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In the Matter of the ORS 656.262(11) Penalty Dispute of  
**Jones, Larry R., Claimant**  
Contested Case No: H02-075  
**AMENDED FINAL ORDER**  
July 2, 2003  
LARRY R. JONES, Petitioner  
LANE COUNTY, Respondent  
Before John L. Shilts, Workers' Compensation Division Administrator

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On April 16, 2003, the director issued a Final Order. By letter dated April 28, 2003, claimant moved to abate the order to reconsider an inconsistency. On May 22, 2003, the director abated the April 16, 2003 order pending this Final Order on Reconsideration. Employer Lane County has not responded to claimant's motion. The director amends the Final Order to address the inconsistency.

The Investigations & Sanctions Unit of the Department of Consumer and Business Services, Workers' Compensation Division issued an administrative order on July 1, 2002 that assessed respondent a penalty for late payment of permanent disability compensation. On October 23, 2002, Hearing Officer Catherine P. Coburn conducted a telephone hearing. Attorney Dale C. Johnson represented petitioner, claimant Larry R. Jones. Respondent, employer Lane County, and its claims administrator, Pinnacle Risk Management Services, Inc., were represented by attorney Brian L. Pocock. The Workers' Compensation Division waived appearance. Erika Schulz, Senior Claims Adjustor, testified on behalf of the employer; no other witnesses testified.

Claimant filed exceptions to Hearings Officer Coburn's November 26, 2002 Proposed and Final Contested Case Hearing Order, which affirmed the administrative order. Before the director, the issues are penalties for alleged delay in closing the claim and for alleged late payment of permanent disability compensation. The entire record, consisting of a tape recording of the hearing, all evidence received, and all documents filed, has been considered.

### **Findings of Fact**

The director accepts the hearing officer's findings of fact, with the following supplementation.

Claimant worked as a deputy sheriff at the time of his compensable left knee injury. His job entailed a considerable amount of weightbearing, including going up and down stairs. Claimant filed an aggravation claim in October 2000, which the employer accepted on November 20, 2000. Claimant underwent knee surgery on December 4, 2000. His attending surgeon, Dr. Donald Jones, released claimant for sedentary work on January 1, 2001. Claimant continued to have pain, and difficulty kneeling, squatting and going up and down stairs.

Dr. Stanley James examined claimant on September 18, 2001 at the employer's request. He noted claimant's current knee complaints, and also noted that claimant had been terminated

from his employment. Dr. James' report contained range of motions findings, strength findings, and discussion attributing claimant's current knee condition to degenerative changes. Dr. James declared claimant medically stationary. Pinnacle received Dr. James' report on September 27, 2001. The next day, Pinnacle sent Dr. James's report to Dr. Jones for his concurrence. Pinnacle received Dr. Jones' response on November 23, 2001.

On December 6, 2001, Ms. Schulz wrote to Dr. Jones inquiring whether claimant was capable of performing his regular work and the cause of any work limitations. Dr. Jones responded that he needed a job description to make that determination. After obtaining the job description from the employer, Ms. Schulz sent it to Dr. Jones on January 16, 2002. On February 15, 2002, Ms. Schulz received Dr. Jones' response that claimant could not return to regular work and that the limitations were due to degenerative joint disease. Upon receipt of Dr. Jones' response, the claim was submitted for closure. The Notice of Closure issued on March 22, 2002.

Ms. Schulz acknowledged that a determination regarding claimant's return to work was not relevant for purposes of determining permanent disability, but it was relevant for purposes of determining entitlement to vocational assistance. She, however, testified that information regarding claimant's work capabilities was necessary to determine whether claimant had limitations and whether those limitations were due to the accepted condition.

### **Conclusions of Law and Opinion**

Claimant seeks penalties for two alleged violations. Claimant contends that a 25 percent penalty should be assessed for the employer's alleged delay in determining his permanent disability award. He argues that the employer should have closed the claim within 14 days after it received the attending physician's concurrence with Dr. James' report, or by December 7, 2001. Claimant next contends that the second violation occurred when the employer paid his permanent disability award late. For this second violation, claimant asserts that a 15 percent penalty should have been assessed.

The Investigations & Sanctions Unit found that payment of the entire permanent disability award was due no later than Monday, April 22, 2002, but that the employer mailed the payment four days late. Relying on ORS 656.262(11), OAR 436-060-0002 and 436-060-0155, the unit concluded that a penalty was warranted for the employer's late payment of the permanent disability award. Because this was a first violation of untimely claim processing, the unit assessed a five percent penalty of the permanent disability award. The unit did not address claimant's entitlement to a penalty for the employer's alleged delay in closing the claim.

The hearing officer adopted and affirmed the unit's determination regarding the employer's late payment of the permanent disability award. The hearing officer, however, rejected claimant's contention that he was entitled to further penalty for the employer's delay in closing his aggravation claim. Relying on ORS 656.268(1), the hearing officer determined that the employer did not have sufficient information to close claimant's claim and to determine his permanent disability until it received information concerning his return to regular work in order to determine whether claimant would be enrolled in training. The hearing officer, thus,

concluded that the employer did not delay in closing the claim and, therefore, a penalty was not warranted.

In his exceptions, claimant argues that the hearing officer incorrectly applied ORS 656.268(1), which provides:

“One purpose of this chapter is to restore the injured worker as soon as possible and as near as possible to a condition of self support and maintenance as an able-bodied worker. The insurer or self-insured employer shall close the worker’s claim, as prescribed by the Director \*\*\*, and determine the extent of the worker’s permanent disability, provided the worker is not enrolled and actively engaged in training according to rules adopted by the director pursuant to ORS 656.340 and 656.726, when:

- (a) The worker has become medically stationary and there is sufficient information to determine permanent impairment.”

