

BEFORE THE WORKERS' COMPENSATION BOARD OF  
THE STATE OF OREGON

In the Matter of the Adoption of Permanent )  
Amendments to the Rules of Practice and ) WCB ADMIN. ORDER 2-2016  
Procedure for Contested Cases under the ) ORDER OF ADOPTION  
Workers' Compensation Law, Relating )  
to Attorney Fees (OAR 438-015). )

1. On August 12, 2016, the Workers' Compensation Board filed a Notice of Proposed Rulemaking Hearing with the Secretary of State, giving notice of its intent to amend permanent rules of practice and procedure relating to the aforementioned rules. Copies of the notice were electronically provided to the *Oregonian*, the *Associated Press*, and the *Capitol Press* on August 19, 2016. The notice was published in the Secretary of State's September 1, 2016 *Oregon Bulletin*.

On August 16, 2016, copies of the notice and the proposed rules were mailed to all interested parties whose names appear on the Board's mailing list, as well as the Board of Governors of the Oregon State Bar. On August 22, 2016, copies of the notice and the proposed rules were electronically provided to the appropriate legislators. Notice of the hearing was published in the July 2016 and August 2016 issues of the Board's News and Case Notes, which were posted on the Board's website in early August 2016 and September 2016, respectively.

Members of the Workers' Compensation Section of the Oregon State Bar were notified by e-mail about the Board's website postings regarding the aforementioned issues of the Board's News and Case Notes on August 12, 2016 and September 8, 2016. In August 2016, notice of this hearing was posted on the Board's website at <http://www.oregon.gov/wcb/legal/Pages/laws-and-rules.aspx>.

Thereafter, in accordance with the notice, a public hearing was conducted by Debra L. Young, Staff Attorney, on September 30, 2016 at Salem, Oregon. The record of the public hearing was closed at 5:00 p.m. on September 30, 2016.

2. Two individuals offered comments at the hearing. One was an attorney who represents injured workers and one was an attorney who represents an insurer. In addition, four written comment exhibits were received. Written comments consisted of the Board's Administrative Rules Coordinator's September 30, 2016 "Statement of Filing/Notice of Procedures" regarding the aforementioned rules, two emails from the National Council on Compensation Insurance, Inc. (NCCI), and one email from an attorney who represents employers and insurers. 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 25<sup>th</sup> 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.

3. Order of Adoption for Rules. At its October 11, 2016 public meeting, the Members thoroughly reviewed and considered the public record developed regarding the proposed permanent rules. A written summary of the comments is also included in the record. After completing its review and consideration of the comments and summary, the Board has reached the following conclusions regarding each of the following proposed rules.

In House Bill (HB) 2764 (2015), the Oregon Legislature adjusted the attorney fees for workers' compensation claimant attorneys, who are compensated only when the statute allows for a fee. The legislature expanded the circumstances in which fees are awarded, and added language that adequate attorney representation for injured workers is a policy objective. The statutory amendments included modifications to existing attorney fees and required the Board to biennially review all attorney fee schedules. In conducting this review, the Board is directed to consider the contingent nature of the law practice while allowing the broadest access to attorneys for injured workers.

In June and July 2015, the Members received "concept" letters regarding attorney fees from attorneys representing injured workers. At their November 17, 2015 public meeting, the Members decided to appoint an advisory committee of stakeholders, which was formed in 2016.<sup>1</sup> After public meetings on March 14, 2016 and May 20, 2016, the committee produced a June 17, 2016 report with its recommendations. On August 2, 2016, at a public meeting, the Members discussed that report and proposed the amendment of permanent rules.

#### OAR 438-015-0005(4)

The Members were asked to consider a rule concept that would allow for the consideration of the time spent by paralegals and legal assistants in determining an attorney fee. Prior case law limits consideration of time spent by paralegals and legal assistants to legal research services. *See Carmen O. Macias*, 53 Van Natta 689 (2001) (legal assistant time can be considered only if it represents hours devoted to "research and investigation" subject to supervision by an attorney); *Candace L. Spears*, 47 Van Natta 2393, 2394 n1 (1995) (same). The advisory committee was unable to reach a consensus regarding this rule concept.

At their August 2, 2016 public meeting, the Members considered statements from the claimants' and defense bar. The claimants' attorneys explained that a significant portion of their staffs' time can be spent representing injured workers, which represents time that cannot be included in their request for a fee. A defense attorney noted that paralegal and legal assistant time is routinely stricken from their billing invoices by insurers and third party administrators.

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<sup>1</sup> The Advisory Committee was comprised of the following individuals: Jennifer Flood, Ombudsman for Injured Workers; Martin Alvey, claimant attorney; Matthew Fisher, carrier attorney; Philip Garrow, claimant attorney; Julie Masters, carrier attorney; Sheri Sundstrom, Hoffman Construction; Graham Trainor, AFL-CIO; and Administrative Law Judge Mark Mills, who served as the facilitator. The Members extend their grateful appreciation to the committee for their valuable participation in this endeavor.

