

In the Matter of the Compensation of  
**STEPHANIE THOMAS, Claimant**

WCB Case No. 04-08079

ORDER ON REVIEW

Hollander & Lebenbaum, Claimant Attorneys  
Scott H Terrall & Assoc, Defense Attorneys

Reviewing Panel: Members Langer, Biehl, and Herman. Member Langer concurs in part and dissents in part.

The self-insured employer requests review of Administrative Law Judge (ALJ) Lipton's order that: (1) set aside its denial of claimant's occupational disease claim for a mental disorder; and (2) awarded an attorney fee under ORS 656.386(1). On review, the issues are compensability and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation concerning the compensability issue.<sup>1</sup>

Claimant began working for the employer in June 1998, at which time she was 22 years old. (Tr. II: 7-8).<sup>2</sup> She began as a maintenance helper (cleaning buses and trains), but enrolled in an apprenticeship program in 2000 to become a signal technician. (Tr. II: 8-9). The apprenticeship typically took four years, but she completed it in less time. (Tr. II: 9).

As an apprentice, claimant was assigned to work with various journeyman signal technicians, all of whom were men. (Tr. II: 33). She worked frequently with Mr. Hunter, a journeyman technician, whom she knew as a friend of her parents prior to beginning her employment with the employer. (Tr. II: 30, 33). Mr. Hunter was in his "early 50s," approximately the age of claimant's parents. (Tr. II: 30). During the first two years of claimant's apprenticeship, she became "pretty good friends" with Mr. Hunter, whom she considered a mentor and "father figure." (Tr. II: 34). As such, they discussed personal matters. (Tr. II: 35-36).

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<sup>1</sup> We do not adopt the third, fourth, fifth or sixth sentences in the second full paragraph on page 7 of the ALJ's "Findings of Fact." Additionally, to the extent that the ALJ's order could be read as including a 1998 workplace incident as contributing to her occupational disease claim, we do not adopt that portion of the order.

<sup>2</sup> Because this matter convened on nine different hearing dates, citations to the transcripts will include both a volume (from I to IX) and page number.

In 2002, Mr. Hunter at times made physical contact with claimant at work in ways that made her feel uncomfortable. (Tr. II: 40-41). She did not, however, at that time, lodge a complaint. (Tr. II: 40).

In March 2003, Mr. Hunter bought claimant a dozen long-stemmed red roses, which were placed on her desk at work. (Tr. II: 49). Claimant thought it was inappropriate and left them at work. (Tr. II: 50).

Also in March 2003, claimant had just purchased a home and wanted to build a fence. (Tr. II: 50-51). Mr. Hunter stated that he would help build the fence, but claimant told him that she was not ready to start the project. (Tr. II: 51). One day, while claimant's mother was visiting, Mr. Hunter arrived at claimant's house unannounced with materials to begin building a fence. (*Id.*) Claimant told him that she was not ready to build the fence and that she could not pay for it, but Mr. Hunter persisted in starting to build the fence. (Tr. II: 51-53). Thereafter, Mr. Hunter would call claimant at work and tell her that he was over at her house working on the fence. (Tr. II: 55-56). Claimant told him to stop and he finally did. (Tr. II: 56).

Mr. Hunter also called claimant several times between April and July 2003 "saying he was just in the neighborhood" and asking "if he could stop by." (*Id.*) Claimant responded "no" and made up excuses as to why he could not come over. (*Id.*)

Later in 2003, claimant and her coworkers went out for drinks on a Friday evening because a coworker was leaving to work at a different shop. (Tr. II: 41). A supervisor had invited a man who was claimant's age to the event because the supervisor wanted claimant to meet him. (*Id.*) The following Monday at work, Mr. Hunter was visibly upset and asked claimant whether she "had gotten any that [Friday] night." (Tr. II: 41-42). He then called her a "skank" several times and threatened that she would "get what [she] deserve[d]" before storming away. (Tr. II: 42). When claimant confronted Mr. Hunter later in the workday, he asserted that she "need[ed] counseling because [she wouldn't] put out for him." (Tr. II: 43). She found his response "rude" and pinched him on the shoulder; Mr. Hunter responded by pinching her on the breast. (Tr. II: 44).

The following day, claimant reported Mr. Hunter's actions to Mr. Bell, a supervisor. (Tr. II: 47). Mr. Bell sat down with claimant and Mr. Hunter; at that meeting, Mr. Hunter apologized for his comments. (*Id.*) He also admitted that he wanted "more than a friendship" from claimant. (*Id.*) Claimant responded that she would not have become friendly with him had she "known his intentions." (*Id.*)

Claimant filed a formal claimant with the employer concerning Mr. Hunter's actions, and the employer conducted an investigation. (Tr. II: 56-57). In an August 10, 2003 letter, the employer made the following findings: (1) claimant and Mr. Hunter were friends before she started the signal apprenticeship program, and that friendship continued until March 2003; (2) there was evidence of some physical contact, including hugging during work hours; (3) in March, claimant asked Mr. Hunter not to touch her or call her names at work; (4) there was evidence that, after March, claimant occasionally hugged Mr. Hunter and allowed him to rub lotion on her sunburned back; and (5) both claimant and Mr. Hunter "had a level of responsibility for the situation" and both agreed that the friendship had ended and that there would not be an issue in the future. (Ex. 1).

Claimant disagreed that she shared in the responsibility for Mr. Hunter's conduct, but signed the letter because she was informed that she could not return to work unless she did so; at the time, the examination for her journeyman's license was imminent. (Tr. II: 58-59; III: 65-66). With regard to the workplace "hugging," claimant explained that Mr. Hunter's mother had just died and that she gave him a hug because she "knew he was going through a hard time." (Tr. II: 60). The record also established that Mr. Hunter frequently hugged lots of people. (Tr. IV: 94). Claimant reported that Mr. Hunter's frequent hugging at work made her uncomfortable. (*Id.*)

Claimant also acknowledged that she had permitted Mr. Hunter, on a single occasion, to rub lotion on her sunburned back, but only after Mr. Hunter persisted. (Tr. II: 60; IX: 32-33). Claimant explained that this took place in the presence of other coworkers and that she felt pressured to let Mr. Hunter apply the lotion. (Tr. IX: 32-33). Claimant also noted that, due to the outdoor nature of the work, applying sunscreen was common in the workplace, and that she had, on occasion, helped other coworkers if she noticed that they had "a big glob" of sunscreen on the "back of their ears, or their neck." (Tr. II: 62; III: 127-28).

