Exhibit 25

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October 25, 2019

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 "Attorney Fees" Advisory Committee report, scheduled for discussion on October 29, 2019. Please also consider this as SAIF's response to Board Member Lanning's rule concept dated October 17, 2019.

The original directive for the board's rule review was pursuant to ORS 656.388(4). (*See* WCB's December 11, 2018 meeting minutes). As noted in SAIF's previous submission, the review under ORS 656.388(4) is intended to be applied to scheduled, rather than assessed fees. The board further delineated in its December 11, 2018 meeting that more data was needed to determine if there was an underlying systemic issue with the fees earned by claimant's attorneys.

WCD provided data to the board related to attorneys' fees in memorandum dated April 16, 2019 and May 1, 2019; the board also was provided data in a memo dated August 1, 2019 from WCB staff. SAIF previously provided its own data regarding attorneys' fees to the board in its letter dated December 10, 2018.

The data supports conclusions that HB 2764 created the desired impact, that the system is working as intended and that there exists no underlying systemic issue around fees. Growth in attorneys' fees has significantly outpaced general economic growth in Oregon, while at the same time injured worker representation has remained high. *See* Appendixes 2 & 8, WCD's April 16, 2019 Memorandum. This is consistent with the data that SAIF provided to the board in December 2018.

In response to the specific Attorney Fee Advisory Committee Report and Board Member Lanning's proposal, SAIF offers the following:

Item One: Optional Bifurcation of Attorney Fee Issues

This concept was proposed during the HB 2764 Attorney Fee review in 2016. At that time, the Oregon Association of Workers' Compensation Judges (OAWCJ) unanimously opposed the proposal; the proposal is virtually identical at this time. SAIF's position is that this is an unnecessary step in the litigation process, and will increase costs of litigation overall.

Item Two: Multiplier

SAIF understands the "multiplier" concept to essentially contemplate a method of increasing attorney fee awards to a level that claimant's attorneys consider "sufficient." The advisory committee report also references a loadstar, or market, rate system such as is provided for in federal Longshore and

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Harbor Workers' Act claims. The loadstar method was thoroughly discussed by Norman Cole in a March 10, 2016 letter to the Board (Appendix 1). Both of these methods merely elucidate a different set of criteria to establish attorney fee awards than what is currently in the board's rules. As SAIF's previous submission of December 10, 2018 indicated, the current system provides for claimant's attorneys 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.

The rule proposed by Member Lanning on October 17, 2019 would encourage litigation, especially unmeritorious litigation, as for every case an individual claimant's attorney lost, their loss/win ratio would increase, thereby increasing the potential award for cases in which they did actually prevail. The rule also discourages settlements, stipulations, and use of the WCD contested case processes as it is limited to cases in which the ALJ or Board determines an assessed fee. Additionally, how a loss/win ratio would be tracked is not stated; how would cases in which multiple issues were decided, with some being "wins" and others "losses" be considered? Part of the work for both defense attorneys and claimant's attorneys is to serve as gatekeepers for those cases which are unlikely to result in a positive outcome for either side. Such a multiplier based on a loss/win ratio would encourage both sides to take any and all issues to hearing, resulting in additional workload for the system as a whole.

Thus, SAIF believes that the current board rules provide sufficient guidance to the ALJ and board in determining and awarding attorneys' fees in workers' compensation cases.

Item Three: Investigative Statement Fee

The advisory committee report recommended that the investigative statement hourly rate be raised from $275 to $400 per hour, an increase of 45%. SAIF would endorse increasing the hourly rate by the change in the state average weekly wage between July 2016 and July 2019, as published in Bulletin 111 by WCD. This would be equivalent to an hourly rate of $300

Item Four: Consideration of Defense Fees & Item Five: Assessed Fee with Objection

The committee considered two ideas which attempt to compare or consider the amount defense attorneys are paid in determining the amount claimant's attorneys are paid. SAIF in-house attorneys do not track hours spent working on either litigated or non-litigated matters. SAIF in-house attorneys perform significant prelitigation advice work in cases where workers do and do not have attorneys. This includes regular work pre-decision, in an effort to ensure SAIF makes claims decisions that align with our not-for-profit mission, and to discourage unnecessary litigation. SAIF attorney salaries contemplate more work than simply trying cases. For example, SAIF attorneys develop claims policies and procedures that apply broadly (the majority of SAIF claims to which these policies apply are never litigated), train claims adjusters, perform business development and policyholder claim portfolio review activities, and build software and business process systems to support the full contingent of claims work.

