

In the Matter of the Compensation of)
Christopher G. Taylor, Claimant.)
)
CHRISTOPHER G. TAYLOR,) Agency No. 14-03708
)
Petitioner,) CA A162892
)
v.)
)
SAIF CORPORATION AND)
AUTOMOTIVE PRODUCTS)
INCORPORATED,)
)
Respondents.)

RESPONDENTS' BRIEF

On Judicial Review of the Order on Review
of the Workers' Compensation Board
of the State of Oregon

Holly J. Somers, Board Chair
Judy L. Johnson, Board Member
Margaret F. Weddell, Board Member (Dissenting)

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The legislative history does not directly speak to the issue presented here. The precursor to ORS 656.388 was enacted in 1933, and required that all fees for legal services be approved by the court or the State Industrial Accident Commission. *Carr v. State Indus. Acc. Commission*, 153 Or 517, 520-521, 57 P2d 1278 (1936), *rejected in part by Verban v. State Indus. Acc. Commission*, 168 Or 394, 123 P2d 988 (1942). In 1937, the Oregon State Bar appointed a committee to make recommendations concerning attorney fees in workers' compensation cases. See *Oregon State Bar Association Meeting Summary of Proceedings*, Report of B.A. Green, Chairman, Committee In Re Accident Commission, 13 Or L Rev 31, 34-35 (1933-34). In response, the committee published a suggested fee schedule. (App-26). The fee schedule set forth various caps for attorney fees for the purpose of providing uniformity to the fees awarded, which courts accepted and followed. See e.g., *Cox v. SIAC*, 168 Or 508, 123 P2d 800, 521-24 (1942), *Verban*, 168 or at 410. A new provision was added in 1965 as part of that legislature's comprehensive revision of the workers' compensation laws. It required that the board consult with the Board of Governors of the Oregon State Bar and establish a suggested fee schedule for attorneys representing claimants. (Or Laws 1965, ch 285, §42b.)

In 1987, ORS 656.388 was amended to require board approval of fees charged by attorneys representing insurers and employers. (Or Laws 1987, ch 884 §35.) In 1988, the board revised its rules. The rules set forth new terms to track the amendments, including defining “approved” fees as those “out of compensation,” and “assessed” fees as those paid by the insurer or employer to the claimant’s attorney and “client” paid, an attorney fee paid by a client or insurer to its attorney. *See generally former OAR 438-15-003 (1988); (App-29).* The rules also provided that assessed fees (which were previously subject to a cap pursuant to the schedule) would become unscheduled fees that would be determined by the board on a case-by-case basis.

At this time, the board also provided a list of factors to be considered when an ALJ, board or court was charged with determining a reasonable fee in a particular case. (App-30, 31). This list of factors is still in force without significant change. The factors in OAR 438-015-0010(4) are used in all cases where an ALJ or the board are required to determine a reasonable fee. The “schedule” of fees, which include those fees that are set and determined to be capped fees pursuant to board rules, is still in place to this day and is reflected in the current attorney fee rules.

1937 FEE SCHEDULE

PROCEEDINGS OF THE OREGON STATE BAR 57

REPORT OF THE COMMITTEE ON STATE INDUSTRIAL
ACCIDENT COMMISSION FEES

Dear Sirs:

Since the enactment of the Workmen's Compensation Law in 1913, until 1933, there was no provision in the law relating to the fixing of attorney's fees in compensation cases. While many county bar associations had adopted schedules of minimum fees, no recommendation was made with regard to fees in this class of cases. It was the practice among attorneys generally to charge claimants under the Compensation Law in accordance with the schedule of contingent fees in personal-injury actions. There were numerous abuses, and many complaints were made to the State Industrial Accident Commission by injured workmen respecting the fees charged, and a considerable number of these complaints were justified. It was the practice of some attorneys to base their fee charges upon the entire amount of compensation awarded to the claimant, even though the claimant may have obtained a portion of the award in the first instance without the intervention of the attorney.

In 1933, the Legislature enacted Section 49-1843 (b), which reads as follows:

"No claim for legal services or for any other services rendered before the commission in respect to any claim or award for compensation, to or on account of any person, shall be valid unless approved by the commission, or if proceedings on appeal from the order of the commission in respect to such claim or award are had before any court, unless approved by such court. In event an attorney and the commission cannot agree upon the amount of the fee, each forthwith shall submit a written statement of the services rendered to the presiding judge of the circuit court in the county in which the claimant resides, which judge shall, in a summary manner, without the payment of filing, trial or court fees, determine the amount of such fee. Said controversy shall be given precedence over other proceedings. Any claim so approved shall, in the manner and to extent fixed by the commission or such court, be a lien upon such compensation."

It will be observed that, since the enactment of the above law, the State Industrial Accident Commission is empowered to fix the attorney's fees in each case, and if the attorney is dissatisfied he may have the fee fixed by the presiding judge of the circuit court in the county in which the attorney resides. The attorney's fee thus fixed is a lien upon the compensation, and the attorney cannot be deprived of his fee.