Subsequent to the August 2003 letter, claimant and Mr. Hunter "pretty much avoided each other." (Tr. II: 63). Towards the end of that calendar year, however, they started talking again at work. (Tr. II: 63-64).

In January 2004, Mr. Hunter approached claimant at the "smoke shack," while claimant was smoking a cigarette before beginning her work shift. (Tr. II: 64-66). Mr. Hunter asked claimant about her activities the prior evening. (Tr. II: 66). After claimant responded that she did nothing unusual, Mr. Hunter

informed her that he had driven by her house around midnight and noticed a coworker's truck in her driveway. (*Id.*) Mr. Hunter then commented, using crude language, that "at least" claimant was having sexual relations. (Tr. II: 67).

Claimant immediately left and reported the incident to her manager, Mr. Larson. (Tr. II: 68). Claimant had previously suspected that Mr. Hunter had been driving by her house, but when she had reported this to Mr. Larson, he had responded that she needed proof of those actions. (Tr. II: 68-70; III: 119). Claimant finished the workday, but described herself as "an emotional wreck"; she did not sleep well for the next month or two. (Tr. II: 76).

The employer conducted an investigation that substantiated claimant's complaints, finding that Mr. Hunter, while on duty and in an employer vehicle, drove by claimant's house for personal reasons. (Ex. 1BB-1). The employer also found that Mr. Hunter questioned her about a vehicle in the driveway and her "visitor" and then commented on her "sex life." (Ex. 1BB-2). The investigation also determined that, despite being instructed to stay away from claimant after she reported his actions, Mr. Hunter subsequently left two cell phone messages on claimant's phone, two messages on her home phone, and attempted to approach her at work. (*Id.*) Accordingly, the employer concluded that Mr. Hunter had engaged in a series of behaviors contrary to workplace policies and in violation of claimant's workplace rights. (*Id.*) Mr. Hunter was suspended 40 hours for those actions. (Ex. 1BB-3).

Because of Mr. Hunter's erratic behavior, past threats that claimant would "get what she deserved," and now confirmation that Mr. Hunter had driven by her house late at night, claimant went to court to get a "stalking protective order." (Tr. II: 72; Ex. 1B). After a temporary stalking protective order was granted, a hearing was conducted, at which Mr. Hunter was present, and the court issued a "Final Stalking Protective Order and Judgment," finding that:

- "1. [Mr. Hunter] had engaged knowingly in repeated and unwanted contact with [claimant] \* \* \*.
- "2. [Mr. Hunter] knew or should have known that the repeated contact was unwanted.
- "3. [Claimant] was alarmed or coerced by this unwanted contact.
- "4. It [was] objectively reasonable for a person in [claimant's] situation to have been alarmed or coerced by [Mr. Hunter's] contact.

“5. [Mr. Hunter’s] repeated and unwanted contact caused [claimant] reasonable apprehension regarding [claimant’s] own personal safety \* \* \*.

“6. [Mr. Hunter] represents a credible threat to the physical safety of [claimant].

“7. Any unwanted contact that was purely communicative in nature was perceived by [claimant] as a credible threat of imminent serious personal violence or physical harm to [claimant] \* \* \*, and it was reasonable to believe that such threat was likely to be followed by unlawful acts.” (Ex. 1B).

In August 2004, a Saturday, after finishing her inspection duties for the day, claimant returned to her desk. (Tr. II: 88-91). She believed that she was alone, but as she was sitting at her computer, she heard her name whispered twice. (Tr. II: 91). She saw Mr. Waldner, a maintenance worker, sitting at a computer in his street clothes. (*Id.*) She asked him what he was doing there because she did not believe that he was supposed to be there. (*Id.*) Mr. Waldner said that he had come to see claimant. (*Id.*) He then told her that he wanted to show her something on his e-mail; he subsequently showed her some pornographic pictures. (Tr. II: 93). Claimant felt “very uncomfortable” and wanted to get outside where other people were around; she informed Mr. Waldner that she was going outside to smoke a cigarette, and that he could come if he wanted. (Tr. II: 93; III: 109).

Claimant left the room and Mr. Waldner followed her outside. Mr. Waldner then asked her if she “wanted to see the warm room,” referring to a boiler room that he maintained as part of his job. (Tr. II: 95). Claimant attempted to change the subject because she found Mr. Waldner’s invitation “really strange.” (*Id.*) Mr. Waldner then asked claimant if she could “keep a secret,” before leaning into her and saying that he “want[ed] [her] bad.” (Tr. II: 95-96). Claimant said “no,” and then ran into her van, and Mr. Waldner “took off” as well. (Tr. II: 96).

Claimant was scared and in shock. (*Id.*) Not feeling safe, she locked her van doors and called her supervisor, Mr. Bounds. (Tr. II: 96-97) She drove to a signal house and Mr. Bounds told her to stay put and that he was sending an escort for her. (Tr. II: 97). Claimant went home without finishing her workday. (Tr. II: 100).

While working the following week, claimant met with Mr. Bounds. (Tr. II: 102). She was very upset, and he informed her that the incident was being investigated. (*Id.*) At lunch, she decided that she needed to seek medical treatment

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because she was scared and could not calm down. (*Id.*) While headed to the doctor's office, claimant "had a panic attack." (*Id.*) She had to pull over and was treated by emergency responders. (Tr. II: 103-104).

Claimant treated with Dr. Rabie, who diagnosed a "severe anxiety reaction with panic attack." (Ex. 50-3). Claimant also treated with Dr. Griffin, who diagnosed adjustment disorder with mixed anxiety and depression. (*See* Exs. 8A, 8C, 8F, 8G).

