

John Calvi, 76 Van Natta 687 (2024)

Penalty under ORS 656.268(5)(f)

# ORS 656.268(5)(f)

- Provides for a penalty if:
  - The workers' compensation carrier has closed the claim
  - The correctness of the Notice of Closure is at issue at a hearing
  - A finding is made at the hearing that the Notice of Closure was unreasonable

# Correctness of the Notice of Closure

- ORS 656.268(4) –
  - If a worker objects to the Notice of Closure, they must first request reconsideration with the Appellate Review Unit of the Workers' Compensation Division.
  - The worker can request a hearing with an Administrative Law Judge at the Workers' Compensation Board only after the Appellate Review Unit has made a determination regarding the Notice of Closure.
- Penalties under ORS 656.268(5)(f) are not awarded by the Appellate Review Unit because the reconsideration process is not a “hearing.”

# Correctness of the Notice of Closure

- Workers with favorable reconsideration decisions must request a hearing with a Workers' Compensation Board Administrative Law Judge to seek a penalty for an unreasonable closure.
- *Warren D. Duffour*, 70 Van Natta 176 (2018): The Board held that a request for hearing seeking a penalty under ORS 656.268(5)(f) put the correctness of the notice of closure at issue at the hearing if the request is made “from” the reconsideration order.

# John Calvi

- Appellate Review Unit set aside the Notice of Closure as premature
- The worker requested a hearing asserting entitlement to a penalty under ORS 656.268(5)(f) contending that the Notice of Closure was unreasonable, but the hearing request was not a request “from” the reconsideration order.
- The Board affirmed the Administrative Law Judge’s order that declined to award a penalty because the correctness of the Notice of Closure was not at issue at the hearing.

## Member Ousey, Concurring

- Followed prior Board cases but expressed concerns with the statutory requirements in ORS 656.268(5)(f).
- When the penalty statute was enacted and later amended, a worker could request a hearing challenging the Notice of Closure and assert entitlement to an ORS 656.268(5)(f) penalty at the same time.

# Member Ousey, Concurring

- Later legislative changes required the worker to first dispute the Notice of Closure with the Appellate Review Unit.
- But ORS 656.268(5)(f) was not amended to allow the Appellate Review Unit to award a penalty for an unreasonable closure
- Amended statutory scheme creates an “unnecessarily cumbersome process” for workers by requiring two levels of litigation – one to determine the validity of the closure and one to determine entitlement to a penalty
- Urged the Management Labor Advisory Committee and the legislature to review the statutory scheme