
In the Matter of the Compensation of
HEATHER M. GREENE, Claimant
WCB Case No. 18-02068
ORDER ON REVIEW
Moore & Jensen, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Ousey.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Mills's order that set aside its denial of claimant's aggravation claim for lumbar conditions. Claimant cross-requests review of that portion of the ALJ's order that awarded an \$8,000 attorney fee under ORS 656.386(1). On review, the issues are aggravation 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

The ALJ found claimant's aggravation claim compensable. *See* ORS 656.273(1);¹ *Fernandez v. M & M Reforestation*, 124 Or App 38 (1993). We adopt and affirm that portion of the ALJ's order.²

¹ ORS 656.273(1) provides:

"After the last award or arrangement of compensation, an injured worker is entitled to additional compensation for worsened conditions resulting from the original injury. A worsened condition resulting from the original injury is established by medical evidence of an actual worsening of the compensable condition supported by objective findings. However, if the major contributing cause of the worsened condition is an injury not occurring within the course and scope of employment, the worsening is not compensable."

² In addition to the reasoning expressed in the ALJ's order, we note that the opinions of Drs. Malos and Lewis, on which SAIF relies, either support, or do not contest, the proposition that claimant's compensable injury materially contributed to her worsened condition. Specifically, Dr. Lewis agreed that claimant's compensable injury materially contributed to the worsened L5-S1 disc condition. (Ex. 52-4). Moreover, Dr. Malos did not offer an opinion concerning material causation. (Ex. 51).

On review, SAIF contends that the opinions of Drs. Pederson and Weller (who did not attribute the major contributing cause of claimant's worsened condition to an injury outside the course and scope of employment) are unpersuasive. Yet, for the reasons expressed in the ALJ's order, the opinions of

The ALJ also awarded an \$8,000 insurer-paid attorney fee under ORS 656.386(1). Claimant disagrees with the ALJ's attorney fee award, asserting that \$12,000 is a reasonable attorney fee for her counsel's services rendered at the hearing level. In doing so, claimant notes that her counsel traveled from his Eugene office to the Salem hearing, that substantial benefits were secured, and mentions her counsel's extensive experience (over 36 years). In response, SAIF asserts that the ALJ's \$8,000 attorney fee award was reasonable. 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).

In determining a reasonable attorney fee award under OAR 438-015-0010(4), the following factors are considered: (1) the time devoted to the case; (2) the complexity of the issue(s) 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; (8) the contingent nature of the practice; and (9) the assertion of frivolous issues or defenses.

Here, the hearing took place in Salem, which is about an hour from claimant's counsel's Eugene office. *See Peggy S. Shelton*, 70 Van Natta 73, 75 (2019) (attorney's travel time to an out-of-town hearing or deposition represented hours of legal services rendered on behalf of the claimant, which were considered in awarding a reasonable fee); *Carmen O. Macias*, 53 Van Natta 689 (2001) (same). The hearing lasted 42 minutes, with claimant as the only witness. Closing arguments took place on the same day as the hearing. The hearing transcript consists of 24 pages.

Drs. Malos and Lewis are insufficient to meet SAIF's burden of proof under ORS 656.273(1). *See Jason J. Skirving*, 58 Van Natta 323, 324 (2006), *aff'd without opinion*, 210 Or App 467 (2007) (where a carrier bears the burden of proof, the medical opinion supporting its denial must be persuasive); *see also Fernandez*, 124 Or App at 42 (a carrier bears the burden of proof to establish that the major contributing cause of a claimant's worsened condition is an injury occurring outside the course and scope of employment under ORS 656.273(1)).

There were 52 admitted exhibits, including one concurrence report submitted by claimant's counsel that was instrumental in setting aside the denial. (Ex. 50). 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); *John V. Rocks, Jr.*, 68 Van Natta 1799, 1800 (2016).

Considering the range of compensability disputes generally submitted for resolution to this forum, this case presented legal and medical issues at a moderate complexity level. The competing opinions expressed by the physicians created a significant risk that claimant's counsel's efforts might go uncompensated. We have also considered the contingent nature of the practice of workers' compensation law.

The value of the interest involved and the benefit secured for claimant include acceptance of a low back condition, which requires surgery. (Exs. 36, 43). As a result, additional temporary and permanent disability benefits are reasonably foreseeable. (Exs. 34, 38, 42). Thus, the record supports a conclusion that the interest involved and the benefits secured for claimant are substantial. Counsel for claimant is a long time practitioner (over 36 years) in workers' compensation and presented claimant's position in a skillful, succinctly focused, and professional manner. Finally, there were no frivolous issues or defenses.

In sum, based on our review of the record and considering the parties' respective positions, as well as applying the factors prescribed in OAR 438-015-0010(4) to the particular circumstances of this case, we find that a \$10,000 award is a reasonable attorney fee for claimant's attorney's services at the hearing level concerning the aggravation issue. Consequently, the ALJ's award is modified accordingly.

Claimant's counsel is also entitled to an assessed attorney fee for services on review concerning the aggravation 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 concerning this issue is \$4,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the aggravation issue (as represented by claimant's respondent's brief and his counsel's uncontested fee submission), 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 SAIF. *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).

OPINION

The ALJ's order dated August 20, 2018 is affirmed in part and modified in part. In lieu of the ALJ's \$8,000 attorney fee award, claimant's counsel is awarded \$10,000, payable by SAIF. The remainder of the ALJ's order is affirmed. For services on review, claimant's counsel is awarded a \$4,500 attorney fee, payable by SAIF.

Entered at Salem, Oregon on April 24, 2019