
In the Matter of the Compensation of
KRISTOFER M. EDWARDS, Claimant
WCB Case No. 15-00006TP
THIRD PARTY DISTRIBUTION ORDER
Jodie Phillips Polich, Claimant Attorneys
Michael G Bostwick LLC, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

Claimant's counsel has petitioned the Board for the allowance of an extraordinary attorney fee for services rendered in connection with a third party recovery. *See* OAR 438-015-0095. Specifically, claimant seeks approval of an attorney fee equal to 40 percent of the \$250,000 settlement. Sedgwick, the assigned claim agent for the noncomplying employer (NCE) under ORS 656.054(1), objects to the fee request, contending that the circumstances of this case were not extraordinary.¹ We conclude that an extraordinary attorney fee is not warranted.

FINDINGS OF FACT

On August 15, 2011, claimant sustained a compensable injury to his left hand while operating a table saw. He pursued a third party civil claim against the manufacturer of the table saw.

Claimant had difficulty locating an attorney willing to represent him in his third party claim, but eventually found a legal team that included two out-of-state law firms with experience in similar cases. On June 6, 2013, claimant signed a retainer agreement with his attorneys (including his Oregon workers' compensation counsel, as well as the out-of-state attorneys). Claimant agreed to pay his attorneys 40 percent of any amounts collected before an appeal from a trial court judgment, and to reimburse actual expenses incurred as a result of the representation.

On August 7, 2013, claimant filed a complaint in federal court. Claimant's attorneys performed extensive trial preparation, including depositions and other discovery and various motions. Shortly before trial was set to begin, the third party lawsuit settled, with Sedgwick's/WCD's approval, for \$250,000.

¹ The Workers' Compensation Division (WCD) takes no position on claimant's counsel's fee request.

Claimant's counsel petitioned the Board for approval of an extraordinary attorney fee of 40 percent of the third party settlement. Claimant's counsel noted that the settlement was insufficient to pay the outstanding "third party" lien value of \$140,582.72, and that litigation costs were \$37,971.76.²

Claimant's out-of-state attorneys submitted an affidavit regarding the product liability litigation. They stated that their team had pursued cases against table saw manufacturers since 2005. They also stated that these complex cases include considerable expense and risk, involving extensive discovery, video depositions, and a large amount of expert involvement and preparation. They explained that, given the importance of history and industry lack of action, each such case requires "[h]undreds of thousands of pages of documents from the defendant manufacturer, and the entire table saw industry." They described "substantial pre-trial preparation" that was required in this case, as well as over \$37,000 in litigation expenses that were advanced to claimant. They also estimated that their litigation expenses would have exceeded \$100,000 if the case had gone to trial.

As previously noted, Sedgwick, the statutory claim processing agent concerning this "NCE" claim, opposes claimant's attorney's request for an extraordinary attorney fee.

CONCLUSIONS OF LAW AND OPINION

If a worker receives a compensable injury due to the negligence or wrong of third persons not in the same employ, the worker or the beneficiaries of the worker shall elect whether to recover damages from the third persons. ORS 656.578. The proceeds shall be subject to a lien of the paying agency for its share of the proceeds. ORS 656.580. The statutory formula for distribution of a third party recovery obtained by judgment is set forth in ORS 656.593(1).

Settlement proceeds are distributed so that the worker shall receive the amount to which the worker would be entitled for a recovery under subsections (1) and (2) of ORS 656.593. ORS 656.593(3). ORS 656.593(1)(a) provides that the total proceeds shall be distributed such that "costs and attorney fees incurred shall be paid, such attorney fees in no event to exceed the advisory schedule of fees

² The "third party" lien value is based on actual claim costs, without consideration of future expenditures.

established by the Workers' Compensation Board for such actions.” OAR 438-015-0095 sets forth the Board's advisory schedule concerning attorney fees in third party cases as follows: “Unless otherwise ordered by the Board after a finding of extraordinary circumstances, an attorney fee not to exceed 33-1/3 percent of the gross recovery obtained by the plaintiff in an action maintained under the provisions of ORS 656.576 to 656.595 is authorized.”

