

STATEMENT OF NEED AND FISCAL IMPACT

A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

Workers' Compensation Board

OAR Chapter 438

Agency and Division

Administrative Rules Chapter Number

Amending OAR 438-015 regarding procedures concerning the determination of a reasonable assessed attorney fee

Rule Caption (Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.)

In the Matter of: Adoption of Permanent Amendments to the Rules of Practice and Procedure for Contested Cases under the Workers' Compensation Law, Relating to: The Determination of a Reasonable Assessed Attorney Fee, Including the Submission of Information Concerning a "Contingent Hourly Rate" and its Calculation (OAR 438-015-0010(6)); and a Voluntary Procedure for the Bifurcation of the Determination of a Reasonable Assessed Attorney Fee From the Merits of the Claim for Certain Cases on Board Review (OAR 438-015-0125).

Statutory Authority: ORS 656.307; ORS 656.388; ORS 656.726(5).

Other Authority:

Stats. Implemented: ORS 656.307; ORS 656.308; 656.382; ORS 656.383; ORS 656.386; ORS 656.388.

Need for the Rule(s):

Pursuant to ORS 656.388(4) and (5), the Board conducts a biennial review of its attorney fee schedules. In conducting this review, the Board is mandated to give consideration to the contingent nature of the practice of workers' compensation law for attorneys representing injured workers, the necessity of allowing the broadest access to attorneys by injured workers, and the fees earned by attorneys for insurers and self-insured employers.

In December 2018, in conducting its biennial review, the Board convened a public meeting to consider several administrative rule concepts and receive public testimony. Thereafter, the Members appointed an advisory committee, which was comprised of attorneys representing injured workers, insurers, and employers, the Ombudsman for Injured Workers, and an Administrative Law Judge.¹ After conducting their deliberations and considering the rule concepts/statistical information, the committee produced a report.

On October 29, 2019, at a public meeting, the Members received public testimony and considered the advisory committee's report. After discussing the proposals, the Members directed staff to prepare draft language for possible rule adoptions and amendments.

At their December 17, 2019, and February 28, 2020, public meetings, the Members reviewed draft rule language and considered further public testimony.² At the December 2019 public meeting, the Members decided to continue their deliberations on rule language pertaining to one of the now proposed rules (concerning a "contingent hourly rate"). At their February 2020 public meeting, the Members deferred

¹ The Advisory Committee consisted of claimant's attorneys Arthur Stevens III and Theodore Heus, carrier's attorneys William Replogle and Elaine Schooler, the Ombudsman for Injured Workers Jennifer Flood, and Administrative Law Judge Mark Mills, who served as facilitator. The Members extend their grateful appreciation to the committee.

² At the December 17, 2019, and February 28, 2020, public meetings the Members proposed, and subsequently adopted, other amendments to the Board's attorney fee rules, including amendments to OAR 438-015-005(4), 438-015-0010(4), OAR 438-015-0033, and OAR 438-015-0115.

action on the other now proposed rule concept (concerning a “bifurcated attorney fee”). In doing so, the Members directed staff to prepare draft rule language for consideration at a future public meeting.

On June 23, 2020, at a public meeting, the Members reviewed draft rule language and considered further public comment and testimony.³ The Members then proposed the amendment of permanent rules, as explained below.

OAR 438-015-0010(6)

OAR 438-015-0010(4) describes the “rule-based” factors for determination of a reasonable assessed attorney fee. In response to the Members’ invitation for comments regarding the Board’s 2018 biennial review of its attorney fee schedules, several attorneys requested consideration of rule language that would include a “contingent hourly rate” among the “rule-based factors” for determining a reasonable assessed attorney fee under OAR 438-015-0010. The proponents of this language reasoned that it would address the “gap” between the attorney fees and legal costs of insurers/self-insured employers and the attorney fees paid to claimants’ counsel. After the Members referred such language to the Advisory Committee in December 2018, the Committee did not reach an agreement concerning such a concept, with two members in support, two members opposed, and one abstaining.

At their December 27, 2019, public meeting, the Members decided to continue their discussions regarding language concerning the “contingent hourly rate” rule concept. Subsequently, Members Ousey and Lanning each offered language for proposed rule amendments that would address a “contingent hourly rate” under OAR 438-015-0010.

