
In the Matter of the Compensation of
KEVIN J. SIEGRIST, Claimant
WCB Case No. 15-02147
ORDER ON RECONSIDERATION
Julene M Quinn LLC, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Weddell and Curey.

On August 31, 2016, we abated our August 11, 2016 order that declined to award an assessed fee under ORS 656.386(4) (2015) for claimant's attorneys' services at hearing and on review for prevailing on a claim for an increase of costs. We took this action to consider claimant's motion for reconsideration, which disputes our conclusion that he waived the attorney fee issue and seeks the award of an assessed fee. In response, the SAIF Corporation disputes our finding of extraordinary circumstances justifying the reimbursement of claimant's cost bill in excess of \$1,500.¹ Having received the parties' arguments, we proceed with our reconsideration.

Extraordinary Circumstances

SAIF contends that claimant has not demonstrated "extraordinary circumstances" justifying the reimbursement of his cost bill for more than \$1,500. ORS 656.386(2)(d) provides, "Payments for witness fees, expenses and costs ordered under this subsection may not exceed \$1,500 unless the claimant

¹ Claimant contends that SAIF has merely preserved this issue for future proceedings, but has not requested that we reconsider our conclusion. Although SAIF did not label its contention as a request for "reconsideration," it stated that it "reiterate[d] all of the arguments made in its respondent's brief" and specifically argued that our conclusion was erroneous for several reasons. SAIF has subsequently clarified that it "did invite the Board to change its decision," and "[f]rom that standpoint, therefore, SAIF did request that the Board 'reconsider' its order."

The Board has "plenary authority to decide matters committed to it by the legislature," which "includes the authority to withdraw an order and to reconsider the decision embodied in the order," whether "at the request of a party or on its own motion." *SAIF v. Fisher*, 100 Or App 288, 291-92 (1990). Furthermore, OAR 438-011-0035(2) requires that a request for reconsideration "include a concise statement of the reason(s) reconsideration is requested," but does not require the word "reconsideration" to be used.

Based on the aforementioned points and authorities, we may reconsider our decision based on SAIF's submission and our interpretation of its arguments.

demonstrates extraordinary circumstances justifying payment of a greater amount.” Similarly, OAR 438-015-0019(2) states that “the claimant may claim [reasonable expenses and costs] by submitting a cost bill * * * not to exceed \$1,500, unless the claimant demonstrates extraordinary circumstances justifying payment of a greater amount.”

SAIF first asserts that claimant’s cost bill was “procedurally defective” because it did not demonstrate the existence of “extraordinary circumstances” justifying reimbursement of more than \$1,500. We understand SAIF to argue that because the cost bill was defective, the issue of reimbursement of more than \$1,500 is not properly before us. We disagree.

To begin, SAIF did not raise a procedural defect in the cost bill at hearing. Instead, it disputed claimant’s contention that, under OAR 438-015-0019(5), it was required to pay the full cost bill because it had not timely requested a hearing to dispute the cost bill. (Tr. 2-3, 11, 15). SAIF argued that regardless of whether it had timely requested a hearing, claimant bore the burden to establish “extraordinary circumstances” before it could be required to reimburse more than \$1,500. (Tr. 3, 15). It specifically asserted that, because it had declined to pay more than \$1,500, and claimant requested a hearing, “the appropriate procedure has been applied.” (Tr. 3). It further argued, “The question is whether Claimant has demonstrated extraordinary circumstances justifying ignoring the express limitation of \$1500. That’s not something that’s waived.” (Tr. 15).

Because SAIF argued that the presence of “extraordinary circumstances” was properly at issue at hearing, and did not assert a procedural defect in the cost bill at that time, we are not inclined to address that issue now.² See *Stevenson v.*

² A “cost bill” is “an itemized statement from the claimant of the amount of expenses and costs for records, expert opinions, and witness fees incurred as a result of the litigation involving a claim denial under ORS 656.386(1).” OAR 438-015-0005(6). OAR 438-015-0019(3) provides that a cost bill may be submitted on a form prescribed by the Board and shall contain:

“(a) An itemization of the incurred expenses and costs for records, expert opinions, and witness fees that are due to the denied claim(s); and

“(b) The claimant’s signature confirming that the claimed expenses and costs were incurred in the litigation of the denied claim(s).”