Thus, attorney fees in third party matters are ordinarily confined to one-third of the gross recovery, and awarding an extraordinary fee in excess of this amount is the statutory province of the Board upon a finding of extraordinary circumstances. ORS 656.593; OAR 438-015-0095. Such a finding is required even if an executed retainer agreement says otherwise. *See Robbie W. Worthen*, 46 Van Natta 226, 232 (1994), *rev'd on other grounds*, *Worthen v. Lumbermen's Underwriting Alliance, Inc.*, 137 Or App 434 (1995).

We have previously authorized extraordinary attorney fees in the following circumstances. In *Gary D. Smith*, 67 Van Natta 292 (2015), we approved a 40 percent attorney fee from a \$3 million settlement where the issues were complex and the case required retention of multiple experts, extensive case preparation, including depositions and other discovery techniques, more than 1,900 hours of attorney-related time, the investigation, preparation, and mediation resulted in a recovery that was much greater than expected, nearly \$100,000 of litigation-related expenses had been advanced by the attorney, and there was no paying agency objection. In *William Coultas*, 64 Van Natta 1375 (2012), we approved a 40 percent fee from third party settlements totaling over \$2 million for a complex aviation accident case, which involved multiple experts, over 6,000 hours of attorney time, and litigation in 16 cases in seven venues against multiple defendants, despite a paying agency's objection. In *Manfred Schiller*, 59 Van Natta 2768 (2007), we approved a 40 percent fee from third party proceeds totaling \$1,776,051.50 where the legal and medical issues were complex, extensive case preparation, including depositions and other discovery techniques, was required, multiple experts were retained, the investigation, preparation, and litigation extended over five years, there were settlements with 16 defendants and a favorable verdict against another defendant after a seven-day trial, and there was no paying agency objection. In *Alva Anderson*, 57 Van Natta 1457 (2005), we approved a 40 percent fee from a \$350,739.20 settlement for a complex products liability case that required extensive preparation, including depositions and other discovery techniques, and the investigation of the claimant's claim, preparation for the litigation, and the litigation itself extended over several years and required a jury trial lasting over 5 days, and there was no paying agency objection.

In *William D. McEuin*, 56 Van Natta 1423 (2004), we approved a 40 percent fee from a total recovery of \$2,176,631.33 where the complex products liability claim involved investigation, preparation, and litigation that extended over several years, a two-week jury trial, and appeals to the U.S. Supreme Court, and there was no paying agency objection. In *James D. Stevens*, 52 Van Natta 814 (2000), we approved a 36 2/3 percent fee from a \$433,369.15 judgment where the claimant's attorney's firm devoted 34 hours to investigation, undertook exhaustive research, took numerous witness statements and depositions, prepared opening statements and closing arguments, the case involved medically complex issues, and there was no paying agency objection. In *Ted Sowers*, 51 Van Natta 1223 (1999), we approved a 40 percent fee from a \$259,708.73 judgment where the issues were complex, the case required extensive preparation, including depositions and other discovery techniques, the preparation and litigation extended over more than a year and required a five-day jury trial, and there was no paying agency objection. In *Victoria A. Brokenshire*, 50 Van Natta 1411 (1998), we approved a 45 percent fee from a \$729,967.76 judgment where the case involved a complex strict product liability claim, a jury trial was required, the claimant prevailed over the defendant's appeal to the Court of Appeals, the claimant's argument was relied on by the Oregon Supreme Court in dismissing the defendant's appeal to that Court, and there was no paying agency objection. In *Pamela J. Jennings*, 49 Van Natta 12 (1997), we approved a 40 percent fee from a \$280,000 judgment where the case involved a complex medical negligence issue, extensive motion practice and court memorandum were necessitated by the defendant's failure to follow the usual voluntary methods of obtaining discovery, litigation extended almost ten years and involved several appeals, and there was no paying agency objection.

Claimant contends that the present circumstances are comparable to those in *Smith*, *Coultas*, and *Anderson*, and thus justify an extraordinary fee. As discussed below, we find the current circumstances more similar to the circumstances in which we have declined to award such a fee.