In advance of the Board’s June 23, 2020, public meeting, the Oregon Trial Lawyer’s Association (OTLA) submitted comments concerning the “contingent hourly rate” concept and the language offered by Members Ousey and Lanning.

At their June 23, 2020, public meeting, the Members considered testimony and written comments concerning the language advanced by Members Ousey and Lanning and the OTLA submission. After considering this information, the Members support moving forward to a rulemaking hearing proposed OAR 438-015-0010(6), which provides that, if such information is submitted by the claimant’s attorney, “the claimant’s attorney’s contingent hourly rate, as well as the basis on which the rate was calculated,” will be considered in the determination of a reasonable assessed attorney fee under OAR 438-015-0010(4).⁴

This amendment is presented in Exhibit A, attached and incorporated by reference.

OAR 438-015-0125

In response to the Members’ invitation for comments regarding the Board’s 2018 biennial review of its attorney fee schedules, several submissions from claimants’ attorneys requested consideration of a rule that bifurcates an attorney fee determination from a decision regarding the merits of the underlying litigation. Asserting that the production of a statement of services is time-consuming, the proponents recommended bifurcating the attorney fee determination to those cases in which the claimant has prevailed. After the

³ The June 23, 2020, public meeting was originally scheduled for April 7, 2020. However, the meeting was rescheduled due to the Governor’s mandates related to COVID-19.

⁴ Members Ousey, Woodford, and Lanning, as well as Chair Wold, note that because consideration of the “contingent hourly rate” under the proposed rule includes “the basis on which the rate was calculated,” the rule allows for the consideration of attorney fee information/data consistent with that discussed in the OTLA submission, including the Oregon State Bar Economic Survey, median or customary hourly rates for attorneys in Oregon, and the win-loss ratio in a particular forum or type of case.

Members' December 2018 referral of this concept to an Advisory Committee, a slight majority of the Committee supported the "bifurcation" concept.

At their February 27, 2020, public meeting, the Members decided to continue deliberations regarding the rule concept.⁵ They also directed staff to prepare possible language for a proposed rule. Subsequently, Jim Moller, former Managing Attorney for the Board, offered language for a proposed rule. Attorney Julene Quinn also offered language for a proposed rule.

After considering those submissions, the testimony and public comment, and the advisory committee's recommendation, a majority of the Members support moving forward to a rulemaking hearing a proposed rule that allows for a voluntary "bifurcation" of the attorney fee determination from the merits of certain cases litigated at the Board review level provided that those attorney fee awards concern ORS 656.386(1), ORS 656.383, or ORS 656.382(2).⁶ Under the proposed rule, a claimant's counsel could request bifurcation of the attorney fee determination for the aforementioned type of cases within 14 days of the expiration of the briefing schedule. If claimant prevailed on review, the Board's order would award a reasonable attorney fee, without a specified amount and assign a separate WCB Case Number to the "attorney fee" matter. Within 60 days of the Board's order becoming final, the claimant's attorney could file a written statement with the Board, specifying a proposed reasonable attorney fee award. The Board would acknowledge the receipt of statement, and the carrier could respond within 21 days of the date of mailing of the Board's acknowledgment letter. The claimant could then submit a reply within 14 days of the date of filing of the carrier's response. After receiving the parties' submissions, the Board would conduct an expeditious review and determine a reasonable assessed attorney fee award in a final appealable order. Alternatively, if the parties reached an agreement regarding the amount of a reasonable attorney fee, a stipulation would be filed with the Board, which the Board would approve in a final order.

This proposed rule is presented in Exhibit B, attached and incorporated by reference.

Rulemaking Hearing:

The accompanying "Notice of Proposed Rulemaking Hearing" provides further information regarding the July 31, 2020, hearing concerning these proposed rule amendments. Pending the hearing, written comments may be submitted for admission into the record by directing such comments by mail, FAX (503-373-1684), e-mail (rulecomments.wcb@oregon.gov), or by means of hand-delivery to any permanently staffed Board office. The written comments may be addressed to the attention of Ian Brown, Rulemaking Hearing Officer, Workers' Compensation Board, 2601 25th St. SE, Ste. 150, Salem, OR 97302-1280. Written comments must be received by July 31, 2020.

