

In the Matter of the Compensation of  
**RICK D. BEEHLER, Claimant**  
WCB Case No. 10-02996, 08-04707  
ORDER ON RECONSIDERATION DECLINING TO APPROVE  
SETTLEMENT

Jodie Phillips Polich, Claimant Attorneys  
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

On December 29, 2011, we withdrew our December 15, 2011 order, which had approved that portion of the parties' agreement that was designed to resolve the parties' dispute pending before the Court of Appeals. We took this action to consider the self-insured employer's contention that our interpretation of a portion of the agreement was inconsistent with the parties' intentions. Having received claimant's responses, as well as further submissions from the employer, we proceed with our reconsideration.<sup>1</sup>

In granting our approval of the parties' agreement, we noted that, because the employer agreed to accept claimant's initial injury claim, we interpreted the parties' position to be that our Order on Review, which set aside the employer's denial and awarded an attorney fee under ORS 656.386(1)) should stand. We considered the provisions in the parties' "Disputed Claim Settlement" (DCS), which stated that "this entire matter be compromised and settled" and resolved "all issues raised or raisable" to pertain to the resolution of the "bona fide dispute" regarding the compensability of the employer's "current condition" denial, which was also set forth in the agreement. *See* ORS 656.289(4); OAR 438-009-0010. Our conclusion was supported by the existence of a proposed Claim Disposition Agreement (CDA) pending before the Administrative Law Judge/Mediator, which requires the existence of an accepted claim from which a claimant may release his "non-medical service-related" benefits. ORS 656.236(1); OAR 438-009-0001; OAR 438-009-0022(4)(a).

The inclusion of the footnote reflected our understanding that the employer was withdrawing its appeal of the Board's "compensability" decision regarding its *initial claim* denial. Based on that accepted claim, the parties were entering into a

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<sup>1</sup> The employer has requested an opportunity to submit a supplemental response to claimant's final reply. Because both parties have resented two written arguments expressing their respective positions (in addition to the employer's motion for reconsideration), we believe that the issues have been sufficiently developed for our consideration. Consequently, we decline the request for additional briefing.

CDA. Thus, the portion of the parties' agreement which was subject to our review authority was actually a "stipulation" that the initial claim was compensable.<sup>2</sup> In the absence of a provision either modifying or vacating our prior attorney fee award, we interpreted the agreement to provide that the attorney fee award for claimant's counsel's services in overturning the employer's initial denial remained payable. *See* ORS 656.386(1).

The employer requests reconsideration, asserting that the agreement was designed to be in lieu of our previous order (including our attorney fee award). In support, the employer encloses e-mails that it submits confirms the parties' intentions.<sup>3</sup> In doing so, the employer contends that we are obliged, without qualification or interpretation, to approve the settlement if it meets statutory and administrative requirements. Consequently, the employer requests that we approve the parties' agreement, rescinding our footnote and comments regarding our interpretation of its meaning.

In response, claimant does not dispute the accuracy of the e-mails. Nonetheless, characterizing these materials as "mediation-related" communications, he considers them to be confidential. *See* OAR 438-019-0030(1). Finally, claimant declines to take any action to "affirmatively assist" the employer in correcting a document that it drafted.

After considering the parties' respective positions, we reach the following conclusions. To begin, the e-mails appear to be the mediator's attempt at clarifying the parties' responses to a summary of a potential agreement in principle resulting from the mediation. Considering the integral role that confidentiality serves in the mediation process, we decline to consider the ALJ's e-mail seeking confirmation of the parties' respective positions arising from the mediation to constitute "the outcomes of the mediation." *See* OAR 438-019-0030(3). Consequently, the e-mails represent confidential communications, which will not be considered. *See* OAR 438-019-0010.

Referring to a provision in the agreement where claimant acknowledged that the settlement resolves "\* \* \* all current issues of compensability, \* \* \*, attorney fees and any and all issues raised or raisable relating to the denied and disputed

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<sup>2</sup> Pursuant to OAR 438-009-0015(5), a DCS and/or stipulation that resolve disputes pending before both the Hearings Division and Board shall be submitted in a format for approval by both forums. Here, the DCS portion of the agreement (which pertained to the resolution of the "current condition" dispute) was approved by an ALJ. That approval was also abated by the ALJ.

<sup>3</sup> Reasoning that the e-mails are outcomes of the parties' mediation, the employer does not consider them to be confidential. OAR 438-019-0030(3).

claim referenced above on a disputed claim basis,” the employer objects to the statement in our prior order that claimant acknowledged that the settlement resolves “all current compensability issues.” We disagree with the employer’s position.

As previously explained, we interpreted this provision as addressing the “current condition” denial, which was the only denied claim involving a bona fide dispute over compensability and, as such, the sole claim subject to the “DCS” portion of the agreement. *See* ORS 656.289(4); OAR 438-009-0010. Consistent with this analysis, we did not construe the agreement’s “attorney fee” reference as extending to the initial claim, particularly when the employer was acknowledging its acceptance of the claim, which was consistent with our compensability decision (which concerned the denied claim that our previous order had overturned), as well as the CDA (from which claimant was releasing all “non-medical service related benefits under that accepted claim).

Finally, the employer asks that we reinstate our previous approval order, with the exception of our interpretation of the parties’ intentions. In doing so, it asserts that we are not statutorily authorized to “interpret” settlements, but rather to merely approve or disapprove the agreement. We disagree with the employer’s characterization of our approval order.

Pursuant to ORS 656.289(4) and OAR 438-009-0010(7), we are authorized to approve, disapprove, or specify the manner in which any objection to the agreement may be cured. Our approval order was consistent with this authority. The purpose of the additional comments in our approval order was not to “impose” any obligation on a party not otherwise expressed in, or implied by, the agreement. To the contrary, our statements were simply designed to articulate the meaning of the agreement’s terms, as we understood them, in granting our approval. In this way, if the parties disagreed with our understanding of the agreement, they could seek reconsideration to clarify their intentions.

As explained above, considering the employer’s acceptance of the initial claim (an action consistent with our compensability decision and a foundational imperative for an approved CDA) and in the absence of a provision expressly modifying or vacating the attorney fee award granted by our compensability decision, our approval was premised on the understanding that our prior award remained. Upon further reflection, we continue to consider that assessment to be reasonable for the reasons discussed above.

The employer disagrees with our analysis of the settlement and presents a reasonable dissection of several provisions in support of its position. What has not been submitted is any “post-approval order” written confirmation from claimant or his counsel concurring with the employer’s analysis. In the absence of such written confirmation (*e.g.*, claimant’s and his counsel’s execution of a proposed addendum), we decline the employer’s request to approve the agreement based on its unilateral representation of the parties’ intentions.

In sum, based on the parties’ positions, we are unable to conclude that they have reached a “meeting of the minds” regarding the meaning of the proposed agreement. Without a mutual agreement concerning the effect of the settlement/stipulation, we decline to approve our portion of the agreement.

Accordingly, on reconsideration the proposed settlement is not approved. Consequently, the employer’s petition for judicial review of our previous order remains pending before the court. *See* ORS 656.298(9).

**IT IS SO ORDERED.**

Entered at Salem, Oregon on January 27, 2012