cross-petition.

Costs allowed, to abide the outcome on remand, payable by

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1                   TOOKEY, J.

2                   In this workers' compensation case, insurer Liberty Northwest Insurance  
3 Corp. (Liberty), and employer Hallmark Inns and Resorts seek review of an order of the  
4 Workers' Compensation Board (board) upholding a determination by an administrative  
5 law judge (ALJ) that Liberty prematurely closed claimant's low back claim after claimant  
6 finished an authorized training program (ATP), and that claimant is entitled to additional  
7 benefits for temporary disability, a penalty under ORS 656.268(5)(d), and attorney fees.  
8 On judicial review, Liberty asserts that the board erred in setting aside its notice of  
9 closure and also erred in assessing a penalty and related attorney fees. In a cross-petition,  
10 claimant seeks additional penalties and attorney fees. We affirm on the petition, and on  
11 the cross-petition we remand for a redetermination of penalty under ORS 656.268(5)(d)  
12 based on all compensation due as of the May 25, 2011, premature closure, and otherwise  
13 affirm.

14                   We first describe the relevant statutory provisions and administrative rules  
15 relating to claim closure, because they provide necessary context for an understanding of  
16 the petition and cross-petition. As applicable here, ORS 656.268(1)(a) to (d)<sup>1</sup> set forth  
17 the procedures generally for claim closure. ORS 656.268(1) provides that, when a  
18 claimant is not enrolled and actively engaged in training, "[t]he insurer or self-insured  
19 employer shall close the worker's claim, as prescribed by the Director of the Department

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<sup>1</sup> ORS 656.268 was amended in 2011. Or Laws 2011, ch 99, § 1. The only change pertinent here was a renumbering of ORS 656.268(9) to ORS 656.268(10). For simplicity, throughout this opinion, we refer to the current version of the statute.

1 of Consumer and Business Services," when the claimant "has become medically  
2 stationary and there is sufficient information to determine disability." *See also* OAR 436-  
3 030-0020(1)(a) (providing for claim closure when "[m]edical information establishes  
4 there is sufficient information to determine the extent of permanent disability under  
5 ORS 656.245(2)(b)(C), and indicates the worker's compensable condition is medically  
6 stationary").<sup>2</sup> Thus, the general provisions relating to claim closure require that a claim  
7 be closed when the worker is medically stationary<sup>3</sup> and there is sufficient information to  
8 determine disability.

9           ORS 656.268(10)<sup>4</sup> describes the procedures that apply when a claim is

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<sup>2</sup> Under OAR 436-030-0020(2), "sufficient information" to determine the extent of permanent disability consists either of a written statement provided by an authorized medical professional showing that there is no permanent impairment, OAR 436-030-0020(2)(a), or a closing medical examination and report describing the measurements and findings regarding any permanent impairment. OAR 436-030-0020(2)(b). When the worker has not yet been released for regular work, the closing medical examination report must also include information about the worker's wages, date of birth, work history and level of formal education, and the physical requirements of the worker's job at the time of injury. *Id.*

<sup>3</sup> A worker is "medically stationary" when "no further material improvement would reasonably be expected from medical treatment, or the passage of time." ORS 656.005(17).

<sup>4</sup> ORS 656.268(10) provides:

"If, after the notice of closure issued pursuant to this section, the worker becomes enrolled and actively engaged in training according to rules adopted pursuant to ORS 656.340 and 656.726, any permanent disability payments due for work disability under the closure shall be suspended, and the worker shall receive temporary disability compensation and any permanent disability payments due for impairment while the worker is enrolled and actively engaged in the training. When the worker ceases to be enrolled and actively engaged in the training, the insurer or