Documents Relied Upon, and Where They Are Available:

ORS Chapter 656; July 1, 2019, Attorney Fee Advisory Committee report; Exhibits 1-39, received at the June 23, 2020, Board Meeting. These documents are available Monday through Friday, 8:00 am to 5:00 pm, at the Workers' Compensation Board, 2601 25th St. SE, Ste. 150, Salem, OR 97302-1280.

⁵ At their December 27, 2019, public meeting, the Members proposed a previous version of an "attorney fee bifurcation" rule for public comments, which were received at the January 31, 2020, rulemaking hearing and the February 27, 2020, public meeting. Because the rule amendments ultimately proposed at the June 23, 2020, public meeting differ substantially from those initially proposed, the Members chose to propose another version of the rule and to invite further public comment on the proposed rule before considering its adoption as a permanent rule.

⁶ Member Curey did not support moving this proposed rule forward to a rulemaking hearing.

Fiscal and Economic Impact:

The proposed rule adoptions and amendments will likely result in increased attorney fee awards. However, the amount of any increase is presently undetermined.

The rule proposal regarding a “contingent hourly rate” may have a fiscal and economic impact related to the development of written materials/arguments related to the appropriate “contingent hourly rate” in a specific case. However, the amount of any potential impact is presently undetermined.

The rule proposal regarding the bifurcation of attorney fees may also have a fiscal and economic impact. Parties and practitioners may have extra costs associated with the processing of attorney fee requests (if the voluntary procedure is initiated), and the preparation of stipulations, and the development of written materials/arguments in case of a dispute regarding the specific amount of a reasonable attorney fee. There could be additional cost to the Board in the separate review of attorney fees in bifurcated cases. However, the amount of any potential impact is presently undetermined. The Members invite public comment (written and oral) on these subjects.

Statement of Cost of Compliance:

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

As addressed above, implementation of these rule adoptions and amendments may result in increased assessed attorney fee awards, as well as increased administrative costs to insurers and self-insured employers benefits, which may increase claim costs, impacting state agencies and units of local government. There could be an additional cost to the Board in the separate review of attorney fees in bifurcated cases.

2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:

Although an estimated number is presently indeterminate, all small businesses subject to the Workers’ Compensation Law, as well as workers’ compensation insurers, and self-insured employers would be subject to the proposed rules.

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:

It is anticipated that there will be additional administrative activities (including costs for professional services) if a claimant’s counsel chooses to submit “contingent hourly rate” information or initiate the “bifurcation of attorney fee” process. Because it is presently unknown how many cases will include these submissions or initiate the processes, the amount of those costs is presently undetermined.

c. Equipment, supplies, labor and increased administration required for compliance:

Additional administration is likely for the preparation/submission of written materials/argument related to the “contingent hourly rate” rule amendment. However, the amount of these costs is presently undetermined.

Additional administration is also anticipated concerning the “bifurcation of attorney fee” rule amendment (if the voluntary rule is initiated), particularly for attorney firms who represent insurers and self-insured employers. However, the amount of those costs is presently undetermined.

How were small businesses involved in the development of this rule?

The proposed rules are a part of the culmination of the Members’ comprehensive biennial review of their attorney fee rules and several rule concepts advanced by stakeholders. This process began with the Members receiving rule concept letters in August, 2018. After reviewing these concepts, the Members appointed an Advisory Committee to analyze and make recommendations on the attorney fee rules. Members of that committee (which held two public meetings) included attorneys who represent small businesses impacted by the proposed rule amendments recommended by the committee. Furthermore, small business representatives participated in the public meetings to discuss these rule concepts. In addition, the Ombudsman for Injured Workers served on the committee, and an ALJ served as the committee’s facilitator. Finally, representatives of legal and business organizations, which include small businesses attended and participated in the numerous public meetings, which proceeded the Members’ decision to initiate rulemaking procedures regarding these proposed amendments.

Administrative Rule Advisory Committee consulted?: Yes.

If not, why?:

Dated this 25th day of June, 2020.

WORKERS’ COMPENSATION BOARD

by: Constance L. Wold
Constance L. Wold, Board Chair

Sally Anne Curey
Sally Anne Curey, Board Member

Barbara Woodford
Barbara Woodford, Board Member

Steve Lanning
Steve Lanning, Board Member

Roger Ousey
Roger Ousey, Board Member

Administrative Rules Unit, Archives Division, Secretary of State, 800 Summer Street NE, Salem, Oregon 97310. ARC 925-2007