
In the Attorney Fee Dispute of
JAY MURPHY, Claimant
Contested Case No: H05-098

PROPOSED AND FINAL ORDER

February 3, 2006

SAIF CORP., Petitioner
JAY MURPHY, Respondent
Before Daina Upite, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Insurer appeals the Administrative Order issued on June 17, 2005 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On July 19, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On August 24, 2005, Administrative Law Judge Daina Upite conducted a hearing in Salem, Oregon. Attorney David L. Runner represented petitioner SAIF Corporation (insurer). Attorney Hollis Ransom represented respondent Jay Murphy (claimant). No witnesses testified and the record closed on the date of hearing.

ISSUE

Whether RRU incorrectly assessed an attorney fee of \$1,300.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 20 were admitted into the record without objection.

FINDINGS OF FACT

1. On November 18, 2002, claimant suffered a compensable injury while working as a logging equipment operator. (Exs. 1 and 4-5.) On July 31, 2003, the accepted conditions became medically stationary. (Exs. 4-1 and 8-2.)

(2) On February 15, 2005, insurer sent claimant a Notice of Ineligibility for Vocational Assistance. (Ex. 10.) On March 14, 2005, claimant's attorney filed a request for administrative review. (Ex. 11.) On June 6, 2005, claimant's attorney stated that he had devoted 3 hours to the matter and requested an attorney fee of \$600. (Ex. 16-1.) On June 17, 2005, RRU issued an Administrative Order finding claimant eligible for vocational assistance and assessing a \$1,300 attorney fee.

CONCLUSION OF LAW

RRU incorrectly assessed an attorney fee of \$1,300.

OPINION

The director exercises jurisdiction over an attorney fee issue arising under ORS 656.385. I review *de novo*. OAR 436-001-0225(4). The burden of presenting evidence to support a fact or position rests with the proponent. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982). As petitioner, insurer bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of contrary legislation, the standard of proof in administrative hearings is preponderance of evidence). Preponderance of evidence means that the factfinder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1998).

RRU overturned insurer's Notice of Ineligibility and assessed an attorney fee of \$1,300. Insurer contends that the \$1,300 is excessive for three reasons. First, insurer argues that RRU may not properly assess an attorney fee in excess of the amount requested. Next, insurer argues that the \$1,300 fee exceeds the amount listed in the OAR 436-120-0008(2) matrix. Finally, insurer requests remand to RRU for an explanation of the factors considered in fixing the fee amount. In contrast, claimant contends that the administrative order is correct and should be affirmed.

ORS 656.385(1) provides in pertinent part:

In all cases involving a dispute over compensation benefits pursuant to ORS 656.245, 656.260, 656.327 or 656.340, where a claimant finally prevails after a proceeding has commenced before the Director of the Department of Consumer and Business Services, the director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney.

It is an abuse of discretion to assess an attorney fee greater than the amount requested by a claimant's attorney. *SAIF v. Severson*, 105 Or App 67 (1990). Here, claimant's attorney requested a \$600 attorney fee, but RRU assessed a \$1,300 fee. Therefore, under *de novo* review, I assess an attorney fee of \$600. Accordingly, I do not reach insurer's second and third arguments.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing and is not entitled to an attorney fee for services rendered before OAH. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated June 17, 2005 is modified. Insurer shall pay to claimant's attorney a fee of \$600.