



December 10, 2018

Constance L. Wold, Board Chair
Workers' Compensation Board
2601 25th St. SE, Ste. 150
Salem, OR 97302

RE: SAIF Corporation written comments regarding WCB's biennial review of schedule of attorney fees under ORS 656.388(4)

Dear Board Members:

SAIF Corporation thanks the Workers' Compensation Board for the opportunity to provide advice and written comments related to the biennial review of scheduled attorney fees pursuant to ORS 656.388(4).

In response SAIF offers the following:

The board's biennial review is limited to scheduled attorney fees and not assessed attorney fees. A review of the legislative and administrative history is instructive.

ORS 656.388(4) was amended, effective January 1, 2016, with the bolded language below, via House Bill 2764:

(4) 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.**

The board established an Advisory Committee after passage of House Bill 2764, to propose amendments to the board's rules to implement the statutory changes contained in the bill. On September 23, 2015, the Advisory Committee provided its recommendations in relationship to rules affected by changes made via House Bill 2764, including the amendment made to ORS 656.388(4). The Advisory Committee commented as follows:

Summary: Subsection (4) is amended by adding the sentence "The Workers' Compensation Board shall review all attorney fee schedules biennially for adjustment." p. 16

Response #2: ...The prior version of ORS 656.388(4) states, "**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." While this provision has applied to the Board's task of setting scheduled amounts (percentages of attorney fees from settlements, cost bill caps, responsibility fee caps), it has not been applied to assessed attorney fee cases in individual cases that are based on the OAR 438-015-0010(4) factors. Nothing in the new provision, or the legislative history, seemed to indicate different handling of this provision. p. 17

The Advisory Committee did not recommend any rule changes in response to the amendment to ORS 656.388(4). The board ultimately did not make any changes to its rules in relation to ORS 656.388(4) at that time. See *WCB Admin. Order 1-2015 Order of Adoption*. An hourly rate for participation in investigative interviews was also established.

On June 17, 2016, a second report from an Attorney Fee Advisory Committee was issued. The second report issued in response to a January 15, 2016 board request for input regarding:

"...the Board's biennial review of all attorney fee schedules under *ORS 656.388(4)*. In addition, to *address the following concepts* (emphasis supplied):

- (1) A possible amendment of the Board's rule regarding factors for consideration in the determination of a reasonable assessed attorney fee (OAR 438-015-0010(4)) to include the time devoted by a claimant's attorney's legal assistants and to incorporate the contingent nature of the practice of workers' compensation law as set forth in ORS 656.388(5);
- (2) adopting an administrative rule, which would implement a voluntary process to bifurcate the determination of a reasonable assessed attorney fee from the merits of the case;
- (3) amending OAR 438-015-0082(2), which provides that an assessed fee award must be paid within 30 days after the litigation order becomes final; and
- (4) reviewing the "thresholds/soft caps" for "out-of-compensation" attorney fees prescribed in OAR 438-015-0025, OAR 438-015-0040, OAR 438-015-0050, OAR 438-015-0052, OAR 438-015-0055, OAR 438-015-0080 and OAR 438-015-0095.

The committee was tasked with addressing the board's schedule of fees, and it did so by addressing the caps on fees out of compensation that are in the board's attorney fee rules.

The committee's recommendations, and the board's implementation thereof, involved a twofold approach: first, the board expressly delegated review of scheduled fees under ORS 656.388(4) to an advisory committee, and second, the board met to accept, reject or, in some cases, make changes to what the advisory committee recommended.

The board properly did not consider assessed fees to be part of the delegated review under ORS 656.388(4), because they are not scheduled fees. The written responses provided to date in relation to the board's November 9, 2016 biennial review do not seek to amend or alter the prior advisory committees' recommendations, and the board's actions of 2016 in relationship to scheduled fees. Rather, the testimony thus far is directed at assessed fees, which is beyond the scope of the board's current review under ORS 656.388(4).

The data available to SAIF in relation to the board's October 13, 2016 changes to "out-of-compensation" attorney fee caps for PPD and PTD cases, Disputed Claim Settlements, Claims Disposition Agreements, and Own Motion cases, reveals that:

For CDA/DCS agreements paid by SAIF during the years 2014-2015, the average attorney fee was \$3,991. In 2016-2017, the average attorney fee paid in relation to CDA/DCS agreements increased to \$4,412 - an increase of 11%. For reference, the Consumer Price Index (CPI) rose 1.3% from 2015 to 2016, and 2.1% from 2016 to 2017.

Attorney fees paid by SAIF associated with CDA/DCS agreements have remained static at about 40% of all fee payment types from 2013-2017.

In response to specific comments which go beyond the board's review under ORS 656.388(4), it is SAIF's position that the available data indicates injured workers have access to adequate representation. This is due, in part, to increased assessed fees which have occurred notwithstanding any rule changes, as demonstrated by the data below. Claimants' counsel emphasize the contingent nature of workers' compensation practice as the basis to suggest that an hourly rate, or "contingent multiplier," or both, should be implemented, in part relying on an Oregon State Bar 2017 Economic Survey. This analysis simply ignores that, overall, claimants' counsel have experienced substantial increases in fees between 2014 and 2016.

While SAIF possesses only data on its own matters, that data reveals that assessed fees significantly increased in 2016-2017 as compared to 2014-2015, outpacing any increases in the CPI:

2014-2015	Average attorney fee	2016-2017	Average attorney fee	Change
Opinion and Order	\$7,612	Opinion and Order	\$8,168	7%
Order on Reconsideration ¹	\$6,917	Order on Reconsideration	\$8,100	17%
Order on Remand	\$6,600	Order on Remand	\$7,500	14%
Order on Review	\$5,623	Order on Review	\$7,132	27%
Grand Total	\$7,116	Grand Total	\$7,953	12%

SAIF also has available total attorney fees paid by SAIF only for the top ten claimant firm payees, per year, since 2014. Firm names have been removed for anonymity. The data show that fees paid (in all categories) have increased from 2014 to 2017. In 2014, the combined total attorney fee paid by SAIF to the top ten claimant firms was approximately \$3.7 million. In 2017, that amount increased to approximately \$4.6 million.