The required content of a cost bill does not depend on whether it requests reimbursement of more than \$1,500, and a cost bill is not required to identify “extraordinary circumstances.” Accordingly, if the issue were before us, we would not be inclined to conclude that a cost bill that requests reimbursement of more than \$1,500, but does not assert “extraordinary circumstances,” is insufficient to allow the issue of such reimbursement to be raised in a hearing.

Blue Cross of Oregon, 108 Or App 247 (1991) (Board can refuse to consider issues on review that are not raised at hearing); *Brian M. Eggman*, 49 Van Natta 1835 (1997) (failure to raise a procedural defect is a waiver of the procedural error). Instead, we have assumed, without deciding, that SAIF did not waive its right to contest the cost bill and that claimant bore the burden to establish “extraordinary circumstances” justifying the payment of more than \$1,500. Consequently, we continue to find that the “extraordinary circumstances” issue is properly before us.³

SAIF next contends that the legislative history of ORS 656.386(2) is inconsistent with the finding of “extraordinary circumstances” in this case because claimant’s \$1,550 cost bill exceeded the \$1,500 threshold by only a small amount. We disagree with SAIF’s interpretation of the legislative history.

SAIF cites statements of Martin Alvey, an attorney who represents injured workers, who testified as a proponent of SB 404 (2007). We have considered Mr. Alvey’s statements to be relevant legislative history regarding the type of costs that may be reimbursed. See *Ronald Dean*, 66 Van Natta 961, 964-65 (2014); *Shirley A. Smith*, 63 Van Natta 2354, 2361-62 (2011). In particular, we noted that, although Mr. Alvey was not a legislator, no legislative history suggested an intent contrary to his statements. *Dean*, 66 Van Natta at 965; *Smith*, 63 Van Natta at 2357 n 4. However, in evaluating whether “extraordinary circumstances” exist, we have relied on the plain meaning of the statutory text. *Ken L. Circle*, 67 Van Natta 61, 62 (2015) (defining “extraordinary” by citing *Webster’s Third New Int’l Dictionary* 807 (unabridged ed 1993)).

The extent of the legislative history considered, and the weight given to it, is for us to determine. *State v. Gaines*, 346 Or 160, 172 (2009). After considering the legislative history, we consider it consistent with our case law. We reason as follows.

Although Mr. Alvey initially suggested that he “probably wouldn’t have a very good argument” to establish “extraordinary circumstances” if total expenses were less than \$1,700, he also reasoned that much greater expense would

³ If, as SAIF reasons, OAR 438-015-0019(2) requires a demonstration of “extraordinary circumstances” to allow the *submission* of a cost bill exceeding \$1,500, then a finding of “extraordinary circumstances” (as we have made here) would allow the submission of such a cost bill. Thus, applying OAR 438-015-0019(2) as SAIF suggests, an order finding “extraordinary circumstances” would not order the payment of claimant’s full cost bill, but would instead allow him to submit a second cost bill. We decline to interpret OAR 438-015-0019(2) in a manner that requires the resubmission of a cost bill after a factfinder finds “extraordinary circumstances.”

be required “any time you have to leave the arena of attending physicians.” Audio Recording, Senate Committee on Commerce, SB 404, April 23, 2007 (statement of Martin Alvey). When asked whether the demonstration of “extraordinary circumstances” would be based on a dollar amount, or what is actually required to prove a case, Mr. Alvey replied, “It will probably, in most cases, be a dollar amount. But I think it’s going to be what’s necessary to prove the case.” *Id.* Thus, Mr. Alvey endorsed both “a dollar amount” and “what’s necessary to prove the case” (particularly when an expert opinion, beyond an attending physician’s opinion, is required), as criteria for finding extraordinary circumstances.

Further, the voting legislators who commented regarding the subject explicitly rejected a dollar threshold of expenses to determine whether circumstances were “extraordinary.” Senator Roger Beyer expressly disagreed with the proposition that “extraordinary circumstances” would be established by a “dollar figure.” *Id.* (statement of Senator Beyer). He reasoned that “extraordinary circumstances” should be established, instead, by the showing that the claimant “had no other choice but to bring someone who costs more.” *Id.* Similarly, Senator Avakian said, “It would be an independent analysis from the actual dollars spent. You would have to justify the dollars that you spent.” *Id.* (statement of Senator Avakian). Senator Prozanski likewise indicated that “extraordinary circumstances” is “more than just a dollar amount,” and that “it has to be demonstrated that those extra expenses were warranted and necessary.” *Id.* (statement of Senator Prozanski).

