



MEMORANDUM

July 15, 2024

To: Board Members

From: Terry Bello, Kerry Anderson, and Lauren Eldridge

Subject: Report on Bifurcation of Attorney Fees on Board Review

In 2020, the Workers' Compensation Board (WCB) adopted OAR 438-015-0125, which allows for the determination of a reasonable attorney fee to be bifurcated from the underlying dispute on Board review in cases where an attorney fee is awardable under ORS 656.382(2), ORS 656.386(1), or ORS 656.383. At its December 2023 public meeting, the Board discussed the concept of expanding the rule to allow for the bifurcation of a reasonable attorney fee determination at the Hearings Division. As part of that discussion, the Members requested that Board staff provide information regarding the bifurcated attorney fee process on Board review. Specifically, the Members instructed staff to provide data on how many requests for bifurcation the Board has received, how many attorneys have made those requests, and what the outcomes of the cases involving those requests were. Along with some background regarding the processing of bifurcated attorney fee matters on Board review, the requested data is provided below. We have also included an analysis of the implementation costs for the bifurcated attorney fee process.

Background:

OAR 438-015-0125 took effect on October 1, 2020. As noted above, the rule allows for the determination of a reasonable attorney fee to be bifurcated from the underlying dispute on Board review in cases where an attorney fee is awardable under ORS 656.382(2), ORS 656.386(1), or ORS 656.383. It does not allow for bifurcation of the attorney fee determination where the fee is awardable under other statutory provisions, including ORS 656.382(1) and (3) and ORS 656.262(11)(a).

A request for bifurcation of the attorney fee must be made within 14 days of the expiration of the briefing schedule. OAR 438-015-0125(1)(b). As such, at the time a bifurcation request is made, the Board has generally not made a determination regarding the underlying dispute or whether an attorney fee subject to bifurcation is awardable. If the Board determines that an attorney fee

subject to bifurcation is not awardable in the underlying case, Board staff do not set up a bifurcated case file or record that a bifurcation request was made. However, when the Board determines that an attorney fee subject to bifurcation is awardable based on its resolution of the underlying dispute, Board staff record the bifurcation request and set up a bifurcated case file with an associated WCB “BF” case number. Consequently, because the Board collects data on only those bifurcation requests for which a bifurcated case file is created, the data below reflects those requests rather than all bifurcation requests.¹

Additionally, because the attorney fee award in a bifurcated case is determined only after the Board’s order regarding the underlying dispute is final, the Board holds the bifurcated case in abeyance until the Board’s order becomes final and it receives either claimant’s counsel’s statement of services or a settlement. *See* OAR 438-015-0125(3). Thus, if the underlying case is appealed to the court, the Board holds the bifurcated case in abeyance until resolution of the appeal. Accordingly, in the data below, one case is listed as “Held in Abeyance” because the underlying case is pending before the Court of Appeals.

Statistical Information:

- In 2020, the Board did not create any bifurcated case files.
- In 2021, as reflected in the table below, the Board created five bifurcated case files. The bifurcation requests in those cases were made by one attorney and each of those cases was settled by stipulation and dismissed by the Board.

| BF Case Number | WCB Case Number | Claimant’s Attorney | Defense Attorney | Disposition |
|-----------------------|------------------------|----------------------------|-------------------------|-----------------------------------|
| 21-00001BF | 19-05896 19-02594 | Julene Quinn | Beth Cupani | Dismissed pursuant to stipulation |
| 21-00002BF | 20-04771 | Julene Quinn | Jesse O’Bryant | Dismissed pursuant to stipulation |
| 21-00003BF | 20-02183 | Julene Quinn | Beth Cupani | Dismissed pursuant to stipulation |
| 21-00004BF | 20-01770 | Julene Quinn | Daniel Walker | Dismissed pursuant to stipulation |
| 21-00005BF | 20-05832 | Julene Quinn | Matthew Williams | Dismissed pursuant to stipulation |

- In 2022, as reflected in the table below, the Board created eight bifurcated case files. The bifurcation requests in those cases were made by two attorneys. In one of those cases, the Board issued an order denying the bifurcated fee request. In one of the cases, the Board dismissed the BF case, concluding that the attorney fee should not have been bifurcated because it arose from ORS 656.262(11)(a). One of the cases is being held in abeyance

¹ Board staff are exploring options for recording all bifurcation requests made, rather than only those where a bifurcated case file is created.