The challenges of any small law firm or solo practitioner aren't limited to just workers' compensation lawyers; these challenges are inherent to the nature of such a practice. As is the nature of a contingent practice, in some cases claimant's attorneys earn more than in others.

Both of these proposals fail to consider the nature of defense practice outside of litigated matters, and therefore, are misguided.

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

SAIF concurs with the advisory committee's recommendation that the caps on fees out of compensation not be eliminated.

Item Seven: Fee Schedule

The advisory committee discussed the proposed fee schedule under ORS 656.388(4). Please see SAIF's prior submission dated December 10, 2018 regarding this subject (Appendix 1).

The data provided by both WCD and WCB in 2019 reflect that the current system is working; judges and the board have the discretion and factors available to award attorneys' fees appropriate to the individual case while ensuring that the vast majority of injured workers' have representation. Establishing a new system will deny the discretion necessary to both the judge and board to apply case specific factors and a resultant appropriate attorney fee under Oregon's workers' compensation laws and rules.

Sincerely,

s/ Holly O'Dell

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December 10, 2018

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Workers' Compensation Board
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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

Appendix 1

> 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.

Appendix 1

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 <u>by SAIF only</u> 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.

Appendix 1

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

Appendix 1

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.

Appendix 1

- 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,

Holly O'Dell

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[1] "Order on Reconsideration" in SAIF's system could mean either an Order on Reconsideration from the Board, or an ALJ, but not from WCD.

Appendix 1

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March 10, 2016

Workers' Compensation Board
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Re: OAR 438 Rule Changes

Dear Board Members:

At SAIF Corporation's request, I reviewed an October 30, 2015 letter from Theodore Heus to the Board, advocating rules that would award fees in Oregon workers' compensation claims commensurate with fees received by Oregon's top earners in other fields. Some of the information Mr. Heus provided, especially with respect to Longshore & Harbor Workers' Compensation Act claims is misleading, inaccurate, or both. I respectfully offer a different perspective.

I began my workers' compensation defense practice in 1979 as a trial counsel for SAIF Corporation. In the early 1980's I began defending Longshore and Harbor Workers' Compensation Act claims in addition to Oregon Workers' Compensation Act claims. In 2005 I left SAIF Corporation to join Sather, Byerly & Holloway LLP, where I am now a partner and where I have continued my Oregon and LHWCA defense practice. I have authored chapters in OSB Workers' Compensation CLE publications and have been a speaker at Oregon and LHWCA CLE seminars. I am a past chair of Workers' Compensation Section of the Oregon State Bar. I have argued cases before the Oregon Court of Appeals, the Benefits Review Board, and the Circuit Court for the 9th Circuit. I have a broad understanding of the Oregon Act and the LHWCA, especially with respect to attorney fees.

In general §26 of the LHWCA (33 USC §526) entitles attorneys to fees and costs when they secure compensation for a claimant when the employer or insurer either refused to pay compensation or refused to pay the full amount claimed. Like the Oregon Act, all fees must be approved by an administrator (the District Director) or a court, so there is no true market rate for these services. An attorney cannot require an injured worker to agree to pay an agreed rate. Therefore, like other federal fee shifting statutes, the trier must determine the rate charged by other attorneys in the same locality who charge an hourly rate for their services and apply their skills in practice areas reasonably comparable to workers' compensation and who have reasonably comparable skill, experience, and reputation. *Christensen*

v. SSA, 557 F3d 1049 (9th Cir. 2009); *Blum v. Stenson*, 465 U.S. 886, 104 S. Ct. 1541 (S. Ct. 1984.