1 reopened so that the worker can attend an ATP. During training, the worker continues to  
2 receive that portion of the permanent disability award relating to impairment, and also  
3 begins to receive temporary disability compensation; however, any benefits the worker is  
4 receiving for "work disability" are suspended.<sup>5</sup> ORS 656.268(10). When the worker  
5 ceases to be enrolled and actively engaged in training, "the insurer or self-insured  
6 employer shall again close the claim \* \* \* if the worker is medically stationary[.]" *Id.*  
7 The notice of closure is required to include "the duration of temporary total or temporary  
8 partial disability compensation." *Id.* ORS 656.268(10) further provides that, after ATP  
9 terminates, "[p]ermanent disability compensation shall be redetermined for work  
10 disability only." *See also* OAR 436-030-0020(13) (providing that, when ATP has ended

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self-insured employer shall again close the claim pursuant to this section if the worker is medically stationary or if the worker's accepted injury is no longer the major contributing cause of the worker's combined or consequential condition or conditions pursuant to ORS 656.005(7). The closure shall include the duration of temporary total or temporary partial disability compensation. Permanent disability compensation shall be redetermined for work disability only. If the worker has returned to work or the worker's attending physician has released the worker to return to regular or modified employment, the insurer or self-insured employer shall again close the claim. This notice of closure may be appealed only in the same manner as are other notices of closure under this section."

<sup>5</sup> "Work disability" is defined as impairment, modified by "age, education, and adaptability to perform a given job." ORS 656.214(1)(e); *see also* OAR 436-035-0005(20) ("'Work disability,' for the purposes of determining permanent disability, means the separate factoring of impairment as modified by age, education, and adaptability to perform the job at which the worker was injured."). Pursuant to OAR 436-035-0012, the adaptability factor of "work disability" requires a determination of the worker's remaining ability to perform work-related activities despite impairment, through a comparison of the impaired worker's functional capacity before the injury (Base Functional Capacity) and functional capacity after treatment and rehabilitation (Residual Functional Capacity).

1 and the worker is medically stationary, the insurer must issue a new notice of closure and  
2 must redetermine the worker's "work disability").

3           We turn to the facts of this case as they pertain to the premature closure  
4 issue. Claimant suffered an on-the-job disabling injury to his back in 2007. After  
5 treatment and time loss, claimant's attending physician determined that claimant's  
6 condition had become medically stationary as of September 11, 2009. Liberty closed the  
7 claim on December 1, 2009, with an award of 18 percent "whole person impairment," and  
8 33 percent "work disability."

9           Liberty reopened the claim as of April 5, 2010, so that claimant could  
10 participate in an ATP. The training terminated on December 17, 2010, due to concerns  
11 about suitability. Liberty did not reclose the claim at that time. Beginning April 27,  
12 2011, claimant participated in an occupational skills ATP. That program terminated  
13 prematurely on May 16, 2011, for lack of employer participation.

14           Liberty reclosed the claim on May 25, 2011. The notice of closure stated  
15 that claimant had become medically stationary on September 11, 2009, and awarded  
16 claimant temporary disability for the two periods during which claimant had participated  
17 in ATP: from April 5, 2010 through December 17, 2010, and from April 27, 2011  
18 through May 16, 2011.

19           Claimant requested reconsideration of the notice of closure. In an order on  
20 reconsideration, the Appellate Review Unit (ARU) of the Workers' Compensation  
21 Division of the Department of Consumer and Business Services upheld the notice of

1 closure, explaining, "[T]he worker was medically stationary on September 11, 2009.  
2 There has been no accepted aggravation in the current open period."

3           Claimant requested a hearing. The ALJ determined that the claim had been  
4 closed prematurely, reasoning that Liberty had failed to obtain (1) a determination by the  
5 claimant's attending physician that claimant is medically stationary; and (2) sufficient  
6 information to determine the extent of claimant's permanent disability at the time of  
7 closure.

