



MEMORANDUM

November 20, 2019

To: Board Members
From: Roger C. Pearson, WCB Managing Atty
Subject: Draft Proposed "Attorney Fee" Rules/Amendments

In accordance with your directives at your October 29, 2019, meeting, set forth below are draft rules/amendments for your review/consideration. If I can be of further assistance, please let me know.

438-015-0005 Definitions

In addition to the definitions set forth in OAR 438-005-0040:

- (1) "Approved fee" means an attorney fee paid out of a claimant's compensation.
- (2) "Assessed fee" means an attorney fee paid to a claimant's attorney by an insurer or self-insured employer in addition to compensation paid to a claimant.
- (3) "Attorney" means a member of the Oregon State Bar.
- (4) "Attorney fee" means payment for legal services performed on behalf and at the request of a claimant under ORS Chapter 656.
- (5) **"Client paid fee" means an attorney fee paid by an insurer or self-insured employer to its attorney.**
- (6) "Compensation" means all benefits, including medical services, provided for a compensable injury to a subject worker or the beneficiaries of a subject worker pursuant to ORS Chapter 656.
- ([6]7) "Cost bill" means an itemized statement from the claimant of the amount of expenses and costs for records, expert opinions, and witness fees incurred as a result of the litigation involving a claim denial under ORS 656.386(1).

([7]8) “Denied claim” means a claim for compensation which an insurer or self-insured employer refuses to pay on the express ground that the injury or condition for which compensation is claimed is not compensable or otherwise does not give rise to an entitlement to any compensation or a claim under ORS 656.386(1)(b)(B), (C) or (D) to which the insurer or self-insured employer does not timely respond.

([8]9) “Expenses and costs” reimbursable under ORS 656.386(2) mean reasonable expenses and costs incurred by the claimant for things and services reasonably necessary to pursue a matter, but do not include attorney fees. Examples of expenses and costs referred to include, but are not limited to, costs of records, expert witness opinions, witness fees and mileage paid to execute a subpoena and costs associated with travel.

438-015-0010

General Principles

- (1) Attorney fees for an attorney representing a claimant before the Board or its Hearings Division shall be authorized only if an executed attorney retainer agreement has been filed with the Administrative Law Judge or Board.
- (2) Attorney fees for an attorney representing a claimant shall be paid out of the claimant’s compensation award except as provided by ORS 656.307, 656.382, 656.383 and 656.386.
- (3) An approved fee awarded or allowed to an attorney representing a claimant shall be a lien upon the claimant’s compensation.
- (4) In any case where an Administrative Law Judge or the Board is required to determine a reasonable attorney fee, the following factors shall be considered:
 - (a) The time devoted to the case for legal services;
 - (b) The complexity of the issue(s) involved;
 - (c) The value of the interest involved;
 - (d) The skill of the attorneys;
 - (e) The nature of the proceedings;
 - (f) The benefit secured for the represented party;
 - (g) The necessity of allowing the broadest access to attorneys by injured workers;**
 - (h) The fees earned by attorneys representing the insurer/self-insured employer in the proceeding as described in the statement of services filed pursuant to OAR 438-015-0120;**

([g]i) The risk in a particular case that an attorney's efforts may go uncompensated and the contingent nature of the practice; and

([h]i) The assertion of frivolous issues or defenses.

(5) Percentage limitations on fees established by these rules apply to the amount of compensation paid the claimant exclusive of medical, hospital or other expenses of treatment.

(6) Consistent with the legislative mandate in ORS 656.388(5) to consider the contingent nature of the practice of workers' compensation law in establishing the Board's schedule of attorney fees awarded under chapter 656, the "contingent nature of the practice" factor prescribed in section (4)(h) shall include consideration of claimant attorney's annual average loss/win ratio multiplied by the average hourly rates charged by attorneys representing insurers and self-insured employers multiplied by the number of hours claimant's attorney has spent on the case. This contingent formula is to serve as a general guideline with other factors in determining a reasonable assessed attorney fee.