Under such circumstances, we consider the legislative history to conclusively establish that the presence of “extraordinary circumstances” justifying the reimbursement of a cost bill greater than \$1,500 does not depend on a “dollar figure” threshold. Accordingly, we continue to evaluate the presence of “extraordinary circumstances” by examining whether the circumstances of the case were of the type that were usual, regular, common, or customary in this forum, rather than by examining the amount by which claimant’s cost bill exceeded \$1,500. Additionally, based on the foregoing legislative history, we look to whether the additional expense was warranted and necessary.

Finally, SAIF disputes our conclusion that the circumstances of this case were “extraordinary.” Specifically, we noted that claimant had no private health insurance at the time of the injury, had lost his job shortly after the injury, and needed a surgery that would only, realistically, be obtainable by prevailing over the denial. We also noted that SAIF had procured the opposing report of a highly credentialed hand surgeon to support its denial and that the two expert opinions that claimant had obtained from other physicians, at a total cost of \$350, would not

have been sufficient to establish the compensability of the claim. Furthermore, we observed that the third expert opinion, which cost \$1,200 to obtain and was from a well-qualified specialist, was the evidence that ultimately determined the outcome of the case in claimant's favor.

Of the circumstances identified, we give the most weight to the fact that, in light of the opposing opinion of a highly credentialed expert, claimant would not have been able to prove his claim without obtaining, at significant cost, the opinion of a specialist who could persuasively explain why claimant's occupational disease was compensable and, in doing so, persuasively rebut SAIF's expert's opinion. Claimant's expenditure of more than \$1,500 was necessitated by the circumstances of the case, and was decisive to its outcome.

We conclude that the facts set forth in the previous paragraph are, alone, sufficient to establish "extraordinary circumstances." Nevertheless, the additional circumstances identified before the previous paragraph further reinforce our conclusion that "extraordinary circumstances" exist to support a payment of more than \$1,500. Accordingly, based on the aforementioned reasoning, SAIF is required to reimburse the full cost bill.

Attorney Fee

Claimant contends that he did not waive the ORS 656.386(4) fee issue.⁴ Based on the following reasoning, we modify our previous conclusion and determine that claimant waived an award of an assessed fee for his attorney's services at the hearing level, but did not waive such an award for his attorney's services at the Board level. We reason as follows.

Prior to January 1, 2016, there was no statutory basis for an award of an assessed fee to a claimant's attorney for services for prevailing on a claim for an increase of costs awarded under ORS 656.386(2). However, on June 22, 2015, the Governor approved HB 2764 (2015), which created a basis for such a fee under ORS 656.386(4) for orders issued and attorney fees incurred on or after January 1, 2016.⁵

⁴ Claimant makes several factual assertions in his request for reconsideration that are not supported by the record. Our review is limited to the record developed at hearing. ORS 656.295(5). Accordingly, we do not consider claimant's attorney's unsupported representations. See *SAIF v. Cruz*, 120 Or App 65, 69 (1993) (attorney's unsupported representations do not constitute evidence).

⁵ Entitlement to attorney fees in workers' compensation cases is governed by statute; no attorney fee may be awarded unless it is specifically authorized by statute. *Forney v. Western States Plywood*, 297 Or 628, 632 (1984). There was no entitlement to an attorney fee for prevailing on a claim for any

At the August 5, 2015 hearing, claimant’s attorney described the issue as whether SAIF should be responsible for the full amount of the cost bill. (Tr. 2). After the ALJ noted that claimant’s hearing request had also raised the issues of penalties and attorney fees, claimant’s attorney responded:

“I’m going to withdraw that. At this point, I don’t know what the issue would be, and the--this is not compensation. And at this point, the law doesn’t allow me to get an attorney fee for fighting about fees or costs.” (Tr. 2).

On review, we reasoned that claimant’s attorney’s statement plainly and unequivocally relinquished claimant’s right to an attorney fee for prevailing in the “costs” dispute.

