
In the ORS 656.340 Vocational Assistance of

James A. Miller, Claimant

Contested Case No: 06-150H

FINAL ORDER

May 14, 2007

ST. PAUL FIRE & MARINE INSURANCE CO., Petitioner

JAMES A. MILLER, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Insurer, through its attorney William H. Replogle, and claimant, through his attorney John C. DeWenter, timely filed exceptions to Workers' Compensation Board Administrative Law Judge Robert Pardington's February 8, 2007 Proposed and Final Order. This matter comes before the director for a final order. The issues are eligibility for vocational assistance and attorney fees. I affirm.

I adopt the ALJ's findings of fact.

On January 20, 2005, insurer determined claimant ineligible for vocational assistance because he did not have a substantial handicap to employment. The Rehabilitation Review Unit (RRU), by August 22, 2005 Director's Review and Order, set aside insurer's determination, finding that claimant does have a substantial handicap to employment. A December 1, 2005 Proposed and Final Order affirmed. Insurer filed exceptions, and on June 2, 2006 I remanded to RRU for a determination of whether claimant was suitably employed for more than 60 days, which would make him ineligible for assistance. RRU issued another Director's Review and Order on September 18, 2006 finding that claimant was suitably employed for more than 60 days, but that that issue became moot after insurer reopened his claim to process a new condition. Both parties requested a hearing. ALJ Pardington affirmed RRU's September 18, 2006 order, finding that it was based on a reasonable interpretation of the rules.

RRU's order may be modified only if it violates a statute or rule, exceeds the director's statutory authority, is characterized by abuse of discretion, or was made upon unlawful procedures. ORS 656.283(2)(c).

Insurer first argues that RRU violated OAR 436-120-0003(3)¹ and 436-120-0350(4)² and abused its discretion by failing to correctly interpret and apply the rules. Insurer argues the rules do not provide that OAR 436-120-0350(4) becomes moot upon the filing of a new medical condition claim. Further, insurer contends that the omitted medical condition claim directly arose from the original injury and claimant should be ineligible for assistance because he was suitably employed for at least 60 days after the injury.

Claimant responds that OAR 436-120-0350(4) applies to employment "after the injury or aggravation," not to employment after claim reopening to process a newly accepted condition,

¹ The relevant text of the rules is set out below.

² Insurer's exceptions refer to OAR 436-120-0320(4), but the rule at issue is OAR 436-120-0350(4).

and he was employed before his claim was reopened. Claimant further contends that his post-injury employment at Lumbermen's was not suitable because he did not have the necessary physical capacities and abilities.

OAR 436-120-0003(3)³ provides:

“Under these rules a claim for aggravation or reopening a claim to process a newly accepted condition will be considered a new claim for purposes of vocational assistance eligibility and vocational assistance, except as otherwise provided in these rules.”

OAR 436-120-0350 provides, in part:

“A worker is ineligible or the worker's eligibility ends when any of the following conditions apply:

“* * * * *

“(4) The worker has been employed at least for 60 days in suitable employment after the injury or aggravation and any necessary worksite modification is in place.”

RRU determined that, under OAR 436-120-0003(3), the issue of whether claimant was suitably employed for at least 60 days, rendering him ineligible for assistance, became moot when his claim was reopened to process a new condition. RRU found that claimant was suitably employed⁴ between June 11, 2003 and November 7, 2003. During that period of time, he was released to regular work without restrictions, and there is no evidence that he had restrictions during the period of time. However, insurer reopened claimant's claim to process a new condition on October 25, 2004. RRU found that the preponderance of medical evidence after that date indicates that claimant is not able to return to regular work.

I agree with ALJ Pardington that RRU did not violate the rules or abuse its discretion in interpreting and applying the rules. Had claimant's claim not been reopened, he would be ineligible for vocational assistance under OAR 436-120-0350(4). However, the circumstances after his claim was reopened should have been considered in determining eligibility.

Other rules support RRU's interpretation and application of OAR 436-120-0003(3). OAR 436-120-0320(9) provides, in part:

“A worker entitled to an eligibility evaluation is eligible for vocational services if all the following additional conditions are met:

³ As adopted by WCD Admin. Order 04-056, effective April 1, 2004.

⁴ Employment is suitable if the worker has the necessary physical capacities, knowledge, skills, and abilities; if it is located where the worker customarily worked, or within a reasonable commuting distance of the worker's residence; if it pays a suitable wage; and if it is permanent. OAR 436-120-0005(12).

“* * * * *

“(d) None of the reasons for ineligibility under OAR 436-120-0350 applies *under the current opening of the claim.*”

(Emphasis added.) The reason for finding claimant ineligible – that he was suitably employed for 60 days after the injury – applied under the initial opening of his claim. Claimant was not suitably employed for 60 days after his claim was reopened.