Dr. Rabie released claimant to modified work: specifically, that she only perform work that did not require her to be alone with men. (Tr. II: 105; Ex. 8B). While on modified work, claimant was informed by a coworker that she (and two other females) had previously been assaulted by Mr. Waldner. (Tr. II: 111, 113; Tr. IV: 118-130).

The employer investigated the August 2004 incident with Mr. Waldner and substantiated claimant's allegations. (Ex. 7A-1). Specifically, the employer found that Mr. Waldner showed claimant two sexually explicit images and made sexually inappropriate remarks to her. (Ex. 7A-1, -2). He was issued a written reprimand. (Ex. 7A-2).

Separate from the incidents with Mr. Hunter and Mr. Waldner, claimant participated in off-color conversations at work, including those of a sexual nature. (Tr. III: 50). She denied, however, other certain allegations of sexually explicit comments or actions in the workplace. (Tr. III: 50, 51).

Claimant was examined by Drs. Davies and Klecan at the employer's request. (Exs. 9, 25). Dr. Davies diagnosed major depression (unipolar) versus bipolar depression and personality disorder, not otherwise specified, with histrionic, narcissistic, and passive-aggressive features. (Ex. 9-9). He opined that the inappropriate actions of claimant's male coworkers "were essentially insults, not threats, and if they 'really' triggered a disabling emotional response, it would have to be because [claimant] was emotionally unstable at the time." (*Id.*) He added that it was "apparent that [claimant] [had] been 'victimized' in the workplace, but that it [was] irrational to embellish the consequences of this victimization to illegitimate extremes." (Ex. 9-10).

Dr. Klecan opined that claimant did not have a "psychiatric disorder other than physiologic dependency on sleeping pills \* \* \* and a probable personality disorder of the histrionic and dependent type." (Ex. 25-36). Dr. Klecan added that claimant's personality disorder was the major contributing cause of any prospective need for treatment. (Ex. 25-38).

Claimant was also examined by Drs. Smurthwaite, Turco, and Howell. Dr. Smurthwaite diagnosed anxiety disorder, not otherwise specified, with multiple symptoms of post-traumatic stress disorder (PTSD), which he attributed to multiple episodes of sexual harassment experienced by claimant while working for the employer. (Ex. 11A-8). Dr. Turco diagnosed anxiety disorder with panic attacks and symptoms of PTSD, which he attributed in major part to workplace events. (Exs. 14-5, 15, 31, 35-41, -42). Dr. Howell diagnosed PTSD, resulting from the workplace events described above. (Exs. 24-15, 34, 36).

The employer denied claimant's mental disorder claim for a "psychiatric condition." Claimant requested a hearing.

The ALJ set aside the employer's denial, relying primarily on the opinions of Drs. Howell and Turco. The ALJ also found that the employer's witnesses, particularly Mr. Hunter, Mr. Waldner, and Mr. Ferguson, were not credible; accordingly, he did not rely on their accounts concerning their interactions with claimant or certain alleged actions undertaken by claimant.

On review, the employer asserts that the opinions from Drs. Howell and Turco are unpersuasive because they were based on an inaccurate history (provided by claimant).<sup>3</sup> Essentially, the employer urges us to reverse the ALJ's credibility finding and find claimant's testimony not credible. Additionally, the employer argues that Drs. Davies and Klecan offered the more persuasive opinions in finding that claimant did not incur a mental disorder as a result of her employment activities. We disagree with the employer's arguments, reasoning as follows.

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 good practice for an agency or court to give weight to the fact finder's credibility assessments). Where the issue of credibility concerns the substance of a witness's testimony, we are equally qualified to make our own credibility determination. *Coastal Farm Supply v. Hultberg*, 85 Or App 282 (1987); *Michael A. Ames*, 60 Van Natta 1324, 1326 (2008).

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<sup>3</sup> We disagree with the employer's alternative argument that Dr. Turco, in his deposition, "changed his mind" as to whether the incidents with Mr. Hunter and Mr. Waldner were the major contributing cause of claimant's mental disorder. At the conclusion of that deposition, Dr. Turco asserted, in unequivocal terms, that he had not changed his opinion that those incidents were the major contributing cause of her mental disorder. (Ex. 35-41, -42).

Here, it is unclear whether the ALJ's credibility findings were based on demeanor, substance, or both. With regard to the substance of the testimony, based on our review of the record, we concur with the ALJ's finding that, where there were differences, claimant's testimony was more credible than that of Mr. Hunter, Mr. Waldner, and Mr. Ferguson.

Claimant must prove that employment conditions were the major contributing cause of her mental disorder. ORS 656.802(2)(a). There must also be a diagnosis of a mental or emotional disorder generally recognized in the medical or psychological community, and the employment conditions producing the mental disorder must exist in a real and objective sense. ORS 656.802(3).<sup>4</sup> The employment conditions producing the mental disorder must also not be conditions generally inherent in every working situation, reasonable disciplinary, corrective, or job performance evaluation actions by the employer, or cessation of employment or employment decisions attendant upon ordinary business or financial cycles. ORS 656.802(3)(b). Finally, there must be clear and convincing evidence that the mental disorder arose out of and in the course of employment. ORS 656.802(3)(d).

When assessing the major contributing cause of a condition, an expert must weigh the relative contribution of each cause, including the precipitating cause, under the particular circumstances. *Dietz v. Ramuda*, 130 Or App 397, 401-02 (1994), *rev dismissed*, 320 Or 416 (1995); *Eldon L. Carroll*, 56 Van Natta 736, 737 (2004). In the context of a mental disorder claim, both those factors excluded by ORS 656.802(3)(b) and non-work-related factors must be weighed against nonexcluded work-related factors; only if the nonexcluded work-related causes outweigh all other causes combined is the claim compensable. *Liberty Northwest Ins. Corp. v. Shottthofer*, 169 Or App 556, 565-66 (2000); *Shannon Spada*, 56 Van Natta 3505, 3508 (2004).

