

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Joy M. Walker, Claimant,

Joy M. WALKER,  
*Petitioner,*

*v.*

PROVIDENCE HEALTH SYSTEM OREGON,  
*Respondent.*

Workers' Compensation Board  
0904145, 0902065; A161863

Submitted January 30, 2017.

Ronald A. Fontana and Ronald A. Fontana, P.C., filed the  
brief for petitioner.

Vera Langer and Lyons Lederer, LLP, filed the brief for  
respondent.

Before DeVore, Presiding Judge, and Garrett, Judge, and  
James, Judge.

DEVORE, P. J.

Reversed and remanded.

**DeVORE, P. J.**

Claimant petitions for judicial review of the Workers' Compensation Board's second order on remand that declined to award her attorney fees for legal services on prior review before the board, on review before this court, and on a remand to the board. The board declined to award attorney fees because it viewed its authority as limited by our remand to the board. We conclude that the board did not lack authority by reason of our remand. We reverse and remand for the board to consider the request for attorney fees.

We recite only the parts of past proceedings that are necessary to this decision. In March 2011, the board determined, among other things, that claimant's employer unreasonably delayed accepting and processing her condition—major depression and panic disorder. Despite that conclusion, the board ruled that claimant was not entitled to a penalty under ORS 656.262(11)(a) because there were no “amounts then due.”

In relevant part, ORS 656.262(11)(a) provides:

“If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, attorney fees or costs, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the *amounts then due* plus any attorney fees assessed under this section. The fees assessed by the director, an Administrative Law Judge, the board or the court under this section shall be reasonable attorney fees. In assessing fees, the director, an Administrative Law Judge, the board or the court shall consider the proportionate benefit to the injured worker. The board shall adopt rules for establishing the amount of the attorney fee, giving primary consideration to the results achieved and to the time devoted to the case. An attorney fee awarded pursuant to this subsection may not exceed \$4,000 absent a showing of extraordinary circumstances.”

(Emphasis added.)<sup>1</sup> Even so, the board awarded claimant attorney fees of \$2,000 for earlier legal services before

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<sup>1</sup> We quote the current version of the statute because the difference between the former and current versions—formerly a presumptive maximum of \$3,000 attorney fees for events reviewed in the board's prior order—is not material to our

the administrative law judge. At the same time, the board declined to award any attorney fees for services before the board itself. It noted that “claimant is not entitled to an attorney fee for services on review [before the board] related to the attorney fee issue.”

Claimant petitioned this court for judicial review and assigned error to the board’s failure to award a penalty under ORS 656.262(11)(a) based on the amount to be awarded on claim closure. She did not assign error to that part of the board’s decision that denied attorney fees for services before the board. Claimant argued only that her employer unreasonably delayed accepting the condition and that she should have been entitled to a penalty based on the amount ultimately awarded on claim closure. We agreed and remanded to the board to calculate the award of a penalty. *Walker v. Providence Health Systems Oregon*, 267 Or App 87, 105-08, 340 P3d 91 (2014), *adh’d to as modified on recons*, 269 Or App 404, 344 P3d 1115 (2015). In our review of the board’s order, we discussed only the penalty issue, which had been assigned as error, and not the issue of attorney fees, which had not been assigned as error. *Id.*

On remand, the board considered a penalty as directed. The parties filed no memoranda with the board, and the board held no hearing. In what would be its first order on remand, the board awarded claimant a penalty of 25 percent of her compensation for a 35 percent unscheduled permanent disability. After that order, claimant filed a motion to reconsider the order so as to permit the board to entertain a request for attorney fees for services before the board and the court. Claimant filed a statement seeking \$9,600. Among other things, the employer objected that the court had not remanded the case for consideration of attorney fees and that claimant had not asserted entitlement to attorney fees on the matter remanded. The employer argued that the board properly limited its decision on remand to the determination of a penalty. Claimant replied that any earlier request for fees would have been premature because she had not yet prevailed.

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opinion. See ORS 656.262(11)(a) (2009) (setting a \$3,000 limit on attorney fees absent extraordinary circumstances).

