



Attorney Fee Advisory Committee Report

July 1, 2019

To: Workers' Compensation Board Members

From: ALJ John Mark Mills Mr. Theodore Heus
 Mr. Arthur Stevens III Ms. Jennifer Flood
 Mr. Elaine Schooler Mr. William Replogle

Subject: Attorney Fee Concept Recommendations

Dear Board Members:

Consistent with the February 1, 2019 letter from Board Chair Wold, the Attorney Fee Advisory Committee offers the following comments and recommendations in response to the Board's request that the committee provide guidance in the following areas:

The Board identified two concepts to be addressed:

- (1) Bifurcation of the determination of a reasonable attorney fee. (Exs. 2, 3, 4, 5, 9).
- (2) An amendment or adoption of administrative rules to include consideration of claimant's counsel's hourly rate and a multiplier. (Exs. 2, 4, 5, 7, 8, 9, 10, 14, 15).

The committee also identified other concepts to consider:

- (3) Increasing the investigative statement fee from the current \$275.
- (4) Consideration of defense costs.

- (5) When claimant asserts an assessed fee and there is an objection to the amount of the fee, defense must provide information regarding its fees. If there is no objection to the amount of the fee request, that fee should be awarded.
- (6) Eliminating the caps for DCS's and CDA's.
- (7) Questions determining the meaning of providing fee schedules pursuant to ORS 656.388(4).

Background

The committee initially met on February 27, 2019. During the meeting, the members addressed most of the issues identified above. However, the committee agreed that it would be preferable to receive additional data on attorney fees where it was available. The ALJ, acting as facilitator, recommended to the Board Chair that this documentation, if possible, be provided to the committee. Attorney fee data was provided on April 19, 2019 and on May 2, 2019. (Exs. 19-22).

Another meeting was held on June 14, 2019. No other interested parties or potential witnesses appeared at either meeting.

As different rules or concepts were addressed, the process was to receive pro and con positions on proposed changes with a view towards obtaining a consensus, if possible. Where a consensus was not possible, different proposals were voted on by the committee members. The goal of this report is to address the rules and concepts that were discussed, to provide a summary of the pro and con positions taken by the members, and to indicate whether the committee did or did not reach a consensus on making a recommendation to the board.

All of the topics identified above were voted on. The committee did not reach a full consensus, except with regard to one proposal.

Item One: Optional Bifurcation of Attorney Fees Issues

The proposal is to allow claimant's attorneys, after a hearing is held, to bifurcate the assessed fee issue in the event that claimant prevails in the claim. The amount of fee would be determined post hearing in such circumstances once the compensability issue was resolved to final judgment. One member indicated that

many systems follow this procedure. Some attorneys are reluctant to argue issues regarding attorney fees in front of their client. Another member suggested that it would be a rarely used procedure. Defense counsel argued that the proposal would increase the costs of the employer/insurer as well as increase ALJ involvement in finalizing the claim. This proposal was previously addressed in a prior advisory committee setting in 2016 and was passed on to the Board, suggesting it consider implementation of the process. One member explained that issues with arguing the attorney fee issue at the time of the hearing could be resolved by having claimant's counsel simply ask that the record be held open for a statement of services to be provided.

A vote was taken and the vote was 3 yay and 2 nay.

Item Two: Multiplier

As is true with all of the issues addressed by the committee, the basis for the multiplier proposal is to adjust the system in such a way that attorney fee awards to claimant are sufficient. This is an access to justice issue from claimant's counsel's point of view.

Anecdotally, members argued that attorney fees have been increasing significantly in the last couple of years. To the contrary, others argued that young attorneys are not coming in to the workers' compensation bar and claimant's counsel have difficulty making a living under the current system. The multiplier/load star system of assessing fees can be set up in different ways. Essentially, it involves taking a statewide or otherwise average fee and multiplying it by a win/loss multiplier times the number of hours claimant's counsel has spent on a case. One negative asserted by a member is that this will invade the flexibility of the ALJ's discretion in setting fees.

The members initially voted 3 yay and 2 nay on this issue. However, one of the members then indicated the member would abstain instead of voting yay. Ultimately, the vote on this issue was 2 yay, 2 nay, and 1 abstain.

Item Three: Investigative Statement Fee

A member raised the concern that claimant's attorneys can only send in a bill for the time that the recording goes on until the recording goes off when taking a

statement. They are unable to bill for the time to prepare the claimant and review the record. In contrast, the defense is able to bill for this time.

The committee described this issue as *de minimus*. It is not an area where workers' compensation claimant's attorneys make much income. The members discussed recommending that the fee be raised to \$400. That sum had also been put forward by Board Member Lanning. (Ex. 7). Ultimately, a majority of members recommended an increase in the fee, but did not specify the amount. The vote was 4 yea and 1 nay.

Item Four: Consideration of Defense Fees

This proposal concerns essentially a consideration of defense fees be allowed or considered in setting assessed fees. Defense counsel argue that assessed fees have already been going up and that comparing fees paid to claimant with fees from Liberty and SAIF Corporation is comparing apples and oranges. One member indicates that the data reviewed does not support that there is such a general increase in fees. The stats do not support it. One statistic identified by the claimants as supporting their position and denied by the insurers is that the insurers have spent as much as \$40 million in fees versus \$23 million in fees for claimants in the same period.

This matter was voted on with a result of 3 yea and 2 nay.

Item Five: Assessed Fee with Objection

This proposal is that when claimant asserts an assessed fee and there is an objection to the amount of the fee, defense must provide information regarding its fees. If there is no objection to the amount of the fee requested by claimant, that fee should be awarded by the ALJ.

One member explained that the basis for this proposal is that, where there is an objection regarding the amount of an assessed attorney fee, the ALJ generally knocks off some of the amount of the fee in response. The goal is to provide an incentive for defense to not object on a routine basis to the amount of the fee requested by claimant when claimant prevails. One member considered the proposal as a complicated and cumbersome action which seems unnecessary.

However, with little additional discussion, the members voted 4 yay and 1 nay with regard to this proposal.

Item Six: DCS and CDA Fees Out-of-Compensation

There was a proposal to eliminate caps on fees out-of-compensation awarded in DCS's and CDA's. The members noted that this type of issue had been discussed in a prior review of fees out-of-compensation. The members also noted that the impact of the proposed change would be *de minimus*. The committee voted Zero yay and 5 nay.

Item Seven: Fee Schedule

ORS 656.388(4) requires the establishment of a schedule of fees for both attorneys representing workers and those representing an insurer or self-insured employer. However, the members are not aware that the Board has provided for any schedule of fees for insurers or self-insured employers. It is unclear what this schedule of fees in that situation would refer to. The members are unclear as to how a schedule of defense fees is determined. Is the statute referring to out-of-compensation versus assessed fees?

There was once a different version of the statute which the Board relied on to require defense counsel to provide statements of services in cases that went to hearing. The committee discussed different ways of implementing the statute such as making payment of defense fees contingent in some way, setting billing rates relying on the current factors established for determining fee awards. New factors could be adopted.

The committee voted for 4 yay and 1 nay to request clarification of the application of ORS 656.388(4).