When fees are sought under the LHWCA, attorneys must submit an itemized petition that supports their proposed market (lodestar) rate. It is insufficient to merely cite rates that historically have been awarded by other judges unless these decisions are based on an assessment of the market rate for similarly skilled attorneys practicing in a comparable area of law. The trier must make findings regarding the appropriate rate when services were performed, inasmuch as rates might be different in different years, and must evaluate other objections to the petition, such as whether the time claimed is excessive or unnecessary. In LHWCA claims, it is assumed experienced attorneys will be more efficient and should bill fewer hours but receive a higher hourly rate than less experienced attorneys who take more time but receive a lower rate. The proposed rate must be relevant to the community in which the litigation occurs. *Shirrod v. Director, OWCP*, 809 F.3d 1082 (9Th Cir. 2015). A sole practitioner in Burns, Oregon probably cannot command the same hourly rate for comparable services as an attorney in Portland, Oregon. A one year attorney in any area of practice in any locality cannot command the same hourly rate as the senior partner in a 50 lawyer firm.

An aggrieved party can appeal the trier's decision. Many appeals have been filed, creating a large body of caselaw on which some of my comments to the Board are based.

Mr. Heus states the Benefits Review Board excludes consideration of Oregon workers' compensation fees when determining a reasonable fee under federal statutes. It is more accurate to state the Board views civil plaintiff litigation with and without personal injury, but not business litigation, as reported in the Oregon State Bar's Economic Survey, as requiring skills comparable to those required to represent injured workers under the Oregon Compensation Act. The Board and the Court of Appeals also does not view rates reported in the OSB survey for workers' compensation as comparable because fees in workers' compensation claims are capped when fees are awarded out of compensation. *Christensen v. SSA*, 2010 WL 2256182 (BRB 03-0302, 2010); *Shirrod v. Director, OWCP*, 809 F.3d 1082 (9Th Cir. 2015).

In the LHWCA system, fees are not awarded out of compensation except in extremely rare claims when a fee is owed by the claimant, rather than the employer or insurer. Even then, the fee is based on the time devoted to the claim. In the Oregon system, an attorney can receive a fee for establishing entitlement to a penalty, a fee for reversing a denial, and an out of compensation fee. In the LHWCA system, penalties may be assessed for untimely payment, but the attorney receives a fee based on the time devoted to securing compensation, rather than a fee in addition to all other fees due.

The 2012 OSB Economic Survey reports rates for Portland attorneys in 25th, 75th, and 95th percentiles[1]. In the categories deemed comparable to workers' compensation, the rates are:

Category	25th Percentile	75th Percentile	95th Percentile
Civil plaintiff litigation without personal injury	$205.00	$300.00	$400.00
Civil plaintiff litigation with personal injury	$239.00	$350.00	$385.00
Average	$222.00	$325.00	$392.50

Mr. Heus states "federal case law and regulations include the reasonable rate and time spent by staff." It is more accurate to state an attorney can receive payment for services provided by paralegals and law clerks, albeit at lower market rates, but not receive payment for secretarial services, which is considered overhead expense. To obtain payment, the attorney must provide an itemized statement and evidence of the appropriate market rate.

Mr. Heus, citing *Christensen v. SSA*, 44 BRBS 39 (BRB 2010), states "longshore attorneys, working under a contingent fee shifting system, earn $400 for prevailing at hearing, *** and the most experienced attorneys in other fields earned over $450 per hour in 2011." He contends hourly rates for any competent attorney should be $350 per hour, practitioners with greater experience should expect rates of $550 per hour, and the best attorneys should earn an hourly rate commensurate with Oregon's top earners in other fields.

Christensen concerned a fee request by Charles Robinowitz, a Portland attorney who has represented injured workers under the LHWCA for more than 40 years. Mr. Robinowitz was the first to convince the 9th Circuit fees should be based on evidence of market rate rather than historical rates. In so doing, he submitted affidavits and other materials suggesting he was in the 95th percentile of practicing attorneys and therefore deserved the highest fee for his services. The Board, based on the evidence Mr. Robinowitz submitted, and in the absence of any contrary evidence submitted by defense counsel, held:

> According to the 2007 Oregon Bar Survey, the base hourly rate for 2006 is $350, based on the 95th percentile rate for general plaintiff civil litigation, both personal injury and non-personal injury. Use of the percentage increase in the Federal locality pay

[1] The percentiles represent the point in the range of responses at which 5%, 75%, and 95% of the responses occur for a specific question. For example, the 95th percentile amount is the amount at which 95% of the reported amounts were below and 5% of the amounts were above

Appendix 1

> for Portland results in these rates: (1) 2007 – 2.11% - $357.50; (2) 2008 – 3.45% - $370; (3) 2009 – 3.76% - $384; (4) 2010 - 2.04% - $392.

