



Attorney Fee Advisory Committee Report

June 17, 2016

To: Workers' Compensation Board Members

From: ALJ John Mark Mills Mr. Philip H. Garrow
Mr. Martin L. Alvey Ms. Julie Masters
Mr. Matthew M. Fisher Mr. Graham Trainor
Ms. Jennifer Flood Ms. Sheri Sundstrom

Subject: Attorney Fee Concept Recommendations

Dear Board Members:

Consistent with the January 15, 2016 letter from Board Chair Somers, the Attorney Fee Advisory Committee offers the following comments and recommendations in response to the Board's request that the committee provide guidance in the following areas:

To generally address and assist in the Board's biennial review of all attorney fee schedules under ORS 656.388(4). In addition, to address the following concepts:

- (1) A possible amendment of the Board's rule regarding factors for consideration in the determination of a reasonable assessed attorney fee (OAR 438-015-0010(4)) to include the time devoted by a claimant's attorney's legal assistants and to incorporate the contingent nature of the practice of workers' compensation law as set forth in ORS 656.388(5);
- (2) adopting an administrative rule, which would implement a voluntary process to bifurcate the determination of a reasonable assessed attorney fee from the merits of the case;
- (3) amending OAR 438-015-0082(2), which provides that an assessed fee award must be paid within 30 days after the litigation order becomes final; and
- (4) reviewing the "thresholds/soft caps" for "out-of-compensation" attorney fees prescribed in OAR 438-015-0025, OAR 438-015-0040, OAR 438-015-0050,

OAR 438-015-0052, OAR 438-015-0055, OAR 438-015-0080 and OAR 438-015-0095.

Background

The committee initially met on Monday, March 14, 2016. A second meeting was held on Friday, May 20, 2016. In addition to the committee, a number of interested parties also appeared at the meetings. As discussion of the various topics addressed by the committee proceeded, input was provided by both committee members and any of the interested parties who were present and wished to participate. Input from committee members will be referred to as coming from a “member” and input from interested parties will be referred to as coming from a “witness.”

As different rules or concepts were addressed, the process was to receive pro and con positions on proposed changes with a view towards obtaining a consensus, if possible. Where a consensus was not possible, different proposals were voted on by the committee members. The goal of this report is to address the rules and concepts that were discussed, to provide a summary of the pro and con positions taken by both members and witnesses, and to indicate whether the committee did or did not reach a consensus on making a recommendation to the board.

Item One: OAR 438-015-0040 and OAR 438-015-0055

OAR 438-015-0040

Attorney Fees When a Claimant Requests a Hearing on Extent of Permanent Disability

- (1) If the Administrative Law Judge awards additional compensation for permanent partial disability, the Administrative Law Judge shall approve a fee of 25 percent of the increased compensation, but not more than \$4,600, to be paid out of the increased compensation.
- (2) If the Administrative Law Judge awards compensation for permanent total disability, the Administrative Law Judge shall approve a fee of 25 percent of the increased compensation, but not more than \$12,500, to be paid out of the award for permanent total disability.

OAR 438-015-0055

Attorney Fees When a Claimant Requests Review by the Board

- (1) If a claimant requests review of an Administrative Law Judge's order on the issue of compensation for temporary disability and the Board awards additional compensation, the Board shall award a reasonable assessed attorney fee.

(2) If a claimant requests review of an Administrative Law Judge's order on the issue of compensation for permanent disability and the Board awards additional compensation, the Board shall approve a fee of 25 percent of the increased compensation, provided that the total of fees approved by the Administrative Law Judge and the Board shall not exceed \$6,000.

(3) If a claimant requests review of an Administrative Law Judge's order on the issue of compensation for permanent total disability and the Board awards additional compensation, the Board shall approve a fee of 25 percent of the increased compensation, provided that the total of fees approved by the Administrative Law Judge and the Board shall not exceed \$16,300.

The committee's discussion focused on the caps for out of compensation fees for permanent partial disability (\$4,600/\$6,000) and permanent total disability (\$12,500/\$16,300) both on appeals to the ALJ (OAR 438-0015-0040) and to the Board (OAR 438-015-0055). These rules were discussed at both meetings.

The members were in agreement that the caps provided in the rules should be increased. The members also discussed eliminating the caps. One member suggested increasing the caps consistent with the increase in the average weekly wage since the caps were last adjusted. The last change in soft and hard caps was made in February 1999. (Ex. 8).

