Exhibit 4

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October 30, 2018

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

Dear Board Members,

Thank you inviting comments regarding the board's biennial review of attorney fees. I offer my comments from the perspective of one attorney who has spent the last fifteen years of his career representing workers, self-insured employers, and insurers.

Background

I specialize in Oregon workers' compensation. For more than 15 years I have represented workers, insurers, and self-insured employers. During law school, I worked as a law clerk for a small personal injury firm, which also handled workers' compensation matters. After law school, I worked as an associate attorney for a medium-sized workers' compensation defense firm, representing Oregon and Washington self-insured employers. I then spent the majority of my career as an appellate attorney for a small defense firm, representing Oregon self-insured employers and insurers before the board, the Oregon Court of Appeals, and the Oregon Supreme Court. I am now Of Counsel for Preston Bunnell, LLC, and represent injured workers before Oregon agencies, federal agencies under the Longshore and Harbor Workers Compensation Act and Defense Base Act, and in state and federal court.

The 2015 Statutory Changes

As the board is aware, the legislature intended HB 2764 to increase the number of attorneys representing workers. The bill's sponsors' testimony makes that intent clear. The legislature codified that intent, formally making Chapter 656's objective to "provid[e] for access to adequate representation for injured workers." ORS 656.012(2)(b). The legislature's intent is also reflected in ORS 656.388(5), which requires the board to consider "the necessity of allowing the broadest access to attorneys by injured workers." Those statements are not ambiguous. Thus, HB 2764 intended to increase fees earned by claimants' attorneys and make those fees available in a wider variety of disputes.

The legislature chose attorney fees as the mechanism to implement its intent. The legislature intended to accomplish two things: eliminate the gap between defense fees and claimants' fees

and make the practice of workers compensation competitive with other areas of law. The legislature codified the former goal by requiring the board to "give consideration to fees earned by attorneys for insurers and self-insured employers." ORS 656.388(5). The latter goal is clear from the legislative history and testimony. By making workers' compensation more lucrative, the legislature expected the number of attorneys practicing Oregon workers compensation law would increase, and workers would then benefit by having access to a broader selection of attorneys.

The goal of HB 2764 was to make representing workers not only as lucrative as representing insurers and self-insured employers, but to make representing workers economically attractive when compared to other similar fields of law.

Implementation of HB 2764

The board has taken some steps to implement the goal of HB 2764. In 2016, it increased rule-based caps on fees claimants' attorneys received from settlements, and increased fees in permanent disability disputes and in own motion cases. The board also now allows consideration of legal staff time when determining a reasonable fee.

Despite those efforts, problems persist. The most recent statistics from the Workers' Compensation Division demonstrate that legal defense costs have risen from $26.5 million in 2015 to $40 million in 2017, a 9.6% increase over the 2015 data. In contrast, claimant's attorneys' fees rose from 22.3 million in 2015 to 23.3 million in 2017, a 4.4% increase. This data shows the gap between claimant's fee and defense fees continues to widen.

In addition, the board has issued several decisions that resist making the system more economically equal. For example, since HB 2764, the board has declined to award fees for failing to submit a respondent's brief (*Craig Schommer*, 68 Van Natta 1856 (2016), *rev'd*, 294 Or App 147 (2018)), awarded a contingent fee at a rate less than an attorney's non-contingent rate (*Christopher Taylor*, 68 Van Natta 1109 (2016)), awarded a contingent fee of $2,500 for 33.1 hours of work, an effective rate of $75.53/hr (*Jorge Rodriguez*, 70 Van Natta 418 (2018)), and reduced by 60% a requested fee in a case requiring an appeal to prevail (*Karista Peabody*, 69 Van Natta 1579 (2017)).

The board has also, without explanation, reduced fees awarded by Administrative Law Judges for services at hearing. *Glady Sosa-Shirley,* 69 Van Natta 1790 (2017); *Tressa J. Anderson,* 69 Van Natta 587, 591-92 (2017); *Cory L. Krauss,* 68 Van Natta 190 (2016).

The board has also determined that temporary disability awarded in reconsideration proceedings under ORS 656.268 does not allow for an attorney fees under ORS 656.383, despite ORS 656.383 expressly referring to ORS 656.268. *Mekayla Dancingbear,* 70 Van Natta 550 (2018).

Fees for representing workers also do not compare to attorney fees in similar fields. According to the Oregon State Bar's 2017 Economic Survey, based on 2016 data, fees for representing workers continue to languish behind those other fields. For instance, Portland area personal injury attorneys bill between $250 and $450 per hour, with the mean and median rates of $317 and $300. Likewise, Portland area criminal defense attorneys bill between $200 and $485 per hour, with the mean and median rate of $300. Other non-injury related fields are higher.

