
In the Matter of the Compensation of
KEVIN J. SIEGRIST, Claimant
WCB Case No. 15-02147
ORDER ON REVIEW
Julene M Quinn LLC, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Weddell and Curey.

Claimant requests review of Administrative Law Judge (ALJ) Kekauoha's order that declined to direct the SAIF Corporation to fully reimburse claimant's cost bill under ORS 656.386(2). On review, the issue is litigation costs. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following summary.

After SAIF denied claimant's carpal tunnel syndrome (CTS) claim, he requested a hearing and paid a total of \$1,550 to obtain medical reports from three physicians, including \$1,200 paid for the report of Dr. Woolley, a consulting hand and upper extremity surgeon. (Exs. 7, 8, 14-3-7, 18). On April 22, 2015, a prior ALJ issued an Opinion and Order that set aside SAIF's denial and awarded "reasonable costs and expenses" under ORS 656.386(2). (Ex. 13-6).

On April 27, 2015, SAIF received a cost bill, which requested reimbursement of \$1,550, from claimant's attorney. (Ex. 14-1). On May 5, 2015, SAIF reimbursed \$1,500 of claimant's cost bill. (Ex. 15). On May 13, 2015, claimant requested a hearing to recover the remaining portion of the cost bill (\$50). (Hearing File).

CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that SAIF had not waived any right to challenge claimant's cost bill by not filing a hearing request within 30 days of its receipt of the cost bill. *See* OAR 438-015-0019(4). Additionally, the ALJ agreed with SAIF's contention that claimant had not established "extraordinary circumstances" justifying payment of an amount greater than \$1,500. *See* ORS 656.386(2); OAR 438-015-0019(2). Accordingly, the ALJ declined claimant's request for additional reimbursement.

On review, claimant contends that extraordinary circumstances justified the payment of the full \$1,550 cost bill. As explained below, we agree with claimant's contention.¹

ORS 656.386(2) provides for an award of a claimant's reasonable expenses and costs for records, expert opinions, and witness fees if the claimant finally prevails against a denial. ORS 656.386(2)(d) limits such an award to \$1,500 unless the claimant demonstrates extraordinary circumstances justifying payment of a greater amount.² See also OAR 438-015-0019(2).

We have addressed whether "extraordinary circumstances" justified payment of an amount greater than the statutory \$1,500 limit in *Ken L. Circle*, 67 Van Natta 61 (2015), and *Donna K. Barnett*, 67 Van Natta 181 (2015). Recognizing that "extraordinary" is defined as "more than ordinary : not of the ordinary order or pattern <ordinary and ~ expenses> : going beyond what is usual, regular, common or customary," we evaluated the assertion of "extraordinary circumstances" by examining whether the circumstances were of the type that were usual, regular, common, or customary in this forum. *Barnett*, 67 Van Natta at 182; *Circle*, 67 Van Natta at 62 (citing *Webster's Third New Int'l Dictionary* 807 (unabridged ed 1993)).

The circumstances of this case include the facts that claimant had no private health insurance at the time of the injury, had lost his job shortly after the injury, and needed a surgery that would only, realistically, be obtainable by prevailing over the denial. (Exs. 13-1-3, 18). Additionally, SAIF had procured the opposing report of a highly credentialed hand surgeon, Dr. Nolan, to support its denial. (Ex. 13-3).

In this context, claimant paid \$1,550 to obtain reports from three doctors, including \$150 for a telephone conference with Dr. Lowe, a treating physician, \$200 for a telephone conference with Dr. Taylor, a neurologist who conducted nerve studies, and \$1,200 for an examination by Dr. Woolley. (Ex. 14). As the ALJ noted, Dr. Lowe lacked the specialized knowledge of the other physicians,

¹ Because we find extraordinary circumstances justifying the payment of more than \$1,500, we need not address claimant's contention that OAR 438-015-0019(5) required SAIF to pay the full cost bill because it did not request a hearing within 30 days of its receipt of the cost bill.

² SAIF disputes only whether payment of the amount greater than \$1,500 is justified by extraordinary circumstances, not that claimant's expenses and costs were "reasonable."

and Dr. Taylor's opinion ultimately did not support claimant's burden of proof. (Ex. 13-4-5). In light of SAIF's submission of Dr. Nolan's report, claimant needed to bolster the record supporting compensability. Consequently, he took an additional step and secured a report from Dr. Woolley, whom was described by the prior ALJ as a "well-qualified hand and upper extremity surgeon." (Ex. 13-6). Ultimately, it was the report from Dr. Woolley that tipped the scale in favor of the compensability of the disputed claim. (*Id.*)

Based on our experience in deciding contested cases in this forum, we recognize that costs associated with presenting claimants' cases vary. In this case, the preparation of claimant's case required the acquisition of an additional medical report from a specialist to establish the compensability of his claim, and the cost of securing that report brought claimant's costs beyond the customary \$1,500 limit of ORS 656.386(2)(d). We do not consider the circumstances that required claimant to procure Dr. Woolley's report, in addition to the reports of Drs. Lowe and Taylor, to have been usual, regular, common, or customary in this forum. Therefore, we find "extraordinary circumstances" justifying payment of an amount greater than \$1,500 for witness fees, expenses, and costs.

Finally, claimant requests a penalty and attorney fee under ORS 656.262(11)(a), and an assessed attorney fee under ORS 656.386(4). *See* Or Laws 2015, ch 521, §§ 2, 7, 11 (amending ORS 656.262(11)(a) to provide for a penalty and attorney fee for unreasonable refusal to pay costs, and enacting ORS 656.386(4) to provide for an assessed attorney fee for prevailing on a claim for an increase of costs, effective for order issued and attorney fees incurred on or after January 1, 2016). However, when the ALJ inquired about the penalty and attorney fee issues at the hearing, claimant's attorney responded, "I'm going to withdraw that." (Tr. 2).

Claimant contends that he should not be bound by his withdrawal of the penalty and attorney fee issues at hearing because the statutory amendments allowing the requested penalty and attorney fee awards became effective on January 1, 2016, after the August 5, 2015 hearing date. We disagree with claimant's contention.

A waiver is "the intentional relinquishment of a known right." *Drews v. EBI Cos.*, 310 Or 134, 150 (1990). A waiver must be "plainly and unequivocally manifested." *Wright Schuchart Harbor v. Johnson*, 133 Or App 680, 185 (1995). If an issue is not raised at the hearing level, it is our longstanding practice not to consider such an issue on review. *See Stevenson v. Blue Cross*, 108 Or App 247,

252 (1991); *Fister v. South Hills Health Care*, 149 Or App 214, 218 (1997) (absent adequate reason, Board should not deviate from well-established practice of considering only issues raised by the parties at the hearing).

Here, claimant unambiguously withdrew the penalty and attorney fee issues at the August 5, 2015 hearing. Although the statutory amendments allowing penalty and attorney fee awards in “costs”-related litigation were not yet effective, House Bill (HB) 2764 (2015) had been approved by the Governor on June 22, 2015. Claimant could have preserved the issue in the event the case could involve a penalty or attorney fee award after January 1, 2016, the effective date of the legislation.

Under these particular circumstances, we conclude that claimant effectively waived the penalty and attorney fee issues, and they were not at issue at the hearing. Accordingly, we do not address those issues on review.

ORDER

The ALJ’s order dated September 2, 2015 is reversed. SAIF is directed to pay the unpaid \$50 of the cost bill.

Entered at Salem, Oregon on August 11, 2016