

Workers' Compensation Board
Tuesday, August 2, 2016
9:30 a.m.

Meeting Minutes

Present: Holly Somers, Chair
Sally Curey, Member
Judy Johnson, Member
Steve Lanning, Member
Margaret Weddell, Member
Joy Dougherty, Presiding ALJ
Monte Marshall, Assistant Presiding ALJ
Roger Pearson, Managing Attorney
Debra Young, Staff Attorney
Terry Bello, Administrative Services Division Manager
Greig Lowell, Project Manager
Karen Burton, Executive Assistant
Jay Dotter, DCBS Information Technology & Research
Jennifer Flood, Ombudsman for Injured Workers
Betsy Earls, AOI
Carrie Wipplinger, Liberty Mutual
Alec Shebiel, NCCI
David Barenberg, Sabas Strategies
Jaye Fraser, SAIF
Julie Masters, SAIF
Martin Alvey, Attorney
Kevin Anderson, Attorney
Robert Carlson, Attorney
Aaron Clingerman, Attorney
James Dodge, Attorney
Randy Elmer, Attorney
Matthew Fisher, Attorney
Christine Frost, Attorney
Colin Hackett, Attorney
Ted Heus, Attorney
Katie McDowell
Christopher Moore, Attorney
Liz Miller
Julene Quinn, Attorney
Keith Semple, Attorney
Jeffery Thayer, Attorney

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 Lanning seconded. Motion carried.

Approval of Past Minutes

Member Curey moved for approval of the May 17, 2016 meeting minutes. Member Lanning seconded. Motion carried.

Reports of Administrative Staff

Administrative Services Division: Bello reported that new phones are being installed in all offices throughout the state and the Medford office is scheduled to transition to the new phone system today.

Hearings Division: No report.

Board Review: No report.

Unfinished Business

None.

New Business

Consideration of the [advisory committee report](#) concerning attorney fee-related administrative rule concepts regarding Division 015 (Attorney Fees) as well as the Board's biennial review of attorney fee schedules under ORS 656.388(4), including discussion of proposed rule amendments in response to the committee's report and the scheduling of a future rulemaking hearing regarding any proposed rule amendments.

Chair Somers acknowledged the advisory committee members for taking time away from their busy schedules to meet and the work they put into the report. Discussion of the advisory committee's report was addressed by each item as follows.

Item One: OAR 438-015-0040 and OAR 438-015-0055. Member Curey moved that the Board move forward with the advisory committee's recommendation. Member Lanning seconded. All in favor: Curey, Lanning, Johnson, Weddell, and Somers.

Item Two: OAR 438-015-0050 and OAR 438-015-0055(2). Matthew Fisher reported that the committee discussed raising the soft cap to \$50,000. Martin Alvey noted that the committee did not discuss the "extraordinary circumstances" provision. Member Curey moved that the Board move forward with the advisory committee's recommendation. Member Lanning seconded. All in favor: Curey, Lanning, Johnson, Weddell, and Somers.

Item Three: OAR 438-015-0080. Member Curey moved that the Board move forward with the advisory committee's recommendation. Member Lanning seconded. All in favor: Curey, Lanning, Johnson, Weddell and Somers.

Item Four: OAR 438-015-0055(5); OAR 438-015-0095; OAR 438-015-0025. Member Curey moved that the Board accept the advisory committee's recommendation to make no changes. Member Lanning seconded. All in favor: Curey, Lanning, Johnson, Weddell, and Somers.

Item Five: Legal Assistant Time. Sympathetic to why the Advisory Committee was unable to come to a consensus, Member Curey said the statute speaks only to legal services provided by an attorney, not a legal assistant. Accordingly, she believed that the Board would have to redefine what legal services entailed.

Martin Alvey noted that the advisory committee members from the claimant's bar favored including legal assistant time, because the defense bar includes it in their fees.

Matthew Fisher questioned whether it would be appropriate to level the playing field for claimant's bar at this time, because it is becoming more prevalent for clients of the defense bar not to pay for legal assistant time.

Carrie Wipplinger indicated that for Liberty Mutual, paralegals bill their time, but legal assistants do not.

Julene Quinn did not interpret the statute to pertain only to an attorney's legal service time. She believed attorney fees would include a legal assistant's time.

Member Johnson relayed that while in private practice her clients understood they would be billed for paralegal work, but not legal assistant time. She believed clerical work is included in overhead.

Julie Masters indicated that SAIF provides a statement of their overall legal costs to the Director, but did not believe it breaks out hours for legal assistants. Also, she relayed that SAIF's attorneys do not bill, but rather, the amount is broken out per case.

Chair Somers said that to add legal assistant time as a factor would need to specify what shall be considered, as well as defining legal assistant versus paralegal services. She was uncertain whether such matters belonged in a rule.

Member Curey agreed with Chair Somers. She was not comfortable saying that legal assistants' time should be considered, but did believe that paralegal time should be considered as "legal" time.

Chair Somers questioned whether "overhead" is considered in the contingent nature of the practice.

Keith Semple noted, as an example, his legal assistants do a lot of work in auditing time loss issues which takes a large amount of time to collect records from employers, etc., which requires skilled work. He envisioned that practitioners would have to be very specific about what they did and who was doing it in order for the Board to give any weight to that factor, rather than recording the time as overhead.

