

BEFORE THE WORKERS' COMPENSATION BOARD

STATE OF OREGON

HEARINGS DIVISION

In the Matter of the Compensation	)	WCB Case No. 19-02648
	)	Claim No. 555232469
of	)	DOI: 1/21/2017
	)	WCD File No. EBX2484
	)	
<b>ANDREW K. MYERS,</b>	)	
Claimant	)	<b>OPINION AND ORDER</b>

A hearing was convened in the above-entitled matter on October 22, 2019, in Bend, Oregon, and on March 9, 2020, in Portland, Oregon, before Administrative Law Judge Darren Otto of the Workers' Compensation Board. Claimant was present and was represented by his attorney Glen J. Lasken. The employer, Jet Blue Airways, and its processing agent, AIG – Chartis Claims, Inc., were represented by their attorney Matthew M. Fisher. Exhibits 1 through 71 were received into evidence regarding the employer's appeal of the May 9, 2019 Order on Reconsideration that rescinded a February 6, 2019 Notice of Closure on the basis that there were insufficient findings to establish the scope of claimant's permanent impairment. The hearing was continued for additional evidence regarding the compensability issues and for written closing arguments.

On April 28, 2020, claimant filed his initial written closing argument. On July 2, 2020, the employer filed its written response. The hearing concluded on July 14, 2020, upon receipt of claimant's corrected reply. The employer's request for hearing challenging the May 9, 2019 Order on Reconsideration in WCB Case No. 19-02648 is bifurcated from the compensability issues in the remaining WCB Case numbers which will be addressed in a separate Opinion and Order.

**ISSUES**

1. The employer appeals the May 9, 2019 Order on Reconsideration which rescinded a February 6, 2019 Notice of Closure which awarded claimant no permanent disability benefits. The issue is whether the Appellate Review Unit (ARU) incorrectly concluded that there were insufficient findings to establish permanent disability due to claimant's compensable injury at closure.

2. Claimant seeks an assessed attorney fee for defending against the Order on Reconsideration that rescinded the Notice of Closure pursuant to ORS 656.382(2). If the Order on Reconsideration is approved, the issue is what is a reasonable assessed attorney fee given the circumstances of this case.

### FINDINGS OF FACT

Claimant was 54 years old at the time of hearing (Ex. 3). On December 2, 2002, he began working for the employer as a pilot in its commercial airline business (Exs. 3 & 22-3). On January 21, 2017, he was exposed to toxic chemical fumes on board an airplane at work (Exs. 3, 5, 6, & 22-2). He immediately started coughing, his eyes stung and watered, the right side of his body shook with tremors, and he had mild shortness of breath, headache, and congestion (Exs. 5-1 & 22-2). He felt confused afterward and, the following day, his headaches increased significantly. *Id.* He also had some ulnar aspect numbness in his forearm and hand for a couple of days that resolved (Ex. 11-1). Subsequently, he did not return to work (Exs. 5-1 & 22-2).

Chemicals can effectively enter the body via inhalation, skin, and ingestion, with inhalation being the most effective because of the large surface area of the lung and the fact that inhaled chemicals escape first-pass metabolism (Ex. 62-2). Nerve system damage may result from a single large chemical exposure that cause neurological deficits. *Id.* Nerve system damage can also result from repeated low-level chemical exposures that cause small neural injuries which accumulate and result in neurological deficits over time. *Id.* In addition, nerve system damage is more likely when there is exposure to multiple chemicals because those chemicals compete with each other for the body's defense mechanism with subsequent increased delivery of each chemical to the neurotoxicity target. *Id.* The medical literature regarding toxic exposures reveals common neurocognitive complaints of confusion, fatigue, headache, difficulty with concentration, information processing speed, memory and learning, along with depression, anxiety, irritability, and restlessness (Ex. 61-25). According to the medical literature, cognitive deficits can also develop secondary to toxic exposure and may present after a brief latency period (Ex. 61-26).

On January 30, 2017, claimant filed an 801 injury claim form with the employer alleging a toxic chemical fume event caused respiratory disorders (Ex. 3).