Insurer argues in the alternative that RRU erred in finding claimant eligible for assistance without first requiring a reevaluation for vocational eligibility. According to insurer, claimant did not automatically become eligible upon acceptance of the new condition, but rather became entitled to a new eligibility evaluation. On that basis, insurer argues the matter should be remanded to the employer.

Claimant responds that the issue of whether he has a substantial handicap to employment, making him eligible for vocational assistance, has already been fully developed and litigated, and his eligibility has been upheld four times.

Insurer requested an eligibility evaluation in November 2004, after claimant’s claim was reopened. The Notice of Ineligibility finding that claimant did not have a substantial handicap to employment⁵ was issued January 20, 2005. On August 22, 2005, RRU set aside insurer’s determination and found that claimant has a substantial handicap to employment. That conclusion has been upheld and I decline to remand this matter to employer so the issue can be relitigated.

Claimant has prevailed and his attorney is entitled to a fee. The parties dispute which subsection of ORS 656.385 applies, as well as the amount of the fee. ORS 656.385 provides:

“(1) In all cases involving a dispute over compensation benefits pursuant to ORS 656.245, 656.247, 656.260, 656.327 or 656.340, where a claimant finally prevails after a proceeding has commenced, the Director of the Department of Consumer and Business Services or the Administrative Law Judge shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant’s attorney. In such cases, where an attorney is instrumental in obtaining a settlement of the dispute prior to a decision by the director or an Administrative Law Judge, the director or Administrative Law Judge shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant or claimant’s attorney. 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 under

⁵ "Substantial handicap to employment" means the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment. OAR 436-120-0005(11).

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.

“* * * * *

“(3) If a request for a contested case hearing, review on appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court is initiated by an insurer or self-insured employer, and the director, Administrative Law Judge or court finds that the compensation awarded under ORS 656.245, 656.247, 656.260, 656.327 or 656.340 to a claimant should not be disallowed or reduced, the insurer or self-insured employer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney fee in an amount set by the director, the Administrative Law Judge or the court for legal representation by an attorney for the claimant at the contested case hearing, review on appeal or cross-appeal.

“* * * * *.”

Claimant’s attorney argues that he should be awarded a total fee of \$7,900, the sum of the attorney fees awarded at each level of this matter to-date, under both ORS 656.385 (1) and (3). He contends the record in this case shows that it involves extraordinary circumstances. In his reply to insurer’s arguments claimant’s attorney elaborates that the extraordinary circumstances involve the number of levels that have been involved in this proceeding, plus the delay between the time the fees were assessed and the time when they might be paid. Claimant’s attorney further argues that insurer has not previously contested the amount of the fees that have been awarded to-date.

Insurer responds that claimant’s attorney is only entitled to a fee under ORS 656.385(3) for services at hearing. According to insurer, ALJ Pardington was not authorized to assess a fee under ORS 656.385(1) because claimant has not finally prevailed. Assuming ORS 656.385(1) did apply, however, insurer argues that extraordinary circumstances have not been shown.

A fee can be awarded under ORS 656.385(1) in (1) a dispute over compensation benefits pursuant to ORS 656.245, 656.247, 656.260, 656.327, or 656.340, where (2) the claimant finally prevails after (3) a proceeding has commenced. The language provides that either the director or the Administrative Law Judge will order the fee. The fee must be reasonable; based on all work done relative to the proceeding at all levels before the department; be proportionate to the benefit to the injured worker; and may not exceed \$2,000 absent a showing of extraordinary circumstances.

A fee can be awarded under ORS 656.385(3) where (1) compensation has been awarded to a claimant under ORS 656.245, 656.247, 656.260, 656.327, or 656.340, (2) the insurer initiated a request for a contested case hearing, and (3) the director or ALJ finds that the compensation awarded should not be disallowed or reduced. The fee must be reasonable and in an amount set by the director or ALJ, and is for legal representation of the claimant at hearing.

This is a dispute over vocational assistance benefits under ORS 656.340. Both parties requested a hearing. Claimant has prevailed;⁶ stated another way, vocational assistance should not be disallowed. Under these circumstances it appears ORS 656.385(1) and (3) overlap and a fee could be awarded under either section.

Prior to January 1, 2004, fees under ORS 656.385(1) could only be awarded “in a contested case order.”⁷ The 2003 Legislature amended the statute to allow fees to be awarded “after a proceeding has commenced,” so fees could be awarded for an attorney’s services at administrative review, even if the matter did not proceed to hearing. Additional amendments were made in 2005 to provide that the fees could be awarded by an Administrative Law Judge in addition to the director.⁸ The present language of ORS 656.385(1), then, contemplates that a fee

⁶ Claimant will not “finally prevail” until an order finding him eligible for vocational assistance becomes final by operation of law. If this final order is appealed, the issue of whether claimant’s attorney is entitled to a fee will remain undetermined. *See Greenslitt v. Lake Oswego*, 305 Or 530, 534-35 (1988) (Interpreting a former version of ORS 656.386(1): “A claimant ‘prevails finally’ before a forum if that forum holds in the claimant’s favor * * * and that determination is not appealed within the time allowed by statute. * * * If the referee [awards fees] before the claimant prevails finally, it is interlocutory in nature unless and until the 30-day appeal period runs.”).