8           On appeal to the board, Liberty conceded that, pursuant to OAR 436-060-  
9 0040(4), it owed claimant benefits for temporary disability for the period of May 17,  
10 2011 to May 25, 2011, between the end of claimant's second ATP and the notice of  
11 closure. Liberty also conceded that it owed claimant a penalty on benefits owing for that  
12 time, as well as attorney fees. It contended, however, that inasmuch as claimant had  
13 previously been determined to be medically stationary as of September 11, 2009, and the  
14 claim had been reopened only for ATP, in the absence of an aggravation, there was no  
15 need for a redetermination of claimant's medically stationary status or a new closing  
16 examination, and the claim qualified for closure immediately upon termination of ATP.

17           The board affirmed the ALJ's determination that the claim was prematurely  
18 closed on May 25, 2011. Like the ALJ, the board concluded that the general  
19 requirements for claim closure set out in ORS 656.268(1) and OAR 436-030-0020 are  
20 applicable in the context of a reclosure of a claim after ATP. Although, as the board  
21 acknowledged, a worker whose claim has been reopened for ATP and who has not

1 experienced an aggravation is entitled to a redetermination of "work disability" only, the  
2 board concluded that that determination requires consideration of the worker's abilities in  
3 light of his impairment and therefore necessitates a closing medical examination. The  
4 board affirmed the ALJ's determination that the claim had been closed prematurely and  
5 found that Liberty owed claimant additional temporary disability benefits for two distinct  
6 periods: (1) from the time Liberty ceased paying temporary disability benefits on  
7 December 18, 2010 through April 26, 2011, when claimant began the second ATP; and  
8 (2) from May 17, 2011, when Liberty stop paying benefits, to the date the hearing record  
9 closed.

10           On judicial review, Liberty once again contends that, when, as here, a  
11 claimant has previously been determined to be medically stationary and there has been no  
12 intervening aggravation claim, there is no requirement in the statutes or administrative  
13 rules for a redetermination of the worker's medically stationary status prior to claim  
14 closure after ATP. Liberty further disputes the board's conclusion that, even when there  
15 has been no aggravation claim, a redetermination of "work disability" after ATP  
16 necessitates a closing examination. In Liberty's view, the ARU's order on reconsideration  
17 upholding claim closure reflects the director's interpretation of the department's own  
18 administrative rules and implicitly recognizes that, when, as here, there has been no  
19 intervening aggravation claim, there is no need for a redetermination of the worker's  
20 medically stationary status or a new closing examination to determine the extent of  
21 disability. Liberty asserts that the department's plausible interpretation of its own

1 administrative rules is entitled to deference. *See Don't Waste Oregon Com. v. Energy*  
2 *Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994) (stating that, where "the agency's  
3 plausible interpretation of its own rule cannot be shown either to be inconsistent with the  
4 wording of the rule itself, or with the rule's context, or with any other source of law, there  
5 is no basis on which this court can assert that the rule has been interpreted 'erroneously'";  
6 *Coats-Sellers v. ODOT*, 209 Or App 281, 287, 147 P3d 946 (2006) (citing *Don't Waste*  
7 *Oregon Com.*, 320 Or at 142, and stating that, "[w]hen an administrative agency  
8 interprets its own administrative rules, we defer to the agency's interpretation if it is  
9 plausible and is not inconsistent with the wording of the rule, its context, or any other  
10 source of law").

11           We readily conclude, as did the board, that upon claim closure after ATP,  
12 ORS 656.268(1) and ORS 656.268(10) together require both a redetermination of the  
13 worker's medically stationary status and a closing medical examination for the purpose of  
14 redetermining work disability. As the board correctly reasoned, ORS 656.268 sets forth  
15 the requirements for claim closure generally as well as for claim closure after ATP.  
16 Under ORS 656.268(1), closure of a claim is permitted when the worker is medically  
17 stationary and there is sufficient information to determine permanent disability. There is  
18 no indication in ORS 656.268 that those two requirements do not also apply when a claim  
19 is closed after ATP. Although, under ORS 656.268(10), the redetermination of  
20 permanent disability after ATP is limited to work disability, we agree with the board that,  
21 as required by ORS 656.268(1), in order to close the claim after ATP, the insurer must

1 have "sufficient information" to determine work disability, and that an evaluation of the  
2 adaptability component of work disability necessitates a closing examination.

