IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Steven Vaida, Claimant.

Steven VAIDA,
Petitioner
Cross-Respondent,

v.

HOWELLS CUSTOM CABINETS,
Respondent
Cross-Petitioner.

Workers' Compensation Board
1300580; A159474

On respondent-cross-petitioner's petition for reconsideration of "prevailing party" costs award on cross-petition filed September 14, 2016. Affirmed without opinion September 8, 2016. 280 Or App 848, 381 P3d 1114. Reassigned September 7, 2017.

Jerald P. Keene and Oregon Workers' Compensation Institute, LLC, for petition.

Before DeVore, Presiding Judge, and Lagesen, Judge, and Garrett, Judge.

LAGESEN, J.

Reconsideration allowed; former disposition withdrawn; affirmed on petition, cross-petition dismissed as moot.

LAGESEN, J.

Employer seeks reconsideration of our decision in *Vaida v. Howells Custom Cabinets*, 280 Or App 848, 381 P3d 1114 (2016), a workers' compensation case in which claimant filed the petition for judicial review and employer filed the cross-petition. We affirmed the Workers' Compensation Board's (board) order without a written opinion. We designated employer as the prevailing party on the petition and claimant as the prevailing party on the cross-petition, and we awarded claimant costs on the cross-petition.

In its petition for reconsideration, employer requests that we modify our disposition to dismiss the cross-petition as moot with no designation of a prevailing party on the cross-petition. Employer states that its cross-petition was "precautionary," to be addressed only if we reversed the board's order. Employer asserts that our decision affirming the board's order "rendered its precautionary cross-petition moot." Pointing to our decision on reconsideration in *Village at North Pointe Condo. Assn. v. Bloedel Constr.*, 281 Or App 322, 383 P3d 409 (2016) (*Village*), employer argues that the proper disposition of the cross-petition under these circumstances is dismissal of the cross-petition with no designation of a prevailing party on the cross-petition. Employer reasons that, because we were "not required to address the contingent cross-petition, *** neither party can be said to have 'prevailed' on it."

We agree with employer that its cross-petition was rendered moot by our decision affirming the board's order under the circumstances of this case. *See Dept. of Human Services v. G. D. W.*, 353 Or 25, 32, 292 P3d 548 (2012) ("As a general rule, a case becomes moot when the court's decision no longer will have a practical effect on the rights of the parties."). Accordingly, we allow reconsideration, withdraw our former disposition, and replace it with the following disposition: "Affirmed on petition; cross-petition dismissed as moot."

As to our prevailing party designation, we adhere to our designation of claimant as the prevailing party on the cross-petition. Employer is correct that, in *Village*, we did what employer requests: We modified our prior disposition of

a cross-appeal to dismiss the cross-appeal as moot without designating a prevailing party where, as here, our disposition of the primary appeal had rendered the cross-appeal moot. We deemed it "appropriate" under those circumstances "to revise the prevailing-party designation on the cross-appeal to indicate that there is no prevailing party on the cross-appeal." *Village*, 281 Or App at 333. However, in *Village*, neither we nor the parties addressed certain provisions of ORAP 13.05.

We begin by addressing ORS 19.450(1), which defines a "decision" of the appellate courts, and specifies what a Court of Appeals decision must contain:

> "'Decision' means a memorandum opinion, an opinion indicating the author or an order denying or dismissing an appeal issued by the Court of Appeals or the Supreme Court. The decision shall state the court's disposition of the judgment being appealed, and may provide for final disposition of the cause. The decision *shall* designate the prevailing party or parties, state whether a party or parties will be allowed costs and disbursements, and if so, by whom the costs and disbursements will be paid."

(Emphasis added.) The plain terms of that statute direct us to designate the prevailing party or parties in any decision.[1] ORAP 13.05, in turn, echoes ORS 19.450, stating that "[t]he court *will* designate a prevailing party," ORAP 13.05(3) (emphasis added), and specifying further that, on a cross-petition, the cross-petitioner "is the prevailing party only if the court reverses or substantially modifies the judgment or order from which the *** judicial review was taken. Otherwise, the *** cross-respondent *** is the prevailing party." *Id*. Under that provision, every cross-petition necessarily results in a prevailing party. Taken together, those provisions mean that (1) cross-respondent is the prevailing party in this case and (2) we—ordinarily, at least—must designate cross-respondent as such. For that reason, allowing

[1] Although employer correctly characterizes its cross-petition as "contingent," in that it was not necessary for us to reach its substance upon affirming on the appeal, we observe that no statute or rule provides for the filing of a contingent cross-appeal or cross-petition for judicial review. In other words, under the applicable statutes and rules, employer's cross-petition for judicial review was no different from any other petition or cross-petition for review.

for the possibility that ORAP 13.05 gives us the discretion in some circumstances to do what we did in *Village*, in this case we adhere to the directives of the rule. *See* ORAP 1.20 (generally requiring adherence to ORAPs absent "good cause" for waiver).

Finally, employer also argues that, regardless of our prevailing party designations, no costs should be allowed on the petition or cross-petition. We agree with employer on that point and, thus, modify the award of costs to state, "No costs allowed on petition or cross-petition."

Reconsideration allowed; former disposition withdrawn; affirmed on petition, cross-petition dismissed as moot.