On January 25, 2017, claimant sought treatment from Sean Suttle, PAC, for shortness of breath, headache, coughing, constipation, nausea and a feeling of



fogginess (Ex. 5-1). Mr. Suttle's assessment was a cough, exposure to chemical inhalation, and toxic inhalation. *Id.*

On February 10, 2017, claimant went to the emergency room with complaints of mental confusion, headaches, memory difficulties, and word finding difficulties (Ex. 9). A brain MRI scan was interpreted as showing (1) no acute intracranial abnormality with no evidence of ischemic infarction and (2) mild bilateral cerebellar tonsillar ectopia, slightly worse on the right than left (Ex. 8). MRI scans, however, are not sensitive for detecting toxic exposure to tricresyl phosphate, an ingredient used in jet airplane oil (Ex. 11-2). Dr. Siebe felt that claimant's symptoms could be related to the toxic fume exposure and recommended he see a neurologist (Ex. 9).

On February 21, 2017, claimant sought care from David Schloesser, M.D., for mental processing, speech and reading difficulties, fatigue, daily headaches, mild photophobia and phonophobia, an internal sensation of tremors, and nausea (Ex. 11-2). The examination demonstrated diminished sensation into the feet (Ex. 11-2). As a result, nerve conduction testing was performed which demonstrated evidence for sensorimotor polyneuropathy affecting the lower and upper extremities (Exs. 11 & 12). Dr. Schloesser diagnosed migraine headaches and polyneuropathy due to toxic agents (Ex. 11-2). He prescribed medications and recommended neuropsychological testing. *Id.*

On February 23, 2017, the employer accepted claimant's "acute chemical inhalation" as a disabling industrial injury (Ex. 13). Subsequently, the employer amended that Notice of Acceptance to include claimant's "acute toxic inhalation" as well (Ex. 70).

On March 3, 2017, claimant began treating with Viviane Ugalde, M.D., for cognitive deficiencies with difficulties reading, speaking, and recalling information (Ex. 17-1). He also complained of coughing, trouble swallowing, and body tremors, worse on the right side, a couple times a day. *Id.* Dr. Ugalde diagnosed (1) toxic encephalopathy, (2) toxic peripheral neuropathy, (3) exposure to chemical inhalation, (4) tremor, (5) wheezing on expiration, (6) vision impairment, (7) vestibular disequilibrium, and (8) daily persistent headache (Ex. 17-4). Dr. Ugalde remained claimant's primary care physician for his acute toxic inhalation and acute chemical inhalation conditions until claim closure on February 6, 2019 (Exs. 18, 20, 26, 27, 38, 44, 46, 49, 51, 54, 55, 56, 65, and 66).



On March 15, 2017, a CT scan of claimant's chest showed no evidence of pneumonitis or other acute lung injury (Ex. 19). No significant air trapping or excessive airway collapse was seen on expiratory imaging. *Id.*

On March 28, 2017, claimant returned to Dr. Schloesser, with low energy, forgetfulness, and difficulties with mental processing and reading retention (Ex. 21-1). Dr. Schloesser diagnosed peripheral neuropathy, although claimant's reflexes were slightly improved on examination. *Id.* He recommended a PET scan. *Id.*

On April 3, 2017, claimant underwent neuropsychological testing with Licensed Psychologist Leah Schock, Ph.D., who concluded that the January 21, 2017 fume event resulted in a mild neurocognitive disorder which was consistent with the types of cognitive changes described in the post-toxic exposure literature (Ex. 22-8). Dr. Schock recommended speech and language therapy, continued psychological support, and repeat neuropsychological testing to assess changes in cognition over time (Ex. 22-9). Neuropsychological tests are designed to evaluate brain function at the time the assessment is completed (Ex. 61-26).

On April 10, 2017, claimant sought treatment for breathing difficulties from Jean Verheyden, M.D., who performed a flexible nasolaryngoscopy of the larynx (Ex. 24-2). During that test, claimant exhibited abnormal vocal cord movement which was either due to an underlying neurologic issue or an underlying pulmonary issue. Dr. Verheyden recommended the issue be monitored long-term. *Id.*

On May 26, 2017, claimant sought treatment for photophobia, special confusion, and blurred visual from Kirsten Scott O.D., who diagnosed convergence insufficiency and presbyopia (Ex. 31). Dr. Scott recommended SV reading glasses with blue lenses to calm his visual symptoms (Ex. 31-3).