3           Additionally, ORS 656.268(10) requires claim closure after ATP "if the  
4 worker is medically stationary." We agree with the board that that requirement implicitly  
5 necessitates a medical determination that the worker is or continues to be medically  
6 stationary at the time of closure after ATP. In order to close the claim, it is not sufficient  
7 that the worker has previously been determined to be medically stationary and that there  
8 has been no aggravation claim during the open period. Here, because there was no post-  
9 ATP medical opinion concerning claimant's medically stationary status or his work  
10 disability, we affirm the board's order that the May 25, 2011, notice of closure was  
11 premature.<sup>6</sup>

12           The remaining issues on the petition and cross-petition concern penalties  
13 and attorney fees. ORS 656.268(5)(d) provides:

14           "If an insurer or self-insured employer has closed a claim or refused  
15 to close a claim pursuant to this section, if the correctness of that notice of  
16 closure or refusal to close is at issue in a hearing on the claim and if a  
17 finding is made at the hearing that the notice of closure or refusal to close  
18 was not reasonable, a penalty shall be assessed against the insurer or self-

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<sup>6</sup> Liberty contends that the ARU, in its order on reconsideration, made a plausible interpretation of the department's own administrative rule, OAR 436-030-0020(13)(c), requires the conclusion (to which this court must defer) that a closing examination is not required if the person was injured after January 1, 2005, and there has been no aggravation. We reject the contention. To the extent that the ARU's interpretation of OAR 436-030-0020(13)(c) conflicts with our conclusion that a closing examination is required under ORS 656.268, the director's interpretation is neither plausible nor entitled to deference.

1 insured employer and paid to the worker in an amount equal to 25 percent  
2 of all compensation determined to be then due the claimant."

3 Having determined that Liberty closed the claim prematurely, the ALJ also determined  
4 that Liberty's closure of the claim was unreasonable. The ALJ found:

5 "[Liberty's] claim closure was unreasonable on at least three  
6 grounds, including failing to obtain medical information regarding  
7 claimant's medically stationary status, failure to obtain sufficient  
8 information to determine the extent of his permanent disability, and failure  
9 to continue to pay post ATP temporary disability benefits through the  
10 May 25, 2011 Notice of Closure. Therefore, claimant is entitled to a  
11 penalty equal to 25 percent of all compensation determined to be then due  
12 the claimant."

13 The board affirmed the ALJ's determination that Liberty had unreasonably  
14 closed the claim on May 25, 2011, and assessed a penalty based on 25 percent of the  
15 amounts "then due." ORS 656.268(5)(d).

16 As we have previously noted, when, after a notice of closure, a worker  
17 becomes enrolled in ATP, any permanent disability payments for "work disability" are  
18 suspended. When the worker ceases to be enrolled in ATP,

19 "[t]he insurer must stop temporary disability compensation payments  
20 and resume any award payments suspended under ORS 656.268(10) upon  
21 the worker's completion or ending of the training, unless the worker is not  
22 then medically stationary. *If no award payment remains due, temporary  
23 disability compensation payments must continue pending a subsequent  
24 claim closure.*"

25 OAR 436-060-0040(4) (emphasis added). It is undisputed that, when claimant's two  
26 periods of ATP ended, no award payments were due to claimant. Therefore, as the board  
27 correctly concluded, under OAR 436-060-0040(4), claimant was entitled to continue to  
28 receive temporary disability benefits from the time he completed his first ATP until claim

1 closure. *See Atchley v. GTE Metal Erectors*, 149 Or App 581, 586, 945 P2d 557, *rev den*,  
2 326 Or 133 (1997) (interpreting a former version of OAR 436-060-0040(4) to require  
3 continuation of temporary disability benefits "during the period between completion of a  
4 training program and issuance of a redetermination order if the worker is medically  
5 stationary, is not entitled to additional permanent disability awards and is not working").

