

July 30, 2020

Ex. C

**MEMORANDUM**

To: Ian Brown, Hearings Officer  
Workers' Compensation Board

Cc: Connie Wold, WCB Chair  
Steve Lanning, WCB Member  
Barbara Woodford, WCB Member

From: Sally Anne Curey, WCB Board Member  
Roger Ousey, WCB Member

RE: Proposed Amendment to 438-015-0010(4)

Please accept the following recommended proposed rule for consideration.

During its June 23, 2020, public meeting, the Workers' Compensation Board made a recommendation to create a subsection (6) under OAR 438-015-0010, which provides that in determining a reasonable assessed attorney fee under OAR 438-015-0010(4), the Board will consider a "contingent hourly rate" and the basis for its calculation, if such information is submitted by the claimant's attorney. The Board proposed including that factor in subsection (6), rather than subsection (4)(which contains the other factors to be considered in determining a reasonable assessed attorney fee), to make clear that the Board was not required to consider the "contingent hourly rate" factor unless the claimant's attorney supplied such information.

Upon further reflection, since the wording of the proposed rule includes the fact that this factor shall be considered only when such information is submitted, we propose that separating this voluntary "contingent hourly rate" factor from the other factors for determining a reasonable attorney fee award listed in subsection (4) of OAR 438-015-0010 is unnecessary. We, therefore, recommend the following revision to the proposed rule:

**438-015-0010**  
**General Principles**

- (1) Attorney fees for an attorney representing a claimant before the Board or its Hearings Division shall be authorized only if an executed attorney retainer agreement has been filed with the Administrative Law Judge or Board.
- (2) Attorney fees for an attorney representing a claimant shall be paid out of the claimant's compensation award except as provided by ORS 656.262(11)(a), 656.307, 656.382, 656.383 and 656.386.
- (3) An approved fee awarded or allowed to an attorney representing a claimant shall be a lien upon the claimant's compensation.

(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 contingent hourly rate, if asserted, together with any information used to establish the basis upon which the rate was calculated.**

(5) Percentage limitations on fees established by these rules apply to the amount of compensation paid the claimant exclusive of medical, hospital or other expenses of treatment.

Statutory/Other Authority: ORS 656.726(5)

Statutes/Other Implemented: ORS 656.307, 656.382, 656.383, 656.386 & 656.388