

In the Matter of the Compensation of
MARVIN E. LEWIS, Claimant
WCB Case No. 97-05360, 97-05050, 97-00071
ORDER ON REMAND
Hooton Wold & Okrent LLP, Claimant Attorneys
Scheminske et al, Defense Attorneys

Reviewing Panel: Members Biehl, Lowell, and Herman.

This matter is before the Board on remand from the Supreme Court. *Lewis v. Cigna Ins. Co.*, 339 Or 342 (2005). The Supreme Court has reversed the Court of Appeals decision, *Lewis v. Cigna Ins. Co.*, 192 Or App 658 (2004), that affirmed our prior order, *Marvin E. Lewis*, 51 Van Natta 624 (1999), that upheld the insurer's "noncooperation" denial under ORS 656.262(13) and (14) (*former* ORS 656.262(14) and (15) (1999))¹ based on claimant's unreasonable refusal to participate in an "insurer-arranged medical examination" (IME). The Court found that, pursuant to ORS 656.325(1)(a), the maximum statutorily authorized sanction for such conduct was suspension of claimant's right to compensation until the IME occurred, rather than claim denial, and remanded the case for further proceedings regarding the "unresolved issue" of whether claimant failed to cooperate in a deposition in violation of ORS 656.262(14).²

¹ ORS 656.262(14) and (15) were added to ORS Chapter 656 in 1995 as part of Senate Bill 369 and were renumbered as ORS 656.262(13) and (14) in 2003. The relevant language was not changed and references throughout this order use the current numbers.

² On remand, claimant argues that, at hearing and on initial Board review, he raised the issue of the duration of the suspension orders related to his failure to attend the scheduled IMEs. Claimant apparently contends that, because the insurer did not promptly reschedule the IMEs after November 24, 1997, the date his former attorney notified the insurer's attorney that claimant was willing to attend IMEs and participate in the investigation deposition, the suspension of benefits should not extend beyond that date. There is no indication that claimant assigned this issue as error on judicial review. Therefore, we are not inclined to address it on remand. *Judith C. Whith Munro*, 54 Van Natta 2116, 2120 (2002) (Board declined to address penalty issue on remand where the claimant did not preserve the issue on initial Board review or assign it as error on judicial review). In addition, the Court only remanded for resolution of the "unresolved issue * * * regarding whether claimant failed to cooperate in a deposition in violation of ORS 656.262(14)." *Lewis*, 339 Or at 352.

In any event, in determining that ORS 656.325(1)(a) deals specifically with IMEs, the Court emphasized the following language in that statute: "*If the worker refuses to submit to any such examination, or obstructs the same, the rights of the worker to compensation shall be suspended with the consent of the director until the examination has taken place, and no compensation shall be payable during or for account of such period.*" 339 Or at 346-47 (Emphasis in original).

Claimant sustained compensable back injuries on October 21, 1992 and August 27, 1996, which the insurer accepted, respectively, as a cervical/lumbosacral strain and a disabling sacroiliac sprain/strain. The 1992 injury claim was closed by a January 25, 1993 Determination Order.

Claimant underwent IMEs in October 1996 and December 1996 regarding the 1996 injury claim. On December 13, 1996, the insurer issued a partial denial of claimant's multilevel degenerative disc disease as preexisting and unrelated to the 1996 work injury. Claimant requested a hearing on that denial. (WCB Case No. 97-00071). The hearing was set for March 1997 before Administrative Law Judge (ALJ) Neal. However, at claimant's request, the hearing on the partial denial was postponed when he subsequently filed a new claim for an occupational disease for his low back degenerative disc disease condition and an aggravation claim relating to the 1992 back injury claim. (Ex. 113). In making this deferral request, claimant noted that all claims should be consolidated for hearing because they involved alternative theories of compensability of the same condition and that the insurer was within the claim processing period for the recently filed occupational disease and aggravation claims. (*Id.*)

The insurer arranged for claimant to undergo an IME for the purpose of obtaining medical opinions regarding the aggravation and occupational disease claims. Claimant failed to appear. The insurer rescheduled the IME and again claimant failed to appear. Claimant and his former attorney subsequently appeared at an April 30, 1997 deposition, but left before the insurer's counsel had finished questioning claimant. (Ex. 132-38-40).

