

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:

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

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

RE: 5-Year Review of OAR 438-015-0125

Dear Board Members,

Thank you for requesting comments regarding the board's 5-year review of OAR 438-015-0125. I offer my comments to the provided questions:

1. Did the rule achieve its intended effect?

Yes. I believe the rule has achieved its primary purpose of separating the merits of a case from issues regarding the amount of attorney fees that are contingent on the outcome.

The rule has worked to make me and my colleague's practice more efficient by requiring fee petitions and arguments only when a worker prevails. The rule has also worked to lessen concerns about outcomes of certain cases being dependent in-part or "negotiated" along with the amount of any attorney fees. And the rule has been a boon for justice and the rule of law, working well in combination with the court's decision in *Peabody v. SAIF*, 326 Or App 132 (2022), rev den, 371 Or 511 (2023), to allow claimants to challenge the amount of attorney fees awarded without risk of delaying their own payment of benefits.

Despite the rule achieving its primary purpose, the rule has not been perfect. Specifically, the rule requires the board to conduct an "expeditious review" of the bifurcated attorney fee matter. Too often the board's review has not been "expeditious." In several instances, the board's review of bifurcated attorney fee cases has taken longer than seven months. In my opinion, this is not "expeditious review." The rule should be clarified to require a decision within 21 days, which should be ample time to determine any single-issue dispute over the amount of attorney fees.

Given that the rule has achieved its primary goals, I believe a similar rule allowing voluntary bifurcation of attorney fees determination at the hearing level should be adopted by the board.

Office Address: 4504 S Corbett Ave. Suite 120, Portland, Oregon 97239

2. *Was the anticipated fiscal impact of the rule underestimated or overestimated? (See enclosed "Statement of Need and Fiscal Impact.")*

The fiscal impact statement warned about a potential increase in attorney fees. My review of the average attorney fees awarded on board review do show any significant increase due to bifurcation. While a modest year-over-year increase appears to have occurred, I do not believe the bifurcation rule was the cause of such increase, or that any one factor caused the increase.

Regarding processing costs, I am unaware of any statistical information regarding the number of bifurcated cases that have gone to decision versus settled. Of course, those cases in which the amount of a fee were resolved without litigation would reduce administrative costs. Only those that are litigated would cause a marginal increase in administrative costs.

3. *Have any subsequent changes in the law required that the rule be repealed or amended?*

Not that I am aware of.

4. *Is there continued need for the rule?*

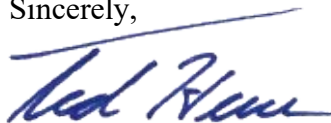
Yes. As above, the rule works well and should not only be maintained, but should be expanded to apply to cases at the hearing level.

5. *What impact has the rule had on small businesses?*

From the perspective of a small business owner and the claimants' bar, the rule has had a small positive impact on my small business and likely a small positive impact on the claimants' bar which is comprised exclusively of small businesses.

Thank you again for taking the time to reach out for comment on OAR 438-015-0125. As always, please let me know if I can be of further assistance to the board or help provide any further information or comment.

Sincerely,



Theodore P. Heus

heus@quinnheus.com

Enclosures: --