On May 31, 2017, claimant sought treatment for voice, breathing, and swallowing problems from Speech Pathologist Linda Bryans (Ex. 32). Specifically, claimant's voice was hoarse, effortful, weak, and reduced in loudness (Ex. 32-2). She provided voice therapy to improve efficiency of breathing and reduce laryngeal hyperfunction (Ex. 32-3; see also Exs. 33 & 35).

On May 31, 2017, claimant sought additional treatment for his breathing problems from Joshua Schindler, M.D., who did not believe that claimant was suffering from classic vocal cord dysfunction (Ex. 34-5). Instead, Dr. Schindler believed that claimant had a pattern of breathing most consistent with diminished



lung compliance and need for Valsalva on exhale to prevent collapse of the alveoli. *Id.* He recommended more extensive cardiopulmonary workup. *Id.*

A June 14, 2017 esophagram was interpreted as showing mild oropharyngeal discoordination (Ex. 36).

On June 15, 2017, claimant was examined by the insurer-arranged medical examiner and Medical Toxicologist Brent Burton, M.D., who believed it was impossible that TCP or TOCP or any other substance in the jet engine oil caused any of claimant's symptoms on the grounds that he was not exposed to a sufficient quantity of those toxins (Ex. 37, pages 7-8). Dr. Burton also believed that claimant did not exhibit any evidence of an organic illness or injury and there were no reported cases of toxicity stemming from an inhalational exposure to TOCP (Ex. 37-7). Therefore, Dr. Burton concluded that claimant was suffering from a psychogenic disorder (Ex. 37-8). Dr. Burton's belief, however, that "aero toxic syndrome" was a myth was not supported by the medical literature (Exs. 61, 62 & 64).

On August 9, 2017, claimant was examined by the insurer-arranged medical examiner and Neurologist Lynne Bell, M.D., who found no objective evidence of any neurological disorder, including polyneuropathy, peripheral neuropathy, or acute toxic encephalopathy (Ex. 45, pages 16-19). Dr. Bell concluded that claimant's worsening symptoms since the fume event raised the possibility of a psychogenic source in the absence of verifiable objective neurological deficits (Ex. 45-19).

On September 29, 2017, claimant was examined by the insurer-arranged medical examiner and Neurologist Patrick Radecki, M.D., who performed nerve conduction studies and found no electrical evidence of a diffuse peripheral neuropathy on examination and inconsistent physical findings in the medical record relative to peripheral neuropathy (Ex. 48-9).

On October 30, 2017, and November 8, 2017, claimant underwent another round of neuropsychological testing by Dr. Schock, who diagnosed a mild neurocognitive disorder without improvement (Ex. 52). In comparison to his prior neuropsychological evaluation on April 3, 2017, claimant demonstrated ongoing generalized cognitive dysfunction with primary deficits in language expression, complex attention, and working memory. *Id.* The neurocognitive testing included validity measures which showed no evidence of malingering or somatization (Ex. 55-1 & Ex. 57).



On January 4, 2018, Dr. Ugalde disagreed with the conclusions of the IME physicians, Drs. Burton and Bell, noting that claimant did have immediate symptoms following the fume event and Dr. Schloesser's clinical examination was consistent with the NCS findings of peripheral neuropathy (Ex. 55-1). Dr. Ugalde explained that claimant's peripheral nerve function subsequently improved and he had consistent symptoms of toxic encephalopathy with documented neurocognitive changes on neuropsychological testing. *Id.* Dr. Ugalde also found the opinions of Drs. Burton and Bell invalid because they did not have serial assessments of claimant. *Id.* Based on all of the evidence, Dr. Ugalde continued to believe that claimant's toxic encephalopathy was caused by the January 21, 2017 exposure to fumes at work (Ex. 55, pages 1-2). Dr. Ugalde deferred to the opinions of claimant's pulmonologist and ENT physicians regarding objective measurements of claimant's vocal cord and breathing dysfunction (Ex. 55-2).

On January 9, 2018, claimant sought treatment from Dr. Ugalde, who diagnosed toxic encephalopathy, exposure to chemical inhalation, paradoxical vocal cord movement on respiration, and tremors (Ex. 56-6). At that time, claimant continued to experience daily headaches, vertigo and dizziness, along with total body internal tremors, breathing problems, and cognitive difficulties (Ex. 56-1).

