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In the Matter of the Compensation of  
**DAWN TURNER, Claimant**  
WCB Case No. 16-00701  
ORDER ON REVIEW  
Ernest M Jenks, Claimant Attorneys  
Wallace Klor Mann Capener, Defense Attorneys

Reviewing Panel: *En Banc*; Members Curey, Lanning, Somers, Weddell, and Johnson.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Jacobson’s order that awarded a \$2,500 penalty-related attorney fee for a discovery violation. On review, the issue is attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ’s “Findings of Fact,” which we summarize as follows.

Claimant was compensably injured on November 7, 2014. (Ex. 7). On April 6, 2015, the employer’s claim adjuster received a request for discovery from claimant’s counsel. Discovery was timely provided through November 6, 2015. (Ex. 40A). Thereafter, further discovery was not provided until February 19, 2016, after claimant’s attorney filed a request for hearing on February 10, 2016, alleging late discovery. (Tr. I: 2).

At hearing, the parties stipulated that: (1) no discovery was provided to claimant or his attorney after November 6, 2015 until February 19, 2016; and (2) there were no amounts due as a result of the claim processor’s late discovery. (Tr. I: 2-3, 12). The parties eventually agreed that the sole issue was whether claimant’s attorney was entitled to a penalty-related attorney fee under ORS 656.262(11)(a) for the late discovery of claim documents up until February 19, 2016.<sup>1</sup> (Tr. I: 12, 24).

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<sup>1</sup> In opening statements, claimant’s attorney also discussed an alleged “ongoing” discovery violation pertaining to personnel records, which apparently had been requested, but not provided. (Tr. 2, 3). The employer’s counsel objected, contending that claimant’s hearing request only raised the issue of

a discovery violation for medical records through February 10, 2016, and did not include an “ongoing” issue of discovery of the personnel information. (Tr. 3). The ALJ ruled in the employer’s favor, thereby not addressing the “personnel” record discovery issue. (Tr. 10). Claimant subsequently requested a hearing on that alleged discovery violation. That case was assigned WCB Case No. 16-02131, and is currently also pending review.

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## CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that the employer's late discovery conduct was unreasonable and that a penalty-related attorney fee was awardable under ORS 656.262(11)(a), even though there were no "amounts then due" related to the violation. In reaching this conclusion, the ALJ relied on *SAIF v. Traner*, 273 Or App 310 (2015). The ALJ awarded claimant's counsel a \$2,500 penalty-related attorney fee.

On review, the employer contends that claimant's counsel is not entitled to a penalty-related attorney fee pursuant to ORS 656.262(11)(a). Specifically, the employer asserts that *Traner* is distinguishable in that it involved an action/inaction (acceptance/denial of a claim) that fell squarely within ORS 656.262(11)(a), whereas this case involves a late discovery violation, which is not a basis for assessing a penalty/fee under the statute. Therefore, the employer argues that, unlike in *Traner*, the requirements for the assessment of a penalty-related attorney fee under ORS 656.262(11)(a) are not satisfied.<sup>2</sup> See *James L. Williams*, 65 Van Natta 874 (2013). For the following reasons, we conclude that no penalty-related attorney fee under ORS 656.262(11)(a) is awardable under the circumstances of this case.

Failure to provide discovery can interfere with the payment of compensation, and, if found unreasonable, may result in the imposition of penalties or attorney fees. OAR 438-007-0015(8);<sup>3</sup> *Morgan v. Stimson Lumber Co.*, 288 Or 595, modified, 289 Or 93 (1980); *Boehr v. Mid-Willamette Valley Food*, 109 Or App 292, 295 (1991) (failure to comply with discovery requirements may result in attorney fee award under ORS 656.382(1) if the underlying claim is compensable, citing *Randall v. Liberty Northwest Ins. Corp.*, 107 Or App 599 (1991); *Aetna Casualty Co. v. Jackson*, 108 Or App 253, 257 (1991) (failure to comply with

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<sup>2</sup> The employer does not specifically address the ALJ's "unreasonableness" finding.