A witness argued that this would not be enough of an increase. The witness noted that, considering the likelihood of prevailing before an ALJ or the Board, the increases proposed were not enough to make it feasible for an attorney to take on these types of appeals. The witness submitted written argument to support her position. (Ex. 13) A member proposed eliminating the caps on PPD, but not PTD. Other members were not comfortable with this proposal.

At this point, the committee agreed to table further discussion of the out of compensation rules. A number of the members expressed interest in obtaining various statistical information. Information was provided by the Board and shared with the members shortly before the second meeting. (Ex. 15).

The committee returned to the PPD and PTD rules at the second meeting. A witness argued there should be a significant increase in the out of compensation fees for PPD and PTD. She also provided written material to the Board. It was noted that claimants were winning less than 20% of PPD and PTD cases when claimant sought an increase. This witness and other witnesses explained that it was not financially practical to appeal these cases unless there was a substantial increase in the out of compensation fees. Members generally agreed with this argument. They noted that most of the effort in PPD cases was directed at the reconsideration level where medical evidence and vocational evidence needed to be developed. The reconsideration level was where the larger increases in awards were obtained. Accordingly, the amounts at issue in appeals to the ALJ or to the Board tended to be very small.

Two proposals were discussed by the members. The first was to eliminate the PPD caps in both OAR 438-015-0040(1) and OAR 438-015-0055(2). The second was to increase the cap by approximately 60%. This represented the net increase in the fee award under the increase recommended by the committee with regard to DCS's and CDA's. The DCS and CDA rules were addressed by the committee prior to the PPD and PTD caps. Following further discussion regarding eliminating the PPD caps, a consensus was reached by the committee to recommend that change to OAR 438-015-0040(1). The committee also agreed to recommend raising the cap in OAR 438-015-0040(2) to \$20,000.

The committee then went on to discuss PTD. There was initially no support for eliminating the caps with regard to PTD. A proposal was again made to increase these fees based upon the net increase of 60% in attorney fees as discussed above. All of the members ultimately agreed to recommend eliminating the cap in OAR 438-015-0055(2) and to increase the cap in OAR 438-015-0055(3) to \$25,000. Further discussion occurred regarding these fees. Witnesses suggested that the PTD increase was still insufficient. A member suggested increasing it to \$30,000. The members reached a consensus on that amount.

Committee Recommendation

1. Remove the caps in OAR 438-015-0040(1) and OAR 438-015-0055(2).
2. Increase the cap to \$20,000 in OAR 438-015-0040(2) and in OAR 438-015-0055(3) to \$30,000.

Item Two: OAR 438-015-0050 and OAR 438-015-0052

OAR 438-015-0050

Attorney Fees in Connection With Disputed Claim Settlements

(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 first \$17,500 of the settlement proceeds plus ten percent of any amount of the settlement proceeds in excess of \$17,500. Under extraordinary circumstances, a fee may be authorized in excess of this calculation.

438-015-0052

Attorney Fees in Connection With Claim Disposition Agreements

(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 by the Board in an amount up to 25 percent of the first \$17,500 of the agreement proceeds plus

ten percent of any amount of the proceeds in excess of \$17,500. Under extraordinary circumstances, a fee may be authorized in excess of this calculation.

Both the DCS and the CDA rule provide that claimant's attorney may receive a fee in an amount up to 25 percent of the first \$17,500 of the settlement proceeds and 10 percent of any amounts of the settlement that exceed \$17,500. No member supported lowering these soft caps. Two members suggested elimination of the cap. One member noted that these two rules, along with the other out of compensation rules being reviewed by the committee, were last adjusted in 1999. Given that, raising the soft caps to account for inflation would be appropriate. Many of the members agreed that, in reaching settlements such as DCS's and CDA's, the interest of the claimant was to receive a certain amount of money out of the settlement proceeds. It was noted that labor had traditionally opposed changes to the statutes or rules regarding attorney fees out of compensation to put as much money as possible into the claimant's pocket when a settlement was reached. However, the unions supported House Bill 2764 and increases in attorney fees to improve access to justice. Other members felt that increasing the cap would make it more difficult to obtain settlements, as the settlement amounts would have to increase in order to provide claimant with the same amount of money as claimant would get under the current rule. This could result in fewer settlements and increased litigation.

A witness noted that it was the goal of the legislation to bring in additional attorneys and that the legislature recognized that raising attorney fees would increase costs in the system. One member noted that increasing the caps consistent with inflation would result in the caps being increased to approximately \$25,000. Other members and witnesses argued that the purpose of the legislation was not just to give claimant's attorneys a cost of living adjustment. Another member noted that an increase to \$25,000 was actually a double-COLA, because settlement amounts have been increasing consistent with inflation during the same time period.

