
In the Matter of the Compensation of
BENNANICO ROSALES, III, Claimant
WCB Case No. 15-00007TP
THIRD PARTY DISTRIBUTION ORDER
Benson Bingham, Claimant Attorneys
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

Claimant has petitioned the Board for approval of a third party compromise, as well as for resolution of a dispute regarding a “just and proper” distribution of proceeds from the third party settlement (assuming the proposed settlement is approved). *See* ORS 656.587; ORS 656.593(3). The self-insured employer, as a paying agency, objects to claimant’s proposed third party settlement, contending that it is grossly unreasonable. We approve the settlement and conclude that a distribution in accordance with ORS 656.593(1) is “just and proper,” and that the employer is entitled to receive a portion of its actual claim costs as its “just and proper” share.

FINDINGS OF FACT

On March 24, 2012, claimant, a truck driver, was compensably injured in a motor vehicle accident with another vehicle. The employer accepted the claim and paid benefits.

Claimant retained counsel to pursue a third party claim against the allegedly negligent third party. Claimant and the third party insurer engaged in settlement negotiations, in which the third party insurer offered \$290,000 to settle the claim. Claimant accepted the offer, but the employer has declined to approve the settlement. Claimant has petitioned the Board for approval of the proposed settlement and for a “just and proper” distribution of the settlement proceeds.

CONCLUSIONS OF LAW AND OPINION

The employer, as the paying agency, contends that because it never approved the settlement, it should be void as a matter of law under ORS 656.587. *See Donna Dean*, 63 Van Natta 558 (2011) (because third party settlement was made without the approval of the paying agency or the Board, the settlement was void); *Karl A. McDade, Jr.*, 48 Van Natta 2564 (1996) (same). However, pursuant to ORS 656.587, the Board is authorized to resolve disputes concerning the

approval of any compromise of a third party action, even in cases where the paying agency disapproves. In exercising this authority, we employ our independent judgment to determine whether the compromise is reasonable. *See Weems v. American Int'l Adjustment Co.*, 319 Or 140 (1994); *Mark A. Farrand*, 65 Van Natta 537 (2013); *Michael F. Boyle*, 55 Van Natta 848 (2003); *Alfred Storms*, 48 Van Natta 1470 (1991).¹

A paying agency's failure to recover full reimbursement for its entire lien is not determinative as to whether a third party settlement is reasonable. *See Boyle*, 55 Van Natta at 849; *Storms*, 48 Van Natta at 1480; *Catherine Washburn*, 46 Van Natta 74, *recons*, 46 Van Natta 182 (1994); *Jill R. Atchley*, 43 Van Natta 1282, 1283 (1991); *John C. Lappen*, 43 Van Natta 63 (1991). Generally, we will approve settlements negotiated between a claimant/plaintiff and a third party defendant, unless the settlement appears to be grossly unreasonable. *Storms*, 48 Van Natta at 1480; *Washburn*, 46 Van Natta at 74; *Kathryn I. Looney*, 39 Van Natta 1400 (1987).

We have previously determined that, as the prosecutor of his third party action, a claimant is aware of the potential weaknesses of his case, as well as the statutory distribution scheme and his lien holders. *See Kathleen J. Steele*, 45 Van Natta 21 (1993). Considering this accessibility to vital factual information and relevant statutory prerequisites, we have reasoned that the claimant is in the best position to make an informed and reasoned decision regarding the appropriateness of a settlement offer. *Id.* Moreover, with that knowledge, the claimant has the capacity to accurately calculate what his eventual net recovery will be, should he accept such an offer. *Id.* Consequently, although there may be reasons to proceed with litigation, we generally conclude that the claimant and his/her counsel are in the best position to weigh the risks of litigation versus the certainty of a settlement. *See, e.g., Karen A. King*, 45 Van Natta 1548 (1993).

Here, claimant contends that a recovery of \$290,000 was a reasonable settlement of the third party claim. In so concluding, he considered the fact that he did not have visible injuries and was claiming post-traumatic stress disorder

¹ In *Weems*, the Supreme Court affirmed our decision to disapprove a third party settlement under ORS 656.587 that was, in our opinion, grossly unreasonable. 319 Or at 147. In *Weems*, the claimant sought Board approval of a third party settlement. We declined to approve the settlement because it was disproportionate to and significantly less than the settlement of the claimant's wife's loss of consortium claim. *Everett L. Weems*, 44 Van Natta 1182, 1187 (1992). Here, unlike *Weems*, we find that a third party settlement that allows for about 30 percent reimbursement of the employer's lien is not grossly unreasonable.

