

Workers' Compensation Board
Tuesday, October 6, 2015
9 a.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 (via phone)
Karen Burton, Executive Assistant
Debra Young, Staff Attorney
Kerry Garrett, Assistant to PALJ Dougherty
Kevin Anderson, Attorney at Law
Chris Moore, Attorney at Law
Julene Quinn, Attorney at Law
Connie Wold, Attorney at Law
Julie Masters, SAIF Attorney
Jaye Fraser, SAIF
Mike Manley, DCBS Information Technology & Research

Call to Order

Chair Somers called the meeting to order.

Unfinished Business

Continued 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).

Advisory Committee Report - Section 2 (continued):

OAR 438-015-0033 (Procedure) - Member Johnson proposed adding language to subsection (3) to state claimant's attorney shall submit a bill within 30 days of completion of the deposition, as well as adding subsection (c) under subsection (3) to require a retainer agreement prior to payment, if one has not been previously submitted.

Member Curey moved that the Board forward with advisory committee's proposed recommendation with the additions referenced by Member Johnson. Johnson seconded.

Chair Somers suggested inclusion into the Statement of Need that the Board has jurisdiction, as it is implicit in statute that the Board has this rulemaking authority. Johnson seconded. All in favor: Curey, Johnson, Weddell, Lanning and Somers.

Section 3: No discussion, no action.

Section 4: No discussion, no action.

Section 5:

ORS 656.382(1) - No discussion, no action.

ORS 656.382(2) - No discussion, no action.

ORS 656.382(3) - Julie Masters commented on the proposed subsection (2) to both OAR 438-015-0065 and OAR 438-015-0070, and suggested language should provide for the Board or court to award a reasonable additional attorney fee when the carrier raises attorney fees, penalties or costs as a separate issue in its request for review, appeal, or cross-appeal to the court or petition for review to the Supreme Court, and the Board or court does not disallow or reduce the disputed item. She suggested modeling OAR 438-015-0070 after OAR 438-015-0065 and change it to the Board rather than an ALJ.

Julene Quinn suggested that that language should also include a request for reconsideration. In addition, she submitted her [written comments](#) regarding the implementation of HB 2764 into the record.

Chris Moore expressed concern that since Board provides *de novo* review, he wants to ensure that if claimant has to defend those issues, counsel gets paid for it. If it is determined that the statutory language is included, he has no objection.

Pearson recommended the rules mirror the statute, citing a Court of Appeals case. Chair Somers concurred. Member Johnson agreed to incorporating language from the statute and removing appeals to the Court of Appeals and the Supreme Court. Pearson noted that since there are attorney fee rules and ALJ rules, it would seem appropriate to mirror the statute in OAR 438-015-0065 and OAR 438-015-0070.

Member Johnson moved that the Board adopt language in ORS 656.382(3), but modify so that it fits OAR 438-015-0065 which governs attorney fees in the context of a request for hearing, and OAR 438-015-0070 which models language for Board Review. Member Curey seconded. All in favor: Johnson, Curey, Weddell, Lanning and Somers.

Member Curey moved that proposed changes to OAR 438-015-0065 and OAR 438-015-0070 (adding “all or part of”) be approved and incorporated. Member Johnson seconded. All in favor: Curey, Johnson, Weddell, Lanning and Somers.

ORS 656.382(4) - Quinn commented that HB 2674 is about getting claimant's attorneys paid, referring to a [document](#) that was used in the legislative process. This statute is in the context of attorneys who have already done the work. If a matter has been briefed, she urged the Board to do the right thing, as well as consider the legislature's intent.

Jaye Fraser stated that the document to which Quinn referred was provided to the Senate Workforce Committee during testimony on Senate floor and that the document did get into the legislative history along with other documentation.

Masters commented that OTLA submitted the bill, and it was significantly altered with the agreement of MLAC. It includes a reasonable assessed fee in briefing the matter to the Board, and its intent does not include calendaring, etc. Masters agreed that the statutory language should be mirrored.

Member Weddell said what the Members have to work with is what the statutory language states: "efforts in briefing" starts when the insurer files an initial brief. She is persuaded that Board should identify briefing at that time.

Member Curey voiced concerns about how to determine a fee for services rendered. She agrees that calendaring would not be covered, but writing a brief would be. Also it makes sense that the matter be considered as "briefed" when the insurer has filed its initial brief. Her concern is once it is briefed, would the Board require a statement of service? How does the Board make the determination regarding what types of activities would be paid for, and those that would not?

Member Johnson agreed that a definition is needed, and felt that the language in Quinn's submission "A matter is considered 'briefed' when the insurer has filed its initial brief..." is appealing, but was not supportive of including calendaring or motions.

Chair Somers favored Quinn's comment (when insurer has filed its initial brief on this case), but it is up to the Board to determine what is involved in "briefing" at this point.

Member Weddell stated for the record, that rules should not include what is determined in briefing and what is not. Member Weddell moved that OAR 438-015-0070 be amended to add a new subsection (3) as submitted by the advisory committee and further that the subsection be titled (3)(a) and (3)(b) when an insurer has filed its initial brief on the case. Member Johnson seconded. All in favor: Weddell, Johnson, Curey, Lanning and Somers.

Section 6: No discussion, no action.

Section 7:

ORS 656.386(3) - Member Weddell moved that the Board adopt the advisory committee's proposed rule OAR 438-015-0048. Member Johnson seconded. All in favor: Weddell, Johnson, Curey, Lanning and Somers.