Shortly after the enactment of the above-mentioned law, the Oregon Bar Association appointed a committee to study the matter of fees in compensation cases and to make recommendations to the circuit judges and the State Industrial Accident Commission with a view to securing uniformity in the fixing of the attorney's fees. The committee so appointed made its recommendations to the Oregon Bar Association, but for various reasons no recommendations were made, either to the circuit judges or to the State Industrial Accident Commission. The committee finds there has been great variation in the fixing of fees by the circuit judges upon appeal from the determination of the State Industrial Accident Commission and in such cases in which the attorney's fee is fixed in the first instance by the circuit judge. There have been numerous appeals from the State Industrial Accident Commission's determination of fees, and it is the belief of the committee that the appeals would be greatly reduced if the Oregon State Bar would fix an elastic schedule of fees in compensation cases. We are attaching hereto a suggested schedule of fees, which, unlike other schedules that have been adopted, is a schedule of maximum fees applicable to all cases except those in which unusual services have been rendered. The great majority of cases arising under the Workmen's Compensation Law involve only the question of the amount of compensation to be awarded. In a smaller number of cases there may also be involved the question as to whether the injuries are compensable, that is, whether they arose out of and in the course of the workman's employment and were sustained by accidental means. The procedure in all of the cases is practically identical, and in the great majority of cases the services rendered by the attorneys are comparable. The committee, therefore, believes that a schedule of maximum fees is indicated.

The committee realizes that any recommendations made by the Oregon State

Bar to the circuit judges and the State Industrial Accident Commission can be advisory only. We believe that the allowance of excessive fees is usually due to a failure to comprehend properly the nature and extent of the services rendered by the attorneys. Since this proposed schedule of maximum fees is based upon the experience of attorneys who have had an extensive practice in compensation cases, we believe that they should prove helpful and produce a uniformity that will do justice to the workmen and to the attorneys.

Very truly yours,

OSCAR HAYTER, *Chairman*,
EUGENE OPPENHEIMER,
WALTER MCGUIRK.

PROPOSED SCHEDULE OF MAXIMUM FEES IN WORKMEN'S
COMPENSATION CASES.

Section 49-1843 (b) OREGON CODE 1930 provides as follows:

"No claim for legal services or for any other services rendered before the commission in respect to any claim or award for compensation, to or on account of any person, shall be valid unless approved by the commission, or if proceedings on appeal from the order of the commission in respect to such claim or award are had before any court, unless approved by such court. In event an attorney and the commission cannot agree upon the amount of the fee, each forthwith shall submit a written statement of the services rendered to the presiding judge of the circuit court in the county in which the claimant resides, which judge shall, in a summary manner, without the payment of filing, trial or court fees, determine the amount of such fee. Said controversy shall be given precedence over other proceedings. Any claim so approved shall, in the manner and to extent fixed by the commission or such court, be a lien upon such compensation."

The Oregon State Bar recognizes that the law places the responsibility for fixing attorney's fees upon the State Industrial Accident Commission and upon the circuit judges. It is believed that these recommendations, which are the result of a careful study by a committee of the Bar, will produce a certain uniformity with justice to the workmen and the attorneys.

(1) No attorney's fee shall be allowed unless the attorney was instrumental in obtaining the allowance of the claim or an actual increase in compensation to the claimant, except, when a petition for rehearing has been filed in good faith and valuable services have been rendered, even though no advantage accrues to the workman, a fee of not exceeding \$25.00 shall be allowed.

(2) Attorney's fees shall be based only upon the amount of compensation paid to the workman and not upon medical, hospital, and other expenses of treatment.

(3) Where no dispute of law or fact has arisen between the workman and the commission, but the services of an attorney are engaged by the workman, a fee not exceeding \$100.00 shall be allowed.

(4) Where an issue of law or fact has arisen and it is resolved without an appeal to the circuit court, a fee not exceeding fifteen per cent (15 per cent) of the increase in compensation shall be allowed, with a minimum fee of \$25.00.

(5) If an appeal is taken from the award of the State Industrial Accident Commission to the circuit court, a fee shall be allowed not exceeding twenty-five per cent (25 per cent) of the increase in compensation, with a minimum fee of \$50.00, and a maximum fee of \$500.00.

(6) A fee of \$750.00 shall be the maximum fee to be allowed an attorney for a trial in the circuit court and an appeal to the Supreme Court.

(7) No attorney's fee shall be allowed upon an appeal to the circuit court from a decision of the State Industrial Accident Commission, nor from an appeal to the Supreme Court from a judgment of the circuit court, unless the workman has obtained an increase in compensation by reason of the appeals.

(8) If exceptional circumstance be shown in a detailed, sworn statement setting forth the actual work which the attorney has done, the commission or

PROCEEDINGS OF THE OREGON STATE BAR 59

the court may allow a larger attorney's fee than the maximum amount fixed herein. It is believed that cases justifying larger fees than the maximum fees above mentioned will be extremely rare.

