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

Reviewing Panel: Members Biehl, Lowell, and Herman. Member Lowell dissents in part and specially concurs in part.

On April 26, 2007, we issued an Order on Remand that: (1) affirmed that portion of an Administrative Law Judge's (ALJ's) order that set aside the insurer's "noncooperation" denials based on claimant's failure to cooperate with a deposition; and (2) awarded claimant's counsel an insurer-paid attorney fee of \$9,000 for services performed at the hearing level, on Board review, before the courts, and on remand. Both parties requested reconsideration. The insurer challenged our finding that claimant "fully and completely" cooperated in the claim investigation and submitted a copy of an Oregon Supreme Court disciplinary order regarding claimant's former counsel. Claimant requested an increased attorney fee award. On May 18, 2007, we abated our prior order and implemented a briefing schedule. Having received the parties' positions, we proceed with our reconsideration.

As we explained in our initial Order on Remand, the court remanded for resolution of the issue regarding whether claimant failed to cooperate in a deposition in violation of ORS 656.262(14).¹ Thus, the issue before us is whether the circumstances surrounding the April 30, 1997 deposition justified the insurer's "noncooperation" denials. In other words, we must determine whether claimant established, under ORS 656.262(14), that: (1) he fully and completely cooperated with the investigation; or (2) he failed to cooperate for reasons beyond his control; or (3) the investigative demands were unreasonable.

Following our reconsideration, we continue to affirm that portion of the ALJ's order that set aside the insurer's "noncooperation" denials based on claimant's failure to cooperate with a deposition.

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.

In arguing that claimant did not cooperate with the deposition, the insurer focuses on various pre-deposition negotiations between its attorney and claimant's former attorney regarding the time and place of the deposition and claimant's former attorney's efforts to limit the issues that could be addressed in the deposition. The insurer's attorney did not agree to the proposed limitation on the issues and agreed to a mutually acceptable time and place for the deposition. Specifically, at claimant's former attorney's request, the deposition was held at the Portland office of the Board's Hearings Division.

Claimant and his former attorney attended the deposition as scheduled. In addition, claimant participated in the deposition, although he acknowledged having a poor memory and not being able to recall many of the events or information he was questioned about by the insurer's attorney. The negotiations before the scheduled deposition are not relevant to the issue of whether claimant "fully and completely cooperated" with the deposition. In any event, the attorneys were eventually able to agree to a mutually convenient time and place for the deposition. Thus, for purposes of this particular case, the relevant matter under ORS 656.262(14) is that claimant attended and participated in the scheduled deposition. Moreover, in the absence of evidence persuasively establishing an intentional misrepresentation by claimant, his inability to recall specific events or information does not constitute a failure to cooperate.²

The insurer also contests our finding that claimant's former attorney's actions at the deposition were not incorrect or unreasonable and that claimant's actions in following his former attorney's advice were not incorrect or unreasonable. In support of this contention, the insurer submits a copy of a November 21, 2002 "Order Approving Stipulation for Discipline" involving claimant's former attorney and requests that we take administrative notice of that order.³

² The insurer also objects to our quoting its attorney's explanation of the deposition process to claimant after he responded "I can't recall" to several questions during the deposition. Our citation to this portion of the deposition was included to show that the insurer's attorney recited claimant's obligations because, according to claimant, no one had previously provided him with that information. The aforementioned dialogue was quoted for no other purpose.

³ Because the insurer did not previously refer to this 2002 disciplinary order in support of its position during our initial review on remand, we are not inclined to exercise our discretion and consider the insurer's request for administrative notice on reconsideration of our April 26, 2007 Order on Remand. See *Vogel v. Liberty Northwest Ins. Corp.*, 132 Or App 7, 13 (1994); *William A. Hedger, on recons.*, 58 Van Natta 2382 (2006). Nevertheless, as addressed below, even if we considered this disciplinary order, it would not change the result.

Claimant responds that the statutory scheme under ORS 656.262(13) and (14) presents a “separation of remedies” that evidences a legislative intent that a claimant is subject to a noncooperation denial under ORS 656.262(14) based solely on his or her own conduct, without consideration of any misconduct by his or her attorney, which claimant contends is subject to sanction by the Director under ORS 656.262(13). Therefore, claimant argues, the additional evidence being offered by the insurer is irrelevant because it concerns his former attorney’s conduct rather than his own conduct at the deposition. Claimant also contends that, under ORS 656.262(13), he had the right to have his attorney present during the deposition.

The insurer counters that in our initial Order on Remand we agreed that, under the principles in *Sekermestrovich v. SAIF*, 280 Or 723 (1977), and *International Paper Co. v. Huntley*, 106 Or App 107 (1991), claimant cannot rely on any incorrect advice of his attorney, although we concluded that his former attorney was not incorrect or unreasonable – a conclusion that the insurer challenges. The insurer also contends that claimant’s “separation of remedies” argument is without merit, arguing that the inclusion in ORS 656.262(13) of a sanction for obstructive conduct by a worker’s attorney does not absolve claimant from the requirement that he fully cooperate and assist in the claim investigation. Finally, the insurer argues, the “statute contains no language providing that a worker may rely on the obstructive conduct of their counsel to avoid complying with the cooperation requirements of the law.”