Ultimately, a proposal to eliminate the caps was put on the table and was voted on. There were two yes votes and five no votes.

Suggestions to increase the cap to \$75,000 and \$100,000 were discussed, but not generally supported. When raising the cap to \$50,000 was discussed, six of the members were willing to support that recommendation.

These issues were briefly addressed again at the second meeting. By the time of the second meeting, the members had received additional data regarding attorney fees. One member suggested that the recommendation to raise the cap to \$50,000 be lowered to \$25,000, as that would be more proportional to the increase in the CPI since the last time the out of compensation rules were addressed by the board. Another member pointed out that the data showed that any increase above the current \$17,500 threshold would have little effect as it would apply to only a small number of injured workers. (Ex. 15). Another member was in favor of keeping the increase at \$50,000 to effectuate a meaningful change in order to bring in new attorneys and promote access to justice.

One member suggested moving forward. All of the members were in agreement. The member who previously opposed the increase to \$50,000 withdrew that opposition.

Committee Recommendation

Increase the soft caps in OAR 438-015-0050(1) and OAR 438-015-0052(1) to \$50,000.

Note: During the committee's discussion of DCS's and CDA's in the first meeting, a number of the members discussed and were critical of the occasional practice of splitting the combined proceeds of the DCS and CDA 50/50 between the two agreements to maximize claimant's attorney fees. One member suggested that a rule precluding this practice be recommended. Other members favored this. A witness was opposed, indicating that in rare cases it was appropriate, with claimant's consent, to do so. There was concern among the members that such a rule recommendation could be beyond the committee's charge from the Board. The facilitator shared that concern and suggested tabling the issue so that he could look into this. Regrettably, the facilitator did not have the committee return to this issue during the second meeting. Accordingly, the committee makes no specific recommendation with regard to this issue.

Item Three: OAR 438-015-0080

OAR 438-015-0080

Attorney Fees in Own Motion Cases

(1) If an attorney is instrumental in obtaining increased temporary disability compensation, the Board shall approve a fee of 25 percent of the increased compensation, but not more than \$1,500, to be paid out of the increased compensation.

(2) If an attorney is instrumental in obtaining a voluntary reopening of an Own Motion claim that results in increased temporary disability compensation, the Board shall approve a fee of 25 percent of the increased compensation, but not more than \$1,500, to be paid out of the increased temporary disability compensation resulting from the voluntary reopening.

The committee discussed the \$1,500 caps for out of compensation fees in Own Motion cases. Initially, there was some discussion as to whether the committee could recommend that this fee be changed to an assessed fee rather than an out of compensation fee. There was a question as to whether the implementing statute could be interpreted to allow for an assessed fee. A member of the committee explained that the Board had addressed this issue approximately one year ago and had made no changes to the rule. Accordingly, this issue was not addressed further by the committee.

The committee then discussed the \$1,500 cap on fees. A member noted that the benefits available in Own Motion cases are low, particularly time loss, which is based on the date of injury. There was minimal discussion about increasing the caps, although the members felt that they were too low. A proposal to eliminate the cap was agreed to by all of the members.

Committee Recommendation

Eliminate the \$1,500 caps provided for in OAR 438-015-0080(1) & (2).

Item Four: OAR 438-015-0055(5); OAR 438-015-0095; OAR 438-015-0025

OAR 438-015-0055(5)

Attorney Fees When a Claimant Requests Review by the Board

(5) If a claimant requests review of an Administrative Law Judge's order that upheld a responsibility denial issued under ORS 656.308(2) and the claimant's attorney actively and meaningfully participates in finally prevailing against the responsibility denial, the Board shall award a reasonable assessed fee to be paid by the insurer or self-insured employer who issued the responsibility denial. Absent a showing of extraordinary circumstances, the assessed attorney fee for prevailing over the responsibility denial shall not exceed \$2,500. The maximum attorney fee awarded under this section is subject to an annual adjustment on July 1 as calculated by the Workers' Compensation Division (on behalf of the Director) by the same percentage increase as made to the average weekly wage defined in ORS 656.211, if any. Before July 1 of each year, the Board, by bulletin, will publish the maximum fee, after adjusting the fee by the same percentage increase, if any, to the average weekly wage. Dollar amounts will be rounded to the nearest whole number.

OAR 438-015-0095

Attorney Fees in Third-Party Cases

Unless otherwise ordered by the Board after a finding of extraordinary circumstances, an attorney fee not to exceed 33-1/3 percent of the gross recovery obtained by the plaintiff in an action maintained under the provisions of ORS 656.576 through 656.596 is authorized.

