

In the Matter of the Compensation of
WILLIAM COULTAS, Claimant
WCB Case No. 12-00003TP
THIRD PARTY ORDER

Furniss Shearer & Leineweber, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Langer, Weddell and Herman. Member Langer dissents.

Claimant has petitioned the Board for resolution of disputes regarding his settlements of third party causes of action. Specifically, claimant seeks approval of the settlements and an extraordinary attorney fee of 40 percent, as well as deferral of a determination of reasonable litigation costs. *See* ORS 656.587; ORS 656.593(1)(a)(3); OAR 438-015-0095. For the following reasons, we approve the settlement, grant an extraordinary attorney fee, and defer action on the costs issue.¹

FINDINGS OF FACT

On August 5, 2008, claimant, a pilot, sustained severe injuries when he was injured in a helicopter crash. The paying agency accepted the claim and provided benefits in excess of \$771,000 for medical services and \$201,000 in temporary disability.

Claimant and his spouse have filed a number of lawsuits against various third party defendants. This required multi-state litigation in both federal and state courts. This involved seven venues consisting of 16 cases that required appearances by claimant's counsel. Claimant's attorney's law firm has been required to devote legal resources for over three years, consisting of more than 6,000 hours of attorney time and substantial amounts of legal support time.²

¹ The paying agency has moved to strike portions of claimant's reply brief. Claimant asserts that the paying agency's response to his reply brief was improper and should not be considered. We need not resolve these matters because our decision would be the same regardless of whether we considered the disputed portions of claimant's brief or the contentions made in the paying agency's response to claimant's reply brief.

² In an earlier decision, we detailed some of the protracted litigation that previously occurred between the parties, which included the paying agency's unsuccessful contention that claimant assigned his right to file a cause of action against one of the third parties to the paying agency. *See William Coultas*, 63 Van Natta 781, *recons*, 63 Van Natta 963 (2011).

With regard to this matter, claimant and his spouse filed suit in Multnomah County Circuit Court against Columbia Helicopters (Columbia); Sikorsky Aircraft Corporation, United Technologies Corporation and Hamilton Sundstrand (Sikorsky); and General Electric (GE). In November 2011, claimant and his spouse reached a settlement agreement with Columbia. On March 19, 2012, they signed a settlement agreement with Sikorsky.

The Columbia settlement allocates \$1,233,333 for claimant and \$616,666 for his spouse for loss of consortium. The Sikorsky agreement allocates \$1,210,000 for claimant and \$605,000 for his spouse's loss of consortium claim.

On March 27, 2012, a jury returned a verdict in the amount of \$37,700,000 for claimant in the trial against the only remaining defendant, GE. The jury returned a verdict for his spouse for loss of consortium for \$4,300,000, or approximately 10.24 percent of the total amount awarded (\$42,000,000).

In February 2012, claimant's attorney requested that the paying agency approve the Sikorsky settlement in the amount of \$1,815,000 but did not specify the amount to be allocated to the loss of consortium claim or to attorney fees. The paying agency approved the settlement through its counsel on the condition that the agreement not apportion any specific amount of the recovery to a particular form of damages such as loss of consortium, that the attorney fee not exceed one third of the gross recovery and that the paying agency retain its right to object to costs without limitation. The conditional approval was amended to include a provision that the claim against the employer, Carson Helicopters, would be dismissed with prejudice.

In March 2012, claimant petitioned the Board to approve the third party settlements with Columbia and Sikorsky.

CONCLUSIONS OF LAW AND OPINION

Pursuant to ORS 656.587, the Board is authorized to resolve disputes concerning the approval of any compromise of a third party action. 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); *Michael F. Boyle*, 55 Van Natta 848 (2003); *Alfred Storms*, 48 Van Natta 1470 (1996).

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. Generally, we will approve settlements negotiated between a claimant/plaintiff and a third party defendant, unless the settlement appears to be grossly unreasonable.³ *Storms*, 48 Van Natta at 1480; *Catherine Washburn*, 46 Van Natta 74, 75, *recons*, 46 Van Natta 182 (1994); *Kathryn I. Looney*, 39 Van Natta 1400 (1987).

We lack the statutory authority to approve or disapprove a proposed settlement of a claimant's spouse's loss of consortium claim. *Weems v. American Int'l Adjustment Co.* 123 Or App 83, 86 (1993), *aff'd Weems v. American Int'l Adjustment Co.*, 319 Or 140 (1994); *SAIF v. Cowart*, 65 Or App 733 (1983). However, we can consider the value of such a claim as evidence of the reasonableness of a proposed settlement of claimant's underlying negligence claim. *Weems*, 123 Or App at 86.