In *Sekermestrovich*, 280 Or at 727, the court held that the failure of an attorney to file a request for hearing from a carrier’s denial did not constitute good cause under ORS 656.319(1)(b), unless the attorney’s reason for failing to file would be good cause if attributed to the claimant. In doing so, the court relied on *former* ORS 18.160, which allowed a court discretion to “relieve a party from a judgment, decree, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect.” *Id.* at 726. Reasoning that it had repeatedly held that the negligence of an attorney is not excusable neglect under *former* ORS 18.160 unless the attorney’s reason for failure to file would be excusable had it been attributed to the party, the court applied the same principles in workers’ compensation cases. *Id.* at 727.

In *Huntley*, 106 Or App at 110, the court upheld a penalty assessed against a carrier for terminating temporary disability benefits when there was no statutory basis for such termination. In doing so, the court rejected the carrier’s contention that it had a legitimate doubt as to its liability because it relied on the advice of

counsel. Citing *Free v. Wilmar J. Helric Company*, 70 Or App 40 (1984), *rev den*, 298 Or 553 (1985), the court held that “[e]mployer’s attorney is its agent, and employer, as principal, cannot hide behind the incorrect advice of its agent.” *Huntley*, 106 Or App at 110.

After further considering this matter, we find the holdings of *Sekermestrovich* and *Huntley* distinguishable. We reason as follows.

ORS 656.262(13) specifically provides that a represented injured worker “shall have the right to have the attorney present during any personal or telephonic interview or deposition.” In addition, *Sekermestrovich* and *Huntley* and their progeny did not involve a statute that expressly granted the right of a represented party to have his or her attorney present during an interview or deposition and the consequences when that attorney was unavailable. Moreover, ORS 656.262(13) provides for sanctions against a worker’s attorney if the Director determines that the attorney’s unwillingness or unavailability is unreasonable, whereas ORS 656.262(14) addresses sanctions against a worker for his or her failure to cooperate with an investigation involving compensability of an initial claim or an aggravation claim.

In analyzing ORS 656.262(13) and (14), we apply the methodology established by the Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). Under that methodology, we first examine the text and context of the statute because the statute’s wording “is the best evidence of the legislature’s intent.” *Id.* at 610. Related to that principle is a rule of textual construction that governs the scope of our first-level inquiry. That rule limits our role in construing a statute “simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted[.]” ORS 174.010; *PGE*, 317 Or at 611. If the legislature’s intent is clear from the text and context of the statute, further inquiry is unnecessary. *PGE*, 317 Or at 611. Only if the intent of the legislature is not clear from the first level of analysis may legislative history be considered. *Id.*

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 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."

ORS 656.262(13) requires that injured workers cooperate and assist the carrier in the investigation of claims for compensation, including submission to and full cooperation with personal and telephonic interviews and other formal or informal information gathering techniques. In this regard, the second sentence of ORS 656.262(13) provides that "[i]njured workers *shall* submit to and shall fully cooperate with personal and telephonic interviews and other formal or informal information gathering techniques." (Emphasis added). The term "shall" is a command expressing what is mandatory. *Bacote v. Johnson*, 333 Or 28, 34 (2001); *Preble v. Department of Revenue*, 331 Or 320, 324 (2000) (citing *Webster's Third New Int'l Dictionary*, the court stated that "shall" is a command "used in laws, regulations, or directives to express what is mandatory"). Thus, an injured worker is required to submit to and fully cooperate with personal and telephonic interviews and other formal or informal information gathering techniques.

On the other hand, the third sentence of ORS 656.262(13) provides that "[i]njured workers who are represented by an attorney *shall* have the right to have the attorney present during any personal or telephonic interview or deposition." (Emphasis added). Thus, a represented injured worker has an absolute right to have his or her attorney present during any interview or deposition. *Bacote*, 333 Or at 34; *Preble*, 331 Or at 324.

The fourth sentence of ORS 656.262(13) begins with the word "however" and provides that a carrier may notify the Director when the carrier "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 last sentence of ORS 656.262(13) requires the Director to assess a civil penalty against the attorney of not more than \$1,000 if the Director determines that the attorney’s unwillingness or unavailability is unreasonable.

“However,” as used in the context of the fourth sentence of ORS 656.262(13), means “in spite of that : on the other hand : but.” *Webster’s Third New Int’l Dictionary* 1097 (unabridged ed 1993). Thus, the third sentence of ORS 656.262(13), which gives a represented injured worker an absolute right to have his or her attorney present during any interview or deposition, is followed by a sentence that could mean that right is qualified; *i.e.*, a represented injured worker whose attorney is not available might be required to attend an interview or deposition without his or her attorney. On the other hand, it is not clear that this qualification results in such a requirement because the qualification addresses procedures to obtain a sanction from the Director against the attorney if the attorney’s unwillingness or unavailability is unreasonable and is *preventing* the worker from timely complying with the request for interview. Furthermore, the reasonableness of the worker’s attorney’s actions is only referred to in the context of the attorney’s willingness or availability to participate in an interview at a time reasonably chosen by the carrier.

