

**Workers' Compensation Board**  
**Tuesday, November 17, 2015**  
**10:00 a.m.**

Meeting Minutes

Present: Holly Somers, Chair  
Sally Curey, Member  
Judy Johnson, Member  
Steve Lanning, Member  
Margaret Weddell, Member  
Roger Pearson, Managing Attorney  
Joy Dougherty, Presiding ALJ  
Karen Burton, Executive Assistant  
Autumn Blake, Administrative Staff  
Greig Lowell, WCB Project Manager  
Terry Bello, Administrative Services Division Manager  
Debra Young, Staff Attorney  
Chris Moore, Attorney at Law  
Ted Heus, Attorney at Law  
Sheri Sundstrom, Hoffman Construction  
Betsy Earls, AOI  
Julene Quinn, Attorney at Law  
Alec Shebiel, NCCI  
Chad Kosieracki, Attorney at Law  
Jaye Fraser, SAIF  
Julie Masters, SAIF  
Mike Manley, DCBS Information Technology & Research

**Call to Order**

Chair Somers called the meeting to order.

**Approval of Agenda and Order of Business**

Member Curey moved for approval of the agenda. Member Johnson seconded. Motion carried. Chair Somers requested that the agenda be allowed to deviate in order to hear public comment during discussion of the agenda items.

**Approval of Past Minutes**

Member Johnson moved for approval of the September 29, 2015 meeting minutes. Member Curey seconded. Motion carried.

## **Reports of Administrative Staff**

Hearings Division: No report.

Board Review: No report.

Administrative Services Division: Bello reported on the following:

**Eugene office.** The office update has been completed. The property owner paid for the replacement of the carpet and new paint as part of the lease renewal. Thanks to OSHA for allowing the use of their training room for hearings to avoid any interruption of service.

**Portland office.** In the early stages of the move. Expected to move in early 2016.

**Salem fleet car.** Two weeks ago a fire of unknown origins destroyed the fleet car. A replacement was provided by DAS the same day. OSP is investigating the incident.

**Phone system.** DAS will be replacing the Board's phone system. The new phones will include features such as updated paging and conference call capabilities.

## **Unfinished Business**

None.

## **New Business**

**Discussion of "attorney-fee related" concepts from Attorneys [Julene Quinn](#) and [Christopher Moore](#), as well as "organizational" discussion for upcoming review of "out-of-compensation" attorney fee rules.**

[Ted Heus](#) sent a letter to the Board regarding the House Bill. Heus would be available for any questions regarding his submission.

Chair Somers invited Chris Moore to speak regarding his concepts. Moore explained that when the defense bar bills for their time they are able to take into account overhead costs such as work done by legal assistants, secretaries, and law clerks. However, a claimant's counsel's statement of service may only include work done by the attorney, which is not an accurate reflection of the overall time spent.

Heus relayed the history of the carriers' "client-paid" attorney fees. Paralegal time was treated as a cost and incorporated under the "reasonable rate."

Julene Quinn drew a parallel to other areas of civil law. Attorney fees broadly include paralegal or legal assistant time as well as other costs. She considers the current practice for workers' compensation to be the exception in civil law in narrowly defining attorney fees. By making this change, it would make workers' compensation more consistent with other practices.

Julie Masters stated that the area of workers' compensation law is administratively dissimilar to other areas of civil law. The statutes for workers' compensation attorney fees were developed out of concern for the proliferation of litigation. Time is only one of the factors considered in the fee that the ALJ or Board awards to an attorney in overturning a denial. If the forum moves towards an hourly rate structure, the entire way in which attorneys request fees would need to be redone. HB 2764 was adopted for access to justice by way of ensuring claimant's attorneys are properly compensated. SAIF Corporation is not in favor of making a rule to allow hourly billing for legal assistant time. Masters concluded by saying that spending more time on fees and arguing about fees does not lend itself to a good practice to benefit workers.

Quinn responded that the expectation that an attorney work without compensation is troubling. Reasonable does not mean that they are paid for only part of their work. The legislation recognized the inequity between defense counsel and the claimant's bar, and is intended to raise fees to close the gap. Costs to defense do not come out of attorney fees, whereas claimant costs do when cases are lost. Anecdotal numbers for fees will not be beneficial; the fees need to be studied.

Member Curey noted that out-of-house counsel is being paid by the carrier on a flat-fee basis. She stated that because there are many different ways carriers' attorneys are paid, one would not be able to definitively determine fees.

Sheri Sundstrom shared her experience as a representative of the Oregon Self-Insurers Association. As a small company with fewer claims they are not able to negotiate a low hourly rate. Self-insurers do not pay more than \$200 per hour, and higher fees are provided at the appellate level.

Chair Somers said that there are many ways to look at the attorney fee issue, including from the perspective of access to justice.