Here, Drs. Howell and Turco opined that the workplace incidents with Mr. Hunter and Mr. Waldner were the major contributing cause of claimant's mental disorder.<sup>5</sup> The record establishes that Drs. Howell and Turco had a more

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<sup>4</sup> The record establishes that Drs. Howell's and Turco's diagnoses, which are classified as DSM-IV diagnoses, are generally recognized in the medical or psychological community.

<sup>5</sup> It is not disputed that Mr. Hunter's January 2004 on-duty conduct of driving by claimant's house, for which he was disciplined and culminated in a protective "stalking" order, flowed from a work relationship. *See Shottthofer*, 169 Or App at 566 (an off-premises event constitutes a work-related factor where the incident flows from a person's work). In any event, Mr. Hunter brought his "stalking" behavior

comprehensive record than any of the other medical experts, including Drs. Davies and Klecan. (*Compare* Exs. 9, 25 with Exs. 20, 26, 31, 34, 35, 36). Moreover, Drs. Howell and Turco explained the basis of their respective opinions in great detail, even after receiving additional information. (*See, e.g.*, Exs. 24, 26, 31, 34, 35, 36).

Drs. Howell and Turco also explained in great detail that Dr. Davies improperly interpreted the MMPI-2, the psychological test on which Dr. Davies based his diagnosis. (*See* Exs. 31, 34). Dr. Davies did not rebut or respond to Drs. Howell's and Turco's criticism of his MMPI-2 interpretation.

Likewise, Dr. Howell effectively rebutted Dr. Klecan's assertion of a histrionic personality disorder. Dr. Howell explained that there are eight diagnostic criteria for that disorder, and that five of those must be met to properly diagnose a histrionic personality disorder. (Exs. 34-13, -14, 36-32, -33, -46). Dr. Howell opined that claimant did not meet a single criterion for that diagnosis, much less the requisite five criteria. (*Id.*) Neither Dr. Klecan nor any other medical expert refuted Dr. Howell on that point.

Drs. Howell and Turco also demonstrated that they weighed non-work-related factors in reaching their opinion, including claimant's boyfriend moving to another state proximate to the time of the incident with Mr. Waldner. (Exs. 35-34 through 36, 36-36 through 41). Moreover, there are no excluded factors under ORS 656.802(3)(b) relevant to this claim.<sup>6</sup> For instance, the sexual harassment to which claimant was exposed (and which the employer verified and punished after conducting its investigation) would not be considered as a condition generally inherent in every working situation. *See Donna A. Goodman-Herron*, 50 Van Natta 2123, 2125 n 5 (1998) (on remand), *recons*, 51 Van Natta 27 (1999) (sexually harassing behavior not generally inherent in every working situation). The other factors do not form any part of claimant's claim. Accordingly, we find that Drs. Howell and Turco properly weighed the potentially contributing causes (and any arguably excluded factors) in reaching their opinions.

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to claimant's attention (and continued to harass and pursue her) while on work premises. (*See* Ex. 1BB). Under such circumstances, we consider these causes of claimant's mental condition to be nonexcluded work-related factors.

<sup>6</sup> As set forth above, we are not persuaded by those medical opinions that attributed claimant's mental disorder to a non-work-related "personality disorder."

Therefore, given the thoroughness and persuasiveness of Drs. Howell's and Turco's opinions, and their un rebutted critiques of the opinions of Drs. Davies and Klecan, we find that claimant has demonstrated, by clear and convincing evidence, that her mental disorder arose out of and in the course of employment. ORS 656.802(3)(d). The employer argues that claimant's own participation in certain sexually explicit workplace conversations undermines the probability that she suffered a mental disorder as a result of the actions of Mr. Hunter and Mr. Waldner. The persuasive medical evidence, however, does not support that argument. Dr. Howell explained that, being the first female signal technician, claimant "wanted very badly to get along with her peers." (Ex. 36-42). Her way of doing this, Dr. Howell noted, was "try[ing] to be one of the boys" and at times engaging in some of the workplace banter that was common among her coworkers. (Ex. 36-42, -43, -44; *see also* Ex. 36-86, -88). Moreover, no medical expert opined that claimant could not or did not experience a mental disorder merely because she occasionally participated in some off-color workplace conversations.

The record also establishes that the employment conditions producing the claimed mental disorder existed in a real and objective sense. In making that determination, we assess whether the events underlying claimant's mental condition are real, as opposed to imaginary, and are capable of producing stress. *Duran v. SAIF*, 87 Or App 509, 513 (1987); *Gary R. Jones*, 52 Van Natta 2216 (2000). For the reasons expressed above, we are persuaded that the aforementioned events were real, and not imaginary. Mr. Hunter and Mr. Waldner admitted to their misconduct, and claimant's allegations of sexual harassment in violation of the employer's policies were verified by the employer's own investigation. Moreover, Mr. Hunter's conduct was sufficiently threatening to culminate in a protective court order. (Ex. 1B). Drs. Turco and Howell persuasively explained that those events were capable of producing stress.

In sum, for the foregoing reasons, we find that claimant has satisfied the necessary criteria for a compensable claim for a mental disorder under ORS 656.802. Therefore, we affirm the ALJ's order that set aside the employer's denial.

We turn to the ALJ's attorney fee award under ORS 656.386(1). In a footnote in its appellant's brief, the employer requests, without explanation, that we "reduce[] significantly" the ALJ's attorney fee award made pursuant to ORS 656.386(1). In awarding that fee, after considering claimant's counsel's submission and the employer's objections, the ALJ applied the factors set forth in OAR 438-015-0010(4), specifically noting the time devoted to the case, the

employer's vigorous defense that included the filing of several motions and seeking court relief from the aforementioned "protective stalking" order, the "extraordinary" skill of the attorneys involved, and the "significant" risk that claimant's counsel's efforts would go uncompensated. The employer has not argued or demonstrated that the ALJ misapplied those factors to the facts in this case.

Nevertheless, the dissent has raised its own objections to the ALJ's attorney fee award, as well as our attorney fee award for services on review, which the employer has not contested. In light of such circumstances, we offer the following response.

