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RE: Biennial Review of Attorney Fees Under ORS 656.388(4)

Dear Board Members,

Thank you again for inviting comments on the board's biennial review of attorney fees. I offer a few additional comments based on developments that have occurred since my October 30, 2018 letter.

Christopher Taylor v. SAIF Corporation

On December 5, 2018, the Court of Appeals reversed and remanded the board's decision in *Christopher Taylor v. SAIF*. The court concluded that the board failed to adequately explain why it reduced the requested fee and substituted a substantially lower amount. The case exemplifies the problems with the current fee schedule and, particularly, the method of determining fees. The current rules lack transparency and the parties and the court have difficulty understanding how the board applies them to determine attorney fees. The board should review *Taylor* carefully when reviewing its method for awarding fees.

Proposed Rule by Board Member Steve Lanning

I want to commend Member Lanning for his efforts in solving the problem that the legislature identified in 2015. I especially appreciate his attempt to create a transparent and objective method of determining fair and reasonable attorney fees and increase access to justice for Oregon's workforce.

The proposed rule, which mandates consideration of a contingent multiplier based on defense counsel's rates, unquestionably moves the board in the correct direction. If the board considers adopting a contingent multiplier approach, I encourage the board to review an overview of how contingent fee-shifting works in federal agencies.¹

¹ The Longshore Reporter Staff has provided an excellent overview here:
<https://www.lexisnexis.com/legalnewsroom/workers-compensation/b/workers-compensation-law-blog/posts/longshore-act-reasonable-hourly-rate-determination-overview-of-recent-decisions>

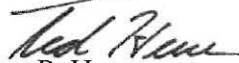
Some aspects of the proposed rule may be unclear or result in unintended consequences. For instance, the proposed rule should not be tied to defense counsel's "average hourly fee" in a particular case. That amount may fluctuate wildly between cases—such as cases involving in-house counsel or private counsel—can be manipulated by defense counsel in a particular case, and may not include staff time or exposure to litigation costs. A better metric is to focus on average attorney's fees, as described in the OSB 2017 Economic Survey, for all attorneys practicing in Oregon, regardless of specialty, and modified by future increases in the average weekly wage. This prevents rate-manipulation in a particular case or even field, and serves the legislature's ultimate goals of increasing economic incentives for younger lawyers to enter the field workers' compensation field and choose to represent Oregon workers.

Further, because the rule is coupled with the subjective factors listed under OAR 438-015-0010(4), I am concerned that the rule has no actual force of law, *i.e.* no teeth. The requirement that the board "consider" factors is not actually a substantive requirement at all, at least given the board's past practice of reciting the factors, making limited findings of fact, and then awarding an amount without any explanation. A rate-and-hour calculation should be the starting place, and allow consideration of subjective factors to increase or decrease that amount. This would allow meaningful appellate review of a decision if party disagrees.

Again, I greatly appreciate the board inviting comments, and I hope the board will take action to realize the legislature's goal of granting Oregon workers the broadest access to attorneys. As always, please let me know if you have any questions.

Sincerely,

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