

LAW OFFICES OF
JODIE ANNE PHILLIPS POLICH, P.C.

Exhibit 38

June 11, 2020

Workers' Compensation Board
2601 25th Street SE, Suite 150
Salem, OR 97302-1280

Re: OTLA Alternative Attorney Fee Rule Proposal

Dear Board Members,

On behalf of the Oregon Trial Lawyers Association (OTLA), I would like the Board to consider the attached proposed amendments to OAR 438-015-0010(4) and OAR 438-015-0005 at the scheduled June 23, 2020 Board Meeting. The proposed amendments give claimants' attorneys the voluntary option of requesting attorney fee awards based on two primary factors: 1) the time devoted to legal services and 2) a contingent hourly rate. If claimant's attorneys do not choose to use this new method in a particular case, the rule does not change the Board's current method of determining fees based on the same eleven factors that currently govern the determination of attorney fees.

How the Rule Works

The proposed amendments provide an analytical method of determining fees and require the initial fee calculation to begin with a time and rate analysis. If the claimant attorney submits a statement of services, the new method under proposed OAR 438-015-0010(4)(a) is triggered. If triggered, the ALJ or Board must initially consider the time devoted to legal services and a contingent hourly rate. The ALJ or board may then apply the current eleven factors to adjust upward or downward the time reasonably spent on the case or the requested contingent hourly rate. The ALJ or Board would explain how the eleven factors affect those objective numbers.

Proposed OAR 438-015-0005(7) defines "Contingent Hourly Rate" to mean:

"the prevailing market rates in the relevant geographic community for legal services, adjusted for the loss rate for litigated cases and the reduction in value for delay between the time a fee is awarded and the time the services were performed."

The definition explains how to determine an appropriate contingent rate in a case and describes three primary factors that comprise a contingent hourly rate.

The rule begins by identifying a general, non-contingent market rate for legal services of all kinds in the relevant geographic area. That noncontingent market rate is then adjusted upward based on the general loss rate for litigated workers' compensation cases. This makes the market rate reflect the contingent nature of workers' compensation cases overall. Finally, the rate is adjusted for the delay between the time the services are performed and the time the fee is awarded in the particular case. This compensates a claimants' attorney for the burden of waiting for fees to be awarded and paid, even though the legal services were performed months or years prior.

Comparison with Members' Proposed Rules

OTLA understands that Members Lanning and Ousey have submitted proposed rules. OTLA takes no position on these rules. However, OTLA believes its proposed rule provides significant advantages over the other proposals.

Mandatory Nature of the Rules

OTLA cannot support a rule that requires modification of the current attorney fee process. The option for claimant's attorneys to continue to request fees under the current rule must remain intact. OTLA seeks a rule allowing claimants' attorneys to voluntarily choose an alternative method of calculation.

OTLA's proposed rule presents a novel legal analysis to determine fees but makes application of that new analysis entirely voluntary. An attorney that chooses to pursue fees under the current rule and current framework need not do anything differently. An attorney who chooses to pursue fee under the new framework, must submit a statement of services.

Novel Analysis - Not Novel Process

OTLA's proposal provides ease of process and analysis; it is elegant in retaining the current attorney fee framework without adding additional legal process. Instead, the proposed rule provides a voluntary option for attorneys who wish to submit statements of services and requires a new method of legal analysis separate and distinct from the current method only in those cases.

The Members' proposed rules add to the eleven existing factors and do not require the board to engage in novel legal analysis, but simply to "consider" additional factors and subjectively determine a fee without reliance on any discrete criteria, such as time or rate. OTLA's proposal more fully accomplishes the goals of the 2015 legislature.

Objectivity and Accountability

OTLA's proposed rule requires the board begin its analysis with two objective criteria: time and hourly rate. Objective criteria" means discrete numbers from which final discrete number is derived. OTLA recognizes that the subjective elements required to prove and persuade the factfinder of what those discrete numbers should be remain. Subjectivity and discretion may be applied only to adjust those objective criteria. This allows the board to cogently explain how the fee award is calculated. Cogent explanation ensures that the Board's conclusion is correct, legally supportable, and just. It also ensures accountability, as either party can more easily explain the basis for disagreement and appeal.

A Concrete Example

This is an example of the proposed method. The specific numbers, percentages, and analysis are not based on any existing authorities or sources.

A claimant's attorney is unsuccessful in a claim brought before an ALJ and requests Board review. Claimant's attorney timely submits a statement of services describing a contingent hourly rate and the time devoted to the case. The claimant's attorney's statement argues that \$275 per hour is a general market rate based on the Oregon State Bar's 2017 Economic Survey. She relies on the most recent win/loss statistics compiled by the Workers' Compensation Division in 2017, asserting that claimants prevail in 43% of litigated cases. She also explains that the case has been pending final decision for more than two years, and requests that the contingent rate be increased by 2.8% based on the two-year change in the Consumer Price Index for Portland.

Claimant's attorney's statement also includes a detailed description of the time devoted to the case, listing the amount of time spent preparing the case for litigation and litigating the case totaling 33 hours for services at hearing and on review. Finally, claimant's attorney's statement provides some information relevant to each of the eleven factors enumerated in proposed OAR 438-015-0010(4)(b).

Insurer timely submits a response. It argues that a reasonable market rate is \$215 per hour, based on the US Bureau of Labor Statistics. It argues that, based on its internal statistics, claimants prevail in 57% of litigated cases. It further asserts that the two-year delay justifies only a 2.1% based on general inflation. It also argues that the amount of time spent is excessive given the claimant's attorney's experience and the complexity of the issues litigated and should be reduced to 22 hours.

