
In the Matter of the Compensation of
CHRISTOPHER TAYLOR, Claimant
WCB Case No. 14-03708
ORDER ON REVIEW
M & L Legal Attorneys, Claimant Attorneys
SAIF Legal, Salem, Defense Attorneys

Reviewing Panel: Members Weddell, Johnson and Somers. Member Weddell dissents.

Claimant requests review of Administrative Law Judge (ALJ) Marshall's order that awarded a \$5,000 attorney fee under ORS 656.386(1)(a). On review, the issue is attorney fees. We modify.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

Claimant, a delivery driver, filed a claim for a respiratory condition and other symptoms, attributing them to engine exhaust from his employer's vehicle. (Exs. 5, 7). Claimant's former counsel requested a hearing, asserting a *de facto* denial of the claim. (Hearing File).

Prior to the hearing, which was scheduled for July 25, 2015, claimant's counsel deposed the insurer-requested medical examiner. (Ex. 10). Additionally, claimant's counsel subpoenaed vehicle maintenance records from the employer, and obtained a medical opinion in support of the claim. (Exs. A, 11).

On July 25, 2015, before the hearing was convened, SAIF agreed to rescind the denial. Thereafter, the parties submitted written arguments concerning the determination of a reasonable attorney fee award regarding the "pre-hearing" rescission of SAIF's denial. *See* ORS 656.386(1)(a).

Claimant's counsel requested a \$12,000 fee. SAIF asserted that \$4,000 would be a reasonable fee. After considering the factors provided in OAR 438-015-0010(4), the ALJ awarded a \$5,000 attorney fee. On review, claimant reiterates his counsel's original request for \$12,000. Based on the following reasoning, we modify the ALJ's award.

Claimant's counsel is entitled to a reasonable attorney fee for his services in obtaining the rescission of SAIF's denial. ORS 656.386(1)(a). We determine the amount of claimant's counsel's attorney fee for services in preparation for the hearing by applying the factors set forth in OAR 438-015-0010(4) to the circumstances of this case. Those factors are: (1) the time devoted to the case; (2) the complexity of the issues involved; (3) the value of the interest involved; (4) the skill of the attorneys; (5) the nature of the proceedings; (6) the benefits 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.

Here, claimant's counsel submitted a statement of services representing 30.3 hours in case preparation.¹ Based on cases typically litigated before the Hearings Division, the issue was moderately complex (both factually and medically) requiring claimant to seek automotive maintenance records and consultation with a medical expert. The value of the interest was two emergency room evaluations. (Exs. 1, 3, 4). Both attorneys have substantial workers' compensation experience and exhibited a high degree of skill in the proceedings. The nature of the proceedings was claimant's appeal of SAIF's initial claim denial. The benefits secured for claimant included payment of the abovementioned medical services, as well as statutory benefits flowing to claimant by virtue of SAIF's acceptance. No frivolous issues or defenses were raised.

Finally, the record supports a conclusion that claimant's counsel's development of the record through submission of automotive maintenance records and expert medical opinion persuaded SAIF to rescind its denial. Absent claimant's counsel's successful development of the record, claimant would have been unable to satisfy his burden of proof. Therefore, we conclude that claimant's counsel provided his legal services in the face of a significant risk that his efforts would go uncompensated. In assessing this aforementioned risk, we do not confine our review to the circumstances present only when the denial was rescinded, but also take into consideration the entire record as developed following claimant's retention of his attorney.²

¹ Counsel's statement of services does not include any services completed after SAIF's agreement to accept the claim. *See Bowman v. SAIF*, 278 Or App 417, 423 (2016) (remanding to the Board for consideration of "post-rescission" services in determining the amount of a reasonable attorney fee award).

² While a multiplier for the general statistical risk of representing a claimant is not considered, the risk of going uncompensated in a specific case may justify an increased attorney fee award. *See, e.g., Wattenbarger v. Boise Cascade Corp.*, 301 Or 16, 16 (1986).

In reaching this conclusion, we do not consider the “pre-hearing” rescission of the denial to weigh against a finding that counsel’s efforts might go uncompensated. However, the rescission affects the “nature of the proceedings” factor because it was unnecessary for claimant’s counsel to provide services at a hearing (though the timing of SAIF’s rescission required him to prepare for the hearing).