On January 25, 2018, Timothy Craven, M.D., provided a medical treatment review of claimant's condition, assuming that there had not been any confirmed cases of toxic encephalopathy in flight crews from exposure to TCP in the medical literature (Ex. 58-2). Based in part on that information, Dr. Craven concluded that claimant's exposure to toxic fumes at work on January 21, 2017 caused his symptoms during the first few days, but it was very unlikely to have caused his long-term persistent neurological problems and cognitive impairment (Ex. 58-2). Dr. Craven recommended a psychological consultation. *Id.* Dr. Burton agreed with Dr. Craven's assessment (Ex. 64-4).

On February 1, 2018, Brett Wyrick, D.O., denied claimant's application for airman medical certification due to his toxic encephalopathy requiring the use of disqualifying medication (Ex. 59). Therefore, it was unlawful for claimant to fly a plane. *Id.*

On February 28, 2018, Matthew Bentz, M.D., interpreted a PET scan of claimant's brain, stating, "Mildly and symmetrically decreased uptake within the posterior fossa is of uncertain etiology. A case report of organic tin poisoning (Korean Journal of Occupational and Environmental Medicine, 21 (2009), pp. 289-



292) leading to similar findings raises the possibility of toxic encephalopathy.” (Ex. 60).

On March 2, 2018, claimant was examined by the insurer-arranged medical examiner and Clinical Neuropsychologist Tracy Kreiling, Psy.D., who diagnosed a major neurocognitive disorder due to toxic inhalation (Ex. 61, pages 24-25). During that examination, claimant had a slight resting tremor, headache pain, nausea, confusion, and sensitivity to light (Ex. 61-23). On standardized neuropsychological testing, claimant demonstrated significant cognitive decline in sustained attention and aspects of visual memory. *Id.* Dr. Kreiling did not believe that claimant’s cognitive deficits were better explained by a mental disorder (Ex. 61-24). Instead, Dr. Kreiling believed that claimant’s symptoms, neuropsychological measures, and the stability of his performance from repeated neuropsychological evaluations over time were caused by his toxic exposure. *Id.* Dr. Kreiling found no evidence of malingering or symptom magnification during the evaluation (Ex. 61, pages 26-27). If anything, it was felt that claimant was possibly underreporting his symptoms. *Id.*

On March 9, 2018, Mohamed Abou-Donia, Ph.D., performed an autoantibodies test in serum involving a sample of claimant’s blood to determine if he had any nerve damage (Ex. 62-1). The specially developed test sought to establish the level of serum-derived autoantibodies circulating in the blood which could indicate nerve damage. *Id.* Based on the test results, Dr. Abou-Donia believed that claimant’s elevated levels of serum autoantibodies against certain neuronal proteins were highly significant (Ex. 62, pages 1-2). He also concluded that the presence of circulating autoantibodies against neuronal and glial proteins at higher levels confirmed claimant’s chemical-induced nervous system injury and resulting neurological deficits (Ex. 62-5).

On March 9, 2018, a SPECT scan of claimant’s brain was interpreted as normal (Ex. 63).

On October 16, 2018, Dr. Ugalde diagnosed (1) toxic encephalopathy, (2) cognitive deficits, (3) chronic headaches, (4) dyspnea, (5) migraine, (6) paradoxical vocal cord movement on respiration, and (7) vestibular disequilibrium (Ex. 66-7). In addition, she believed that claimant’s toxic inhalation condition with persistent cognitive, neurologic and pulmonary complaints was medically stationary with residual impairment and he was precluded from returning to his regular job as an airline pilot (Ex. 66, pages 1 & 7). At that time, claimant continued to have persistent daily headaches, frequent vertigo resulting in falls several times a week, visual problems that included seeing double and difficulty focusing to read, breathing



difficulties which limited his physical activity, cognitive deficits, and significant fatigue. *Id.* During a typical day, he did exercises for physical strengthening, cognition, speech, vision, and vestibular problems (Ex. 6-1). He also took about a dozen medications to help alleviate those problems while continuing with speech therapy, physical therapy, occupational therapy, and mental health counseling (Ex. 66, pages 2-3). Dr. Ugalde concluded that claimant's head injury resulted in Rancho Los Amigos Level VIII impairment with class II head and brain impairment (Ex. 66-7). In addition, his cognition remained significantly impaired, preventing him from returning to regular work. *Id.*

On February 6, 2019, a Notice of Closure closed claimant's compensable claim for acute toxic inhalation and acute chemical inhalation without a permanent disability award on the grounds that claimant's impairment was not due to the accepted conditions (Ex. 67).