438-015-0029

Request at Board Review Level for Assessed Fees

(1) On Board review of an Administrative Law Judge's order, to assist the Board in determining the amount of a reasonable assessed fee for services at the hearing level and/or for services on Board review, a claimant's attorney may file a request for a specific fee, which the attorney believes to be reasonable.

(2) The request shall be considered by the Board if:

(a) The request is filed no later than 14 days from the date of filing of the last appellate brief under OAR 438-011-0020;

(b) The request describes in detail the manner in which the factors set forth in OAR 438-015-0010(4) specifically apply to the case, as well as any other information deemed relevant; and

(c) A copy of the request is simultaneously served upon the attorneys who appeared at hearing and on Board review in the manner provided in OAR 438-005-0046(2)(a) and proof of such service is provided in accordance with 438-005-0046(2)(b).

(3) A written response raising objection to the request shall be considered by the Board if:

(a) **The attorney for the insurer/self-insured employer has timely filed a statement of services as prescribed in OAR 438-015-0120;**

(b) The response is filed no later than 14 days from the date of filing of claimant's attorney's request for a specific fee under subsection (2)(a) of this rule; and

([b]c) A copy of the response is simultaneously served upon the attorneys who appeared at hearing and on Board review in the manner provided in OAR 438-005-0046(2)(a) and proof of such service is provided in accordance with 438-005-0046(2)(b).

(4) A request or response that does not comply with this rule shall not be considered by the Board in determining the amount of a reasonable assessed fee.

438-015-0033

Attorney Fee Award Under ORS 656.262(14)(a)

(1) In accordance with ORS 656.262(14)(a), a reasonable hourly rate for an attorney's actual time spent during a personal or telephonic interview or deposition conducted under that statute is \$[275]400. **The maximum attorney fee awarded under this section is subject to an annual adjustment on July 1 as calculated by the Workers' Compensation Division (on behalf of the Director) by the same percentage increase as made to the average weekly wage defined in ORS 656.211, if any. Before July 1 of each year, the Board by bulletin, will publish the maximum fee, after adjusting the fee by the same percentage increase, if any, to the average weekly wage. Dollar amounts will be rounded to the nearest whole number.**

(2) If the claimant is represented by an attorney, the insurer or self-insured employer shall pay a reasonable attorney fee award, which is based upon the hourly rate prescribed in section (1) multiplied by the actual time spent by the attorney during the personal or telephonic interview or deposition conducted under ORS 656.262(14)(a).

(3) To obtain the attorney fee described in section (2), the claimant's attorney shall submit a bill to the insurer or self-insured employer within 30 days of completion of the personal or telephonic interview or deposition. The bill, which may be submitted on a form prescribed by the Board, shall contain, but is not limited to, the following information:

- (a) An itemization of the actual time spent by the claimant's attorney during the personal or telephonic interview or deposition;
- (b) The claimant's attorney's signature confirming that the claimed time was actually spent during the personal or telephonic interview or deposition conducted under ORS 656.262(14)(a); and
- (c) A copy of the executed retainer agreement, unless previously provided.

(4) If the parties disagree regarding the attorney's bill under section (3), a party may request a hearing seeking resolution of that dispute. The resolution of disputes under this section shall be made by a final, appealable order.

(5) Unless it files a request for hearing, the insurer or self-insured employer must pay the attorney fee described in section (3) as an award under this rule within 30 days of its receipt of the bill.

438-015-0115

Fees for Attorneys Representing Insurers and Self-Insured Employers

(1) Attorneys representing insurers and self-insured employers shall submit statements for legal services performed in connection with a claim under ORS Chapter 656 to their client seeking payment of a reasonable client paid fee.

(2) A requested client paid fee shall:

(a) Be reasonable, considering the factors prescribed in OAR 438-015-0010(4), to the extent such factors are relevant to a client-paid fee; and

(b) Not exceed that agreed upon in the retainer agreement.

