
In the Matter of the Compensation of
RANDELL R. LEDBETTER, Claimant
WCB Case No. 15-01022
ORDER ON REVIEW
Preston Bunnell LLP, Claimant Attorneys
John M Pitcher, Defense Attorneys

Reviewing Panel: Members Weddell, Johnson, and Somers. Member Weddell specially concurs.

The self-insured employer requests review of Administrative Law Judge (ALJ) Fisher's order that set aside its denial of claimant's new/omitted medical condition claim for a C6-7 disc condition. In his respondent's brief, claimant seeks an increased carrier-paid attorney fee. On review, the issues are compensability and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation.

Compensability

In setting aside the employer's denial, the ALJ concluded that claimant had established that his September 5, 2014 work injury was a material contributing cause of his need for treatment/disability for his C6-7 disc condition. ORS 656.005(7)(a); ORS 656.266(1). In doing so, the ALJ determined that the opinion of Dr. Kovacevic, as supported by the opinions of Drs. Noonan and Carlson, was more persuasive than those of Drs. Dewing and Kitchel.

On review, the employer asserts that claimant provided inconsistent and unreliable histories and, consequently, has not established legal causation. The employer also contends that the medical opinions relying on claimant's varied histories cannot meet his burden of proof.¹ As explained below, we disagree with the employer's contentions.

¹ The employer asserts that compensability should be analyzed under an "occupational disease" standard, rather than an "injury" standard. Yet, the record does not establish that it raised this challenge at the hearing level. Under such circumstances, we decline to consider this issue for the first time on review. See *Charles F. Hoffman*, 63 Van Natta 1594, 1594-95 (2011) (declining to address the carrier's "combined condition" and "occupational disease" arguments raised for the first time on review); *Leah M. Fritz*, 54 Van Natta 632 (2002) (when parties agreed to litigate claim as injury and did not identify occupational disease as issue in preliminary discussion of issues to be litigated, occupational disease theory was not considered when raised for first time in closing argument).

Claimant must prove both legal and medical causation by a preponderance of the evidence. *Harris v. Farmer's Co-op Creamery*, 53 Or App 618, *rev den*, 291 Or 893 (1981); *Carolyn F. Weigel*, 53 Van Natta 1200 (2001), *aff'd without opinion*, 184 Or App 761 (2002). Legal causation is established by showing that claimant engaged in potentially causative work activities; whether those work activities caused claimant's condition is a question of medical causation. *Darla Litten*, 55 Van Natta 925, 926 (2003).

Whether claimant established legal causation hinges principally on his credibility. In determining the credibility of a witness's testimony, we normally defer to an ALJ's demeanor-based credibility findings. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (on *de novo* review, it is a good practice for an agency or court to give weight to the factfinder's credibility assessments).

Here, the ALJ did not make a demeanor-based credibility finding. Because the credibility issue concerns the substance of claimant's testimony, we are equally qualified to make our own credibility determination. *Coastal Farm Supply v. Hultberg*, 84 Or App 282, 285 (1987); *Michael A. Ames*, 60 Van Natta 1324, 1326 (2008). Inconsistencies in the record may raise such doubt that we are unable to conclude that material testimony is reliable. *George V. Jolley*, 56 Van Natta 2345, 2348 (2004), *aff'd without opinion*, 202 Or App 327 (2005).

The employer contends that claimant's testimony is not credible in light of the conflicting histories that he provided to Drs. Kitchel, Carlson, and Dewing, the employer's recorded statement, and two 827 forms. For the following reasons, we disagree with the employer's assertion.

Claimant is an electrician who had worked for the employer since August 2008. (Tr. 10; Ex. 1). At the completion of the work project on September 5, 2015, he felt "just like I had a rough day, you know, sore, tense[.]" (Tr. 13). At that point, he was not experiencing any tingling or shooting pains. (*Id.*) The next morning, he felt nagging pain in his left shoulder and neck, as well as shooting pain into the left arm. (Tr. 14).

Claimant's wife testified that, when he got home the evening of September 5, 2015, he looked "tired or pooped." (Tr. 27). She stated that claimant requested that she rub his shoulders and neck because they were achy. (*Id.*)

On September 6, 2014, claimant treated with Mr. Musgrave, a physician's assistant at an urgent care facility, who documented a history of "tingling in fingers x 1 day." (Tr. 14; Ex. A-1). He noted that claimant may have pulled a muscle earlier that week. (*Id.*)

On September 8, 2014, claimant treated with Dr. Carlson, chiropractor, with a history of "pushing and pulling with force for long periods while at work last Friday." (Ex. 2-1). He noted that claimant "woke up on Saturday when the symptoms started," but also that he "noticed these symptoms for the past several days." (*Id.*) Dr. Carlson later clarified that claimant did not have symptoms at work or on the drive home on September 5, but awoke with symptoms at home the next day. (Ex. 24-1).