On February 8, 2019, the employer denied compensability of claimant's current condition on the grounds that his accepted acute chemical inhalation and acute toxic inhalation conditions were no longer materially contributing to any disability or need for treatment (Ex. 69).

On February 20, 2019, the employer denied compensability of claimant's toxic encephalopathy on the grounds that the condition did not exist and, if it did, the industrial injury was not a material contributing cause of that condition (Ex. 70).

On May 9, 2019, an Order on Reconsideration rescinded the February 6, 2019 Notice of Closure on the grounds that there were insufficient findings to establish the scope of claimant's permanent disability resulting from the compensable injury (Ex. 71).

On July 31, 2020, an Opinion and Order set aside (on both procedural and substantive grounds) the employer's February 20, 2019 denial of compensability of claimant's toxic encephalopathy, its April 2, 2019 denial of compensability of claimant's mild neural cognitive disorder, convergence insufficiency, and saccadic eye movement deficiency, and its February 8, 2019 denial of compensability of claimant's current condition (Administrative Notice).

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## CONCLUSIONS OF LAW AND OPINIONS

### 1. Premature claim closure

The employer contends that, on May 9, 2019, the ARU improperly rescinded a February 6, 2019 Notice of Closure because there was sufficient information to close the claim and the Notice of Closure should be reinstated. Claimant asserts that the ARU correctly concluded that there was insufficient information to close the claim and the Order on Reconsideration should be approved.

The Hearings Division has jurisdiction over “matters concerning a claim,” such as a compensability issue raised by an employer’s denial. ORS 656.283(1); ORS 656.704(3)(a). However, an objection to a Notice of Closure must first be brought before the Director. ORS 656.268(5). Furthermore, any objection to an updated Notice of Acceptance or a denial of denied conditions shall not delay claim closure pursuant to ORS 656.268. ORS 656.262(7)(c). If a carrier’s claim denial is subsequently set aside, the claim must be reopened and processed to closure. *Id.* Thus, the statutory framework contemplates that objections to a closure are evaluated separately from questions of compensability. This separation is illustrated by *Jonathan E. Ayers*, 56 Van Natta 270 (2004) (*Ayers I*), and *Jonathan E. Ayers*, 56 Van Natta 1103 (2004), *on recons*, 56 Van Natta 1470 (2004) (*Ayers II*). Thus, a combined condition denial, asserting that the accepted condition ceases to be the major contributing cause of a combined condition, which issues prior to closure does not invalidate a Notice of Closure. ORS 656.262(7)(b); ORS 656.268(1)(b); OAR 436-030-0020(1)(b); *see also* OAR 436-030-0034(4). Thus, in the present case, the employer’s February 8, 2019 denial of compensability of claimant’s then-current condition and February 20, 2019 denial of compensability of claimant’s toxic encephalopathy did not invalidate the February 6, 2019 Notice of Closure.

In evaluating claims at closure, the focus is on accepted conditions. *See James L. Mack*, 50 Van Natta 338, 339 (1998). Under ORS 656.262(7)(c), if a condition is found compensable after claim closure, the carrier is required to reopen the claim for processing regarding that condition. *Verna C. Flescher (FKA Lowell)*, 50 Van Natta 1105, 1111 n. 2 (1998); *aff’d mem* 159 Or App 426 (1999). In *Anthony J. Telesmanich*, 49 Van Natta 49, 51 (1997) *on recon* 49 Van Natta 166 (1997), the Board held that, where the carrier has accepted additional conditions after issuance of an Order on Reconsideration, the proper procedure at hearing on the Order on Reconsideration is to rate the conditions accepted at the time of the Order on Reconsideration and remand the later accepted conditions to the carrier for processing according to law. *See also* ORS 656.262(7)(c); *Bonnie J. Woolener*, 52



Van Natta 1579 (2000); *Bernard G. Hunt*, 49 Van Natta 223 (1997). In rating permanent disability, the focus is on accepted conditions at the time of claim closure and reconsideration. See *Sally D. Yates*, 52 Van Natta 2258 (2000); *Janet R. Christensen*, 50 Van Natta 1152 (1998). For example, in *James L. Mack*, 50 Van Natta at 338, a February 10, 1997 Order on Reconsideration found claimant's physical condition medically stationary, but a day later, on February 11, 1997, the insurer accepted multiple additional physical conditions and claimant's reactive depression. *Id.* It later reopened the claim. *Id.* Since claimant's psychological condition was not an accepted condition at the time of claim closure, the Board held that whether that condition was medically stationary at the time of closure was not relevant to a determination of whether the claim was prematurely closed and affirmed the Order on Reconsideration. *Id.* At 339.