OAR 436-030-0020(1) requires the insurer to issue a Notice of Closure within 14 days when: “(a) medical information indicates the worker’s compensable condition is medically stationary and there is sufficient information to determine the extent of permanent disability; or (b) the accepted injury/condition is no longer the major contributing cause of the worker’s combined condition or consequential condition(s), a major contributing cause denial has been issued, there is sufficient information to determine the extent of permanent disability and the worker is not enrolled and actively engaged in training; \*\*\*.”

“Sufficient information” includes “a closing medical examination and report when there is a reasonable expectation of loss of use or function, changes in the worker’s physical abilities, or permanent impairment attributable to the accepted condition(s) based on evidence in the record of the physician’s opinion. The closing medical examination report shall describe in detail all measurements and findings regarding any permanent impairment, residuals or **limitations attributable to the accepted condition(s)** pursuant to OAR 436-010-280 and OAR 436-035.” OAR 436-030-0020(2)(a) (emphasis added).

For the purpose of determining whether a penalty is warranted, the employer is liable when it “unreasonably delays or unreasonably refuses to pay compensation.” ORS 656.262(11). The standard for determining reasonableness is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. *International Paper Co. v. Huntley*, 106 Or App 107 (1991). “Unreasonableness” is to be considered in light of all the evidence available at the time of the conduct. *See Brown v. Argonaut Insurance Company*, 93 Or App 588 (1988). Thus, at issue is whether the employer reasonably complied with ORS 656.268(1).

Ms. Schulz testified she received Dr. Jones’ concurrence with Dr. James’ September 2001 report on November 23, 2001. She could not close the claim because she had no information regarding claimant’s work capacity, which she felt was necessary to determine whether claimant had limitations and whether those limitations were due to the accepted condition. On December 6, 2001, Ms. Schulz wrote to Dr. Jones inquiring whether claimant could return to work as a sheriff. Dr. Jones responded that he needed a job description to make

that determination. After obtaining the job description from the employer, Ms. Schulz sent it to Dr. Jones on January 16, 2002. On February 15, 2002, Ms. Schulz received Dr. Jones' response that claimant could not return to regular work because of his degenerative condition. Upon receipt of Dr. Jones' response, the claim was submitted for closure. The claim was not closed until March 22, 2002.

The director finds<sup>1</sup> that it was reasonable for the employer to await receipt of additional information from the attending physician regarding claimant's work capacity before it had sufficient information to close the claim.<sup>2</sup> Although the information was pertinent for the purpose of vocational assistance eligibility, this information was also relevant for purposes of determining whether claimant's limitations were attributable to the accepted conditions, as required under OAR 436-030-0020(2)(a). That rule requires medical evidence regarding limitations attributable to the compensable condition.<sup>3</sup> The employer, thus, acted reasonably in obtaining the additional information prior to submitting the claim for closure.

However, the claims adjuster received the additional information on February 15, 2002. The Notice of Closure issued 35 days later, on March 22, 2002. Because the Notice of Closure did not issue within 14 days of receipt of the additional information, an ORS 656.262(11) penalty for unreasonable delay may be warranted. However, when there are no "amounts then due" upon which to assess a penalty, no penalty will be issued. OAR 436-060-0155(7); *Martin Mendoza-Razo*, 7 WCSR \_\_\_ (2002) (prior to claim closure, no amount is then due upon which to assess penalty for untimely claim closure). The permanent partial disability award was not due until after it was awarded in the Notice of Closure. Accordingly, there is no amount upon which to assess a penalty.

Claimant contends that the second violation warranting a penalty occurred by the employer's late payment of the permanent disability award. The Notice of Closure issued on March 22, 2002 and, thus, payment was due no later than April 22, 2002, pursuant to OAR 436-060-0150(7)(a). The employer paid the award four days late. The employer does not dispute that the permanent disability payment was late. For this violation, a five percent penalty is assessed. OAR 436-060-0155. Accordingly, that portion of the hearing officer's order, which assessed a five percent penalty, is affirmed.

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<sup>1</sup> The director disagrees with the hearing officer's conclusion that "ORS 656.268(1) requires the insurer before closing the claim to determine whether the worker "will enroll in and actively engage in vocational training." Rather the phrase—"provided the worker is not enrolled and actively engaged in training"—in the statute is a condition affecting claim closure.

<sup>2</sup> See *Cinda L. Barnes*, 53 Van Natta 1419 (2002) (board determined there was insufficient information to close the claim in light of the attending physician's inability to fully respond to the insurer's request for information); see e.g., *John R. Payne*, 54 Van Natta 2338 (2002)(claim prematurely closed because of insufficient information to determine permanent impairment as required by ORS 656.268(1)(a)).

<sup>3</sup> ORS 656.268(1) states the circumstances under which the insurer shall close a claim. The administrative rules interpreting this rule further contain requirements regarding information that the Notice of Closure should contain. This information includes the worker's return to work status. Thus, the employer's actions in obtaining information regarding claimant's work capacity as part of the claim closure process were reasonable.

IT IS HEREBY ORDERED THAT: The November 26, 2002 Proposed and Final Contested Case Order is affirmed. The employer is assessed five percent penalty for late payment of the permanent disability award.

DATED this 2<sup>nd</sup> day of July, 2003.

**CORY STREISINGER, DIRECTOR  
DEPARTMENT OF CONSUMER  
AND BUSINESS SERVICES**

By: \_\_\_\_\_  
John Shilts, Administrator  
Workers' Compensation Division