We are authorized to establish a schedule of attorney fees. ORS 656.388(4). Pursuant to that statutory mandate, we have enacted rules that have long governed the awarding of a reasonable attorney fee. *See* OAR 438-015-0010(4). The parties raise no issue concerning these rules, which have been in place over the past 18 years. *See* OAR 438-15-029 (WCB Admin. Order 1-1992, eff. March 4, 1992); OAR 438-15-010 (WCB Admin. Order 11-1990, eff. December 31, 1990).<sup>7</sup>

Neither party here argued that our existing rules are incapable of determining the reasonableness of an attorney fee award in the instant case. Therefore, we consider our attorney fee rules sufficient to determine the reasonableness of claimant's attorney fee award.<sup>8</sup>

Claimant's attorneys have submitted specific information in support of the requested attorney fees. Namely, claimant's attorneys provided declarations concerning the number of hours devoted to the case, including specifics on depositions, traveling, telephone conferences, client meetings, conferences and correspondence with medical experts, responses to the employer's motion to dismiss before the ALJ, review of the extensive record and the impact of delays between the proceedings, and attempts to resolve the dispute by settlement. The declarations noted the factual complexity of the case, which claimant's counsel

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<sup>7</sup> As with any attorney-fee related rulemaking matter, these rules were adopted "after consultation with the Board of Governors of the Oregon State Bar." ORS 656.388(4).

<sup>8</sup> The dissent also focuses on the rules of other forums regarding the awarding of attorney fees. Those awards, however, are made pursuant to different statutes and applicable administrative/court rules. As previously noted, our mandate is to award attorney fees according to the statutes and rules applicable to resolving Oregon workers' compensation disputes.

described as “the most factually complex case [he had] ever handled” in his more than 30 years representing injured workers. The declarations also set forth the attorneys’ collective 54 years of Oregon workers’ compensation experience, as well as their ordinary billing rate. Accordingly, we disagree with the dissent’s characterization that claimant’s counsel has provided only “minimal information” in support of the requested attorney fees, or that, armed with such information, we are incapable of assessing a reasonable attorney fee in this case.

The factors set forth in OAR 438-015-0010(4) are as follows: (1) the time devoted to the case; (2) the complexity of the issue(s) 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.

Claimant filed her occupational disease claim in August 2004. That claim was denied in November 2004, at which point claimant requested a hearing. The subsequent litigation before the ALJ spanned approximately five years, which greatly exceeds most workers’ compensation disputes presented to the Hearings Division.<sup>9</sup>

The case also required *nine* hearings, including one that was held at a county jail so that the employer could call a witness who was confined at that institution. The number of hearings alone is a rarity in cases litigated before this forum. These hearings yielded approximately 750 transcript pages, a number far in excess of even the most complex workers’ compensation disputes.

Because the claimed occupational disease was for a “mental disorder” under ORS 656.802(3), claimant was required to meet the additional elements and heightened evidentiary standard to establish compensability under that provision. In addition to that legal complexity, this claim involved significant factual complexity, including opinions from more than seven medical experts, as well as six depositions of medical experts, and an additional deposition of a lay witness. The depositions alone resulted in approximately 330 transcript pages (excluding exhibits), again rarely seen in cases litigated before this forum.

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<sup>9</sup> During that five-year litigation period, the employer took the extraordinary step of obtaining relief from the aforementioned “stalking protective order” for the purpose of producing Mr. Hunter’s testimony.

Additionally, the employer pursued a particularly assertive defense that included the filing of no fewer than six procedural motions before the ALJ. In addition to responding to those motions, claimant's counsel participated in numerous conference calls to resolve various disputes throughout this extended litigation.

The record also demonstrates the exceptional skill of all the attorneys involved. Claimant's attorneys possess a collective 54 years of Oregon workers' compensation experience. In light of the vigorous defense, which has continued on Board review, and the complexity of the claim, claimant's counsel ran an exceedingly high risk of going uncompensated.

The above facts demonstrate that claimant's counsel was required to devote an extraordinary amount of time to the case, which involved such factual and legal complexity that it required five years to complete (as well as additional time at the Board review level). The facts also show that the employer mounted an especially aggressive defense, which produced a significant risk that claimant's counsel would go uncompensated. The ALJ, well-versed and experienced in workers' compensation matters, was intimately involved with the case throughout its five-year lifespan and was well-positioned to evaluate the legal services in question, including the skill of the attorneys in presenting their respective positions and the vigorosity of the employer's defense. The employer has not questioned the ALJ's application of the factors that resulted in the assessed attorney fee for claimant's counsel's services at hearing, nor provided any information or argument that would support a reduction in that fee.<sup>10</sup> After reviewing this particular record, and considering the aforementioned rule-based factors, we find the ALJ's attorney fee award reasonable.<sup>11</sup>

We next turn to claimant's attorney's entitlement to an assessed fee for services on review. ORS 656.382(2). Claimant's counsel has requested a fee of \$14,000, noting that 40 hours was spent in preparing a response to the employer's

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<sup>10</sup> Here, none of the arguments made by the dissent (either to the applicable attorney fee statutes and rules generally or their application in the instant matter) have been advanced by the employer. Therefore, we would not, as does the dissent, "make or develop [the employer's] argument when [it] has not endeavored to do so itself." See *Beall Transport Equipment Co. v. Southern Pacific*, 186 Or App 696, 700 n. 2, adh'd to as clarified on recons 187 Or App 472 (2003) (noting generally that, "it is not this court's function to speculate as to what a party's argument might be" or "to make or develop a party's argument when that party has not endeavored to do so itself").

<sup>11</sup> Although the record did not demonstrate the monetary value of the important benefit secured for claimant, the other factors sufficiently warrant the awarded fee.

55-page initial brief. The employer has not contested that fee request. After considering the factors set forth in OAR 438-015-0010(4), as discussed in detail above, and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$14,000, 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 her counsel's uncontested fee request), the complexity of the issue, the nature of the proceedings, the skill of the attorneys, and the risk of going uncompensated.

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 14, 2009 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$14,000, to be paid 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 November 19, 2010

Member Langer concurring in part and dissenting in part.

