

---

In the Matter of the Compensation of  
**ASHLEY A. REHFELD, Claimant**  
WCB Case No. 13-04380  
**ORDER ON RECONSIDERATION**  
M & L Legal Attorneys, Claimant Attorneys  
Michael G Bostwick LLC, Defense Attorneys

Reviewing Panel: Members Weddell and Curey.<sup>1</sup>

On June 5, 2014, in modifying an Administrative Law Judge's (ALJ's) order, we awarded temporary disability benefits pursuant to ORS 656.210(1) and penalties/attorney fees under ORS 656.262(11)(a). Contending that our order neglected to address his entitlement to temporary disability benefits based on ORS Chapter 653 and an attorney fee award under ORS 656.382(1), claimant seeks reconsideration of our decision.

In our initial order, we concluded that, at the time of her compensable injury, claimant was a worker who would receive wages based on her advertising sales commissions. However, because she had not received any such wages at the time of her injury and because she had worked for a noncomplying employer, we reasoned that the rate of her temporary total disability (TTD) benefits must be based on the amount of \$50 per week. *See* ORS 656.210(1); OAR 436-060-0025(5)(j). Because Sedgwick Claims Management Services had not paid any TTD benefits, we found its conduct to have been unreasonable and awarded penalties/attorney fees under ORS 656.262(11)(a).

In seeking reconsideration of our decision, claimant asserts that we neglected to address her contention that her TTD benefits must be calculated based on what she should have received as wages under the state's minimum wage laws. ORS Chapter 653. Yet, other than the portions of the ALJ's order summarized above, our initial decision affirmed the remainder of the ALJ's order. Among those "affirmed" portions of the ALJ's order was the decision that the calculation of claimant's TTD benefits must be based on ORS Chapter 656, not ORS Chapter 653.

---

<sup>1</sup> Member Lowell participated in the initial review. Because Member Lowell's term has expired, Member Curey has participated in this reconsideration.

Thus, we have considered and addressed claimant's contentions regarding the application of the state's minimum wage laws and their impact on the calculation of claimant's TTD benefits. As the ALJ reasoned, our statutory authority is based on the methods prescribed in ORS 656.210, ORS 656.212, and OAR 436-060-0025.

Claimant also argues that our initial order did not address her counsel's entitlement to an attorney fee award under ORS 656.382(1), but instead limited the award to ORS 656.262(11)(a). In doing so, claimant notes that she incorporated her arguments presented at the hearing level (which she asserts sought attorney fee awards under both ORS 656.262(11)(a) and ORS 656.382(1)) into her appellate briefs.

Our review of claimant's hearing memorandum confirms that her counsel cited both ORS 656.382(1) and ORS 656.262(11). Nonetheless, the memorandum did not seek separate attorney fee awards under those statutes for Sedgwick's alleged unreasonable conduct in miscalculating claimant's TTD benefits. In any event, in appealing the ALJ's eventual determinations that her TTD rate was zero and that a reasonable attorney fee award under ORS 656.262(11)(a) was \$2,500, claimant argued in her appellate briefs (notwithstanding incorporating her hearing arguments) that the ALJ's \$2,500 penalty-related attorney fee award was "too low" and that we should review the "sufficiency" of that award.

After conducting our review and considering the parties' respective positions on appeal, we concluded that claimant was entitled to TTD benefits (based on the \$50 per week statutory formula), penalties based on these recalculated benefits was appropriate, and that a \$3,000 attorney fee award under ORS 656.262(11)(a) (in lieu of the ALJ's \$2,500 award) was reasonable.

Based on the procedural background detailed above, we are disinclined to interpret claimant's appellate reference to a "too low" attorney fee award (which was granted pursuant to ORS 656.262(11)(a)) to constitute a request for an additional attorney fee award under ORS 656.382(1). In any event, we need not resolve this procedural issue because claimant is not entitled to separate attorney fee awards under ORS 656.262(11)(a) and ORS 656.382(1) based on the same unreasonable claim processing. *See Corona v. Pacific Resource Recycling*, 125 Or App 47 (1993); *Andrew A. Veluscek*, 64 Van Natta 686, 692 (2012) (attorney fee awards under both ORS 656.262(11)(a) and ORS 656.382(1) are available only if there are separate acts of unreasonable conduct). Thus, even if we considered her request for a separate attorney fee award pursuant to ORS 656.382(1), such an award would not be authorized.

Accordingly, we withdraw our June 5, 2014 order. On reconsideration, as supplemented, we republish our June 5, 2014 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 3, 2014