

Exhibit 2

RECEIVED

October 26, 2018

OCT 26 2018

Workers' Compensation Board  
2601 25<sup>th</sup> Street SE, Suite 150  
Salem, OR 97302-1282

WCB SLM

Re: Biennial Attorney Fee Review pursuant to ORS 656.388(4)

Dear Board Members,

In 2015, the Legislature amended the statutes to require a biennial review of attorney fees by this Board. In responding to the Legislature's directives, in 2015, the Board promulgated OAR 438-015-0033, addressing attorney fees for mandatory investigative statements.

In 2016, the Board reviewed and adjusted the maximum attorney fee schedules, including the fees for settlements. This raise was much appreciated. However, more is required to raise attorney fees for those representing injured workers in order to attract new attorneys and hire associates to train for the next generation.

The Board has not formally or publicly reviewed litigation attorney fees as a group, and, in particular, has not reviewed appellate attorney fees for work done on Board review.

Based upon a review of the Board orders, and with an understanding of the hours spent on appeals, the Board awards fees approximating \$200 per hour. This fee is contingent, awarded to claimants' attorneys only when a claimant prevails. The rate of \$200 is substantially below market value and fails to be a reasonable attorney fee relative to the time spent or the contingent nature of the practice.

I specifically request the Board review attorney fees awarded on Board review to increase them to a market rate based upon experience and, then, implement the Legislature's mandate under ORS 656.388(5) to compensate for the contingent nature of the practice of representing injured workers.

Having worked on both sides of the aisle, my experience is that insurance attorneys, particularly in-house counsel who do not have the regular time and expenses of running a business, are not familiar with the time and financial requirements of running a law business. For

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example, malpractice and other insurances, alone, cost thousands for each attorney. The multiple jurisdictional taxes take over 20% on the gross (and the most common adversary, SAIF, does not pay taxes). Staff, postage, phones, rent, PLF, and other expenses must be paid from the fees earned, regardless of whether claimant prevails.

The reasonable conclusion from the Board's excessively low awards is that the Board is unfamiliar with the actual cost of doing business and the real impact of a contingent practice. I hope by providing some hard numbers, the Board can reassess the amount of attorney fees allowed on each case.

### **Market Rates for Attorney Fees**

Unless the Board hires an expert organization to sample market rates for attorneys, the only information we have is the Oregon State Bar Economic Survey. The citation to the 2017 survey is:

[https://www.osbar.org/\\_docs/resources/Econsurveys/17EconomicSurvey.pdf](https://www.osbar.org/_docs/resources/Econsurveys/17EconomicSurvey.pdf)

The following is a sampling of practice areas, which show a rate of \$200 is below market.

Practice Area	Portland Average	State Average
<b>All Practices<sup>1</sup></b>	\$413	\$332
Bankruptcy	\$309	\$298
Defense Litigation	\$327	\$309
Criminal	\$300	\$266
Family Law	\$258	\$243
Tax/Estate Planning	\$252	\$313
Workers' Compensation	\$384	\$256

Oregon State Bar 2017 Economic Survey 40-42.

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<sup>1</sup> This covers all practices, private, governmental, in-house counsel, every one. Oregon State Bar 2017 Economic Survey 40.

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Based upon experience of the attorney, \$200 per hour is even less than the average for a new attorney, fresh from law school:

Years of Practice	Portland Average	State Average
0-3	\$236	\$210
4-6	\$249	\$231
7-9	\$282	\$259
10-12	\$283	\$272
13-15	\$288	\$273
16-20	\$334	\$293
21-30	\$394	\$307
Over 30 years	\$413	\$332

Oregon State Bar 2017 Economic Survey 38-40.

Even the range of fees paid by the director begin above \$200 per hour, with a range of \$275 to \$400. OAR 436-001-0435.

The hourly average rate for attorneys in Oregon is \$332 per hour for all practices and \$413 per hour in Portland. That, alone, should inform the Board that an amount of \$200 per hour is insufficient.

**Billable Hour Capacity**

	Portland Average	State Average
Average Hours per Month	113.8	97.4

Oregon State Bar 2017 Economic Survey 37.

This comports with my experience of an average of 4.5 *billable* hours per day, 5 days per week, 52 weeks per year, minus vacation, regular holidays and CLE days.

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Note: the defense can "value bill" or contract for particular billing methods: .2 minimum for each email or letter, or charging for form settlements, etc.