In summary, after considering the aforementioned factors and the parties’ arguments, we conclude that \$8,000 is a reasonable attorney fee for claimant’s counsel’s services in obtaining the “pre-hearing” rescission of SAIF’s denial. *See* ORS 656.386(1)(a). In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record, claimant’s counsel’s fee request, and SAIF’s objections),³ the value of the interest involved and benefit secured, the nature of the proceedings, and the risk that claimant’s counsel might go uncompensated. Consequently, the ALJ’s attorney fee award is modified.

ORDER

The ALJ’s order dated December 21, 2015 is modified. In lieu of the ALJ’s \$5,000 attorney fee award, claimant’s counsel is awarded \$8,000, payable by SAIF.

Entered at Salem, Oregon on July 25, 2016

Member Weddell dissenting.

The majority concludes that \$8,000 is a reasonable attorney fee for claimant’s counsel’s services in obtaining SAIF’s rescission of its denial of claimant’s claim for an occupational disease. Because I consider claimant’s counsel’s request for an award of \$12,000 to be reasonable based on the record, claimant’s counsel’s fee submission, and the factors under OAR 438-015-0010(4), I would grant the requested amount. Moreover, the majority’s award of \$8,000 is unexplained and inconsistent with the statutory policy of allowing adequate representation and “the broadest access to attorneys” by injured workers. *See* ORS 656.012(2)(b); ORS 656.388.

³ The time devoted to the issue is but one factor in determining a reasonable attorney fee, and we do not calculate such a fee by strictly multiplying the time spent by an hourly rate. *See Brad L. Emerson*, 67 Van Natta 1550, 1552 (2015).

OAR 438-015-0010(4) Factors

Regarding the time devoted to the case, claimant's counsel submitted an itemized estimate of hours spent on the case totaling approximately 30 hours. All of the hours submitted were related to preparation of claimant's case for hearing, and reflect reasonable amounts of time spent for the described tasks including multiple telephone conferences with a medical expert, a deposition of SAIF's medical examiner, and research related to the factual, medical, and legal issues in the case.

Regarding the complexity of the issues, the case presented factual and medical issues of above average complexity. In particular, claimant's counsel performed research into the mechanical sources of exhaust fume pollution, and research into the medical consequences and symptoms of such exposure.

The value of the interest involved included payment of two emergency room evaluations, as well as the legal benefits that may accrue to claimant by reason of establishing the compensability of his claim.

Both attorneys are highly experienced in workers' compensation and demonstrated a high degree of skill in the proceedings.

Claimant's attorney assumed a significant risk that his efforts might go uncompensated given the factual complexities that gave rise to claimant's need for medical treatment. There were no frivolous issues or defenses raised by the parties.

Claimant's counsel submitted that his hourly rate in non-contingent, non-workers' compensation legal matters is \$300 per hour. While the OAR 438-015-0010(4) factors do not explicitly include an hourly rate as one of the factors for consideration, it is highly questionable how the Board could properly weigh the "time devoted to the case" in determining a reasonable attorney fee without consideration (directly or indirectly) of a reasonable hourly rate.

Here, the majority has determined that a reasonable hourly rate is approximately \$267 per hour in this contingent fee workers' compensation case, even though claimant's counsel garners a higher rate of \$300 per hour in non-contingent legal matters. While the majority disagrees with the ALJ's low assessment of the risk that claimant's counsel would go uncompensated, it paradoxically awards a fee at a rate that seems to reflect no risk at all.

Alternatively, the majority may have concluded that claimant's counsel misrepresented the amount of time spent on the case, or included unnecessary or duplicative efforts in his representation of the time spent. I find no evidence to support either conclusion, and overall consider the amount of time spent on the described tasks to be reasonable.

Therefore, I conclude that the majority's attorney fee award is not supported by substantial evidence or reasoning, and that it is inconsistent with policy objectives of ensuring adequate compensation to sustain adequate representation for injured workers. I consider claimant's counsel's request for \$12,000, based, in part, on a \$400 hourly rate for contingent workers' compensation legal services, to be reasonable. Therefore, I would grant the requested amount.

Finally, the majority's award reflecting a contingent hourly rate below claimant's counsel's non-contingent rate cannot but have the effect of dissuading claimant's counsel from litigating such cases in the future, and therefore, is inconsistent with the statutory policy objectives of ensuring access to adequate representation for injured workers. *See* ORS 656.012(2)(b); ORS 656.388.

Because the majority does not explain whether or how it concluded that claimant's counsel's fee request is not reasonable, and the amount of the award is inadequate for the purpose of encouraging representation in contingent fee cases, I respectfully dissent.