On May 2, 1997, the insurer requested that the Director suspend claimant's benefits. (Ex. 134). On May 20, 1997, the Director issued "pre-suspension" warning notices,³ notifying claimant that it would suspend his benefits unless, within five days, he or his attorney documented that the failure to cooperate was reasonable or the insurer notified the Director that he was cooperating. (Exs. 138, 139).

³ We have previously referred to the Director's "pre-suspension" warning notices as "suspension notices." See *Claude M. Jones*, 54 Van Natta 337, 339 (2002); *Mark S. Lehman*, 51 Van Natta 3, 5 (1999). To avoid confusion between a Director's "warning notice" and a Director's order suspending benefits, we refer to the former notice as a "pre-suspension" warning notice. See *Randy L. Kimball*, 55 Van Natta 3455, 3457 n 4 (2003).

On June 6, 1997, the Director suspended claimant's compensation for failing to cooperate with the deposition and failing to attend and cooperate with the IME. (Exs. 154, 155).

On June 20, 1997, the insurer issued two denials based on claimant's alleged "failure to cooperate," one denial related to the aggravation claim and the other related to the occupational disease claim. (Exs. 158, 159). The grounds for both denials were the same: (1) claimant's failure to attend scheduled IMEs; and (2) his failure to cooperate at the deposition.

Claimant requested a hearing on these "noncooperation" denials. In doing so, he did not explicitly indicate that he was requesting an expedited hearing.⁴ The insurer argued that, by failing to request an expedited hearing under ORS 656.291, claimant had forfeited his right to a hearing.

On review, we rejected the insurer's procedural argument. Finding that claimant's failure to appear at the rescheduled IME amounted to noncooperation under ORS 656.262(14), we upheld the insurer's denials on that basis. In doing so, we did not reach the issue of whether claimant's conduct at the deposition amounted to noncooperation. *Marvin E. Lewis*, 51 Van Natta 624 (1999).

Both claimant and the insurer sought judicial review. The court held that claimant did not properly request an expedited hearing on the noncooperation denials. *Lewis v. Cigna Ins. Co.*, 174 Or App 531 (2001). Relying on its decision in *SAIF v. Dubose*, 166 Or App 642 (2000), *rev allowed*, 331 Or 692 (2001), the court concluded that we lacked authority under ORS 656.262(14) to consider claimant's challenge to the noncooperation denials and that the insurer was entitled to have those denials upheld on that basis.

On review, the Supreme Court vacated the court's decision and remanded the case to the Court of Appeals for consideration in light of *SAIF v. Dubose*, 335 Or 579 (2003). *Lewis v. Cigna Ins. Co.*, 336 Or 125 (2003). On remand, the Court of Appeals affirmed our prior order, *Marvin E. Lewis*, 51 Van Natta 624 (1999), that upheld the insurer's "noncooperation" denials. *Lewis v. Cigna Ins. Co.*, 192 Or App 658, 700 (2004). Claimant appealed that decision to the Supreme Court.

⁴ On Board review, claimant argued: (1) his conduct at the deposition did not amount to noncooperation; and (2) failure to attend an IME was not noncooperation under ORS 656.262(13) and (14); rather, it was noncooperation under ORS 656.325(1)(a), which provided a maximum penalty of suspension of benefits, not denial of the claim.

The Supreme Court held that the legislature intended to limit the sanction for a claimant's noncooperation with an IME to suspension of a claim during any period of noncooperation pursuant to ORS 656.325(1)(a). *Lewis v. Cigna Ins. Co.*, 339 Or 342 (2005). Because our decision upholding the insurer's noncooperation denials was based on the issue of noncooperation in the IME, the Court remanded for resolution of the issue regarding whether claimant failed to cooperate in a deposition in violation of ORS 656.262(14).

As the Court has held, the insurer could not deny claimant's aggravation and occupational disease claims based on his failure to attend scheduled IMEs.⁵ *Lewis*, 339 Or at 351. Thus, the issue before us is whether the circumstances surrounding the deposition justified the insurer's "noncooperation" denials. Based on the following reasoning, we set aside the "noncooperation" denials.