ORS 656.262(14) includes the appeal process for a “noncooperation” denial and 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 Administrative Law Judge finds that the worker has not fully cooperated, the Administrative Law Judge shall affirm the denial, and the worker’s claim for injury shall remain denied. If the Administrative Law Judge finds that the worker has cooperated, or that the investigative demands were unreasonable, the Administrative Law Judge 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.”

Regarding the above-quoted language of ORS 656.262(14), after a noncooperation denial, the merits of the claim will not be heard unless the worker fully and completely cooperated with the investigation, or the worker failed to cooperate for reasons beyond the worker's control, or the investigative demands were unreasonable. Thus, the focus is on the worker's actions, without any mention of the worker's attorney. It is unclear from the language of the statute whether a worker's actions that are based on his or her attorney's advice or actions would be considered in determining a worker's cooperation with an investigation.

Thus, the legislature's intent is not clear from the text and context of the statutes. Therefore, we turn to the legislative history to resolve these ambiguities. ORS 656.262(13) and (14) were added to ORS Chapter 656 in 1995 as part of Senate Bill 369. That portion of ORS 656.262(14) quoted above was initially introduced with essentially the same language that was ultimately adopted.⁴ However, as initially introduced on January 26, 1995, the language of ORS 656.262(13) was significantly different and provided:

“Injured workers have the duty to cooperate and assist the insurer or self-insured employer in their 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 and place reasonably chosen by the insurer or self-insured employer within seven days of the request for interview, the worker shall attend the interview without the presence of the attorney.*” (Emphasis added).

The above-highlighted language compelled a represented worker to attend an interview without his or her attorney if the attorney was not willing or available to participate in the interview within seven days of the request for interview. Several legislators commented on this new legislation.

⁴ As initially introduced, the language in ORS 656.262(14) used the term “Workers’ Compensation Law Judge” rather than the term “Administrative Law Judge,” as ultimately adopted. Otherwise, the above-quoted language in ORS 656.262(14) that was ultimately adopted was essentially the same as the language that was initially introduced on January 26, 1995.

On March 13, 1995, Mr. Trethewy and Mr. Lasken testified before the House Committee on Labor as representatives of the Workers' Compensation Section of the Oregon State Bar. Representative Brown asked their position about ORS 656.262(13) as initially introduced:

“REPRESENTATIVE BROWN: * * * I'm a lawyer and we're prohibited obviously from deposing the other side without the attorney being present and I, when I see, I believe, [ORS 656.262(13)], it allows the investigator to depose the claimant without the lawyer being present. I find that morally repugnant, but I would just like to hear from both of you about the practical effect.

“MR. LASKEN: Well, I can state first that the Section was not able to take a position on that because of the polarity, and I'm sure [Mr. Trethewy] can speak to that. From the claimant's perspective, the provision has wording in there that says that the claimant's lawyer is to be notified. But the way the bill is written now, as a practical effect, a claimant's lawyer can be kept out of that loop, because the insurer is allowed to say we get this statement within seven days, we pick the time, we pick the place, and if the attorney can't make it, well, so be it, we're going to go ahead with the statement, and under some rather severe penalties if the statement is not allowed. So I would agree, Representative Brown, that as worded, claimant's lawyers can very well be taken out of the loop. And it creates a real crisis situation when you have a claimant who, perhaps, is not very sophisticated and, perhaps, has a very complicated claim, and now they're going to be grilled without the right of representation for an undetermined amount of time. But that is not something that we could take a position on, substantively, as far as both Sections of the Bar. But as a claimant's lawyer, I share your concern.

“MR. TRETHEWY: Mr. Chair and Representative Brown, speaking from the other side, let me say that as a tactician, I'd love to have that. But as an attorney, and as speaking for the Bar, we can't -- we obviously are not able to take a position on that. I can certainly appreciate

why that could be abused and how it could be abused. On the other hand, I can also see many cases, and usually they're in responsibility cases, where it would be very helpful to all parties to be able to depose, and whether it would be in this form or some other form, to depose the worker right away and find out who really were your employers during all this time; get everybody named and involved. Then you don't get up to the hearing and find out that there are more. Or you get along further in the discovery process and you find out that there are more. So, whatever form that takes, I think that there's some merit to it. Whether or not it's this form, I don't know." (Tape recording, House Committee on Labor on March 13, 1995, Tape 57A).

