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In the Matter of the Compensation of  
WCB Case Nos. 09-04145, 09-02065  
**JOY M. WALKER**, Claimant  
SECOND ORDER ON REMAND  
Ronald A Fontana, Claimant Attorneys  
Lyons Lederer, Defense Attorneys

Reviewing Panel: Members Weddell, Curey, and Somers. Member Weddell dissents.

We previously withdrew our Order on Remand that had awarded a penalty pursuant to ORS 656.262(11)(a) based on the court's mandate in *Walker v. Providence Health System Oregon*, 267 Or App 87 (2014). We took this action to consider claimant's request for an attorney fee award under ORS 656.262(11)(a) for her counsel's services on review, before the court, and on remand. Having considered the parties' respective positions, we proceed with our reconsideration.

Relying on *SAIF v. Traner*, 273 Or App 310 (2015), claimant seeks a penalty-related attorney fee for her counsel's services at the aforementioned levels of review in ultimately securing the penalty pursuant to ORS 656.262(11)(a). In response, the self-insured employer contends that claimant's counsel is not entitled to the requested attorney fee, which was raised for the first time on reconsideration. In reply, asserting that she did not ultimately prevail regarding her pursuit of a penalty under ORS 656.262(11)(a) until the issuance of our Order on Remand, claimant contends that her attorney fee request should be allowed. Based on the following reasoning, claimant's attorney fee request is denied.

Our order issued in response to the court's mandate, which arose from claimant's appeal of that portion of our previous order that had declined to award a penalty under ORS 656.262(11)(a) for the employer's unreasonable claim processing (based on a finding that there were no amounts then due), but had awarded a \$2,000 carrier-paid attorney fee under *Nancy Ochs*, 59 Van Natta 1785 (2007). The court determined that there were amounts "then due" based on an intervening permanent disability award, and remanded for a determination of the penalty.

After the court's remand order issued, the court issued *Traner*, which held that ORS 656.262(11)(a) independently authorizes an attorney fee award for a claimant's counsel's services on appeal regarding an "unreasonable claim processing" finding under that statute. Claimant now asks for reconsideration

of our order for the purpose of determining an attorney fee under ORS 656.262(11)(a). In doing so, she relies on the *Traner* decision. However, for the following reasons, we decline to award an “ORS 656.262(11)(a)” attorney fee.

In *SAIF v. Traner*, 270 Or 67 (2015) (*Traner I*), the court affirmed our order that had awarded an “*Ochs* fee” for the carrier’s failure to formally deny the claimant’s new/omitted medical condition claim within 60 days. In doing so, the court agreed with our conclusion that ORS 656.262(11)(a) allows an attorney fee award for an unreasonably delayed denial, even when there was no compensation due or penalty awarded. In *Traner II*, the court awarded a separate “ORS 656.262(11)(a)” attorney fee for the claimant’s attorney’s services before the court in defending the Board’s award of an “*Ochs* fee” in *Traner I*. In doing so, the court reasoned that ORS 656.262(11) independently authorizes an award of attorney fees where there is a finding that the carrier unreasonably delayed payment, acceptance, or denial of a claim.

Here, in awarding a \$2,000 *Ochs* fee, our prior order made a finding that the employer unreasonably delayed acceptance of the “major depression and panic disorder” claim. On appeal, claimant did not contest our attorney fee award, and the court did not address it.

Instead, claimant appealed only that portion of our order that declined to award a “ORS 656.262(11)(a)” penalty for the carrier’s unreasonably delayed acceptance (based on a finding that there were no amounts then due). In holding that claimant is entitled to such a penalty based on the amount of compensation ultimately awarded on the claim, the court did not award an “ORS 656.262(11)(a)” attorney fee or make any reference to claimant’s counsel’s entitlement to an additional attorney fee award for services rendered on appeal concerning the penalty decision. To the contrary, the sole issue on remand was the determination of the amount of claimant’s penalty under ORS 656.262(11)(a). *Walker*, 267 Or App at 108, 115.

As previously noted, claimant did not ask the court to award an “ORS 656.262(11)(a)” attorney fee or to direct us to make such an attorney fee award, nor did claimant ask us to award such a fee on remand. Instead, she first raised the issue in her request for reconsideration. Claimant notes that the court issued *Traner II* less than a week before we issued our Order on Remand. Yet, *Traner II* addressed amendments to ORS 656.262(11)(a) that became effective in 1990 and 2003. Although the court had not previously expressly addressed the effect of these statutory amendments on a claimant’s counsel’s entitlement to an attorney

fee award for appellate services, the statute's attorney fee authorization for such services was an available remedy to seek from the court before the issuance of its mandate in remanding this case to us for the determination of a penalty under ORS 656.262(11)(a).

Claimant argues that it would have been premature for the court to consider an attorney fee because he did not finally prevail until the Board determined the penalty amount. We disagree.

Claimant "prevailed" when the court held that she was entitled to an "ORS 656.262(11)" penalty based on the amount of compensation ultimately awarded on the claim. When the court remanded for the implementation of its decision, no substantive matters (other than the penalty determination) remained to be decided. In the absence of further instructions from the court, we are without authority to award additional attorney fees. *See Marco Aguiar*, 40 Van Natta 85 (1988), *aff'd*, *Aguiar v. J.R. Simplot Co.*, 94 Or App 658 (1989) (where the case was remanded to the Board to reinstate the referee's attorney fee award for the services provided at the hearing, the Board did not have authority to award attorney fees under ORS 656.388); *Charles M. Kepford*, 42 Van Natta 1994, 1995 (1990) (where the court's directions on remand did not include the award of an attorney fee for the successful defense of a temporary disability award, Board was without authority to consider the issue).