2014	Total Paid	Change
Grand Total	\$3,718,567	N/A
2015	Total Paid	
Grand Total	\$4,208,513	+13%
2016	Total Paid	
Grand Total	\$4,105,656	-2%
2017	Total Paid	
Grand Total	\$4,673,641	+12%

Similarly, total attorney fees paid by SAIF only to all claimant attorney payees increased by 17.8% during the same three-year period.

The current system requires that assessed fees are awarded on a fact specific case by case basis where claimant's attorneys have the opportunity to argue for higher fees in any of their cases, should they feel they are entitled to them under the current factors in the board's rule for awarding assessed fees.

Several written responses suggest that the board fails to appreciate the contingent nature of a claimant's attorney's practice. Contingent practice is, by its very nature, an area where some matters return substantial reward for little effort, and others return no pay for substantial effort. It is that balance between claims which yield easy and quick results and those that ultimately yield no return to counsel that define the very nature of contingency representation. Just as with personal injury, worker's compensation claims may resolve with a simple letter and thereby produce a windfall to counsel, or they may end in a denial being upheld after hearing. Practical experience suggests that most cases fall somewhere in between these two extremes, resulting in a fair and equitable reward to claimants and their counsel. Skilled counsel, through experience, correctly evaluate the risk at an appropriate level and avoid burdening the system with frivolous claims in the hopes of obtaining a disproportionate reward to the risk associated with pursuing the claim.

There exists an inherent tension between the need to ensure an adequate balance between the availability of able counsel to pursue remedies in the context of a workers' compensation proceeding and the need to make insurance available to employers at rates that encourage economic development. That balance would be adversely affected if workers' compensation counsel's efforts yielded pay at the same rate as complex business litigation, tax, or patent and trademark practice - either for the claimant or the defense counsel. The system is not structured to support such rates, and an increase on one side will necessitate an increase on the other side. The end product of this effort will be that the lawyers will receive a larger share of a fund intended for injured workers and the remainder will be less than for the intended recipients.

OAR 438-015-0010 directs the ALJ or board to consider (a) The time devoted to the case; (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. These factors vest in the ALJ and board wide discretion to fix a fee appropriate to the facts of a given claim. Note, these factors are similar to those considered by Judges in all civil proceedings where an award of fees is available. See, for example, ORS 20.075.

Establishing a base hourly rate or fixed contingency factor would also run contrary to subsection (f) of OAR 438-015-0010 which requires a judge to consider the benefit secured for the represented party when determining a reasonable fee. Rote application of a multiplier would lead to a fee that is disproportionate to the benefit secured. Additionally, a multiplier encourages the inefficient use of an attorney's time.

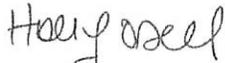
Importantly, the Oregon State Bar 2017 Economic Survey is not an appropriate or reliable starting point for determining reasonable attorney fees in workers' compensation matters. Consider the following regarding the Survey:

- A downtown Portland business lawyer is the most expensive counsel available in Oregon. Firms like Stoel Rives and Miller Nash, Graham and Dunn service fortune 100 clients and offer no workers' compensation practice groups, either for claimants, or defense. None of the large downtown firms have such a practice group and as such, they are not representative of the nature of workers' compensation practice. Any reliance on average hourly rates for business practices such as bankruptcy, tax, etc. is not reflective of workers' compensation practice in Oregon.
- Those same large firms have tremendous overhead, both as a result of their physical presence in high rise towers, and because they employ a team of lawyers, paralegals, and practice assistants to the cases in which they are involved. There is simply no similarity between a claimant's contingency practice or workers' compensation and, for example, an intellectual property group at Schwabe Williamson and Wyatt.
- There are roughly 300 workers' compensation section members in the Oregon State Bar's section. The survey notes that a total of 29 bar members (not section members) who self-identified as devoting more than 50% of their time to the area provided data in relation to 2016 hourly billing rates. Whether this number includes both claimants' counsel, defense counsel, or both, is unknown, as the area of practice referenced in the survey was simply "workers' compensation." P. 42.
- Similarly, "Civil litigation - Insurance Defense" yielded responses from 69 OSB members. This area of practice is again, not defined, and could include a multitude of types of insurance defense, i.e. personal injury, construction defect, etc. P. 41.
- The OSB Survey requested "annual net personal income before taxes." Net income in an employee context is typically understood to mean after taxes, while net income in an ownership context is typically understood to mean before taxes but after expenses are deducted. Given the various types of employment relationships and potential ownership models involved, it is not clear what figures were self-reported to the Bar.

- The 2012 OSB Economic Survey showed self-reported income for “workers’ compensation” practitioners totaling \$139,419 on average vs. \$142,619 in the 2017 survey, a reported increase of \$3200. This conflicts with SAIF’s data above, which reflects double digit percentage increases in fees over the past three years.

The current system, in which judges and the board are granted discretion and clear factors to craft an appropriate award in no way discourages competent counsel from taking on meritorious clients and claims, and presenting a request for fees associated with those claims. Establishing blanket rates and predetermined multipliers will deny judges and the board the ability, and the obligation, to apply case specific factors and determine appropriate attorney fee awards pursuant to Oregon’s workers’ compensation laws and rules.

Sincerely,



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ⁱ “Order on Reconsideration” in SAIF’s system could mean either an Order on Reconsideration from the Board, or an ALJ, but not from WCD.