Here, claimant argues that the value of his spouse's loss of consortium claim is substantially greater than the approximately 10 percent that the paying agency argues should be allocated to that claim in light of the jury verdict in the GE litigation. He asserts that the approximately 33 percent allocation to the spouse's loss of consortium claim is reasonable.

We acknowledge that the percentage amount allocated to the loss of consortium claims in the Sikorsky and Columbia settlements substantially exceeds the amount awarded for loss of consortium in the jury verdict. However, as claimant notes, the settlements were reached *before* the GE jury verdict was rendered.⁴ While the timing of the settlements does not prevent us from

³ Our analysis in assessing proposed settlements is premised on the following principles. 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 David Rubrecht*, 64 Van Natta 222, 223 (2012); *Kathleen J. Steele*, 45 Van Natta 21 (1993). Considering this accessibility to vital factual information and relevant statutory prerequisites, 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 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).

⁴ Moreover, claimant's spouse's testimony indicates that she was required to provide substantial care of her husband with respect to treatment of burns and assistance with personal hygiene. She was also required to frequently travel long distances when driving her husband to a burn center for treatment. We acknowledge that the paying agency submitted an affidavit from an experienced defense counsel that

considering the subsequent jury verdict for comparative purposes, the allocation in the jury verdict is also not controlling as to whether the amount directed to loss of consortium in the settlements is unreasonable. Having considered this record, we are unable to conclude that the aforementioned “pre-jury verdict” settlements are “grossly unreasonable” in their respective allocations of proceeds to the negligence claims and to the loss of consortium claims.⁵ Thus, we approve the settlements, including the allocation of proceeds as agreed to by the third parties and claimant.⁶

We now turn to the attorney fee issue. Claimant requests that we approve an extraordinary fee of 40 percent, as well as an additional 5 percent in case of an appeal.⁷ For the following reasons, we approve the 40 percent fee.

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.”

detailed the standard range of loss of consortium claims. We further acknowledge that the proposed allocation of settlement proceeds to the loss of consortium claim exceeds that standard range. Nevertheless, having reviewed this record (including the circumstances surrounding the settlement and the spouse’s testimony regarding the effect of claimant’s severe injuries on their relationship), we are not persuaded that the allocation of this “pre-jury verdict” settlement proceeds to the loss of consortium claims is inappropriate.

⁵ 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 (\$250,000) because it was disproportionate to and significantly less than the settlement of the claimant’s wife’s loss of consortium claim (\$330,000). *Everett L. Weems*, 44 Van Natta 1182, 1187 (1992). Here, unlike *Weems*, the amount allocated to the loss of consortium claims is considerably less than that allocated to claimant’s third party settlements. Accordingly, we do not conclude that the third party settlements are grossly unreasonable due to “disproportionate” amounts.

⁶ As previously noted, the paying agency approved the Sikorsky settlement on the condition that the claim against the employer would be dismissed with prejudice. However, the employer was not subject to the settlement. Therefore, the lack of a provision dismissing the cause of action against the employer does not make the settlement grossly unreasonable. Thus, we approve the settlement as written.

⁷ We reject claimant’s request for an additional 5 percent attorney fee award in case of an “appeal.” There will be no appeal in the causes of action that have been settled. Moreover, any appeal that may occur in the “GE” cause of action is not relevant to the issue of the amount of the attorney fee that should be awarded for legal services provided in reaching the Columbia and Sikorsky settlements.

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 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(1)(a); OAR 438-015-0095.

We have previously authorized extraordinary attorney fees in third party cases. *See Alva Anderson*, 57 Van Natta 1457 (2005) (a fee of 40 percent of the \$350,739.20 settlement was approved 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; moreover, the insurer did not object to the claimant's request for an extraordinary fee); *James D. Stevens*, 52 Van Natta 814 (2000) (a fee of 36-2/3 percent of the \$433,369.15 judgment approved where the claimant's attorney's law firm devoted 34 hours to investigation, undertook exhaustive research, took numerous witness statements and depositions, prepared opening statements and closing arguments, and the case involved medically complex issues); *Ted Sowers*, 51 Van Natta 1223 (1999) (a fee of 40 percent of the proceeds was approved where the issues were complex, the case required extensive preparation, including depositions and other discovery techniques, the preparation for litigation and litigation extended over more than a year and required a jury trial lasting 5 days, and the insurer did not object to the claimant's request for an extraordinary fee); *Victoria A. Brokenshire*, 50 Van Natta 1411 (1998) (a 45 percent share of a \$729,967.76 judgment was allowed 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 Supreme Court in dismissing the defendant's appeal to that Court, and the paying agent did not object to the fee); *Pamela J. Jennings*, 49 Van Natta 12 (1997) (a 40 percent share of a \$280,000 judgment was allowed where the case involved a complex medical negligence issue, extensive motion practice and court memorandum were necessitated due to the defendant's failure to follow the usual voluntary methods of obtaining discovery, litigation extended almost ten years and involved several appeals, and the paying agent did not object to the fee).

