

In the ORS 656.340 Vocational Assistance Dispute of
Alex E. Rivas, Claimant

Contested Case No: 11-043H

FINAL ORDER

May 15, 2012

VERIS INDUSTRIES, INC., Petitioner

ALEX E. RIVAS, Respondent

Before John Shilts, Workers' Compensation Division Administrator

Administrative Law Judge (ALJ) Gregory J. Naugle denied claimant's requests for attorney's fees and penalties in his February 13, 2012, Second Amended Proposed and Final Order. Claimant filed exceptions to that order. I find claimant's attorney is entitled to a fee award but that there is no factual basis for penalties. The merits of the underlying Director's Review and Order are not in dispute because insurer withdrew its hearing request concerning that order.

FACTUAL SUMMARY

The Workers' Compensation Division issued a Director's Review and Order on February 17, 2011, setting aside Veris Industries' (employer) end of Alex E. Rivas' (claimant) vocational assistance eligibility. Employer requested a hearing on March 29, 2011. Claimant signed a representation agreement with his attorney on April 21, 2011.

A hearing was scheduled for July 6, 2011. Employer requested a postponement. The hearing was re-scheduled to September 28, 2011. On September 26, 2011, employer withdrew its hearing request. Claimant's counsel requested attorney's fees and penalties.

ALJ Naugle issued his Second Amended Proposed and Final Order on February 13, 2012. That order dismissed the matter in response to insurer's withdrawal of its hearing request. The order also denied the attorney fee and penalty requests. Claimant filed exceptions to the order.

CONCLUSIONS OF LAW

Claimant's counsel requested attorney fees under ORS 656.385(1).¹ That statute requires that fees be awarded to a worker's attorney if the worker finally prevails after a proceeding starts. ALJ Naugle found claimant had not finally prevailed here because employer withdrew its hearing request.

¹ ORS 656.385(1) provides in part:

"In all cases involving a dispute over compensation benefits pursuant to ORS * * * 656.340, where a claimant finally prevails after a proceeding has commenced, the Director of the Department of Consumer and Business Services or the Administrative Law Judge shall require the insurer * * * to pay a reasonable attorney fee to the claimant's attorney."

1. Jurisdiction

Employer contends the director lacks jurisdiction to hear this matter because employer withdrew its hearing request. I have previously awarded attorney fees under ORS 656.385(1) after an insurer withdrew its hearing request. *Regina L. Trent*, 9 CCHR 188 (2004). Employer fails to distinguish between the jurisdiction of an ALJ to act on a matter concerning a claim under the jurisdiction of the Workers' Compensation Board with the director's authority to exercise jurisdiction over a matter not concerning a claim.

Jurisdiction to hear disputes over matters not concerning a claim rests with the director of the Department of Consumer and Business Services. Vocational assistance disputes fall within this definition. ORS 656.704(2), (3). Jurisdiction to hear disputes over matters concerning a claim rests with the board. ORS 656.283, 656.704. An ALJ hearing a vocational services dispute is exercising the director's authority, not the board's. OAR 436-001-0019. It is therefore jurisdiction with the director, not the board, which is relevant here.

Employer and the Proposed and Final Order cite a board decision as support for their position. *Jacqueline S. Allen*, 54 Van Natta 1987 (2002). In that case the board held it did not have jurisdiction to consider a claimant's attorney fee request after the insurer withdrew its hearing request. That decision concerns and addresses the board's jurisdiction, not the director's jurisdiction. *Allen* therefore is not relevant here.

The board does not have jurisdiction over a matter concerning a claim until a party files a hearing request. ORS 656.262(9), 656.283, 656.704. Thus, the board does not have authority to act if there is no valid hearing request before it.

In contrast, the director's authority continues through several review stages. The director's authority to act on a matter begins when a party requests administrative review of a matter not concerning a claim. ORS 656.340(16)(b), 656.704. A party dissatisfied with the results of the administrative review can request a hearing. ORS 656.340(16)(d), 656.704. In such a hearing, the ALJ exercises the director's authority, not the board's. A party dissatisfied with the ALJ's proposed and final order can file exceptions. OAR 436-001-0170(1), 436-001-0246. The director will then review the Proposed and Final Order. ORS 656.704(2)(a). The director continues exercising authority over the matter from the time the administrative review request is filed until an order addressing all of the issues becomes final or until a party requests judicial review.