(PTSD) with a history of emotional issues. Furthermore, while the accident caused severe damage to the other vehicle, resulting in the death of the driver, there was minimal damage to claimant's 18-wheeled trailer and no damage to the front of the cab where he was seated. Witnesses had testified that claimant appeared indifferent and remained on his cell phone at the scene while awaiting emergency personnel. In addition, there were other potential causes of the claimed PTSD, such as underlying, pre-injury emotional issues. There was also a lack of physical evidence comporting with a typical emotional brain injury, which presented problems in establishing emotional damages. Claimant's counsel described the situation as "very subjective."

Finally, as noted by claimant's counsel, a plaintiff in federal litigation can expose themselves to attorney fees and costs by not accepting a reasonable award. *See* F.R.C.P. 68(d), "Offer of Judgment" (OOJ).² Therefore, had claimant not accepted the \$290,000 offer at the time of the mediation, he could have been served with a formal OOJ for that amount, and the repercussions of not recovering more than the offer at trial could have consumed the proceeds of a lesser verdict. Upon weighing these various factors, including the venue in Northern Nevada, claimant's counsel asserts that the ultimate settlement was reasonable.

The employer opposes claimant's position. Asserting that its lien is \$317,822.37 (for actual and future claim costs), and that the third-party case was a "straightforward case of damages" with "very little" weaknesses and "very little risk" to claimant, the employer argues that a \$290,000 settlement is grossly unreasonable.

Based on our review, including consideration of the parties' respective positions, and taking into account claimant's risks in pursuing his third party claim (and considering that claimant was in the best position to weigh the risks of litigation versus the certainty of settlement), we conclude that the \$290,000 settlement is reasonable. In reaching this conclusion, we are particularly persuaded by the challenges related to the emotional damages issue due to the subjective nature of the injury (emotional trauma), the lack of physical evidence relating to a typical emotional brain injury, and claimant's history of emotional issues.

² That rule provides: "Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made."

In arriving at our determination, we acknowledge that the employer will not receive full reimbursement of its lien, as explained in more detail below. Nevertheless, our determination regarding whether a third party compromise is reasonable is not dependent on the proportionate amount of the settlement that the employer will receive in satisfaction (partial or otherwise) of its lien for actual and projected claim costs. *See Boyle*, 55 Van Natta at 849; *Storms*, 48 Van Natta at 1480. In any event, as discussed in more detail below, based on a “just and proper” distribution following the statutory formula in ORS 656.593(1), the employer will recover approximately 33 percent of its actual and projected lien. Such a recovery is not inconsistent, and actually compares favorably, with prior cases where proposed third party settlements have received our approval. *See Michael A. Leonhardt*, 59 Van Natta 792 (2007) (carrier recovered approximately 25 percent of its lien); *Boyle*, 55 Van Natta at 850 (carrier recovered 15.5 percent of its lien); *John C. Lappen*, 43 Van Natta at 65 (carrier recovered 20 percent of its lien).

Accordingly, for these reasons, we do not consider the proposed settlement “grossly unreasonable.” Therefore, the third party settlement is approved. ORS 656.587.

We turn to the proposed distribution of the settlement proceeds. If a worker is compensably injured due to the negligence or wrong of a third party not in the same employ, the worker shall elect whether to recover damages from the third party. ORS 656.578. The proceeds of any damages recovered from the third party by the worker shall be subject to a lien of the paying agency for its share of the proceeds. ORS 656.593(1). Here, because the employer has paid benefits to claimant as a result of a compensable injury, it is a “paying agency.” ORS 656.576.

Because claimant settled his third party claim and we have approved that settlement, the paying agency is authorized to accept as its share of the proceeds “an amount which is just and proper,” provided that claimant receives at least the amount to which he is entitled under ORS 656.593(1) and (2). ORS 656.593(3); *Estate of Troy Vance v. Williams*, 84 Or App 616, 619-20 (1987). The amounts referred to in ORS 656.593(1) and (2) pertain to attorney fees, litigation expenses, and claimant’s statutory 1/3 share of the settlement. Any conflict concerning a “just and proper” distribution shall be resolved by the Board. ORS 656.593(3).