Subsequently, Representative Mannix testified regarding the changes made to ORS 656.262(13), and the following dialogue took place:

“REPRESENTATIVE MANNIX: In regard to a failure to cooperate with an investigation, the time frame, first of all, was changed from seven days to fourteen days in regard to the request for the interview. * * * The insurer or self-insured employer is now -- instead of jumping in and going after the worker -- gets to notify the Director, and the Director gets to look at the conduct of the attorney, and if the Director determines that the attorney's unwillingness or unavailability for this investigation process is unreasonable, the director assesses a civil penalty against the attorney of not more than \$1,000.00. This puts the onus on the attorney, but it also calls for a standard of reasonableness or unreasonableness.

“CHAIR WATT: I think, Representative Brown, you brought that up during the initial hearing, that there is a concern that the worker is going to be penalized for the unavailability of the attorney. This shifts all that and takes the burden from the worker and puts it back on the Director to decide if the attorney will be [inaudible].

“* * * * *

“REPRESENTATIVE BROWN: I agree that in all cases we should punish attorneys where appropriate. Would you consider reasonableness to be if an attorney leaves town for two weeks? Is that a reasonable reason? Is that unreasonable? What are you talking about in terms of reasonable?”

“REPRESENTATIVE MANNIX: Well that’s -- unreasonableness is a term of art in workers’ compensation. There are probably more cases on what that means than any other, and it means in light of the circumstances and in light of the expertise, case load, whatever, of a given individual or attorney, in this case. Was that person being unreasonable from the perspective of an outsider? Not from the perspective of an insider, but looking at that person’s conduct, their scope of practice, nature of practice, were they being reasonable? If there’s a death in the family, of course that’s reasonable. If they had a pre-planned vacation for a month to be in Maui, that would be reasonable. The Director is allowed to adjudicate that, and since the Director is applying a penalty -- by the way, the Director’s decision applying the penalty is subject to APA review.

“JERRY KEENE: Representative Brown, also I think it’s important to note for the record that the background of this provision is to prevent the obfuscation, or the obstruction, of interviews for a tactical advantage in a claim, or to keep information from coming out that’s relevant to the claim. And to the extent that’s the motive, it’s expected that it would be found unreasonable.”
(Tape recording, House Committee on Labor on March 13, 1995, Tape 63A).

We draw the following conclusions from this legislative history. First, the legislature intended to provide a represented worker with the absolute right to have his or her attorney present during any interview or deposition. In order to handle a situation where a worker’s attorney might be unreasonably unavailable to attend an interview or deposition, the legislature added the final two sentences in

ORS 656.262(13),⁵ which provide the remedy that a carrier may pursue if it believes that a worker's attorney's unwillingness or unavailability to participate in an interview or deposition is unreasonable and is preventing the worker's timely participation in the interview or deposition. Specifically, the express statutory remedy under such circumstances is for the carrier to refer the matter to the Director for possible sanctions against the worker's attorney.⁶ The statutory remedy does *not* mandate a represented worker's participation in an interview or deposition without his or her attorney.

Second, the legislative history is focused on the statutory remedy regarding a represented worker's attorney's availability to attend an interview or deposition. The legislative history establishes that the statutory remedy provided in ORS 656.262(13) is the means to enforce a represented worker's right to have his or her attorney present at the investigation or deposition, without punishing the worker for any unavailability of his or her attorney. In other words, whether the unavailability of a represented worker's attorney to attend a deposition is reasonable or unreasonable, there is no suggestion in the legislative history that the worker would be required to attend the deposition without his or her attorney. To the contrary, the initial language of the statute, which supported the proposition that a represented worker must attend a deposition without an attorney under certain circumstances, was deleted from the version of the statute that was ultimately adopted. As such, the statutory scheme prescribed in ORS 656.262(13) and (14) provides a limited exception to the principles in *Sekermestrovich* and *Huntley* that a party may not rely on incorrect advice or actions of its counsel to excuse conduct or omissions for which the party would otherwise be responsible.

⁵ These sentences in ORS 656.262(13) provide:

“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 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.”

⁶ Here, that remedy was sought. Although claimant's attorney was initially sanctioned under ORS 656.262(13), in part, for her conduct at the deposition, that sanction was ultimately reversed. Nonetheless, the fact that the insurer's sanction remedy ultimately failed does not affect the outcome of this proceeding regarding claimant's alleged noncooperation in the deposition.

Cf. Evangelical Lutheran Good Samaritan Soc. v. Bonham, 176 Or App 490, 497-98 (2001), *rev den*, 334 Or 75 (2002) (ORS 656.262(7)(a) (1995) provided a statutory exception to the judicially created doctrine of claim preclusion for new medical condition claims).

Here, claimant's former attorney's act of leaving the deposition meant that claimant was unable to effectuate his right to have his attorney present at the deposition. Therefore, even assuming that claimant's former attorney's action was unreasonable, any failure of claimant to cooperate in the deposition was for reasons beyond his control.⁷

Consequently, because claimant has established that he failed to cooperate with the insurer's investigative (deposition) demands for reasons beyond his control, we set aside the insurer's "noncooperation" denials based on his failure to cooperate with the deposition.⁸ Therefore, we remand the claim to the insurer for processing according to law. ORS 656.262(14).

