

REPORT OF THE ATTORNEY FEE ADVISORY COMMITTEE REGARDING SETTLEMENT ATTORNEY FEE CAPS

Dear Board Members,

The Advisory Committee regarding caps on attorney fees paid out settlement proceeds met on March 18, 2024. The entire Committee attended as follows:

Geoffrey Wren, facilitator
Barb Anderson
Elaine Schooler
Brian Noble
Jovanna Patrick
Caitlin Breitbach

A copy of the meeting Minutes is attached.

Committee members discussed the fact that removing the 10 percent cap on amounts over \$50,000 would in many cases result in less settlement proceeds going to represented workers, but that concern was weighed against various considerations, including:

Workers' compensation law and practice has become more complex and involved. In settling cases, attorneys often must devote time to dealing with liens on settlements.

Attorneys representing individuals contingently in other areas of law typically recover higher fees. In personal injury cases, for instance, the percentage contingent fee typically is 33 percent of the settlement proceeds.

Attorneys should be paid for their work commensurate with the complexity of workers' compensation law and practice and addressing problems settlements present.

Attracting and retaining high-quality legal representation could have the effect of increasing settlement amounts.

Increasing the amount of settlement attorney fees could have the impact of encouraging some attorneys to engage more in settlement practice, but, overall, the impact more likely would be enhancement of the quality of representation. That in turn would serve the end of providing injured workers the broadest access to justice.

Increasing the amount of settlement attorney fees likely would not discourage injured workers from seeking representation.

Increasing the percentage attorney fee out of workers' compensation settlements should not result in greater claims costs to businesses. Carriers evaluate settlement offers with regard to what benefits and assessed fees potentially are payable, not with regard to how much of a percentage attorney fee a claimant attorney recovers.

A straight 25 percent cap avoids the problem of some attorneys taking settlement attorney fees based on amounts specified in settlement documents as opposed to the total settlement amount.¹

It is rare for attorneys to seek extraordinary fees. The text "extraordinary circumstances," while somewhat imprecise, discourages attorneys from seeking higher fees than allowed by the caps while giving ALJs flexibility to evaluate circumstances justifying a higher fee on a case-by-case basis.

The Committee reached consensus that OAR 438-015-0050(1) and OAR 438-015-0052(1) should be revised as follows:

The reduction in the percentage attorney fee to 10 percent after the first \$50,000 of proceeds should be removed, leaving a straight 25 percent cap regardless of the settlement amount or how proceeds are divided when the form of settlement includes more than one settlement document.

The overall cap of 25 percent should be retained. No Committee member proposed increasing the cap.

The text regarding "extraordinary circumstances" justifying a higher fee should be retained.

The Advisory Committee proposes the following texts for the rules governing settlement attorney fees:

OAR 438-015-0050(1): When a denied and disputed claim is settled under the provisions of ORS 656.289(4) and OAR 438-009-0010, an attorney fee may be approved by the Administrative Law Judge or the Board in an amount up to 25 percent of the settlement proceeds. Under extraordinary circumstances, a fee may be authorized in excess of this calculation.

OAR 438-015-0052(1): When a claim disposition agreement is approved under the provisions of ORS 656.236 and OAR 438-009-0020, an attorney fee may be approved

¹ For instance, if the total settlement were \$70,000 divided between a DCS for \$35,000 and a CDA for \$35,000, the total fee if based on the total proceeds under the current rules would be \$14,500, whereas if the attorney based the fee on the amounts specified in the settlement documents, the total fee would be \$17,500.

by the Board or the Administrative Law Judge who mediated the settlement in an amount up to 25 percent of the settlement proceeds. Under extraordinary circumstances, a fee may be authorized in excess of this calculation.

The Committee is aware that the existing rules and suggested revised rules state that a fee up to the percentage amount *may be* awarded. The existing and revised rules do not state that a percentage fee *shall be* awarded. The Committee did not understand its charge to include addressing the fact the rule language is not mandatory. If the Committee did address that fact, the Committee would submit that changing the existing language might be a solution in search of a problem. The Committee is not aware of instances where ALJs or the Board required lower percentage fees as a condition for approval of settlements. Doing so presumably would require justification. There could be situations where an ALJ or the Board could condition approval of a settlement on a lower percentage fee without there being abuse of discretion.

The Committee does not see a financial impact to this rule change apart from that discussed, namely potentially less money to injured workers out of settlements while claimant attorneys recover more in percentage fees where settlements exceed \$50,000.

Thank you for considering this report.

Barb Anderson
Elaine Schooler
Brian Noble
Jovanna Patrick
Caitlin Breitbach
Geoffrey Wren, ALJ