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In the Matter of the Compensation of  
**CRYSTAL L. DELEON, Claimant**  
WCB Case No. 08-03173  
ORDER ON RECONSIDERATION  
Dunn & Roy PC, Claimant Attorneys  
Bruce A. Bornholdt, SAIF Legal, Defense Attorneys

Reviewing Panel: *En Banc*. Members Langer, Weddell, Herman, Lowell, and Biehl.

On April 28, 2009, we withdrew our April 7, 2009 order that reversed an Administrative Law Judge's (ALJ's) order that had reduced claimant's whole person impairment award for upper back, neck, and right shoulder conditions from 11 percent, as granted by an Order on Reconsideration, to zero. In addition to awarding an "out-of-compensation" attorney fee payable from our permanent disability award (for claimant's counsel's services on review), we granted a carrier-paid attorney fee for her counsel's services at the hearing level for ultimately defending against the SAIF Corporation's hearing request from the Order on Reconsideration's permanent disability award. We abated our April 7 order to consider SAIF's assertion that we are not authorized to award a carrier-paid attorney fee for claimant's counsel's services at the hearing level.

After considering SAIF's arguments, as well as pertinent case precedent and legal authority, we conclude that our carrier-paid attorney fee award was within our appellate review authority and statutorily authorized.<sup>1</sup> We reason as follows.

As discussed in our previous order, this case originated from SAIF's request for hearing, challenging an Order on Reconsideration's permanent disability award. That challenge was successful when the ALJ reduced claimant's permanent disability award to zero. Because claimant's compensation award had been reduced or disallowed as a result of SAIF's hearing request, the ALJ's order did not award a carrier-paid attorney fee for claimant's counsel's services at the hearing level. *See* ORS 656.382(2).<sup>2</sup>

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<sup>1</sup> In a companion case issued this same day (*Michael J. Terleski*, 61 Van Natta \_\_\_ (issued this date)), SAIF has submitted more detailed arguments in support of its position. Because the procedural circumstances and issues in the cases are identical, we have chosen to incorporate those arguments into our analysis in this case, as discussed below.

<sup>2</sup> ORS 656.382(2) provides:

Claimant then requested Board review of the ALJ's order. After conducting our review, we reversed the ALJ's decision and reinstated the Order on Reconsideration's permanent disability award. Turning to claimant's counsel's attorney fee, we awarded an "out-of-compensation" fee for counsel's services on Board review, equal to 25 percent of the "increased compensation" created by our order.<sup>3</sup> ORS 656.386(3); OAR 438-015-0055(2). In addition, because the compensation award that SAIF had originally contested at the hearing level was ultimately determined not to be reduced or disallowed, we awarded a carrier-paid attorney fee of \$2,500 for claimant's counsel's services at the hearing level. ORS 656.382(2).

SAIF challenges our statutory authority to award the ORS 656.382(2) attorney fee where *the ALJ* did not find that claimant's permanent disability award should be reduced or disallowed. In support of its position, SAIF relies on *Santos v. Caryall Transport*, 171 Or App 467 (2000), *rev den*, 332 Or 558 (2001) (hereinafter "*Santos II*"), for the proposition that ORS 656.382(2) authorizes a carrier-paid attorney fee only when the carrier initiates review at a particular level and the compensation award that the carrier is contesting is not disallowed or reduced at that level of review. Noting that its hearing request contesting the Order on Reconsideration's permanent disability award was successful and that claimant subsequently prevailed on her request for Board review of the ALJ's order, SAIF asserts that our award of a carrier-paid attorney fee for claimant's counsel's services at the hearing level was contrary to ORS 656.382(2). We disagree.

In *Santos II*, the claimant had requested a hearing, seeking an increase in the rate of his permanent disability benefits. After the claimant initially prevailed before the ALJ, the carrier requested Board review, which resulted in a Board

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"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 the compensation awarded to a claimant should not be disallowed or reduced, the employer or insurer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney fee in an amount set by the Administrative Law Judge, board or the court for legal representation by an attorney for the claimant at and prior to the hearing, review on appeal or cross-appeal."

<sup>3</sup> On reconsideration, SAIF does not dispute the "out-of-compensation" attorney fee award.

order reversing the ALJ's decision. Following his petition for judicial review, the claimant was successful in overturning the Board's decision. In response to the claimant's request for a carrier-paid attorney fee award under ORS 656.382(2) for services rendered before the court, the court concluded that it was not authorized to grant such an award. Reasoning that the carrier must initiate the review at the level at which fees are sought, the court held that it was not statutorily authorized to grant a carrier-paid attorney fee because the claimant had initiated the petition for judicial review of the Board's order. 171 Or App at 470-71.

