



MEMORANDUM

November 20, 2019

To: Board Members
From: Sally A. Curey, Board Member
Subject: Draft Rule Amendments Language

In advance of our next meeting, I have drafted some rule amendments. I look forward to discussing these proposals at that time.

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 656.262(11)(a), 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 information contained in the insurer's / self-insured employer's attorney's "statement of services" filed pursuant to OAR 438-015-0120(1) for services performed in the proceeding;

(h) The information contained in the claimant's attorney's "statement of services/specific fee request" filed pursuant to OAR 438-015-0120(2);

(i) The insurer's / self-insured employer's attorney's and/or the claimant's attorney's noncompliance with OAR 438-015-0120(1) and (2) (if any), as well as the effect(s) of any such noncompliance under OAR 438-015-0120(4) and (5);

([g]j) The risk in a particular case that an attorney's efforts may go uncompensated [and];

(k) T[t]he contingent nature of the practice; and

([h]l) 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.

438-015-0029

Request at Board Review Level for Assessed Fees

(1) **In addition to filing a "statement of services/specific fee request" under OAR 438-015-0120(2), [O]n** 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) which 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(s) 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(1);**

(b) The response is filed no later than 14 days from the date of filing of claimant'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 claimant or the attorney who appeared **on behalf of the claimant** 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.

(5) The “request/objection” procedures described in this rule are intended to allow the parties an opportunity to present their respective arguments regarding a reasonable assessed fee, and do not replace the “statement of service/specific fee request” rules prescribed in OAR 438-015-0120(1) and (2), which are designed to obtain information regarding the total hours of service (or a reasonable estimate thereof) of the services provided by the parties’ legal representatives, as well as the hourly rate for such services (or a reasonable estimate of the value of such services).

438-015-0120 **Statement of Services**

(1) In every proceeding conducted before the Hearings Division and before the Board (on review of an Administrative Law Judge’s order, on reconsideration, on Own Motion review, or on remand from the appellate courts), in accordance with ORS 656.388(5),

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 (or a reasonable estimate thereof) by each attorney, paralegal, and legal assistant who contributed to the investigation, preparation, and litigation of the claim involved in the proceeding (including the billable hourly rate for such services) up through the close of the record at each respective proceeding; and

(b) The total attorney fees 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 has 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) In every proceeding conducted before the Hearings Division and before the Board (on review of an Administrative Law Judge's order, on reconsideration, on Own Motion review, or on remand from the appellate courts), the claimant's attorney shall file a statement of services/specific fee request that includes, but is not limited to, the following information:

(a) The total hours of services performed (or a reasonable estimate thereof) by each attorney, paralegal, and legal assistant who contributed to the investigation, preparation, and litigation of the claim involved in the proceeding (including the hourly rate for such services) up through the close of the record at each respective proceeding; and

(b) The attorney's specific request for a reasonable assessed fee, which may, but is not required to, include a discussion of the factors prescribed in OAR 438-015-0010(4) that are relevant to the particular proceeding.

(3) The insurer's/self-insured employer's attorney's statement of services and the claimant's attorney's statement of services/specific fee request shall be filed as follows:

(a) For proceedings before the Hearings Division, no later than the date of the close of the hearing record; or

(b) For proceedings on Board review of an Administrative Law Judge's order, in an Own Motion case, or on remand from an appellate court, within 14 days of the expiration of the briefing schedule.

(4) Unless the parties submit a proposed stipulation as described in section (6), if the insurer/self-insured employer's attorney does not timely file a statement of services, the insurer/self-insured employer waives the right to object to the claimant's attorney's statement of services/specific fee request regarding the determination of a reasonable assessed attorney fee under OAR 438-015-0010(4) and the claimant's attorney's specific fee request (if any) will be awarded, if statutorily authorized.

(5) Unless the parties submit a proposed stipulation as described in section (6), if the claimant's attorney does not timely file a statement of services/specific fee request, a determination of a reasonable assessed fee will be based on application of the factors prescribed in OAR 438-015-0010(4) as relevant to the particular record, including the insurer's/self-insured employer's attorney's statement of services as described in section

(1) (if any).

(6) At any time before an Administrative Law Judge's or a Board order awarding a reasonable assessed attorney fee (as well as after such an order has issued while the Administrative Law Judge or the Board retains jurisdiction over the order), the parties may file a written proposed stipulation for approval by the Administrative Law Judge or Board that specifies the amount of the reasonable assessed fee in the event that the claimant's attorney was entitled to such a fee if the claimant prevailed before the Administrative Law Judge or the Board regarding the merits of a disputed issue. If the proposed fee is statutorily authorized, the parties' stipulation shall be approved in the final, appealable order that resolves the merits of the disputed issue.