



MEMORANDUM

May 1, 2019

To: Connie Wold, WCB

From: Cecily Warren, CSD

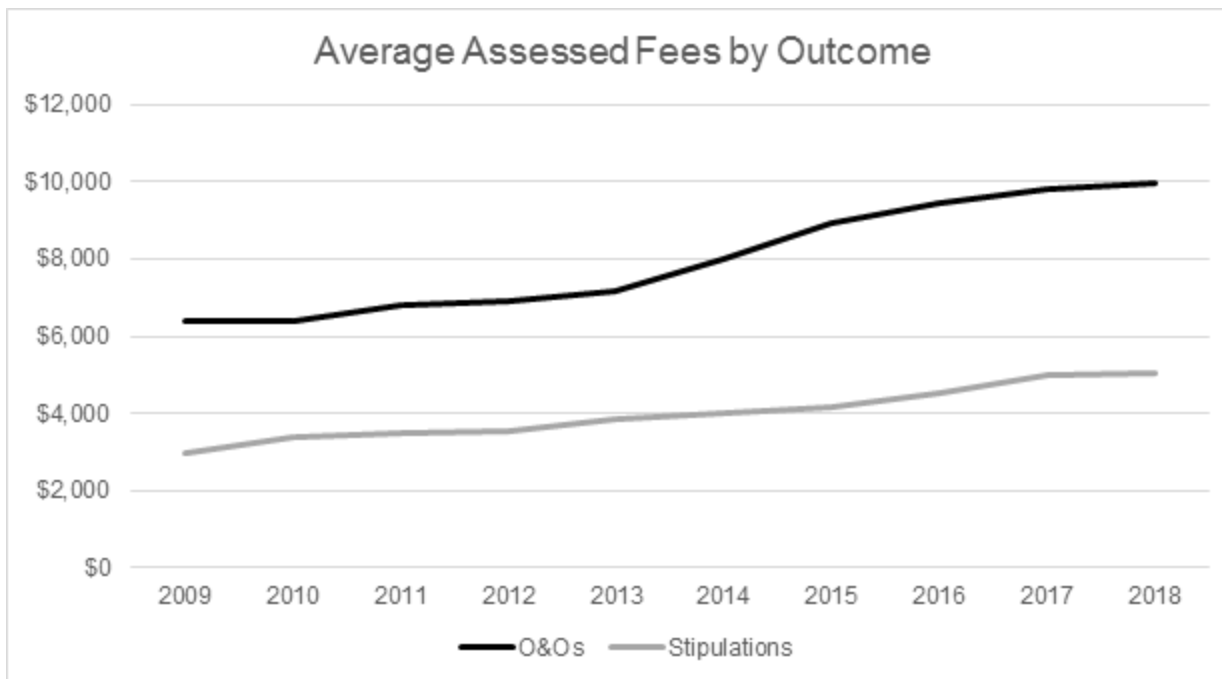
Subject: 2018 Attorney Fee review – follow-up

I received an e-mail on April 25, 2019, from Theodore Heus asking a few follow up questions regarding the report provided to the Attorney Fee Advisory Committee on April 19, 2019. Below are his questions and our responses.

- On page 7, I understand that "All Hearings" account for all cases where there was an "assessed attorney fee." However, because Stipulations and DCS agreements are apparently included, the statistic does not reveal the number of cases litigated to conclusion, i.e., cases "won." Does the WCD have data on cases that fees are assessed are **not** settled via DCS? I can't extrapolate win/loss data if it is combined with DCS, which are extra-judicial settlements.

Below are two tables that show cases in which one or more denials were overturned by an O&O or a Stipulation, respectively. The case counts in the tables below include all cases with an outcome of O&O or Stipulation at hearings, where an assessed fee was awarded and compensability was affirmed. Other issues may have been litigated, in addition to compensability, in the cases counted below. The data is represented on a graph on the following page (page 2).