Dr. Kovacevic, attending physician, took a history that claimant had neck discomfort and soreness on September 5, which significantly progressed by morning in his neck, left shoulder, and arm. (Exs. 7, 13, 21A, 23, 27, 28A). He acknowledged that histories provided on an 827 form and during the employer's recorded statement were different than the history reported to him. (Ex. 30-16, -17).

Claimant authored histories contained in 827 forms, which stated that "after a day of pulling and tugging at work (9-5-14) I went home—woke up the next morning (9-6-14) with extreme pain on my left side neck, shoulder, and arm." (Exs. 4, 6).

On September 15, 2014, the employer recorded an interview with claimant. (Ex. 5). Claimant stated that he "was hot, sweaty and... just trying to get it done and, uh... I didn't feel anything until the next day." (Ex. 5-5). He explained that he had pain in the left side of his neck, "down the left shoulder... and down the left arm... through the fingers." (Ex. 5-6).

Dr. Noonan, consulting neurosurgeon, indicated that claimant noticed neck discomfort on his drive home from work, and woke up the next day with significant pain. (Ex. 10-1). Dr. Noonan later clarified that claimant felt some neck discomfort and soreness on September 5, and that he experienced significant neck, left shoulder, and arm symptoms the next morning. (Ex. 23A).

In November 2014, Nurse Practitioner Kovacevic, in Dr. Kovacevic's absence, evaluated claimant and noted that he "had an incident on 9/5/14 where he had a heavy labor day which caused pain in his left arm and shoulder and then worsened the following day." (Ex. 11).

Dr. Kitchel, orthopedic surgeon, performed an examination at the employer's request. (Ex. 12). Claimant reported that he had worked a particularly strenuous day on September 5, with a lot of tugging, cable stripping, pushing, and pulling, but was able to complete his shift. (Ex. 12-1). He woke up the next morning with pain in his neck, left shoulder and left arm. (Ex. 12-7). Dr. Kitchel later clarified that claimant provided a history that his "first symptoms were at home when he woke up on September 6th." (Ex. 22-1).

Dr. Dewing, orthopedic surgeon, examined claimant at the employer's request. (Ex. 25). He took a history that claimant had no symptoms at work or on the drive home, but that he had an onset of symptoms when he woke up on September 6. (Ex. 25-2, -9).

We find claimant's history reliable and consistent with the medical record. Claimant testified that he was sore on September 5, but had the onset of radicular type symptoms the following morning. (Tr. 13, 14). Dr. Carlson's history, claimant's statement taken by the employer, or the 827 forms do not expressly contradict that history, because the primary focus of the histories contained therein was on "pain" or severe symptoms, rather than on claimant's "discomfort" or "soreness." Furthermore, the more detailed histories obtained by Dr. Kovacevic and Dr. Noonan that claimant had soreness on September 5 and more significant symptoms on September 6 are consistent with claimant's unrebutted testimony. (Exs. 21A, 23A). Finally, the record does not indicate any off-work event, injury or other contributor to otherwise account for claimant's need for treatment, disability or condition. Under such circumstances, we conclude that claimant's history is sufficiently reliable and that he has established legal causation.

We turn to medical causation. To establish the compensability of his new/omitted medical condition claim, claimant must prove that his work injury was a material contributing cause of the disability/need for treatment of the claimed condition.² ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977 (2006). If claimant meets that burden and the medical evidence establishes that the "otherwise compensable injury" combined at any time with a "preexisting condition" to cause or prolong disability or a need for treatment, the employer has the burden to prove that the "otherwise compensable injury" (*i.e.*, the "work-related injury incident") was not the major contributing cause of

² The parties do not dispute, and the record establishes, the existence of the claimed C6-7 disc condition. See *Maureen Y. Graves*, 57 Van Natta 2380 (2005).

the disability or need for treatment of the combined C6-7 disc condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*; 233 Or App 499, 505 (2010); *Brown v. SAIF*, 262 Or App 640, 652 (2014); *Jean M. Janvier*, 66 Van Natta 1827 (2014), *aff'd without opinion*, 278 Or App 447 (2016).