⁷ Based on this reasoning, even if we took administrative notice of the November 21, 2002 "Order Approving Stipulation for Discipline" involving claimant's former attorney as the insurer requests, it would not affect our decision.

⁸ The dissent contends that we overlook the first half of ORS 656.262(14), without addressing the remedy of requesting suspension of benefits. However, here, the issue is whether the noncooperation denials should be upheld based on claimant's alleged noncooperation at the deposition. In remanding this case, the court held that noncooperation with an IME could be the basis for suspension of compensation under ORS 656.325(1)(a), but it could not be the basis of a noncooperation denial under ORS 656.262(14). *Lewis*, 339 Or at 351-52. The court remanded this case to resolve the issue "regarding whether claimant failed to cooperate *in a deposition* in violation of ORS 656.262(14)." *Id.* at 352. (Emphasis added).

The dissent appears to focus on circumstances *after* the April 30, 1997 deposition in question, contending that claimant could have requested rescheduling and participated in another deposition with or without his attorney following the "pre-suspension" warning notices and was unreasonable in not doing so. However, as framed by the court's mandate on remand, the issue before us is whether claimant cooperated in the April 1997 deposition. The events during that deposition were the grounds, in part, for the subsequent "pre-suspension" warning notices, the suspension orders, and the noncooperation denials. Therefore, the circumstances of the April 1997 deposition are at issue.

Moreover, in our initial Order on Remand, we affirmed the Director's June 6, 1997 Orders Suspending Compensation based on claimant's failure to attend the IMEs. That holding is not affected by our current order.

As explained above, we have set aside the noncooperation denials based on claimant's alleged noncooperation in the April 1997 deposition. Such a determination does not support one basis for the suspension orders. However, because the suspension orders were also based on claimant's failure to attend the IMEs (a basis that is undisputed), the suspension orders remain affirmed.

Attorney Fee / Expenses / Costs

On reconsideration, claimant's attorney seeks an increased fee award before all forums related to the June 20, 1997 "noncooperation" denials regarding his aggravation and occupational disease claims. Specifically, claimant's attorney requests that we increase the assessed attorney fee from \$9,000, as awarded in our initial Order on Remand, to \$16,025. Claimant also requests an assessed fee of \$500 for services regarding the noncooperation issue raised by the insurer's cross-request for reconsideration.

Claimant has prevailed after remand from the court. Therefore, under ORS 656.388(1), claimant's attorney is entitled to an assessed attorney fee for services before every prior forum.

In our initial Order on Remand, we affirmed the Director's June 6, 1997 Orders Suspending Compensation based on claimant's failure to attend the IMEs. That holding is not affected by our current order. However, we also reversed the "ALJ's attorney fee award of \$3,000 for setting aside the June 6, 1997 Orders Suspending Compensation" and noted that our award of a \$9,000 assessed attorney fee for services before every forum was 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."

On reconsideration, claimant's attorney notes that the ALJ did not award a \$3,000 attorney fee for setting aside the June 6, 1997 Orders Suspending Compensation. Instead, claimant's attorney contends that the ALJ awarded a \$3,000 attorney fee for setting aside each of the noncooperation denials, for a total fee of \$6,000. The employer takes no position on this point.

After reconsideration, we agree that the ALJ awarded a total fee of \$6,000 for setting aside the June 20, 1997 "noncooperation" denials. Moreover, the ALJ did not award any attorney fee regarding the June 6, 1997 Orders Suspending Compensation.

Claimant's attorney also submits a copy of the October 11, 2005 "Petition for Attorney Fees" filed with the Oregon Supreme Court, detailing the attorney time expended for services at hearing, on Board review, before the Court of Appeals, and before the Supreme Court.⁹ This petition requests a fee of \$14,525

⁹ In making this submission, claimant's attorney presumed that we already had the "Petition for Attorney Fees" that was filed with the court. However, on remand, except for the court's appellate

(which includes the \$6,000 attorney fee awarded by the ALJ for prevailing over the noncooperation denials). In addition, claimant's attorney requests a fee of \$1,500 for services on remand, for a total assessed attorney fee of \$16,025.

In deciding whether the requested fee is appropriate, we consider the factors in OAR 438-015-0010(4), which include: (1) the time devoted to the case; (2) the complexity of the issue(s) involved; (3) the value of the interest involved; (4) the skill of the attorneys; (5) the nature of the proceedings; (6) the benefit secured for the represented party; (7) the risk in a particular case that an attorney's efforts may

go uncompensated; and (8) the assertion of frivolous issues or defenses. *See Schoch v. Leupold & Stevens*, 325 Or 112, 118-19 (1997) (Board must explain rationale for the attorney fee award).

