

Quinn & Heus, LLC

Attorneys:
Julene M. Quinn
Theodore P. Heus

Law Offices
www.quinnheus.com

Mailing Address:
9450 SW Gemini Dr.
PMB 22366
Beaverton, OR 97008

Legal Assistant:
Amber Zorra

December 11, 2023

Phone: (503) 575-1253
Fax: (971) 925-1288

Oregon Workers' Compensation Board
2601 25th St. SE, Suite 150
Salem 97302-1280
Via Email Only: katy.e.gunville@wcb.oregon.gov,

RE: December 12, 2023 Public Meeting – Attorney Fee Biennial Review
Voluntary Attorney Fee Bifurcation Process

Dear Board Members,

Thank you for giving me notice of the December 12, 2023, Board meeting and inviting comments. I do plan to attend the meeting, but I do not anticipate giving testimony unless asked to do so. I wanted to offer a brief letter of support for a voluntary process of bifurcating an attorney fee determination from the underlying merits of a case. I support the suggestion because it is orderly, efficient, will reduce efforts by all parties, prevent needless litigation, and is the practice adopted nearly uniformly among other courts and agencies.

Oregon Courts Bifurcate

The Oregon civil system usually follows ORCP 68, which provides a process for determining attorney fees after a prevailing party has been determined. An Oregon colleague, who represents plaintiffs in various civil matters, confirms that in cases where fees shift, application is made only after a prevailing party is determined. (See attached letter from Ms. Donaldson). And a colleague who practices Oregon family law confirms the same for when fee shifting is permitted in divorce or custody matters.

The Oregon Court of Appeals' fee process also provides a good example. The court does not award a fee contemporaneously with its opinion in a workers' compensation case. Rather, the court requires claimant's attorney to file an attorney fee petition within 21 days of the court's decision. ORAP 3.10(2). This effectively bifurcates the fee issue from the merits, as no petition is filed if a claimant does not prevail. Notably, the court's authority to award a fee in workers' compensation appeals derives from the same statute, and uses the same language, authorizing a fee before the Board. ORS 656.386(1).

Oregon Agencies Bifurcate

This is also true with cases brought before other Oregon agencies in which contingent fee shifting occurs. For example, in land use cases ORS 197.830(15) governs the assessment of attorney fees in certain cases. The Land Use Board of Appeals implements that statute via the process described

in OAR 661-010-0075, which requires a motion for attorney fees to be filed within 14 days of issuance of a final order. When necessary, this results in a separate order awarding costs and/or attorney fees.

Other States Bifurcate

This bifurcated process has been adopted in many state jurisdictions nationally, and in most federal cases involving similar fee shifting statutes. I have spoken with attorneys in Idaho and Alaska, who confirmed their respective jurisdictions do not generally decide the amount of fees at the time of the merits when contingent fee shifting is provided. My Washington colleague also confirms that, when contingent fee shifting is provided, the Washington workers' compensation system requires fee petitions to be submitted after prevailing on the underlying issue. (See attached letter from Mr. Palmer).

Federal Agencies Bifurcate

Finally, most federal jurisdictions bifurcate the fee process from the merits of the case and rely heavily on parties' ability to resolve the amount of a fee without a formal proceeding being necessary. My experience representing workers under the Longshore and Harbor Workers' Compensation Act is consistent with this process, and my colleague who practices in the area confirms this is the case. (See attached letter from Ms. Simmons).

My research has discovered no process like the Board in any jurisdiction and the Board appears to be a singular outlier on this issue. Although mistrial fees or out-of-compensation fees are generally awarded at the same time as the merits, every case that allows a contingent assessed fee provides a process for requesting the fee after the determination of the merits and prevailing party.

The Proposed Solution

The Board has already adopted the bifurcation process in appeals and has been unequivocally successful. I understand that the vast majority of bifurcations have resolved without the need for adjudication. In fact, I could find only *one* case since 2021 in which the Board was required to adjudicate a bifurcation. *See Mark Acuna, 75 Van Natta 407 (2023)*. Every other case appears to have been resolved via agreement. This was predicted when the Board adopted its rules and confirms the efficiency of that process.

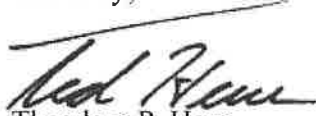
The attorneys representing Oregon's injured workers are asking for this widely adopted process to be an *option* in Oregon workers compensation hearings. This is a natural extension of a successful rule change. If the claimant chooses bifurcation at hearing—likely in more complex or time-consuming cases in which a statement of services needs to be prepared—the initial decision on the merits will award an *entitlement* to fees, just as current board orders award entitlement to fees and costs without determining an amount. The claimant can then submit a statement of services and proposed fee *amount* to the insurer and the matter can be resolved by agreement approved by the Administrative Law Judge. If parties cannot resolve the amount by agreement, the matter can be heard on the limited issue of the amount of a reasonable fee.

Instead of deciding fees in every case, the parties regain control of the process and judges would only need to resolve the anticipated fee in cases in which parties cannot agree.

Based on the above, the Board should adopt new rules expanding the bifurcation process to apply in hearings.

Please let me know if you have any questions or would like further information.

Sincerely,

A handwritten signature in black ink, appearing to read "Ted Heus", written over a horizontal line.

Theodore P. Heus

heus@quinnheus.com

Enclosures: 12/11/23 Letter (Lee Ann Donaldson); 12/8/23 Letter (Douglas Palmer); 12/11/23 Letter (Alana Simmons).

Attorneys
Frances R. Hamrick
Douglas M. Palmer
David C. Johansen
Eric R. Leonard

Receptionist
Italia Prieto



Legal Assistants
Maggie Gutierrez
Ciria Leyva

Bookkeeper
Rita Coombs
Danielle Barrett, Asst.