In this case, the Director's Review and Order is final as to the merits, because insurer withdrew its hearing request on that order. However the Proposed and Final Order is not yet final as to the attorney fee and penalty issues because claimant filed exceptions to that order. The director therefore continues to exercise jurisdiction over the attorney fee and penalty issues.

Employer's argument also contradicts the explicit language of ORS 656.385(1). That statute states that "where a claimant finally prevails after a proceeding has commenced, the Director * * * shall require the insurer * * * to pay a reasonable attorney fee to the claimant's attorney." If employer were correct, the legislature would be requiring an impossible act. Statutes

generally will not be interpreted in a way that produces an absurd result. *Pete's Mountain Homeowners' Association v. Oregon Water Resources Dept.*, 236 Or App 507, 522 (2010). The legislature intended to grant the director jurisdiction to rule on an attorney fee request once the claimant has prevailed.

ORS 656.385(1) also expressly authorizes a fee award where the substantive issues are resolved before an ALJ or the director issues a ruling. The statute states "[w]here an attorney is instrumental in obtaining a settlement of the dispute prior to a decision by the director or an Administrative Law Judge, the director or Administrative Law Judge shall require the insurer * * * to pay a reasonable attorney fee to the claimant's attorney." This again would be an impossible act under the employer's jurisdiction argument. The director's jurisdiction begins and ends at different procedural points than the board's jurisdiction. The director exercises ongoing jurisdiction to act in the matter until all issues are finally resolved. The director, and the ALJ exercising the director's authority, retained jurisdiction to rule on claimant's attorney fee and penalty requests until those issues were finally resolved.

2. Attorney Fees

ORS 656.385(1) authorizes an attorney fee where the claimant finally prevails or where the claimant's attorney is instrumental in resolving the matter before the director or ALJ rules on the dispute. The Proposed and Final Order found neither of those grounds was proved here.

I agree with the ALJ that the record does not establish claimant's attorney was instrumental in bringing about insurer's decision to withdraw its hearing request. The bare fact insurer withdrew its request does not, in itself, demonstrate claimant's attorney played a role in fostering that outcome. There is no evidence in the record that counsel's actions affected insurer's decision. Attorney fees are therefore not justified under this part of the statute.

The Proposed and Final Order also found attorney fees were not authorized under the "finally prevails" portion of the statute. The order concludes a claimant does not finally prevail if the opposing party withdraws its hearing request. The ALJ's order relies on inapplicable authority interpreting a distinguishable statute in reaching this conclusion. The Proposed and Final Order cites *Liberty Northwest Ins. Corp. v. McKellips*, 100 Or App 549 (1990). The court did hold in *McKellips* that a worker had not finally prevailed after the insurer withdrew its request for hearing. However, *McKellips* interpreted ORS 656.386 while ORS 656.385 is at issue here. The statutes' wording differs significantly.²

In *McKellips* the worker sought attorney fees under ORS 656.386(1). That statute authorizes awarding attorney fees where the worker finally prevails in a specified forum; a judicial appeal, at a hearing, or before the Workers' Compensation Board. In *McKellips*, the

² ORS 656.386(1) provides in part:

"[W]here a claimant finally prevails * * * in an appeal to the Court of Appeals or petition for review to the Supreme Court, the court shall allow a reasonable attorney fee to the claimant's attorney. * * *. [W]here the claimant prevails finally in a hearing before an Administrative Law Judge, or in a review by the Workers' Compensation Board, [that forum] shall allow a reasonable attorney fee."

worker had not finally prevailed at one of the specified forums and was therefore not entitled to attorney fees under ORS 656.386(1). Where an opposing party withdraws its hearing request, the underlying administrative order becomes final and the claimant may have finally prevailed at the administrative level. But the claimant may not have finally prevailed under ORS 656.386.

