

**Workers' Compensation Board
Tuesday, December 11, 2018
10:00 a.m.**

Meeting Minutes

Present: Salem
Connie Wold, Board Chair
Sally Curey, Member
Barbara Woodford, Member
Steve Lanning, Member
Roger Ousey, Member
Roger Pearson, Managing Attorney
Kayleen Atkins, Executive Assistant
Autumn Blake, Administrative Staff
Keith Semple, Attorney
Colin Hackett, Attorney
James Dodge, Attorney
Christopher Moore, Attorney
Jaye Fraser, SAIF
Jill Gragg, SAIF
Elaine Schooler, SAIF
Theodore Heus, Attorney
Jovanna Patrick, Attorney
Aaron Clingerman, Attorney
Katie Koenig, Oregon Business & Industry
Julene Quinn, Attorney

Portland

Joy Dougherty, Presiding ALJ
Kevin Anderson, Attorney
Rob Guarrasi, Attorney

Eugene

Trish Fleischman, Staff Attorney

Medford

Greig Lowell, Project Manager
David Jordan, SAIF
Heather Holt, Attorney
Art Stevens, Attorney

Call to Order

Chair Wold called the meeting to order.

Approval of Agenda and Order of Business

Member Woodford moved for approval of the agenda. Member Lanning seconded. Motion carried.

Reports of Administrative Staff

Administrative Services Division:

Chair Wold indicated on behalf of Terry Bello that there was no report.

Board Review:

Pearson stated there was no report.

Hearings Division:

Dougherty stated there was no report.

Unfinished Business

No report.

New Business

Discussion regarding responses received from invitation to comment on biennial review of attorney fee schedules under ORS 656.388(4).

Julene Quinn began public comment and described her background as doing primarily workers' compensation appellate work and being in the workers' compensation field since 1990. Noting that, in 2011 the Board directed claimant's bar to seek permission from all stakeholders before reviewing its attorney fee rules, Quinn pointed out that no other entity involved in workers' compensation has to get approval for their salary to be paid nor do they receive regular objections to their paychecks. In order to have the maximum fees just reviewed, Quinn explained that the claimants bar had to approach stakeholders and then go to the legislature, which in 2015, established that the Board has the authority to review fees that are awarded in this system.

In appellate work Quinn presents a statement of services based on an hourly rate in order to be paid. This is requested by the court in the form of hours spent, the hourly rate, and a justification as to its reasonableness. Fees Quinn has requested from the court are rarely denied and fees requested from the Board are always substantially reduced.

While a request for \$450 per hour may seem excessive it is due to the overhead, taxation, and the win/loss ratio among the claimant's bar. Only receiving \$200 per hour does not suffice.

Quinn reasoned that access to justice for injured workers includes having access to attorneys who will take appellate work. She noted that large firms have at least one attorney whose focus is solely on appellate work. It takes years to train an attorney in appellate work, but it is not possible for Quinn to take on that commitment at this time because of the current fee schedule and the win/loss ratio.

Quinn pointed out that the attorney fees defendant's bar's attorney fee report does not include overhead or staff time. Instead, she explained that defense charges separately for attorneys and legal assistants. Quinn's attorney fee has to be used to pay her legal assistant. She asks that any rate the Board assigns also have overhead and other staff time in mind. Many costs, such as mileage reimbursement, are paid to defense separately. In order to properly compare defense and claimant fees Quinn suggested that the Board look at billings and not simply the rate.

Quinn also asked for the Board to consider a rule to bifurcate fee issues from regular cases. The court does not ask for a statement of services unless she prevails but in the Board cases she has to submit them every time. This becomes an unreimbursed cost in those cases where she does not prevail.

Member Curey asked Quinn about an example she could give regarding a multiplier. Quinn replied that out of ten cases she takes to the Board she can expect to win one to two. Identifying her "non-contingent" hourly rate as a workers' compensation consultant as \$300. Quinn explained that if she spent ten hours on each case, she expended \$30,000 worth of effort. However, she noted that after only winning two cases she's paid \$8,000. Quinn reasoned that, if she doesn't receive \$30,000 for those two winning cases, she has not been paid for the contingent nature of the practice.

Quinn stated that in order to find the most accurate win/loss ratio is to look at the Board level to determine the rate at which injured workers are prevailing. Similarly, she proposed that should be the formula for determining fees at the hearings level and that the multiplier should be based on the win/loss ratio.

