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Workers' Compensation Board
2601 25th St. SE, Ste 150
Salem, OR 97302-1280

RE: HB 2764 Statutory Changes and OAR 438 Rule Changes

Dear Board Members,

I understand that the board will undertake formal rulemaking to implement the statutory amendments enacted under House Bill 2764, amending the attorney's fee provisions for attorneys representing injured workers. I have reviewed the September 23, 2015 Advisory Committee's Memorandum, letters from Julene Quinn and Christopher Moore, and the Board's prior meeting minutes. I wish to offer some additional perspective.

By way of brief background, I have been in the workers' compensation field for more than a decade. 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, which represented 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 before Board, the Court of Appeals, and the Oregon Supreme Court. I am now Of Counsel for Preston Bunnell, LLP, a boutique plaintiff's firm, and represent injured workers in Oregon workers' compensation claims and federal Longshore and Harbor Workers' Compensation Act claims.

With that background and experience, I offer some observations regarding the statutory amendments and proposed rule changes:

Reasonable Fees Beyond the Oregon Workers' Compensation System

At the outset, I want to offer a broader perspective, beyond the Oregon workers' compensation system. Many federal fee shifting statutes¹ award a "reasonable fee" to a prevailing plaintiff or claimant. *See, e.g.*, 33 U.S.C. § 928(a) (in longshore cases, providing for "a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court * * *"). Under federal law, "a 'reasonable' fee is a fee that is sufficient to induce a capable

¹ Although I cite longshore statutes, regulations, and case law, I do so only because I am familiar with those citations. However, all federal fee-shifting statutes are interpreted consistently. *Christensen v. Stevedoring Services of America*, 557 P.3d 1049, 1052 (9th Cir. 2009) ("The definition of a 'reasonable attorney's fee' pursuant to § 928(a) has evolved toward the definition of 'reasonable' used in all federal fee-shifting statutes.").

attorney to undertake the representation of a meritorious [federal] case.” *See Perdue v. Kenny*, 559 US 542, 552 (2010). Federal case law has interpreted “reasonable” to mean a lodestar formula, calculated by multiplying a “reasonable hourly rate” by the “reasonable hours” spent on the case. *Id.* Modifications for experience, complexity, frivolity, delay, partially prevailing, *etc.* are incorporated into the lodestar framework by increasing or decreasing the requested rate or hours reported.

The relationship of federal fee-shifting statutes to Oregon workers’ compensation fee-shifting statutes should be clear: both are workers compensation statutes, both provide for a contingent “reasonable fee,” and both serve purpose of attracting competent counsel to meritorious cases. Certainly, fees for state cases should not be less; rather, reasonable fees in Oregon should be — absent persuasive reasons otherwise — commensurate with other forums that award fees under similar fee-shifting statutes. But they are not.

As evidence of the disparity, the Benefits Review Board — the federal equivalent of the Oregon Workers’ Compensation Board — expressly *excludes* consideration of Oregon workers’ compensation fees when determining a “reasonable” fee under federal statutes. Why? Because “lawyers who litigate for insurers and workers’ compensation tend to show lower hourly rates [in Oregon].” *Christensen v. Stevedoring Services of America*, 44 BRBS 39 (BRB) (2010). The statement means that attorney’s fees in Oregon are not evidence of a reasonable fee for longshore attorneys in Oregon, *because they are not reasonable*. Instead, the federal system finds general plaintiff’s civil litigation fees more relevant to determining fees in longshore cases. *Id.*

This published statement by a federal appellate body should be — if not offensive — eye-opening to the Board. Perhaps there is good reason for a significant disparity between longshore fees and Oregon workers’ compensation fees, but I am unaware of any.

A Reasonable Fee Includes Staff Time

Defense firms bill their clients for time spent by office staff — law clerks, legal assistants, and paralegals — working on files. Tasks include a wide variety of work, including secretarial work, filing and organization, correspondence, discovery, *etc.* In contrast, time spent by office staff — other than “research and investigation” — is not a factor the Board currently considers when approving a reasonable fee for a prevailing claimant’s attorney. *See, e.g., Jamie J. Boldway*, 52 Van Natta 755, 756 (2000) (declining to consider legal assistants time); *Candace L. Spears*, 47 Van Natta 2393, 2394 n1 (1995). This difference creates a disparity between the amount of revenue generated by defense firms and the amount generated by claimants’ firms. That disparity directly translates to the quality of work and representation possible.