| Cases in which one or more denials are overturned (O&Os)* | | | | | | | Cases in which one or more denials are overturned (Stipulations)* | | | | | |
|---|-----------------|-------------|---------|----------|----------|----------|---|-------------|---------|---------|----------|---------|
| Year | Number of Cases | Total | Average | Median | Maximum | Minimum | Number of Cases | Total | Average | Median | Maximum | Minimum |
| 2009 | 435 | \$2,689,005 | \$6,372 | \$ 5,500 | \$72,000 | \$ 1,500 | 605 | \$1,791,844 | \$2,996 | \$3,000 | \$18,000 | \$ 125 |
| 2010 | 429 | \$2,659,345 | \$6,377 | \$ 6,000 | \$20,000 | \$ 250 | 576 | \$1,920,219 | \$3,375 | \$3,250 | \$18,751 | \$ 200 |
| 2011 | 350 | \$2,334,367 | \$6,806 | \$ 6,000 | \$27,000 | \$ 1,500 | 467 | \$1,604,493 | \$3,496 | \$3,500 | \$10,000 | \$ 100 |
| 2012 | 334 | \$2,164,050 | \$6,914 | \$ 6,000 | \$40,000 | \$ 1,000 | 460 | \$1,605,656 | \$3,560 | \$3,500 | \$10,000 | \$ 500 |
| 2013 | 281 | \$1,919,626 | \$7,190 | \$ 6,500 | \$25,000 | \$ 1,000 | 465 | \$1,773,425 | \$3,830 | \$4,000 | \$12,000 | \$ 250 |
| 2014 | 305 | \$2,356,786 | \$8,016 | \$ 7,000 | \$30,000 | \$ 2,000 | 481 | \$1,875,000 | \$3,998 | \$4,000 | \$16,000 | \$ 250 |
| 2015 | 303 | \$2,658,555 | \$8,921 | \$ 8,000 | \$43,334 | \$ 1,000 | 408 | \$1,664,258 | \$4,182 | \$4,000 | \$18,000 | \$ 200 |
| 2016 | 256 | \$2,263,579 | \$9,432 | \$ 8,500 | \$35,600 | \$ 500 | 325 | \$1,436,327 | \$4,545 | \$4,250 | \$16,000 | \$ 150 |
| 2017 | 207 | \$1,933,647 | \$9,815 | \$ 8,500 | \$28,500 | \$ 3,000 | 348 | \$1,702,950 | \$5,009 | \$4,625 | \$40,000 | \$ 500 |
| 2018 | 198 | \$1,857,283 | \$9,985 | \$ 8,500 | \$30,000 | \$ 1,500 | 295 | \$1,455,442 | \$5,036 | \$4,500 | \$20,000 | \$ 500 |



- Why does the "litigated claims count" for defense cases in 2017 on page 9 (7,778), not equal the 2017 "total cases" on page 13 (6525) plus the number of unrepresented cases on page 4 (908). The total is only 7,433; where are the other 345 cases?

On page 9, the 2017 litigated claims count was 6,967. This figure includes claims in which there was a change in litigation status in a given year, with defense legal costs, as reported by insurers, including self-insured employers. That claim count is different than the "total cases" count on page 13, which includes cases at hearings, on board review, and those ending in a CDA, that have an attorney fee. Both of those claim counts differ from the count on page 4, which includes cases that had attorney representation, regardless of whether there was an attorney fee. Not all cases have attorney representation, and not all cases result in an attorney fee, even when there is attorney representation, while litigated claims always have defense legal costs for insurers. Since the basis of the data is different for each of the pages referenced, adding the figures together will not yield accurate results.

- And in parity, do the average fees awarded at hearing **exclude** fees that were later reversed on review? If so, how does it account changes occurring after more than one year? For example, O&O awards a fee on 10k in 2017. Does that go on the total fee pile? What if the board reverses in 2018, and eliminates the fee? How is that accounted for in the 2017 or 2018 statistics?

The average fees awarded at hearings does **not** include fees that were later reversed. Each step in the appeal process is captured individually. The data provided in the original report on attorney fees at hearings and on board review (Appendix 3) illustrates how fees are captured at each level. The statistics on hearings fees, shown in the "Hearings Cases Average Assessed Fee" table, are included in the year based on the first hearing order date. The statistics on board review fees, shown in the "Board Review Group Average Assessed Fee" table, are included in the year based on the first board order date. Therefore, a case could be counted in 2017 for hearings and then in 2018 for board review.

Attorney fees awarded at board review are captured as adjustments to fees awarded at hearing, not the net awarded for the case. Hearing data is not adjusted after a Board review.

- On page 5, the chart shows the average board review fee. I understand this includes both cases in which a claimant prevails as respondent and as appellant. As noted, when a claimant prevails at board review as the appellant, the board awards fees for services at hearing and on review. Does the WCD have data for fees awarded as respondent only, i.e., only fees awarded for services on review? What is the average fee awarded by the board for "services on review."
- As the "contingent nature" is a central issue to the board's fee analysis, I would like to extrapolate the number of "wins" over denials, and other cases, but I can't do that with the data currently in the report. Does the WCD have that data, or maybe know how many "loses" or cases in which denials are affirmed and no fee is awarded at hearing?
- Also, win/loss statistics on board review would be super helpful too.

The above three questions are difficult to answer. The current system that captures board review and hearings orders captures "case" information. However, a case may include several issues. Issues may be upheld, changed, or reversed, but the outcome captured may not truly be reflective of a "win" or a "loss".

I understand that the advisory committee may be in possession of a 2013 Hearings publication distributed by a former Research analyst. Unfortunately, we cannot replicate the results that were reported and sources of the data.. Additionally, numbers reported in 2013 will have changed in the years since, as some cases may have been litigated further and modified or reversed accordingly. We would need additional time to analyze and revise previous methodology to determine whether we can appropriately and accurately capture the data requested. Likely, this would result a new and updated method for collecting the correct data.

Please let me know if you receive further questions or if we can be of further service. Thank you.