

In the Matter of the Compensation of  
**BRIAN E. NODURFT, Claimant**

WCB Case No. 17-02699

ORDER ON REVIEW

Ransom Gilbertson Martin et al, Claimant Attorneys  
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Curey, Lanning, and Wold.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Pardington's order that awarded a \$7,500 employer-paid attorney fee under ORS 656.386(1). The self-insured employer cross-requests review of that portion of the ALJ's order that set aside its denial of claimant's injury claim for a low back condition. On review, the issues are compensability and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

In setting aside the employer's denial, the ALJ found the opinion of Dr. Button, an orthopedic surgeon who examined claimant at the employer's request, insufficient to establish that the March 2017 work injury was not the major contributing cause of the need for treatment/disability for a combined low back condition. *See* ORS 656.005(7)(a)(B); ORS 656.266(2)(a). The ALJ awarded claimant's counsel an attorney fee of \$7,500 for prevailing over the compensability denial.

We adopt and affirm that portion of the ALJ's decision that concluded that claimant's injury claim was compensable.

On review, claimant disagrees with the ALJ's \$7,500 attorney fee award, asserting that \$12,500 is a reasonable attorney fee for his counsel's services rendered at the hearing level, which included out-of-town travel and significant benefits secured. In response, the employer supports the ALJ's \$7,500 attorney fee award. For the following reasons, we modify the ALJ's award.

We review the ALJ's attorney fee award *de novo*, considering the specific contentions raised at the hearing level and on review, in light of the factors set forth in OAR 438-015-0010(4) as applied to the particular circumstances of this case. *See Schoch v. Leopold & Stevens*, 325 Or 112, 118-19 (1997) (in determining a reasonable assessed attorney fee, the factors set forth in OAR 438-015-0010(4) are applied to the circumstances of each 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 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. Application of the "rule-based" factors does not involve a strict mathematical calculation. *Robert L. Lininger*, 67 Van Natta 1712, 1718 (2015).

Here, the hearing took place in Pendleton, which is several hours from claimant's counsel's Portland office. *See Carmen O. Macias*, 53 Van Natta 689 (2001) (attorney's travel time to an out-of-town hearing or deposition represented hours of legal services rendered on behalf of the claimant, which could be considered in awarding a reasonable fee). The hearing lasted 46 minutes, and telephonic closing arguments lasted 32 minutes. The transcript pages for these proceedings totaled 52 pages.

There were 28 admitted exhibits, including two concurrence reports submitted by claimant's counsel that were instrumental in setting aside the employer's compensability denial. (Exs. 24, 26). These reports demonstrate that claimant's counsel spoke to Dr. Brett about the compensability dispute, prepared questions, prepared a summary of his conversations, obtained his signature, and submitted the reports as proposed exhibits. Moreover, there was one telephonic deposition that lasted 22 minutes and totaled 16 pages. (Ex. 28). These circumstances indicate that claimant's attorney's services extended beyond the time spent at the hearing level. *See Bowman v. SAIF*, 278 Or App 417 (2016).

Considering the range of disputed claims generally submitted for resolution to this forum, the case presented legal and medical issues at an average complexity level. The disagreement between the physicians also created a risk that claimant's counsel's efforts might go uncompensated. We also consider the contingent nature of a worker's compensation practice.

The value of the interest involved and the benefit secured for claimant include acceptance of a low back condition. Because claimant had low back surgery, this record suggests a possibility of a compensable surgery, including

additional temporary and permanent disability benefits. (Ex. 22). Thus, the record supports a conclusion that the interest involved and the benefit secured for claimant are substantial. Counsel for both parties are experienced and presented their respective positions in a skillful and professional manner, and there were no frivolous issues or defenses.

In sum, based on our review of the record and considering the parties' arguments regarding the application of the factors set forth in OAR 438-015-0010(4) to the particular circumstances of this case, we find that a \$11,500 award is a reasonable attorney fee for claimant's attorney's services at the hearing level concerning the compensability issue.<sup>1</sup>

Claimant's counsel is also entitled to an assessed attorney fee for services on review concerning the compensability issue. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable attorney fee for claimant's attorney's services on review is \$4,500, 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), 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.

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 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 August 1, 2018, as reconsidered on August 21, 2018, is affirmed in part and modified in part. Claimant's attorney is awarded \$11,500 for his services at the hearing level, in lieu of the ALJ's \$7,500 attorney fee award, to be paid by the employer. For his services on review, claimant's attorney is awarded \$4,500, to be paid by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on April 23, 2019

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<sup>1</sup> Claimant's attorney did not provide a statement of services at the hearing level, an estimate of time spent, or any evaluation of the factors to be considered as set forth in OAR 438-015-0010(4) as specifically applied to this case. Such information would have been relevant to the ALJ at the hearing level in reaching a determination of a reasonable attorney fee.