Christensen v. SSA, 44 BRBS 39 (BRB, 5/13/10). Note: The 95th percentile rate based on the 2007 OSB survey, adjusted for inflation, in 2010 was $392. According to the 2012 OSB survey the 95th percentile rate is $392.50. In a poor economy, market rates did not necessarily increase.

In the years after *Christensen*, when the defense bar submitted market rate evidence contesting the evidence Mr. Robinowitz submitted, none of the administrative law judges from San Francisco (the judges who routinely preside at Mr. Robinowitz' LHWCA hearings) concluded Mr. Robinowitz was a 95th percentile attorney. For example, Presiding Judge Gee held:

> Despite these strengths, he has no experience comparable "to the highest paid civil litigators with expertise in areas such as antitrust, corporate and international tax, or securities. * * * Because he is a solo practitioner, Mr. Robinowitz also "lacks skills for managing teams of associates over years of extended litigation or communicating with large complex organizations as clients." While Mr. Robinowitz's accomplishments no doubt qualify him as an above-average attorney, the limitations on experience due to the nature and size of his practice do not place him in the 95th percentile of practicing attorneys. **** "I find that while his skills are above average, they only warrant inclusion in the 75th percentile of practitioners.

Castillo v. Sundial Marine Tug and Barge Works (2010-LHC-00341, 3/6/13). Judge Berlin agreed:

> I cannot agree with the Board that Mr. Robinowitz ranks in the 95th percentile of Oregon trial lawyers. * * * The fact that an attorney has over 40 years' experience does not necessarily even suggest, not to mention conclusively demonstrate, that the lawyer ranks among the very best attorneys in the state. Mr. Robinowitz is a fine, intelligent, hard-working, dignified, erudite, careful, and zealous attorney with extensive experience in the Longshore arena. He has an exemplary and profound respect for the law and the legal process. He has served many clients extremely well. But he has no experience parallel to the highest paid civil litigators with expertise in areas such as anti-trust, corporate and international tax, and securities. He lacks skills for managing teams of associates over years of extended

Appendix 1

> litigation for communicating with complex corporate organizations as clients. He requires too many postponements and extensions of time to complete required work, and this can cause delays to his clients who are awaiting remedies. He settles many cases, often with good results. But, while his judgment in pursuit of settlement is certainly adequate, it is not always outstanding. He has no history of publication of which I am aware[2], nor does he have a record of extensive contributions to the bar. I do not wish to demean or minimize Mr. Robinowitz's established and strong history of accomplishment. He is a fine lawyer and a real asset to the Longshore bar. It simply is a stretch to place him in the 95th percentile of all Oregon trial-level attorneys.

Wilson v. Honeywell Technology Solutions, Inc. (2010-LDA-00074, 6/29/11). Judge Gee and Judge Berlin's observations could easily apply to Oregon's best workers' compensation attorneys -- fine, intelligent, hard-working, dignified, erudite, careful, and zealous with extensive experience but not in the same category as the highest paid litigators in the state.

In post *Christensen* decisions, the San Francisco administrative law judges generally awarded Mr. Robinowitz $350 to $367 per hour for services performed in 2013 through 2015. Mr. Robinowitz continues to file appeals in an effort to secure a higher rate. Other Portland LHWCA plaintiff attorneys almost always received less than Mr. Robinowitz when fees were contested,usually $300 to $350 per hour. For example, In *Pierce v. Georgia Pacific* (2009-LHC-00915, 7/10/14), Judge Berlin awarded Mr. Bunnell$336 per hour for services in 2013 and awarded Ms. Flynn $305 per hour for services in 2011. Mr. Bunnell is a partner in the firm where Mr. Heus now works, and Ms. Flynn left Preston, Bunnell, and Flynn to accept a seat on the Oregon Court of Appeals. $550 per hour might be paid to an appellate specialist in Washington, D.C., but not to a trial attorney in Oregon. No LHWCA attorney in Oregon has, to my knowledge been awarded $550 per hour fee when fees were contested.

