
In the Matter of the Compensation of
EDGAR M. WOODBURY, II, Claimant
WCB Case No. 07-00007TP
SECOND THIRD PARTY DISTRIBUTION ORDER ON RECONSIDERATION
Swanson Thomas & Coon, Claimant Attorneys
Travis L Terrall, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

On March 2, 2009, we abated our January 29, 2009 Order on Reconsideration that republished, as supplemented and modified, our August 19, 2008 Third Party Distribution Order that resolved a dispute regarding a paying agency's share of claimant's third party recovery. In our prior orders, we concluded that the present value of claimant's reasonably to be expected future medical costs should be determined as of June 1998. Contending that we erred in identifying June 1998 as the "determination date" and in calculating the amount to which claimant would be credited for prior reimbursements, Barrett Business Services (Barrett) seeks further reconsideration of our decision. Having received claimant's and CNA's responses, we now proceed with our reconsideration.¹

Citing *Kelly A. Nielson, DCD*, 49 Van Natta 1087 (1997), we previously reasoned that the time of the third party recovery, rather than the time of the employer's petition, is the date on which the reasonable estimate of future expenses under ORS 656.593(1)(c) should be based. We found that Mr. Dahlberg, whose estimate was contemporaneous with the time of the third party recovery in 1998, provided the most reasonable projection of anticipated future medical costs. Accordingly, we concluded that the present value of reasonably to be anticipated future medical costs should be determined as of the 1998 third party recovery.

Barrett notes that the Court of Appeals had vacated the jury verdict in 2001 and that any third party recovery had not become certain until April 2004, when the Supreme Court declined to review the Court of Appeals' second decision. *Woodbury v. CH2M Hill, Inc.*, 336 Or 615 (2004). Barrett, therefore, contends that we should determine the present value of reasonably to be expected expenses no earlier than April 2004. Having further considered this matter, we adhere to our previous determination regarding the appropriate time for performing the disputed calculation.

¹ CNA agrees with Barrett's position.

We acknowledge that claimant's recovery did not become certain until the April 2004 conclusion of litigation. Nevertheless, as we previously found, Mr. Dahlberg provided the most reasonable projection of anticipated future medical costs. His estimate of future medical costs was based on circumstances existing in 1998, not in 2004. Our prior use of the phrase "the time of the third party recovery" was not intended to make receipt of funds the critical factor in determining the value of future medical costs. Rather, our prior orders identified June 1998 as the most reliable date for calculating the present value of reasonably anticipated future medical expenses.

Therefore, while the "recovery" was in 2004, the calculations and projections were based on Dahlberg's 1998 testimony. That is the most persuasive evidence on "reasonably anticipated future claim costs."² As of the 2004 recovery date, Barrett had incurred actual expenses, but those expenses are part of Dahlberg's projections as of 1998. Barrett is entitled to recover Dahlberg's projected amount, which compensates Barrett for actual expenses between 1998 and 2004, as well as for later claim costs.

Finally, in our prior order, we stated that claimant could offset \$1,969,758 against the total sum due Barrett. Barrett notes claimant's previous concession that this amount should be \$1,521,471.90. Claimant agrees that Barrett's understanding is correct. Therefore, we modify our prior order to allow claimant to offset \$1,521,471.90 against the total sum due Barrett.

Accordingly, as supplemented and modified herein, our January 29, 2009 order is republished. The parties' rights of appeal shall run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on April 15, 2009

² While there was considerable appellate litigation, there was only one trial (the case was not remanded for a new trial to determine damages). The jury award was based on Dahlberg's estimates and the amount of damages was not affected by subsequent appeals.