

In the Matter of the Compensation of  
**STEVEN M. SWEARINGEN, Claimant**

WCB Case No. 07-02810

**ORDER ON REVIEW**

Charles Robinowitz, Claimant Attorneys  
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Mills's order that awarded an attorney fee under ORS 656.307(5).<sup>1</sup> On review, the issue is attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which we summarize as follows.

Claimant was exposed to asbestos during his work as an iron worker for numerous employers. He was diagnosed with mesothelioma and filed an occupational disease claim for that condition against various carriers, including SAIF.<sup>2</sup>

SAIF denied its responsibility for the claim, but not compensability of the claim. (Exs. 6, 7). Other carriers denied both compensability and responsibility. (See Ex. 9). Claimant requested a hearing and the matter was assigned to ALJ Mills.

Before a hearing convened, the parties mediated the matter before ALJ Garaventa. On April 15, 2008, the potentially responsible carriers stipulated that the claim was compensable, and that responsibility was the only outstanding issue. (See Ex. 10DD-1). On April 18, 2008, the Director issued an Order Designating Paying Agent Pursuant to ORS 656.307 ("307" order). (*Id.*)

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<sup>1</sup> Although the ALJ's order does not expressly identify the statutory basis for the attorney fee award, claimant's written closing arguments before the ALJ identified the issue to be decided as his right to a "reasonable attorney fee pursuant to ORS 656.307(5)."

<sup>2</sup> Claimant died in October 2007; his claim was subsequently pursued by his wife as a beneficiary.

On February 23, 2009, the remaining parties, including claimant and SAIF, participated in a mediation session again before ALJ Garaventa. The parties executed a Stipulation, Release and Settlement Agreement, wherein the parties agreed to “settle all issues raised in [claimant’s] request for hearing between them, except entitlement to attorney fees in this proceeding.” As part of that agreement, SAIF agreed to accept claimant’s occupational disease claim for mesothelioma.

ALJ Mills was subsequently presented with claimant’s request for an attorney fee from SAIF under ORS 656.307(5).

### CONCLUSIONS OF LAW AND OPINION

ALJ Mills awarded an insurer-paid attorney fee. On review, SAIF contends that claimant is not entitled to an attorney fee award under ORS 656.307(5). We agree, reasoning as follows.

Under ORS 656.307(1)(a), after the issuance of a “307” order, the matter is assigned to an ALJ “to determine the responsible paying party,” with the subsequent “proceedings [to] be conducted in the same manner as any other hearing \* \* \*.” ORS 656.307(5) provides that:

“The claimant shall be joined in any proceeding under this section as a necessary party, but may elect to be treated as a nominal party. If the claimant appears at any such proceeding and actively and meaningfully participates through an attorney, the [ALJ] may require that a reasonable fee for the claimant’s attorney be paid by the [carrier] determined by the [ALJ] to be the party responsible for paying the claim.”

In *Keenon v. Employers Overload*, 114 Or App 344, 346-47 (1992), the court affirmed our order that did not award an attorney fee under ORS 656.307(5), even though the claimant’s attorney participated in the “307” proceeding by submitting exhibits concerning the responsibility issue, conducting “relatively extensive direct and redirect examination \* \* \* on issues that were pertinent to which insurer was responsible,” and presenting “helpful argument on alternative analyses that arguably applied to deciding the responsibility issue.”<sup>3</sup> Noting that

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<sup>3</sup> At the time that *Keenon* issued, responsibility disputes under ORS 656.307 were resolved by arbitration proceedings.

the claimant's attorney "did not clearly and firmly take a position on which insurer should ultimately be held responsible," the court explained that an attorney fee was not available under ORS 656.307(5), despite the claimant's attorney "actively" participating in the "307" proceeding:

"The legislature intended ORS 656.307(5) to be applied restrictively to allow attorney fees only when a claimant has a material, substantial interest in deciding who is the responsible insurer or employer, that is, if the claimant's benefits can be affected by the outcome of the responsibility hearing. See Minutes, House Committee on Labor, March 25, 1987, pp 3-5. Unless a claimant has a material, substantial interest in deciding who is the responsible party and takes a position advocating that interest, participation by the claimant's attorney, even if helpful to the arbitrator, would be meaningless to the claimant. Because claimant did not advocate that a particular employer is the responsible party, his participation was not 'meaningful,' and the arbitrator erred in finding that it was." *Id.* at 347.

Subsequent to *Keenon*, we reiterated the fundamental premise of "meaningfully" participating in a "307" proceeding: namely, that a claimant must: (1) have a "material, substantial interest in deciding who is the responsible insurer or employer" (*i.e.*, the "claimant's benefits can be affected by the outcome of the responsibility hearing"); and (2) "take[] a position advocating that interest." See *Darrell W. Vinson*, 47 Van Natta 356, 358 (1995) (*en banc*) (quoting *Keenon*, 114 Or App at 347). In other words, "if a claimant has a material, substantial interest in deciding who is the responsible carrier and takes a position advocating that interest, his counsel's participation would be deemed "meaningful" under ORS 656.307(5)." *Id.* We then determined that a claimant's counsel's participation would be "meaningful" under that statute even if the position taken concerning the responsible carrier did "not ultimately prevail." *Id.* at 359; see also *Ruth L. McIntire*, 50 Van Natta 1467, 1468 (1998) ("[e]ntitlement to an attorney fee award under ORS 656.307 is also not dependent on advocating responsibility for the carrier who is ultimately found responsible").