The Board should note that managing a law firm takes time and detracts from billable hours. In-house attorneys do not face this issue.

### **Average Hours per Board Case and Average Pay**

Every attorney is different, but generally it takes between 13 to 18 hours to handle a typical appeal, with an average of 16 hours. There are exceptions, of course, but this is a good average.

In my experience, the typical attorney fee on Board review ranges from \$3500 to \$4500. Being awarded the higher fee often requires submission of a Statement of Services. With one exception, I have never been awarded the fee requested. In contrast, the appellate courts regularly award what I request. If there is a reduction, it is slight and based on specific, articulated reasons. The courts do not *sua sponte* develop their own calculation of a fee, as does the Board.

### **Business Expenses**

Taxes vary depending on the amount earned, but calculate out to over 20% on the gross, considering all jurisdictions, which, in the Portland area, includes the City of Portland and Tri-Met taxes.

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Annual expenses:

Bookkeeper, Accountant	\$2750
Computers, software, maintenance	\$1500
Health Insurance	\$15,600
Interest on Line of Credit (fluctuates)	\$6000
Marketing	\$1200
Paper, supplies	\$3800
Phones/Telecommunications	\$4400
PLF, WC, Other Insurance	\$4000
Postage	\$1600
Professional dues, CLEs, fees, subscriptions	\$5300
Rent	\$6000
Staff (half-time)	\$26,000
Travel, parking	\$4400
<b>TOTAL</b>	<b>\$82,550.00</b>
Retirement ?When? (estimate the 12% received by State Employees)	\$12,000

**Contingent nature of the practice**

There are three main areas that impact the contingent nature of an appellate practice at the Board: one, fees are only paid when claimant prevails; two, delay between the work performed and receiving payment; and three, the significant amount of work done where no payment is allowed regardless of the result.

**A. Fees paid only upon Prevailing**

Fees for representing workers are paid only when an injured worker prevails on an issue, and not always then. The one exception is attorney fees

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paid for mandatory investigatory statements/depositions. The win/loss rate for injured workers is a critical consideration when determining the contingent factor.

Litigation reports are no longer prepared by WCD. I was told that this was at the Board's direction. WCD was kind enough to forward me some statistics it had prepared at the request of SAIF. They are attached, and summarized below.

Since 2012, injured workers won less than 50% of the time in cases involving denials (complete and partial), from a low of 39.7% to a high of 48%, hovering mostly in the low 40's. Temporary disability cases are not represented in these statistics.

Prevailing on Board review is even more difficult for injured workers. Although official statistics are not available, an informal review of a part of the current year (2018) shows, out of 132 appeals, 90 were for injured workers and 42 for employers.

	Raw #	Percentage of Appeals	# Cases Claimant Prevailed	Percentage Claimant Prevailed	Contingent Factor
Claimant's Appeal	90	68%	21	23%	4.35 <sup>2</sup>
Insurer Appeal	42	32%	29	69%	1.45 <sup>3</sup>
TOTAL	32	100%	50	35% (overall)	2.85 <sup>4</sup> (all appeals)

The Contingent Factor is the amount by which the attorney fee must be adjusted to account for the contingent factor of having to prevail on a case in order to compensate the attorney for the contingent factor of prevailing.

The additional point of this is that claimant's lose ground on Board review. The Board reverses percentage-wise more in favor of the employer. The prevailing rate of injured workers is less than that at hearing, with an

<sup>2</sup> 4.35 x 23% = 100%

<sup>3</sup> 1.45 x 69% = 100%

<sup>4</sup> 2.85 x 35% = 100%

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overall win/loss rate of 35% at the Board, a decrease from the win/loss rate at the hearing level that hovers just over 40%.

### **B. Delay in receiving payment**

From the beginning of the Board review process to receiving a check, the time delay is approximately 10 months. (Yes, the analogy of giving birth crosses the mind!) In the calendar of money and business, this is a long time.

Appeal to briefing Schedule	3-4 weeks
Briefing, Appellate to Reply	8-12 weeks
Statement of Services	2 weeks
Objection to Fees by Insurer	2 weeks
Board review period (120 days)	17+ weeks
Payment of Fees, 30 plus 14 days	7 weeks
<b>TOTAL</b>	<b>44 weeks = 10 MONTHS</b>
<b><i>Briefing to Payment</i></b>	<b><i>29 weeks = 6 + MONTHS</i></b>

The average time to prepare a case is around 16 hours. At the average market rate for attorneys in Oregon of \$250, this is \$3750 worth of effort that goes unpaid for many months not to mention the business expense associated with producing this work.

