

In the Matter of the Vocational Dispute of
Stengel, Robert, Claimant

Contested Case No: HH01-097

FINAL ORDER

June 12, 2002

ZURICH AMERICAN INSURANCE CO., Petitioner
ROBERT STENGEL, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

On January 9, 2002, Hearing Officer Paul Vincent conducted a telephone hearing. Petitioner, Zurich American Insurance Co. (insurer), appeared through attorney Bradley Scheminske. Respondent Robert Stengel (claimant) appeared and was represented by attorney Roger Ousey. The Department of Consumer and Business Services, Workers' Compensation Division (WCD) waived appearance. Petitioner called Ann McKinney, Cassandra Moore, and Robert Stengel as witnesses. Claimant also testified on his own behalf.

The respondent filed exceptions to Hearing Officer Vincent's March 7, 2002 Proposed and Final Contested Case Order, which determined claimant was eligible for vocational assistance, but failed to award an assessed attorney fee. Petitioner timely responded to the exceptions. Before the Director, the issue is entitlement to an attorney fee. The entire record, consisting of a tape recording of the hearing, all evidence received, and all documents filed, has been considered.

Findings of Fact

For the purpose of the issue raised in respondent's exceptions, I adopt the hearing officer's findings of fact.

Conclusions of Law and Opinion

The hearing officer affirmed the August 24, 2001 administrative order issued by the Rehabilitation Review Unit (RRU), which required the insurer to determine claimant's eligibility for vocational assistance. Post hearing, claimant's counsel submitted a retainer agreement and a statement of service requesting a \$4,000 assessed attorney fee under ORS 656.385.

Because claimant prevailed at a contested case hearing, his attorney is entitled to a reasonable fee. ORS 656.385(1),(3). The factors to consider in awarding a fee are: time devoted to the case, complexity of the issue(s), quality of legal representation, value of the interest involved, nature of the proceedings, benefit secured for the claimant, risk that an attorney's efforts may go uncompensated, assertion of frivolous issues or defenses, a statement of services, and any other relevant consideration deemed appropriate. OAR 436-001-0265.

Claimant's counsel submitted a statement of services indicating approximately 22.25 hours expended subsequent to the insurer's request for hearing, and requesting a \$4,000 attorney fee. The insurer contended that a \$4,000 attorney fee is unreasonable because the time expended was inflated and the hourly rate was unreasonable.

An attorney fee may be awarded for services only for representation of claimant at the contested case hearing. ORS 656.388(1); *see Donald L. Grant*, 49 Van Natta 250 (1997) (there is no proceeding prior to the filing of a hearing request). Representation at hearing includes filing and related services. *Donald Shaw*, 3 WCSR 237, 244 (1998) (work performed prior to the filing of the request for hearing precedes the actual commencement of a contested case proceeding). Thus, the time expended, 3.25 hours, prior to the insurer's September 6, 2001 request for hearing is not taken into consideration.

The case involved multiple legal and factual issues of usual complexity. The issues included whether: claimant had proper notice of the insurer's notice of ineligibility (NOI) and whether his appeal of NOI was timely; claimant had returned to suitable employment; claimant was available in Oregon for vocational assistance or whether exempted because he neither worked or lived in Oregon; and the insurer was required to determine claimant's eligibility for vocational assistance. The proceeding was a contested case hearing which involved skilled and competent counsel on both sides. The WCD submitted 22 exhibits; the insurer submitted five exhibits; claimant submitted 18 exhibits. The hearing lasted about 4½ hours, including testimony from three witnesses. Securing vocational assistance is a valuable interest and a significant benefit to claimant. Because the insurer had denied claimant's request for vocational assistance, there was a risk that claimant's counsel's efforts may have gone uncompensated. This factor, however, is less significant considering that claimant had prevailed before RRU. Accordingly, based on the factors of OAR 436-001-0265, claimant's counsel is awarded \$3,000 as a reasonable, assessed attorney fee.

IT IS HEREBY ORDERED that the March 7, 2002 Proposed and Final Contested Case Order is supplemented to award a \$3,000 assessed attorney fee, payable by the insurer. The remainder of the order is affirmed.

DATED this _____ day of June, 2002.

**MARY NEIDIG, DIRECTOR
DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES**

By: _____
John Shilts, Administrator
Workers' Compensation Division