

In the Matter of the Compensation of
CORY L. KRAUSS, Claimant
WCB Case No. 14-03199
ORDER ON REVIEW
James O Marsh, Claimant Attorneys
Richard J Cantwell, Defense Attorneys

Reviewing Panel: Members Curey, Weddell, and Somers. Member Weddell dissents in part.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Smith's order that: (1) set aside its denial of claimant's new/omitted medical condition claim for a left shoulder SLAP tear condition; and (2) awarded a \$12,000 attorney fee. On review, the issues are compensability and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that claimant's work injury was a material contributing cause of his disability/need for treatment of the disputed left shoulder condition. Reasoning that the opinion of Dr. Bents was more persuasive than the opinions of Dr. Groman and Dr. Tesar, the ALJ set aside the employer's denial.¹

On review, the employer contests the ALJ's evaluation of the medical opinions. We adopt and affirm that portion of the ALJ's order pertaining to the compensability issue.

The ALJ awarded claimant's counsel an assessed fee of \$12,000 for services at the hearing level in setting aside the denial. ORS 656.386(1). Applying the factors prescribed in OAR 438-015-0010(4), the ALJ "particularly" considered the time devoted to the case (as represented by the size and content of the record as

¹ Dr. Bents is claimant's treating surgeon. (Ex. 36). In May 2014, Dr. Groman, an orthopedic surgeon, performed an examination at the employer's request. (Ex. 30). In February 2015, Dr. Tesar, an orthopedic surgeon, performed a medical records review at the employer's request. (Ex. 38).

well as the travel time for claimant's counsel to attend the hearing), the complexity of the issues, the skill and experience of the lawyers, the value of the interest involved, and the significant risk in the case that claimant's counsel's efforts might have gone uncompensated.

We review the ALJ's attorney fee award *de novo*, based on the record as it was developed at the hearing level 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.² See *Schoch v. Leopold & Stevens*, 325 Or 112, 118-19 (1997); *Daniel L. Demarco*, 65 Van Natta 1837, 1847 (2013). Those factors are: (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).

At the hearing level, claimant's counsel did not request a specific amount for his efforts in finally prevailing over the employer's denial.³ Instead, he estimated that he would spend nine hours traveling between his Portland office and the Medford hearing. (Tr. 21).

On review, the employer argues that the ALJ's \$12,000 attorney fee award is excessive. In doing so, the employer notes that there were no depositions, the hearing involved the testimony of one witness, there were "relatively minimal" exhibits, and the hearing lasted 41 minutes.

Claimant's counsel responds that the hearing was brief because the attorneys were experienced, skilled, and prepared, allowing them to narrow the issues and focus on the pivotal issue (*i.e.*, the mechanism of injury). He argues that the "assumed multiple conferences that likely took place between claimant and claimant's attorney regarding the facts of this case," review of the medical records,

² OAR 438-015-0010(4) directs the ALJ/Board to consider prescribed factors in determining a reasonable assessed fee. In accordance with our *de novo* appellate review authority, our determination of a reasonable attorney fee award under OAR 438-015-0010(4) is based on the record developed at the hearing level and the factors set forth in the rule.

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.

preparation for the conference with the attending surgeon, preparation of the report from the attending surgeon, and preparation for the hearing should also be considered.

Claimant's counsel further contends that the benefit obtained includes "presumed significant medical expenses," temporary disability benefits, and future coverage if complications arise. He reiterates that his attendance at the hearing required nine hours travel time between his Portland office and the Medford hearing. Lastly, he emphasizes that he would go uncompensated if claimant did not prevail on this denied claim.

After considering the parties' respective positions, we modify the ALJ's assessed attorney fee award. We base our determination on the following reasoning.

First, we examine the time devoted to this case as represented by this hearing record. In doing so, claimant's counsel's travel time between his office and the hearing is considered in the determination of a reasonable attorney fee. *See Carmen O. Macias*, 53 Van Natta 689 (2001) (an attorney's travel time to a hearing represents hours of legal services rendered on behalf of a party and is considered in awarding a reasonable attorney fee).

The hearing lasted 41 minutes, including closing argument. The hearing transcript consists of 24 pages, including the closing arguments. There were 41 admitted exhibits, including two orthopedist reports submitted by the employer and a treating surgeon report, submitted by claimant's counsel. This latter report was the basis for the ALJ's compensability decision, which we have adopted and affirmed. There were no depositions.⁴

The disagreement between the medical experts regarding the cause of the disputed condition presented a complex medical question that required expert medical opinion for resolution. *See Barnett v. SAIF*, 122 Or App 279, 282 (1993). Considering the range of disputed claims generally submitted for resolution to this

⁴ We do not consider claimant's counsel's reference to "assumed multiple conferences that likely took place" helpful in applying the OAR 438-015-0010(4) factors to the particular circumstances of this case. As previously noted, claimant's counsel offered no affidavit or express representation substantiating such services. In the absence of a specific presentation at the hearing level explaining the manner in which the rule-based factors apply to the particular circumstances of this case, we confine our analysis to the record developed at the hearing level, as augmented by the parties' arguments, in determining a reasonable assessed fee under OAR 438-015-0010(4).

forum, the case presented legal and medical issues at a complexity level consistent with 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.

