

STATE OF MINNESOTA
HAZARDOUS SUBSTANCE INJURY COMPENSATION BOARD

In the Matter of the proposed new
permanent rules on attorney fees
for property damage claims

STATEMENT OF NEED
AND REASONABLENESS

I. INTRODUCTION

The Hazardous Substance Injury Compensation Board (Board) was created by the 1985 Legislature (Laws 1985, 1st special session, chapter 8) as part of revisions to the Minnesota Environmental Response and Liability Act (MERLA), Minnesota Statutes, Chapter 115B. These revisions were codified as Minnesota Statutes Sections 115B.25-115B.37. The Board was established as a new state agency to administer a \$2 million Hazardous Substance Injury Compensation Fund (Fund). The Board's primary responsibility is to investigate claims of certain types of property damage or personal injury caused by the release of hazardous substances into the environment, and to compensate eligible persons from the Fund for certain types of losses.

Since the administrative procedure for compensation before the Board is less formal and simpler than a court proceeding, an attorney is not required for the process. However, because a claimant may choose to be represented by an attorney, and because the amount of compensation the Board can award to a claimant is strictly limited by statute with no reimbursement for attorney fees, the legislature gave the Board authority to limit the fee charged by any attorney for representing a claimant before the Board.

On June 15, 1987, the Board proposed rules for attorney fees covering all types of claims. These rules limited fees for legal service including expenses to no more than 25 percent of the Board's award.

In response to that proposal, the Board received more than 25 requests for a hearing. The comments objecting to the rules focused primarily on two issues: 1) the inclusion of expenses with the legal fee, and 2) the need for the rules based on the lack of a successful personal injury claim. Several commentators expressed the opinion that the process of establishing causation in a personal injury action before the Board posed several procedural and substantive obstacles requiring the assistance of expert counsel.

Taking the comments under consideration, the Board decided to withdraw the June 15, 1987 proposed rules and to distinguish between the two types of claims for which it awards compensation. Based on several successful awards for property damage without attorney representation, and the simple, straightforward standard that must be met, the Board is proposing in these rules attorney fees for property damage claims that are contingent upon receipt of the award by the claimant and limited to 15 percent of that award. The Board has decided to review its experience with personal injury claims and the involvement of attorneys with the process at a later date and may propose rules to address attorney fees for personal injury claims in the future.

II. STATEMENT OF THE BOARD'S STATUTORY AUTHORITY

The Board's statutory authority to adopt rules relating to attorney fees is set forth in Minn. Stat. Section 115B.37 (1986), which states: "The board may by rule limit the fee charged by any attorney for representing a claimant before the board."

III. STATEMENT OF NEED

The need to adopt the proposed Minnesota Rule Part 7190.0020 arises from the need for the claimant to receive reasonable compensation for the economic losses suffered as a result of property damage caused by hazardous substances. Minnesota Statutes sections 115B.34 and 115B.36 limit the amounts a claimant may receive for various losses. Unlike a court, the board cannot award a claimant punitive damages; no noneconomic losses are compensable. The selected economic losses for which the board can award compensation in the property damage area include actual costs of an uncontaminated water supply and 75% of the decline in a home's value demonstrated upon a bona fide sale of the property. Each of these losses is further capped by statute at \$25,000.

To assure that the claimant benefits from any reimbursement for losses the Board awards and to assure that small claims are not discouraged, it is necessary to limit costs to the claimant for seeking the compensation. Since a claimant may not be reimbursed by the board for attorney fees, it is necessary to limit these costs to the claimant.

IV. STATEMENT OF REASONABLENESS

The proposed rule is reasonable because it recognizes that the administrative proceedings place less burden on the claimant and the attorney than similar court proceedings. The Board investigates the claim to establish eligibility and validity and must compensate if it is "more likely than not" that 1) the claimant suffered property damage causing losses, and 2) the losses resulted from a hazardous substance on the property due to its release from a facility. Since the burden on the attorney is significantly reduced, it is reasonable that the fee should also be reduced from the customary contingency fee of one-third of the award.

The Minnesota workers' compensation statute states: "A fee for legal services of 25 percent of the first \$4000 of compensation awarded to the employee and 20 percent of the next \$27,500 of compensation awarded to the employee is permissible..." [M.S. § 176.081, subd. 1(a)]. To represent a property damage claimant before the Board requires much less specialized knowledge and skill than to represent an injured worker in the more complex workers' compensation system. It is thus reasonable to set a fee limit of 15 percent of the award from the Board to property damage claimants.

Additionally, nationwide fees for attorneys in workers' compensation cases range from 10 percent (with \$100 maximum) to 25 percent with no dollar maximum. Several states allow 15 to 30 percent on the first \$300, \$500, or \$1000, then a smaller percent

on the excess.¹ The proposed 15 percent limit thus reasonably lies within the typical range within which attorney fees are limited by statute.

The other provisions of the proposed rule making the fee contingent upon the acceptance of the award and invalidating other agreements are reasonable because of their consistency with fee limitations in the workers' compensation system. Minnesota Rule Part 5220.2910 states: "No fee will be awarded unless the attorney is successful in obtaining workers' compensation benefits or services for the employee." Minnesota Statutes § 176.081, subd. 5(c) states: "No attorney-client fee contract or arrangement is binding in any workers' compensation matter."

V. CONCLUSION

Based on the foregoing, the proposed rules for attorney fees for property damage claims are both needed and reasonable.

Nov 2, 1987
Date

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¹ Arthur Larson, "Workmen's Compensation for Occupational Injuries and Death," Desk Edition, Vol. 2, page 15-132. Matthew Bender Publisher, 1986.