///

///

///

OAR 438-015-0025

Maximum Attorney Fees Out of Compensation

Except in situations where a claimant's attorney fee is an assessed fee, in settlement of disputed claims or claim disposition agreements and in cases under the third-party law, unless there is a finding in a particular case by an Administrative Law Judge or the Board that extraordinary circumstances justify a higher fee, the established fees for attorneys representing claimants are as set forth in OAR 438-015-0040, 438-015-0055(2), (3), and 438-015-0080.

The fees set forth in OAR 438-015-0055(5) and OAR 438-015-0095 are statutory. The committee understands that it was not precluded from addressing fees set by statute. However, the committee as a whole agreed that since these fees do not fall directly within the Board's jurisdiction, the committee was not inclined to make any recommendations with regard to these rules. It was the committee's feeling that, if changes were to be sought regarding these rules, they would best be addressed through MLAC and the legislature.

The committee discussed the availability to utilize OAR 438-015-0025 to seek increases in fees. The committee did not discuss recommending any changes to that rule.

Committee Recommendation

Make no changes to OAR 438-015-0055(5), OAR 438-015-0095 and OAR 438-015-0025.

Item Five: Legal Assistant Time

438-015-0010

General Principles

- (4) In any case where an Administrative Law Judge or the Board is required to determine a reasonable attorney fee, the following factors shall be considered:
- (a) The time devoted to the case;
 - (b) The complexity of the issue(s) involved;
 - (c) The value of the interest involved;
 - (d) The skill of the attorneys;
 - (e) The nature of the proceedings;
 - (f) The benefit secured for the represented party;
 - (g) The risk in a particular case that an attorney's efforts may go uncompensated;
- and
- (h) The assertion of frivolous issues or defenses.

The committee was asked to address adding the time devoted by claimant's attorney's legal assistants into OAR 438-015-0010(4). One member argued that it would not be lawful to include legal assistant time in the rule, because the statutes authorizing attorney fees only allow fees to be paid to claimant's attorney. Other members noted that defense attorneys routinely do not get paid for legal assistant time. A witness indicated that that was not her experience. In response, a member pointed out that this was something that had changed significantly over the last two years.

One member pointed out that including legal assistant time in the rule was unnecessary as most claimant's attorneys did not provide ALJs with attorney time, much less, legal assistant time, in order to allow the ALJ to assess an appropriate fee.

Committee Recommendation

The committee could not reach a consensus on this issue. Four members were in favor of recommending the inclusion of the legal assistant time in the rule, three were not.

Item Six: Contingent Nature of the Practice

438-015-0010

General Principles

- (4) In any case where an Administrative Law Judge or the Board is required to determine a reasonable attorney fee, the following factors shall be considered:
- (a) The time devoted to the case;
 - (b) The complexity of the issue(s) involved;
 - (c) The value of the interest involved;
 - (d) The skill of the attorneys;
 - (e) The nature of the proceedings;
 - (f) The benefit secured for the represented party;
 - (g) The risk in a particular case that an attorney's efforts may go uncompensated;
- and
- (h) The assertion of frivolous issues or defenses.

The committee was asked to consider the contingent nature of the practice of workers' compensation law by claimant's attorneys and whether that should be included as a factor to be considered in determining assessed fees under OAR 438-015-0010(4). (Exs. 1B, 1C, 9). One member pointed out that the Board recently decided that there is already a contingency factor in the rule, i.e. "the risk in a particular case that an attorney's efforts may go uncompensated." *Cory L. Krauss*, 68 Van Natta 190, 193 (2016). The member felt that this takes into account the contingent nature of the practice. One member suggested that, even if that is the case, it should still be codified by putting this language into the rule. A witness noted that the risk of going uncompensated in a particular case is a different type of contingent factor than the general risk of

going uncompensated when all cases are considered. There was general consensus that the contingent nature of the practice should be considered. There was some debate as to whether the factor should be added to OAR 438-015-0010(4) or listed as a separate factor. When agreement was reached that it would not be listed as a separate factor, but would be added to OAR 438-015-0010(4)(g), a consensus was reached.

Committee Recommendation

Add language regarding “the contingent nature of the practice” to OAR 438-015-0010(4)(g).

Item Seven: OAR 438-15-0082(2)

438-015-0082(2)

Timely Payment of Attorney Fees

(2) An assessed attorney fee shall be paid within 30 days of the date the order authorizing the fee becomes final.