Because of the disagreement between medical experts regarding the cause of claimant's condition, need for treatment, and disability, the claim presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Matthew C. Aufmuth*, 62 Van Natta 1823, 1825 (2010). More weight is given to those medical opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986); *Linda E. Patton*, 60 Van Natta 579, 582 (2008).

After conducting our review, we are most persuaded by Dr. Kovacevic's opinion, which concluded that the work injury caused claimant's C6-7 disc herniation. (Ex. 21A). As explained above, Dr. Kovacevic's understanding of the onset of claimant's symptoms was consistent with his unrebutted testimony. In reaching that decision, Dr. Kovacevic emphasized the work activities of pushing and pulling, and the specific course and timing of claimant's progressing symptoms. (*Id.*) We find Dr. Kovacevic's opinion well reasoned and based on accurate information and, therefore, persuasive. *Somers*, 77 Or App at 263.

In contrast, the opinions of Drs. Dewing and Kitchel are inconsistent with claimant's testimony and the contemporaneous medical record, as previously described. Specifically, Drs. Dewing and Kitchel obtained histories that claimant did not have any symptoms until the morning of September 6. Because Drs. Dewing and Kitchel relied on an inaccurate history, we find their opinions to be unpersuasive. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 476 (1977) (medical opinion that is based on an incomplete or inaccurate history is not persuasive).

In conclusion, based on the foregoing reasoning, in addition to that expressed in the ALJ's order, the medical record persuasively establishes that claimant's work-related injury-incident was a material contributing cause of the need for treatment/disability of the claimed condition. Moreover, because we find the medical opinions of Drs. Dewing and Kitchel unpersuasive for the reasons expressed above, the medical record is insufficient to meet the employer's burden of proof under ORS 656.266(2)(a). Consequently, we conclude that claimant's C6-7 disc condition claim is compensable. Accordingly, we affirm.

Attorney Fee

At the hearing level, claimant's counsel requested a fee of \$18,290 in his "reply" written closing argument (without submitting a statement of services) for his efforts in finally prevailing over the employer's denial.³ The employer did not object to the amount. The ALJ awarded a \$10,000 assessed fee under ORS 656.386(1). Applying the factors prescribed in OAR 438-015-0010(4), the ALJ "particularly" considered the time devoted to the case, the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.

On review, claimant seeks the previously requested attorney fee of \$18,290. Specifically, he asserts that ORS 656.386(1)(a) mandates that the ALJ "shall" allow a reasonable attorney fee. Claimant interprets this language to require that, absent a finding that the requested fee is unreasonable, the requested fee must be approved.

Yet, the Supreme Court has previously addressed ORS 656.386(1) and its authority to award a reasonable attorney fee. In *Schoch v. Leupold & Stevens*, 325 Or 112, 117-18 (1977), the court explained,

"The statutory directive to award a 'reasonable' fee describes an exercise of discretion * * *.

"The attorney fee statute is a broad statement of legislative policy that prevailing claimants' attorneys shall receive reasonable compensation for their representation. The term 'reasonable' is an inexact term that expresses a complete legislative policy. That term delegates authority to the Board to determine, on a case-by-case basis, what constitutes a reasonable attorney fee. The agency's choice, among the range of choices available to it, must be a choice that a reasonable

³ Counsel did not submit an affidavit or a request specifically addressing the "rule-based" factors under OAR 438-015-0010(4) for determining a reasonable attorney fee. *See Cory L. Krauss*, 68 Van Natta 190, 191-92 n 3 (2016) (in reducing an ALJ's attorney fee award, the Board noted that the claimant's counsel did not submit an affidavit or a request specifically addressing the "rule-based factors" of OAR 438-015-0010(4) determining a reasonable attorney fee).

decision-maker would make, given the facts of the case, the interests of the parties appearing before the agency, and the policy or policies of the law that the agency's choice is intended to further.”

Thus, consistent with the *Schoch* rationale, the Board (as well as an ALJ) is authorized to determine, on a case-by-case basis, a reasonable attorney fee award. To reach that determination, the factors prescribed in OAR 438-015-0010(4) are applied. Consistent with the statutory directive of ORS 656.386(1) to “allow” a reasonable attorney fee, the Board has adopted OAR 438-015-0035 and OAR 438-015-0055(4), as well as OAR 438-015-0010(4). Pursuant to those rules, the Board (as well as an ALJ) is authorized to award a reasonable carrier-paid attorney fee in accordance with ORS 656.386(1), which is determined based on the factors prescribed in OAR 438-015-0010(4).