We find the circumstances of the present case similarly compelling as those in cases where we have authorized extraordinary attorney fees. Specifically, the factual and legal issues in this aviation accident case were complex and time-consuming and required the retention of multiple experts and extensive case preparation, including extensive multi-state discovery. Moreover, the matter involved multi-state litigation in both federal and state courts. Claimant's counsel was also required to devote additional time to litigating the issue of whether the paying agency was assigned claimant's cause of action. *See Coultas*, 63 Van Natta at 781. The investigation of claimant's claim, preparation for the litigation and the litigation itself extended three years, with claimant's counsel achieving favorable results, including a substantial settlement with the third party defendants. Finally, claimant and her counsel agreed to an attorney fee of 40 percent of any settlement or recovery, as represented by the retainer agreement.⁸

We acknowledge that the paying agency has objected to claimant's counsel's fee request. Under these circumstances, however, we are persuaded that claimant's counsel is entitled to an attorney fee in excess of one-third of the third party recovery proceeds. Accordingly, for the reasons expressed herein, we find that this case constitutes extraordinary circumstances justifying the allowance of an extraordinary attorney fee. Commensurate with the request from claimant's counsel and the agreement between claimant and his counsel, we further hold that the extraordinary attorney fee shall equal 40 percent of claimant's third party recovery proceeds. Consequently, claimant's counsel is directed to retain the aforementioned extraordinary attorney fee from claimant's third party recovery proceeds (*i.e.*, the \$1,233,333 Columbia settlement and the \$1,210,000 Sikorsky settlement).

Finally, claimant requests that we defer ruling on the issue of litigation costs and expenses to when all expenses and the paying agency's lien costs can be determined. The paying agency has not objected to claimant's request.

⁸ As noted above, 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). While we are not bound by the attorney fee provision in the retainer agreement, we nevertheless consider it to be a factor supporting our decision to award an extraordinary fee.

Our general preference is to resolve all statutory distributions from approved third party settlements when such “just and proper” disputes are presented for our consideration. In this way, all statutory recipients receive their “just and proper” shares of the settlement proceeds. Deferring the distribution process before resolution of the “litigation/expenses” component necessarily delays the distribution of the settlement proceeds to claimant (for his one-third share), as well as to the paying agency (as partial reimbursement of its lien). *See* ORS 656.593(1).

Nevertheless, claimant’s counsel (on his client’s behalf) has expressly requested deferral of our review of the “litigation expenses/costs” distribution issue. Moreover, the paying agency has not opposed the request. As amply demonstrated in our previous order concerning these parties, this “litigation expense/cost” issue has been very contentious. *See Coultas*, 63 Van Natta at 781. Therefore, under these particular circumstances, we grant claimant’s request and defer action on the determination of costs and expenses.

Accordingly, the parties shall provide each other with detailed accountings of their proposed shares (to include litigation costs/expenses for claimant’s counsel, and actual and projected claim costs for the paying agency). Thereafter, if the parties are unable to reach a reasonable accommodation regarding a distribution of the remaining balance of the settlement proceeds, they may present their dispute to us for a determination of a “just and proper” distribution of the remaining settlement proceeds. *See* ORS 656.593(3).

IT IS SO ORDERED.

Entered at Salem, Oregon on July 20, 2012

Member Langer dissenting.

Concluding that the disputed third party settlements are not “grossly unreasonable,” the majority approves the settlements, including the allocation of proceeds as agreed to by the third parties and claimant. Because I would find the settlements grossly unreasonable, I must part company with the majority and dissent.⁹

⁹ I could approve the extraordinary attorney fee requested by claimant’s attorney if it were not for my disagreement with the majority regarding the reasonableness of the proposed settlements.

The paying agency's lien currently amounts to approximately \$972,000. The paying agency has recovered \$34,479.22 from a prior settlement with the United States Forest Service, *William Coultas*, 63 Van Natta 781, 788 n 10 (2011), leaving the remaining amount of \$937,520.78 subject to future reimbursement.

Claimant settled his claim against Columbia for \$1,849,999, and his claim against Sikorsky for \$1,815,000. According to the settlements, claimant's spouse would receive one-third, or 33.33 percent, of each sum for her loss of consortium claim.

An expert opinion shows that generally, the loss of consortium claims would run between five and 20 percent of settlement amounts. Having reviewed pertinent medical records and other documents, the expert further concluded that on the facts of this case, he would expect claimant's spouse's claim to be on the low end of the spectrum. The expert noted that claimant sustained a very serious and painful injury, the paying agency has paid in excess of \$970,000 in medical expenses and indemnity, and there was no evidence that claimant's spouse received medical or psychiatric treatment as a result of caring for her husband. (Ex. 37-5).