ORS 656.262(13) provides:

"Injured workers have the duty to cooperate and assist the insurer or self-insured employer in the investigation of claims for compensation. Injured workers shall submit to and shall fully cooperate with personal and telephonic interviews and other formal or informal information gathering techniques. Injured workers who are represented by an attorney shall have the right to have the attorney present during any personal or telephonic interview or deposition. However, if the attorney is not willing or available to participate in an interview at a time reasonably chosen by the insurer or self-insured employer within 14 days of the request for interview and

⁵ On review, we affirmed the Director's suspension orders, finding that claimant's failure to attend the IME justified the suspension of his compensation until he cooperated in such an examination. The Supreme Court addressed this issue, stating that:

"In this court, claimant argues that his nonattendance at the examinations was reasonable but that, even if his nonattendance was not reasonable, the maximum statutorily authorized sanction that he faced was only a suspension of his right to compensation until the examination occurred, not a denial of his claims. Because we find the latter argument to be well taken, we confine our discussion to that issue." *Lewis*, 339 Or at 346.

In any event, for the reasons expressed in our prior order, we continue to find the Director's suspension orders justified, based on claimant's failure to attend the IME.

the insurer or self-insured employer has cause to believe that the attorney's unwillingness or unavailability is unreasonable and is preventing the worker from complying within 14 days of the request for interview, the insurer or self-insured employer shall notify the director. If the director determines that the attorney's unwillingness or unavailability is unreasonable, the director shall assess a civil penalty against the attorney of not more than \$1,000."

Regarding the appeal process for a "noncooperation" denial, ORS 656.262(14) provides, in relevant part:

"After such a denial, the worker shall not be granted a hearing or other proceeding under this chapter on the merits of the claim unless the worker first requests and establishes at an expedited hearing under ORS 656.291 that the worker fully and completely cooperated with the investigation, that the worker failed to cooperate for reasons beyond the worker's control or that the investigative demands were unreasonable. If the [ALJ] finds that the worker has not fully cooperated, the [ALJ] shall affirm the denial, and the worker's claim for injury shall remain denied. If the [ALJ] finds that the worker has cooperated, or that the investigative demands were unreasonable, the [ALJ] shall set aside the denial, order reinstatement of interim compensation if appropriate and remand the claim to the insurer or self-insured employer to accept or deny the claim."

Pursuant to ORS 656.262(14), we must determine whether: (1) claimant has established that he fully and completely cooperated with the investigation; (2) he failed to cooperate for reasons beyond his control; or (3) the investigative demands were unreasonable.

A deposition is allowed by statute; therefore, the investigative demand of submitting to a deposition is not unreasonable. ORS 656.262(13); *Patti E. Bolles*, 49 Van Natta 1943, 1945-46 (1997). Prior to the deposition, the parties did not reach agreement on claimant's former attorney's attempts to limit the scope and duration of the deposition. (Exs. 126, 129A-2, 132-10, -12, -38). However, the

parties agreed to hold the deposition at a mutually convenient time at the Portland Hearings Division's offices so that an ALJ would be available, if needed. (Exs. 126, 129A, 132).

As agreed, on April 30, 1997, claimant and his former attorney attended the scheduled deposition. (Ex. 132). At the deposition, claimant admitted to having a poor memory and could not recall many of the events or information to answer the insurer's attorney's questions. (*Id.*) After claimant responded to several questions from the insurer's attorney about, *inter alia*, past back injuries and past medical treatment by stating that he could "not recall," the insurer's attorney instructed him about the deposition procedures and possible penalties for failure to tell the truth.⁶

⁶ Specifically, at the deposition, the following dialogue occurred:

"Q. [Insurer's Attorney]: All right. In this setting – in this deposition setting – have you received instructions from anyone as to what is going to take place here, today?"

"A. [Claimant]: No.

"Q. [Insurer's Attorney]: Okay. Let me give you a little bit of a briefing then. You have been, as you know, sworn to tell the truth; that's about the only formality that's involved. Other than that, this is a much less formal setting than being in a courtroom or hearing room. When I ask a question, if you want to confer in private with your attorney, * * * all you have to do is say so and we can take a break and you can talk to her. If you wish to review notes or records before answering a question, all you need to do is to say so and we'll take a break so that you can do that; do you understand?"

