
In the Matter of the Compensation of
LORRAINE I. MCKINNON, Claimant
WCB Case No. 09-00006TP
THIRD PARTY DISTRIBUTION ORDER ON RECONSIDERATION
Kahn & Kahn, Claimant Attorneys
MacMillan Scholz & Marks, Defense Attorneys

Reviewing Panel: Members Langer, Weddell, and Herman.

Claimant requests reconsideration of our February 2, 2010 order that determined that Liberty Northwest Insurance Company (Liberty) was not entitled to receive a share of claimant's recovery under ORS 656.593(3) from an underinsured motorist (UIM) policy. Specifically, claimant argues that his counsel is entitled to an assessed attorney fee under ORS 656.382(2).¹ For the following reasons, we conclude that the statute does not provide for such an attorney fee.

In our previous order, we reasoned that, pursuant to ORS 742.504(4)(c), Liberty was prohibited from benefiting directly or indirectly from claimant's recovery under the UIM policy. Therefore, we declined Liberty's request that it receive a share of claimant's settlement with the UIM insurer under the "third party" statutes.

Claimant contends that, because she would have received a net reduction of compensation had we granted Liberty's request, ORS 656.382(2) provides for an attorney fee payable by Liberty. We disagree.

Entitlement to attorney fees in workers' compensation cases is governed by statute. Unless specifically authorized by statute, attorney fees cannot be awarded. *Forney v. Western States Plywood*, 297 Or 628, 632 (1984).

¹ That statute 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 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."

In *Reynolds v. Hydro Tech*, 182 Or App 488, 492-93 (2002), the court held that ORS 656.382(2) requires an “award” of compensation, which is made by notice of closure, administrative or judicial determination, or other affirmative determination of entitlement to compensation. Here, claimant’s recovery under the UIM policy does not meet the requirements of a compensation “award” as that term was defined in *Reynolds*.² Therefore, we decline claimant’s request for an assessed attorney fee under ORS 656.382(2).

Accordingly, our February 2, 2010 order is withdrawn. On reconsideration, as supplemented herein, we adhere to and republish our February 2, 2010 order. The parties’ appeal rights shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on February 24, 2010

² Moreover, claimant’s UIM recovery appears to be the antithesis of “compensation,” which is defined as “all benefits, including medical services, provided for a compensable injury to a subject worker * * * by an insurer or self-insured employer pursuant to this chapter.” ORS 656.005(8).