A jury verdict in claimant's suit against GE supports the expert's opinion. The GE jury's award amounted to \$37,000,000, out of which the jury allocated 10.24 percent, or \$4,300,000, to claimant's spouse for her loss of consortium claim. The jury valued the past damages of claimant's spouse for her loss of consortium at \$300,000, and future damages at \$4,000,000. (Ex. 34).

When we exercise our authority to approve a proposed settlement of a third party action, our responsibility is to consider the interest of claimants and paying agencies as participants in the workers' compensation system. *Weems v. American Int'l Adjustment Co.*, 319 Or 140, 145-46 (1994). We may consider the value of a claim for loss of consortium by claimant's spouse in determining reasonableness of the proposed settlements between claimant and the third parties. However, we lack authority to approve or disapprove the third party settlement with claimant's spouse. *Weems v. American Int'l Adjustment Co.*, 123 Or App 83, 87, *aff'd*, 319 Or 140 (1994).

As the majority states, we will not approve a third party settlement if the settlement appears to be grossly unreasonable. I find the Columbia and Sikorsky settlements grossly unreasonable as compared to the amount of the paying agency's lien and the common practice of valuing the loss of consortium claims. *See Weems*, 319 Or at 147. (Durham, J., concurring) (the "grossly unreasonable" standard begs the legal question: "Grossly unreasonable, as compared to what?").

Although we are not required to defer to a civil settlement judge's opinion regarding the reasonableness of a settlement, *Weems*, 319 Or at 145-47, we may consider a jury verdict in judging the reasonableness of a settlement. *See Kim Hayes*, 48 Van Natta 1635 (1996) (noting that we lack statutory authority to approve or disapprove a loss of consortium claim, but that we can consider the value of such a claim as evidence of the reasonableness of a proposed settlement of claimant's underlying negligence claim). Here, I see no reason not to give substantial weight to the GE jury's finding that the value of claimant's claim is nearly 10 times higher than the value of his spouse's derivative claim. The jury reached that conclusion while considering the same evidence that is before us. Although claimant argues that his spouse's loss of consortium claim is not typical, the jury verdict in the GE case supports a contrary conclusion.¹⁰ The jury's judgment also is consistent with the expert opinion regarding a reasonable value of the loss of consortium claim. In contrast, under the submitted agreements, claimant's spouse would receive half of what claimant is receiving and a third of the entire settlement. Given the wide disparity between the jury's allocation and what is contained in the settlements, I would not approve the agreements.

We cannot ignore that the paying agency has provided substantial workers' compensation benefits to claimant and its lien remains largely unsatisfied. In my view, the highly irregular apportionment in this case indicates that either the amount allocated to claimant's spouse is unreasonable because claimant should be receiving a much larger sum when compared to the spouse's share, or the settlement reflects "*Weems*-type" gamesmanship whereby a large sum of money is allocated to the loss of consortium claim to reduce the amount of proceeds available to reimburse the paying agency's lien. Had the settlements been structured in a customary manner, hundreds of thousands of dollars would have been available to reimburse some of the paying agency's expenditures.¹¹

¹⁰ I question the majority's emphasis on the services already provided by claimant's spouse in justifying the allocation of settlement proceeds to the loss of consortium claim. "Consortium" is the common-law right of a spouse to the companionship, love and services of the injured spouse. When one spouse is injured, the uninjured spouse may lose those benefits and is entitled to compensation. *Axen v. American Home Prods. Corp.*, 158 Or App 292, 310 (1999), *recons.*, 160 Or App 19 (1999). Thus, it appears that the uninjured spouse's services provided to the injured spouse are not essential to a loss of consortium claim. The GE jury verdict seems to support my understanding. The vast majority of that jury award on the loss of consortium claim was to cover claimant's spouse's future damages. *See id.* (the wife's economic damages by taking early retirement to care for her husband were not a recoverable part of a loss of consortium claim).

¹¹ The difference between a customary consortium award and the amounts negotiated in the Columbia and Sikorsky settlements is about 23 percent of the total settlement amounts (\$435,936 in the Columbia settlement and \$419,144 in the Sikorsky settlement, for a total of \$855,080).

In sum, although we cannot restructure the settlement to change the amounts allocated to claimant's and his spouse's claims, we are authorized to disapprove the settlements if "grossly unreasonable." In this case, the amount of the lien, the amount of the loss of consortium claim settlement, the unrebutted affidavit of the lawyer, and the apportionment in the GE verdict, all support a finding that the settlements are grossly unreasonable. Because the majority concludes otherwise, I must dissent.