

BEFORE THE WORKERS' COMPENSATION BOARD OF
THE STATE OF OREGON

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| Adoption of Permanent Amendments to the |) | |
| Rules of Practice and Procedure for Contested |) | WCB ADMIN. ORDER 1-2020 |
| Cases under the Workers' Compensation Law, |) | |
| Relating to Attorney Fees (OAR 438 Division 015) |) | ORDER OF ADOPTION |

1. On December 23, 2019, the Workers' Compensation Board filed a Notice of Proposed Rulemaking Hearing with the Secretary of State, giving notice of its intent to adopt and amend permanent rules of practice and procedure relating to the aforementioned rules. On December 23, 2019, notice of this hearing was posted on the Board's website at <http://www.oregon.gov/wcb/legal/Pages/laws-and-rules.aspx>.

On January 7, 2020, copies of the notice and proposed rules were mailed to all interested parties whose names appear on the Board's mailing list. On January 8, 2020, notice of the proposed rulemaking was electronically provided to the appropriate legislators. Copies of the notice were also electronically provided to the *Oregonian*, the *Associated Press*, and the *Capitol Press* on January 8, 2020.

In addition, notice of the hearing was published in the December issue of the Board's News and Case Notes, which was posted on the Board's website in early January 2020. Members of the Workers' Compensation Section of the Oregon State Bar received notice of this hearing on January 15, 2020, when the Board's News and Case Notes was electronically distributed to them.

Thereafter, in accordance with the notice, a public hearing was conducted by Jim Moller, the rulemaking hearing officer, on January 31, 2020, at Salem, Oregon. The record of the public hearing was closed at 5:00 p.m. on January 31, 2020.

2. One individual offered comments at the hearing. The individual was an attorney from the SAIF Corporation. In addition, four written comments were received. Written comments consisted of the Board's Administrative Rules Coordinator's January 28, 2020, "Statement of Filing/Notice of Procedures" regarding the aforementioned rules, a memorandum from the Board's Managing Attorney, an email from the American Property Casualty Insurance Association (APCIA), and a letter from a representative of the SAIF Corporation. Copies of the transcript of the public hearing and of all written comments received are available for public inspection and copying at the offices of the Board, 2601 25th St. SE, Suite 150, Salem, Oregon 97302-1280, during normal working hours from 8:00 a.m. to 5:00 p.m., Monday through Friday.

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3. Order of Adoption for Rules. At its February 27, 2020, public meeting, the Members thoroughly reviewed and considered the public record developed regarding the proposed permanent rules. The Members also discussed public comments presented at the hearing and memoranda submitted by Members Curey and Ousey, and Ousey and Woodford. A written summary of the comments, prepared by the rulemaking hearing officer, is also included in the record.

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. On December 17, 2019, at a public meeting, the Members reviewed draft rule language and considered further public testimony. The Members then proposed the amendment of permanent rules.² In addition, a public hearing regarding those rules was scheduled for January 31, 2020. At the January 31, 2020, public hearing, written and oral comments were admitted into the rulemaking record.

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 their December 17, 2019, public meeting, the Members deferred action on a proposed amendment to OAR 438-015-0010, which will address a "contingent hourly rate" factor in determining a reasonable attorney fee award. The Members have scheduled a public meeting for April 7, 2020, at their Salem office to discuss proposed language concerning such a rule, which has been presented in separate memoranda by Members Lanning and Ousey. Those respective versions have been posted on WCB's website. (<http://www.oregon.gov/wcb/legal/Pages/laws-and-rules.aspx>)

At their February 27, 2020 public meeting, the Members reviewed and considered the public record developed regarding the proposed amended permanent rules, public comments presented at the hearing, and the memoranda submitted by Members Curey and Ousey, and Ousey and Woodford. After conducting their review and deliberations, the Members have reached the following conclusions regarding the proposed rules.³

OAR 438-015-0005(4)

ORS 656.388(4) requires the Board to establish a schedule of fees for attorneys representing a worker and for attorneys representing an insurer or self-insured employer. In 1988, a prior version of ORS 656.388 also required the Board to approve this type of attorney fee. Pursuant to the Board's rules regarding this version of the statutory scheme, such a fee was defined as a "client paid fee." Although the statutory requirement for Board approval of such fees was rescinded in 1990, the statutory mandate that the Board establish a schedule of fees for carrier's attorneys has remained. *See* ORS 656.388(4). Nevertheless, following the 1990 statutory amendments, the Board's administrative rules were amended to remove all references to a "client paid" fee.