The value of the interest involved and the benefit secured for claimant included acceptance of a left shoulder SLAP tear condition that required surgery. (Ex. 36). Additionally, the record reflects that, after the October 28, 2014 surgery, claimant missed two weeks from work, returned to half-day light duty work for two weeks, followed by full-day light duty work for about two months, and then regular work in February 2015. (Tr. 12, 13). Claimant testified that he had no symptoms and his left shoulder was "doing fine." (Tr. 13). Thus, this record suggests minimal (if any) permanent impairment, without the need for vocational services.

Counsel for both parties are experienced litigators, who presented their respective positions in a skillful and professional manner.⁵ There were no frivolous issues or defenses.

Accordingly, 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 a reasonable fee for claimant's attorney's services at the hearing level regarding the compensability issue is \$8,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the compensability issue (as represented by the hearing record, including claimant's counsel's travel to/from the remote location), the average complexity of the issue, the moderate value of the interest involved and benefit obtained for claimant, the ordinary nature of the proceedings, and the usual risk that claimant's counsel's efforts in this particular case may have gone uncompensated. This latter factor includes consideration of the contingent nature of representing workers in Oregon.

Claimant's counsel is also 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

⁵ The ALJ's order did not refer to any specific perceptions/observations regarding the attorney's services during the litigation of this claim before the Hearings Division. Thus, we consider ourselves equally equipped to apply the "rule-based" factors to the record in reaching a determination of a reasonable attorney fee.

find that a reasonable fee for claimant's counsel's services on review regarding the compensability issue is \$4,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the compensability issue (as represented by claimant's respondent's brief and his counsel's fee request),⁶ the complexity of the issue, the nature of the proceedings, the skill of the attorneys, and the risk that claimant's counsel may go uncompensated.⁷

ORDER

The ALJ's order dated April 7, 2015 is affirmed in part and modified in part. In lieu of the ALJ's \$12,000 attorney fee award for services at the hearing level, claimant's attorney is awarded \$8,000, payable by the employer. For services on review, claimant's attorney is awarded \$4,000, payable by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on February 9, 2016

Member Weddell dissenting in part.

I agree with the majority's compensability decision. However, I disagree with its decision to reduce the ALJ's attorney fee award for claimant's counsel's services at the hearing level.⁸ I offer the following analysis.

In all cases involving a denied claim where the claimant prevails in a hearing, the ALJ shall allow a reasonable attorney fee. ORS 656.386. No statute or rule compels claimant to submit an affidavit, statement, or request regarding a reasonable attorney fee, and in this case, claimant's attorney only requested a "reasonable fee" and pointed out to the ALJ that he would spend 9 hours traveling to and from hearing. The employer did not suggest a reasonable fee for

⁶ We acknowledge our obligation to award a reasonable attorney fee, irrespective of a specific objection to claimant's counsel's specific fee submission. *Randal D. Plummer*, 63 Van Natta 594, 600 n 8 (2011).

⁷ Claimant's counsel is not entitled to an attorney fee for services on review devoted to the unsuccessful defense of the ALJ's attorney fee award.

⁸ Because I would not reduce the ALJ's attorney fee award, I would award on Board review the reasonable fee requested by claimant. The employer did not object or suggest that the requested fee was unreasonable.

those services. In cases like this, the ALJ must consider the factors put forth in OAR 438-015-0010(4) and determine a reasonable fee.⁹ In explaining the \$12,000 attorney fee award, the ALJ stated he considered each of the factors listed in OAR 438-015-0010(4).

The Board conducts a *de novo* review of the attorney fee awarded by the ALJ. The court has described the statutory directive to award a reasonable fee as “an exercise of discretion.” *Schoch v. Leopold & Stevens*, 325 Or 112, 117 (1997).¹⁰

The Time Devoted to the Case

The majority correctly notes that “the hearing lasted 41 minutes, including closing argument. The hearing transcript consists of 24 pages, including the closing arguments. There were 41 admitted exhibits, including two orthopedist reports submitted by the employer and a treating surgeon report, submitted by claimant’s counsel.” The record demonstrates that claimant arrived at hearing with an understanding of the proceedings, that claimant’s attorney appeared at hearing both well prepared, organized, and with a thorough knowledge of the record, that the report from the treating surgeon addressed the correct legal standard as well as the expert opinions expressed in the reports solicited by the employer. None of that can happen without claimant’s attorney devoting significant time to representation in the matter. Therefore the record demonstrates that claimant’s attorney spent much more than the travel time and the time in hearing in providing services to his client. I conclude that the record supports a finding that claimant’s attorney spent substantial time in preparation of this case.

