

In the ORS 656.340 Vocational Assistance Dispute of

**GLEN A. DEVER, Claimant**

Contested Case No: H05-077

**FINAL ORDER**

January 20, 2006

SAIF CORP., Petitioner

GLEN A. DEVER, Respondent

Before John Shilts, Administrator, Workers' Compensation Division

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Petitioner insurer, through its attorney David L. Runner, timely submitted exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Catherine P. Coburn's August 4, 2005 Amended Proposed and Final Order. Respondent claimant, through his attorney James L. Edmunson, waived response. This matter comes before the director for a final order. The only issue raised in the exceptions is attorney fees. I reverse that portion of the ALJ's order pertaining to attorney fees.

The underlying issue is whether claimant is eligible for vocational assistance. The Rehabilitation Review Unit, by Director's Review and Order dated April 14, 2005, found that claimant is eligible for assistance. Because claimant prevailed, the unit awarded claimant's attorney a fee under ORS 656.385(1), which provides in part,

“In all cases involving a dispute over compensation benefits pursuant to ORS 656.245, 656.260, 656.327 or 656.340, where a claimant finally prevails after a proceeding has commenced before the Director of the Department of Consumer and Business Services, the director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney. \* \* \* The attorney fee assessed by the director \* \* \* under this section must be proportionate to the benefit to the injured worker. The director 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 \$2,000 absent a showing of extraordinary circumstances.”

OAR 436-120-0008<sup>1</sup>, in turn, provides for determining the amount of the fee in vocational assistance disputes before the Rehabilitation Review Unit. Applying the statute and rule, the unit

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<sup>1</sup> OAR 436-120-0008 (WCD Admin. Order 04-056, eff. 4/1/04) provides, in part:

“(2) Attorney fees: In any dispute in which a represented worker prevails after a proceeding has commenced before the director, the director shall award an attorney fee to be paid by the insurer or self-insured employer as provided in ORS 656.385 (§ 2, ch. 756, OL 2003). The attorney fee will be proportionate to the benefit to the injured worker. Primary consideration shall be given to the results achieved and the time devoted to the case. Absent extraordinary circumstances or agreement by the parties, the fee may not exceed \$2000, nor fall outside the ranges for fees as provided in the following matrix:

awarded claimant’s attorney the maximum fee of \$2,000, finding that he devoted 12 hours and achieved restoration of claimant’s eligibility for services.

Insurer requested a hearing, and the ALJ affirmed the unit’s order finding claimant eligible for assistance. After the hearing, claimant’s attorney submitted a statement of services, requesting a fee of \$787.50 for 3.5 hours in the hearing process at the rate of \$225 per hour. Insurer objected to the request for an additional fee, contending that claimant’s attorney has already been awarded the statutory maximum. The ALJ rejected insurer’s argument and awarded claimant’s attorney \$787.50 for services at hearing, for a total combined fee award of \$2,787.50. The ALJ interpreted ORS 656.385(1) and the rules to allow a maximum fee of \$2,000 at each level of review.

Insurer argues that a claimant does not “finally prevail” under ORS 656.385(1) until all levels of review have been exhausted, and the \$2,000 maximum applies to the entire case, not each level of review. I agree with insurer.

Prior to 2003, ORS 656.385(1) provided for attorney fees in disputes over medical services, medical treatment, managed care, and vocational assistance “where a claimant finally prevails in a contested case order by the [d]irector.” Fees were not allowed at the administrative review level. There was no cap on the amount of the fee awarded in a contested case order. In 2003, the legislature amended ORS 656.385(1) to provide for fees “where a claimant finally prevails after a proceeding has commenced before the [d]irector.” Or Laws 2003, chapter 756, §2 (Senate Bill 620). This change allowed for fees at the administrative review level. The following language was also added:

“The attorney fee must be based on all work the claimant’s attorney has done relative to the proceeding at all levels before the department. The attorney fee assessed by the director, or on appeal

Estimated Benefit Achieved	Professional Hours Devoted				
	1-2 hours	2.1-4 hours	4.1-6 hours	6.1-8 hours	8.1-12 hours
\$1-\$2000	\$100-400	\$200-700	\$300-750	\$600-1000	\$800-1250
\$2001-\$4000	\$200-500	\$400-800	\$600-900	\$800-1300	\$1050-1500
\$4001-\$6000	\$300-700	\$600-1000	\$800-1250	\$1000-1450	\$1300-1750
\$6001-\$10000	\$400-900	\$800-1300	\$1050-1600	\$1350-1800	\$1550-2000

“\* \* \* \* \*

“(b) In determining the value of the results achieved, the director may consider, but is not limited to the following:

“\* \* \* \* \*

“(C) For the purposes of applying the matrix, the value of an eligibility determination is assumed to be the maximum allowed in the fee schedule provided in OAR 436-120-0720 for completing an eligibility evaluation; the value of vocational assistance or a training plan, unless determined to be otherwise, is assumed to fall within the highest category provided in the above matrix;

”\* \* \* \* \*

“(c) If any party believes extraordinary circumstances exist that justify a fee outside of the ranges provided in the above matrix or above \$2000, they may submit a written or faxed statement of the extraordinary circumstances to the director.