Considering their ongoing statutory directive to establish a schedule of attorney fees for a carrier's counsel, the Members proposed amending this rule to add a definition ("Client paid fee") to describe fees paid by an insurer or self-insured employer to its attorney, and to renumber the additional definitions in this rule subsection consistent with this amendment.

At the rulemaking hearing, no comments were received regarding this proposed amendment.

The Members find, for the reasons expressed in their December 23, 2019, Statement of Need, and those discussed herein, that the proposed rule is reasonable, necessary, and proper. Accordingly, the Board adopts this proposed rule as a permanent rule, contained in Exhibit A and incorporated by this reference.

OAR 438-015-0010(2), (4)

At their December 27, 2019, public meeting, the Members proposed an amendment to OAR 438-015-0010(2), which describes the statutes that provide for an assessed attorney fee. Specifically, the Members proposed adding ORS 656.262(11)(a) to the rule. Turning to OAR 438-015-0010(4), the Members noted that the rule describes the "rule-based" factors for determination of a reasonable assessed attorney fee. Consistent with ORS 656.388(5), the

³ At the February 27, 2020, public meeting, the Members deferred action on proposed OAR 438-015-0125 (regarding bifurcation of the attorney fee determination in cases at the Board review level) until their April 7, 2020, public meeting. In advance of that meeting, the Members instructed staff to prepare draft language for possible amendment to the current proposed rule. Once that draft language is available, it will be posted on WCB's website. Also, before the Members' April 7, 2020, meeting, parties, practitioners, and the general public are welcome to submit written comments regarding the draft language for consideration at the meeting. Those comments should be directed to Kayleen Swift, WCB's Executive Assistant at 2601 25th St. SE, Ste. 150, Salem, OR 97302, kayleen.r.swift@oregon.gov, or via fax at (503)373-1684.

Members proposed to add the following statutory factors to the rule: the necessity of allowing the broadest possible access to attorneys by injured workers and the fees earned by attorneys for insurers and self-insured employers. In addition, also consistent with ORS 656.388(5), the Members proposed separating the phrase, provided in current OAR 438-015-0010(4)(g), “The risk that in a particular case that an attorney’s efforts will go uncompensated and the contingent nature of the practice,” into two separate provisions under OAR 438-015-0010(4), with the latter being modified to “the contingent nature of the practice of workers’ compensation law.”

At the January 31, 2020, public meeting, APCIA opposed the proposed amendments to OAR 438-015-0010(4), raising concerns that the additional rule-based factors will lead to an undetermined increase in disputes, delays, and costs in the Oregon workers’ compensation system.

On February 13, 2020, Members Curey and Ousey submitted comments concerning proposed subsection (4)(h) (regarding “fees earned by attorneys representing the insurer/ self-insured employer”), proposing that the subsection be modified in a manner consistent with ORS 656.388(5) and the Members’ stated intention at their December 17, 2019, meeting. Specifically, they proposed that the subsection clarify that the source for accessing information regarding “fees earned by attorneys for insurers and self-insured employers” is the Director’s annual report that compiles insurers’ and self-insured employers’ annual reports of attorney salaries and other costs of legal services incurred pursuant to ORS Chapter 656.” *See* ORS 656.388(7).

After considering and discussing these comments, the Members ultimately proposed to amend OAR 438-015-0010(4) as follows:

(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 for legal services;
- (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 necessity of allowing the broadest access to attorneys by injured workers;**
- (h) **The fees earned by attorneys representing the insurer/self-insured employer, as compiled in the Director’s annual report under ORS 656.388(7) of attorney salaries and other costs of legal services incurred by insurers/self-insured employers pursuant to ORS Chapter 656;**

- (i) ~~[t]~~The risk in a particular case that an attorney's efforts may go uncompensated [and];
- (h) ~~j~~ The contingent nature of the practice of workers' compensation law; and
- (k) The assertion of frivolous issues or defenses.

At their February 27, 2020, public meeting, the Members approved the aforementioned amendments to OAR 438-015-0010(2) and (4) and adopted the proposed rule, as amended.