"A. [Claimant]: Yes.

"Q. [Insurer's Attorney]: I have mentioned that you have been sworn to tell the truth and you indicate that you didn't know that there was a penalty if you don't tell the truth during your testimony; so let me explain that. Generally speaking, there's two types of penalties that can be imposed if you falsely testify under oath. One is a crime called false swearing, which means that you falsely testify about something which is not a fact material to the matter at issue. Another is perjury which is a felony charge with which you can be charged and prosecuted and suffer criminal penalties if you falsely testify about a material fact involved in the matter at issue. So do you now understand that if you falsely testify penalties can be imposed against you?"

"[Claimant's Former Attorney]: He's asking you if you understand the question.

"[Claimant]: Yes, I do.

However, claimant's inability to recall events or information does not constitute a failure to cooperate.

At the deposition, claimant's former attorney objected to the insurer's attorney's question as to why claimant did not attend the scheduled April 28, 1997 IME. (Ex. 132-34). The sole ground for this objection was that the question was not relevant.⁷ (*Id.*) Based on his former attorney's instruction, claimant did not answer that question. (Ex. 132-34-35). We find that the relevancy objection was appropriate. We reason as follows.

In *SAIF v. Dubose*, 193 Or App 62, 67 (2004), the court reasoned that ORS 656.262(13) "expressly describes the duty to cooperate as a duty to cooperate in the investigation of *claims for compensation*," and that the failure of a worker to advise a carrier why the worker did not attend an IME was not part of an investigation of the claim for compensation. (Emphasis in original). Here, applying the *Dubose* reasoning, claimant's duty to cooperate in the deposition did not extend to questions regarding why he did not attend the IME because such questions were not part of an investigation of the claim for compensation. Thus, claimant's former attorney's relevancy objection was appropriate.

"Q. [Insurer's Attorney]: You understand that it's very important to tell the truth?

"A. [Claimant]: Yes, I do.

"Q. [Insurer's Attorney]: Do you further understand that if you – if I ask you a question and you know the answer to it and you say, 'I don't remember' then that's not truthful.

"A. [Claimant]: If I can't recall the statement you give me, I can't recall it; dates or times. I don't have no great memory –

"[Claimant's Former Attorney]: He's asking you if you understand.

"[Claimant]: I know; I understand." (Ex. 132-7-9).

⁷ After the deposition, in a separate proceeding before the Director regarding a dispute over civil penalties against claimant's former attorney, the attorney testified that the proper basis for her objection was protection of attorney-client privilege. (Ex. 170-3). Nevertheless, in determining the reasonableness of claimant's actions, we base our decision on the events that transpired during the deposition. Because there was no assertion of attorney-client privilege at the deposition, we decline to consider such a challenge.

Notwithstanding the grounds for the objection, the insurer argues that, claimant's former attorney's instruction to claimant not to answer the disputed question as to why he did not attend the scheduled IME was unreasonable. In support of this argument, the insurer contends that the deposition was taken pursuant to ORCP 39 and, under ORCP 39D, objections shall be noted upon the record and evidence objected to shall be taken subject to the objections. Thus, the insurer contends that claimant's former attorney's instruction not to answer the disputed question subject to her objection was unreasonable. The insurer also argues that claimant's former attorney's eventual instruction to leave the deposition before its attorney was finished with his questioning was unreasonable. Finally, citing *Sekermestrovich v. SAIF*, 280 Or 723 (1977), and *International Paper Co. v. Huntley*, 106 Or App 107 (1991), the insurer contends that ORS 656.262(14) does not provide an exception to the general rule that a party may not be shielded by the incorrect or unreasonable advice of counsel. Thus, the insurer argues that by following his former attorney's incorrect and unreasonable advice, claimant did not cooperate with the deposition.

We agree that, under the principles in *Sekermestrovich* and *Huntley*, a claimant cannot rely on any incorrect advice of his/her attorney. Nevertheless, for the reasons explained below, we do not find that claimant's former attorney's advice was incorrect or unreasonable, and we find that claimant fully cooperated with the deposition.