The Members considered it difficult to draw a distinction between time spent by a paralegal or a legal assistant because both would perform services on behalf of injured workers. Therefore, the Members proposed to delete the phrase “by an attorney” from the definition of “attorney fee” in OAR 438-015-0005(4), which would allow staff time to meet the definition of legal services under the rule.

At the rulemaking hearing, a claimant’s attorney and an insurer’s attorney stated that they believed the intent of this proposed rule change was to allow for consideration of time spent by legal assistants and paralegals, but not secretarial time, or overhead expenses.

After consideration of the rulemaking record and testimony, the Board finds, for the reasons expressed in its August 12, 2016 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 A and incorporated by this reference.

#### OAR 438-015-0010(4)

OAR 438-015-0010(4) provides the factors required to be used by the Administrative Law Judge (ALJ) and the Board in determining a reasonable attorney fee. After reviewing rule concepts submitted by attorneys representing injured workers, the advisory committee’s report, and statements made at the Board’s August 2, 2016 public meeting, the Board proposed two amendments to this rule.

In subsection (4)(a), which references “The time devoted to the case” factor, the Members proposed an amendment to include the phrase “for legal services.” This language was proposed in conjunction with the proposed amendment to OAR 438-015-0005(4), as discussed above.

In addition, the Members proposed amendments to subsection (4)(g), which provides that an attorney fee award consider, “The risk in a particular case that an attorney’s efforts may go uncompensated \*\*\*.” In this regard, HB 2764 amended ORS 656.388(5) to require the Board to consider the contingent nature of a workers’ compensation law practice in establishing the schedule of attorney fees awarded under Chapter 656. The advisory committee was asked to consider whether additional language regarding the “contingent nature of the practice” should be added to OAR 438-015-0010(4). Ultimately, the committee recommended that “contingent nature of the practice” be added to OAR 438-015-0010(4)(g), rather than added as a separate rule factor in determining a reasonable attorney fee. After considering the advisory committee’s analysis and recommendation, the Members proposed to amend subsection (4)(g) to include: “and the contingent nature of the practice.”

At the rulemaking hearing, oral comments from two attorneys, one representing injured workers and one representing an insurer, expressed support for the package of amendments to the attorney fee rules, noting that the advisory committee’s recommendations were a product of negotiation among the committee members.

After consideration of the rulemaking record and testimony, the Board finds, for the reasons expressed in its August 12, 2016 Statement of Need, and those discussed herein, that the proposed amendments are reasonable, necessary, and proper. Accordingly, the Board adopts this proposed rule as a permanent rule, contained in Exhibit B and incorporated by this reference.

OAR 438-015-0040(1), (2)

Consistent with the advisory committee's recommendation, the Members proposed to: (1) amend OAR 438-015-0040(1) to eliminate the "out-of-compensation" attorney fee cap on increased awards of permanent partial disability (PPD) at hearing; and (2) amend OAR 438-015-0040(2) to increase the "out-of-compensation" attorney fee cap to \$20,000 for awards of permanent total disability (PTD) at hearing.

At the September 30, 2016 public hearing, NCCI submitted written comments on this rule, observing that the rule amendments may lead to an undetermined increase in workers' compensation system costs. Oral comments from two attorney witnesses, one who represents injured workers and one who represents an insurer, expressed support for the rule amendments, noting that they were part of negotiated recommendations from the advisory committee.

After consideration of the rulemaking record and testimony, the Board finds, for the reasons expressed in its August 12, 2016 Statement of Need, and those discussed herein, that the proposed amendments are reasonable, necessary, and proper. Accordingly, the Board adopts this proposed rule as a permanent rule, contained in Exhibit C and incorporated by this reference.

OAR 438-015-0050(1)

The Members proposed an increase in the "out-of-compensation" attorney fee "threshold/soft cap" amounts for Disputed Claim Settlements (DCS). This rule, which was last amended in 1999, currently provides that claimant's attorney shall receive 25 percent of the first \$17,500 of a DCS, and 10 percent of the amounts exceeding \$17,500. The advisory committee was asked to review this "threshold/soft cap" and provide a recommendation in light of HB 2764. The committee observed that the legislation was designed to provide greater access to attorney representation for injured workers, and that an increase in the attorney fees out of settlements would encourage attorney representation. The committee ultimately reached a consensus to recommend increasing the attorney fee to 25 percent of the first \$50,000 of a DCS and 10 percent of the settlement proceeds in excess of \$50,000.

Consistent with the advisory committee's recommendation, the Members proposed amending OAR 438-015-0050(1) to increase the "threshold/soft cap" attorney fee to 25 percent of the first \$50,000 of a DCS, plus 10 percent of the settlement proceeds in excess of \$50,000.