On remand from the *Santos II* court, the Board recalculated the claimant's permanent disability rate and awarded a carrier-paid attorney fee for the claimant's counsel's services before the Board for successfully defending the ALJ's compensation award. *Benjamin G. Santos*, 53 Van Natta 1599, 1600 (2001) (on remand). The carrier appealed, contending that the attorney fee award before the Board was not authorized under ORS 656.382(2) because the claimant had prevailed before the Court of Appeals, and not before the Board, whose actions on remand were "merely ministerial." *SAIF v. Santos*, 194 Or App 289, 292 (2004) (hereinafter "*Santos III*"). The court agreed. The court first reiterated that an attorney fee is available under ORS 656.382(2) "only if (1) the employer initiated review at the level at which fees are sought and (2) the finding that claimant's compensation was not disallowed or reduced occurred at that level." *Id.* at 293.

Then, specifically noting that the issue before it was "whether the board found that claimant's compensation should not be disallowed or reduced," the *Santos III* court stated that it had to decide "whether the board's order on remand was a decision of the board on the merits of an appeal initiated by employer or merely a ministerial act carrying out a decision of this court." *Id.* at 293-94. Determining that the Board's Order on Remand was "merely ministerial," the court concluded that ORS 656.382(2) attorney fees were not allowed for services before the Board on remand, and reversed the award. *Id.* at 294-95.

Our award of a carrier-paid fee under the circumstances of this case is not inconsistent with the *Santos* decisions. First, the *Santos II* holding was expressly confined to the claimant's counsel's request for an attorney fee award for services rendered *before the court*.<sup>4</sup> 171 Or App at 469. In addition, *Santos III* reversed

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<sup>4</sup> The cases relied on by the *Santos II* court in support of its decision, *Gainer v. SAIF*, 51 Or App 869 (1981), and *Bailey v. Morrison-Knudsen*, 5 Or App 592 (1971), are likewise distinguishable.

our attorney fee award for services before the Board on remand from the court because, although the first requirement for a fee under ORS 656.382(2) had been met in that the employer had originally initiated board review, our remand decision was “ministerial” because we did not find (at that level) that the claimant’s compensation should not be disallowed or reduced. Therefore, at the Board level, the second requirement for an attorney fee under ORS 656.382(2) had not been met. 191 Or App at 293-295. However, the *Santos III* court’s rationale suggests that had the Board’s remand responsibilities not been considered “ministerial,” our carrier-paid attorney fee award for the claimant’s counsel’s services *at the Board level* would have been appropriate.

Here, in line with the *Santos* decisions, although our April 7, 2009 order was not ministerial, claimant’s counsel was not entitled to a fee before the Board for services *at that level* in defending claimant’s compensation award because *claimant* had requested Board review, and not SAIF. Thus, the requirement that the carrier must have initiated review *at that level* for an ORS 656.382(2) fee to be available had not been met. However, neither *Santos* decision addressed the precise issue that is before us now; *i.e.*, whether a reviewing body is authorized to award a carrier-paid attorney fee for a claimant’s counsel’s services before a lower forum when the circumstances authorizing such a fee have been subsequently met on appeal by virtue of the reviewing body’s reversal of the lower body’s decision.

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In *Bailey*, the court affirmed the circuit court’s decision that the claimant was not allowed carrier-paid attorney fees for successfully appealing the Board’s decision to the circuit court. 5 Or App at 598-99. The court found “no provision in the law whereby claimant is entitled to recover an attorney fee from his former employer for services performed by his counsel in successfully appealing the board’s decision to the circuit court, where the claimant rather than the employer or the board initiated the appeal to the circuit court.” *Id.* at 599.

In *Gainer*, at a hearing requested by the claimant, the ALJ (then “Referee”) awarded additional PPD. The ALJ also granted the claimant’s attorney “a reasonable attorney’s fee.” *Archie Gainer*, 29 Van Natta 47 (1980). The carrier appealed to the Board and the ALJ’s award was reduced. The claimant then appealed to the Court of Appeals, which reviewed the case *de novo*, and reinstated the ALJ’s award. Citing *Bailey*, the court declined the claimant’s petition for an award of attorney fees for services *before the court*, arguing that a fee was not authorized under ORS 656.382(2).

Thus, similar to *Santos II*, the *Bailey* and *Gainer* decisions are distinguishable because in those cases the court was only addressing the claimants’ requests for attorney fee awards for services expended by the claimants’ attorneys for their appeals before the reviewing body itself. In neither decision did the court address whether a fee should have been awarded at the lower level, where the requirements for an ORS 656.382(2) fee had been met at the lower level, and the reviewing body had reversed the lower level decision.