The insurer is correct that the generally accepted procedure in a deposition when a party objects to a question is to state the objection for the record, then allow the deponent to answer the disputed question. Later, at hearing, the objecting party may then seek ALJ resolution of the evidentiary issue. These procedures are modeled after ORCP 39. *See generally* ORCP 39.⁸ Although the

⁸ ORCP 39D(3) provides the rule of civil procedure for objections at a deposition and states:

“D(3) **Objections.** All objections made at the time of the examination shall be noted on the record. A party or deponent shall state objections concisely and in a non-argumentative and non-suggestive manner. Evidence shall be taken subject to the objection, except that a party may instruct a deponent not to answer a question, and a deponent may decline to answer a question, only:

“(a) when necessary to present or preserve a motion under section E of this rule;

“(b) to enforce a limitation on examination ordered by the court;
or

“(c) to preserve a privilege or constitutional or statutory right.”

rules of civil procedure may provide some general guidelines for handling objections at a deposition in a workers' compensation matter, they are not binding under Workers' Compensation law. *See* ORS 656.283(7) (ALJ is not bound by common law or statutory rules of evidence and may conduct a hearing in any manner that will achieve substantial justice).

In addition, the above method is not the only one that may be used to address an objection during a deposition. In this regard, ORCP 39E provides for court assistance during the taking of a deposition.⁹ Again, that rule provides some general guidelines for handling objections at a deposition in a workers' compensation matter, although it is not binding under Workers' Compensation law. *See* ORS 656.283(7). The insurer argues that, because there was no pending hearing request, the Board's Hearing Division had no jurisdiction to address any objection at the deposition. We disagree.

First, there was a pending hearing request regarding the insurer's partial denial (WCB Case No. 97-00071), although it had been deferred pending processing of the newly filed occupational disease and aggravation claims. (Ex. 113). Second, even without considering the deferred hearing request, the Board's Hearings Division would have jurisdiction over an objection to a question during a pre-hearing deposition regarding issues of compensability and responsibility concerning a claim.

⁹ ORCP 39E(1) provides the rule of civil procedure for motion for court assistance at a deposition and states:

“E(1) Motion for court assistance. At any time during the taking of a deposition, upon motion and a showing by a party or a deponent that the deposition is being conducted or hindered in bad faith, or in a manner not consistent with these rules, or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in section C of Rule 36. The motion shall be presented to the court in which the action is pending, except that non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only on order of the court in which the action is pending. Upon demand of the moving party or deponent, the parties shall suspend the taking of the deposition for the time necessary to make a motion under this subsection.”

In this regard, in *Gaynor v. Board of Parole*, 165 Or App 609 (2000), the court discussed an agency's statutory authority to act:

“It is a fundamental principle of administrative law that an administrative body possesses only those powers that the legislature grants, and that it cannot exercise authority that it does not possess. *SAIF v. Shipley*, 326 Ore. 557, 561, 955 P.2d 244 (1998). That principle extends to administrative bodies * * * that perform judicial functions. They do not possess the general jurisdictional powers of a court. Instead, their powers are restricted to those conferred expressly by statute or by necessary implication. *Campbell v. Bd. of Medical Exam.*, 16 Ore. App. 381, 391-92, 518 P.2d 1042 (1974).” 165 Or App at 612.

In other words, an agency's power includes that expressly conferred by statute as well as such implied power as is necessary to carry out the power expressly granted. *Warren v. Marion County*, 222 Or 307 (1960).

Thus, the relevant inquiry is whether the legislature, either expressly or by necessary implication, granted the Board's Hearings Division the power to resolve an objection to a question presented during a deposition held under ORS 656.262(13). Based on the following reasoning, we find that it did.

The legislature did not explicitly grant such power to the Board's Hearings Division.¹⁰ However, ORS 656.262(13) provides that “[i]njured workers have the duty to cooperate and assist the insurer or self-insured employer in the investigation of *claims for compensation*.” (Emphasis added). That duty to cooperate includes participating in information gathering techniques, including depositions. ORS 656.262(13). Furthermore, the deposition here concerned compensability and responsibility issues, which are “matters concerning a claim” (*i.e.*, “matters in which a worker's right to receive compensation, or the amount thereof, are directly in issue”) and, as such, are within the jurisdiction of the Board and its Hearings Division. ORS 656.704(1), (3).¹¹ Because the Board and its

¹⁰ The legislature also did not explicitly grant such power to the Director, although it did grant the Director the power to assess a civil penalty against an injured worker's attorney if the Director determined that the attorney's unwillingness or unavailability to participate in an interview was unreasonable. ORS 656.262(13).