Here, claimant's counsel simply requested a specified fee, without providing any information or argument applying the “rule-based” factors to the hearing record. In light of such circumstances, we consider the limited information before us to determine a reasonable attorney fee.

We provide the following supplementation in support of the ALJ's determination. In determining a reasonable attorney fee award under OAR 438-015-0010(4), the following factors are considered: (1) the time devoted to the case; (2) the complexity of the issues involved; (3) the value of the interest involved; (4) the skill of the attorneys; (5) the nature of the proceedings; (6) the benefit secured for the represented party; (7) the risk in a particular case that an attorney's efforts may go uncompensated; and (8) the assertion of frivolous issues or defenses. Application of the “rule-based” factors does not involve a strict mathematical calculation. *Robert L. Lininger*, 67 Van Natta 1712, 1718 (2015).

Here, the hearing took place in Portland, which is where claimant's counsel's office is located. The hearing lasted 50 minutes, which did not include closing arguments. The hearing transcript consists of 33 pages. There were 35 admitted exhibits, including three concurrence reports submitted by claimant's counsel, which formed the basis for the ALJ's compensability decision. The concurrence reports demonstrate that claimant's counsel spoke to the doctors about the compensability dispute, prepared a summary of their conversations, obtained their signatures, and submitted the summaries as proposed exhibits. There was one “post-hearing” deposition, which was held in Eugene, and lasted 40 minutes.

See Carmen O. Macias, 53 Van Natta 689 (2001) (attorney's travel time to an out-of town hearing or deposition represented hours of legal services rendered on behalf of the claimant, which could be considered in awarding a reasonable fee). Claimant's attorney submitted a 3-page hearing memorandum and 33 pages of written closing arguments. These circumstances indicate that claimant's attorney's services extended well beyond the time spent at hearing.

Considering the range of disputed claims generally submitted for resolution to this forum, the case presented legal and medical issues at a complexity level slightly beyond that generally litigated before the Hearings Division. The disagreement between the medical experts also created a risk that claimant's counsel's efforts would go uncompensated. This latter factor includes consideration of the contingent nature of representing workers in Oregon. *See Krause*, 68 Van Natta at 193.

The value of the interest involved and the benefit secured for claimant included acceptance of a C6-7 disc condition, which may require surgery. (Ex. 10-3). Moreover, claimant remained on light duty work. (Tr. 24). This record suggests a possibility of additional temporary disability benefits, as well as eventual permanent impairment and vocational assistance. Thus, the record supports a conclusion that the value of the interest involved and the benefit secured for claimant are higher than average.

Counsel for both parties are experienced and presented their respective positions in a skillful and professional manner. There were no frivolous issues or defenses.

Based on our review of the record and considering the parties' arguments regarding the application of the factors set forth in OAR 438-015-0010(4) to the particular circumstances of this case, we find that the \$10,000 awarded by the ALJ's order is a reasonable fee for claimant's attorney's services at the hearing level regarding the compensability issue. In reaching this conclusion, we have particularly considered the time devoted to the compensability issue (as represented by the hearing record), the complexity of the issue, the value of the interest involved and benefit obtained for claimant, the nature of the proceedings (including an out-of-town deposition), and the risk that claimant's counsel's efforts in this particular case may have gone uncompensated.

Claimant's attorney is entitled to an assessed fee for services on review regarding the compensability issue. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review regarding the compensability issue is \$3,720, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief and his counsel's uncontested Statement of Services and fee request), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.⁴

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. See ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated September 21, 2015 is affirmed. For services on review regarding the compensability issue, claimant's attorney is awarded an assessed fee of \$3,720, payable by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on August 12, 2016

Member Weddell specially concurring.

On this record, I agree with the majority's conclusion that \$10,000 represents a reasonable fee for claimant's counsel's services at hearing. However, because I consider it necessary to further address claimant's statutory argument that the Board "shall allow" a reasonable attorney fee request, and because I disagree with the majority's application of *Schoch v. Leupold & Stevens*, 325 Or 112, 117-18 (1997), I offer the following analysis by way of concurrence.

⁴ Claimant's counsel is not entitled to an attorney fee award for services devoted to his unsuccessful challenge to the ALJ's attorney fee award. Although his counsel's Statement of Services does not specify that the time devoted on review (12 hours) excluded time on attorney fee issues, his arguments concerning the other rule-based factors discuss only the compensability issues. Therefore, we interpret the fee request to apply to the compensability issue. We also conclude that \$3,720 is a reasonable fee in light of the rule-based factors.