The wording of ORS 656.385(1) differs significantly from that of ORS 656.386(1). ORS 656.385(1) permits an attorney fee award “where a claimant finally prevails after a proceeding has commenced * * *.” The Oregon Supreme Court specifically defined the meaning of “finally prevails” in *Greenslitt v. City of Lake Oswego*, 305 Or 530, (1988). A party finally prevails when a forum holds in claimant’s favor and that forum’s order is not appealed within the time allowed by statute. *Greenslitt*, 305 Or at p. 533; see also *Theresa M. Patterson*, 9 CCHR 361 (2004).

Here, there is a final order in claimant’s favor. It is the February 17, 2011, Director’s Review and Order. Although employer requested a hearing, employer withdrew the hearing request. Employer’s withdrawal of its hearing request leaves the original order in the same status it would have had if employer had never requested a hearing. The order is therefore now final and cannot be appealed. ORS 656.340(16)(d). That order found in claimant’s favor. Claimant has finally prevailed under *Greenslitt*. (See *Justin Hayes*, 14 CCHR 80 (2009) (worker prevailed where parties reached stipulated agreement before administrative order issued); *Regina L. Trent*, 9 CCHR 188 (2004) (claimant finally prevailed where insurer withdrew hearing request).

Counsel did not represent claimant during the administrative review. However counsel’s fee request concerns the work she performed preparing for the hearing. She is not requesting fees in connection with the administrative review. She is also not requesting fees for time she spent trying to collect fees. See *Steiner v. E. J. Bartells, Co.*, 11 Or App 22 (1992) (insurer-paid attorney fees are not compensation). And the administrative order became final during the time counsel was representing claimant, after employer withdrew its hearing request. Counsel is entitled to fees under the statute.

Claimant’s attorney submitted written argument for the hearing in which she stated she had spent six hours on this matter. An attorney fee awarded under ORS 656.385(1) must be based on all work the attorney has done and the value of the benefit to claimant. In a dispute over vocational services the value of the benefit received is deemed to fall within the highest range of the applicable matrix. OAR 436-001-0410(3). That matrix calls for a fee of \$1657 to \$2841. This case is of average difficulty so a fee award in the middle of the range is appropriate. Employer will therefore pay claimant’s attorney a fee of \$2249.00.

3. Penalties

Claimant requested penalties on the grounds insurer unreasonably delayed in paying compensation, and that insurer requested a hearing for delay or without reasonable grounds. ORS 656.262(11)(a), 656.385(4).³ ALJ Naugle found there was no basis for the penalties.

³ ORS 656.262(11)(a) provides in part:

“(11)(a) If the * * * self-insured employer unreasonably delays or unreasonably refuses to pay compensation * * * the * * * self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees assessed under this section.”

There is no evidence in the record insurer unreasonably delayed paying compensation or requested the hearing for an improper purpose. There were delays. And insurer did request a hearing, request a continuance of that hearing, and then withdraw its hearing request. Claimant does not identify any evidence in the record, apart from the fact some delay did occur, that employer acted with a wrongful intent. There is therefore no basis for penalties or penalty attorney fees.

IT IS HEREBY ORDERED the February 13, 2012, Second Amended Proposed and Final Order is affirmed in part and reversed in part. That part of the order dismissing the employer's hearing request is affirmed. That part of the order denying claimant's request for penalties and attorney fees under ORS 656.262(11)(a) and ORS 656.385(4) is affirmed. That part of the order denying claimant's attorney fee request under ORS 656.285(1) is reversed. Employer is ordered to pay to claimant's attorney fees in the amount of \$2249.00.

ORS 656.385(4) provides in part:

“ If upon reaching a final contested case decision where such contested case was initiated by an insurer or self-insured employer it is found that the insurer or self-insured employer initiated the contested case hearing for the purpose of delay or other vexatious reason or without reasonable ground, the director or Administrative Law Judge may order the * * * self-insured employer to pay to the claimant such penalty not exceeding \$750 and not less than \$100 as may be reasonable in the circumstances.”