In its second order on remand, the board concluded that claimant would not have been premature to seek fees earlier, that she had prevailed when this court decided she was entitled to a penalty, that the board's calculation of a penalty was ministerial, and that, given the scope of the remand, the board lacked authority to award attorney fees.

The impression that the board lacked authority was based on a decision of this court in another case, *Aguiar v. J.R. Simplot Co.*, 94 Or App 658, 767 P2d 86 (1989). That case turned on a different statute. At that time, ORS 656.388(1) (1987) provided, in relevant part:

“In cases in which claimant *finally prevails after remand* from the Supreme Court, Court of Appeals or Board, then the referee, Board or appellate court shall approve or allow a reasonable attorney fee for services before every prior forum.”

(Emphasis added.) The claimant sought review of a board order after a remand from this court. *Id.* at 660. We had remanded the case to the board to rescind its determination order as premature and to reinstate a referee's order that allowed certain medical services and awarded attorney fees for services at the hearing before the referee. The board did so but refused to award additional attorney fees for each level of review through remand pursuant to ORS 656.388(1). The claimant argued, in statutory terms, that he had “prevailed” only “after remand.” We concluded, however, that the claimant had not prevailed “after remand.” Instead, the claimant had prevailed *before this court* when overturning the premature determination. We explained that we had remanded “to the Board for [a] ministerial implementation of our decision,” and, accordingly, the board “had no authority to award attorney fees to claimant under ORS 656.388.” *Id.* Understood correctly, it was not the scope of this court's remand that limited the board's authority. The board's authority was not limited by a directive from the court. Rather, it was the operation of ORS 656.388(1), in those unique procedural circumstances, that served to limit the board's authority. To repeat for clarity's sake, the claimant had not prevailed *after remand*.

The case at hand does not involve such a procedural twist. That is, ORS 656.262(11)(a) does not employ language that makes the award of attorney fees turn on prevailing “*after* remand” like ORS 656.388(1). Instead, ORS 656.262(11)(a) provides, in relevant part, simply that, if the predicate circumstances occur, “the insurer or self-insured employer shall be liable for an additional amount up to 25 percent [*i.e.*, a penalty] of the amounts then due plus any attorney fees assessed under this section.” Nothing conditions attorney fees on an award being made at a particular procedural stage, such as prevailing “*after* remand.”<sup>2</sup> Rather, the award of fees under ORS 656.262(11)(a) turns on the predicate circumstances—an unreasonable refusal or delay in accepting or denying a claim. When those circumstances occur, an insurer or self-insured employer shall be liable for a penalty “plus any attorney fees.” Because ORS 656.262(11)(a) involves different predicate circumstances than ORS 656.388(1), the statute at issue here does not operate to limit the board’s authority even if claimant prevailed on the right to a penalty before the court and the amount was left for the board to determine on remand. Nothing in our remand, which contemplated determination of a penalty sum, implied a limitation on the board’s authority to conduct any related proceedings. The remand simply returned this case to the board to determine the penalty and to complete the case consistently with statutes, board rules, and procedures.

We note that the employer had objected to a request for a fee award that was made for the first time on reconsideration rather than at some earlier stage of the proceedings. Likewise, the board observed that claimant “first raised the issue in her request for reconsideration.” In considering the request, however, the board did not refer to its own rules or practices in matters involving requests and awards of attorney fees. *See, e.g.*, OAR 438-015-0029(2)(a) (providing that a claimant shall file with the board a request for attorney fees

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<sup>2</sup> As it happens, ORS 656.262(11)(a) does not employ the term “prevailing” when referring to circumstances justifying attorney fees. The board offered a better description in its prior order. There, the board explained that, if an insurer acts unreasonably in accepting or denying a claim, the insurer “shall be liable for an additional amount up to 25 percent of the ‘amounts then due,’ plus ‘*penalty-related*’ attorney fees.” (Emphasis added.)

within 14 days after the filing of the last brief to the board). The board instead assumed, as a consequence of a remand on the penalty issue, that it lacked authority to consider fees. That was error. The board has authority to consider or reject the fee request consistent with its rules and practices. *Id.*; *see also* ORS 656.262(11)(a) (“proportionate benefit to the injured worker”); OAR 438-015-0010 (considerations in fee awards).

Reversed and remanded.