To put this in perspective, take \$3750 and put it on your credit card for 6 months and see how much you owe at the end of the time. By month 6, you will owe over \$5900. Three years later, which is when the fee would be paid out if the case is appealed to the court, you would owe almost \$60,000.<sup>5</sup>

The reality is that one tries to have other work to pay the bills in the meantime, but this other work is merely subsidizing the delay in payment. The fact remains that the delay in payment is costly to a law firm.

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<sup>5</sup> Imagine what injured workers really suffer waiting for benefits pending appeal.

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### **C. Unpaid and underpaid work in this system**

Trial attorneys face this more than appellate, but appellate attorneys perform unpaid work as well. It is often the little things. First, fee statements have to be filed before all work is completed on a case. Wrap up work happens afterwards, such as communication with the client, chasing down checks that are not sent, communication with opposing counsel as to payment of fees, TIN numbers, monitoring for appeal, confirming payment of benefits, reminders of interest to be paid on benefits, making sure that the claim is properly processed and accepted, and so forth.

Many cases are reviewed for appeal, but few are accepted for representation. A fellow attorney may anticipate a case will go up on appeal and will seek some advice to position the issue correctly.

Injured workers call with matters not related to the immediate appeal, and advice or at least a response must be given.

The statutes have gaps when attorney fees may be paid. For example, when an employer appeals a matter and representation is accepted, work is done to advise of representation, create the file, gather appropriate documents, and monitor the file. Yet, if the appeal is withdrawn before a brief is filed, there is no payment for the work done on representation.

There are issues where attorney fees cannot be awarded. In *Bowman v. SAIF*, 278 Or App 417 (2016), claimant prevailed in the attorney fee issue creating important precedent that will allow payment of fees in the future for work performed, but the statutes did not allow for attorney fees when an injured worker must appeal regarding the amount allowed.

Attorney fees are capped in significant situations. *SAIF v. Traner*, 270 Or App 67 (2015), is a perfect example. In *Traner*, claimant was defending an appeal by SAIF. The hours to defend the appeal were 48.9 hours. The court held that an ordinary appellate case was not an extraordinary situation that justifies a fee beyond the, then, statutory cap of \$3334. *SAIF v. Traner*, 273 Or App 310 (2015). Barely \$68 per hour is legislatively allowed to defend an insurer's appeal of a penalty by the insurer. To be sure, SAIF's attorney received a full salary for the work done, and SAIF spent more in resources on the appeal than \$3334. But, the statutes do not provide for equal payment. This principle has not been tested in medical services or other director-review cases under ORS 656.385, but the same principle may apply.

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In stark contrast, defense attorneys are free to negotiate terms of when, how and why they are paid regardless of any statutory limit. The inequity caused by the contingent nature of a claimant's practice has significant monetary consequences. The Legislature amended ORS 656.388(5) to require the Board to consider this aspect. Attorney fees on appeal have not been changed by the Board as the Legislature has directed. The Board needs to adjust attorney fees to reflect the real numbers and to be in compliance with this directive.

### **Sua Sponte Reduction of Attorney Fees**

More recently, the Board has changed its practice of allowing the attorney fee requested when it goes without objection. *See Ruby Kerr* n. 1 (WCB Case 14-02139); *Julie Hooks* (WCB Case 15-02460), *pending judicial review*. For years, this was not done. *See Chester E. Guthrie (Dcd)*, 65 Van Natta 1432, 1432 n. 2 (2013). This change has been met with astonishment by attorneys representing injured workers. Insurers are well-represented, and their attorneys are capable. To step in and act on behalf of an insurer gives the appearance of preferential treatment to insurers over injured workers.

The insurance attorneys know how much time they spent on a case, and they know how much they have billed their client. The ALJ often has a better understanding of the amount of work that went into a case and how vigorous the defense is. The Board has created an issue where none existed, and to the ultimate detriment of injured workers.

### **Summary of the Numbers**

Let's put some math to the numbers.

At the average billing amount of 97 hours in Oregon, or 1164 per year, 73 cases maybe handled. this amounts to approximately 73 cases.

At 35% prevailing rate, an attorney is paid on 25 - 26 of those cases.