<sup>3</sup> OAR 438-007-0015(8) provides:

"It is the express policy of the Board to promote the full and complete discovery of all relevant facts and expert opinion bearing on a claim being litigated before the Hearings Division, consistent with the right of each party to due process of law. Failure to comply with this rule, if found to be unreasonable or unjustified, may result in the imposition of penalties and attorney fees, exclusion of evidence, continuance of a hearing (subject to OAR 438-006-0091), and/or dismissal of a request for hearing."

discovery requirements may be unreasonable resistance to the payment of compensation and may justify attorney fees under ORS 656.382(1), even when there is no evidence that the noncompliance delayed acceptance of the claim); *Michael V. Lim*, 55 Van Natta 3110, 3114 n 6 (2003) (an attorney fee for a discovery violation may not be awardable if the claim is not compensable).<sup>4</sup> Under ORS 656.262(11)(a), if the employer “unreasonably delays or unreasonably refuses to pay compensation, attorney fees or costs, or unreasonably delays acceptance or denial of a claim,” it “shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees assessed under this section.”

Here, it is undisputed that there is no compensation due, and no “amounts then due” upon which to base a penalty/fee under ORS 656.262(11)(a). The penalty/fee issue in this case also does not involve a late acceptance/denial or delay or refusal to pay attorney fees or costs. However, claimant argues that a decision not to award a penalty-related attorney fee for a discovery violation fails to recognize the “change in law” made by *Traner*; *i.e.*, that ORS 656.262(11)(a) does not require compensation or amounts then due to award a penalty-related attorney fee. Claimant asserts that *Traner* provides for an ORS 656.262(11)(a) fee for a discovery violation, in the absence of compensation or amounts then due, because the violation equates to a delay in “claim processing” that impairs a “procedural right.” In advancing his position, claimant argues that the *Traner* reasoning applies whether the unreasonable processing delay is a discovery violation or, as in *Traner*, a failure to process a new/omitted medical condition claim in a timely fashion.

For the reasons that follow, we disagree with claimant’s contentions.

First, we do not consider *Traner* to have “changed the case law.” In *Nancy Ochs*, 59 Van Natta 1785 (2007), we held that the claimant’s counsel was entitled to a carrier-paid fee under ORS 656.262(11) for the carrier’s untimely and

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<sup>4</sup> OAR 438-007-0015(8) does not automatically authorize a penalty or an attorney fee for a carrier’s unreasonable failure to provide discovery. Rather, the rule merely provides that the unreasonable or unjustified failure to comply with the discovery rules “may” result in the imposition of penalties and attorney fees. Administrative rules must be consistent with an agency’s statutory authority. An agency may not, by its rules, alter, amend, enlarge or limit the terms of a statute. *Cook v. Workers’ Comp. Dep’t*, 306 Or 134, 138 (1988) (“an administrative agency may not, by its rules, amend, alter, enlarge or limit the terms of a statute”); *Julio C. Garcia-Caro*, 50 Van Natta 160, 163 (1998) (if there is a conflict between an administrative rule and a statute, it is the statute rather than the rule that controls). Therefore, OAR 438-007-0015(8) does not provide for an independent basis for a penalty or attorney fee for a carrier’s unreasonable failure to provide discovery. *Michael Hinds*, 59 Van Natta 1980 (2007).

unreasonable claim denial, even though no compensation was “then due.” Based on the text and context of ORS 656.262(11), we determined that a penalty was not a necessary prerequisite for an attorney fee. In reaching our conclusion, we noted that an unreasonable delay in accepting or denying a claim was listed in the statute as a circumstance supporting a penalty and fee, and was described separately from an unreasonable delay or refusal to pay compensation. We reasoned that an unreasonably delayed denial did not necessarily mean that compensation was delayed or that there were “amounts then due.” *Id.* at 1787.