On reconsideration, we consider the "Petition for Attorney Fees" as documentation of the time spent for attorney services before every prior forum, including briefing before the Court of Appeals twice and before the Supreme Court twice. However, time devoted to the case is but one factor we consider in determining a reasonable attorney fee. Moreover, a reasonable attorney fee is not based solely on a strict mathematical calculation. *See Cheryl Mohrbacher*, 50 Van Natta 1826 (1998); *Danny G. Luehrs*, 45 Van Natta 889, 890 (1993).

Here, the complexity of the issues involved was greater than those generally presented to this forum, requiring extensive argument to the Court of Appeals twice and to the Supreme Court twice before final resolution of the legal issues and remand to the Board to determine the merits of the noncooperation denial issue. The value of the interest involved and the benefit secured is substantial in that claimant, for the first time, will have an opportunity to receive the insurer's decision regarding the merits of his previously denied claims. ORS 656.262(14); *SAIF v. Wart*, 192 Or App 505, *rev den*, 337 Or 248 (2004) (if a "noncooperation" denial is set aside, the claimant is entitled to a reasonable attorney fee pursuant to ORS 656.386(1) for prevailing over a "denied claim"); *Robert S. Deputy*, 56 Van Natta 1728 (2004) (same).

In addition, the nature of the proceedings was more complex than those usually litigated before this forum, resulting in two separate appeals to both the Court of Appeals and the Supreme Court. Based on the insurer's vigorous

judgment, we only received the record that we previously forwarded to the court. With the exception of an occasional appellate brief to the court, we typically receive no other pleading or any other documents filed with the court.

challenge regarding the noncooperation denials, there was a significant risk that claimant's counsel might go uncompensated for services rendered. Claimant's appellate counsel, as well as the insurer's counsel, are highly experienced and skilled attorneys who advocated their respective positions in a legally supportable manner. Finally, no frivolous issues or defenses were asserted.

After considering the factors set forth in OAR 438-015-0010(4) in light of this particular record, we find that a reasonable fee for claimant's counsel's services at hearing, on Board review, before the Court of Appeals, before the Supreme Court, and on Board remand is \$16,025, payable by the insurer. In determining this fee, we have not considered claimant's attorney's services regarding the attorney fee award. *See Saxton v. SAIF*, 80 Or App 631 (1986); *Amador Mendez*, 44 Van Natta 736 (1992). This award is in lieu of all prior attorney fee awards.

Claimant's attorney is also entitled to an assessed fee for services on reconsideration. ORS 656.382(2). 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 attorney's services on reconsideration is \$500, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's response to the insurer's cross-request for reconsideration), the complexity of the issue, the value of the interest involved, the nature of the proceedings, and the risk that counsel may go uncompensated.

Finally, because our order issues after the effective date of ORS 656.386(2) and OAR 438-015-0019, and affirms the ALJ's decision regarding the insurer's denial under ORS 656.386(1), we consider it appropriate to award reasonable expenses and costs to claimant for records, expert opinions, and witness fees.¹⁰ *See Barbara Lee*, 60 Van Natta 1 (January 3, 2008), *on recons* 60 Van Natta 139 (January 30, 2008) (Member Lowell dissenting).

¹⁰ Because an attorney represents a claimant, the references to "the claimant" in OAR 438-015-0005(6) and (8), and thereby OAR 438-015-0019, encompass both an unrepresented claimant and a claimant's duly retained attorney. WCB Admin. Order 1-2007, eff. January 1, 2008, Order of Adoption, page 11.

Consequently, in accordance with the aforementioned statute and rule, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the insurer. The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).¹¹

On reconsideration, as supplemented and modified herein, we republish our April 26, 2007 order. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on February 8, 2008

Member Lowell, dissenting in part and specially concurring in part.

I disagree with the majority's interpretation of ORS 656.262(13) and (14) and would find that, under the proper interpretation of those statutes, the noncooperation denials should be upheld. Therefore, I respectfully dissent from that portion of the majority's opinion that finds that the insurer's "noncooperation" denial should be set aside.

The statutory text "is the starting point for interpretation and is the best evidence of the legislature's intent." *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). Examining the text, we observe rules of construction that bear directly on how to read it. In this instance I am particularly mindful of the statutory enjoiner "simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." ORS 174.010.

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

¹¹ Within 30 days after the order finding that claimant finally prevails against a denied claim becomes final, claimant shall submit a cost bill to the insurer, which provides an itemization of the incurred expenses and costs for records, expert opinions, and witness fees that are due to the denied claim and the claimant's signature confirming that the claimed expenses and costs were incurred in the litigation of the denied claim.

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 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."

ORS 656.262(14) provides:

"If the director finds that a worker fails to reasonably cooperate with an investigation involving an initial claim to establish a compensable injury or an aggravation claim to reopen the claim for a worsened condition, the director shall suspend all or part of the payment of compensation after notice to the worker. If the worker does not cooperate for an additional 30 days after the notice, the insurer or self-insured employer may deny the claim because of the worker's failure to cooperate. The obligation of the insurer or self-insured employer to accept or deny the claim within 60 [formerly 90] days is suspended during the time of the worker's noncooperation. 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

Administrative Law Judge finds that the worker has not fully cooperated, the Administrative Law Judge shall affirm the denial, and the worker's claim for injury shall remain denied. If the Administrative Law Judge finds that the worker has cooperated, or that the investigative demands were unreasonable, the Administrative Law Judge shall set aside the denial, order the reinstatement of interim compensation if appropriate and remand the claim to the insurer or self-insured employer to accept or deny the claim."