PO Box 1306, Vancouver, WA 98666
Phone 360.553.0207 Fax 360.418.0126

December 8, 2023

Workers Compensation Board

Re: Attorney Fees

Dear Madam or Sir,

I was requested by Mr. Heus to write a letter explaining how attorney fees are handled in Washington Workers Compensation Claims. I have been practicing workers compensation since 2000, starting in Oregon and since 2004 in Washington. My Oregon Bar Number is currently inactive. I have been representing injured workers since 2010 in Washington claims. I have handled my client's claims from the Department of Labor & Industries up through the Washington State Supreme Court.

In Washington, attorney fees are governed by RCW 51.52.120 and RCW 51.52.130. Washington permits attorneys to charge fees directly on benefits, without leave of the Department or the Board. The statute does permit workers to ask the Department or Board to set attorney fees if they believe the attorney collected fees contrary to statute. These are not prevailing party fees.

However, there is a subset of appeals where workers can petition for prevailing party fees payable by the Department or Self-Insured Employer. This is generally firefighter presumption cases, but there are a couple of other areas. Also, attorney fees are potentially payable for frivolous defense. Regardless, the process is that once the Board issues a final order finding in favor of the injured worker, they can then petition the Board to award fees and costs. There is no requirement that they plead attorney fees at the outset of the appeal or in briefing regarding the merits.

The same is true for superior court trials. I know in Oregon, your claims bypass jury trials in circuit court. In our court trials, once a verdict is entered in favor of the worker, the attorney fees are added to the final judgment entered by the court. Again, there is no requirement to plead attorney fees prior to receipt of the verdict. However, in our appellate courts, Rule of Appellate Procedure 18.1 requires parties to include in their opening brief a section requesting an award of attorney fees and costs.

I am hopeful this information has been helpful to the Board. I am willing to answer any questions you may have regarding awarding attorney fees in Washington workers compensation claims.

Sincerely,

Douglas Palmer

Douglas M. Palmer
OSB 01081; WSBA 35198

DMP:dmp

cc:

THE DALTON LAW FIRM

Attorneys
Bennett P. Dalton
Alana G. I. Simmons
Derek E. Swanson
Nathan Mitchell

BENNETT P. DALTON, LLC

Legal Assistants
Kian Yamin
Ruby Vandel

December 11, 2023

Worker's Compensation Board
2601 25th St. SE, Ste 150
Salem, OR 97302-1280

Re: Bifurcation of Attorney Fees from Underlying Merits

Dear Board Members,

I am an attorney licensed to practice law in Oregon. I represent injured workers covered under the Federal Longshore and Harbor Workers' Compensation Act (LHWCA) and Defense Base Act (DBA).

A colleague has asked me to provide a general summary of how attorney fees operate in my practice area. In LHWCA and DBA claims, litigation and adjudication take place in the federal administrative system before the Office of Workers' Compensation Programs and the Office of Administrative Law Judges. The system provides for hourly contingent shifting of attorney fees to the Employer/Carrier if certain criteria is met.

Procedurally, a petition for attorney fees is not typically submitted or considered prior to a determination of the underlying issue. For example, if a claim is controverted (denied), a fee petition would not be prepared or filed until a determination or agreement sets aside the controversion (denial) or a settlement reached in the underlying dispute. After the worker prevails, the Claimant's attorney then submits a fee petition which is either adjudicated or resolved via agreement. The majority of fees are resolved by agreement and do not require adjudication.

I hope this information provides some perspective on the procedure for obtaining attorney fees when representing injured workers in LHWCA and DBA claims.

Sincerely,



Alana G. I. Simmons, Esq.

The Dalton Law Firm
OSB #143456

1212 SE Spokane Street, Portland, Oregon 97202

Phone: 503-253-6029 Fax: 503-212-4439



NICHOLS

LAW
GROUP
LLC

Craig A. Nichols

Geoff M. Nichols
Lee Ann Donaldson

December 11, 2023

Oregon Workers' Compensation Board
2601 25th St. SE, Ste 150
Salem, OR 97302-1280

Re: Bifurcation of Attorney Fees from Underlying Merits

Dear Members of the Board:

I am an attorney licensed to practice law in Oregon, Washington and the District Court of Oregon. My practice includes representing injured people in personal injury, medical malpractice, as well as business litigation, including contract disputes.

A colleague has asked me to provide a general summary of how attorney fees operate in my practice areas, and specifically as they relate to contingent fee shifting. I represent clients on a contingency basis, but also when there is an attorney fee provision. Both personal injury and contract disputes can involve fee shifting, such cases brought under ORS 20.080 and ORS 20.082, and cases for contract disputes when attorney fees are provided to the prevailing party. In those cases, attorney fee petitions are submitted after a determination of the underlying issue and the prevailing party. For example, many contracts have an attorney fee provision written into the four corners of the frame. In those disputes, attorney fees are awarded to the prevailing party. After the trier of fact determines which party prevails in its claims, the prevailing party is asked to submit an attorney fee petition pursuant to ORCP 68.

In all of my cases involving a fee shifting statute, or a contractual basis, the prevailing party is determined before the submission of a petition for attorney fees. A party is never required to submit a fee petition or make a fee request prior to a determination of the underlying merits of the action or identification of the prevailing party. This process ensures that the attorneys concentrate on the merits of the matter and doing the best for their client without time being spent on arguing something that may or may not come to fruition.

Re: Bifurcation of Attorney Fees
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I hope this information provides some perspective on the procedure for obtaining attorney fees when representing clients in matters that have a statutory attorney fee provision, or a fee shifting clause in contract.

Sincerely,



Lee Ann Donaldson
Nichols Law Group

LAD/gc
Encl.