The report of the Committee on State Industrial Accident Commission Fees, together with the committee's proposed schedule of maximum fees, has been submitted to and approved by the Board of Governors of the Oregon State Bar. Copies of the report and proposed schedule have been sent to the Supreme Court, to the several circuit judges, and to the State Industrial Accident Commission.

The Board of Governors has also directed that this report and schedule of fees, together with notice of the board's approval thereof, be published in the OREGON BAR BULLETIN.

1988 FEE RULESDIVISION 15ATTORNEY FEES

438-15-001 STATEMENT OF POLICY. The Legislative Assembly has recognized that workers, employers, self-insured employers and insurers litigating disputes under the Workers' Compensation Law of this State usually engage the services of attorneys to marshal, present and advocate their cases before, during and after formal hearings, on review by the Board and before the appellate courts. It also has been a requirement that corporations and state agencies be represented by attorneys in proceedings before the Hearings Division and the Board. The law has provided for the regulation of fees paid to attorneys representing injured workers in the delivery of benefits under the Workers' Compensation Law. The requirements of 1987 Oregon Laws, Chapter 884, section 35, is that all attorney fees, whether incurred for representation of workers or employers and insurers, be subject to approval by the Board. In accordance with these requirements, and after consultation with the Board of Governors of the Oregon State Bar, the Board adopts these rules relating to the allowance or award of attorney fees in contested cases under the Workers' Compensation Law.

438-15-002 PRIOR RULES REPEALED. OAR 438-47-000 through 438-47-095, adopted by WCB Admin. Order 1-1979, are repealed effective midnight December 31, 1987.

438-15-003 AUTHORITY FOR ADOPTION; EFFECTIVE DATE.

(1) These rules are adopted pursuant to ORS 656.388, as amended by 1987 Or. Laws, c. 884, sec. 35, and ORS 656.593, under the general rulemaking authority of the Board pursuant to ORS 656.726(4).

(2) These rules are effective as of January 1, 1988.

438-15-005 DEFINITIONS. In addition to the definitions set forth in 438-05-040:

(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 by an attorney on behalf and at the request of a claimant, insurer or self-insured employer 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) "Costs" means money expended by an attorney for things and services reasonably necessary to pursue a matter on behalf of a party, but do not include fees paid to any attorney. Examples of costs referred to include, but are not limited to, costs of independent medical examinations, depositions, expert witness opinions, witness fees and mileage paid to execute a subpoena and costs associated with travel.

(8) "Court" means the Court of Appeals or Supreme Court of the State of Oregon.

438-15-010 GENERAL PRINCIPLES.

(1) Attorney fees for an attorney representing a claimant, insurer or self-insured employer shall be authorized only if an executed attorney retainer agreement has been filed with the referee, Board or court.

(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 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) Payment of attorney fees for attorneys representing insurers and self-insured employers are the responsibility of the insurer or self-insured employer. Collection of any such fee shall be the responsibility of the attorney.

(5) Except as otherwise provided in these rules, an assessed fee or client paid fee shall not be authorized by a referee, the Board or a court unless the attorney requesting authorization for payment of the fee files a statement of services on a form prescribed by the Board, or complies with the rules of the court for matters involving authorization of attorney fees.

(6) In any case where a referee, the Board or a court is required to determine a reasonable attorney fee, the following factors shall be considered:

- (a) The time devoted to the case;
- (b) The complexity of the issue(s) involved;
- (c) The value of the interest involved;
- (d) The skill and standing of the attorneys;
- (e) The nature of the proceedings;
- (f) The result secured for the represented party;
- (g) The risk in a particular case that an attorney's efforts may go uncompensated; and
- (h) The assertion of frivolous issues or defenses.

(7) 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.

438-15-015 CHARGE FOR LEGAL SERVICES MUST BE AUTHORIZED.

No charge for legal services for representation of claimants, insurers or self-insured employers in connection with any claim under ORS Chapter 656 is valid unless the charge has been authorized in accordance with ORS 656.307, 656.382 to 656.390 or 656.593 or these rules.

438-15-020 ATTORNEY FEES FOR ATTORNEYS REPRESENTING INSURERS AND SELF-INSURED EMPLOYERS.

(1) Attorneys representing insurers and self-insured employers are authorized to submit statements for legal services performed in connection with a claim under ORS Chapter 656 directly to the client without further authorization from a referee or the Board if no request for hearing has been filed and the total charges for legal services do not exceed \$500, exclusive of costs.

(2) In all other cases the referee, Board or court shall authorize a client-paid fee that is reasonable, considering the factors set forth in 438-15-010(6). The fee authorized shall not exceed that agreed to in the retainer agreement.

438-15-025 MAXIMUM ATTORNEY FEES OUT OF COMPENSATION.

Except in situations where a claimant's attorney fee is an assessed fee, in settlement of disputed claims and in cases under the third-party law, unless there is a finding in a particular case by a referee, the Board or a court that