



PERMANENT ADMINISTRATIVE ORDER

WCB 2-2020

CHAPTER 438
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION BOARD

FILED

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ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Amending OAR 438-015 regarding procedures concerning the determination of a reasonable assessed attorney fee.

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CONTACT: Kayleen Swift
503-934-0123
kayleen.r.swift@oregon.gov

2601 25th Street SE Suite 150
Salem ,OR 97302

Filed By:
Kayleen Swift
Rules Coordinator

RULES:

438-015-0010, 438-015-0125

AMEND: 438-015-0010

RULE TITLE: General Principles

NOTICE FILED DATE: 06/25/2020

RULE SUMMARY: The rule would allow the consideration of a "contingent hourly rate and the basis for its calculation" in determining a reasonable assessed attorney fee, if such information was submitted by claimant's counsel. (OAR 438-015-0010)(4)(I)

RULE TEXT:

- (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), ORS 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;

(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.

(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

ADOPT: 438-015-0125

RULE TITLE: Bifurcation of Attorney Fee Award (Board Review)

NOTICE FILED DATE: 06/25/2020

RULE SUMMARY: This rule 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).

RULE TEXT:

(1) The determination of the Board's reasonable assessed attorney fee award under ORS 656.382(2), ORS 656.383, or ORS 656.386(1) shall be bifurcated from the underlying claim if:

(a) A request for Board review of an Administrative Law Judge's order has been filed;

(b) Within 14 days of the expiration of the briefing schedule, the claimant files a request for bifurcation of the Board's attorney fee award as described in section (1); and

(c) The Board reaches a decision that entitles the claimant's counsel to a reasonable assessed attorney fee award under one or more of the statutes described in section (1).

(2) If the requirements in section (1) have been satisfied, the Board's order will award a reasonable assessed attorney fee award without specifying the amount thereof. The Board's order will also identify a separate WCB Case Number that pertains to the "bifurcated" attorney fee award.

(3) Within 60 days after the Board order under section (2) becomes final, the claimant's counsel may file a written statement specifying a proposed amount for the reasonable attorney fee award, including a description of how the factors set forth in OAR 438-015-0010(4) support the proposed fee.

(4) Upon the filing of the claimant's counsel's statement under section (3), the Board will acknowledge the statement. The insurer's/self-insured employer's response, if any, to the claimant's counsel's statement shall be filed within 21 days from the date of mailing of the Board's acknowledgment letter. The claimant's reply, if any, shall be filed within 14 days from the date of filing of the insurer's/self-insured employer's response. After conducting an expeditious review, the Board will determine the amount for the reasonable assessed attorney fee award in a final, appealable order.

(5) If the parties reach agreement regarding the amount of a reasonable assessed attorney fee award, a stipulation (which pertains to the assigned WCB Case Number described in section (2)) may be filed with the Board. The Board's approval of the parties' stipulation will be contained in a final order, which will specify that the award shall be paid within 14 days of the order.

STATUTORY/OTHER AUTHORITY: ORS 656.307, ORS 656.388(4), (5), ORS 656.726

STATUTES/OTHER IMPLEMENTED: ORS 656.308, ORS 656.382, ORS 656.383, ORS 656.386