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RE: 2018 Biennial Review of Attorney Fees Under ORS 656.388(4)

Dear Board Members,

Thank you for inviting comments regarding the board's 2018 biennial review of attorney fees. Although I participated in the board's Attorney Fee Advisory Committee, and I am a member of the OTLA/OWCA policy group, I offer comments from my perspective, and do not speak on behalf of either group. My background in workers' compensation is detailed in my October 30, 2018 letter to the board concerning attorney fees.

### **The Goals of the 2015 Legislature**

I encourage to board to review the goals of the 2015 legislature. The legislature intended to accomplish two things: eliminate the economic gap between defense costs and claimants' fees and make the workers' compensation practice economically competitive with other areas of law to prevent continued attrition of attorneys representing injured workers. These goals are not in dispute, yet the board has taken no effective action in three and-a-half years since the changes became effective. In fact, the gap has grown larger, there is no evidence that the number of attorneys willing to represent workers has changed, or that the number of *pro se* litigants has reduced. I request that the board take the legislative directive and resolve the issues identified by the 2015 legislature.

### **The Advisory Committee**

On February 1, 2019, the Board Chair asked for comments and recommendations concerning attorney fees awarded to attorneys representing injured workers. The board chair gave assurances that the resulting subcommittee was not formed for the purposes of delay, but I fear that is exactly the function the committee has served.

While I thoroughly prepared for a creative discussion about how to fix the problems the 2015 legislature identified, including time consuming research into how the problem is addressed in other jurisdictions and forums, I was met with participants who were unprepared to speak about solutions, took institutional positions against proposed solutions, and desired to focus instead on whether there was really a problem at all.

For example, one defense stakeholder took the position that the board does not have “authority” to revise its rules on assessed fees as part of its biennial review. The stakeholder essentially argued to the committee that the board lacked jurisdiction to change its own administrative rules concerning assessed or awarded fees. It then adopted institutional positions against the proposed solutions without offering alternatives. That position was wholly inappropriate given the directive of the board, was not productive in developing detailed solutions to the problem, and set a discouraging tone for the remainder of the committee meetings.

Another defense stakeholder claimed ignorance, first about the existence and extent of the gap, and then about what the gap comprised. He claimed that the statistics were out-of-date, and prevented a frank discussion of solutions. This position was held despite being given more recent information of the extent of the gap and information about what the gap comprises. In response, he accused me of “having better statistics than they had,” despite them being accurate and obtained directly from the WCD. This is simple unpreparedness and unfamiliarity with the issues, nothing more.

To my understanding, this was not the purpose of the committee. Since 2015, there is no dispute that there is a problem or what that problem is. The purpose of the committee, again to my understanding, was to address potential solutions to that defined problem. If certain stakeholders were unwilling to accept the presence or nature of the problem, unwilling to prepare and research the problem, and unable to offer potential solutions to the problem, they should not have been selected as members of a committee to discuss solutions to the problem. Those stakeholders had their chance to participate, squandered it, and should not now be listened to.

### **The Advisory Committee Report**

On July 1, 2019, the Attorney Fee Advisory Committee submitted a report to the board members summarizing the committee’s responses to the board’s request for comments and recommendations. I would like to comment on three of those recommendations.

#### *Voluntary Bifurcation of Attorney Fees*

The committee voted 3 to 2 on item one, recommending the board adopt a process of voluntary bifurcation of attorney fees and encouraged the board to adopt a process for bifurcation. As before, I stand by my prediction this will resolve many underlying fee issues indirectly. Board members will be protected from conspiracy theories about negotiating compensability in exchange for reduced fees. It will encourage settlement of fee issues by parties, reducing the number of adjudicated fees. And it will prevent unnecessary appeals of benefits when fees are the underlying issue. I have previously offered potential rule language, and what I would like to see is a meaningful process to bifurcate fee issues from underlying substantive issues, *like it is done in nearly all other forums*.

#### *Lodestar and Contingency Multiplier*

The committee was split 2 to 2 on the issue of a multiplier, with one stakeholder abstaining, but it did not directly discuss the lodestar model for determining fees. I understand that Member

Lanning has proposed a rule to include a lodestar method combined with a contingency multiplier. See Rule Concept, Steve Lanning (10/17/19). A voluntary lodestar method of calculating fees is clearly the right path. However, it is my opinion that the correct variables should be based on a reasonable market-based and *contingent* hourly rate multiplied by a reasonable number of hours spent. A reasonable contingent hourly rate should take into consideration the contingent nature of the practice by dividing the average attorneys' fees statewide in similar practice areas by the average loss ratio of workers' compensation cases. This would help achieve the goal of making the practice of workers' compensation comparable to other practice areas and encourage recruiting and retention of younger legal talent.

### *Regulation of Defense Fees*

The committee voted 4 to 1 for the board to address ORS 656.388(4), which *requires* the board to establish a schedule of fees for defense attorneys. This statute has been ignored far too long. The board must adopt rules governing defense fees. The committee discussed several methods that the board could consider, including making payment of defense fees contingent on the insurer prevailing in the case. From my standpoint, it would be interesting to see how defense rates would change, or their ranks atrophy, if defense fees were contingent on prevailing for their clients. Such a rule would illuminate the complex fee issues that currently exist, as it would be hard to imagine that defense firms would be able to operate the same while generating 53% of their current revenue.

