

In the Matter of the ORS 656.340 Vocational Assistance Dispute of

Moore, Jimmie D., Claimant

Contested Case No: H02-116

FINAL ORDER

October 31, 2003

FREMONT INDEMNITY CO., Petitioner

JIMMIE D. MOORE, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Insurer, Fremont Indemnity Company, by and through its attorney Matthew F. Denley, timely filed exceptions to Administrative Law Judge (ALJ) Ella D. Johnson's April 23, 2003 Proposed and Final Contested Case Hearing Order. Claimant, Jimmie D. Moore, by and through his attorney Philip H. Garrow, filed a response and accompanying petition for attorney fees; insurer replied.

Insurer argues that the ALJ incorrectly framed the issue, the ALJ's findings of fact are inaccurate, and the ALJ failed to take into account relevant rules. Insurer further objects to the ALJ's award of attorney fees.

Claimant argues that the ALJ, as an agent of the director, had the prerogative to re-frame the issue. Like insurer, claimant comments on each of the ALJ's findings of fact. Claimant argues that the plan was inadequate due to insurer's error or omission. Claimant further seeks additional attorney fees.

The entire record of this matter has been reviewed. After consideration of the parties' respective arguments, the director adopts the ALJ's proposed order except as modified and supplemented below. *See* OAR 137-003-0655(6). The director issues this Final Order to address the issues of (1) what insurer is ordered to provide; (2) claimant's October 20, 2003 submission of additional evidence; and (3) attorney fees.

Insurer is ordered to provide a vocational evaluation.

At the contested case hearing in vocational assistance disputes, the director's administrative review may only be modified if the ALJ finds that the director violated a statute or rule; exceeded the statutory authority of the agency; followed unlawful procedure; or abused her discretion or exercised her discretion in a clearly unwarranted way. ORS 656.283(2)(c). The ALJ found none of these grounds to be true, and the director declines to change that finding. Accordingly, the October 9, 2002 Director's Review and Order cannot be modified.

However, the ALJ did modify the order insofar as she found that claimant was entitled to additional training. The administrative review did not order additional training per se. Rather, it ordered a vocational evaluation in order to determine whether claimant needs additional training or direct employment services to return to suitable employment. Whether insurer must provide additional training will depend on the results of the vocational evaluation.

Claimant's submission of additional evidence.

On October 20, 2003, claimant submitted for entry in the record a copy of the October 14, 2003 Order on Review. However, the director's review of this matter is limited to the record before the ALJ. *See* OAR 137-003-0655(5). Therefore, the director declines to consider the Order on Review or to enter it into the record.

Attorney fees.

Claimant has prevailed, and his attorney is entitled to a fee under ORS 656.385(1).

Applying the factors set forth in OAR 436-001-0265, the ALJ awarded \$3,593.75. Claimant's attorney sought that amount based on 12.25 hours of attorney "legal time" at \$275 per hour, and 1.5 hours of paralegal time in reviewing documents and preparing the file at \$150 per hour. The hourly rates were inflated to reflect the contingent nature of claimants' attorney fees and the risk of not being compensated. Claimant's normal hourly rate is \$175 per hour, and paralegal time is normally \$100 per hour.

Insurer objected to the contingency factor and the paralegal time, citing Workers' Compensation Board cases.¹ Insurer believes a fee of \$2,000 would have been reasonable. In response, claimant's attorney contends that insurer can only object to the award of fees, not the amount, citing OAR 436-001-0275. Moreover, claimant contends, insurer's objections are superfluous.

Claimant's attorney seeks a further award in the amount of \$2,237.50,² based on 3.5 hours of attorney time preparing a response at \$275 per hour, and 8.5 hours of paralegal time reviewing the exceptions, researching the law, and investigating the facts, at \$150 per hour. The total fee requested is \$5,831.25.

Where a claimant finally prevails in a contested case order, the director shall require the insurer to pay a reasonable attorney fee to claimant's attorney. ORS 656.385(1). Because claimant has prevailed, it is undisputed that his attorney is entitled to a fee. The factors to consider in awarding a fee include: the time devoted to the case; the complexity of the issues involved; the quality of legal representation; the value of the interest involved; the nature of the proceedings; the benefit secured for the claimant; the risk that an attorney's efforts may go uncompensated; the assertion of frivolous issues or defenses; a statement of services, if submitted; and any other relevant consideration. OAR 436-001-0265(1). Claimant's attorney addresses each of these factors in his affidavits and petitions. Insurer specifically objects to two of the factors relied on by claimant's attorney - the contingency factor and paralegal time. The remainder of the factors are uncontroverted.

¹ While Board cases may provide guidance for the director, they are not binding nor precedential in contested cases before the director.

² Claimant's supplemental petition states that he is seeking \$3,237.50. However, 3.5 hours at \$275 plus 8.5 hours at \$150 equals \$2,237.50.

Contrary to claimant's attorney's assertion, insurer can except to the amount of the ALJ's award. Nothing in OAR 436-001-0265(4) or 436-001-0275 is to the contrary. While claimant's attorney automatically factors in a contingency factor to reflect the contingent nature of the fee and the risk of going uncompensated, this is but one of several factors the director may consider in awarding an attorney fee. Therefore, the director does not automatically consider the inflated rates. Further, an attorney's time spent in requesting and defending an attorney fee award is not considered. Attorney fees are one of several issues in dispute in this case. Because claimant's attorney's affidavits and petitions do not break down the number of hours devoted to the attorney fee issue and the number of hours devoted to the other issues, the director discounts the number of hours accordingly. Finally, the director discounts some of the paralegal time, particularly in the exceptions process. The bulk of this case should have been tried at the hearing level, yet claimant's attorney's paralegal spent 8.5 hours of time post-hearing "researching the law and investigating the facts."

For the time spent at the contested case hearing level, the director modifies the ALJ's award to \$2,912.50 calculated as follows: 11.25 hours of attorney time at the rate of \$250 per hour and 1 hour of paralegal time at the rate of \$100 per hour. For the exceptions process, the director awards \$950 calculated as follows: 3 hours of attorney time at the rate of \$250 per hour and two hours of paralegal time at the rate of \$100 per hour. The total fee awarded to claimant's attorney is \$3,862.50.

IT IS HEREBY ORDERED that the April 23, 2003 Proposed and Final Contested Case Hearing Order is adopted as modified and supplemented above; the October 9, 2002 Director's Review and Order is affirmed.

Mr. Moore's eligibility for vocational assistance is restored. Insurer shall:

- (1) Provide a vocational evaluation to determine whether Mr. Moore needs training or direct employment services to return to suitable employment; and
- (2) Pay to claimant's attorney a fee in the amount of \$3,862.50.

DATED this 31st day of October, 2003.

CORY STREISINGER, DIRECTOR
DEPT. OF CONSUMER AND BUSINESS SERVICES

By: _____
John Shilts, Administrator
Workers' Compensation Division