

**Workers' Compensation Board**  
**Tuesday, September 29, 2015**  
**1:30 p.m.**

Meeting Minutes

Present: Holly Somers, Chair  
Sally Curey, Member  
Judy Johnson, Member  
Steve Lanning, Member  
Margaret Weddell, Member  
Roger Pearson, Managing Attorney  
Joy Dougherty, Presiding ALJ  
Karen Burton, Executive Assistant  
Debra Young, Staff Attorney  
Kerry Garrett, Assistant to PALJ Dougherty  
Martin Alvey, Attorney at Law  
Kevin Anderson, Attorney at Law  
Aaron Clingerman, Attorney at Law  
Randy Elmer, Attorney at Law  
Rob Guarrasi, Attorney at Law  
Dale Johnson, Attorney at Law  
Chris Moore, Attorney at Law  
Jodie Phillips Polich, Attorney at Law (via phone)  
Connie Wold, Attorney at Law  
Julie Masters, SAIF Attorney  
Mike Manley, DCBS Information Technology & Research

**Call to Order**

Chair Somers called the meeting to order.

**Approval of Agenda and Order of Business**

Chair Somers requested that the agenda be amended to allow public comment during discussion of the agenda items. Member Weddell moved for approval of the amended agenda. Member Johnson seconded. Motion carried.

**Approval of Past Minutes**

Member Curey moved for approval of the July 9, 2015 meeting minutes. Member Lanning seconded. Motion carried.

## **Reports of Administrative Staff**

Hearings Division: No report.

Board Review: No report.

Administrative Services Division: No report.

## **Unfinished Business**

None.

## **New Business**

### **Update on projected completion date for WCB staff report regarding attorney fee concept discussed at July 9, 2015 meeting.**

Pearson provided an update on the review of Julene Quinn's concepts. He met with staff regarding the potential impact on logistics and processing issues, and anticipates his research will be complete within the next few weeks.

Chair Somers acknowledged Chris Moore's concepts, noting that one was sent to the advisory committee, and the other was tabled to be heard with Quinn's concepts at a future meeting.

Member Johnson voiced interest in having the Board review caps on out-of-compensation attorney fees, noting the issue was last reviewed in 1999, and suggested the matter be included with Quinn's and Moore's concepts.

Member Curey preferred to table those issues until the rule amendments to HB 2764 are complete, then lump those concepts in with a biennial review beginning in January.

Member Weddell would rather proceed more quickly on the concepts. Members Lanning and Johnson agreed with Member Weddell.

Pearson said it was reasonable to assume an administrative staff report regarding Quinn's concept would be completed shortly.

Moore reported that the claimant's bar believes the caps need to be raised, but will first need time to meet with organized labor.

Member Johnson moved that the Members table the concepts until mid-November, then be handled as a group. Weddell seconded. All in favor: Johnson, Weddell, Lanning, Curey, and Somers.

**Consideration of the [advisory committee report](#) concerning attorney fee-related administrative rule concepts resulting from passage of HB 2764, including discussion of proposed rule amendments in response to the committee’s report and the scheduling of a future rulemaking hearing (to consider public comments received in response to the proposed rule amendments).**

Section 1 of HB 2764 amends ORS 656.012(2)(b) to add “while providing for access to adequate representation for injured workers.” Member Weddell suggested that there be mention of providing access to adequate representation to injured workers in the policy section of the Board’s rule.

Chris Moore and Connie Wold agreed that there are key policy changes that should be specified and it would be easier if it were reflected in rule, rather than going back to look at the statute.

Member Weddell moved that the Board propose an amendment to OAR 438-005-0035 to include that language. Lanning seconded. All in favor: Curey, Johnson, Lanning, Weddell, and Somers.

Section 2 – Member Curey moved that the Board propose amendments to OAR 438-015-0110 consistent with the advisory committee’s recommendations. Lanning seconded. All in favor: Curey, Johnson, Lanning, Weddell, and Somers.

Dougherty summarized the advisory committee’s recommendation regarding jurisdiction and procedure, and the proposed rule language specific to ORS 656.262(14)(a). Dougherty noted the advisory committee proposed a process that mirrored the cost bill procedure. Member Johnson concurred with that concept.

Julie Masters noted the language does not include a timeframe for submitting a bill for services, and that SAIF supported a 30-day timeframe. Masters also relayed a concern that under ORS 656.388 no fee may be charged without approval by the Board (by statute). She further noted that a retainer agreement is required before the scheduling of a worker’s statement.

