

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 2-2020 |
| Cases under the Workers' Compensation Law, |) | |
| (OAR 438 Division 015) Relating to The |) | |
| Determination of a Reasonable Assessed |) | |
| Attorney Fee, Including the Submission of |) | |
| Information Concerning a "Contingent Hourly |) | |
| Rate" and Its Calculation (OAR 438-015-0010); |) | |
| and a Voluntary Procedure for the Bifurcation of |) | |
| the Determination of a Reasonable Assessed |) | |
| Attorney Fee From the Merits of the Claim for |) | |
| Certain Cases on Board Review |) | |
| (OAR 438-015-0125). |) | ORDER OF ADOPTION |

1. On June 25, 2020, 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 June 25, 2020, notice of this hearing was posted on the Board's website at <http://www.oregon.gov/wcb/legal/Pages/laws-and-rules.aspx>.

On July 8, 2020, copies of the notice and proposed rules were mailed to all interested parties whose names appear on the Board's mailing list. On July 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 July 8, 2020.

In addition, notice of the hearing was published in the June 2020 issue of the Board's News and Case Notes, which was posted on the Board's website in early July 2020. Members of the Workers' Compensation Section of the Oregon State Bar received notice of this hearing on July 13, 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 Ian Brown, the rulemaking hearing officer, on July 31, 2020, at Salem, Oregon. The record of the public hearing was closed at 11:59 p.m. on July 31, 2020.

2. There were no oral comments submitted at the hearing. Three written comments were received, which consist of: the Board's Administrative Rules Coordinator's July 29, 2020, "Statement of Filing/Notice of Procedures" regarding the aforementioned rules; a memorandum from Board Members Curey and Ousey; and a letter from a representative of the American

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Property Casualty Insurance Association (APCIA). Copies of the transcript of the public hearing and of all written comments received have been posted on the Board's website at <https://www.oregon.gov/wcb/legal/Pages/laws-and-rules.aspx>. Any questions regarding these materials may be directed to Kayleen Swift, the Board's Administrative Rules Coordinator, at (503)934-0123.

3. Order of Adoption for Rules. At their August 18, 2020, public meeting, the Members thoroughly reviewed and considered the public record developed regarding the proposed permanent rules. The Members also discussed the memorandum submitted at the hearing by Members Curey and Ousey. A written summary of the comments, prepared by the rulemaking hearing officer, is also included in the record. After completing its review and consideration of the comments, memoranda, and summary, the Board has reached the following conclusions regarding the proposed rules.

Pursuant to ORS 656.388(4) and (5), the Members conduct a biennial review of the Board's attorney fee schedules. In conducting this review, the Members are 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 their biennial review, the Members convened a public meeting to consider several administrative rule concepts and receive public testimony. Thereafter, the Members appointed an advisory committee, which was composed 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 and statistical information, the committee produced a report dated July 1, 2019. In connection with the advisory committee's report, Exhibits 1 through 39 were submitted.

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. At their December 17, 2019, and February 28, 2020, public meetings, the Members reviewed draft rule language and considered further public testimony.² At the December 2019 public meeting, the Members decided to continue their deliberations on rule language pertaining to one of the now-proposed rule amendments (concerning a "contingent hourly rate"). On January 3, 2020, the

¹ The Advisory Committee consisted of claimant's attorneys Arthur Stevens, III, and Theodore Heus, carriers' 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 the December 17, 2019, and February 28, 2020, public meetings, the Members proposed, and subsequently adopted, other amendments to the Board's attorney fee rules, including amendments to OAR 438-015-0005(4), OAR 438-015-0010(4), OAR 4387-015-0033, and OAR 438-015-0115. *See* WCB Admin Order 1-2020 (eff. June 1, 2020).

Board of Governors of the Oregon State Bar was invited to consult and provide input. At their February 2020 public meeting, the Members deferred action on the other now-proposed rule concept (concerning a “bifurcated attorney fee”). In doing so, the Members directed staff to prepare draft rule language to be considered at a future public meeting.

On June 23, 2020, at a public meeting, the Members reviewed draft rule language and considered further public comment and testimony.³ The Members then proposed the amendment of permanent rules. In addition, a public hearing regarding those rules was scheduled for July 31, 2020. At the July 31, 2020, public hearing, written comments were admitted into the rulemaking record.