I concur with the majority's opinion on the compensability issue. However, I disagree with those portions of the majority's opinion that affirm the ALJ's \$72,000 attorney fee award under ORS 656.386(1), and that award \$14,000 under ORS 656.382(2) for services on review. I conclude that the record does not support the reasonableness of these fee awards.

Initially, I wish to reply to the majority's criticism of exercising my discretion to review the attorney fee requests and address at length various attorney fee issues in this case. First, the majority suggests that, because of the employer's sporadic argument regarding the ALJ's attorney fee award and failure to object to claimant's fee request for services on review, it is inappropriate to raise my "own objections." Second, finding that claimant's attorneys provided specific and

adequate information in support of the requested fees and because the parties raise no issue regarding the method of assessing attorney fees in this forum, which has been in place for 18 years, the majority apparently believes that this case is an inappropriate conduit for identifying any inadequacies of our rules and procedures and formulating proposed changes. Third, the majority believes that focusing on other forums is unhelpful and finds our existing rules sufficient to determine reasonable attorney fees.

I dispute the majority's first point. As discussed in more detail below, my review of the ALJ's attorney fee award as well as the attorney fee request for services on review is entirely consistent with our precedent. Moreover, under the existing practice, I have found it increasingly difficult to determine what a reasonable attorney fee should be. *See, e.g.*, my dissenting opinions in *Cheryl Barlow*, 62 Van Natta 2109, 2120 (2010); *Agusto Sanchez-Lopez*, 62 Van Natta 1487, 1494 (2010); *Jerry R. Brosnan*, 61 Van Natta 2956, 2958 (2009); *Alma R. Salgado*, 60 Van Natta 2486, 2489 (2008); *Steven Poti*, 59 Van Natta 158, 161 (2007); *Harold D. Rost*, 59 Van Natta 3055, 3058 (2007); *Shirley M. Smith*, 59 Van Natta 3072, 3074 (2007).<sup>12</sup> Thus, it is hardly a surprise that I would want to address in detail the instant requests for attorney fees amounting to \$86,000.

In response to the majority's second point, while I believe that our attorney fee rule, OAR 438-015-0005, adequately identifies factors relevant to the assessment of reasonable attorney fees, the requirement that the parties sufficiently support their attorney fee requests or objections is missing. This case presents ideal circumstances to point out that void. The requested amount of the fees and minimal information the parties provided to us fully justify questioning the adequacy of our rules and practice and whether a change is necessary. I particularly disagree with the majority's assessment of the information submitted to us by claimant's counsel as "specific." True, the attorneys adequately described the years of their experience and provided the specific number of hours spent on written closing arguments and briefs. Regarding all other services, however, counsel provided nonspecific information, such as "several depositions," "numerous conferences," "several letters," and "hundreds of pages." I submit that this information indeed is "minimal" in the setting of this extraordinary case and extraordinary attorney fee request.

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<sup>12</sup> I have counted 11 cases in which I have dissented on the issue of reasonable attorney fees under various statutes.

Third, because this attorney fee award is one of the largest ever granted in this forum, I find it appropriate to discuss attorney fee issues arising before us, as well as in courts and other administrative agencies, to put this particular attorney fee request and award in perspective.

I begin with the workers' compensation proceedings. ORS 656.386(1) and ORS 656.382(2) mandate awards of "reasonable" attorney fees for legal representation, where the claimant prevails finally over a denied claim or the compensation awarded is not reduced or disallowed. We refer to such fees as "assessed," because they are payable in addition to the claimant's compensation. OAR 438-015-0005(2). The statutes delegate authority to us to determine, on a case-by-case basis, what constitutes a reasonable assessed attorney fee. *Schoch v. Leupold & Stevens*, 325 Or 112, 117-18 (1997). To carry out that authority, OAR 438-015-0010(4) provides that, in determining a reasonable attorney fee, the following factors shall be considered: (1) the time devoted to the case; (2) the complexity of the issue(s) 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.

Our rules of practice and procedure require no petition for attorney fees, statement of services or the opposing party's objection to a specific attorney fee request. Our case law supports very relaxed rules of raising assessed attorney fee issues. A represented claimant need not specifically raise the entitlement to assessed attorney fees under ORS 656.386(1), because it is a "natural derivative" of a determination that the claimant prevailed over a denied claim. *Frank P. Heaton*, 44 Van Natta 2104, 2106 (1992). *See also Ricardo C. Cortes*, 62 Van Natta 2330 (2010) (a request for an "appropriate attorney fee" encompassed an attorney fee award under ORS 656.382(1) where the claimant did not refer to a specific statute and the carrier did not object). No formal petition, statement of services or objection is required, because under ORS 656.295(6), we have *de novo* review authority and may reverse or modify the ALJ's order or make any disposition of the case that we deem appropriate. *See, e.g., Daniel M. McCartney*, 56 Van Natta 460 (2004); *Phyllis M. Hays*, 50 Van Natta 867 (1998), *aff'd*, 160 Or App 55 (1999).

Apparently, our forum presents a unique exception to other adjudicating bodies. In Oregon state courts, a petition for attorney fees must identify a statute or rule authorizing the fees and describe services provided, hours spent and hourly rates charged. UTCR Form 5.080. In Oregon appellate courts, a timely petition

for attorney fees is a prerequisite to an attorney fee award. The petition must state the authority relied on for claiming the fees and must be supported by a statement of facts showing the total amount of attorney time involved, the amount of time devoted to each task, the reasonableness of time claimed, the hourly rate and the reasonableness of the hourly rate. ORAP 13.10(5). In the absence of a timely objection, with some exceptions, the court will allow attorney fees in the amount sought. ORAP 13.10(9). *See also Strunk v. PERB*, 343 Or 226, 236 (2006) (petitions for attorney fees in Oregon's appellate courts must present billing entries containing specific data designed to aid the courts in determining the overall reasonableness of a fee request; to be successful, objections must be similarly specific). *But see, Gates v. Deukmejian*, 987 F.2d 1392, 1401 (9<sup>th</sup> Cir. 1993) (the United States District Court has an independent duty to review a petition for attorney fees for reasonableness). Although ordinarily the amount of the awarded fee may not exceed \$3,500, the Employment Relations Board requires a formal petition for attorney fees and an objection in unfair labor practice cases and appeals. OAR 115-035-0055, 57. The Land Use Board of Appeals requires a motion for attorney fees, including a signed and detailed statement of the amount sought. OAR 661-010-0075(1)(e)(A).