Aaron Clingerman stated that he interprets the statute differently in that it does not pertain to the cost bill/fee statement.

Randy Elmer urged the Board not to adopt SAIF’s recommendation regarding a retainer agreement.

Dougherty relayed that the advisory committee did not come to a resolution at their first meeting, but did come to a consensus on an hourly fee of \$275 at their second meeting. The advisory committee wanted to communicate to the Board that it was a hard fought compromise on both sides; they did take public comment, and were provided with case law from the Court of Appeals.

Rob Guarrasi commented on the attorney fee amount, with his view that the system is out of balance.

Randy Elmer stated as co-author of HB 2764, and after consultation with the Oregon State Bar, they put a lot of thought into this, and wanted the Board to follow-up with the OSB Board of Governors to obtain information from their surveys.

Martin Alvey said he attends every interview/deposition because there can be many loaded questions, so he believes it is important to assist an injured worker from the beginning.

Connie Wold stated that HB 2764 addresses many of the things that claimant's attorneys do for which they are not getting paid. A policy to increase access to justice is apparent throughout the statutory changes. She believed the Board should consider those factors in setting the hourly rate.

Chris Moore sees the House Bill as a change in the landscape. Legislative history shows there is an attorney fee problem in the claimant's bar. Large carriers/firms are able to bill for legal assistant charges at \$120 hour, and sometimes they have two legal assistants and add that to the attorney's charge of \$180. Claimant's attorneys are unable to do that. He has looked at the economic surveys, and he bills \$400 hour at the Court of Appeals. He thinks that is a reasonable fee in order to increase access to injured workers and attract people to the practice. It takes a lawyer's skill to defend at a deposition. He would also determine the scale of the attorney fee by the years in practice.

Connie Wold shared Moore's concerns. She agrees the legislation is intended to address the discrepancy in defense/claimant's bar, and that the rate should be considered in the contingency nature of the practice. Claimant's attorneys also have a high overhead with many clients that are not English speaking which requires staff to assist, for which she cannot bill under the system. Although \$275 hour was a compromise between both sides of the advisory committee, she does not believe it is high enough to cover all of the other aspects of their practice.

Julie Masters said part of the reason carrier's attorneys' fees are higher is because they are giving advice and processing claims issues. She also believes there is a smaller pool of injured workers for claimant's attorneys to represent. The higher the fee, the

more motivation to get the statements in, will take them longer, be more complicated, etc. Masters feels \$275 is a reasonable compromise.

Dougherty noted that all of the concerns that were being discussed were concerns brought up by committee and were considered. It all came down to what the fee is for – appearance at a deposition, and is a tool for bridging the gaps.

Member Weddell does not believe that \$275 is anywhere near where it should be, and indicated the Board has authority to promulgate the rules that legislators have set forth. She believes \$400 to be more reasonable.

Member Curey thanked the advisory committee for their work, and respected that they came to a compromise. She felt that statutes have gradually been modified to acknowledge and address the issue of paying claimant's attorneys for things they do but are not compensated for. It is also her understanding that this particular rule concerns the specific activity of taking statements, and will take the comments heard under advisement.

Member Johnson sees this issue as only a small portion of HB 2764. She is concerned about putting together an advisory committee of well-respected practitioners who came to a compromise, and rejecting it. Reluctant to do that, she supports \$275.

Member Lanning believes \$275 is a low number, and agreed with Member Weddell that \$400 is reasonable.

Chair Somers acknowledged all perspectives, and believes there are inequities on both sides of the bar. All the Board can do is extrapolate the information it receives and put it all together. She agreed that what is being looked at is very narrow – putting a dollar amount on claimant's attorneys who provide a valuable service to injured workers by attending their statements/depositions. Lastly, she did not feel that the Board can correct all inequities discussed; *i.e.*, including travel time, legal assistant time, etc., as the statute is specific to the hourly rate for actual time spent during the interview/deposition. Lastly, the Board will be provided with additional public comment at the rulemaking hearing.

Member Curey agreed with Member Johnson, and has a hard time not giving a lot of weight to the recommendation of the advisory committee. However, after hearing all comments received, Member Curey made a motion that the Board propose rules with the changes discussed above with an hourly rate of \$300. Johnson seconded. In favor: Curey, Johnson, Somers. Opposed: Weddell and Lanning.

Another meeting will be scheduled for the following week to reconvene for discussion of the remaining sections of the advisory committee's report. Dougherty will participate by phone.

**Public Comment**

As above.

**Announcements**

None.

**Adjournment**

The meeting adjourned, and will reconvene at a date the following week.