Here, the employer accepted claimant's acute toxic inhalation and acute chemical inhalation (Ex. 70). In a July 31, 2020 Opinion and Order, the undersigned ALJ determined that, by accepting claimant's "acute toxic inhalation" and "acute chemical inhalation," which either described the mechanism of injury or a vague/ambiguous condition, the contemporaneous medical records established that the employer also accepted claimant's toxic encephalopathy, mild neural cognitive disorder, convergence insufficiency, and saccadic eye movement deficiency (Administrative Notice).<sup>1</sup> Since those specific conditions were encompassed by the employer's acceptances and there was no medical evidence that those conditions had resolved, the employer's February 8, 2019 denial of compensability of claimant's current condition was also set aside in that Opinion and Order. *Id.* Inasmuch as the employer's acceptances included claimant's toxic encephalopathy and other associated conditions from the time it initially accepted the claim, those specific conditions were required to be processed to closure according to Oregon workers' compensation laws.

ORS 656.268(1)(a) provides that the insurer shall close the worker's claim and determine the extent of permanent disability, provided the worker is not enrolled and actively engaged in a training program, when the worker has become medically stationary and there is sufficient information to determine permanent impairment. "Sufficient information" requires a closing medical examination and report measuring a worker's permanent impairment or a physician's written statement that clearly indicates there is no permanent impairment attributable to the accepted

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<sup>1</sup> Review of a Notice of Closure at the Hearings Division is limited to the record developed on reconsideration under ORS 656.238(7) and ORS 656.295(5). Taking administrative notice of an Opinion and Order, however, does not make that document part of the reconsideration record. Therefore, considering the legal posture of the case contained within an administrative order does not run afoul of the aforementioned statutes.



condition. OAR 436-030-0020(2)(a). If the physician indicates there is no impairment, but the record reveals otherwise, a closing examination and report is required. *Id.* Only the attending physician at the time of claim closure or a medical arbiter may make findings regarding the worker's impairment for the purpose of evaluating the worker's disability. ORS 656.245(2)(b)(B); 656.268(7). However, impairment findings from a physician other than the attending physician or medical arbiter may be used to determine impairment when the attending physician concurs with those findings. OAR 436-030-0035(5); *Ryan Marchand*, 72 Van Natta 242 (2020) (the Board found insufficient information to determine the extent of claimant's permanent disability under OAR 436-030-0020(2)(b) because the treating doctor did not provide a qualified closing examination or concur with the IME report).

The May 9, 2019 Order on Reconsideration rescinded a February 6, 2019 Notice of Closure based on the following reasoning by the ARU,

In this case, the insurer closed the worker's claim based on the attending physician's October 16, 2018, report wherein Dr. Ugalde provided some permanent disability findings. However, the record contains evidence of potential permanent impairment resulting from the compensable injury, specifically lung impairment, depicted in the attending physician's chart notes, pulmonary chart notes, and occupational therapy chart notes throughout the record. Given the evidence of potential permanent impairment reflected in the record, an actual detailed closing examination with specific reported findings pursuant to OAR 436-035-0385, is required pursuant to OAR 436-030-0220(2) and OAR [436]-035-0007(5). A general statement from the attending physician indicating there is no permanent impairment does not suffice. See OAR 436-030-0020(2). Additionally, the record does not contain a detailed closing examination with specific impairment findings provided by a consulting provider with attending physician concurrence as allowed under OAR 436-035-0007(6).

(Ex. 71-2).