In contrast, workers' compensation attorneys bill between $175 and $450, with mean and median rates of $231 and $195. On average, that is nearly $100 per hour lower than the *non-contingent* rates in other fields.

These figures persist even in the context of decreasing workers' compensation premiums; that is, employers have been paying less into the workers' compensation system each of the past six years, while claimants' attorneys have seen virtually no increase. See Workers' Compensation Cost Summary: Effective January 1, 2019 < https://www.oregon.gov/DCBS/cost/Documents/wc-summary.pdf>.

The above actions suggest that the board is resistant to the legislature's intent in enacting HB 2764. Instead of increasing fees, the board has largely maintained the status quo. The board should work to further the legislature's goal of making workers' compensation practice more lucrative and economically attractive to attorneys representing workers; instead, the board is frustrating that purpose.

Proposed Solutions

The ongoing depression of fees for representing workers is largely the responsibility of the board. The statute requires the board to approve fees for legal services performed before it and fees taken from settlements. The board has given itself the authority to determine the amount of those fees, by rule and by agency fiat. The solution to the problem could be as simple as increasing fees awarded until claimant's attorneys are able to hire staff and retain young associates.

Of course, another solution is to formally revise OAR Chapter 438 Division 015, the rules governing attorney fees. Specifically, the board should change the rules to 1) allow consideration of a reasonable *contingent* hourly rate for a prevailing workers' attorney, 2) require consideration of fees earned by defense counsel when determining a reasonable fee, 3) allow voluntary bifurcation of attorney fee determinations and 4) ensure that an established schedule of fees for defense attorneys is commensurate with the schedule governing fees for attorneys representing workers.

Consideration of a Reasonable Contingent Hourly Rate

There exists a lack of consistency and accountability when awarding attorney fees, both at the hearing level and on board review. The board rules allow this inconsistency to persist because a "reasonable" fee under OAR 438-015-0010(4) is largely subjective and arbitrary. For decades, the board has repeatedly struggled to explain why any particular factor results in an increase or reduction of a particular requested fee. *Compare Schoch v. Leupold & Stevens*, 325 Or 112, 119, 934 P2d 410 (1997); *Wal-Mart Assocs. v. Lamb*, 278 Or App 622 (2016).

The solution is to allow attorneys representing workers to request fees be determined by a "lodestar" analysis. If the analysis begins by multiplying time by rate, then the starting point is a real number supported by facts. Subjective factors, such as experience, frivolity, value of the interests, *etc.* can be argued and determined under one category or the other.

For example, if an experienced attorney spends 30 hours on a case, that fact can be reflected in the hourly rate. Or, if frivolous defenses must be addressed, that can reflected in the hours spent. Conversely, if frivolous issues are tried and lost, that could justify reduction in the hours spent. In either case, the rule would allow a reasoned analysis and explanation for the fee determined, rather than an arbitrary and capricious result.

Thus, I suggest changing OAR 438-015-0010(4) to read:

> In any case where an Administrative Law Judge or the Board is required to determine a reasonable attorney fee, **the time devoted to the case for legal services and a reasonable hourly rate shall be considered. When considering the time devoted to the case and a reasonable hourly rate, the board may consider:**
>
> (a) The complexity of the issue(s) involved;
>
> (b) The value of the interest involved;
>
> (c) The skill of the attorneys;
>
> (d) The nature of the proceedings;
>
> (e) The benefit secured for the represented party;
>
> (f) The risk in a particular case that an attorney's efforts may go uncompensated and the contingent nature of the practice; and
>
> (g) The assertion of frivolous issues or defenses.

Consideration of Defense Fees

As noted, ORS 656.388(5) was amended to require the board to consider "fees earned by attorneys for insurers and self-insured employers." To this end, the board should adopt rules that not only allows consideration fees earned or billed in a particular case, but also allows for that information to be discoverable upon request.

Thus, I suggest changing OAR 438-015-0010(4) to read:

> 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 risk in a particular case that an attorney's efforts may go uncompensated and the contingent nature of the practice; and

(h) The assertion of frivolous issues or defenses; **and**

(i) The amount of fees earned by attorneys representing the insurer or self-insured employer.

Not only would this rule track with the express language of the statute, but would provide additional information about the amount of a "reasonable fee" in any particular case. As discussed below, defense fees are controlled by market forces, and knowing the amount of fees earned by defense in a particular case may be relevant to determine a reasonable fee award in that case.

Voluntary Bifurcation

The absence of objective explanations for fee awards feeds suspicion that fee determinations may be politically influenced. The statute requiring two board members to have a "background and understanding as to the concerns of [the other side]" bolsters such concerns. The board's current procedure allows speculation that "horse trading" occurs regularly, *i.e.* pragmatic negotiations conflating the merits of a case with the amount or entitlement to an attorney fee.