In the principal *Traner* case (*Traner I*), 270 Or App 67 (2015), the court mentioned our reliance on *Ochs* and 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 (which was based on *Ochs*) that ORS 656.262(11)(a) allows for an attorney fee award when a carrier “unreasonably delays a denial \* \* \* even when the result means that no compensation or penalty is awarded.” *Id.* at 75.

After prevailing on judicial review, the claimant petitioned the court for an award of attorney fees under ORS 656.262(11)(a). *SAIF v. Traner*, 273 Or App 312, 318 (2015) (*Traner II*).<sup>5</sup> Analyzing ORS 656.262(11)(a) (and its legislative history), the court held that the claimant’s counsel was entitled to a carrier-paid attorney fee for services performed on judicial review regarding the successful defense against the carrier’s appeal of the Board’s order that awarded an attorney fee under ORS 656.262(11)(a) for the carrier’s unreasonable failure to timely issue an acceptance/denial of a new/omitted medical condition claim. *Id.* at 312-13. The court found that an attorney fee award under ORS 656.262(11)(a) was not dependent upon satisfying any precondition of any other statute. Instead, the court explained that under ORS 656.262(11)(a), the only condition required for application of the statute was a finding “that the insurer or employer unreasonably delayed payment, acceptance, or denial of a claim.” *Id.* at 313-14. The court ultimately held that ORS 656.262(11)(a) provided an independent authorization for attorney fees when a carrier “unreasonably delays a response to a claim—even a correct denial of a claim.” *Id.* at 317.

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<sup>5</sup> The claimant also requested an attorney fee under ORS 656.382(2). The court declined to award such a fee because there had been no award of “compensation,” which is a prerequisite to an award of attorney fees under ORS 656.382(2). *Id.* at 313, 314, 317. Nevertheless, noting that ORS 656.262(11)(a), by its terms, independently authorized an attorney fee award on appeal under the circumstances presented, the court granted an attorney fee award under that statute. *Id.* at 313.

In reaching its conclusion, the court cited to reasoning from *SAIF v. Allen*, 320 Or 192 (1994), which involved a carrier's appeal of an attorney fee award under ORS 656.386(1). According to the *Traner II* court, the Supreme Court in *Allen* "explained the importance of a prompt response by an insurer or employer to a claim. A delay not only delays everything, it avoids identification of the issues and impairs a claimant's procedural rights." 273 Or App at 317 (citing *Allen*, 320 Or at 213-14).

This *Traner II* rationale comes from discussion in *Allen* pertaining to whether the Board had properly determined that the carrier's response to the claim was a denial within the meaning of former ORS 656.262(6).<sup>6</sup> 320 Or at 208. To answer that question, the court addressed the context of that statutory provision, which included former ORS 656.262(8).<sup>7</sup> When discussing ORS 656.262(8), the *Allen* court explained:

"[t]he notice of a denial is a key procedural component of the claim adjudication system. ORS 656.262(8) entitles a claimant who receives notice of a denial to request a hearing under ORS 656.283. \* \* \*. Because the notice of denial includes the insurer's reasons for the denial, it enables the claimant, the Board, and the director to determine the scope of any disputed issues and the proper forum for resolution of those issues." *Id.* at 213.

Similarly, in reaching its decision, the *Traner I* court noted that a "denial at least triggers procedural rights, the opportunity for a hearing, and potential remedies." 270 Or App at 74. Also, in *Traner II*, the court described the situation as one in which the "[carrier's] appeal resulted in conclusions that a response to a claim was necessary and that the carrier's delay was unreasonable. Claimant vindicated her procedural right to a timely response to her claim." 273 Or App at 312.