Chris Moore said the administrative rules now require that whomever is determining the fee, consider the time. The rules do not specify "by the attorney." He thought it might be useful in some instances to break out the difference between the attorney time and the paralegal time to provide a different objective measure to consider in determining an attorney fee. If it would be useful for the Board to have that information, it should be set forth in the rules. If not, then the request for attorney fees will need to include that analysis.

Julie Masters suggested language such as "time devoted to a case may include paralegal time," as a factor the Board may consider.

Jim Dodge stated that he does not include paralegal time in his billings.

Chris Moore most likely would not change his billing methods in keeping track of paralegal/legal assistant time. Instead, when estimating his time, and if the paralegal has spent time on the case, he would include it in the estimate.

Randy Elmer would purchase software to track billable hours for his legal staff if the rule were to be amended to allow such time.

Chair Somers would be in favor of adding language about the time devoted to the case for legal services. However, whether that would require an amendment to 0005(4) was unclear. She would prefer a more general term like “legal services” instead of the specificity of “paralegal” or “legal assistant.”

Member Weddell favored amending the language in 0010(4)(a) to “time devoted to case for legal services,” rather than determining what the various firms would define as legal assistant versus paralegal time.

Member Johnson supported both positions above.

Member Curey concurred, but hoped that fee statements made a distinction between attorney and legal staff time.

Member Lanning also supported.

Member Johnson moved that the Board move forward with proposed rulemaking concerning the definition of “attorney fee” in 0005(4) and the “time devoted” factor in 0010(4)(a) to include the consideration of “legal services” when determining a reasonable attorney fee. Member Curey seconded. All in favor: Johnson, Curey, Weddell, Lanning, and Somers.

Item Six: Contingent Nature of the Practice. Julie Masters explained that the advisory committee recommended including “the contingent nature of the practice” in subsection (g) and not listing it as a separate factor due to the Board’s decision in *Krause*, because if it were a separate factor, it would be given additional weight and that was not what all committee members agreed to.

Julene Quinn concurred with where the language is placed, but disagreed that it was added by the legislature to be innocuous. She believed it was a message that “the contingent nature of the practice” had not been considered, and needed to be examined further.

Member Curey moved that the Board move forward with the advisory committee’s recommendation. Member Johnson seconded. All in favor: Curey, Johnson, Weddell, Lanning, and Somers.

Item Seven: OAR 438-015-0082(2). Member Johnson moved that the Board move forward with the advisory committee’s recommendation. Member Lanning seconded. All in favor: Johnson, Lanning, Curey, Weddell, and Somers.

Item Eight: Bifurcating Attorney Fees. Julene Quinn explained that her concept is similar to cost bills, where claimant submits a bill, and, if a carrier objects, the ALJ makes a determination.

Ted Heus explained his views about the concept and reported that the a survey done by one of the national injured workers' associations reflected 14 states make a determination on both issues at the same time, but the vast majority of states do not. Accordingly, he did not believe there would be a legal barrier to a "cost bill-related" system.

Carrie Wipplinger did not think the defense bar should be placed in the default position of when an attorney fee is submitted by claimant and, unless defense counsel opposes, WCB would be bound to approve. She believed ALJs should have the discretion to award a fee, and she has attended hearings where a claimant's counsel had asked the ALJ for 7 days to prepare a fee statement, and defense counsel then had a chance to respond, which is a good alternative to the bifurcation concept.

Colin Hackett keeps his hours contemporaneously and files fee statements with an itemized explanation of time spent. He said it takes a minimum of 4 hours to compile a statement of services, which is a large amount of time expended if he does not prevail in the Opinion and Order. If the Board were to implement such a system, it would encourage claimants' attorneys to invest more time in detailing their hours which would also provide ALJs with more evidence/argument in determining attorney fee awards.

Julie Masters considered the cost bill procedure as potentially the only legal way to implement the process. If the Board were to move forward with the concept, SAIF would seek the opportunity to bring forward a number of factors for it to consider.

Keith Semple believed that the cost bill procedure was the most reasonable process, and would probably be used only in the more complex cases and in those requests for higher attorney fees.

Chris Frost felt it should be voluntary process, as well as a simple procedure.

Terry Bello explained the WCB staff's administrative process, and that separate procedures would require the assignment of a separate WCB case number, which would involve retooling and reprogramming of the data base system.

Member Curey did not believe WCB needed to institute a process to make it work if the parties could negotiate before compiling a statement of services. If the concept were implemented, it would increase the ALJs' caseload and WCB staff time, so she was hesitant to support it.

Dougherty commented that there currently is nothing preventing parties from bifurcating cases now, but it did open the door for new evidence being presented in that case, since it would be a separate case with its own requirements of notice and hearing.

Member Lanning did not support moving the concept forward.

Absent a motion, the Board took no action.

Item Nine: Automatic Escalator. Member Curey was not supportive of moving the concept forward. Member Lanning was unable to support. Member Johnson felt it was appropriate to defer action at this time.

Absent a motion, the Board took no action.

Public Comment

As above.

Announcements

None.

Adjournment

There being no further business, the meeting adjourned.