Here, claimant does not allege that he had "a material, substantial interest in deciding who [was] the responsible party" or that, through his counsel's participation, he took "a position advocating that interest." See *Keenon*, 114 Or

at 347. Therefore, regardless of whether his counsel “actively” participated in the “307” proceeding, the record does not establish that his attorneys “meaningfully” participated in that proceeding. As such, he is not entitled to an attorney fee award under ORS 656.307(5). *Id.*

We disagree with claimant’s assertion that the holding in *Keenon* does not affect his entitlement to an attorney fee award under ORS 656.307(5) for his counsel’s services before the issuance of the “307” order. In *Keenon*, the court remanded the matter to the Board to award attorney fees for the claimant’s attorney’s services before the issuance of the “307 order,” but did so only because the carrier conceded on appeal that such fees should have been allowed. *Id.* at 346-47; *see also Frances R. Keenon*, 44 Van Natta 2066 (1992) (on remand). Neither the court’s order nor our order on remand identified the statutory provision under which the attorney fee was awarded or the basis for the carrier’s concession.<sup>4</sup> The court did not hold, however, that the claimant was entitled to an attorney fee award under ORS 656.307(5) for services rendered before the issuance of the “307” order where her attorney did not actively and meaningfully participate in the “307” proceeding; indeed, as the text of ORS 656.307(5) and *Keenon* make clear, an attorney fee award under that statute is contingent on a claimant appearing at a “307” proceeding and “actively and meaningfully participat[ing] through an attorney.” *See* ORS 656.307(5).

Moreover, although we have awarded attorney fees under ORS 656.307(5) that encompassed services rendered before the issuance of a “307” order, we have done so only on a showing of active and meaningful participation in a “307” proceeding. *See Vinson*, 47 Van Natta at 359; *Kenneth Cage*, 43 Van Natta 487, 488 (1991). We have not awarded, as claimant requests here, an ORS 656.307(5) attorney fee for “pre-307 order” services in the absence of active and meaningful participation in a “307” proceeding. Indeed, as set forth above, such active and meaningful participation is a requirement for an attorney fee under ORS 656.307(5).

We also disagree with claimant’s assertion that the phrase “actively and meaningfully participates” in ORS 656.307(5) refers only to a formal “hearing,” which did not take place in this case, as opposed to a “proceeding.” The statute

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<sup>4</sup> Considering the procedural context of the attorney fee “concession” in *Keenon*, the award was likely premised on ORS 656.386(1) for the claimant’s counsel’s “pre-hearing” services in prompting the carrier’s rescission of the compensability portion of its claim denial. Here, as previously noted, SAIF did not deny the compensability of the claim.

expressly states that a claimant “shall be joined in any *proceeding* under [ORS 656.307] as a necessary party,” and that a reasonable attorney fee for a claimant’s attorney is available “[i]f the claimant appears at any such *proceeding* and actively and meaningfully participates through an attorney.” *Id.* (emphases added). By its terms, there must be active and meaningful participation by an attorney in a “307” *proceeding* (as opposed to a hearing) to receive an attorney fee under ORS 656.307(5). Moreover, a contrary reading of the statute would not advance claimant’s assertion that he is entitled to an ORS 656.307(5) attorney fee; if claimant is correct that the statute requires active and meaningful participation in a “hearing” that did not take place, he would not be entitled to an attorney fee under that statute in any event.<sup>5</sup>

Claimant next contends that denying a fee under ORS 656.307(5) ignores the time his counsel spent setting aside denials of his occupational disease claim. Fees for those services, however, needed to be asserted under ORS 656.386(1) against carriers that issued (and subsequently rescinded) compensability denials. *See Steven Poti*, 59 Van Natta 158 (2008). Here, SAIF did not issue a compensability denial.

A reasonable attorney fee for claimant’s counsel’s services before the issuance of the “307” order would also be potentially available under ORS 656.308(2)(d) “for the attorney’s appearance and active and meaningful participation in finally prevailing against a responsibility denial.” Claimant, however, has not relied on that statute in seeking an attorney fee award from SAIF. In any event, for the reasons previously expressed, he has not actively and meaningfully participated in finally prevailing against the responsibility denial within the meaning of that statute. *See Robert H. Hannah*, 49 Van Natta 579, 581 (1997) (holding that, like ORS 656.307(5), “meaningful” participation under ORS 656.308(2)(d) “requires that counsel take a position, based on a ‘material, substantial’ interest of the claimant, which advocates that a particular or insurer is the responsible party”).

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<sup>5</sup> Claimant’s interpretation would also foreclose an attorney from receiving a fee under ORS 656.307(5) in any case where a formal hearing did not convene; such an interpretation would disadvantage attorneys for claimants in any “307” proceeding where a formal hearing did not take place. We do not agree with such a narrow interpretation of ORS 656.307(5).

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In conclusion, the only issue argued and preserved for our review is claimant's entitlement to an attorney fee award from SAIF under ORS 656.307(5).<sup>6</sup> For the reasons set forth above, no such fee is awardable.

ORDER

The ALJ's order dated December 18, 2009 is reversed. The ALJ's attorney fee award is reversed.

Entered at Salem, Oregon on October 1, 2010

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<sup>6</sup> We disagree with SAIF's argument that claimant did not properly preserve his right to argue that he was entitled to an attorney fee award under ORS 656.307(5) because such a fee was not included in a mediation agreement pursuant to ORS 656.307(6)(h). ORS 656.307(6)(h) only governs the arrangement of attorney fees for services provided during a "307" mediation session (*i.e.*, mediation convened following the issuance of a "307" order). That is not the basis of the claim before us, and claimant did not pursue or preserve any entitlement to attorney fees under ORS 656.307(6)(h). Accordingly, that statute is inapposite with respect to claimant's entitlement to an attorney fee award under ORS 656.307(5).