Real or imagined, the board should work hard to avoid the appearance of politicization and strive for transparency and consistency. All stakeholders and board members should agree that political concerns have no role in determining the merits of a case or the amount of a reasonable attorney fee, and that effort should be taken to effectively minimize any perceived political interference.

In 2016, Julene Quinn, a member of the claimants' bar and appellate specialist, proposed a voluntary process for bifurcating the merits of a case and the issue of attorney fees. I supported the suggestion then, and I would like the board to reconsider adopting that approach now. Such a process would be efficient, effectively increase transparency, and minimize suspicions of politicization.

My August 1, 2016 illustrates how bifurcation could work and how it complies with the statutory scheme, and I encourage the board to review the August 2016 letter. (See attached.) Consistent with that explanation, I suggest a new rule:

OAR 438-015-0120: Voluntary Bifurcation of Attorney Fee Dispute

1) Prior to an order, in any case in which attorney fee may be authorized, claimant may move to bifurcate the determination of the amount of an attorney fee from the underlying issues in the case. The Administrative Law Judge or Board shall grant the motion and shall consider the amount of the fee only after the order addressing the underlying issues becomes final.

2) If claimant moves for bifurcation, and is entitled to an attorney fee under ORS 656.262, 656.386, 656.382, 656.383, or 656.388, the Administrative Law Judge or Board shall award an attorney fee in the order addressing the underlying issues without determining the specific amount of the fee. When entitlement to an attorney fee is contingent upon another event, the award of attorney fees may be conditioned upon that event.

3) If an order under section (2) does not specify the amount of a reasonable attorney fee, claimant may submit to the insurer, no later than 14 days after the order under section (2) becomes final, a request for a specific fee amount. The request shall be copied to the Administrative Law Judge or Board. If no request is submitted timely, the Administrative Law Judge or Board shall issue a separate appealable order determining the amount of a reasonable attorney fee within 28 days of the underlying order becoming final.

4) Within 14 days of a request for a specific fee, the parties may stipulate to a specific fee amount. The stipulation shall be filed with the Administrative Law Judge or Board, who shall approve the stipulation within 14 days of receipt and shall order payment of the stipulated fee amount within 14 days of approval. If insurer objects to the amount requested, insurer must file a request for an expedited hearing under ORS 656.291(2)(b) within 14 days of receiving the request for a specific fee. The resolution of disputes under this section shall be made by a final, appealable order.

5) Unless the parties stipulate to a specific fee amount or the insurer timely requests a hearing under section (4), the Administrative Law Judge or Board shall issue an order awarding the amount specified in claimant's request for a specific fee.

6) If the insurer requests a hearing under section (4), and the Administrative Law Judge or Board does not award less than the amount requested, the Administrative Law Judge or the Board shall award a reasonable assessed attorney fee to the claimant's attorney under ORS 656.382(3) in addition to the amount requested.

Schedule of Fees For Defense Attorneys

Finally, ORS 656.388(4) expressly provides, "The board *shall*, after consultation with the Board of Governors of the Oregon State Bar, establish a schedule of fees for attorneys representing a worker and *representing an insurer or self-insured employer*, under this chapter. The Workers' Compensation Board shall review *all attorney fee schedules* biennially for adjustment." (Emphasis added).

In May 2018, I requested copies of the board's administrative records pertaining to ORS 656.388. Upon reviewing the materials generously providing, I was unable to locate any discussion or adoption of rules governing "a schedule of fees for attorneys * * * representing an insurer or self-insured employer." The reasons for this are unclear from the records.

Market forces are an important contributor to the gap between defense fees and fees for representing injured workers. Insurers and self-insurer employers must offer attorney fees and terms sufficient to attract attorneys from other practices in order to represent them. By and large, the legal services market controls and sets the fees paid to defense attorneys. Distortions in supply and demand are quickly cured via normal market correction.

In contrast, attorneys representing injured workers cannot negotiate in the market and injured workers cannot use market forces to maintain a large and diverse pool of attorneys to draw from. The board entirely controls and highly regulates attorney's fees for representing workers without any influence from market forces. As far as I am aware, the Board does not control or regulate defense attorney fees in a similar manner. Not only does this lead to the continued gap between the fees, but it leads to the Board having no information about the amount of defense fees charged in a particular case, the actual amounts negotiated, or the types of costs reimbursed, all of which could be relevant to determine a "reasonable" fee in that case.

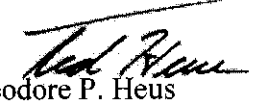
Given the mandatory language in the statute, and a known $17 million difference between defense fees and claimant's fees, the board should identify what rules establish a schedule of fees for defense attorneys and how that schedule mirrors or differs from the schedule of fees established for attorneys representing injured workers.