Member Johnson moved that the Board adopt the advisory committee's proposed subsection (6) to OAR 438-015-0055. Member Curey seconded. All in favor: Johnson, Curey, Weddell, Lanning and Somers.

ORS 656.386(4) - Member Weddell moved that the Board adopt the advisory committee's language to amend OAR 438-015-0019 to reflect the new title and the addition of subsection (6). Member Johnson seconded. All in favor: Weddell, Johnson, Curey, Lanning and Somers.

Section 8:

ORS 656.388(4) and (5) - PALJ Dougherty explained the advisory committee's discussion in that no amendments to the rules were recommended.

Quinn supplied some information on the legislative history, and noted two comments in Section 8 outlined the impetus of HB 2764, where the legislature has put its faith in the Board to address these issues. One is to consider the contingent nature of the practice, and the second is to review the attorney fees and begin looking at the financial woes of the claimants' practice. Quinn believes the Board should create a new rule which states "In awarding any attorney fee under Chapter 656, the attorney fee shall consider the contingent nature of the practice."

Not comfortable adopting the language Quinn proposed, Member Johnson noted the Members will be reconvening later to discuss other rule concepts. In addition, Member Johnson wants to start a review of "out-of-compensation" fees, but does not want those included with the HB 2764 statutory changes.

Dougherty stated the advisory committee did discuss some of those points.

Connie Wold noted that Rep. Holvey submitted some of the documentation indicating it would be helpful in determining the "intent" of the HB 2764. Wold believes it should be included in this portion of the rules.

Masters commented that OTLA had included in the legislation a "schedule of attorney fees" and SAIF concurs that Board should review that every two years, but not "increase" every two years. She concurs with the advisory committee's recommendation not to include it at this time, but rather, it should be reviewed in the biennial review.

Member Weddell feels OAR 438-015-0010 should be amended to add, at a minimum, to consider the “contingent nature of the practice.”

Member Curey said her interpretation of subsection (g) which states “the risk in a particular case that an attorney’s efforts may go uncompensated” akin to the fact that it is a contingent practice. As such, she believes it is already covered in the rule.

Chair Somers wants to give more consideration to determine whether it belongs in the rules, and expressed the difficulty of comparing defense attorney fees versus claimants’ attorney fees, because they are billed so differently.

Member Weddell does not see the need for a delay. Member Lanning concurred.

Member Johnson thinks the general principles need to be reworded to reflect the general contingency. She is not opposed to it, but agreed with Chair Somers that she needs more time to consider.

Member Weddell moved that OAR 438-015-0010 be amended to add an additional factor of the “contingent nature of the practice.” Member Lanning seconded. All in favor: Weddell and Lanning. Opposed: Curey, Johnson and Somers.

Chris Moore noted that “schedule” is not defined in ORS 636.388. He thinks those factors are included in a schedule, and believes “the contingent nature of the practice” should be included in OAR 438-015-0010.

Chair Somers questioned whether a scheduled fee is an assessed fee, and suggested the Members consider it again at their next meeting.

Section 9: No discussion, no action.

Section 10:

OAR 438-015-0010(2); OAR 438-015-0025, OAR 438-015-0045, OAR 438-015-0055(1); and OAR 438-015-0080(1), (2)

The advisory committee noted that it could not find language implementing these changes to the Board’s Own Motion jurisdiction under ORS 656.278. The Members discussed whether Sections 9 and 10 of HB 2764 apply to Own Motion claims.

The majority of the Members proposed to amend OAR 438-015-0080 to apply Sections 9 and 10 of HB 2764 to Own Motion claims. Member Curey did not support the proposed amendments.

Member Johnson moved to propose the advisory committee’s recommended changes in implementing Section 10 of the bill including the proposed change to OAR 438-015-0080(1) and (2) which would also require an amendment to OAR 438-015-0025

to add subsection (3) at end of the reference to OAR 438-015-0080 which would limit its application consistent with the changes proposed. Member Johnson also moved that the Board amend OAR 438-015-0080(4) to refer to subsection (3), rather than subsections (1) through (3). Chair Somers supplemented the motion to include in the Statement of Need the Members' willingness to consider further public comment regarding whether the statutory amendments extend to Own Motion-related temporary disability benefits. Member Lanning seconded. All in favor: Johnson, Weddell, Somers, Lanning. Opposed: Member Curey, did not support the proposed amendments specific to the Own Motion portion.

Section 11: Statutory amendments are "retroactively" effective. No action, no vote necessary.

SAIF concurs with advisory committee's recommendation to not do anything.

Quinn stated it is the understanding of the claimant's bar that these changes are retroactive and apply to cases issued after January 1. There is no wording about when it is "triggered."

Pearson suggested a rulemaking hearing date of December 4. Board staff will put rulemaking materials together as soon as possible for the Members' review, which must be filed with the Secretary of State by October 15, then distributed to interested parties for notification. Members will need to meet shortly after the rulemaking hearing to review the comments received at the rulemaking hearing. Somers relayed that she spoke to the Oregon State Bar's Board of Governors which indicated the matter could be placed on their November 20 meeting agenda, and they would also refer it to the Workers' Compensation Section's Executive Committee to provide comment at the rulemaking hearing.

Chair Somers suggested a date of December 10 for the next Board meeting. The Members agreed and will keep December 15 open as a contingency.

Public Comment

As above.

Announcements

None.

Adjournment

There being no further business, the meeting adjourned.