This is not the case in federal fee-shifting statutes. Federal case law and regulations include the reasonable rate and time spent by staff. *See, e.g., Todd Shipyards Corp. v. Dir., OWCP*, 545 F.2d 1176, 1182 (9th Cir. 1976) (remanding to calculate time spent by non-lawyer staff at a reasonable hourly rate); 20 C.F.R. § 702.132. Again, I am unaware of anything in the statutes — or the overall rationale — justifying the disparity.²

² In *Janelle I. Neal*, 40 Van Natta 359 (1988), the Board approved a *client-paid self-insured* attorney fee. The Board added that “costs” are not attorney’s fees, and that approval of costs is not required. (Citing OAR 438-15-005(7) (1988)). In *Jeffrey P. Keimig*, 41 Van Natta 1486 (1989), the Board applied the reasoning in *Neal* to a request for “word

Further, considering staff time is necessary. Consider a law prohibiting defense counsel from recovering staff costs in the course of a claim. I suspect such a prohibition would cause disconcertion uniformly among defense counsel. And for good reason: Staff allow effective management of the complex *administrative* nature of the Oregon workers compensation system. They also allow attorneys to operate an efficient *business*.

Based on the above, staff time should be considered when calculating a reasonable attorney fee under the legislature's amended policy objective and reevaluation of the Board's rules concerning attorney fees.

Attracting New Workers' Compensation Attorneys and Keeping Them

The 2015 legislature amended the policy goals of the Oregon workers' compensation law specifically to "provid[e] for access to adequate representation for injured workers." The Board should take seriously that amendment, and strive to satisfy that goal.

The 2012 Oregon State Bar Economic Survey indicates that workers' compensation attorneys made up the lowest percentage of practicing attorneys, only 3% of all practicing attorneys in Oregon.³ And the effective hourly rates for claimants' attorneys remain dismally low. For instance, the hourly rate for Oregon workers' compensation attorneys in 2011 ranged from \$154 to \$300 per hour, whereas plaintiff's civil litigation — non-injury and injury — ranged from \$188 to \$393 and \$200 to \$396 per hour, respectively. Longshore attorneys, working under a contingent fee-shifting system, earn around \$400 per hour for prevailing at hearing. *See Christensen*, 44 BRBS 39 (awarding \$392 per hour for longshore work performed in 2010). And the most experienced attorneys in other fields earned over \$450 per hour in 2011.⁴

One method of attracting new attorneys, and retaining them, is to make workers' compensation law more lucrative. The Board has substantial authority in this area and can make a real difference. One way to make the field more lucrative is to award reasonable hourly rates, and recognizing that workers' compensation is a contingency practice. The lodestar method is a well-developed system, and compatible with Oregon law.

Of course, that is not the only method. Ultimately, the method adopted to attract and keep new *talented* attorneys in workers' compensation is less important as actually achieving that goal. Simply awarding higher fees for prevailing in cases under the traditional multifactor framework — rather than implementing a lodestar formula — may accomplish that task. Although I favor a more objective standard, I understand some do not.

processor' time," holding that such time was a "cost" not subject to approval. *See former OAR 438-15-005 (1988)*. The Board applied that reasoning to investigator time in *Tom Goodpaster*, 46 Van Natta 936 (1992), and to general staff time in *Spears*. The take away from the Board's cases, is that costs are not fees, and therefore chargeable directly to the client. With respect, charging workers for staff is unworkable, and creating potential ethical problems and potential statutory violations.

³ The OSB 2012 Economic Survey can be found at: www.osbar.org/_docs/resources/Econsurveys/12EconomicSurvey.pdf

⁴ Based on the reported hourly rates of the 95% percentile of Business/Corporate Litigation attorneys (\$450), Civil Litigation, Defense attorneys (\$450), Business/Corporate Transaction attorneys (\$468), and Real Estate/Land Use/Environmental attorneys (\$494).

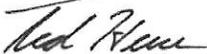
Regardless of the method adopted, the *effective* rate for claimant's attorneys prevailing in workers' compensation cases must be increased. At *minimum*, the hourly rate for any competent attorney prevailing in an Oregon workers' compensation case should be \$350 per hour; practitioners with greater experience should expect effective rates of \$550⁵ per hour. In addition to those rates, support staff's time should be recoverable at a rate of, at least, \$135 per hour. Oregon's best workers' compensation attorneys should earn an hourly rate commensurate with Oregon's top earners in other fields.

These amounts are necessary to attract and cultivate new ranks of claimants' attorneys. Not only will the increased fees directly attract new talent, but it will allow experienced attorneys to hire new associates, provide competitive salaries, spend resources mentoring, and ultimately ensure those new associates continue to practice Workers' compensation law in Oregon.

In sum, I understand the Board may be reluctant to overhaul its attorney fee process, or take on various opposing interests. I do not pretend to know if an overhaul is necessary, nor do I know the best way to negotiate the apparent political gauntlet. However, as an attorney who has practiced on both sides, and practiced outside the state system, I do know that if Oregon's system is going to begin functioning again, significant changes need to be made to Board's attorney's fee policy. That is the intent of the legislature when enacted HB 2864 and I hope that the Board considers my perspective when implementing those needed changes.

Sincerely,

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⁵ This increase places workers' compensation attorneys on par with attorneys practicing in other fields, which are generally noncontingent practices. The requested rate reflects the contingent nature of workers' compensation, with the understanding that an attorney will earn nothing on a losing case.