The Complexity of the Issues Involved

Workers’ Compensation is a complex area of the law in Oregon, and resolution of this workers’ compensation dispute required claimant’s attorney to understand competing medical opinions regarding a complex medical question.

⁹ The factors set forth in OAR 438-015-0010(4) are: (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 benefits secured for the represented party; (7) the risk in a particular case that an attorney’s efforts may go uncompensated; and (8) the assertions of frivolous issues or defenses.

¹⁰ Claimant does not argue that the Board’s review should be for an abuse of discretion.

The Value of the Interest Involved

As the majority notes, claimant will receive considerable benefits as the result of establishing a compensable claim. There are medical benefits, including office visits and surgery. The record demonstrates that claimant had work restrictions for three months and with a compensable claim, claimant will be entitled to temporary total and temporary partial disability payments. The monetary value of these benefits could be quantified and is considerable.

Claimant will be entitled to lifetime medical benefits for the compensable injury including aggravation rights under ORS 656.273, palliative care under ORS 656.245, and potential new or consequential medical conditions. Claimant will be entitled to have his injury evaluated for permanent impairment. I do not agree with the majority that the record establishes that claimant will have “minimal (if any) permanent impairment,” although the record does demonstrate that it is unlikely claimant will be entitled to a work disability award. In any event, while these benefits can not be quantified at this time, there is value in having a compensable claim with potential for future benefits.

The Skill of the Attorneys

Both attorneys are experienced and skilled advocates.

The Nature of the Proceedings

The record does not demonstrate that the “proceedings” were anything other than the proceeding in front of the ALJ at the Hearings Division.

The Benefit Secured for the Represented Party

The benefits of a compensable claim include access to medical care for the compensable injury, time loss benefits, compensation for permanent impairment, reinstatement rights, vocational rehabilitation, ORS Chapter 659A reinstatement rights, and preferred workers’ rights. While it is uncertain and, hopefully, unlikely that claimant will receive all categories of these benefits, the protection of a compensable claim is significant.

The Risk in a Particular Case that an Attorney's Efforts May Go Uncompensated

As noted above, the legal and factual merits of this particular claim were uncertain at the time claimant's attorney undertook representation in this matter. In fact, until claimant's attorney solicited a report from claimant's surgeon, all the evidence weighed against compensability.

This factor includes consideration of the contingent nature of representing injured workers in Oregon. An attorney who is only paid when his/her client prevails will charge a higher fee than one who is paid regardless of outcome. That means that a reasonable attorney fee must incorporate a reasonable incentive to an attorney contemplating whether or not to take a case in the first place. Thus a reasonable fee is one that would attract competent counsel to represent injured workers.¹¹

The Assertion of Frivolous Issues or Defenses

There were no frivolous issues or defenses raised.

The majority reduces the ALJ's \$12,000 attorney fee award to \$8,000. In doing so, the majority does not declare the ALJ's \$12,000 attorney fee award unreasonable or explain why the rule-based factors lead to a conclusion that an \$8,000 attorney fee award is more reasonable than a \$12,000 attorney fee award. *See Schoch v. Leopold & Stevens*, 162 Or App 242 (1999) (Board must explain the reasons why the factors considered lead to the conclusion that a specific fee is reasonable). There is not a single "reasonable" fee for any particular case. To attempt to establish a single reasonable fee would infringe on the judicial independence of the ALJs.

As a policy matter, I would rely heavily on the judgment of the ALJ who actually presided over the proceedings. He had first-hand opportunity to observe and to assess the efforts of the attorneys, and to compare this case to others litigated before the Hearings Division.¹²

It is evident from the record and claimant's counsel's arguments on review that substantial effort was expended by claimant's counsel to properly prepare claimant's case and secure the compensability of his claim. His skillful

¹¹ See ORS 656.212(2)(b).

¹² I urge ALJs awarding attorney fees to describe their observations and assessments rather than merely listing the factors.

presentation of a complicated case, at a remote location, resulted in claimant obtaining a substantial benefit. At a minimum, claimant had significant medical expenses and temporary disability. Moreover, given the employer's vigorous defense, the risk that claimant's counsel's efforts might go uncompensated was high.

Under these circumstances, I would find that the OAR 438-015-0010(4) factors support the \$12,000 attorney fee awarded by the ALJ. Because the majority concludes otherwise, I respectfully dissent.