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<sup>6</sup> At that time, former ORS 656.262(6) required a carrier to provide "written notice of acceptance or denial of the claim \* \* \* within 90 days after the employer has notice or knowledge of the claim." In 1990, the statute was amended to require a 60-day response period. See Or Laws 1990 (Special Session), ch. 2, § 15.

<sup>7</sup> The current version of that statute has been renumbered as ORS 656.262(9).

Claimant parses out phrases from the *Allen* passage quoted above (as cited by *Traner II*) as support for the conclusion that *Traner* dictates the award of a penalty-related attorney fee under ORS 656.262(11)(a) for a discovery violation, even in the absence of compensation, because such a violation impedes processing of a claim and amounts to an impairment of a “procedural right.”

However, as discussed above, the holdings of the *Traner* cases (and cases relied on therein) are expressly premised on the untimely acceptance/denial of a claim. 273 Or App at 317; 270 Or App at 75. The court specifically recognized that there are two scenarios that give rise to a penalty and attorney fees under ORS 656.262(11)(a): (1) an unreasonable delay/refusal to pay compensation; or (2) an unreasonable delay in accepting/denying a claim.<sup>8</sup> 273 Or App at 314. Here, there is no contention that there was a delay in the acceptance/denial of a claim. The parties also agree that there is no compensation or amounts then due. Therefore, on its terms, ORS 656.262(11)(a) is not applicable to the current situation. To include discovery violations when no compensation is awarded would add an additional requirement to the statute that the legislature did not include, and we cannot insert what has been omitted. ORS 174.010 (when interpreting statutes, we must not insert what has been omitted or omit what has been inserted).<sup>9</sup>

Moreover, to the extent *Traner I* discusses a “procedural right” and “delay” in claim processing, it does so solely in the context of a timely denial. 270 Or App at 74. The court explained that “[t]he *denial* at least triggers procedural rights, the opportunity for a hearing, and potential remedies. An unspoken philosophy of ‘no harm, no foul’ may seem plausible in other contexts, but, here, ORS 656.262(7)(a) mandates a 60-day deadline even for a denial.” *Id.* at 74 (emphasis added). As noted above, the language quoted from *Allen*, to which claimant repeatedly refers, was made when determining whether a carrier’s response to a claim was a denial within the meaning of ORS 656.262(6). 320 Or at 208. Under such circumstances, we decline to extend the *Traner/Allen* holdings beyond their context of penalty/fee disputes involving unreasonable responses (acceptance/denial) to claims.

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<sup>8</sup> At the time of the court’s decision, ORS 656.262(11)(a) had not yet been amended to include a delay/refusal to pay attorney fees or costs.

<sup>9</sup> See also *Forney v. Western States Plywood*, 297 Or 628, 632 (1984) (the statutory bounds of the rights and remedies of workers and employers cannot be exceeded, even if an inequity to a claimant or carrier might result); *Brown v. EBI Cos.*, 289 Or 905, 908 (1980) (unless a specific statute authorizes an award of an attorney fee to a claimant, a fee cannot be awarded).

Finally, in a pre-*Traner* context, we have previously addressed the issue of whether a penalty-related attorney fee under ORS 656.262(11)(a) was awardable for a discovery violation in the absence of compensation, and concluded that such a fee was not justified. *See Williams*, 65 Van Natta at 878 (no penalty-related attorney fee under ORS 656.262(11)(a) awarded for discovery violation where the case did not involve a delay in acceptance/denial of the claim or a delay or refusal to pay compensation); *Jeffrey A. Shultz*, 65 Van Natta 829, 832-33 (2013) (same).