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With a range of \$3500 - \$4500, this equals At the average rate of \$4000 per case where claimant prevails (this is probably a high dollar figure considering all of the cases and fees awarded), this amounts to \$87500 - 117,000.

Subtract costs of \$82,500 and the **balance left is \$4950 - 34,950** before taxes for the attorney to live on.

By billable hour, 1164 hours per year x \$200 = gross \$232,800.

\$232,800 times the 35% prevailing rate = \$81,480.

This does not even pay expenses, and we have not discussed the impact of taxes, yet!

Using the **average hourly market rate** in Oregon of \$332 per hour, then here is the calculation:

1164 x \$332 = \$386, 448 x 35% prevail rate = **\$135, 260.**

\$135,260 - \$82,550 annual expenses = 52,710

\$52,710 - taxes at 20% of gross \$27050 = **\$25,660.**

Ok, let's put in the overall **contingent factor** of 2.85:

\$332/hr x 1164 annual billable hours x 35% win rate = \$135,260  
(rounded)

\$135,260 x 2.85 contingent factor = \$385,500 (rounded)

\$385,500 - .25 tax rate (increases at this level of pay) = \$289,100

\$289,000 - \$82,550 (expenses) = **\$206,550**

Suddenly, you can pay yourself an attorney's salary, hire an associate to train for the next 2-5 years, and possibly put away for retirement.

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Costs for Associate

Salary	\$70-90,000
PLF, Insurance	\$4000
Rent/space	\$6000
Part-time staff legal assistant	\$26,000
Phones, supplies, computer, costs	\$9,000
Health Insurance	\$12,000
<b>ROUGH TOTAL</b>	<b>\$127,000 - 147,000.00</b>

These numbers should show you that both the hourly rate paid by the Board and the lack of consideration of the contingent factor really matter in maintaining a practice. I cannot even consider hiring another attorney, though I have enough business, because I cannot conceive of paying one. Instead, I struggle to maintain a business. This is not what the Legislature envisioned in 2015.

**Request**

The above shows that appellate fees on Board review need to be increased substantially, to include a reasonable market hourly rate and a contingent factor.

Additionally, anything that decreases unpaid work would be very helpful, to include:

- creating a rule where Statement of Services do not need to be submitted until it is known that claimant will be entitled to an attorney fee;
- not rewarding objections to fees by employers simply to reduce appropriate fees;
- not *sua sponte* reducing attorney fees (which requires advance work to submit a substantial statement in order to head off this potential).

(Cont'd next page)

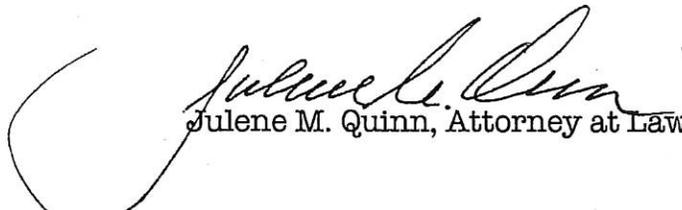
On behalf of myself and other attorneys representing injured workers, I request the Board to:

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1. Review and increase appellate fees for injured workers to pay at a reasonable market rate and to consider the contingent nature of the practice.
2. Develop a specific method to compensate for the contingent nature of the practice.
3. Create a Board rule allowing submission of Statement of Services after it is determined claimant has prevailed. Ted Heus is submitted a specific request, and I whole-heartedly endorse that request as a necessary cost-saving measure.
4. Continued changes to attorney fee rules, or spear-heading statutory changes that would assist in providing the broadest access to attorneys, removing the gap between Claimants' bar and the Defense Bar.
5. Board monitoring and actively encouraging the development of new attorneys to represent injured workers.
6. Develop a range for the payment of investigative fees to reflect the different experience levels, similar to the Director's range of \$275 - \$400 per hour.

If you have any questions, please do not hesitate to contact me. Thank you for your assistance with this matter.

Sincerely,



Julene M. Quinn, Attorney at Law

cc: Keith Semple, Chair, OWCA Policy Committee

Data run 4/8/2016 by Jay Dotter per request from SAIF

Hearings for 3 of the 12 issues WCB hearings are normally broken out as giving the counts for O&O, Stipulations, and all cases then percent disposition per issue and for total issues.

