
In the Matter of the Compensation of
DANNY E. ARVIDSON, Claimant
WCB Case No. 16-05828
ORDER ON REVIEW
James W Moller, Claimant Attorneys
Law Offices of Kathryn R Morton, Defense Attorneys

Reviewing Panel: Members Johnson and Ousey.

The insurer requests review of that portion of Administrative Law Judge (ALJ) Sencer's order that awarded an insurer-paid attorney fee pursuant to ORS 656.382(2) when the insurer's request concerning an Order on Reconsideration was dismissed as untimely filed. On review, the issue is attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary.

On December 27, 2016, the insurer requested a hearing, challenging a November 21, 2016 Order on Reconsideration. Claimant moved to dismiss the insurer's hearing request as untimely. *See* ORS 656.268(6)(g); ORS 656.319(4) (a request for hearing on a reconsideration order must be filed within 30 days after the copies of the reconsideration order were mailed to the parties). Claimant also requested an attorney fee pursuant to ORS 656.382(2).

CONCLUSIONS OF LAW AND OPINION

The ALJ dismissed the insurer's hearing request, finding that the request was untimely filed. The ALJ awarded an attorney fee pursuant to ORS 656.382(2), concluding that the plain wording of the statute does not distinguish between a hearing on the merits and a dismissal based on an untimely request for hearing.

On review, the insurer argues, based on *Timothy L. Williams*, 46 Van Natta 2274 (1994), that because its hearing request was dismissed, the ALJ did not find, as required by ORS 656.382(2), that the compensation awarded to claimant by the reconsideration order should not be reduced or disallowed. Accordingly, it argues that claimant was not entitled to the attorney fee award under that statute. Based on the following reasoning, we agree with the insurer's contention.

ORS 656.382(2) provides for a reasonable attorney fee award at the hearing level:

“If a request for hearing * * * is initiated by * * * an insurer, and the [ALJ] * * * finds that all or part of the compensation awarded to a claimant should not be disallowed or reduced, or, through the assistance of an attorney, that * * * all or part of the compensation awarded by a reconsideration order should not be reduced or disallowed.”

In *Williams*, we held that the claimant was not entitled to an attorney fee under ORS 656.382(2) where the carrier’s request for review had been dismissed without a decision on the merits of the claim. 46 Van Natta at 2276. We reasoned that to constitute a finding that the compensation awarded to the claimant should not be “disallowed or reduced” for purposes of the statute, such a finding must be made on the merits of the claim. *Id.* (citing *Agripac, Inc. v. Kitchel*, 73 Or App 132 (1985) (holding that because the carrier’s petition for judicial review had been dismissed without a finding on the merits that the compensation awarded to the claimant should not be disallowed or reduced, the claimant was not entitled to an attorney fee under ORS 656.382(2)); *Terlouw v. Jesuit Seminary*, 101 Or App 493 (1990) (declining to award an attorney fee under ORS 656.382(2) because the carrier’s request for Board review was dismissed without a decision on the merits of the claim)).

Since the *Williams* decision, we have consistently applied its rationale to cases involving a dismissal order rather than a decision on the merits of the claim. *See, e.g., Bardomiano Espinoza*, 64 Van Natta 432 (2012) (“Where, as here, a request for Board review has been dismissed without a decision on the merits that the claimant’s award of compensation should not be disallowed or reduced, we are not authorized to award a carrier-paid attorney fee award under ORS 656.382(2).”); *Michael Kelly*, 60 Van Natta 552 (2008) (when a carrier’s request for review of an ALJ’s order is dismissed, there has been no decision on the merits of the issues raised by the request, and thus, no Board finding that the compensation awarded to the claimant by the ALJ’s order has been disallowed or reduced). We have also applied the *Williams* reasoning to the dismissal of a carrier’s hearing request from a Workers’ Compensation Division (WCD) order. *See Lynn E. Fisher*, 52 Van Natta 1492 (2000) (because the ALJ dismissed the carrier’s hearing request regarding a WCD order, there was no finding that the claimant’s compensation award should not be disallowed or reduced for purposes of ORS 656.382(2)).

Williams and *Fisher* did not directly address the portion of ORS 656.382(2) that applies to the reconsideration process, because that portion of the statute was not added until 2009. *See* Or Laws 2009, ch 526 § 3; *former* ORS 656.382(2) (1990) (“If a request for hearing * * * is initiated by * * * an insurer, and the [ALJ] * * * finds that the compensation awarded to a claimant should not be disallowed or reduced, * * * the insurer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney fee * * * .”). However, because the “reconsideration process” portion of the statute contains the same requirement that the Board interpreted in *Williams* and *Fisher* (*i.e.*, that *the ALJ find that the compensation awarded to claimant in a reconsideration order should not be reduced or disallowed*), we conclude that the *Williams/Fisher* rationale also applies where a carrier’s request for a hearing concerning a reconsideration order is dismissed without a finding on the merits of the claim. In fact, we have previously applied the *Williams* rationale in such circumstances. *See, e.g., David E. Matthews, Dcd*, 63 Van Natta 358, 359 (2011) (the claimant was not entitled to an attorney fee under ORS 656.382(2) where the carrier’s hearing request from an Order on Reconsideration was dismissed, because there had been no finding that the compensation awarded on reconsideration should not be disallowed or reduced).

Here, the insurer’s hearing request was dismissed as untimely filed and no finding was made on the merits that claimant’s compensation awarded by the reconsideration order should not be disallowed or reduced. Accordingly, based on the *Williams* and *Fisher* rationale, claimant is not entitled to an attorney fee under ORS 656.382(2).

Finally, claimant contends that he is entitled to an attorney fee under ORS 656.382(2) based on *SAIF v. DeLeon*, 352 Or 130 (2012). However, that case is distinguishable. In *DeLeon*, the court concluded that, where the Board determined that the claimant’s compensation should not be disallowed or reduced, an attorney fee under ORS 656.382(2) was awardable for the claimant’s counsel’s services at the hearing level. *Id.* at 143. There, in contrast to this case, the Board concluded *on the merits* that the claimant’s compensation award should not be disallowed or reduced and neither the hearing request, nor the request for review, was dismissed. *Id.* at 132, 143. Accordingly, *DeLeon* does not support claimant’s contention that ORS 656.382(2) provides for an attorney fee under the circumstances of this case.

Consequently, based on the aforementioned reasoning, we reverse.

ORDER

The ALJ's order dated March 7, 2017, as reconsidered on April 10, 2017, is reversed in part and affirmed in part. The ALJ's \$8,500 insurer-paid attorney fee is reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on September 27, 2017