¹¹ ORS 656.704 provides, in relevant part:

Hearings Division have jurisdiction over the compensability and responsibility issues that gave rise to the investigative deposition authorized under ORS 656.262(13), by necessary implication, the Board's Hearings Division has the authority to resolve objections to questions posed during that deposition.¹²

Here, at claimant's former attorney's request, the deposition was held at the Portland office of the Board's Hearings Division. This request was made in case an ALJ was needed to resolve any disputes during the deposition. (Exs. 126, 129A).

As noted above, claimant's former attorney attempted to limit the scope and duration of the deposition, and the insurer's attorney did not agree to those limitations. When the insurer's attorney first asked the question about claimant's reasons for not attending the scheduled IME, claimant's former attorney objected on the grounds of relevance and instructed claimant not to answer that question. (Ex. 132-34-35). The insurer's attorney proceeded to ask several other questions, then he returned to the disputed question about claimant's reasons for not attending the scheduled IME. The insurer contends that, at that point, claimant's former attorney unreasonably terminated the deposition. We disagree.

After reviewing the deposition transcript, we find that claimant's former attorney stopped the deposition so that a ruling could be obtained from an ALJ regarding her objection to the insurer's attorney's question. (Exs. 132-37-39). Claimant's former attorney made the following statements after the insurer's attorney returned to the disputed question during the deposition.

“(1) Actions and orders of the Director of the Department of Consumer and Business Services regarding matters concerning a claim under this chapter, and administrative and judicial review of those matters, are subject to the procedural provisions of this chapter and such procedural rules as the Workers' Compensation Board may prescribe.

* * * * *

“(3)(a) For the purpose of determining the respective authority of the director and the board to conduct hearings, investigations and other proceedings under this chapter, and for determining the procedure for the conduct and review thereof, matters concerning a claim under this chapter are those matters in which a worker's right to receive compensation, or the amount thereof, are directly in issue. * * * ”

¹² Moreover, our rules provide for pre-hearing depositions of claimants “in the manner prescribed by ORS 656.262(14).” OAR 438-006-0055. As noted in footnote 1, ORS 656.262(14) was renumbered as section (13) in 2003. We note that OAR 438-006-0055 has not been amended to reflect that change. Therefore, the statute listed in the quoted clause should be “ORS 656.262(13).”

“* * * what we can do is stop, now. You can get a ruling from a judge as to whether [claimant] has to answer that question with regard to your investigation. Then we’ll come back and do the deposition at another time * * * based on that ruling.” (Ex. 132-37)

“* * * let’s go ahead and stop the deposition now and resume it after a judge’s ruling, because I’m not going to be here more than an hour.” (Ex. 132-38).

“* * * * *

“We’re going to stop the deposition now, until we get a ruling.” (*Id.*)

At that point, claimant’s former attorney prepared to leave and the following dialogue occurred:

“[Insurer’s Attorney]: We’re still on the record * * *. The record should reflect that [claimant’s former attorney] has *soto voce* instructed [claimant] to leave and [she] is gathering her belongings, as is [claimant] and they’re leaving. I’m certainly not finished with my questions, counsel; if you leave, appropriate sanctions are available.

“[Claimant’s Former Attorney]: We’ll wait for a ruling. You’ve threatened me twice, as to sanctions and we’ll wait for a judge to rule and then we can proceed with a deposition, if you so proceed afterwards, based on the ruling. So I’m willing to cooperate with your client if you ask the appropriate questions for an investigation.” (Ex. 132-38-39).

Based on the above statements, it is clear that claimant’s former attorney was not terminating the deposition for all time. Instead, her primary concern was getting a ruling from an ALJ before proceeding with the deposition. As discussed above, an ALJ had the authority to provide such a ruling and the relevance objection to the disputed question was appropriate.