Chad Kosieracki, an attorney representing employers, shared that the nature of the entire practice is contingent. Therefore, attorneys are being paid for things they have done as well as those they have not. Claimants do not have the ability to negotiate fees, whereas employers and carriers do. The best claimant's attorney is essentially paid the same as the worst claimant's attorney. There are some defense attorneys who bill the maximum allowable to their client.

Chair Somers asked the Members for input on the next steps, with options including moving forward, sending to an advisory committee, or tabling the issue and looking at possible case law.

Member Johnson suggested that it be tabled at least until the end of the meeting in order to discuss the remaining issue of “out-of-compensation” attorney fees as it could also impact the other concepts. Member Curey concurred.

Moore said that the contingent nature is not the same as the risk that the attorney will go uncompensated. Contingency is to compensate an attorney on lost cases. Fees between defense counsel and the claimant’s bar should end up being roughly equal. The statute does refer to contingency and it should also be expressly included in the administrative rules.

PALJ Dougherty pointed out that, in the last Board meeting, the Members had discussed adding language regarding the contingent nature of the practice. It was also discussed among the advisory committee. The advisory committee, however, did not make any recommendations, though they did specifically consider whether it should be included in OAR 438-015-0010(4) regarding factors.

Member Curey said that the Board needs to agree on what is meant by “schedule of fees” before adding contingency, such as the factors considered when assessing the entire fee. She then asked Moore how adding the contingency factor would change the way attorney fees are requested.

Moore responded that he would rely on the overall percentage that the claimant’s bar risks going uncompensated, specifically, the addition of “contingent nature” versus the risk of going uncompensated in only one particular case.

Chair Somers would like to take out OAR 438-015-0010(4)(g) entirely as she finds it unhelpful in assessing fees and insert contingent nature as an alternative.

Quinn would like to see contingency added as a factor as opposed to replacing the language regarding the risk of not being compensated so that it would make an effect on all attorney fees.

Chair Somers opined that “scheduled fees” are those that are scheduled with gradations and “assessed fees” are those which are separate in a particular case. She then invited Quinn to present her aforementioned concepts to the Board regarding awarded attorney fee payments.

Quinn stated that after an order is final and processed the fee must be paid, however, the Board has a rule that allows an extra 30 days for payment. Quinn does not see the legal reasoning for this rule. It makes more sense to pay attorney fees at the same time as claimant's award. This process already gives parties time to appeal and should also be applicable to payment.

Regarding the implementation of the "statement of service" rule, Quinn said that of the 20-plus attorneys she surveyed, approximately 25 percent said they would take advantage of this rule. They would not want it to be mandatory, but would find it helpful on a "case-by-case" basis.

Masters responded to the concept of timely payment of attorney fees and the optional "statement of service" rule as explained by Quinn. She stated that paying attorney fees on the day of or the day after the order is final is not possible; however, SAIF is willing to coordinate attorney fee payments with those of other payments. SAIF is not in favor of a separate process in determining attorney fees.

Pearson pointed out that the Board's Own Motion rules provide that temporary disability be paid within 14 days of a Board order. Permanent disability must be paid within 30 days of a final Board order. These are both based on WCD's rules.

Chair Somers proposed that an advisory committee be put together to look at the concepts regarding adding the language "contingent nature of the practice" in assessing attorney fees, if the attorney's hourly rate should include staff time, a "statement of service" rule in more complicated cases, and paying attorney fees at the same time as other compensation.

Member Weddell moved that Moore's concept considering the work of legal assistants in assessing attorney fees be sent to the advisory committee. Member Lanning seconded. All in favor: Curey, Lanning, Weddell, Johnson and Somers.

Member Weddell moved that Moore's concept of amending OAR 438-015-0010(4)(g) to reflect the consideration of the contingent nature of the practice be sent to the advisory committee. Member Johnson seconded. All in favor: Curey, Lanning, Weddell, Johnson, and Somers.

Member Weddell moved that Quinn's concept regarding when an assessed attorney fee must be paid be sent to the advisory committee. Member Lanning seconded. All in favor: Curey, Lanning, Weddell, Johnson, and Somers.

Member Weddell moved that the Board refer Quinn's concept regarding changing the process of determining an attorney fee to the advisory committee. Member Lanning seconded. All in favor: Johnson, Lanning, and Weddell. Opposed: Curey and Somers.

Member Curey moved that Member Johnson's concept to reevaluate the caps on "out-of-compensation" fees be sent to the advisory committee. Also, that they evaluate the possible amendment of OAR 438-015-0010(4) to make the language consistent with the statute in reference to the "proportionate benefit to the worker." Member Johnson seconded. All in favor: Curey, Lanning, Weddell, Johnson, and Somers.

**Public Comment**

As above.

**Announcements**

None.

**Adjournment**

There being no further business, the meeting adjourned.