The board issues a decision one year later, reversing the ALJ's decision. Because claimant prevailed, the board calculates a reasonable fee under proposed OAR 438-015-0010(4)(a). It initially considers the time devoted to legal services and a contingent hourly rate. The Board concludes that the proper non-contingent market rate is \$250 per hour, citing the OSB survey and considering claimant's attorney's geographic location. Citing its own published statistics, the board concludes that claimants prevail in 47% of litigated cases, resulting in a 2.13 ratio. Finally, the board cites general inflation, increasing the contingent rate by 4.6% based on the additional year-long delay in awarding the fee. The resulting contingent rate is \$556.38 per hour.

The board then turns to the eleven factors. It reduces the time spent devoted on some tasks due to complexity of the case, explaining that those tasks took too much time for the level of complexity. However, it allows for some additional time due to the value of the interests involved, noting that while an attorney with similar experience should have spent less time, it was reasonable to spend extra time on some tasks due to the relatively high value of the case. It concludes that the reasonable time spent on this case is 28 hours.

Citing the OSB survey, the board notes that the contingent hourly rate would be reduced due to the limited experience of claimant's counsel. However, because claimant did not prevail at hearing and appealed the case, the risk of claimant's attorney going uncompensated was greatly increased and justifies the general contingent hourly rate calculated above. The board concludes the proper contingent hourly rate is \$556.38 per hour.

The board then multiplies the reasonable number of hours devoted to the case, 28, and the contingent hourly rate, \$556.38, to determine that \$15,578.64 is a reasonable attorney fee award.

Conclusion

Based on the above, OTLA requests that the board consider adopting OTLA's proposed amendments to OAR 438-015-0010(4) and OAR 438-015-0005. Should the board have any questions, OTLA intends to have members present at the public meeting scheduled for June 23, 2020 who will be prepared to answer any questions or concerns.

On behalf of OTLA,



Jodie Phillips Polich &
Keith Semple

OAR 438-015-0010(4)

Current Rule:

(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, as compiled in the Director's annual report under ORS 656.388(7) of attorney salaries and other costs of legal services incurred by insurers/self-insured employers pursuant to ORS Chapter 656;
- (i) The risk in a particular case that an attorney's efforts may go uncompensated;
- (j) The contingent nature of the practice of workers' compensation law; and
- (k) The assertion of frivolous issues or defenses.

Proposed Rule: OAR 438-015-0010(4)

(4) In any case where an Administrative Law Judge or the Board is required to determine a reasonable attorney fee:

- (a) If a statement of services is submitted, the time devoted to legal services and contingent hourly rate shall be the primary considerations when**

calculating a reasonable fee. The judge or Board may adjust the time devoted or hourly rate based on the factors enumerated in subsection (b).

(b) If a statement of services is not submitted, the judge or board shall consider:

- (i) The time devoted to the case for legal services;
- (ii) The complexity of the issue(s) involved;
- (iii) The value of the interest involved;
- (iv) The skill of the attorneys;
- (v) The nature of the proceedings;
- (vi) The benefit secured for the represented party;
- (vii) The necessity of allowing the broadest access to attorneys by injured workers;
- (viii) The fees earned by attorneys representing the insurer/self-insured employer, as compiled in the Director's annual report under ORS 656.388(7) of attorney salaries and other costs of legal services incurred by insurers/self-insured employers pursuant to ORS Chapter 656;
- (ix) The risk in a particular case that an attorney's efforts may go uncompensated;
- (x) The contingent nature of the practice of workers' compensation law; and
- (xi) The assertion of frivolous issues or defenses.

Current Rule w/ 2020 Amendments Redlined:

(4) In any case where an Administrative Law Judge or the Board is required to determine a reasonable attorney fee:

(a) If a statement of services is submitted, the time devoted to legal services and contingent hourly rate shall be the primary considerations when calculating a reasonable fee. The judge or Board may adjust the time

devoted or hourly rate based on the factors enumerated in subsection (b).

(b) If a statement of services is not submitted, the judge or board shall consider:

- (xii) The time devoted to the case for legal services;
- (xiii) The complexity of the issue(s) involved;
- (xiv) The value of the interest involved;
- (xv) The skill of the attorneys;
- (xvi) The nature of the proceedings;
- (xvii) The benefit secured for the represented party;
- (xviii) The necessity of allowing the broadest access to attorneys by injured workers;
- (xix) The fees earned by attorneys representing the insurer/self-insured employer, as compiled in the Director’s annual report under ORS 656.388(7) of attorney salaries and other costs of legal services incurred by insurers/self-insured employers pursuant to ORS Chapter 656;
- (xx) The risk in a particular case that an attorney’s efforts may go uncompensated;
- (xxi) The contingent nature of the practice of workers’ compensation law; and
- (xxii) The assertion of frivolous issues or defenses.

OAR 438-015-0005

Current Rule

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.

(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).

(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.

(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.

Proposed Rule

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.

(7) “Contingent Hourly Rate” means the prevailing market rates in the relevant geographic community for legal services, adjusted for the loss rate for litigated cases and the reduction in value for delay between the time a fee is awarded and the time the services were performed.

(8) “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).

(9) “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.

(10) “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.

(11) “Statement of Services” means a request for a specific attorney fee that describes a contingent hourly rate for legal services and the time devoted to the case.

Current Rule Redlined:

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.
- (7) “Contingent Hourly Rate” means the prevailing market rates in the relevant geographic community for legal services, adjusted for the loss rate for litigated cases and the reduction in value for delay between the time a fee is awarded and the time the services were performed.
- (8) “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).
- (9) “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.
- (10) “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.

- (11) “Statement of Services” means a request for a specific attorney fee that describes a contingent hourly rate for legal services and the time devoted to the case.