Accordingly, on reconsideration, as supplemented, we republish our prior Order on Remand. The parties' 30-day statutory rights of appeal shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on March 11, 2016

Member Weddell dissenting.

I would award a penalty-related attorney fee under *SAIF v. Traner*, 273 Or App 310 (2015), for claimant's attorney's services in securing the penalty. Because the majority reaches a different result, I respectfully dissent.

In *Traner*, the court held that ORS 656.262(11)(a) independently authorizes an attorney fee award for a claimant's counsel's services on appeal regarding an "unreasonable claim processing" finding under that statute. The court stated that

“[t]he only condition in ORS 656.262(11) is that the court, board, or administrative law judge must find that the insurer or employer unreasonably delayed payment, acceptance, or denial of a claim.” *Id.* at 314. The court reasoned that its interpretation promotes the legislature’s intention of encouraging legal representation for claimants at all levels of the dispute resolution process regarding “penalty” claims under ORS 656.262(11)(a).

Here, our prior order made a finding that the employer unreasonably delayed acceptance of the “major depression and panic disorder” claim. The court affirmed our finding. Therefore, under *Traner*, “the only condition in ORS 656.262(11)(a)” has been met and an attorney fee award is authorized for claimant’s counsel’s services at all review levels, regarding her “unreasonable claim processing” claim.

Because the assessment of the penalty resulting from such unreasonable conduct had not been determined until our remand decision, it necessarily follows that the determination of a reasonable attorney fee for claimant’s counsel’s services rendered before the court (in successfully responding to the employer’s appeal of the Board’s “unreasonable claim processing” finding, as well as in appealing and ultimately prevailing over our prior decision that no penalty was available) could not be determined until our remand order. An “ORS 656.262(11)(a)” attorney fee must be proportionate to the benefit to the claimant and take into consideration the factors set forth in OAR 438-015-0010(4), primarily the results achieved and the time devoted to the case. OAR 438-015-0010(1), (2). Those factors were unknown before our remand order.<sup>1</sup>

The attorney fee award is subject to a cap of \$4,000, absent a showing of “extraordinary” circumstances.<sup>2</sup> ORS 656.262(11)(a); OAR 438-015-0110(3) (WCB Admin. Order 1-2015, eff. Jan. 1, 2016). Claimant contends that “extraordinary” circumstances justify an attorney fee award beyond the statutory “soft cap.” I agree.

In *Traner*, the court considered whether there were “extraordinary circumstances” that justified the claimant’s request for an attorney fee award

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<sup>1</sup> ORAP 13.10(3) was amended effective July 1, 2015 to specifically provide that “the failure of a party on appeal or on review to petition for an award of attorney fees under this subsection is not a waiver of that party’s right later to petition on remand for fees incurred on appeal and review if that party ultimately prevails on remand.”

<sup>2</sup> The \$4,000 “soft cap” in ORS 656.262(11)(a) applies to “orders issued and attorney fees incurred on or after the effective date of the 2015 Act [January 1, 2016], regardless of the date on which the claim was filed.” Or Laws 2015, ch 521, § 11.

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that exceeded the “soft cap” in ORS 656.262(11)(a). There was no discussion of whether “extraordinary circumstances” had been raised at the hearings level or on Board review. Although the court did not find “extraordinary circumstances” in that case, the court’s reasoning supports the proposition that “extraordinary circumstances” may be raised at each level of appeal.

Here, the employer did not accept “major depression and panic disorder” for nearly seven months after it was directed to do so by an earlier Board order. This conduct resulted in further litigation and postponement in claimant’s receipt of permanent disability benefits.<sup>3</sup> The penalty dispute presented a novel legal issue that was ultimately resolved at the court. Due to claimant’s attorney’s persistent efforts, the claim was eventually properly processed, resulting in significant benefits and a significant penalty.<sup>4</sup> Under these circumstances, I would find that there were extraordinary circumstances sufficient to justify a penalty-related attorney fee greater than the statutory maximum of \$4,000.

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<sup>3</sup> The employer’s denial of claimant’s new/omitted medical condition claim for “major depression and panic disorder” was set aside by an ALJ’s order, which we affirmed on March 23, 2009. *Joy M. Walker*, 61 Van Natta 739 (2009). On April 10, 2009, the employer modified the acceptance to include “acute major depression and panic disorder.” (Ex. 41). Claimant objected to the acceptance, explaining that the employer needed to accept “major depression and panic disorder” as previously requested and ordered. (Ex. 42). When the employer did not amend the acceptance within 60 days, claimant requested a hearing regarding the employer’s *de facto* denial of major depression and panic disorder. On November 5, 2009, before the case was submitted to the ALJ on the written record, the employer amended the acceptance to include “major depression and panic disorder.” (Ex. 66).

<sup>4</sup> A January 13, 2010 Order on Reconsideration awarded 35 percent unscheduled permanent disability. The penalty awarded on remand was \$6,796 (25 percent of the \$27,184 award).