At the September 30, 2016 public hearing, NCCI submitted written comments on this rule, observing that the rule amendments may lead to an undetermined increase in workers' compensation system costs. Oral comments from two attorney witnesses, one who represents injured workers and one who represents an insurer, expressed support for the rule amendments, noting that they were part of negotiated recommendations from the advisory committee.

After consideration of the rulemaking record and testimony, the Board finds, for the reasons expressed in its August 12, 2016 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 D and incorporated by this reference.

OAR 438-015-0052(1)

For the reasons expressed regarding the above-mentioned DCS rule (OAR 438-015-0050), and consistent with the advisory committee's recommendation, the Members proposed to amend OAR 438-015-0052(1) to increase the "threshold/soft cap" attorney fee to 25 percent of the first \$50,000 of a Claim Disposition Agreement (CDA), plus 10 percent of the settlement proceeds in excess of \$50,000.

At the September 30, 2016 public hearing, NCCI submitted written comments on this rule, observing that the rule amendments may lead to an undetermined increase in workers' compensation system costs. Oral comments from two attorney witnesses, one who represents injured workers and one who represents an insurer, expressed support for the rule amendments, noting that they were part of negotiated recommendations from the advisory committee.

After consideration of the rulemaking record and testimony, the Board finds, for the reasons expressed in its August 12, 2016 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 E and incorporated by this reference.

OAR 438-015-0055(2), (3)

Consistent with the advisory committee's recommendation, the Members proposed to: (1) amend OAR 438-015-0055(2) to eliminate the "out-of-compensation" attorney fee cap on increased awards of PPD on Board review; and (2) amend OAR 438-015-0055(3) to increase the "out-of-compensation" attorney fee cap to \$30,000 for awards of PTD on Board review.

At the September 30, 2016 public hearing, NCCI submitted written comments on this rule, observing that the rule amendments may lead to an undetermined increase in workers' compensation system costs. Oral comments from two attorney witnesses, one who represents injured workers and one who represents an insurer, expressed support for the rule amendments, noting that they were part of negotiated recommendations from the advisory committee.

After consideration of the rulemaking record and testimony, the Board finds, for the reasons expressed in its August 12, 2016 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 F and incorporated by this reference.

OAR 438-015-0080(1), (2)

Under the current rule, "out-of-compensation" attorney fee awards for obtaining increased temporary disability compensation in an Own Motion claim, or a voluntary reopening of an Own Motion claim that results in increased temporary disability benefits, are limited to

\$1,500 of the increased compensation. Consistent with the advisory committee's recommendation, the Members proposed to eliminate the cap on "out-of-compensation" attorney fee awards relating to increased temporary disability benefits in Own Motion cases.

At the September 30, 2016 public hearing, oral comments from two attorney witnesses, one who represents injured workers and one who represents an insurer, expressed support for the rule amendments, noting that they were part of negotiated recommendations from the advisory committee.

After consideration of the rulemaking record and testimony, the Board finds, for the reasons expressed in its August 12, 2016 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 G and incorporated by this reference.

OAR 438-015-0082(2)

Consistent with the advisory committee's recommendation, the Members proposed amending this rule to provide that assessed attorney fees shall be payable within 14 days of the date the order authorizing the fee becomes final. This amendment will make payment of attorney fees consistent with timely payment of other benefits, such as temporary disability, after an order is final.

After consideration of the rulemaking record and testimony, the Board finds, for the reasons expressed in its August 12, 2016 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 H and incorporated by this 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.**

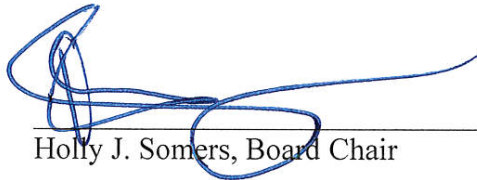
Consequently, in accordance with its Notice of Proposed Rulemaking, the Board adopts the attached amendments, as set forth in Exhibits A through H incorporated herein by this reference, as permanent amendments of the Workers' Compensation Board, to become effective November 1, 2016, which shall apply to all cases pending before the Hearings Division and Board, on or after November 1, 2016.

The Board further orders that a certified copy of the adopted rules be filed with the Secretary of State and that a copy of the Order of Adoption and the adopted rule with revision marks be filed with the Legislative Counsel within 10 days after filing with the Secretary of State as required by ORS 183.715.

Dated this 13<sup>th</sup> day of October, 2016

**WORKERS' COMPENSATION BOARD**

by:

  
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Holly J. Somers, Board Chair

  
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Sally Anne Curey, Board Member

  
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Judy L. Johnson, Board Member

  
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Steve Lanning, Board Member

  
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Margaret F. Weddell, Board Member