because the underlying case is pending before the Court of Appeals, and five of the cases settled by stipulation and were dismissed by the Board.²

| BF Case Number | WCB Case Number | Claimant's Attorney | Defense Attorney | Disposition |
|-----------------------|------------------------------------|----------------------------|-------------------------|---|
| 22-00001BF | 20-03350 | Louis Marcanti | Kimberly Shubin | Order issued - Request for attorney fee denied |
| 22-00002BF | 19-06277 | Julene Quinn | Beth Cupani | Dismissed pursuant to stipulation |
| 22-00004BF | 20-01968 | Julene Quinn | Trisha Hole | Dismissed pursuant to stipulation |
| 22-00005BF | 20-01968 | Julene Quinn | Brian Solodky | Dismissed pursuant to stipulation |
| 22-00006BF | 21-04691 | Julene Quinn | Daniel Walker | Dismissed because bifurcation was allowed in error |
| 22-00007BF | 21-03150, 21-03570, 23-01670 | Julene Quinn | Benjamin Debney | Dismissed pursuant to stipulation |
| 22-00008BF | 20-05244 | Julene Quinn | Brian Solodky | Dismissed pursuant to stipulation |
| 22-00010BF | 21-02985 | Julene Quinn | Katherine Caldwell | Held in Abeyance (underlying case pending at the court) |

- In 2023, the Board created nine bifurcated case files. The bifurcation requests in those files were made by two attorneys. Two of the cases settled by stipulation and were dismissed by the Board. Five of the cases are actively under review by the Board (*i.e.*, claimant's statement of services has been filed and the amount of the reasonable attorney fee is under review by the Board). In two of the cases, the Board issued an order determining a reasonable attorney fee amount.³

| BF Case Number | WCB Case Number | Claimant's Attorney | Defense Attorney | Disposition |
|-----------------------|------------------------|----------------------------|-------------------------|--|
| 23-00001BF | 22-03591 | Laura Newsom | John Young | Dismissed pursuant to stipulation |
| 23-00002BF | 22-02562 | Julene Quinn | Michelle Shaffer | Actively under review |
| 23-00003BF | 22-04702, 22-01283 | Julene Quinn | Thomas Dyke | Dismissed pursuant to stipulation |
| 23-00004BF | 22-02398 | Julene Quinn | Daniel Walker | Order issued – determining reasonable fee amount |

² In 2022, two bifurcated case files were created in error. Those files were administratively closed and are not included in the data.

³ In 2023, one bifurcated case file was created in error. That file was administratively closed and is not included in the data.

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|------------|------------------------------------|--------------|-------------------|--|
| 23-00005BF | 22-04971 | Julene Quinn | Alexander Sargent | Actively under review |
| 23-00007BF | 22-03346, 22-03347, 22-03348 | Julene Quinn | Beth Cupani | Actively under review |
| 23-00008BF | 20-04933 | Julene Quinn | Rebecca Watkins | Order issued – determining reasonable fee amount |
| 23-00009BF | 23-00406 | Julene Quinn | Beth Cupani | Actively under review |
| 23-00010BF | 22-03653 | Julene Quinn | Jonathan A. Rose | Actively under review |

- As of the date of this memorandum, the Board has not created any bifurcated case files in 2024.

In sum, since the adoption of OAR 438-015-0125, the Board has created 22 bifurcated attorney fee case files. The bifurcation requests in those cases were made by three attorneys. 12 of the bifurcated cases have been dismissed pursuant to stipulation. One was dismissed because bifurcation was erroneously allowed. Five are actively under review by the Board. In three cases, the Board issued an order (one order denying the attorney fee request and two orders determining the amount of a reasonable attorney fee). Finally, the Board is holding one case in abatement while the underlying dispute is pending at the court.

Implementation and Cost:

After the adoption of OAR 438-015-0125, the WCB initiated a request to add the programming to the WCB central data base (Net Center) to create a new case type. For purposes of this discussion, a new case type designates a separate WCB number and file that travels in tandem with another WCB file. We gathered information on what specific data elements would be needed for this case type and identified the following data elements:

- a. BF Number
- b. Associated WCB Number
- c. Claimant
- d. Claimant Attorney
- e. Employer
- f. Defense Attorney
- g. Attorney Fee awarded at O & O
- h. Attorney Fee awarded upon Reconsideration
- i. Attorney Fee awarded in Order on Review
- j. Attorney Fee awarded in BF Case

It took approximately 120 hours to create the process, including meetings with staff, screen design incorporating requested data elements, and testing and implementation with WCB administrative staff. An additional 20 to 40 hours remain to finish this project in order to hand it

off to WCB staff to complete each action. Currently, DCBS Information Technology and Resource (ITR) is still required to complete background processes to “link” the cases in our database. We would like to add reporting capabilities allowing the agency to access the number of cases monthly, quarterly, and yearly. We are able to gather basic information from the above data elements due to the small number of cases.

Because project participants are not working solely on one project at a time, we are providing the principal project team, their classification and hourly rate at mid step in the range for that classification. The hourly rates based on the average number of hours per month in a state calendar year (173.5 hours) are as follows:

| | |
|------------------------------|------------|
| WCB IT Project Manager SR 31 | \$43.57 hr |
| DCBS Info Spec 6 | \$39.21 hr |
| DCBS Info Spec 7 | \$43.42 hr |
| DCBS Info Spec 8 | \$47.41 hr |