Quinn further stated that law students are often discouraged from pursuing a career in workers' compensation based on a prevailing attitude that the fees received as a claimants' attorney do not compensate for the complexity of the law. She reasoned that fees must be commensurate to take on and train new associates and should be grounded in the win/loss ratio. She added the delay in final payment should also be a factor.

Keith Semple testified on behalf of the Oregon Trial Lawyers Association (OTLA). He thanked the Board for their enthusiasm in taking on this issue, especially Member

Lanning. He stated that there is still a large fee disparity between claimants and defense bars. Semple cited that, in 2017, \$40 million was awarded to the defense side while \$23.3 million was awarded on claimants' side, which he considers to be an enormous difference that undermines access to justice for injured workers.

Semple said that keeping pace with defense fees helps to regulate both sides and becomes a driving force. He added that there may be a temptation from listening to the testimony and assessing the win/loss ratio to advise a new attorney that if it is not profitable to be a claimants' attorney then choose a different field or make different choices in taking on cases. However, Semple asserts that such reasoning ignores the obligation of access to justice and that fees have to be reasonably profitable to keep capable attorneys representing injured workers.

Semple supported the bifurcation of fees rule concept indicating that the practice is currently done in the civil system. He further notes that a cost bill is submitted after prevailing and if there is a dispute it is litigated separately. He stated that the cost issue should not be part of the compensability question. Semple added it becomes uncomfortable, and possibly inappropriate, to put the attorney fee issue before the fact-finder. Semple believed that a bifurcation of the attorney fee will not and should not be used in every case, but it should be an option and that is the largely unanimous view in the claimants' bar.

In regards to a multiplier, Semple stated that hourly time is only one factor of many in determining a fee. In order to determine an appropriate multiplier Semple suggested looking at the entirety of the defense's billing. He anticipated, however, that the defense would be reluctant to give up those billing statements. He proposed focusing on fees awarded at the appellate level and consider the market rate, which would be essential to allowing injured workers a level playing field.

Member Curey inquired as to whether Semple was there representing OTLA as a whole or only himself. He responded that he was there in both capacities, explaining that many members are submitting their own individual comments and the main concern has been appellate fees, especially as less attorneys are practicing on the claimants side.

Colin Hackett testified that he has practiced in the Portland area since 2007 and sees himself as the future of the claimants' bar. His firm does not have the resources to hire associates and that puts them at a major disadvantage. He cannot delegate lower level tasks to spend time in analysis. Just being able to hire a paralegal has made a tremendous difference in having a successful practice and gives him the best chance in getting a better outcome for his clients.

Hackett said that 90% of his practice is in workers' compensation and most of that is at the hearing level. Despite being onerous and time consuming, he keeps track of all of his time in order to show clients in good faith the amount of time he's spent on their case.

However, he does not consider the Board and ALJs' attorney fee awards to be fair in that they generally award only a third of his requested fee.

Hackett argued that awarding higher fees to claimants bar was about ensuring quality representation and levelling the playing field for injured workers. He noted that large firms such as SAIF fund their entire legal department including overhead such as legal assistants, IT support, and secretaries. He further stated that SAIF attorney salaries are not comparable as they do not have to work without pay for months and their risk is much smaller.

Member Curey sympathized that creating a statement of services is onerous, but thought that it helps assess how much time was put into a file and there's no way for the ALJ or Board to know how much work was invested if they're not told. She asked Hackett if being able to hire a full-time staff member was due to the recent changes in out of compensation and out of settlement attorney fees.

Hackett replied absolutely. He added because of the amount of micro-tasking involved it is inefficient trying to track everything. He believed that there should be another way to compensate attorneys because ultimately keeping track of time does not help the injured worker and is for the benefit of the fact-finder.

Member Ousey asked Hackett where he learned workers' compensation and if Hackett had considered hiring a clerk. Hackett replied that he was at Reinisch Mackenzie for 14 months and clerked for the district attorney prior to that. Further, Hackett does not have the resources to hire a clerk since they are more of a long-term investment. He would prioritize hiring an associate.

Jim Dodge testified of cost bills he had seen from SAIF Corporation several years ago. In those, SAIF charged \$500 per hour for attorney services. As someone with 35 years of experience he bills \$500 per hour for his hourly work. He said that statements of service are largely ignored and have not seemed to make a difference in the amount of awarded fees. For example, on a statement of service he requested \$60,000 but received \$6,000. On another case he was awarded a \$9,000 fee while defense counsel was paid \$90,000.