The Members find, for the reasons expressed in the Statement of Need, and those discussed herein, that the proposed amendments to OAR 438-015-0010(2) and (4), as revised, are reasonable, necessary, and proper. Accordingly, the Board adopts this proposed rule, contained in Exhibit B and incorporated by this reference.

OAR 438-015-0033

OAR 438-015-0033 currently prescribes a reasonable hourly rate for a claimant's attorney's time spent in an interview or deposition of the injured worker under ORS 656.262(14)(a) at \$275. The Advisory Committee recommended an increase in the hourly rate, but did not specify the amount. At their December 17, 2019, public meeting, the Members also considered comments submitted concerning an increase in the hourly rate. After considering those comments and public testimony, the Members proposed to increase the hourly rate to \$350. The Members further proposed that this amendment include an automatic annual adjustment in the rate consistent with the percentage increase in the state average weekly wage. In doing so, they noted that such a provision mirrors similar attorney fee provisions prescribed in OAR 438-015-0038, OAR 438-015-0055(5) and OAR 438-015-0110(3).

At the January 31, 2020, public hearing, APCIA submitted comments, noting that the current hourly rate (\$275) is effective based on the availability of attorneys to represent injured workers.

After consideration of the rulemaking record and discussing the proposed rule amendment, the Members find, for the reasons expressed in the Statement of Need, and those discussed herein, that the proposed amendment is reasonable, necessary, and proper. Accordingly, the Board adopts this proposed rule as a permanent rule, contained in Exhibit C and incorporated by this reference.⁴

⁴ In doing so, the Members expressly emphasize that the \$350 hourly rate is limited to OAR 438-015-0033 (concerning a claimant's counsel's services in an interview or deposition of the injured worker) and should not be interpreted in any way as a determination of a reasonable hourly rate for any other services provided by claimants' attorneys under ORS Chapter 656.

OAR 438-015-0115

As discussed in OAR 438-015-0005(5), pursuant to ORS 656.388(4) and (5), the Board is authorized to establish a schedule of fees for attorneys representing insurers and self-insured employers. Consistent with that statutory directive, the Members proposed to adopt OAR 438-015-0115, which provides that a “client paid fee” be reasonable under the “factors” described in OAR 438-015-0010(4) and not exceed the agreed amount in the retainer agreement between the client and its attorney.

At the rulemaking hearing, no comments were received regarding this proposed amendment.

After further considering the matter, the Members find, for the reasons expressed in the Statement of Need and those discussed herein, that the proposed rule is reasonable, necessary, and proper. Thus, the Board adopts this proposed rule as a permanent rule, contained in Exhibit D and incorporated by reference.

4. Under the authority granted by ORS 656.726(5), the Board finds that:
 - a. All applicable rulemaking procedures have been followed; and
 - b. The rules being adopted are reasonable, necessary, and proper.

PURSUANT TO THE AMERICANS WITH DISABILITIES ACT GUIDELINES, ALTERNATIVE FORMAT COPIES OF THE RULES WILL BE MADE AVAILABLE TO QUALIFIED INDIVIDUALS UPON REQUEST TO THE BOARD.

Consequently, in accordance with its Notice of Proposed Rulemaking, the Board adopts the attached amendments, as set forth in Exhibits A through D incorporated herein by reference as permanent rules of the Workers’ Compensation Board, to become effective June 1, 2020. These amendments are applicable as follows:

Amendments to OAR 438-015-005 and OAR 438-015-0115 apply to all “client paid fee” bills submitted by an attorney for an insurer/self-insured employer on or after June 1, 2020.

Amendments to OAR 438-015-0010(2) and (4) apply to all cases in which an order has issued on or after June 1, 2020.

Amendments to OAR 438-015-0033 apply to all interviews or depositions conducted under ORS 656.262(14)(a) on or after June 1, 2020.

The Board further orders that a certified copy of the amended rules be filed with the Secretary of State as required by ORS 183.355.

Dated this 6th day of March, 2020.

WORKERS' COMPENSATION BOARD

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

Steve Lanning
Steve Lanning, Board Member

Sally Anne Cusey
Sally Anne Cusey, Board Member

R. Ousey
Roger Ousey, Board Member

Barbara Woodford
Barbara Woodford, Board Member