At their August 18, 2020, public meeting, the Members reviewed and considered the public record developed regarding the proposed amended permanent rules and the memorandum submitted by Members Curey and Ousey. After concluding their review and deliberation, the Members have reached the following conclusions regarding the proposed rules.

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

OAR 438-015-0010(4) describes the “rule-based” factors for determination of a reasonable assessed attorney fee. In response to the Members’ invitation for comments regarding the Board’s 2018 biennial review of its attorney fee schedules, several attorneys requested consideration of rule language that would include a “contingent hourly rate” among the “rule-based factors” for determining a reasonable assessed attorney fee under OAR 438-015-0010. The proponents of this language reasoned that it would address the “gap” between the attorney fees paid to claimants’ counsel and the attorney fees and legal costs of insurers and self-insured employers. After the Members referred such language to the Advisory Committee in December 2018, the Committee did not reach an agreement concerning such a concept, with two members in support, two members opposed, and one abstaining.

At their December 27, 2019, public meeting, the Members decided to continue their discussions regarding language concerning the “contingent hourly rate” rule concept. Subsequently, Members Ousey and Lanning each offered language for proposed rule amendments that would address a “contingent hourly rate” under OAR 438-015-0010.

In advance of the Board’s June 23, 2020, public meeting, the Oregon Trial Lawyer’s Association (OTLA) submitted comments concerning the “contingent hourly rate” concept and the language offered by Members Ousey and Lanning.

At their June 23, 2020, public meeting, the Members considered testimony and written comments concerning the language advanced by Members Ousey and Lanning and the OTLA submission. After considering this information, the Members proposed the addition of OAR 438-015-0010(6), which provided that, if such information is submitted by the claimant’s

³ The June 23, 2020, public meeting was originally scheduled for April 7, 2020. However, the meeting was rescheduled due to the Governor’s mandates related to the Coronavirus pandemic.

attorney, “the claimant’s attorney’s contingent hourly rate, as well as the basis on which the rate was calculated,” would be considered in the determination of a reasonable assessed attorney fee under OAR 438-015-0010(4). Members Ousey, Woodford, and Lanning, as well as Chair Wold, indicated that adding the phrase “the basis on which the rate was calculated” would allow for the consideration of attorney fee information and data as suggested by the OTLA, including the Oregon State Bar Economic Survey, median or customary hourly rates for attorneys in Oregon, and the win-loss ratio in a particular forum or type of case.

For the July 31, 2020, public hearing, Members Curey and Ousey submitted a memorandum, proposing that the “contingent hourly rate” factor be included as subsection (4)(l), rather than as section (6). Specifically, they explained that the Board had proposed including the “contingent hourly rate” factor in a separate section (section (6)) to make clear that the Board was not required to consider such information unless it was supplied by the claimant’s attorney. On further reflection, because the wording of the proposed rule includes the fact that the “contingent hourly rate” factor will be considered only when such information is submitted, Members Ousey and Curey reasoned that the separation of the voluntary “contingent hourly rate” factor in a separate section was unnecessary. Accordingly, they proposed to include the “contingent hourly rate” factor within section (4), as subsection (4)(l).

At their August 18, 2020, public meeting, the Members considered the various proposals, comments that had been offered regarding the “contingent hourly rate” factor, and further discussed the proposed language. Consistent with the comments submitted by Members Curey and Ousey, as well as their discussion at the meeting, 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) The risk in a particular case that an attorney's efforts may go uncompensated;
- (j) The contingent nature of the practice of workers' compensation law; [and]
- (k) The assertion of frivolous issues or defenses; **and**

(l) Claimant's counsel's contingent hourly rate, if asserted, together with any information used to establish the basis upon which the rate was calculated.

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

OAR 438-015-0125

In response to the Members' invitation for comments regarding the Board's 2018 biennial review of its attorney fee schedules, several submissions from claimants' attorneys requested consideration of a rule to bifurcate the determination of an attorney fee from a decision regarding the merits of the underlying litigation. Asserting that the production of a statement of services is time-consuming, the proponents recommended bifurcating the attorney fee determination in those cases in which the claimant has prevailed. After the Members' December 2018 referral of this concept to an Advisory Committee, a slight majority of the Committee supported the "bifurcation" concept.