Dodge added his experience in not being able to pay himself several months out of the year. Because of his case load he would like to hire another associate but is unable to afford the staffing because it would take at least two years to teach them workers' compensation law. He does not have the resources to carry someone else for that long. He said he has seen attorneys leave the claimants' bar. He finished by reiterating that there is a large "attorney fee" disparity between the two sides of the bar.

Ted Heus stated that as a claimants' attorney his practice consists of 75-80% Oregon workers' compensation law and the remaining is federal workers' compensation. He

asked the Board to review the 2015 legislative history of HB 2764 and assess what the legislature's intent was in changing attorney fee award rules.

Heus considered the numbers that Semple quoted as \$40 million to defense and \$23 million to claimants bar to be a good benchmark in assessing the attorney fee disparity. Heus also said that another benchmark should be having a large firm, similar to Reinisch Wilson Weier, for claimants' attorneys. He added that legal costs do not have to be a one-to-one ratio, but the gap should not be so large as 30%.

Heus shared his background as clerking for John Oswald and his father and beginning workers' compensation in law school. Upon graduating law school he moved to the defense bar and gained experience there with appellate defense work. He records his time and submits statements of service indicating actual time spent.

Heus is concerned that subjective "rule-based" factors, other than "time devoted to the case," can be translated into a specific number. He cited an actual case where he prevailed in which the ALJ reduced the requested fee by \$1,515 without any reasoning. If he had appealed the fee decision to the Board he would spend hours on the case while earning nothing. In addition, in a Board case (*Jorge Rodriguez*), Heus observed that he finally prevailed in an Order on Reconsideration following a previous Board order. While the amount under consideration was small, he believed that it created an important precedent. For spending 30 hours on the case he was awarded \$2500. He was unsure how he could continue representing claimants and help develop beneficial case law for claimants at that rate.

Relating to a multiplier, Heus explained that his submission cited a Longshore Reporter article that detail the ways in which federal agencies deal with a "contingent fee" analysis. Heus said that this article would be able to answer any questions the Board might have about how a multiplier would work. He said that a better approach when determining a multiplier would be to look at the practice as a whole versus a specific case or attorney.

Kevin Anderson testified that he has been an associate at Sather Byerly & Holloway for six years. He cited the concern that there is insufficient revenue to hire associates. He encouraged the Board to review the workers' compensation section member list to determine if there is a lack of claimants' attorneys. He also suggested that the Board consider the number of attorneys along with the number of claims and requests for hearing, not only the win/loss ratio.

Anderson stated that most Oregon defense bar attorneys also do Washington workers' comp, longshore, and civil litigation and that many new hires are merely replacing retiring practitioners.

Anderson asserted that many TPAs use e-billing systems and employ active or retired attorneys to audit submitted time and billing rates for accuracy. In addition, he noted that many TPAs give prompt payment discounts.

Regarding the issue of bifurcation he said that when there is a statement of services at hearing it is easier to discuss what the issues are regarding those fees and reduces the chance that fees will be appealed. Without a statement of services, he believed that it makes the fees seem arbitrary.

Robert Guarrasi stated he has been practicing as a claimants' attorney since 1981. His workers' compensation cases are down to about 10% of his current practice and most of that is *pro bono*, at a reduced fee, or for former clients.

Guarrasi brought up a concern about the time value of money. He said that if he filed a request for hearing in December of 2018 in which claimant prevailed but then went through all the stages of appeal, he would not receive a decision from the court until December 2020. Then he would not be paid until February 2021. He would not be compensated for any case work during that time.

Guarrasi said he submits statements of service in 95% of his cases but he has never gotten paid what was requested. He believed there needs to be some presumption of correctness. He would like to see the "benefit secured" for the client as a multiplier applied to the benefit received as benefits are often significant.

Art Stevens is a partner at Black Chapman law firm and has been practicing workers' compensation law for 30 years. He also practices federal social security and personal injury law. He stated that workers' compensation has become more difficult and that other aspects of his practice have to subsidize his workers' compensation cases. He said that he used to work for SAIF where there were law clerks, investigators, and expert witnesses available. In order for the claimants' bar to be in a position to compete, he believed that they must have an office of highly skilled staff. In order to attract that staff he would have to offer a competitive salary, benefits, and retirement.

Stevens said he is hesitant to submit a statement of service because a skilled attorney could very well spend less time on a case than a new attorney. He is concerned that experience is not considered by the Board when awarding fees. Stevens supported the letters of record as a member of OTLA.