If the board reviewed defense fees and costs, hourly rates, billing methods, and cost bills, the board would understand where the economic gaps comes from. The statute mandates this be done, and it is time for it to be done.

### **DCBS Statistics**

Finally, I would like to make a comment about statistics. On April 16, 2019, the DCBS released a memorandum, summarizing a variety of statistics. Those updated statistics suggest that the board has done little to further the goals of the 2015 legislature.

### *The Gap*

As noted, one of the explicit and primary goals of the legislature was to reduce the economic gap between defense legal costs paid to defend claims and legal fees paid to claimant's attorneys when prevailing in claims. The most recent statistics from the DCBS demonstrate that legal defense costs have risen from \$36.5 million in 2015 to \$40 million in 2017, a 9.59% increase over the 2015 data. DCBS Memorandum, at 8. In contrast, claimant's attorneys' fees rose from \$21.3 million in 2015 to \$23.3 million in 2017, a 9.39% increase. *Id.* at 13. The data show the gap between claimant's fee and defense fees continues to widen.

In 2015, claimants' attorneys were paid \$15.2M *less* than defense attorneys. In 2017, that difference *increased*, as claimants' attorneys' fees totaled only 52.76% of defense legal costs, representing a \$17.4M difference. The gap continued to increase, despite a two million dollar increase in fees paid directly by workers out of Claims Disposition Agreements.

This statistic means that the gap persists and continues to widen, despite the board's decision to shift more of the fee burden to Oregon's workers.

#### *Average Fees Per Case*

In 2017, insurers and self-insured employers paid, on average, \$5,741 to defense counsel for every single litigated case. That is the average amount defense counsel earned, win or lose, on every single case. In contrast, claimant's attorneys earned, on average, \$3,458 for every litigated case. This represents a 60% difference, showing that claimant's attorneys, on average, are grossly underpaid.

Even more stark is that claimant's attorneys earn, on average, \$5,121 on cases that go to a decision. DCBS Memorandum, at 10. As one defense stakeholder pointed out, that is almost the same as the \$5,741 per-case average for defense counsel! What the stakeholder failed to realize is that defense counsel is paid, on average, \$5,741 *for every single case win or lose*, whereas the \$5,121 is the average fee paid *only when the claimant's attorney wins*. See also, DCBS Memorandum at 5 (average assessed fee at hearing *for winning* is \$5,231). This should be a clear indicator that the board has simply ignored the legislature's direction to take into account the contingent nature of workers' compensation practice. Indeed, the board members should ask themselves, which they would prefer: 1) earning \$5,741 on every single case taken, or 2) earning \$5,121 on only 47% of the cases they win, and zero on the cases they lose.

#### *Board Review Fees*

In 2018, the board's "Average Assessed Fee" was \$5,979. DCBS Memorandum, at 5. But in calculating the fee, the DCBS included cases in which "the claimant's attorney also provided services at hearings." This is flawed methodology. It effectively shifts fees that should be included in the average fees at hearing and uses them to "pad" fees for services on review. These should be separate, as it is not always the same attorneys or even the same firm who performs the work on review. Also, it would be telling to see how much the board awards for legal services on review, and encourage the board to break out and explain the awards each level, unlike they do now.

#### *Pro Se Representation*

The DCBS optimistically states that "claimant attorney representation at the various levels of litigation remains high." DCBS Memorandum, at 1. With respect to the DCBS's interpretation of its own data, the level of representation is actually slightly worse than in 2015. In 2015, 87.5% of workers were represented at hearing, leaving 899 *pro se* hearings. In 2018, 87.1% of workers were represented at hearing, leaving 936 *pro se* hearings. In all, there has been virtually no change since the legislature changed the law in 2015 with the intent to increase representation and nearly 1000 workers still go without representation at hearing every year. Although I appreciate the cheery description of 87% as "high," I disagree that the legislature's goal in 2015 was to maintain the *status quo* as it existed in 2015.

### *Board Review Cases*

Finally, in 2009 there were 601 board review requests, for which a median time from request to decision was 172 days. (Workers' Compensation Dispute Statistics) (attached). In contrast, in 2018, the board received 264 requests for review, less than half the number in 2009. Yet, the time from request to order *increased* from 172 days to 178 days.

One explanation for this is that workers' compensation cases have become twice as complex, requiring careful and detailed legal analysis by staff attorneys, a managing attorney, and board members, to render accurate and consistent legal decisions. If this were the case, however, one would expect that attorney fees would similarly double, as appellate attorneys would be required to spend twice as much time analyzing such complex cases. Yet, the average assessed fees for board review has not doubled. Rather, since 2009, claimants' attorneys have seen only a 46.6% increase, from \$4,078 in 2009 to \$5,979 in 2018, rather than 127.7% increase that would be anticipated by a doubling in legal complexity. The board needs to explain why, if claims are twice as complex, that fees have not risen accordingly.

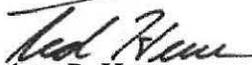
### **Conclusion**

At the last public board meeting on attorney fees, a wise and experienced claimant's attorney characterized the Oregon worker's compensation system as a three-legged stool. That analogy is apt. If one leg is slightly shorter, the stool becomes unstable. If one leg is 41.75% percent shorter, the stool falls. I ask the board to use its authority to right the stool, before it falls.

As always, please let me know if you have any questions.

Sincerely,

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