The parties do not dispute that a “just and proper” distribution of the settlement proceeds should follow the statutory formula in ORS 656.593(1).³ *See Urness v. Liberty Northwest Ins. Corp.*, 130 Or App 454 (1994); *Steven M. Anderko*, 50 Van Natta 2011 (1998) (in accordance with *Urness*, when exercising our statutory authority under ORS 656.593(3), we do not arbitrarily adhere to the specific distribution scheme set forth in ORS 656.593(1)). For the following reasons, we find that it is “just and proper” for the paying agency to receive \$103,798.23 from the third party settlement as partial reimbursement for its actual claim costs.

We first address the issues of attorney fees and costs. Claimant’s attorney requests an attorney fee of 40 percent of the gross recovery, and the paying agency objects on the basis that such a fee exceeds the attorney fees authorized by OAR 438-015-0095. For the following reasons, we conclude that an attorney fee of 33 1/3 percent of the gross recovery is warranted, which equates to a fee of \$96,666.66.

³ ORS 656.593(1) provides that the total proceeds shall be distributed as follows:

“(a) Costs and attorney fees incurred shall be paid, such attorney fees in no event to exceed the advisory schedule of fees established by the Workers’ Compensation Board for such actions.

“(b) The worker or the beneficiaries of the worker shall receive at least 33-1/3 percent of the balance of such recovery.

“(c) The paying agency shall be paid and retain the balance of the recovery, but only to the extent that it is compensated for its expenditures for compensation, first aid or other medical, surgical or hospital service, and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the worker’s claim under this chapter. Such other costs include expenditures of the Department of Consumer and Business Services from the Consumer and Business Services Fund, the Self-Insured Employer Adjustment Reserve and the Workers’ Benefit Fund in reimbursement of the costs of the paying agency. Such other costs also include assessments for the Workers’ Benefit Fund, and include any compensation which may become payable under ORS 656.273 or 656.278.

“(d) The balance of the recovery shall be paid to the worker or the beneficiaries of the worker forthwith. Any conflict as to the amount of the balance which may be retained by the paying agency shall be resolved by the board.”

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 established by the Workers’ Compensation Board for such actions.” OAR 438-015-0095 provides: “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 confined to 33 1/3 percent of the gross recovery and awarding extraordinary fees in excess of this percentage is the special statutory province of the Board upon a finding of extraordinary circumstances. ORS 656.593; OAR 438-015-0095. That finding is conclusive of the matter notwithstanding an executed retainer agreement that 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).

Here, claimant’s counsel does not assert that the third party action involved “extraordinary circumstances.” Alternatively, even if such an assertion were advanced, our review of the record does not support a conclusion that the circumstances presented were “extraordinary.” We recognize that significant efforts and resources were expended in preparing and presenting claimant’s case. However, despite the amount of “pre-trial” time and preparation, including numerous depositions, mediation, procedural/discovery hearings, and retention of multiple experts, we are not persuaded that the record regarding this third party supports the existence of extraordinary circumstances.

Consequently, after conducting our review, we find that the circumstances of this case do not warrant a fee beyond the 33 1/3 percent of the recovery allowed under ORS 656.593 and OAR 438-015-0095. *See, e.g., Kristofer M. Edwards*, 68 Van Natta 1076 (2016) (no extraordinary fee awarded where, despite complex litigation, retention of experts, extensive discovery, and trial preparation, complexity of the case was not greater than other “non-extraordinary” fee cases; recovery was not considered particularly favorable relative to the lien and occurred without the necessity of a trial; and paying agency objected to the fee request); *Anthony L. St. Julien*, 62 Van Natta 43 (2010) (although case was factually and legally complex, involved two defendants and multiple defenses, retention of numerous experts, and extensive discovery and pleadings, such circumstances where not “extraordinary” where the complexity of the case did not exceed other “non-extraordinary” fee cases, there was no trial or appellate litigation, and the paying agency objected to the fee request).

Accordingly, in the absence of “extraordinary circumstances,” claimant’s counsel is limited to an attorney fee of 33 1/3 percent of the \$290,000 settlement, which is \$96,666.66.