Issue	2015 Disposition			Opinion and order			Stipulation			All cases		
	SAIF	Other Ins.	All ins.	SAIF	Other Ins.	All ins.	SAIF	Other Ins.	All ins.	SAIF	Other Ins.	All ins.
Permanent disability	5	8	13	49	46	95	0	3	3	49	98	147
Increase	9	18	27	7	11	18	2	0	2	8	15	23
Total cases	63	63	126	63	63	126	4	6	10	67	69	136
Claim denial	96	86	182	884	523	1407	884	523	1407	980	609	1589
Set aside	84	75	159	102	88	190	102	88	190	186	163	349
Total cases	180	161	341	986	611	1597	986	611	1597	1166	772	1938
Partial denial	73	86	159	823	1050	1873	823	1050	1873	856	1136	2032
Set aside	56	91	147	112	122	234	112	122	234	168	213	381
Total cases	129	177	306	935	1172	2107	935	1172	2107	1084	1349	2413
Total cases, all issues	591	720	1311	2191	2379	4670	2191	2379	4670	2782	3089	5871

Issue	2014 Disposition			Opinion and order			Stipulation			All cases		
	SAIF	Other Ins.	All ins.	SAIF	Other Ins.	All ins.	SAIF	Other Ins.	All ins.	SAIF	Other Ins.	All ins.
Permanent disability	3	6	9	1	4	5	1	4	5	29	42	71
Increase	6	17	23	0	5	5	0	5	5	3	8	11
Total cases	37	58	95	2	5	7	2	5	7	8	22	29
Claim denial	76	103	179	840	645	1485	840	645	1485	916	748	1664
Set aside	84	90	174	108	115	223	108	115	223	192	205	397
Total cases	160	193	353	948	760	1708	948	760	1708	1108	953	2061
Partial denial	84	88	172	896	1151	2047	896	1151	2047	980	1239	2219
Set aside	51	117	168	117	142	259	117	142	259	168	226	394
Total cases	135	172	307	1013	1293	2306	1013	1293	2306	1148	1465	2613
Total cases, all issues	516	762	1278	2239	2710	4949	2239	2710	4949	2755	3472	6227

Issue	2013 Disposition			Opinion and order			Stipulation			All cases		
	SAIF	Other Ins.	All ins.	SAIF	Other Ins.	All ins.	SAIF	Other Ins.	All ins.	SAIF	Other Ins.	All ins.
Permanent disability	4	7	11	0	6	6	0	6	6	24	40	64
Increase	10	9	19	1	2	3	1	2	3	5	9	14
Total cases	38	50	88	4	4	8	4	4	8	14	13	27
Claim denial	91	111	202	845	706	1551	845	706	1551	936	817	1753
Set aside	59	81	140	111	135	246	111	135	246	170	216	386
Total cases	150	192	342	956	841	1797	956	841	1797	1106	1033	2139
Partial denial	93	111	204	832	1163	1995	832	1163	1995	925	1274	2199
Set aside	62	81	143	115	121	236	115	121	236	177	202	379
Total cases	155	192	347	947	1284	2231	947	1284	2231	1102	1476	2578
Total cases, all issues	535	783	1318	2174	2778	4952	2174	2778	4952	2709	3561	6270

Issue	2012 Disposition			Opinion and order			Stipulation			All cases		
	SAIF	Other Ins.	All ins.	SAIF	Other Ins.	All ins.	SAIF	Other Ins.	All ins.	SAIF	Other Ins.	All ins.
Permanent disability	3	9	12	0	7	7	0	7	7	31	53	84
Increase	18	10	28	1	3	5	1	3	5	4	13	17
Total cases	52	65	117	2	3	5	2	3	5	20	13	33
Claim denial	111	134	245	692	682	1374	692	682	1374	803	816	1619
Set aside	56	405	461	99	127	226	99	127	226	155	532	687
Total cases	167	239	406	791	809	1600	791	809	1600	958	1048	2006
Partial denial	115	139	254	730	1109	1839	730	1109	1839	845	1248	2093
Set aside	65	110	175	100	142	242	100	142	242	165	252	417
Total cases	180	249	429	830	1251	2081	830	1251	2081	1010	1500	2510
Total cases, all issues	640	910	1550	1870	2688	4558	1870	2688	4558	2510	3598	6108

NOTE: Total Cases, all issues includes the following: Permanent disability, Temporary disability, Claim denial, Partial denial, Aggravation, Responsibility, Premature closure, Insurer penalty, Attorney fee, Subjectivity, Other Issue, Rate of time loss