Given the evidence of potential permanent impairment reflected in the record, the ARU also concluded that an actual detailed closing examination with specific reported findings was required for claimant's headaches, neurological symptoms,

speech impairment, swallowing issues, and visual impairment (Ex. 71-2). The ARU noted that, if there was permanent disability for those conditions, it was unclear what was causing those permanent disability findings since Dr. Ugalde did not indicate what findings of permanent disability were specifically due to the accepted conditions or sequelae, what findings of permanent disability were due to the denied condition, or what findings were due to other conditions. *Id.* Given the potential for neurological, speech and vision impairment, along with swallowing issues, the ARU determined that an actual detailed closing examination with specific reported findings was required pursuant to OAR 436-035-0390 & 0260. *Id.* Therefore, a general statement from the attending physician indicating there was no permanent impairment did not suffice. *Id.* Moreover, the record did not contain a consulting physician's detailed closing examination with specific impairment findings with which the attending physician concurred. *Id.* Finally, The ARU concluded that, since claimant was not released to return to his regular job, additional documentation, including an accurate description of the physical requirements of his job at injury had to be provided by certified mail to the worker and his attorney before the claim was closed (Ex. 71, pages 2-3).

The ARU was correct. Since the employer accepted claimant's toxic encephalopathy, mild neural cognitive disorder, convergence insufficiency, and saccadic eye movement deficiency when it accepted his "acute chemical inhalation" and "acute toxic inhalation," it was required to obtain a closing evaluation of claimant's permanent impairment regarding those conditions. No such report was obtained. Thus, there was insufficient information to close the claim and the May 9, 2019 Order on Reconsideration properly rescinded the February 6, 2019 Notice of Closure as premature.

## 2. Attorney fee

Claimant's counsel seeks a reasonable assessed attorney fee for his efforts in defending against the employer's attempt to decrease claimant's compensation.

656.382(2) provides:

If a request for hearing, request for review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court is initiated by an employer or insurer, and the Administrative Law Judge, board or court finds that all or part of the compensation awarded to a claimant should not be disallowed or reduced, or, through the assistance of an attorney,



that an order rescinding a notice of closure should not be reversed or all or part of the compensation awarded by a reconsideration order issued under ORS 656.268 should not be reduced or disallowed, the employer or insurer shall be required to pay to the attorney of the claimant a reasonable attorney fee in an amount set by the Administrative Law Judge, board or court for legal representation by an attorney for the claimant at and prior to the hearing, review on appeal or cross-appeal.

After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, I find that a reasonable fee for claimant's attorney's services at hearing regarding the premature claim closure issue is \$7000 (seven thousand dollars) payable by the employer. In reaching this conclusion, I have particularly considered the time devoted to the issues (including the number of exhibits and written closing arguments), the complexity of the issues, the high value of the interest involved, and the risk that counsel may go uncompensated.

### **ORDER**

**IT IS HEREBY ORDERED** that the May 9, 2019 Order on Reconsideration is approved in its entirety.

**IT IS FURTHER ORDERED** that JetBlue Airways and Chartis Claims are assessed a reasonable attorney fee in the amount of \$7000 (seven thousand dollars) to be paid directly to claimant's attorney pursuant to ORS 656.382(2).

**Notice to all parties:** If you are dissatisfied with this Order, you may request Board review. A request for review must be submitted within thirty (30) days after the mailing date on this Order. You must timely submit your request for review by any of the following methods:

- |     |                 |   |
|-----|-----------------|---|
| (1) | Mail:           | Workers' Compensation Board<br>2601 25 <sup>th</sup> St SE, Suite 150<br>Salem, OR 97302-1280 |
| (2) | E-mail:         | <a href="mailto:request.wcb@oregon.gov">request.wcb@oregon.gov</a>                            |
| (3) | Fax:            | 503-373-1600  |
| (4) | In-person:      | Workers' Compensation Board office in Salem,<br>Portland, Eugene, or Medford                  |
| (5) | Website portal: | For attorneys, self-insured employers and insurers<br>that are registered users               |

**You must also provide a copy of your request to all other parties to this proceeding within the same 30-day period.** All other parties will have the remainder of the 30-day period, and in no case less than 10 days, to request Board review. The 10-day minimum is provided even if it extends the time allowed to request Board review beyond 30 days.

**Failure to provide a timely request for review to the Board and provide copies to all other parties within the time allowed will result in the loss of your right to appeal this Order and the Board will be unable to review the Administrative Law Judge's decision.**

Entered at Portland, Oregon, on JUL 31 2020 , with copies mailed to:

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Workers' Compensation Board



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Darren Otto  
Administrative Law Judge