438-015-0120

Statement of Services (For Insurer's/Self-Insured Employer's Attorney)

(1) In every proceeding conducted before the Hearings Division or before the Board (on review of an Administrative Law Judge's order, on reconsideration of a previously issued Board order, on Own Motion, or on remand from the appellate courts), the insurer's/self-insured employer's attorney shall file a statement of services that includes, but is not limited to, the following information:

(a) The total hours of services performed by each attorney, paralegal, and legal assistant (or a reasonable estimate thereof), who contributed to the investigation, preparation, and litigation of the claim involved in the proceeding; and

(b) The total attorney fees and legal charges that have been, or will be, billed to the insurer/self-insured employer for the services described in subsection (1)(a) or, if no attorney fee/legal charges have been or will be billed to the insurer/self-insured employer, a reasonable estimate of the value of the services described in subsection (1)(a).

(2) A statement of service under section (1) shall be filed in the following manner:

(a) For proceedings before the Hearings Division, within 7 days of the closure of the record;

(b) For proceedings before the Board (on review of an Administrative Law Judge's order, on Own Motion, or on remand from an appellate court), within 7 days of the expiration of the briefing schedule; or

(d) For proceedings before the Board (on reconsideration of a previously issued Board order), within 7 days of the expiration of the supplemental briefing schedule (or, if no schedule was implemented, within 7 days of the last brief/written argument on reconsideration timely filed by the insurer/self-insured employer's attorney.

(3) A statement of services is intended to assist an Administrative Law Judge and the Board in a determination of a reasonable assessed attorney fee under OAR 438-015-0010(4). In the event that the insurer/self-insured employer's attorney does not timely file a statement of services, any objection by the insurer/self-insured employer to a claimant's counsel's submission/argument regarding the determination of a reasonable assessed attorney fee shall not be considered by the Administrative Law Judge and the Board in reaching such a determination.

OAR 438-015-0125

Bifurcation of Attorney Fee Award (Board Review)

(1) The determination of a reasonable assessed attorney fee award shall be bifurcated from the underlying claim when:

(a) A case is on Board review of an Administrative Law Judge's order;

(b) The Board reaches a decision that entitles claimant's counsel to a reasonable assessed attorney fee under ORS 656.386(1) or ORS 656.382(2); and

(c) The claimant files a request for bifurcation within 14 days of the last timely filed appellate brief.

(2) If the requirements in section (1) have been satisfied, the Board's order shall award a reasonable assessed attorney fee award without specifying the amount.

(3) Within 60 days of the date the Board order under section (2) becomes final, the claimant shall submit to the insurer/self-insured employer a request for payment of the Board's attorney fee award in a specific amount.

(4) If the parties reach agreement regarding the specific amount of the reasonable attorney fee award that was granted in the Board's final order, a stipulation shall be filed with the Hearings Division, seeking an Administrative Law Judge's approval of the proposed attorney fee award. The stipulation must identify the date of the Board's order and the WCB case number(s) concerning that order.

(5) If the Administrative Law Judge approves the parties' stipulation, the final, appealable approval order shall specify that the attorney fee award must be paid within 14 days of the order.

(6) If the parties are unable to reach an agreement concerning a reasonable attorney fee, within 14 days of the insurer's/self-insured employer's receipt of claimant's request for payment of the Board's attorney fee award as described in section (4), the insurer/self-insured employer must file a request for a hearing.

(7) In the absence of a stipulation under section (4) or a timely filed hearing request by the insurer/self-insured employer under section (6), claimant may file a hearing request seeking an attorney fee award in the specific amount requested under section (3). Under such circumstances, the Administrative Law Judge shall not consider any objections/arguments filed by the insurer/self-insured employer. Unless the Administrative Law Judge finds that the requested amount is not reasonable based on the factors prescribed in OAR 438-015-0010(4), the specific amount requested by the claimant shall be awarded. The Administrative Law Judge's decision shall be contained in a final, appealable order.

(8) If the insurer/self-insured employer files a hearing request under section (6) and the Administrative Law Judge awards the specific amount requested by the claimant, a reasonable attorney fee award under ORS 656.382(3) shall also be awarded.