Notably, attorney fee awards in these forums are governed by similar principles as in our proceedings. *See, e.g., ORS 20.075(2); Dockins v. State Farm*, 330 Or 1, 6-7 (2000) (consideration of factors drawn from Disciplinary Rule 2-106 of the Code of Professional Responsibility in determining the reasonableness of an attorney fee); OAR 115-035-0055(4).

One could argue that the purpose and nature of the workers' compensation proceedings may justify lenient rules regarding the assessed attorney fee issues. To effectuate the legislative policy of prompt and expeditious delivery of benefits for injuries that bear a sufficient relationship to employment, workers' compensation disputes are resolved in relatively uncomplicated and informal administrative proceedings. Moreover, even though workers' compensation cases may present complex legal issues, the law nevertheless is confined to one chapter of the Oregon Revised Statutes. *See ORS 656.012* (rejecting the method provided by common law for compensating injured workers as involving long and costly litigation and enacting an exclusive, statutory system of compensation).

Nonetheless, already in 1993, a Board member expressed frustration over "the lack of adequate rules" for attorney fee awards. *Shirley S. Scaparro*, 45 Van Natta 137 (1993) (Kinsley, dissenting). There, the issue was reasonableness of a \$1,500 attorney fee award for the claimant's attorney's services at hearing

regarding a forearm strain/bruise claim. The attorney did not provide information about the time or services he devoted to the claim other than stating that “it certainly does not seem unfair for an award of \$1,500 \* \* \* for overturning a denial, since in numerous other cases I have had awards considerably in excess of this amount.” 45 Van Natta at 138. The dissent found this information entirely inadequate for making an informed decision regarding the reasonableness of the attorney fee award. The dissent reasoned that we should adopt rules and procedures similar to those in state courts and other administrative agencies to enable the parties to present the legal and factual basis for an appropriate award and enable us to make informed decisions on appropriate attorney fees. *Id.*, at 138-39.

Nothing in our rules or practice has changed since 1993, except that workers’ compensation disputes have become more complex and time consuming and attorney fee requests and awards have been rising steadily. Awards in excess of \$10,000 and up to \$20,000 are not unusual. *See, e.g., Carolyn McCann*, 62 Van Natta 2508, 2515 (2010) (\$20,000 for services at hearing and on review); *Lisa M. Guerrero*, 62 Van Natta 1805, 1822 (2010) (\$12,000 for services at hearing); *Randy L. Meyer*, 62 Van Natta 1535 (2010) (\$12,000 for services at hearing); *Sanchez-Lopez*, 62 Van Natta at 1493-94 (\$11,000 for services at hearing and \$2,500 for services on review); *Denise A. Graham*, 62 Van Natta 698 (2010) (\$12,000 for services at hearing); *Eric R. Doak*, 61 Van Natta 2396 (2009) (\$20,000 for services at hearing); *Violet Colhour*, 59 Van Natta 1116, 1122 (2007) (\$12,000 for services at hearing and \$3,000 for services on review). Still, the parties are not required to provide “one scrap of information” that would assist us in determining a reasonable attorney fee. *Scaparro*, 45 Van Natta at 137. Yet, especially in cases where the claimant’s attorney requests a significant award, I would expect that the parties would voluntarily assist us meaningfully in assessing the reasonableness of the requested fees.

I turn to the instant attorney fee requests. At hearing, the employer objected to the attorney fee request. On review, although providing no further explanation for its objection, the employer did not waive the challenge to the ALJ’s attorney fee award. *Wright Schuchart Harbor v. Johnson*, 133 Or App 680, 685-86 (1995) (waiver is the intentional relinquishment of a known right indicating clearly an intention to renounce a known privilege or power). Therefore, I review that award *de novo*. *See Nina Schmidt*, 60 Van Natta 169, 170 (2008) and *Barbara Lee*, 60 Van Natta 139, 140 (2008) (citing *Fister v. South Hills Health Care*, 149 Or App 214 (1997) and recognizing this Board’s practice of not addressing issues that have not been raised by the parties, but awarding unclaimed expenses and costs

pursuant to 656.386(2), as an exception to that general practice). Consistent with our established practice, I also review *de novo* the uncontested attorney fee request for services on review. See, e.g., *Gary E. Gettman*, 60 Van Natta 2862 n 1 (2008) (“We are obligated to award a reasonable attorney fee, irrespective of a specific objection to a claimant’s attorney fee request.”); *Randall C. Burian*, 57 Van Natta 2938, 2940 (2005) (same). Moreover, the attorney fee request for services on review has the same basis as the attorney fee request for services at hearing. Therefore, as reflected in the majority’s analysis, the requests are closely intertwined and we must examine both.

For services at hearing, claimant’s attorney requested a fee of \$72,000 based on his estimation of 221.5 hours devoted to the workers’ compensation claim<sup>13</sup> and his “ordinary billing rate” of \$325 per hour. Counsel’s declaration filed in support of his fee request stated that he did not keep time records except for the preparation of written closing and rebuttal arguments submitted at hearing. Based on the 14.5 hours spent on claimant’s closing argument and seven hours spent on the rebuttal argument, counsel estimated the total hours devoted to this case. He further stated that, based on the latest Oregon State Bar Survey, his hourly fee was less than the 75<sup>th</sup> percentile for attorneys of his expertise practicing in the city of Portland. Acknowledging that the litigation lasted several years, with numerous hearings set and depositions held, the employer raised the reasonableness of both the alleged time and hourly rate, especially in the absence of a detailed record of the time actually spent on the workers’ compensation case. Claimant’s attorney countered that, in the event the employer chose to contest the attorney fee request on the basis of the number of hours spent, he would request that the employer’s counsel be required to provide copies of his firm’s time records for this matter. On review, although discussing the merits of the claim on nearly 80 pages, the employer asserts in a single-sentence footnote that, if we affirm the ALJ’s compensability decision, the fee award for services at hearing should be reduced significantly.

