
In the Matter of the Compensation of
LEAH M. RECOR, Claimant
WCB Case No. 16-02233
ORDER ON REVIEW
Ernest M Jenks, Claimant Attorneys
Gress & Clark LLC, Defense Attorneys

Reviewing Panel: Members Weddell and Johnson.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Kekauoha's order that declined to award a penalty-related attorney fee under ORS 656.262(11)(a) for a discovery violation.¹ On review, the issue is attorney fees.

We adopt and affirm the ALJ's order with the following supplementation.

The ALJ concluded that, even assuming there was a discovery violation by the self-insured employer, no penalties or attorney fees were authorized under ORS 656.262(11)(a) because there was no delay or refusal to pay compensation. Because claimant did not allege, and the record did not support, that the violation resulted in any delay in accepting or denying a claim, the ALJ found *SAIF v. Traner*, 273 Or App 310 (2015), distinguishable.

On review, claimant continues to argue that the employer committed an unreasonable discovery violation and that *Traner* supports a penalty-related attorney fee for that violation, even in the absence of a delay or refusal to pay compensation. We disagree with claimant's contentions.

As recently explained in *Dawn Turner (Turner I)*, 69 Van Natta 444 (March 8, 2017), and *Dawn Turner (Turner II)*, 69 Van Natta 569 (March 16, 2017), we decline to extend *Traner* beyond the context of a penalty/fee dispute involving unreasonable acceptance/denial of claims, and we find no indication in the court's reasoning that it intended such a consequence. Here, as in the *Turner* cases, there is no contention that the employer's alleged discovery violation delayed acceptance/denial of the claim, or resulted in a delay/refusal to pay

¹ At hearing, claimant also requested an attorney fee under ORS 656.382(1) for the same violation. The ALJ analyzed both attorney fee provisions simultaneously, and concluded that neither fee was awardable. On review, claimant does not dispute the ALJ's finding as it related to the ORS 656.382(1) fee, but rather limits his dispute to whether ORS 656.262(11)(a) allows an attorney fee in the absence of compensation due.

compensation, attorney fees, or costs. Accordingly, because none of the requirements for application of ORS 656.262(11)(a) have been satisfied, no penalty-related attorney fee is available under that statute.² Consequently, we affirm.³

ORDER

The ALJ's order dated September 9, 2016 is affirmed.

Entered at Salem, Oregon on March 21, 2017

² We also agree with the ALJ's conclusion that, in the absence of a resistance or refusal to pay compensation, no attorney fee is available under ORS 656.382(1).

³ In response to claimant's arguments, we reiterate that *Boehr v. Mid-Willamette Valley Food*, 109 Or App 292 (1991), *Eastmoreland Hospital v. Reeves*, 94 Or App 698 (1989), and *Steven D. Surber*, 56 Van Natta 2014 (2004), do not support the availability of an attorney fee under ORS 656.262(11)(a) when there is no compensation award or no delay in acceptance/denial of the claim. See *Turner II*, 69 Van Natta at 570 n 3; *Turner I*, 69 Van Natta at 450 n 11. Those cases are distinguishable in that they involved compensable claims and an award of compensation, thereby warranting penalty-related attorney fees 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. *Id.* Here, to the contrary, the claim is denied and there was no compensation delayed by the violation.

Moreover, as noted in *Turner I* and *II*, OAR 438-007-0015(8) does not automatically authorize a penalty or an attorney fee for a discovery violation. 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. *Turner II*, 69 Van Natta at 571 n 4; *Turner I*, 69 Van Natta at 446 n 4. Administrative rules must be consistent with an agency's statutory authority, and 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 an independent basis for a penalty or attorney fee for a carrier's unreasonable discovery violation, but is confined by the statutory requirements of ORS 656.262(11)(a). *Michael Hinds*, 59 Van Natta 1980 (2007).