Claimant is also entitled to reimbursement from the third party recovery for previously unreimbursed costs that are reasonably and necessarily incurred during the litigation of the third party action. *See* OAR 438-015-0005(6);⁴ *Thomas Lund*, 41 Van Natta 1352 (1989). Claimant requests a total cost award of \$37,636, which includes an expert retainer fee of \$2,500, and \$8,735.05 in expert “liens.”

The employer disputes claimant’s cost bill. Specifically, it challenges a \$2,500 expert retainer fee, contending that because the claim did not go to trial, the retainer was unnecessary. The employer also challenges the included “lien” amounts to the extent they are associated with medical treatment provided to claimant, asserting that they do not represent litigation costs. Based on the employer’s assessment, the total award for costs should be \$27,475.93.

For the following reasons, we reject the employer’s challenges to claimant’s counsel’s asserted costs. Claimant’s counsel has adequately explained why the disputed costs were reasonably and necessarily incurred during litigation of the third party action. Specifically, he represents that the “un-reimbursed” \$2,500 expert retainer was paid for the expert’s “pre-trial” work performed. Also, claimant’s counsel explains that, while the “expert liens” included amounts for imaging studies and medical treatment, these costs were designed to be repaid from the third party settlement process as they were deemed necessary for the trial work up, rather than for medical services related to claimant’s compensable injury. Finally, claimant’s counsel asserts that the costs for imaging studies was for services not approved by the employer as part of claimant’s accepted injury claim.

The employer does not assert, and the record does not establish, that the aforementioned costs were either claimed or reimbursed. Under these particular circumstances, we are persuaded that these claimed expenses constitute litigation costs. Accordingly, we conclude that claimant’s attorney is entitled to reimbursement of the asserted costs in the sum of \$37,636.

⁴ Under OAR 438-015-0005(6), “costs” are defined as “money expended by an attorney for things and services reasonably necessary to pursue a matter on behalf of a party, but do not include fees paid to any attorney. Examples of costs referred to include, but are not limited to, costs of independent medical examinations, depositions, expert witness opinions, witness fees and mileage paid to execute a subpoena and costs associated with travel.”

Next, the employer is entitled to receive its “just and proper” share of the settlement based on its actual and reasonably to be expected claim costs. After distribution of attorney fees, litigation expenses, and claimant’s statutory one-third share, the remaining settlement balance is \$103,798.23. *See* ORS 656.593(1). The paying agency asserts that its actual claim costs, as of June 2016, are \$162,126.45 (\$82,943.31 for time loss plus \$79,183.14 for medical costs), and its anticipated future expenses are \$155,695.92. Claimant has not disputed the amount of the employer’s actual claim costs.

Because the paying agency’s actual claim costs exceed the remaining balance of proceeds from the third party judgment, we need not address the validity of its lien for future expenses.⁵ Consequently, the employer is entitled to the entire remaining balance (\$103,798.23) as its “just and proper” share of the settlement proceeds. *See* ORS 656.593(1). Accordingly, claimant’s counsel is directed to forward to the employer \$103,798.23 as its “just and proper” share of the third party settlement proceeds.⁶

IT IS SO ORDERED.

Entered at Salem, Oregon on September 22, 2016

⁵ We acknowledge that a compensability dispute regarding claimant’s new/omitted medical condition claims is currently pending before the Board. Generally, if a new/omitted medical condition is determined to be compensable subsequent to a third party recovery, a carrier may be entitled to an offset against compensation due for that condition to the extent of any lien that would have been authorized under ORS 656.593(3) if: (1) the claim for that condition was not filed at the time of the third party recovery, but later is filed, accepted, and compensation paid; or (2) a claim was filed, but not accepted, at the time of the third party recovery, but later is accepted and compensation paid. ORS 656.596; *Clark L. Leonard*, 61 Van Natta 1810 (2009). Nevertheless, under these particular circumstances, because the current actual claim costs exceed the remaining balance of the third party proceeds, it is unnecessary to address projected future costs for the currently contested conditions.

⁶ In accordance with OAR 438-015-0095, the settlement proceeds would be calculated as follows:

Gross Settlement:	\$290,000.00
1/3 Attorney Fee:	- \$ 96,666.66
Costs/Liens	- \$ 37,636.00
Sub-Balance	\$155,697.34
Claimant’s 1/3 share:	- \$ 51,899.11
Remaining Balance to Employer:	\$103,798.23