At their February 27, 2020, public meeting, the Members decided to continue deliberations regarding the rule concept.⁴ They also directed staff to prepare possible language for a proposed rule. Subsequently, Jim Moller, then the Managing Attorney for the Board, offered language for a proposed rule. Attorney Julene Quinn also offered language for a proposed rule.

At their August 18, 2020, public meeting, after considering those submissions, the advisory committee recommendation, the testimony and public comment presented at the January 31, 2020, and July 31, 2020, rulemaking hearings, and their February 27, 2020, and June 23, 2020, public meetings, a majority of the Members supported adoption of OAR 438-015-0125, which allows for a voluntary "bifurcation" of the attorney fee determination from the merits of certain cases litigated at the Board review level provided that those attorney fee awards concern ORS 656.386(1), ORS 656.383, or ORS 656.382(2).⁵ Under the proposed

⁴ At their December 27, 2019, public meeting, the Members proposed a previous version of an "attorney fee bifurcation" rule for public comments, which were received at the January 31, 2020, rulemaking hearing and the February 27, 2020, public meeting. Because the rule amendments ultimately proposed at the June 23, 2020, public meeting differed substantially from those initially proposed, the Members invited further public comment on the proposed rule before considering its adoption as a permanent rule.

⁵ Member Curey did not support moving this proposed rule forward to a rulemaking hearing.

rule, a claimant's counsel could request bifurcation of the attorney fee determination for the aforementioned type of cases within 14 days of the expiration of the briefing schedule. If the claimant prevails on review, the Board's order would award a reasonable attorney fee, without a specified amount, and assign a separate WCB Case Number to the "attorney fee" matter. Within 60 days of the Board's order becoming final, the claimant's attorney could file a written statement with the Board, specifying a proposed reasonable attorney fee award. The Board would acknowledge the receipt of statement, and the carrier could respond within 21 days of the date of mailing of the Board's acknowledgment letter. The claimant could then submit a reply within 14 days of the date of filing of the carrier's response. After receiving the parties' submissions, the Board would conduct an expeditious review and determine a reasonable assessed attorney fee award in a final appealable order. Alternatively, if the parties reach an agreement regarding the amount of a reasonable attorney fee, a stipulation would be filed with the Board, which the Board would approve in a final order.

At the July 31, 2020, rulemaking hearing, APCIA opposed the proposed rule, raising concerns that the bifurcation of the attorney fee determination is unnecessary and would lead to an increase in complexity, costs, and delays in the Oregon workers' compensation system.

The Members understand that the adoption of this rule introduces an additional procedure into the determination of a reasonable assessed attorney fee for certain cases on Board review. However, the rule is expressly voluntary and limited to a select group of cases. Furthermore, because arguments regarding proposed attorney fee requests would no longer be presented in the parties' appellate briefs in those cases in which bifurcation is requested, the time/expense regarding the attorney fee would be reduced (and eliminated in those cases where the claimant does not finally prevail).

Thus, at the present time, the Members consider the potential for the rule amendment to result in an increase in the complexity, costs, and delays in the system to be confined to a relatively limited number of cases (which may be offset by the number of cases in which the litigation of a potential attorney fee award never materializes, thereby decreasing the time/expense generally incurred in such matters). In any event, in the years to come, the Board intends to closely monitor the effects of this rule amendment, and if the Members believe the rule is not achieving its intended objective, modifications of the rule will be considered.

After consideration of the rulemaking record and discussing the proposed rule amendment, a majority of the Members find, for the reason expressed in the Statement of Need and those discussed herein, that the proposed rule is reasonable, necessary, and proper.⁶ Thus, the Board adopts this proposed rule as a permanent rule, contained in Exhibit B and incorporated by reference.

⁶ Member Curey did not support the adoption of this rule.

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 and B, incorporated herein by reference as permanent rules of the Workers' Compensation Board, to become effective October 1, 2020. These amendments are applicable as follows:

The amendment to OAR 438-015-0010(4) applies to all cases in which an order is issued on or after October 1, 2020.

The amendment to OAR 438-015-0125 applies to all cases in which a request for Board review is filed on or after October 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 ____ day of August, 2020.

WORKERS' COMPENSATION BOARD

by: _____
Constance L. Wold, Board Chair

Steve Lanning, Board Member

Sally Anne Curey, Board Member

Roger Ousey, Board Member

Barbara Woodford, Board Member