For services on review, another of claimant’s attorneys requested \$14,000, based on “over 40 hours preparing claimant’s response brief” and the hourly fee of \$325. The attorney relied on the same “Oregon State Bar information regarding current attorney’s fees by area of practice and experience” submitted by the attorney representing claimant at hearing.<sup>14</sup> The employer did not object.

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<sup>13</sup> Claimant’s attorney also represented claimant in a civil action against the employer.

<sup>14</sup> As discussed below, this statement is incorrect. At the hearing, the attorney submitted the Oregon State Bar’s survey based on years admitted to practice only.

Although the time is only one factor to be considered under OAR 438-015-0010(4), here, it is an important one. Even without specific documentation, the record reflects that this litigation required considerably more time than disputes ordinarily presented in this forum. However, claimant's attorney's guesswork carries limited weight, especially in light of his services provided in another proceeding and the considerable gap between the time when he began representing claimant and the resolution of the case. Nevertheless, I agree that the time factor supports a fee larger than typically awarded in this forum.

An hourly rate is another important factor of claimant's fee request. Although it is not specifically enumerated in OAR 438-015-0010(4), it reflects all non-time factors, especially the attorney's skill and experience, the value of the interest involved and benefit secured for the represented party, as well as the risk that the attorney's efforts may go uncompensated. Moreover, the ALJ and the majority granted the fee requests calculated at claimant's attorneys' alleged rate. Consequently, they must have found that information relevant to their decision. Accordingly, it is appropriate to consider and evaluate this voluntarily provided information in determining a reasonable attorney fee.<sup>15</sup> *See also Barlow*, 62 Van Natta at 2120 (Member Langer, dissenting).

In *State ex rel English v. Multnomah County*, 231 Or App 286 (2009), the Court of Appeals awarded attorney fees to the realtor's attorneys for prevailing in an appeal from a \$1,150,000 judgment. The realtor sought approximately \$200,000 in attorney fees. The county objected, based on, among other things, the reasonableness of the hourly rate. The court found that the time and labor required to litigate the novel legal issues presented by Measure 37 were substantial and required experienced counsel, 231 Or App at 298, and ultimately concluded that the realtor's attorneys' billing rates were "within a 'reasonable' range." *Id.* at 299. The court noted, however: "One is loathe to characterize billing rates of more than \$300 an hour—or even exceeding \$400 an hour—as 'reasonable.'" We use the term in its relative, not absolute, sense." *Id.*, n 12. I share the court's sentiment here.

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<sup>15</sup> ORAP 13.10(5)(a) requires that a petition for attorney fees state the hourly rate at which time is claimed and provide support for the reasonableness of the hourly rate. Likewise, UTCR Form 5.080 requires hourly rates for the requested fees. The United States District Court, District of Oregon, has determined that it will use the Oregon State Bar Economic Survey as its initial benchmark. Attorneys may argue for higher rates based on inflation, specialty, or any number of other factors, but the court requested that fee petitions address the Economic Survey and provide justification for requested hourly rates higher than report by the Survey. Message from the Court Regarding Attorney Fee Petitions (<http://www.ord.uscourts.gov/court-policies/message-from-the-court-regarding-fee-petitions>). In contrast, the Oregon State Bar survey is not subject to administrative notice in our proceedings. *Rene F. Juarez*, 56 Van Natta 1441, 1445 (2004).

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At hearing, claimant's attorney attached a page from the Oregon State Bar 2007 economic survey reflecting Oregon attorneys' hourly billing rates by total years admitted to private practice. That page, however, differentiates only geographical areas, not areas of practice. As such, I do not find it instructive.<sup>16</sup>

Although this case was factually complex and involved many witnesses and depositions, it was not complex legally. While the legal standard for compensability of mental disorders is usually difficult to meet, here, for the reasons discussed in our decision on the merits, claimant's case was fairly clear-cut if her and her experts' testimony was accepted as more persuasive than the employer's evidence. Claimant's counsel skillfully prosecuted the claim and the employer vigorously defended the denial. The record does not establish, however, that the value of the interest involved or the benefit secured for claimant was great. Accordingly, considering the above factors, I do not endorse the hourly rate of \$325 as reasonable in this case. *See Hays*, 50 Van Natta at 868 (the consequential condition claim for a mental disorder was not so complex as to justify the requested extraordinary, \$250 per hour, rate).

Furthermore, when compared to other cases warranting a large fee, the instant attorney fee awards are unreasonable. In *Gurdev S. Sohi, DCD*, 62 Van Natta 610 (2010), we awarded a total of \$35,000 for services at hearing and on review. There, counsel spent 103 hours on a complex legal matter of first impression that resulted in securing benefits in excess of \$750,000. Here, although claimant's counsel expended approximately 260 hours for services at hearing and on review, the benefits secured were small. Moreover, this case lacks *Sohi's* legal complexity and presents no issues of first impression. Accordingly, I do not believe that an attorney fee award more than double that awarded in *Sohi* is reasonable.

In *Cheryl Mohrbacher, DCD*, 50 Van Natta 1826 (1998), we awarded \$75,000 for services at hearing and \$15,000 for services on review. In *Mohrbacher*, the claimant's counsel spent approximately 489 hours at the hearing level alone, and the case was of a highly complex and unusual nature. Here, this case lacked such complexity, and claimant's counsel devoted far less time to the case. Moreover, as in *Sohi, Mohrbacher* involved sizable survivor benefits, whereas the benefits secured in the instant matter are not substantial.

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<sup>16</sup> As discussed above, there is a significant difference between administrative and judicial proceedings and the nature of disputes litigated in those proceedings. I am not prepared to assume that this dispute's substantive and procedural complexity equals to a complexity of, for example, a product liability action.

In sum, for all of the foregoing reasons, I am unable to conclude that the attorney fees awarded for claimant's counsel's services at hearing and on review are reasonable. Therefore, I respectfully dissent from that aspect of the majority's opinion.