

November 7, 2025

JOY DOUGHERTY, BOARD CHAIR
WORKERS' COMPENSATION BOARD
2601 25TH ST. SE, STE. 150
SALEM, OR 97302

Re: Five-year review of OAR 438-015-0125 – “Bifurcation of Attorney Fee Award”

Dear Board Chair Dougherty and Board Members:

Thank you for the opportunity to provide comments regarding OAR 438-015-0125, which allows bifurcation of the attorney fee from the underlying claim for cases at board review. SAIF Corporation appreciates the board’s thoughtful approach and review of the rule and whether it has had the intended impact. SAIF provides the following responses to the board’s request for public comment.

1. Did the rule achieve its intended effect?

Bifurcation of the attorney fee from the underlying dispute was proposed to improve efficiency by limiting arguments regarding a reasonable attorney fee amount until claimant’s attorney prevailed on the underlying dispute. To the extent that some practitioners utilized the rule to bifurcate the attorney fee from the underlying dispute, the rule change reduced the number of arguments presented to the board regarding attorney fees as fees would be argued only in cases where claimant’s attorney prevailed compared to every case on board review.

In addition, stakeholders anticipated that some attorney fee disputes would be resolved through a stipulation to avoid litigating the remaining fee issue after claimant’s attorney prevailed. A negotiated attorney fee promotes efficiency by eliminating additional written arguments and a second order from the board. However, the efficiencies gained by negotiating an attorney fee in this situation steadily decreased since the rule was adopted resulting in fewer negotiated attorney fees.¹

The efficiencies gained by the rule change are also limited by the number of practitioners who utilize bifurcation and the administrative costs of implementing and maintaining a separate process for determining an attorney fee that is not widely utilized.

¹ See Workers’ Compensation Board Memorandum Report on Bifurcation of Attorney Fees on Board Review dated July 15, 2024.

2. Was the anticipated fiscal impact of the rule underestimated or overestimated?

Estimating the fiscal impact of the rule is challenging as the efficiencies gained by attorneys submitting fewer closing arguments is offset by the time devoted to arguing attorney fees in these bifurcated fee disputes. Written arguments regarding the attorney fee are time consuming and lengthy. Board orders that address the attorney fee amount also require additional board time and resources.

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

SAIF is unaware of any subsequent changes in the law that would impact the rule.

4. Is there continued need for the rule?

To the extent that a small number of practitioners utilize the bifurcated attorney fee process, there is some need for the rule.

5. What impacts has the rule had on small business?

To the extent that the rule resulted in a stipulated attorney fee then it may have resulted in lower costs associated with the claim that may impact a small business' workers' compensation premium. For a claimant's attorney who is a small business owner, they may see efficiencies in their practice by limiting the number of arguments presented on attorney fees. However, for cases that require written arguments on the attorney fee amount, the process can be laborious and drawn out with multiple extensions granted and as a result some of the efficiency is lost as the parties maintain an active file requiring client updates and the drafting of lengthy written arguments.

In addition, two stakeholders proposed an expansion of the bifurcated attorney fee rule to cases that are before an Administrative Law Judge (ALJ). SAIF does not support an expansion of the rule to the hearings division. Because the rule is utilized primarily by one practitioner, an expansion of the rule is not well supported. The additional costs associated with expansion also do not support a rule change that is rarely utilized. Additionally, there are jurisdictional concerns regarding bifurcation of the attorney fee from the underlying dispute and whether the ALJ can hold the attorney fee in abeyance. ORS 656.283(6); 656.289(1). Lastly, SAIF questions whether establishing a new process at the hearing division and any costs associated with a new process is supported by the limited use on board review and the 2023 data that show no cases were resolved via stipulation.

Thank you for your time and consideration of the above comments. Please reach out should the board have additional questions or require further information.

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Sincerely,

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