Heather Holt testified as a sole practitioner in Southern Oregon. Her practice used to be half workers' compensation cases, but is now down to 30%. The fees for workers' compensation are greater than the fees she's awarded for social security cases, but the time value of money is lower. Some months she's unable to pay her secretary and must ask her husband to cover that cost. She's talked to personal injury attorneys who are

shocked at the rate of pay for workers' compensation when they receive a third of a settlement.

Member Curey asked Holt if the recent changes in out of compensation, assessed, and settlement fees had boosted her practice. Holt indicated that it had helped some, such as being paid for doing the statement. It has helped, but it does not offset the time put into a case that does not prevail.

Curey asked if Holt had seen a direct correlation between the paid fee for depositions and the carriers' scheduling of them. Holt said yes, she had.

Member Ousey asked if Holt turned away cases. She answered yes, she has turned some cases away but did not have an exact number. If there are cases that seem like they have a decent shot at winning she'll accept them, but if they are on the line she has a harder time accepting them.

Jovanna Patrick stated that she has practiced workers' compensation since 2011 and currently does 80% workers' compensation and 20% personal injury. Her current firm could not hire her so she is essentially a self-employed contractor. She pays for a third of expenses and half the cost of using a legal assistant. Patrick cannot delegate higher level tasks and must perform them herself. She's often asked why she practices workers' compensation law when it is a complicated area and you do not receive payment for months after prevailing instead of personal injury cases which pay more.

Patrick tries to track her time as much as possible but it is a double-edged sword. She stopped telling judges what her non-contingent rate is because they would use that rate and multiply it by the amount of time spent on a case while possibly adding \$500 to account for the contingent nature of the practice. She may ask for \$12,000 but only be awarded \$8,000. However, if she does not submit a statement of service she's challenged every time. She does not spend more time than is needed on a case. Speaking a second language doubles the amount of time needed to meet with a client.

Patrick's former clients with accepted claims will call her and she will never be paid for that time. Patrick mentioned many instances of work that is either not compensated at all or is at a very low rate. She calculated that in the last year she made \$50 per hour.

Elaine Schooler offered a suggestion that the Board look at their own information to see if it matched what SAIF had found in its own data. She suggested that they look at the average fee being awarded at the hearing level based on the aggregate to analyze trends over the last several years.

Christopher Moore pointed out that the intention of the amended statute is not to pay claimants' bar the same as defense bar, but to ensure access to justice for injured workers. He believed that the claimants' bar has to be able to compete with the defense bar.

Moore expressed frustration in training a new associate only to have them join a defense firm.

Moore stated that the Board does not have all the tools needed to solve this issue. Previously, settling PPD cases were a large portion of his income, however, the legislature changed the laws and Moore had only settled one PPD case in 2018 down from the previous 5-10 per month. Right now attorney fees are available from assessed fees for penalties and denials.

Moore asserted that keeping time as a contingency fee attorney does not make sense. He estimates his time knowing that it does not reflect everything.

He described the workers' compensation system as a three-legged stool with the claimants' bar, defense bar, and the Board all supporting. Each leg must be equal. He pointed out that the Board was under attack and much time was spent to protect it. Now it is the claimants' bar that must be strengthened and protected. If it is not then the real victims are injured workers.

Member Woodford asked Moore about the other factors besides the contingent nature of the practice. Moore said that those could include the attorney's qualifications, the benefit to the injured worker, time loss, permanent disability, and estimated time. The problem with stating the estimated time and hourly rate is that it is the maximum of what the judge will award.

Chair Wold thanked everyone who testified and submitted exhibits. She stated that the Members would discuss the information and look at more data as had been suggested. Additionally, she asked the Board to support the forming of an advisory committee to consider the options available.

Member Ousey pointed out that they should also look at the hourly rate for statements because, while the legislature was not wrong, attorneys are not being paid for where their time is actually being spent. He was supportive of an advisory committee, but it should have a clearly defined direction and find consensus for all three sides of the stool. Member Woodford agreed with Ousey's sentiment regarding the advisory committee and Member Lanning was also supportive.

Member Curey stated that she did not disagree with having a committee, but preferred more data so that the Board takes their time to ensure they have everything needed to perform a good analysis.

Chair Wold stated that the committee would work simultaneously with the Board and would possibly produce their own needed questions.

Member Ousey moved to form an advisory committee with a focus on rule concepts. Member Lanning seconded and the motion passed.

Chair Wold stated that the Board welcomes more comments on this matter.

Public Comment

As above.

Announcements

None.

Adjournment

There being no further business, the meeting adjourned.