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In the ORS 656.340 Vocational Assistance Dispute of

**HOMAR S. LOPEZ, Claimant**

Contested Case No: 09-052H

**PROPOSED & FINAL ORDER**

September 4, 2009

SAIF CORPORATION, Petitioner

HOMAR S. LOPEZ, Respondent

Before Steve Rissberger, Administrative Law Judge

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SAIF has requested a hearing in response to a Director's Review and Order that set aside the insurer's decision to end vocational training and awarded claimant \$2,000 in attorney fees. Pursuant to notice a hearing was scheduled for June 30, 2009. However, prior to the hearing, the parties informed the Hearing Division that they planned to submit this matter on the written record. Claimant was represented by his attorney, Phillip Garrow. The employer, Brightwood Corporation and the insurer, SAIF, were represented by SAIF's attorney, James Booth. Exhibits 1-42, 48, 22A, 33A, 41A, 45A, 51A-B, 54A and 57A are received into evidence pursuant to the written agreement of the parties.<sup>1</sup> The record closed following the submission of final argument and related correspondence on August 10, 2009.

**ISSUE STATEMENT**

**Vocational Assistance—Attorney Fees:** Whether the Director's Review and Order of March 16, 2009, which awarded claimant attorney fees of \$2,000 based, in part, on time spent on the case by a paralegal violated applicable provisions of ORS 656.385 and OAR 436-120-0008?

**FINDINGS OF FACT**

The Findings of Fact set forth in the Director's Review and Order of March 16, 2009 are hereby adopted and incorporated by reference. See *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 62-63 (2006).

**CONCLUSIONS AND OPINION**

At issue is the validity of the \$2,000 attorney fee awarded to claimant in the Director's Review and Order. SAIF argues that the award violated ORS 656.385(1) because it was based, in part, on work done by a paralegal in claimant's attorney's office rather than the attorney himself. In response, claimant contends that paralegal time provides a permissible basis for an attorney fee award under ORS 656.385(1), provided that the paralegal works under the supervision of the claimant's attorney and the services provided are reasonable.

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<sup>1</sup> The exhibits submitted by claimant's attorney on June 25, 2009, exs. 48, 22A, 33A, 41A, 45A, 51A-B, 54A and 57A, have been labeled in such a way that they do not correspond chronologically with the prior exhibits submitted by WCD, exs. 1-42. However, in the absence of any objections from SAIF and in the interest of administrative economy, I have elected not to relabel them here.

This is vocational assistance dispute under ORS 656.340. Accordingly, the standard of review available to me is a limited one. I may modify the Director's vocational assistance order only if it: (1) violates a statute or rule; (2) exceeds the statutory authority of the agency; (3) was made upon unlawful procedure; or (4) was characterized by an abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c); OAR 436-001-0225(5). In determining whether one or more of these criteria exist, I may admit evidence which was not before the department and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993). The burden of proof rests on the proponent of an asserted fact or position. See ORS 183.450(2).

ORS 656.385(1) governs the award of assessed attorney fees in vocational dispute cases. It 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 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.

Pursuant to the authority granted to it under ORS 656.385(1), WCD has adopted an administrative rule, OAR 436-120-0008(2) that establishes standards for awarding attorney fees. It provides for payment of attorney fees under a matrix that is incorporated into the rule and contains a top award of \$2,000, absent extraordinary circumstances. Criteria to be considered in determining the amount of the fee include the "results achieved" on behalf of the claimant and the "time devoted to the case." The matrix itself uses the term "Professional Hours Devoted" above a list of five columns that designate differing time categories from 1 to 2 hours to over 8 hours.

Both parties acknowledge that neither the statute, nor the rule, specifically addresses the question presented here—whether time spent by a paralegal can be included in an attorney's time for determining what fee is appropriate under the matrix. Nevertheless, based on the contents of OAR 436-120-0008(2) and the Director's past practice in similar cases, I am persuaded that the Director did not err here by including time spent by a paralegal in determining the amount of claimant's attorney fee.

A key factor here is the terminology employed in matrix itself. The use of the term “professional hours devoted” suggests that the agency did not intend to restrict consideration of the “time devoted to the case” solely to attorney time when it adopted OAR 436-120-0008(2). It follows that time devoted by a professional level employee, like a paralegal, who is not attorney, should be included in this category.

This interpretation is consistent with the agency’s past practice. For example, in *Jimmie D. Moore*, 8 CCHR 300 (2003), the Director specifically included paralegal time in considering the amount of a reasonable attorney fee, even though the insurer in that case argued, among other things, that it was improper to consider paralegal time in awarding a fee. *Moore* was decided before the adoption of OAR 436-120-0008(2) and, consequently, did not entail application of the matrix contained in the current version of OAR 436-120-0008(2). Nevertheless, if the prior practice of the Director was to consider paralegal time in awarding attorney fees, then it follows that use of the term “professional time devoted” as employed in the current version of OAR 436-120-0008(2) was included for a reason, and was intended to encompass professional-level work done by paralegals, as well as attorney time.

SAIF argued, in the alternative, that the agency exceeded its authority, if OAR 436-120-0008(2) was interpreted to allow for the consideration of paralegal time in awarding an attorney fee. SAIF’s position here is understandable. However, I found this contention to be unpersuasive. Nothing in ORS 656.385(1) explicitly prohibits the Director from considering a paralegal’s time in awarding an attorney fee, so long as the paralegal worked under the supervision of the claimant’s attorney and the amount of time asserted by claimant was determined to be reasonable.

Further, the consideration of paralegal time in the award of an assessed attorney fee is consistent with the practice followed by the Workers’ Compensation Board in its interpretation and application of an analogous statute and regulatory scheme. The Board has repeatedly held that paralegal time spent for research and investigation under an attorney’s supervision should be included in evaluating what constitutes a reasonable attorney fee. *See Jamie J. Boldway*, 52 Van Natta 755 (1999).<sup>2</sup>

In sum, I am not persuaded that the Director erred in its March 16, 2009 administrative Order when it found that time worked by a paralegal could be considered in combination with claimant’s attorney’s time for purpose of awarding an assessed attorney fee under OAR 436-120-0008(2).<sup>3</sup> Accordingly, the director’s order should be sustained without modification.

### **ORDER**

The Director’s Review and Order of March 16, 2009 is affirmed without modification.

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<sup>2</sup> Paralegal time is considered as distinct from secretarial services which are not considered as attorney services, but rather are treated as costs.

<sup>3</sup> According to claimant’s written argument, paralegal time in this case was spent on attorney directed research, investigation and participation in a vocational conference.