As relevant to the facts of this case, the language of these statutes provides a clear statement of the rights and responsibilities of a worker to cooperate with the carrier in the investigation of claims for compensation. These rights and responsibilities can be listed simply as follows:

- (1) Workers shall fully cooperate in the investigation of claims for compensation. ORS 656.262(13).
- (2) Represented workers shall have the right to have the attorney present during any personal or telephonic interview or deposition. ORS 656.262(13).
- (3) If the attorney is unwilling or unavailable to participate in the interview or deposition and the carrier believes that unwillingness or unavailability is unreasonable, the carrier can do two things:
 - (a) Notify the Director and request a civil penalty against the worker's attorney (ORS 656.262(13)), and
 - (b) Notify the Director and request suspension of the worker's benefits (ORS 656.262(14)).
- (4) If the Director finds that the worker failed to reasonably cooperate, the Director shall suspend the worker's benefits after notice to the worker. ORS 656.262(14).

(5) If the worker does not cooperate for an additional 30 days after the notice, the carrier may deny the claim because of the worker's failure to cooperate. ORS 656.262(14).

(6) After issuance of a noncooperation denial, no hearing or other procedure on the merits of the claim shall be granted unless the worker establishes full and complete cooperation the investigation, the failure to cooperate was for reasons beyond the worker's control, or the investigative demands were unreasonable. ORS 656.262(14).

The key point is that ORS 656.262(13) and (14) establish the duty of a worker to cooperate with the carrier in the investigation of claims for compensation and the process a carrier may use to enforce that duty. Importantly, this potential enforcement process is included in both sections (13) and (14). Specifically, section (13) provides a remedy if a carrier believes that a represented worker's attorney's unwillingness or unavailability is unreasonable and is preventing the worker from timely complying with an interview. That remedy involves seeking a civil penalty from the Director. ORS 656.262(13).

In addition, ORS 656.262(14) creates a multi-step process before and after issuance of a noncooperation denial, including "pre-suspension" warning notice by the Director informing the worker of the possibility of suspension of benefits for failure to cooperate with an investigation involving an initial claim to establish a compensable injury or an aggravation claim. ORS 656.262(14). The Director can suspend compensation only after finding that the worker failed to "reasonably cooperate." *Id.* If noncooperation continues for an additional 30 days after the "pre-suspension" warning notice, the carrier may issue a denial based on that noncooperation.

Nothing in the clear language of ORS 656.262(14) indicates that the enforcement process addressed in that section is not available if the civil penalty remedy under section (13) against the worker's attorney has been sought. Indeed, ORS 656.262(14) does not mention anything about a right to have an attorney. As noted above, I must interpret the statutes as written by the legislature, without inserting what has been omitted or omitting what has been inserted. ORS 174.010.

Furthermore, contrary to the majority's reasoning, I find that the legislative intent is clear from the text and context of the statutory language. In other words, a statutory remedy is created under ORS 656.262(13) to require a represented worker's attorney to participate in an interview or deposition. However, the worker is still required to cooperate with the investigation of his or her claim. A separate remedy is created under ORS 656.262(14) to enforce that requirement. Nevertheless, by their terms, the remedies created under ORS 656.262(13) and (14) are not mutually exclusive.

The majority, in effect, creates ambiguities that are not in the statutes themselves in order to find that these remedies are mutually exclusive. Under my interpretation of the statutes, where a represented worker's attorney unreasonably refuses to participate in an interview or deposition, a carrier has *two* courses of action for failure to cooperate. One is to request a civil penalty against the worker's attorney, and the other is to request suspension of benefits (which will lead to a denial if the noncooperation continues).¹²

This process was properly followed here. 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, 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).

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 IMEs. (Exs. 154, 155).

Thirty days from the Director's "pre-suspension" warning notices, 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.¹³

¹² The majority overlooks the first half of ORS 656.262(14), without addressing the remedy of requesting suspension of benefits.

¹³ As noted in our initial Order on Remand, the court found that, pursuant to ORS 656.325(1)(a), the maximum statutorily authorized sanction for failure to attend an IME 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

The Director's May 20, 1997 "pre-suspension" warning notices gave claimant five days to cooperate or document that his failure to cooperate was reasonable before his benefits were suspended. In addition, the June 6, 1997 suspension orders found that claimant failed to reasonably cooperate, suspended his benefits, and notified claimant that, if he did not cooperate for an additional 30 days after the "pre-suspension" warning notices, the insurer may deny the claim because of his failure to cooperate.

