
In the Matter of the Compensation of
DAVID J. LAMPA, Claimant
WCB Case No. 13-02172
ORDER ON RECONSIDERATION
Moore Jensen, Claimant Attorneys
Gress & Clark LLC, Defense Attorneys

Reviewing Panel: Members Weddell, Somers, and Johnson.¹

On June 25, 2014, we withdrew our June 3, 2014 order, which reversed that portion of an Administrative Law Judge's (ALJ's) order that had declined to award penalties and attorney fees for the insurer's allegedly unreasonable refusal to close his claim. Finding that the insurer's conduct had been unreasonable, we had assessed penalties under ORS 656.268(5)(d) and attorney fees under ORS 656.382(1). We abated our order to consider claimant's contention that our \$2,500 attorney fee award for his counsel's services at hearing should be increased.² Having received the insurer's response, we proceed with our reconsideration.³

In requesting an \$8,000 assessed attorney fee under ORS 656.382(1), claimant requests that we take administrative notice of an ALJ's "post-hearing" March 21, 2014 order that modified a "post-hearing" Order on Reconsideration in awarding a total of \$49,779.72 in permanent disability.⁴ Claimant's attorney also represents that approximately 15 hours were spent on the penalty issue before and including the July 2013 hearing.

¹ Member Lowell participated in the initial review. Because Member Lowell's term has expired, Member Johnson has participated in the reconsideration of this case. Member Johnson offers no opinion on this attorney fee issue.

² We recognize that the parties have filed petitions for judicial review. Nevertheless, because our initial order was withdrawn within 30 days of its issuance, we retain authority to issue this reconsideration order. ORS 656.295(8); *Haskell Corporation v. Fillippi*, 152 Or App 117, 119 n 1 (1998); *Scarlet M. Allen*, 59 Van Natta 2469 n 2 (2007).

³ The time for claimant's reply has expired.

⁴ At the hearing, claimant asserted that the value of his permanent disability was \$22,362.30. (Tr. 10).

The insurer responds that claimant requested a \$5,000 attorney fee at the hearing without offering argument or evidence justifying the request.⁵ The insurer further cites *Anthony Cayton*, 56 Van Natta 1784 (2013), where we awarded the claimant's counsel a \$3,236 fee for services in obtaining an \$11,000 penalty under ORS 656.262(11)(a). According to the insurer, our \$2,500 attorney fee award was "more than generous."⁶

At the outset, we decline to consider claimant's attorney's representation regarding the number of hours devoted to the penalty issue. See *Daniel L. Demarco*, 65 Van Natta 1837, 1846-47 (2013) (to consider information submitted under OAR 438-015-0029 for the first time on Board review of an ALJ's attorney fee award would be to base our review of an ALJ's attorney fee determination on information that was not available for consideration by the ALJ). However, because claimant's counsel at the hearing level represented that 15 hours had been devoted to the penalty issue, that representation has been considered. (Tr. 10).

Moreover, in assessing the value of the interest involved under OAR 438-015-0010(4), we consider the record existing at the time the record is closed, not subsequent events such as claim closure, reconsideration orders, or ALJ decisions. In fact, claimant's attorney represented the value of the claim at the hearing level based on the then-developed record, which is the time when the determination of reasonable attorney fee would be made. (Tr. 10). In any event, the value of the benefit to claimant is but one of the factors we consider in awarding an assessed fee under ORS 656.382(1).

Finally, the insurer did not contest claimant's counsel's \$5,000 attorney fee request at the hearing level, instead asserting that its conduct was not unreasonable. Therefore, after considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable attorney fee for claimant's attorney's services at the hearing level is \$5,000, payable by the insurer.⁷ In reaching this conclusion, we have particularly considered the time devoted to the

⁵ The insurer, however, did not object to the amount of the attorney fee requested, but rather asserted that its conduct was not unreasonable. (Tr. 17).

⁶ Although the insurer cites *Cayton* in arguing that our previous attorney fee award was sufficient, our decision in that case concerned ORS 656.262(11)(a), not ORS 656.382(1), which applies to this matter.

⁷ Claimant's attorney is not entitled to a fee for services on review related to the attorney fee issue. See *Cayton v. Safelite Glass Corp.*, 258 Or App 522, 525 (2013)

penalty issue (as represented by the hearing record and claimant's counsel's fee representation during closing arguments), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated. This award is in lieu of our previous \$2,500 attorney fee award.

Therefore, on reconsideration, as modified and supplemented herein, we republish our June 3, 2014 order. The parties' appeal rights shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on August 15, 2014