We now address whether claimant's counsel met the statutory requirements for a carrier-paid fee *at the hearing level*. As the *Santos III* court explained, a claimant is entitled to an attorney fee under ORS 656.382(2) if: (1) the employer initiated review at the level at which fees are sought; and (2) the finding that claimant's compensation was not disallowed or reduced occurred at that level." *Id.* Here, SAIF initiated review at the hearing level, which is the level where the ORS 656.382(2) attorney fees were sought. Thus, the first requirement for a carrier-paid attorney fee has been met. Regarding the second requirement, by virtue of our *de novo* review authority under ORS 656.295(6) and replacing the ALJ's decision on the merits, we concluded that the ALJ should have found *at that level* that claimant's compensation was not disallowed or reduced. This fulfills the second requirement for a carrier-paid fee under ORS 656.382(2).

Our authority to award an attorney fee for claimant's counsel's services at the *hearing level* is contemplated by the "prior to" language of the statute.<sup>5</sup> In *Santos II*, the court explained that, by adding such language, the legislature made it clear that fees could be awarded for legal services rendered at prior proceedings, but only if the employer had initiated the review at the level at which fees were sought. 171 Or App at 471. The *Santos III* court also noted that, if the two prerequisites for an attorney fee under the statute are met (*i.e.*, the employer initiated review at the level at which fees are sought, and the finding that the claimant's compensation was not disallowed or reduced occurred at that level), then attorney fees are available not only for legal representation at the pertinent level of review, but also for all legal representation prior to the pertinent level of review. *Id.* at n 2.

Here, the employer requested review at the level at which fees were sought (*i.e.*, the hearing level), so the statute has been triggered. Therefore, because we have appellate authority to review the ALJ's order and have found that claimant's compensation as granted by the Order on Reconsideration (on which SAIF requested a hearing) should not be disallowed or reduced, we can now award an attorney fee for legal services rendered at the hearing (*i.e.*, the prior proceeding).

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<sup>5</sup> In 1983, the legislature amended ORS 656.382(2) to include the words "prior to" in describing the services for which fees are to be awarded once the statutory entitlement to fees is triggered. Or Laws 1983, ch 568, § 1.

We also find no support for SAIF's "parallel" construction analysis (*i.e.*, that the major clauses of the statute should be interpreted in a "parallel" manner, meaning that the proceeding initiated by the employer in the first phrase (*i.e.*, the hearing in this case) is the same proceeding under consideration throughout the entire subsection, including the final "at or prior to" phrase). As discussed, the last phrase of ORS 656.382(2) authorizes the ALJ, Board or court to award a fee for services rendered at a prior proceeding, if the requirements for triggering the statute are satisfied (*i.e.*, a carrier's request/appeal, and compensation not disturbed or reduced). If the legislature had wished to limit the Board's appellate review authority it could have done so. To give effect to that authority, we find that a more reasonable and supportable interpretation is that the statute allows the Board to grant such a "hearing-level" attorney fee award if the claimant's appeal from the ALJ's decision is successful.

Thus, because claimant initiated Board review, her counsel's attorney fee for services on appeal at that level are payable from her increased compensation, as granted by our order. ORS 656.386(3); OAR 438-015-0055; *see Santos II*, 174 Or App at 474. However, for claimant's counsel's services at the hearing level in successfully defending claimant's compensation against SAIF's hearing request seeking disallowance or reduction of the Order on Reconsideration award, a carrier-paid attorney fee award under ORS 656.382(2) is appropriate.

We note that, if claimant's attorney fee award is limited to an "out-of-compensation" award, claimant will, in effect, be receiving a reduced portion of the same compensation award that she successfully defended, while the carrier is simply paying that same award (apportioning it between claimant and her counsel). In other words, this litigation was initiated by the carrier's hearing request, seeking elimination of the permanent disability award granted on reconsideration. Although initially successful in that quest at the hearing level, the carrier's challenge has ultimately been unsuccessful and the reconsideration order's permanent disability award has been restored. Yet, notwithstanding claimant's counsel's services at the hearing (in defense of the Order on Reconsideration) and on review (in challenging the ALJ's rescission of the reconsideration order award) SAIF's interpretation of the statutory scheme and *Santos II* would have claimant pay for her counsel's services before both the

hearing and on review from the identical compensation award that we have determined she was properly granted in the first place (*i.e.*, the permanent disability granted by the Order on Reconsideration).<sup>6</sup>