At that point, it seems clear that claimant and his former attorney were without a doubt on notice that the actions they took at the deposition led to an adverse result (suspension of benefits).¹⁴ They still had time left to cooperate

violation of ORAS 656.262(14). *Lewis v. Cigna Insurance Co.*, 339 Or 342, 351-52 (2005); *Marvin E. Lewis*, 59 Van Natta 1068 (2007).

¹⁴ In our initial Order on Remand, I agreed that, under the principles in *Sekermestrovich v. SAIF*, 280 Or 723 (1977), and *International Paper Co. v. Huntley*, 106 Or App 107 (1991), a claimant cannot rely on any incorrect advice of his/her attorney. Nevertheless, I agreed that claimant "fully and completely cooperated" in the deposition. This decision was based on claimant's attendance and participation in the deposition and a finding that his former attorney's relevancy objection to the disputed question in the deposition and her advice not to answer the disputed question pending a ruling from an ALJ was not incorrect or unreasonable, and claimant's actions in following that advice were also not unreasonable.

However, on reconsideration, the insurer submits a copy of a November 21, 2002 Oregon Supreme Court "Order Approving Stipulation for Discipline" that involves claimant's former attorney's conduct at the deposition in question. The insurer requests that we take administrative notice of that order. Although this document was submitted very late in the process, I would take administrative notice of it. In this regard, claimant does not object to admission of this document. In addition, we have discretion to consider the insurer's request for administrative notice on reconsideration of our April 26, 2007 Order on Remand. See *Vogel v. Liberty Northwest Ins. Corp.*, 132 Or App 7, 13 (1994). Finally, as a general rule, we may take administrative notice of a fact that is "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." This includes agency orders. See *SAIF v. Calder*, 157 Or App 224, 227 (1998) (citations omitted); *Groshong v. Montgomery Ward Co.*, 73 Or App 403 (1985). I find that the above "Order Approving Stipulation for Discipline" falls within these parameters and would take administrative notice of it.

After considering this disciplinary order, I find that claimant's former attorney's conduct at the deposition was unreasonable. In this disciplinary order, claimant's former attorney admitted that she "terminated the deposition" and engaged in "conduct prejudicial to the administration of justice." These admissions have resolved any doubt in my mind about whether the deposition was, in effect, "suspended" pending a ruling from an ALJ regarding the objectionable questions. Claimant's former attorney acted unreasonably at the deposition.

Furthermore, contrary to the majority's reasoning, I do not find any exception in either ORS 656.262(13) or (14) to the well-settled principles in *Sekermestrovich* and *Huntley* that a claimant cannot rely on any incorrect advice of his/her attorney. Therefore, I would find that claimant has not established that he fully and completely cooperated at the deposition, or that his failure to cooperate was for reasons

and submit to the completion of the deposition, but did not do so. While I can understand that claimant (and his former attorney) might have once had a justified belief that terminating the deposition was proper, I cannot understand how he could reasonably believe that it was still a proper action after the Director warned him that failure to complete the deposition would lead to a suspension of benefits and subsequently suspended benefits for failure to cooperate.

Furthermore, in my opinion, it was not beyond claimant's control to cooperate *after* the "pre-suspension" warning notices and the suspension orders were issued by the Director. There was no doubt at those points in time that claimant was at substantial risk of losing benefits. He could have cooperated himself (with or without his former attorney), or he could have found new counsel who would not choose a course of action that would terminate his benefits. In other words, while it may have been "beyond his control" to leave the deposition with his attorney, his continuing noncooperation in the face of the Director's "pre-suspension" warning notices and the suspension orders *was* within his control.

Accordingly, I would find that claimant failed to establish that he fully and completely cooperated at the deposition, or that his failure to cooperate was for reasons beyond his control, or that the investigative demands (deposition) were unreasonable. Therefore, I would uphold the suspension orders and the noncooperation denials. Because the majority does otherwise, I respectfully dissent from that portion of their opinion.

Finally, I have previously expressed my concerns when we address an award of reasonable expenses and costs when the issue had not been raised by the parties on review of an ALJ's compensability decision. *See Barbara Lee*, 60 Van Natta 1 (January 3, 2008), *on recons* 60 Van Natta 139 (January 30, 2008) (Member Lowell dissenting). Because I would uphold the insurer's "noncooperation" denial, it would be unnecessary to address claimant's entitlement to expenses and costs. Nevertheless, in accordance with the principles of *stare decisis*, I recognize that the controlling precedent supports the proposition that we will address such matters when we affirm an ALJ's decision holding that a claimant finally prevails over a denied claim and the ALJ's decision does not include such an award. Because this case fits the aforementioned description (based on the majority's affirmance of the ALJ's decision), I specially concur with that portion of the majority's opinion.

beyond his control, or that the investigative demands (deposition) were unreasonable. Nevertheless, for the reasons explained in the body of my dissent, even if I did not consider the disciplinary order, I would find that claimant did not meet his burden of proof under ORS 656.262(14).