In *Anthony L. St. Julien*, 62 Van Natta 43, 49 (2010), for example, we acknowledged that the case was factually and legally complex, and involved a great deal of time, effort, planning, and execution over more than two years. For instance, the case involved two defendants and multiple defenses, the retention of numerous experts, and extensive discovery. *Id.* The first mediation failed, but the second mediation (which occurred after the original trial date) resulted in a \$500,000 settlement. *Id.* at 44. The paying agency opposed the request for an extraordinary attorney fee.

In *St. Julien*, we acknowledged the claimant's counsel's significant efforts and resources expended, but we reasoned that multiple defendants, extensive research, and numerous depositions and pretrial discovery and pleadings do not automatically establish "extraordinary circumstances," even if there is trial litigation. *Id.* at 50. In addition, we did not consider the complexity of the case to exceed other cases in which extraordinary circumstances had not been found. *Id.* (comparing *Worthen*, 46 Van Natta at 232 (extraordinary circumstances not found in two-defendants case involving product liability, breach of warranty, and manufacturing negligence) and *David C. Holcomb*, 41 Van Natta 159 (1989) (extraordinary circumstances not found in case involving negligence and deprivation of civil rights)). We also noted the absence of a trial and appellate litigation. *Id.*

We further reasoned, in *St. Julien*, that, in light of the paying agency's unopposed lien of \$578,706.79 (including \$219,293.84 in medical bills and temporary disability benefits, plus future expenditures), the \$500,000 settlement result did not seem exceptionally favorable. *Id.* at 51. Finally, we noted the paying agency's objection to the fee request as a factor to consider, albeit not a determinative one. *Id.*

After comparing this case with the aforementioned decisions, we consider the present circumstances to be more similar to those of *St. Julien* than those of *Smith*, *Coultas*, or *Anderson*. As in this case, *St. Julien* involved complex litigation requiring a great deal of time, the retention of experts, extensive discovery, and trial preparation. Despite the extensive discovery and motion practice documented by claimant's attorneys in this particular case,³ we are not persuaded that the complexity of the case is notably greater than that of *St. Julien* or of the cases it followed. Additionally, relative to the lien based on the amounts already disbursed, the recovery appears comparable to the *St. Julien* recovery, which was not considered to be particularly favorable. Further, the third party recovery occurred without the necessity of a trial. Finally, as in *St. Julien*, there is a paying agency objection to the extraordinary fee request.

In *Coultas*, we found an extraordinary fee justified despite the paying agency's objection. However, *Coultas* involved complex litigation in multiple forums against several defendants, requiring over 6,000 hours of the claimant's

³ As Sedgwick notes, claimant's attorneys' have pursued "cases against various table saw manufacturers beginning in 2005." Under such circumstances, we do not consider the review of "Hundreds of thousands of pages of documents from the defendant manufacturer, and the entire table saw industry," or the volume of the exhibit lists, establishes that the circumstances of this particular case were extraordinary.

attorneys' time, which resulted in favorable results including settlements totaling over \$2 million. While the present case involved complex and time consuming litigation, we are not persuaded that it is comparable to *Coultas*.

The present case is similar to *Smith* in some respects (*e.g.*, the existence of complex factual and legal issues, the retention of experts, and extensive case preparation, including depositions and other discovery techniques). Nevertheless, *Smith* involved over 1,900 hours of attorney time, which resulted in a \$3 million recovery that was well above "pre-mediation" estimates. Moreover, in *Smith*, there was no paying agency objection to the fee request. Consequently, we do not consider the overall circumstances in this case to be sufficiently comparable to those present in *Smith*.

In *Anderson*, the recovery occurred after a five-day jury trial, which resulted in a favorable verdict, and the third party offered a settlement in lieu of an appeal. The paying agency was fully reimbursed for its lien and did not object to the fee request. Such circumstances distinguish *Anderson* from the present case.

In conclusion, based on the aforementioned reasoning, we do not find extraordinary circumstances justifying a fee greater than one-third of the third party recovery. Accordingly, claimant's counsel is not entitled to the requested 40 percent attorney fee. Rather, claimant's counsel shall receive 33 1/3 percent of the \$250,000 settlement as prescribed in OAR 438-015-0095.

IT IS SO ORDERED.

Entered at Salem, Oregon on July 21, 2016