These principles influenced our decision in *Patricia L. McVay*, 48 Van Natta 317 (1996). In *McVay*, we addressed the issue of whether a carrier-paid attorney fee was appropriate for services at both hearing and on review, where (as here), an ALJ, in response to a carrier's hearing request, reduced the amount awarded by an Order on Reconsideration and, on Board review of a claimant's appeal, we reinstated that award. In response to our initial "out-of-compensation" attorney fee award, the claimant requested reconsideration, arguing that she was entitled to a fee under ORS 656.382(2) for her counsel's services at both the hearing and on review. 48 Van Natta at 317. On reconsideration, we concluded that the claimant's counsel was entitled to an ORS 656.382(2) attorney fee, but only for services at the hearing level. *Id.*

We reasoned that, although the carrier was initially successful in its quest for a reduction of permanent disability, it was ultimately unsuccessful by virtue of our order. Because our order replaced that of the ALJ, we determined that the claimant was entitled to a carrier-paid fee for her counsel's services at the hearing level. *Id.* We explained that if we were to limit the claimant's counsel's fee to an "out-of-compensation" award, the claimant's attorney would not be receiving a fee for services rendered at the hearing level, and such a result would be inconsistent with ORS 656.382(2) and OAR 438-015-0065. *Id.*

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<sup>6</sup> SAIF also finds it significant that the legislative history contains no statements that the 1983 amendments to ORS 656.382(2) were intended to authorize fees based on the outcome of an appeal initiated by the claimant. It additionally notes that there was a proposal during the 1983 legislative session that would have authorized a carrier-paid fee on a claimant's appeal on the issue of extent of permanent disability, but it was not adopted. *See* Tape Recording, Senate Committee on Labor, May 20, 1983, Tape 142, Side B, at 96-108 (testimony of Representative Tom Hanlon). SAIF argues that the legislature's rejection of an amendment that would have authorized such a fee supports its contention that no ORS 656.382(2) attorney fee is available here. However, absent any *express* statements or discussion by the legislature that it intended to preclude an ORS 656.382(2) attorney fee under the circumstances of this case, we find SAIF's intention-by-omission argument unpersuasive. *See, e.g., Kordon v. Mercer Indus.*, 308 Or 290, 295 (1989) (where the legislature did not include a provision in the statute to allow attorney fees for "cross-requests," the carrier argued that the Court should infer from that omission that the legislature intended to exclude fees in the cross-request context; noting that the relevant legislative history included no discussion of cross-requests for board review, the Court found the carrier's "intention-by-omission" argument unpersuasive).

We have applied the *McVay* decision on numerous occasions both before and after the *Santos* decisions. See, e.g., *Filemon M. Duenas*, 60 Van Natta 738, 742 (2008); *Simitrio A. Cardoso*, 58 Van Natta 1786, 1794-95 (2006); *Lorenzo K. Kimball*, 52 Van Natta 411, *recons*, 52 Van Natta 633 (2000). After further consideration of the current statutory scheme and legal authority, we continue to hold that the *McVay* rationale is viable and we adhere to its holding in support of our award of a carrier-paid attorney fee under the circumstances of this case.<sup>7</sup>

In sum, because SAIF initiated the hearing request and we have reversed the ALJ's decision and determined that the compensation award challenged by that request should not be disallowed or reduced at that level, the statutory scheme allows us to grant a carrier-paid attorney fee under ORS 656.382(2) for claimant's counsel's services at the hearing level. In the absence of an express court holding suggesting that such a fee under these particular circumstances is not authorized, we decline SAIF's invitation to render such a ruling and adhere to our longstanding *McVay* holding.

Accordingly, on reconsideration, as supplemented herein, we republish our April 7, 2009 order. The parties' 30-day rights of appeal shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on July 8, 2009

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<sup>7</sup> We note that if SAIF's interpretation was followed, we would presumably be prohibited from disturbing an ALJ's ORS 656.382(2) attorney fee award even if a compensation award (from which the carrier initially requested a hearing) was ultimately reduced by the Board on review of the ALJ's order. Yet, we previously ruled otherwise in such a situation. In *Stephanie A. Dys-Dodson*, 53 Van Natta 340 (2001), the insurer requested a hearing challenging an Order on Reconsideration's decision of premature closure. The ALJ affirmed, and awarded a carrier-paid attorney fee. The insurer requested Board review and we reversed the ALJ's order, as well as the ALJ's ORS 656.382(2) attorney fee award. The claimant requested reconsideration. Relying on an interpretation of *Santos II* similar to that currently put forth by SAIF, the claimant contended that, notwithstanding that the insurer was ultimately successful in challenging the reconsideration order, her counsel was still entitled to the attorney fee awarded by the ALJ for services rendered at the hearing. We rejected the claimant's contention. Citing *McVay* and *Kimball*, we reasoned that because our order replaced the ALJ's, it necessarily followed that the claimant was not entitled to a carrier-paid fee for services at the hearing.