
In the Matter of the Compensation of
KARISTA D. PEABODY, Claimant
WCB Case No. 16-02309
ORDER ON RECONSIDERATION
Colin Hackett Law PC, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Ousey and Curey.

On October 31, 2017, we reversed an Administrative Law Judge's (ALJ's) order that upheld the SAIF Corporation's denial of claimant's injury/occupational disease claim for right cubital tunnel syndrome. Finding claimant's claim compensable as an occupational disease, we also granted a \$12,500 carrier-paid attorney fee pursuant to ORS 656.386(1) for claimant's counsel's services at the hearing level and on review. Contending that our attorney fee award was unreasonable and neglected to take into consideration all relevant factors as required by ORS 656.388 and OAR 438-015-0010(4), claimant seeks reconsideration.

In reaching our determination of a reasonable attorney fee for claimant's counsel's services at the hearing level and on review, we noted that all of the factors prescribed in OAR 438-015-0010(4) had been taken into consideration. We further emphasized that particular consideration had been given to the following factors: the time devoted to the case (as represented by the record, claimant's appellate briefs, her counsel's fee submission, and SAIF's objections), the complexity of the issue, the value of the interest involved, the risk that claimant's counsel might go uncompensated, and the contingent nature of the practice of workers' compensation law.

On reconsideration, claimant seeks the previously-requested attorney fee of \$31,000 for her counsel's services at the hearing level and on review. Specifically, she asserts that ORS 656.386(1) mandates that the Board "shall allow" a reasonable attorney fee. Absent a finding that the requested fee was unreasonable, and noting her attorney's statements of services addressing the factors in OAR 438-015-0010(4) to support the specific attorney fee request, claimant argues that we must approve the requested fee.

We have previously rejected such an argument in *Randell R. Ledbetter*, 68 Van Natta 1316 (2016). Furthermore, although claimant's counsel here (unlike the claimant's attorney in *Ledbetter*) submitted statements of services addressing

the “rule-based” factors under OAR 438-015-0010(4) for determining a reasonable attorney fee, we are obligated to determine a reasonable attorney fee award on a case-by-case basis. *Schoch v. Leupold Stevens*, 325 Or 112, 117-18 (1977); *Ledbetter*, 68 Van Natta at 1321-22.

Here, among her contentions, claimant asserts that the time devoted to the case was not contested, and that our \$12,500 attorney fee award is not consistent with a reasonable “per hour fee.” Yet, an hourly rate is not one of the “rule-based” factors prescribed in OAR 438-015-0010(4) for the determination of a reasonable attorney fee. Moreover, while the time devoted to the case is one of the “rule-based” factors to consider in assessing a reasonable attorney fee, it is not the sole factor in that determination. *Elizabeth M. Huddleston*, 67 Van Natta 542, *recons*, 67 Van Natta 616, 616-17 (2015); *Vernon L. Bowman*, 66 Van Natta 681, 682 (2014).

Claimant also notes that ORS 656.388(4) requires consultation with the Board of Governors of the Oregon State Bar (OSB) to set fees. Consistent with that statutory provision, the Board’s attorney fee rules have been referred to the OSB for consultation and review.¹ WCB Admin. Order 2-2016 (eff. November 1, 2016); WCB Admin. Order 1-2015 (eff. January 1, 2016); *see Stephanie Thomas*, 62 Van Natta 2825, 2835 n 7 (2010).

Finally, in response to claimant’s motion, we offer the following additional assessment of her counsel’s reasonable attorney fee award.

The hearing lasted 56 minutes, with claimant as the only witness. The hearing transcript consists of 39 pages. The record contains 17 exhibits, including four concurrence reports (three of which supported the compensability of the denied claim) submitted by claimant’s counsel. Claimant was examined by two physicians at SAIF’s request, and another physician at her attorney’s request. There were no depositions.

Claimant’s counsel submitted a 23-page written closing argument and an eight-page written reply argument at hearing. On review, claimant’s counsel’s appellant’s brief was approximately 29 and one-half pages (approximately 17 pages of which were devoted to argument regarding the compensability

¹ Claimant further references an OSB Economic Survey. Because such information is not part of the record, it is not subject to our review. *See Julio Villeda*, 68 Van Natta 1741, 1744 n 4 (2016); *see also Stephanie Thomas*, 62 Van Natta 2825, 2844 n 15 (2010) (OSB Economic Survey not subject to administrative notice).

issue, which were largely duplicative of the previously submitted written closing argument) and his reply brief was approximately 12 pages (11 pages of which were devoted to argument regarding the compensability issue). Claimant's counsel's statement of services submitted on review indicated that he devoted approximately 63 hours to the case (excluding time spent on the attorney fee issue), some of which reflected time spent on administrative tasks. Claimant's counsel's representation of time is uncontested.

The benefit and value to claimant were limited, including medical treatment and temporary disability benefits.² When compared to compensability disputes litigated before this forum, this claim presented issues of average complexity.³ Claimant's counsel and SAIF's appellate attorney have been OSB members for 10 years and 9 years, respectively. There was a risk that claimant's attorney's efforts might go uncompensated given the contingent nature of the practice of workers' compensation law. Finally, there were no frivolous issues or defenses asserted.

In conclusion, after considering the factors set forth in OAR 438-015-0010(4) and applying them to this record, we continue to find that a reasonable fee for claimant's attorney's services at the hearing level and on review is \$12,500, to be paid by SAIF.

Accordingly, we withdraw our October 31, 2017 order. On reconsideration, as supplemented above, we republish our prior order. The parties' 30-day appeal rights shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on November 29, 2017

² Claimant missed about two weeks of work, and has returned to her regular work activities without restrictions. (Ex. 8-2; Tr. 22, 25-26).

³ We particularly note claimant's counsel's statements that the "factual and medical evidence were both of average complexity[.]" that the "injury and occupational disease theories added some additional legal complexity[.]" and that the "case was of typical medical complexity for an occupational disease claim."