In those cases, the claimants requested penalty-related “*Ochs*” attorney fees under ORS 656.262(11)(a) for discovery violations, even though there were no “amounts then due” upon which to base a penalty. *Williams*, 65 Van Natta at 878; *Shultz*, 65 Van Natta at 832. In both cases, *Ochs* was distinguished on the basis that it involved a delay in denying/accepting the claim, which was not an issue in either case. *Id.* Also, neither case record supported a conclusion that the carriers delayed or refused to pay compensation. *Id.* Therefore, it was determined that no ORS 656.262(11)(a) penalty-related attorney fee was available because neither predicate for applicability of the statute was met; *i.e.*, there was no refusal/delay to pay compensation or a delay in acceptance/denial of the claim.<sup>10</sup> *Id.*

This is exactly the same situation before us now. There is no contention that the employer’s discovery violation delayed acceptance/denial of the claim, or resulted in a delay/refusal to pay compensation. Thus, as in *Williams* and *Shultz*, there is no basis to award a penalty-related attorney fee under ORS 656.262(11)(a).<sup>11</sup> *Traner* did not change this analysis, and is not determinative to the issue at hand. Rather, the *Traner* holding confirmed the Board’s “*Ochs*” fee analysis.<sup>12</sup>

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<sup>10</sup> *See also Michael Deroest*, 65 Van Natta 2542, 2544 n 3 (2013), *aff’d on other grounds*, *DeRoest v. Keystone RV Co.*, 276 Or App 698 (2016) (no entitlement to penalties or attorney fees under ORS 656.262(11)(a) for discovery violation because there was no compensation flowing to the claimant on the denied claim and thus no unreasonable refusal to pay compensation; on appeal, the court “reject[ed] without written discussion” the claimant’s challenge to the Board’s refusal to award a penalty and attorney fee for a discovery violation).

<sup>11</sup> In support of his position that an ORS 656.262(11)(a) penalty-related attorney fee is awardable in this situation, claimant also cites to *Boehr*, 109 Or App at 292, *Eastmoreland Hospital v. Reeves*, 94 Or App 698 (1989), and *Steven D. Surber*, 56 Van Natta 2014 (2004). However, those

cases are distinguishable in that they involved compensable claims and an award of compensation, thereby warranting a penalty-related attorney fee under either ORS 656.382(1) or ORS 656.262(11)(a) for a discovery violation that resulted in an unreasonable delay or resistance to compensation. Here, to the contrary, the claim is denied and there was no compensation delayed by the violation.

<sup>12</sup> In reaching its conclusion that ORS 656.262(11)(a) permitted an award of attorney fees when a carrier unreasonably delayed a denial, even when no compensation was due, the *Traner I* court noted that while “[a]n unspoken philosophy of ‘no harm no foul’ may seem plausible in other contexts,” such was

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Accordingly, based on the aforementioned reasoning, the criteria for application of ORS 656.262(11)(a) have not been met. Consequently, claimant is not entitled to a penalty-related attorney fee under that statute. Therefore, we reverse.

### ORDER

The ALJ's order dated June 9, 2016, as reconsidered on August 2, 2016, is reversed in part and affirmed in part. The ALJ's \$2,500 penalty-related attorney fee award is reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on March 8, 2017

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not the case when considering the important procedural rights and remedies triggered by a denial. Similarly, we consider the employer's timely provision of discovery an important procedural right, and we recognize claimant's attorney's substantial efforts to obtain discovery. Nonetheless, we emphasize that our conclusion is based on the current statutory scheme. As discussed previously, when the issue is not a delay in acceptance/denial of a claim, ORS 656.262(11)(a) requires that compensation be delayed or refused for a penalty/fee to be awarded. Likewise, the court has previously held that if a claim is not compensable, there can be no resistance to the payment of compensation under ORS 656.382(2). *See Boehr*, 109 Or App at 295; *Aetna*, 108 Or App at 257; *Randall*, 107 Or App at 604-05; *see also Traner II*, 273 Or App at 313, 314, 317. Thus, the current statutory scheme simply does not allow the remedy that claimant urges us to apply, and *Traner* did not hold otherwise. To the extent there is a "gap" in the attorney fee statutes related to unreasonable discovery violations when no compensation is delayed, resisted or refused, the remedy rests with the legislature.