
In the Matter of the Compensation of
ANTHONY D. CAYTON, Claimant
WCB Case No. 06-00923
FOURTH ORDER ON REMAND
Fontana & Takaro, Claimant Attorneys
Maher & Tolleson LLC, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

In our May 6 Third Order on Remand, we republished our previous Orders on Remand that awarded claimant a penalty under ORS 656.268(5)(d) and affirmed an Administrative Law Judge's (ALJ's) attorney fee award pursuant to ORS 656.382(1). Submitting an unpublished court order regarding attorney fees for his counsel's services before the court pursuant to ORS 656.382(1) in another case involving the same parties, claimant seeks such an award for his counsel's services on Board review, as well as before the court and the Board on remand in this particular case. Based on the following reasoning, we adhere to our previous decision.

In our prior order, we assessed a penalty under ORS 656.268(5)(d), which was based on our finding that the self-insured employer had unreasonably refused to close claimant's injury claim. We also affirmed an ALJ's attorney fee award under ORS 656.382(1). In reaching this latter conclusion, we rejected claimant's request for an attorney fee award for his counsel's services on appeal and remand for securing the penalty.

In requesting reconsideration of our decision, claimant seeks an attorney fee award pursuant to ORS 656.388(1) and ORS 656.382(1) for his counsel's services rendered before all prior forums in finally prevailing after remand regarding the employer's unreasonable resistance to the payment of compensation. In support of his request, claimant submits the court's order in another case involving the same parties as this case, which awarded his counsel an attorney fee, contingent on the outcome of that case on remand.¹

To begin, considering that the court's attorney fee order issued in April 2010 and that claimant has had several previous opportunities to bring the order to our attention, we are not inclined to exercise our discretion to further consider this matter. See *Vogel v. Liberty Northwest Corp.*, 132 Or App 7, 13 (1994)

¹ We have rejected claimant's request for an attorney fee award under ORS 656.382(1) in that case. *Anthony D. Cayton*, 63 Van Natta ____ (issued this date).

(Board has discretion not to address legal arguments raised for the first time on reconsideration); *William A. Hedger*, 58 Van Natta 2382 (2006). Nevertheless, even if we considered claimant’s contentions on reconsideration, we would continue to adhere to our prior conclusions. Our reasoning is as follows.

Claimant does not refer us to any point or authority that would support the proposition that an unpublished court order constitutes controlling precedent for another case (even if the other case includes the same parties). *See Ana J. Calles*, 46 Van Natta 2525 (1994) (Board expressed “serious reservations” regarding the precedential value of an unpublished court ruling). In any event, the procedural background regarding the present case (where an ALJ has already awarded an attorney fee under ORS 656.382(1) and the court has not awarded a “contingent” attorney fee award) is readily distinguishable from the case involving the court’s attorney fee order (where no attorney fee award under ORS 656.382(1) had previously been granted by either an ALJ or the Board and the court had issued a “contingent” attorney fee award). Consequently, we do not find the court’s attorney fee order to control our reasoning and holding in this case.

Moreover, the court’s attorney fee order for claimant’s counsel’s services rendered before the court in the other case does not mandate a similar award for claimant’s counsel’s services performed before the Hearings Division and Board in this particular case. Instead, the court’s order specifically referred to ORS 20.077, ORS 20.075(1)(b), (2), and (4), in granting its attorney fee award for claimant’s counsel’s services. Those statutes do not apply to this Board and its Hearings Division.

The court’s order does mention ORS 656.388(1), noting that if claimant “finally prevails” on remand, the statute “allows him to request attorney fees for services before every prior forum, as authorized by ORS 656.382.” Nevertheless, the court order does not hold that ORS 656.382 requires us to award such an attorney fee following remand in that case.² To the contrary, as emphasized above, the court order conditioned such an attorney fee award to the extent “authorized by ORS 656.382.”

On several occasions, we have ruled that a claimant’s counsel is not entitled to an attorney fee award for services expended on appeal, as well as on remand, in procuring a penalty or attorney fee. *See Anthony D. Cayton*, 63 Van Natta 659, *recons*, 63 Van Natta 797, *recons*, 63 Van Natta 1028 (2011); *Anthony D. Cayton*,

² As we have previously noted, we held in the other case that we were not authorized to award an attorney fee under ORS 656.382(1) for claimant’s counsel’s services before all prior forums.

63 Van Natta 54, 63, *recons*, 63 Van Natta 266, 267 (2011); *Eric V. Orchard*, 58 Van Natta 2574 (2006), *aff'd without opinion*, 218 Or App 229 (2008); *Jay A. Nero*, 46 Van Natta 2252, 2252-53 (1994), *recons*, 47 Van Natta 163 (1995), *aff'd*, 142 Or App 383 (1996). Here, we adhere to such reasoning, which holds that we lack statutory authority to grant such awards.

Accordingly, we withdraw our prior orders. On reconsideration, as supplemented, we republish our May 6 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 May 19, 2011