In LHWCA claims workers almost always receive more compensation than workers with a similar injuries subject to the Oregon Compensation Act. LHWCA settlements frequently exceed $100,000. We sometimes wait two years for an ALJ decision. Discovery is subject to rules of procedure before Administrative Law Judges, comparable to Federal Rules of Civil Procedure. The claimant is routinely deposed. Parties may submit interrogatories, requests for production, and requests for admission. Written closing arguments, after formal hearing, are almost always required. Physicians and other expert witnesses usually testify at hearing or via

[2] Mr. Robinowitz subsequently authored a chapter in a LHWCA publication.

Appendix 1

perpetuation depositions. LHWCA procedure and practice is not comparable to Oregon workers' compensation claims The lodestar rate for an attorney who has an Oregon compensation practice is not equal to the lodestar rate for an attorney with a LHWCA practice.

Although workers' compensation is an honorable and fulfilling area of practice, it is not as lucrative as other areas of the law. Attorneys who have a business litigation, tax, or patent and trademark practice, among other areas of the law, earn more than attorneys who specialize in workers' compensation. Attorneys who practice in large firms tend to earn more than attorneys who practice in small firms. Attorneys who practice in large cities tend to earn more than attorneys who practice in small, rural communities. Young attorneys tend to earn less than older, experienced attorneys. And, in my experience, attorneys who represent workers, employers, or insurers in LHWCA claims have a higher market rate than attorneys who represent workers, employers, and insurers in state compensation claims.

The current Oregon system allows 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 (h) The assertion of frivolous issues or defenses. LHWCA claims take a different approach.

- The time devoted to the claim is based on an itemized petition. Sometimes employers and insurers contend the time listed was excessive or unnecessary.
- The complexity of the issues is not considered. The lodestar rate assumes an experienced attorney is capable of dealing with complex issues. A younger attorney with less experience will receive a lower rate but might devote more time to the issue;
- The value of the interest involved and the benefit secured are not considered. If the attorney secures compensation the insurer refused to pay, the attorney is entitled to a full fee, assuming the time devoted to that pursuit was reasonable.
- The nature of the proceedings is relevant only to the extent fees must be based on the market rate in other comparable matters;
- The skill of the attorney is considered when determining a lodestar rate.
- The risk an attorney's efforts may go uncompensated is *not* considered. The lodestar rate in a LHWCA (and fee shifting statute) claim may not consider

Appendix 1

the contingency nature of recovery. *City of Burlington v. Dague*, 505 U.S. 557 (1992).

In LHWCA claims, if an attorney is partially successful the attorney should receive a partial fee if it can be determined how much time was devoted to the unsuccessful claim. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Judges and the Board follow this concept now by awarding a lesser fee when one denial is reversed and another is affirmed.

It would be a mistake to adopt a one size fits all approach to fees in Oregon workers' compensation claims. Just as the Oregon legislature recently concluded there is a different minimum wage in three sectors of Oregon's economy, there are different lodestar rates for different attorneys in different communities These rates will never be as high as the rates charged by Oregon's top earners in other fields. If Oregon required injured workers to pay their attorneys for services performed, does anybody seriously believe an injured worker would pay $550.00 per hour for that representation?

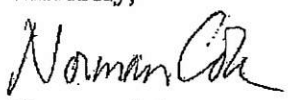
If the Board wants to adopt the LHWCA system, it should direct attorneys to submit an itemized petition in each claim, provide evidence to justify the market rate, and provide employers and insurers an opportunity to object and offer evidence opposing the proposed fee. This approach will lead to additional expense and litigation. In *Baker Botts LLP v. ASARCO LLC*, 135 S.Ct. 2158 (2015), the Supreme Court held "no attorneys, regardless of whether they practice in bankruptcy, are entitled to receive fees for fee-defense litigation absent express statutory authorization." Oregon now has a statute that allows fees for litigating fees under limited circumstances. Requiring litigants to submit fee petitions will encourage fee litigation.

The Supreme Court, in *Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011), stated

> [t]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection.

The current system, in which attorneys may but need not submit fee petitions and the trier awards a fee does rough justice without encouraging additional litigation. The changes Mr. Heus requests are not necessary.

Sincerely,



Norman Cole

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Appendix 1

NC:
cc: Jill Gragg, SAIF Corporation

Appendix 1