The committee has been asked to address a concept to amend OAR 438-015-0082(2), which provides that an assessed fee award must be paid within thirty days after the litigation order becomes final. This concept was offered by a witness who explained that the thirty day delay in getting a fee presents a financial hardship, and that there appears to be no reason why it should take thirty days for payment. The witness suggested that the fee be paid no later than the date the order becomes final. (Ex. 14). The members addressed concern that the proposal was not practical. There was concern that the proposal provided too little time for payment and would therefore subject employers and insurers to penalties for minor delays in the payment.

A member proposed that the rule be amended to require payment within 14 days of the date of the order becoming final. The members agreed with this proposed recommendation.

Committee Recommendation

Amend OAR 438-015-0082(2) by providing 14 days for payment rather than 30.

Item Eight: Bifurcating Attorney Fees

This concept is to adopt an administrative rule which would implement a voluntary process to bifurcate the determination of a reasonable assessed attorney fee from the merits of the case. This concept was again presented by a witness who provided documentation, including a sample rule. (Exs. 1A, 10, 11). The witness emphasized that this process would be voluntary, to be used at the discretion of the claimant’s attorney in a particular case. The witness explained that claimant’s attorneys should, when preparing for a case, be able to concentrate on the merits of the case, and not have to take time away from working up the client’s case to develop

information sufficient to allow for a reasonable presentation regarding attorney fees. The witness argued that the Board and ALJs have indicated that they want more information regarding requested attorney fees, which could include a statement of services. The witness noted that the process used by the Board to set attorney fees is not followed by other systems, which would include Board review, appeals to the Court, and assessed attorney fee issues in Circuit Court.

A member noted that the Oregon Association of Workers' Compensation Judges (OAWCJ) had provided the facilitator with a letter confirming that the association had discussed this bifurcation proposal at some length and voted 11-0, with the facilitator abstaining, to not support the bifurcation proposal as proposed. A member inquired as to the reasons behind the Association's vote. The facilitator was hesitant to get involved in the discussion in that fashion. A different member acknowledged that there were issues with the proposal as it was not authorized by statute. The member pointed out that the Board is required to schedule hearings before an ALJ within 90 days and the order of the ALJ is required within 30 days. ORS 656.289; ORS 656.295. The witness responded by pointing out that the ALJs already bifurcate hearings on occasion and that she understood from speaking with Board staff that bifurcation would be acceptable.

A member pointed out that a different staff member had prepared a report of barriers to implementing the procedure. (Ex. 12). The facilitator noted that the Association had concerns about implementation of the process as well as whether there was a statutory barrier to the process. He also pointed out that, as a practical matter, very few attorneys would do this and the Association did not feel it was necessary to set up an entirely new process that would be seldom used. He pointed out that claimant's attorneys occasionally will submit statements of services post hearing. Others would request permission at the hearing to do so. He of course could not guarantee that all judges would allow a continuance or receive a statement of services post hearing.

A witness indicated that ALJs would probably be seeing more statements of services if the rule was implemented. Another witness indicated that the Board already has a similar process for costs and that disputes regarding cost bill statements. These are generally resolved. There is little litigation over the process. Other attorney witnesses noted that they are uncomfortable in talking about the amounts of fee award they are seeking in front of their claimants.

During the discussion, it became clear that all of the members but one were generally in support of the proposal. Those members however recognized the potential for barriers to the implementation of the rule. One member suggested a trial of the process by an ALJ who might volunteer. Another member suggested a sunset clause built into the process. Ultimately, the majority of the members supported the proposed concept in principle. Their recommendation to the Board is that it consider the proposal from a positive point of view and consider implementing it if any legal or procedural, financial and processing concerns can be resolved.

///

///

Committee Recommendation

That the Board consider implementation of the proposed bifurcation process from a positive point of view.

Item Nine: Automatic Escalator

The committee did address one issue that it was not asked to consider. At several points in the discussion of the various out of compensation fees, increases were discussed based on the change in the average weekly wage since the fee limits were last addressed.

This led to a more specific discussion of applying the type of automatic escalator provided in ORS 656.262(11)(a), which is based on the percentage increase made to the average weekly wage as defined in ORS 656.211. There was a consensus among the committee that applying the average weekly wage to the soft and hard caps set forth in OAR 438-015-0040, OAR 438-015-0050, OAR 438-015-0052, OAR 438-015-0055 and OAR 438-015-0058 could be a benefit to the Board. The committee believes that the application of automatic escalators to these rules could reduce the need for a significant procedural process to review the schedule of fees every two years. The committee recommends the Board consider this concept.