Furthermore, the disputed question was the insurer's attorney's question. Yet, rather than contacting an ALJ to get a ruling, the insurer's attorney, two days after the deposition, requested that the Director suspend claimant's benefits and assess a civil penalty against claimant's former attorney. (Ex. 134). This request was based, in part, on the insurer's contention that claimant failed to fully cooperate with the deposition and that claimant's former attorney was unreasonably unwilling to participate in the deposition.¹³ (*Id.*)

On this record, we conclude that claimant fully cooperated in the deposition.¹⁴ In this regard, claimant attended and participated in the deposition. Claimant's former attorney's relevancy objection to the disputed question and her advice not to answer the disputed question pending a ruling from an ALJ was not incorrect or unreasonable. Nor were claimant's actions in following that advice. The fact that the insurer's attorney did not seek a ruling from an ALJ regarding his disputed deposition question does not mean that claimant did not fully cooperate. Moreover, claimant later agreed to reconvene and participate in the deposition.

Consequently, because claimant has established that he fully cooperated with the insurer's investigative (deposition) demands, we set aside the insurer's "noncooperation" denials based on his failure to cooperate with the deposition. Therefore, we remand the claim to the insurer for processing according to law. ORS 656.262(14).¹⁵

¹³ On November 24, 1997, claimant's former attorney notified the insurer's attorney that claimant would "participate again in the investigation deposition." (Ex. 169). The insurer did not reschedule the deposition following this notice.

¹⁴ On remand, claimant's current attorney argues that, under the doctrine of issue preclusion, the December 30, 1997 contested case order that reversed the civil penalties assessed against claimant's former attorney decides the issue of whether claimant cooperated with the investigation. We disagree.

Issue preclusion precludes future litigation on an issue only if the issue was "actually litigated and determined" in a setting where its determination was essential to the final decision reached. *Drews v. EBI Companies*, 310 Or 134, 139 (1990). For issue preclusion to apply, five requirements must be met: (1) the issue in the two proceedings must be identical; (2) the issue must have been actually litigated and essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard; (4) the party sought to be precluded was a party or was in privity with a party in the prior proceeding; and (5) the prior proceeding was the type of proceeding to which a court will give preclusive effect. *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 104 (1993). Here, even assuming that the other four factors are satisfied, the prior hearing did not address the identical issue. Nevertheless, the contested case order establishes that claimant's former attorney did not unreasonably interfere with the deposition.

¹⁵ Although we find that claimant established that he fully cooperated with the insurer's investigative (deposition) demands under these particular circumstances, we do not recommend suspension of a deposition as a method for resolving evidentiary disputes. Instead, we strongly encourage

Finally, 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, before the Supreme Court, and on Board remand is \$9,000, payable by the insurer. 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 courts 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 \$3,000 attorney fee award.

Accordingly, on remand, the ALJ's May 12, 1998 order is reversed in part and affirmed in part. The June 6, 1997 Orders Suspending Compensation are upheld. The ALJ's attorney fee award of \$3,000 for setting aside the June 6, 1997 Orders Suspending Compensation is reversed. In lieu of the ALJ's \$3,000 attorney fee award for setting aside the June 20, 1997 noncooperation denials for failure to cooperate with the deposition, the total attorney fee awarded for services at hearing, Board review, before the Court of Appeals, before the Supreme Court, and on Board remand is \$9,000, payable by the insurer. The remainder of the ALJ's order is affirmed.

IT IS SO ORDERED.

Entered at Salem, Oregon on April 26, 2007

parties and their attorneys to follow the general procedure of answering a question in a deposition subject to any objection. *See generally* ORCP 39D. In that way, the deposition can proceed without delay and a ruling on the objection may ultimately be made at a later date. Subsequently, if the deposition objection is sustained, the ALJ and reviewing bodies will not consider any response that was provided subject to the objection during the deposition.

Alternatively, if the parties or their attorneys wish to secure an ALJ's ruling to an objection during a deposition, they should contact the assigned ALJ via telephone or, if there is no assigned ALJ, the Presiding ALJ (or Assistant Presiding ALJ) via telephone. *See generally* ORCP 39E. In that way, the objection can be ruled on and the matter resolved while the parties are still at the deposition and any questioning can then proceed. Only as a last resort should the deposition be suspended pending a ruling from an ALJ.