6 Liberty does not dispute that conclusion, but continues to challenge the  
7 board's determination that Liberty's notice of closure was unreasonable. As we recently  
8 said in *Providence Health System v. Walker*, 252 Or App 489, 505, 289 P3d 256 (2013)  
9 (*Walker II*), whether an insurer's conduct "is unreasonable such that attorney fees or  
10 penalties are warranted involves both legal and factual questions." *See also Red Robin*  
11 *International v. Dombrosky*, 207 Or App 476, 481, 142 P3d 493 (2006) (applying  
12 standard to penalty under ORS 656.268(5)(d)). An insurer's conduct is not unreasonable  
13 if the insurer had a legitimate doubt about its liability. *SAIF v. Azorr*, 182 Or App 90, 95,  
14 47 P3d 542, *rev den*, 335 Or 90 (2002) (noting legal standard of "legitimate doubt" about  
15 liability set forth in *International Paper Co. v. Huntley*, 106 Or App 107, 110, 806 P2d  
16 188 (1991) ("An employer's refusal to pay is not unreasonable if it has a legitimate doubt  
17 about its liability."). If the board has applied the correct legal standard, then we review  
18 its finding about reasonableness for substantial evidence, considering that conclusion in  
19 the light of all the evidence available to the employer. *Walker II*, 252 Or App at 505.  
20 Contrary to Liberty's contention, the requirement that temporary disability benefits  
21 continue after claimant's first ATP and until claim closure is not reasonably disputable

1 under the facts of this case. *See Atchley*, 149 Or App at 586. We conclude that the  
2 record supports the board's determination that Liberty unreasonably failed to award  
3 claimant the full amount of the temporary benefits to which he was entitled through the  
4 period of claim closure and affirm the assessment of the penalty under ORS  
5 656.268(5)(d).

6           We move on to consideration of claimant's cross-petition, in which he  
7 contends that the board erred in calculating the amount of the penalty and in failing to  
8 award him additional attorney fees for prevailing on the award of a penalty. As noted,  
9 the penalty assessed under ORS 656.268(5)(d) is based on compensation "determined to  
10 be then due the claimant." In determining the amount of the penalty due claimant as a  
11 result of Liberty's failure to pay claimant the amount of temporary disability to which he  
12 was entitled at the time of claim closure, the board concluded that the amount  
13 "determined to be then due" under ORS 656.268(5)(d) was the amount of temporary  
14 disability benefits due claimant as of the date the hearing record closed. Citing our recent  
15 opinion in *Walker v. Providence Health System*, 254 Or App 676, 298 P3d 38 (2013)  
16 (*Walker III*), claimant contends in his cross-petition that the penalty should be based on  
17 the amount of compensation due at the time of Liberty's premature May 25, 2011, notice  
18 of closure. In light of *Walker III*, we agree. In that case, we said that the "relevant point  
19 in time" for determining the amount "then due" is "the time at which that unreasonable  
20 notice of closure or refusal to close was issued." *Id.* at 684. Accordingly, we conclude  
21 that the penalty should be based on the amount of compensation due claimant as of the

1 date of the premature notice of closure.

2           Claimant further contends that the amount on which the penalty is to be  
3 based is the total amount of compensation--permanent disability, work disability, and  
4 temporary disability--to which claimant was entitled for the period April 5, 2010 through  
5 May 25, 2011, less the amount that had been paid as of the date of the premature notice  
6 of closure. Claimant is correct that the penalty under ORS 656.268(5)(d) is to be based  
7 on "all compensation determined to be then due" claimant. On remand, the board should  
8 determine the amount of compensation due claimant as of the date of the premature  
9 closure.