Citing *Drews v. EBI Cos.*, 310 Or 134 (1990), claimant contends that he could not waive his future right to an assessed fee, which did not exist at the time of the hearing. However, a waiver is simply a knowing relinquishment of a known right, plainly and unequivocally manifested.⁶ *Drews*, 310 Or at 150; *Wright Schuchart Harbor v. Johnson*, 133 Or App 680, 685 (1995). Further, although the right to an attorney fee created by HB 2764 did not yet apply at the time of

increase of costs prior to the enactment of HB 2764. ORS 656.386(4) applies to orders issued and attorney fees incurred on or after January 1, 2016, the effective date of HB 2764. Or Laws 2015, chapter 521, §§ 7, 11; *see also Rodolfo Arevalo*, 68 Van Natta 1142, 1149 n 4 (2016) (application of attorney fee provisions of HB 2764 to orders issued and attorney fees incurred after January 1, 2016 is a prospective, not retroactive, application of the law). ORS 656.386(4) now states:

“In disputes involving a claim for costs, if the claimant prevails on the claim for any increase of costs, the Administrative Law Judge, board, Court of Appeals or Supreme Court shall award a reasonable assessed attorney fee to the claimant’s attorney.”

⁶ A claimant need not specifically raise attorney fees as an issue if the attorney fee is a “natural derivative” of an issue that was raised at hearing. *See Hays v. Tillamook County Gen Hosp.*, 160 Or App 55 (1998) (ORS 656.386(1) fee a “natural derivative” of the compensability issue, and did not need to be asserted to be recovered); *Wray A. Renfro*, 49 Van Natta 1751 (1997) (entitlement to attorney fees that naturally derive from other raised and litigated issues is a limited exception to the general rule that only issues raised by the parties at the hearing will be considered on review). Thus, the right to an attorney fee is not waived merely because a claimant has not specifically raised the issue.

However, we have recognized that a claimant may waive the right to a specific type of attorney fee award. *E.g., Katrina Miller*, 60 Van Natta 1630 (2008) (no “out-of-compensation” fee awarded where the claimant waived such a fee award at hearing). Accordingly, we reject claimant’s contention that the award of an attorney fee is mandatory regardless of any waiver of that issue.

the hearing, the bill had been signed into law, creating the future right to “costs-related” attorney fees for orders issued and attorney fees incurred on or after January 1, 2016.

In *Drews*, the court reasoned that the claimant’s prior silence on the subject of the correct amount of temporary total disability benefits did not indicate a waiver of the issue where he “did not know of the mistake and, thus, could not have intentionally waived the right to correct it.” 310 Or at 151. Yet, the *Drews* court did not reason that a future right could not be waived. Instead, it merely observed that, in that case, there had been no manifestation of an intent to relinquish a known right. We find no authority limiting a party’s ability to waive a right that would otherwise arise in the future.

Claimant also contends that his waiver of a “costs-related” attorney fee did not waive his rights under HB 2764, either because there was no specific discussion of HB 2764 at the hearing or because his rights under HB 2764 were not “known.” HB 2764, however, had been signed into law, and claimant’s waiver of an attorney fee was general and unqualified. Further, claimant’s comment that a fee was not available “at his point” suggests an awareness of the forthcoming change in law.

In any event, even if claimant and his attorney did not know of the specific authority under which an attorney fee might become available, the subject of the waiver (“an attorney fee for fighting about fees or costs”) was specifically identified. (Tr. 2) Accordingly, we conclude that there was a knowing and unequivocal waiver by claimant of all grounds for an attorney fee.

Nevertheless, on reconsideration, we conclude that claimant’s waiver of an attorney fee was limited to a fee for his counsel’s services regarding the costs issue “at this point” (*i.e.*, at the hearing level). There was no discussion of a fee for services that might subsequently become necessary at the Board level. Accordingly, we conclude that claimant waived only a fee for his attorney’s services at the hearing level, and did not waive a fee for his attorney’s subsequent services at the Board level.

Accordingly, on reconsideration, we conclude that claimant’s attorney is entitled to an assessed fee for services before the Board on review and on reconsideration regarding the “costs” issue.⁷ ORS 656.382(3); ORS 656.386(4);

⁷ Claimant’s attorney is not entitled to a fee for services at the hearing level.

Antonio L. Martinez, 61 Van Natta 1892 (2009) (a carrier's request for reconsideration of a Board order awarding compensation constituted a "request for review," entitling the claimant's counsel to an attorney fee award under ORS 656.382(2) when the Board's compensation award was not disallowed or replaced). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review and reconsideration concerning the aforementioned issue is \$5,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's appellate briefs and argument on reconsideration), the complexity of the issue, the value of the interest involved, the risk of going uncompensated, and the contingent nature of the practice of workers' compensation law.

Accordingly on reconsideration, as supplemented and modified herein, we republish our August 11, 2016 order. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on January 19, 2017