In sum, I genuinely appreciate the board review attorney fees. However, I want to express my disappointment that, nearly three years after the statutory change, the status quo has not changed. It is necessary that the board take action in order to preserve the claimants' bar that exists and in order to grow it for the next generation; *i.e.*, the mandate it was given by the legislature.

As always, please let me know if you have any questions.

Sincerely,

PRESTON BUNNELL, LLP



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August 1, 2016

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RE: August 2, 2016 WCB Public Meeting
Voluntary Attorney Fee Bifurcation Process

Dear Board Members,

Thank you for giving me notice of the August 2, 2016 board meeting. I do plan to attend the meeting, but I do not anticipate giving testimony unless asked to do so. As such, I wanted to offer a brief letter of support for Julene Quinn's suggested voluntary process for bifurcating the issue of the amount of an attorney fee from the underlying merits of a case. I support the suggestion because it is orderly, efficient, and should not dramatically alter the current process.

A statutory change is not necessary to implement a new process and I do not believe a voluntary process will significantly increase the work load for ALJs or the Board. For instance, the Board currently has authority to award costs to a prevailing claimant in the same manner, and under the same statutory authority, as attorney fees in cases involving a denial. ORS 656.386(1), (2). The Board's rules implementing the statute allow an ALJ or the Board to determine the entitlement to costs, but defer a ruling on the amount.

The Oregon Court of Appeals' fee process also provides a good example. The court does not award a fee contemporaneously with its opinion in a worker's compensation case. Rather, the court requires claimant's attorney to file an attorney fee petition within 21 days of the court's decision. ORAP 3.10(2). This effectively bifurcates the fee issue from the merits, as no petition is filed if a claimant does not prevail. Notably, the court's authority to award a fee in workers' compensation appeals derives from the same statute, and uses the same language, authorizing a fee before the Board. ORs 656.386(1).

A counter argument may be that costs are generally capped at $1,500, an insignificant amount in most cases, whereas fees are generally more significant. Thus, fees would be more regularly contested than costs. This probably somewhat true, as cost are almost *never* contested unless they exceed $1,500. However, such concerns are likely overblown. In areas of law in which fees are substantially higher than Oregon workers' compensation, such as federal longshore cases, the parties routinely agree on a stipulated attorney fee amounts without having to invoke a formal dispute resolution process. There is no reason the same result cannot be achieved in Oregon.

If the claimant choses bifurcation — likely in more complex or time consuming cases in which a statement of services needs to be prepared — the initial decision on the merits can award an entitlement to fees, just as current orders award an entitlement to costs. The claimant can then submit a statement of services and proposed fee to the insurer and the matter can be resolved by agreement approved by the Board. If parties cannot resolve the amount by agreement, the matter can be heard on the limited issue of the amount of a reasonable fee.

This bifurcated process has been adopted in the majority of state jurisdictions nationally, and in most federal cases involving similar fee shifting statutes. In June 2016, the Workers' Injury Law & Advocacy Group surveyed 44 state jurisdictions[1] on how they determine workers' compensation attorney fees amounts in relation to the merits of the case. (See attached). In only 18 states, workers' compensation forums determine the amount of an attorney fee at the same time as the underlying merits. In addition to the study, I spoke with attorneys in Idaho and Alaska, who confirmed their respective forums do not generally decide the amount of fees at the time of the merits.[2] Finally, most federal jurisdictions bifurcate the fee process from the merits of the case, and rely heavily on parties' ability to resolve the amount of a fee without a formal proceeding being necessary.

The above survey shows that some type of bifurcated process is greatly preferred by the majority of jurisdictions, state and federal. But the most important factor is that a voluntary bifurcated process is more, not less, efficient. It takes time, money, and effort to keep time and prepare bills or statements of services in complex cases. Preparing statements or bills in complex cases can take several hours. That is true whether you are a defense attorney or claimant's attorney. It is only worth that effort in any given case if you are sending a bill that will be paid. Defense attorneys do not prepare bills that their clients are bound to pay only if they win. Likewise, allowing claimant's attorneys to prepare and submit statements only in cases in which they will get paid saves effort and time, and does so without shifting that burden to others.

Finally, I would like to add that I have discussed the concept in detail with John Oswald, a very experienced claimant's attorney, who also has expressed willingness to use a bifurcated process in more complex cases. If the number of claimant's attorneys who support the concept matter, then he and I should be added to Ms. Quinn's list of people who would find a voluntary bifurcated fee process useful.

As always, please let me know if you have any questions.

Sincerely,

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[1] Data was not received regarding Alaska, Idaho, North Dakota, Tennessee, Utah, or the District of Columbia.

[2] For example, in Idaho, fees are capped at 25% of compensation awarded. Thus, the merits of a case, such as amount of temporary disability or permanent impairment, may impact the amount of a fee, the issues are not decided separately by a judge contemporaneously.