10           The remaining issue relates to the award of attorney fees. ORS 656.382  
11 provides, as relevant:

12           "(1) If an insurer or self-insured employer refuses to pay  
13 compensation due under an order of an Administrative Law Judge, board or  
14 court, or otherwise unreasonably resists the payment of compensation,  
15 except as provided in ORS 656.385, the employer or insurer shall pay to the  
16 attorney of the claimant a reasonable attorney fee as provided in subsection  
17 (2) of this section. To the extent an employer has caused the insurer to be  
18 charged such fees, such employer may be charged with those fees.

19           "(2) If a request for hearing, request for review, appeal or cross-  
20 appeal to the Court of Appeals or petition for review to the Supreme Court  
21 is initiated by an employer or insurer, and the Administrative Law Judge,  
22 board or court finds that the compensation awarded to a claimant should not  
23 be disallowed or reduced, or, through the assistance of an attorney, that an  
24 order rescinding a notice of closure should not be reversed or the  
25 compensation awarded by a reconsideration order issued under  
26 ORS 656.268 should not be reduced or disallowed, the employer or insurer  
27 shall be required to pay to the attorney of the claimant a reasonable attorney  
28 fee in an amount set by the Administrative Law Judge, board or the court  
29 for legal representation by an attorney for the claimant at and prior to the  
30 hearing, review on appeal or cross-appeal."

1           The board awarded claimant an assessed attorney fee for services on review  
2 regarding the premature closure and temporary disability issues, pursuant to  
3 ORS 656.382. However, the board declined to award claimant an additional assessed  
4 attorney fee for services on review relating to the securing of a penalty and attorney fees.  
5 Claimant's second contention in his cross-petition is that the board erred in not awarding  
6 a separate fee under ORS 656.382(1) for services before the board in establishing  
7 claimant's entitlement to a penalty and attorney fees. We reject the contention. As we  
8 recently reiterated in *Cayton v. Safelite Glass Corp.*, 258 Or App 522, 525, 310 P3d 718  
9 (2013), penalties are not "compensation," and attorney fees are not awarded for  
10 prevailing on an issue of penalties. Further, we have held that the term "compensation"  
11 as used in ORS 656.382(2) does not include attorney fees. *Dotson v. Bohemia, Inc.*, 80  
12 Or App 233, 236, 720 P2d 1345, *rev den*, 302 Or 35 (1986). We conclude that the board  
13 correctly concluded that claimant's success in obtaining a penalty and attorney fees under  
14 ORS 656.268(5)(d) for Liberty's unreasonable claim closure does not result in an award  
15 of attorney fees under ORS 656.382(1).

16           Contrary to claimant's contention, the Supreme Court's recent opinion in  
17 *SAIF v. DeLeon*, 352 Or 130, 282 P3d 800 (2012), does not mandate a different outcome  
18 or pertain to the issue on review here. In *DeLeon*, the court held that, when an insurer  
19 initiates a review of an award of compensation, and the final tribunal to consider the issue  
20 determines that the award should be upheld, the claimant is entitled to attorney fees under  
21 ORS 656.382(2) (2007) for services at and prior to the final tribunal, irrespective of

1 whether the insurer initiated the appeal or review on which the claimant ultimately  
2 prevailed. *Id.* at 143. In other words, if the claimant ultimately prevails on an insurer's or  
3 employer's request for a reduction or disallowance of benefits, the claimant is entitled to  
4 attorney fees--an entitlement to attorney fees under ORS 656.382(2) is not also  
5 contingent on the insurer having initiated the intervening or final appeal or request for  
6 review. *DeLeon* does not relate to or bear on the issue in this case--claimant's entitlement  
7 to attorney fees for having prevailed on issues relating to penalties and attorney fees.

8                   Affirmed on petition; on cross-petition, remanded for redetermination of  
9 penalty under ORS 656.268(5)(d) based on all compensation due as of the May 25, 2011,  
10 premature closure; otherwise affirmed.