

In the Matter of the Compensation of
MARK S. HALL, Claimant

WCB Case No. 02-07574, 01-01691

ORDER ON REMAND

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Reviewing Panel: Members Lowell and Kasubhai.

This matter is before the Board on remand from the Court of Appeals. *Oregon Insurance Guaranty Association v. Hall*, 200 Or App 128 (2005). The court has reversed our prior order, *Mark S. Hall*, 55 Van Natta 3488 (2003), that affirmed an Administrative Law Judge's (ALJ's) order that set aside Oregon Insurance Guaranty Association's (OIGA's) denial of claimant's low back condition. In reaching our conclusion, we found that OIGA was not authorized to issue its denial because Reliance Insurance Company (the insolvent insurer) had previously erroneously accepted the claim even though it had not provided coverage to claimant's employer on the date of his injury. Relying on ORS 734.510(4)(a), the court determined that claimant's injury claim was not a "covered claim" and, as such, OIGA was not obligated to process his injury claim with Reliance. Holding that we erred in setting aside OIGA's denial and in upholding American Alternative Insurance Co.'s (AAIC's) denial, the court has remanded for reconsideration. Having received supplemental briefs from the parties, we proceed with our reconsideration.

FINDINGS OF FACT

The employer was insured by Reliance Insurance Company (Reliance) from July 1996 to August 2000. The coverage was terminated effective August 1, 2000. Claimant suffered a work-related injury on September 14, 2000, while working for the employer. At the time of injury, the employer's workers' compensation insurer was AAIC/Crawford.

Claimant filed an injury claim with his employer. The employer mistakenly sent the claim to Reliance. On December 15, 2000, Reliance mistakenly accepted claimant's injury claim as a lumbar strain. Reliance became insolvent in October of 2001 and OIGA assumed its rights, duties, and obligations. In May 2002, OIGA denied claimant's low back claim on the basis that the employer did not have an effective workers' compensation policy with Reliance on the date of claimant's injury.

In June 2002, claimant asked AAIC to process the claim. AAIC denied responsibility, arguing that another insurer had already accepted the claim. Specifically, AAIC explained:

“While your injury normally would have been the responsibility of [AAIC], another insurer accepted your claim and paid benefits. Under Oregon law once an insurer accepts a claim it can not later deny that it is not responsible on the basis that it did not have coverage at the time of the injury. Reliance Insurance Company (now OIGA) has improperly denied responsibility for your claim. OIGA is still responsible for your claim.” (Ex. 32).

Claimant requested a hearing on both denials.

CONCLUSIONS OF LAW AND OPINION

The ALJ found that Reliance knew or should have known that its policy ended on August 1, 2000, and thus, the denial was not based on “later obtained evidence” as required by ORS 656.262(6)(a). The ALJ then concluded that OIGA was responsible because the claim was covered, albeit in error, therefore falling under OIGA’s responsibility upon the insolvency of Reliance.

We affirmed the ALJ’s order, finding that OIGA stepped into the shoes of Reliance and took all the rights and responsibilities for the claim. *Mark S. Hall*, 55 Van Natta 3488 (2003). OIGA sought judicial review.

As previously noted, the court reversed and remanded for reconsideration. *OIGA v. Hall*, 200 Or App at 135-36. In resolving the dispute, the court addressed the question of whether the claim was a “covered claim” under the OIGA statutes and, if not, whether ORS 656.262(6)(a) nonetheless required OIGA to assume the insolvent insurer’s obligation to claimant. After reviewing the text and context of ORS 734.510(4)(a), the court identified three conditions that must be satisfied for the claim to be a “covered claim”: (1) the claim must be unpaid; (2) the unpaid claim must arise out of and be within the coverage and limits of an insurance policy to which OIGA applies; and (3) the event that gives rise to the claim must occur at a specific time, namely the time during which the insurance policy is in force.

Applying those criteria, the court determined that it was undisputed that the “insurance policy” regarding the insolvent insurer was not in force when claimant was injured. The court further stated that the context of ORS 734.510(4)(a) confirmed that OIGA was not liable for such a claim, noting that ORS 734.570(1) expressly provided that OIGA shall not be obligated for a claim arising after expiration, replacement, or cancellation of a policy by the insured. Citing *Carrier v. Hicks*, 316 Or 341, 348-51 (1993), the court clarified that OIGA “steps into the shoes of the insurer” only if the claim is a “covered claim” and that the statutory scheme “protects OIGA funds so that they are limited to cases in which no other insurance is available to pay the claim.” *Id.* at 351. Finally, the court concluded that OIGA was not claimant’s insurer of last resort because AAIC provided workers’ compensation coverage for the employer when claimant was injured, and it remained a solvent insurer. *Id.*

On remand, AAIC argues that Reliance’s erroneous acceptance does not establish a statutory ground for a “back-up” denial under ORS 656.262(6)(a).¹ Consequently, AAIC contends that Reliance remains responsible under the statutory scheme for claimant’s injury claim.

AAIC acknowledges Reliance’s insolvency and the practical difficulties that would confront claimant, who would need to stand in line with Reliance’s other creditors at the bankruptcy court. Nonetheless, because the statutory scheme does not relieve Reliance from its claim processing responsibilities, AAIC asserts that it is not liable for the claim. However, in denying responsibility for the claim, AAIC acknowledged that it would normally be liable. Nevertheless, it expressly and narrowly denied responsibility on the ground that another insurer had accepted the claim and paid benefits. (Ex. 32). Specifically, AAIC’s denial explained “while your injury normally would have been the responsibility of [AAIC], another insurer accepted your claim and paid benefits * * * OIGA is still responsible for your claim.” (*Id.*)

However, the aforementioned basis for AAIC’s denial was rejected by the court. That is, the court held that OIGA is not responsible for the claim. In doing so, the court noted that AAIC provided workers’ compensation coverage for the

¹ AAIC also contends that finding a bankrupt insurer no longer responsible would be a radical result because it would mean that despite a final assignment of responsibility, the insurer’s subsequent insolvency would reopen the issue of responsibility and reopen litigation. We disagree that most claims involving insolvent carriers would reopen litigation. This case is unusual because, the insolvent carrier chose to accept a claim for an injury that occurred outside of its dates of insurance coverage.

employer when claimant was injured, and it remained a solvent insurer. Thus, consistent with the court's opinion, we conclude that AAIC is responsible for claimant's injury claim.²

Because claimant has prevailed after remand from the court, ORS 656.388(1) provides for an attorney fee award for claimant's counsel's services before every prior forum.

After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's counsel's services at hearing, Board review, before the Court of Appeals, and on Board remand is \$10,000, payable by AAIC. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the hearing record, as well as claimant's briefs on Board review, to the court and on remand), the complexity of the issues, the nature of the proceedings, the value of the interest involved, and the risk that claimant's counsel might go uncompensated. This award is in lieu of the ALJ's attorney fee award, as well as our prior attorney fee award.

Accordingly, on remand and in lieu of all prior orders, the ALJ's order dated April 8, 2003 is reversed. OIGA's denial is reinstated and upheld. AAIC's denial is set aside and the claim is remanded to AAIC for processing in accordance with law. For services at hearing, on Board review, before the court, and on remand, claimant's attorney is awarded \$10,000, to be paid by AAIC.

IT IS SO ORDERED.

Entered at Salem, Oregon on June 16, 2006

² In its brief, OIGA requested a monetary adjustment between the parties. That matter is between the carriers. If the carriers cannot reach an agreement, they can present their dispute to the Director (Workers' Compensation Division).