⁷ Enrolled Senate Bill 620 (2003) provides, in part:

SECTION 2. ORS 656.385 is amended to read:

656.385. (1) 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** [*in a contested case order by*] 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. In such cases, [*after a contested case hearing request by the claimant,*] where an attorney is instrumental in obtaining a settlement of the dispute prior to a decision by the director, the director [*may*] **shall** require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant or claimant’s attorney. **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 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.**

⁸ Enrolled House Bill 2091 (2005) provides, in part:

SECTION 13. ORS 656.385 is amended to read:

656.385. (1) In all cases involving a dispute over compensation benefits pursuant to ORS 656.245, **656.247**, 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*] **or the Administrative Law Judge** shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant’s attorney. In such cases, where an attorney is instrumental in obtaining a settlement of the dispute prior to a decision by the director

may be awarded for services at administrative review, for services at hearing, and for services on review of a proposed order. At any stage, the fee is to be based on all work the claimant's attorney has done at all levels before the department. The fee awarded at each level of a proceeding, then, must take into account the work done at each previous level of the proceeding. The total fee awarded under ORS 656.385(1) is limited to \$2,000 for services at all levels,⁹ unless extraordinary circumstances are shown.

ORS 656.385(3), by its terms, limits the fee to only services provided at hearing. If I were to award claimant's attorney a fee under ORS 656.385(3) only, I would be ignoring the changes to ORS 656.385(1) that allow a fee for services at all levels of a proceeding. While ORS 656.385(3) does not provide a maximum limit on the fee that may be awarded, it does provide that fees under that subsection are to be in an amount set by the director. Fees under both ORS 656.385(1) and (3) are to be "reasonable." In awarding a fee under ORS 656.385(3), I would turn to the rules adopted pursuant to ORS 656.385(1) to determine what amount would be reasonable.

OAR 436-001-0265 provides a matrix outside of which the fee award may not fall absent a showing of extraordinary circumstances or agreement of the parties. The matrix factors in time devoted and results achieved.

Claimant's attorney has stated that he and his associate have spent time in this proceeding as follows:

Level of Proceeding	Number of Hours
Administrative Review Before RRU	< 2
Hearing Before Office of Administrative Hearings	10.10
Exceptions Process	5
Remand to RRU	4.83
Hearing Before ALJ Pardington	15.17
Exceptions Process	19.7
Total	56.8 hours

According to insurer, 8.10 hours of claimant's attorney's time was devoted to the issue of attorney fees and should be deducted from the total. I agree. Time devoted to the issue of attorney fees will not be taken into account in calculating the fee, so 8.10 hours are deducted, for

or an Administrative Law Judge, the director **or Administrative Law Judge** shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant or claimant's attorney. 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 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.

⁹ *Steven G. Humbert*, 10 CCHR 352, 358 (2005), *aff'd Roseburg Forest Products v. Humbert*, ___ Or App ___ (2007).

a total of 48.7 hours. Insurer also argues that the 11.5 hours claimant's attorney claimed was devoted to drafting the response to employer's exceptions was excessive. However, I have no reason to question the time claimed by claimant's attorney.

Claimant's attorney estimates the benefit to claimant in terms of the temporary disability he would receive if he were found entitled to an approved training plan; for a three-month plan, claimant would receive \$4,467.54, for a 12-month plan he would receive \$17,870.15. As a result of this order, claimant is now eligible for vocational assistance, although the type of assistance is yet to be determined. Under OAR 436-120-0008(2)(c)(C), the value of vocational assistance is assumed to be over \$6,000.

The total fee may not exceed \$2,000 absent a showing of extraordinary circumstances or agreement of the parties. ORS 656.385(1); OAR 436-001-0265(1)(b). Extraordinary circumstances are not established by merely exceeding the values in the matrix. However, the director has found extraordinary circumstances in cases where the amount of the fee under the matrix would not fairly compensate the claimant's attorney for the amount of work done. *See, e.g., Suzanne P. Blakley*, 9 CCHR 287, 297 (2004). I find the procedural history in this case to be extraordinary circumstances warranting a fee in excess of \$2,000. This matter has been before RRU twice, has gone to hearing twice, and has come before the director on insurer's exceptions twice. A fee of \$2,000 will not fairly compensate claimant's attorney for the amount of time devoted to this case. I find that \$7,900 is an appropriate fee for services at all levels, and is not out of proportion to the benefit to claimant.

IT IS HEREBY ORDERED the February 8, 2007 Proposed and Final Order is affirmed. Insurer is further ordered to pay to claimant's attorney a total fee of \$7,900.