“\* \* \* \* \*”

from an order of the director, under this section must be proportionate to the benefit to the injured worker. The director 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 \$2,000 absent a showing of extraordinary circumstances.”

The new statute became effective January 1, 2004.<sup>2</sup> As with the previous language, a fee is only awardable when the claimant “finally prevails.” A claimant does not “finally” prevail before a forum unless the forum finds in the claimant’s favor and that finding is not appealed. *Greenslitt v. City of Lake Oswego*, 305 Or 530, 534 (1988); *see also Longview Inspection v. Snyder*, 182 Or App 530, 538 (2002) (where court reverses and remands board’s order that found in favor of claimant, claimant did not “finally” prevail under ORS 656.386(1)). If the claimant prevails at administrative review and the insurer requests a hearing, the claimant has not “finally” prevailed. If the insurer prevails at hearing, the claimant’s attorney is entitled to no fee under ORS 656.385(1). If the claimant prevails at hearing, the fee awarded by the ALJ must be based “on all work the claimant’s attorney has done relative to the proceeding at all levels before the department.” However, if the insurer requests further review by the director under OAR 436-001-0275,<sup>3</sup> the claimant still has not yet finally prevailed. If the claimant prevails before the director, the fee award must take into account work done at all previous levels, including hearing and administrative review. The total fee awarded when the claimant “finally prevails after a proceeding has commenced,” whether it be at administrative review, at hearing, or on director review, must take into account work at all previous levels, and may not exceed \$2,000 absent a showing of extraordinary circumstances. *See Liberty Northwest Ins. Corp. v. Gordineer*, 150 Or App 136, 141 (1997) (under ORS 656.308(2)(d), maximum fee of \$1,000 for prevailing against responsibility denial applies to entire case, not each level).

Under ORS 656.385(1), the calculation of the fee is no longer simply a matter of multiplying the number of hours by an hourly rate. Rather, primary consideration must be given to the time devoted and the results achieved. Pursuant to the statutory language, the director amended OAR 436-001-0265<sup>4</sup> to provide:

“(1) In cases where the director is required to assess an attorney fee under ORS 656.385(1):

“(a) The fee must be based on the factors listed in ORS 656.385(1).

“(b) Absent a showing of extraordinary circumstances or unless otherwise agreed by the parties, the fee may not exceed \$2,000 nor fall outside the ranges provided in the following matrix:

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<sup>2</sup> The amendments to ORS 656.385(1) apply to all claims for which an order relating to the issue on which attorney fees are sought had not become final on or before January 1, 2004. Or Laws 2003, ch 756, § 3.

<sup>3</sup> Amended and renumbered OAR 436-001-0246 effective January 2, 2006.

<sup>4</sup> WCD Admin. Order 05-056, effective July 1, 2005. OAR 436-001-0003(2) (“These rules apply to all contested case hearings \* \* \* on or after the effective date.”)

Estimated Benefit Achieved	Professional Hours Devoted				
	1-2 hours	2.1-4 hours	4.1-6 hours	6.1-8 hours	Over 8 hours
\$1-\$2000	\$100-400	\$200-700	\$300-750	\$600-1000	\$800-1250
\$2001-\$4000	\$200-500	\$400-800	\$600-900	\$800-1300	\$1050-1500
\$4001-\$6000	\$300-700	\$600-1000	\$800-1250	\$1000-1450	\$1300-1750
Over \$6000	\$400-900	\$800-1300	\$1050-1600	\$1350-1800	\$1550-2000

“(c) Extraordinary circumstances are not established by merely exceeding eight hours or exceeding a benefit of \$6000.

“(d) In cases under ORS 656.245, 656.260, or 656.327, the factors listed in OAR 436-010-0008(13) may also be considered.

“(e) In cases under ORS 656.340, the factors listed in OAR 436-120-0008(2) may also be considered.

“(2) Except as provided in section (3), in cases where the administrative law judge or director assesses an attorney fee, the following factors may also be considered:

“(a) The complexity of the issue(s) involved;

“(b) The quality of the legal representation;

“(c) The value of the interest involved;

“(d) The nature of the proceedings;

“(e) The risk in a particular case that an attorney’s efforts may go uncompensated;

“(f) The assertion of frivolous issues or defenses;

“(g) A statement of services, if submitted within seven days of the hearing date, unless the administrative law judge instructs otherwise; and

“(h) Any other relevant consideration deemed appropriate by the administrative law judge or director.

“\* \* \* \* .”

Here, the parties have not agreed on the amount of the fee, and no extraordinary circumstances have been alleged. Moreover, merely exceeding the number of hours or the benefit achieved provided in the matrix does not, by itself, establish extraordinary circumstances. Accordingly, the fee must fall within the ranges in the matrix. Claimant’s attorney has devoted a total of 15.5 hours to this matter (12 before the unit, 3.5 at hearing). The benefit to claimant – eligibility for vocational assistance – falls within the highest range of the matrix. OAR 436-001-0265(1)(e), 436-120-0008(2)(b)(C). Therefore, claimant’s attorney is awarded a total fee of \$2,000 for services at all levels.

**IT IS HEREBY ORDERED** the August 4, 2005 Amended Proposed and Final Order is adopted and affirmed except the attorney fee award, which is reversed. Insurer shall pay claimant’s attorney a total fee of \$2,000 for services at administrative review and hearing.