Here, in his written closing argument at hearing, claimant's counsel requested an assessed fee of \$18,290. (Hearing File). The ALJ cited OAR 438-015-0010(4) and determined that the factors therein supported a reasonable attorney fee award of \$10,000. I would consider the ALJ's analysis to be inadequate to facilitate meaningful appellate review of the attorney fee award.⁵ I reason as follows.

A line of cases beginning with *Schoch* has reiterated the need for the Board to provide adequate reasoning to explain the amount of an assessed attorney fee award. *See Schoch*, 325 Or at 117-18; *Wal-Mart Associates Inc. v. Lamb*, 278 Or App 622 (2016) (remanding for reconsideration of attorney fees); *Cayton v. Safelite Glass Corp.*, 257 Or App 188, 196 (2013) (remanding for reconsideration of penalty-related attorney fee); *City of Albany v. Cary*, 201 Or App 147, 153 (2005) (remanding for reconsideration of request for attorney fees); *SAIF v. Wart*, 192 Or App 505, 520 (2004) (discussing *Schoch* and the requirement that the Board explain the discrepancy between its attorney fee award and claimant's counsel's documented request). The court has explained that, when there is a specific statement of services or objection to a fee award, "the board must do more than simply describe the factors that it has considered and then posit a reasonable fee." *Cary*, 201 Or App at 153.

While the Board rules provide procedures for requesting attorney fees (including fees for services at hearing when an attorney fee award has not been granted by the ALJ), there is no analogous rule for attorney fee requests at the hearing level, and it would appear that such requests are often made on an informal basis. *See* OAR 438-015-0029; *Daniel L. Demarco*, 65 Van Natta 1837, 1847 (2013) (citing WCB Admin Order 1-1992, eff. April 6, 1992, Order of Adoption, page 2).

Citing ORS 656.386(1), claimant reasons that the ALJ erred by not first determining whether claimant's \$18,290 attorney fee request was reasonable before calculating the attorney fee award. He submits that the statute which provides that the Board "shall allow a reasonable attorney fee" requires that a reasonable attorney fee request must be allowed. *See* ORS 656.386(1). Asserting

⁵ The ALJ's reasoning for awarding a \$10,000 attorney fee was as follows: "In reaching this conclusion, I have particularly considered the time devoted to the case, the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated." (O&O at 8).

that the ALJ did not determine whether claimant's counsel's fee request was reasonable, claimant reasons that the ALJ's determination of an attorney fee was premature and in error.

“Allow” means to “approve,” “sanction,” “accept,” or “permit.” *Webster's Third New Int'l Dictionary*, 58 (unabridged ed 1993). Based on the statutory language of ORS 656.386(1), I conclude that before making its own calculation of a reasonable attorney fee, the Board must determine whether claimant's counsel's fee request is reasonable, and if it is, then the request “shall” be allowed.⁶ If the Board determines that a requested fee is not reasonable, and articulates such reasoning, it should then proceed to a determination of a reasonable attorney fee based on consideration of the OAR 438-015-0010(4) factors.

While there may be a range of attorney fees that may be deemed “reasonable” in a given case, ORS 656.386(1) does not authorize the Board to determine “the most reasonable” attorney fee award. Instead, a reasonable attorney fee request must be allowed. Such a process would serve to encourage the parties to provide well-considered requests and recommendations, rather than artificially high or low amounts in anticipation of a determination somewhere in the middle.

Turning to the case at hand, I note that claimant's counsel's fee request was made in closing arguments and did not include a detailed discussion of the OAR 438-015-0010(4) factors, or estimate of time devoted to the case. In the absence of that information, the Board's *de novo* review of the ALJ's award is necessarily constrained by the limited record. *See, e.g., Cindy R. Johnson*, 68 Van Natta 832, 840 (2016). Based on the record available on review, I do not find that \$18,290 would be a reasonable assessed fee for claimant's attorney's services at the hearing level. Further, I agree with the majority's discussion of the OAR 438-015-0010(4) factors, and concur with the amount of the attorney fee award.

⁶ This does not amount to a “default” or presumptive finding that a claimant's counsel's fee request is reasonable, even in the absence of an objection from the carrier. However, consistent with *Schoch* and its progeny, claimant's counsel's fee request must be the starting place for the Board's attorney fee analysis. *Schoch*, 325 Or at 117-18 (1977).