

Workers' Compensation Board
Tuesday, October 29, 2019
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
Theodore Heus, Attorney
Elaine Schooler, SAIF
Jill Gragg, SAIF
Julene Quinn, Attorney
Aaron Clingerman, Attorney
Matthew Lawrence, Attorney
Nicole Peterson, Oregon Restaurant and Lodging Assoc.
Cathy Ostrand-Ponsioen, Workers' Compensation Division
Jake Hessel, Oregon Trial Lawyers Assoc. (OTLA)
Sheri Sundstrom, Hoffman Construction
Paloma Sparks, Oregon Business & Industry
Kimberly Wood, Perlo Construction
David Barenberg, SAIF
Ron Atwood, Attorney
Jennifer Flood, Ombudsman for Injured Workers
Kirsten Adams, Attorney
Montana Lewellen
Colin Hackett, Attorney
Jodie Phillips Polich, Attorney

Portland

Joy Dougherty, Presiding ALJ
Kevin Anderson, Attorney
J. Mark Mills, ALJ

Eugene

Justin Herr, Administrative Staff
Dale C. Johnson, Attorney

Medford
Greig Lowell, Project Manager
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.

Approval of Past Minutes

Member Curey moved for approval of the September 19, 2019 meeting minutes. Member Ousey seconded. Motion carried.

Reports of Administrative Staff

Administrative Services Division: No report.

Board Review: No report.

Hearings Division: No report.

Unfinished Business

No report.

New Business

Discussion of the Advisory Committee report regarding rule concepts submitted in response to the Board's biennial review of attorney fee schedules under ORS 656.388(4).

Chair Wold invited public comment and testimony regarding rule concepts as outlined in the Advisory Committee's report and received via written comment prior to the meeting.

Art Stevens spoke as a member of the Advisory Committee. He asked that everyone focus on the main reason why the Advisory Committee met: to deal with the \$16 million fee difference between claimant and defense bars. He asked the Members to understand that claimant attorneys do not take the totality of their fee as salary but rather they pay their staff, overhead costs, and malpractice insurance among other expenses. He pointed out that maintaining a practice is expensive, as it should be to compete with defense.

Jake Hessel testified on behalf of Oregon Trial Lawyers Association (OTLA). He stated that the legislature was clear in HB 2764 about creating a robust claimants' bar by enticing new attorneys with student loan debt to join and closing the fee gap, but very little progress has been made since that time. He urged the Members to look at the information and close the gap.

Noting that she had been advised that the claimants' bar makes up one-third of the workers' compensation section, Member Curey stated that this inequality may affect the disparity seen in the total fees/charges paid to each side.

Nicole Peterson testified on behalf of the Oregon Restaurant and Lodging Association (ORLA) which recommended no changes to the current fee structure. Increased claimant attorney fees would result in increased insurance rates. Restaurants have a low profit margin and increased rates would be detrimental to the industry. The current system in which judges and the Board assess reasonable fees, with the parties' right to appeal the decision, should continue as currently implemented.

Member Ousey inquired as to the rates paid by members of the association for their own legal representation, how the premium rates for employers compare to those five years ago, and how many of their workers are able to find representation when they are injured. Peterson indicated that she did not have the information on hand, but would provide it.

Colin Hackett testified as a newer member of claimants' bar. He described the defense bar as being able to invest time in achieving the best result for their client which is evidenced by the size of defense firms; the larger defense firms employ 20 to 30 attorneys whereas claimant firms average 2 or 3. He posited that the disproportionate amount of defense attorneys shows that they are able to hire, train, and retain new attorneys to build successful firms. This is due to employers' ability to invest more resources on a per file basis. Therefore, it would follow that by increasing claimant attorney fees, claimants' bar would yield a higher win/loss ratio. In turn, injured workers would receive better results and contribute to the overall economy because their attorneys would have the resources needed to represent them effectively.

Hackett also stated that while a multiplier is a flawed resolution to the current problem, most ALJs award fees by using the number of hours multiplied by the proposed hourly rate. He said an objective metric is needed, not to replace the current factors, but in addition to them.

Elaine Schooler testified on behalf of SAIF Corporation that their staff attorneys do varied work outside of litigation. Their salary is also comprised of work done in internal and external trainings, meeting with agents, attending employer seminars and industry conferences, creating internal policies that guide adjusters and investigators, Return-to-Work Program, Employer-at-Injury Program, and vocational services.

Member Woodford asked Schooler if SAIF tracks costs per litigated claim or if anticipated defense costs are part of the reserves set for a claim. Schooler said SAIF does not as attorneys do not track hours and are able to spend as much time as they deem appropriate on each case.

After pointing out that the Board has a statutory objective to ensure adequate representation to injured workers and to consider defense fees, Member Ousey asked Schooler what information SAIF was able to provide in order to fulfill that objective. Schooler stated that the available fee data for the claimants' bar is inconsistent and we are not able to compare the fees earned by defense bar with those of claimants' bar. Additionally, SAIF does not track costs on a case by case basis. She suggested acquiring industry-wide data, how many attorneys are providing representation, and the amount of fees awarded based on subject matter. She stated that this can only be resolved after acquiring better data to assess if out-of-compensation fees, assessed fees, or penalties are driving the current fee awards.

Member Ousey inquired as to the number of attorneys SAIF employs. Schooler stated there are about 35 split between appellate and trial attorneys with 5 attorneys set to retire in the near future.

The Board then discussed Attorney James Dodge's proposal to remove the 25% cap on settlement monies. After noting that it was not supported by the Advisory Committee and Julene Quinn's testimony that it would require labor input, the Board voted to table the proposal.

Next, the Board discussed the proposal to increase the hourly rate for investigative statements from \$275 to \$400. Sheri Sundstrom of Hoffman Construction and Ronald Atwood, a defense attorney, opposed the increase stating the \$275 figure had been a compromise from the previous advisory committee and that investigative statements have low probative value in overall litigation. Theodore Heus and Art Stevens of the claimants' bar supported an increase, as statements and depositions do take time to prepare which is not compensated. ALJ Mills, the Advisory Committee facilitator, advised the Board that the committee supported an increase but no amount was specified.

The Members discussed the statutory language limiting the attorney fee to time spent at the deposition/statement and the fee being non-contingent. Member Ousey stated that the actual statement time does not reflect the time spent discussing the interview with the injured worker and preparing them for it. Member Curey pointed out that the statute does not provide for compensation of time spent in preparation and suggested a \$300 hourly rate with a yearly COLA would be more reasonable.

Member Lanning identified the many occurrences in which practitioners use this rate as representative in suggesting claimant attorney fees because it is the only rule where a specific dollar amount is stated. Jodie Phillips Polich echoed Member Lanning's

observation and stated that she is in favor of the increase but that it would not make a significant difference in the claimant/defense fee disparity. Member Ousey moved to propose amending the rule to increase the hourly rate for investigative statements/depositions to \$400 with a cost of living adjustment. Member Lanning seconded. Members Curey and Woodford opposed. Chair Wold approved the motion, noting the importance of such statements in claims investigations and that an increase would have a modest impact on overall fees.

Next, the Board discussed the Advisory Committee's request for clarification of ORS 656.388(4) and the Board's mandate to create a schedule of fees. Member Lanning recited that there was a statutory requirement in 1987 that the Board collect attorney fee information and all but the remaining sentence was repealed in 1991. After reviewing documents and information from that time period he'd not come to a conclusion about what the Board's responsibility was towards it. He supported clarification of the purpose and meaning behind it. Since the Board has not established a schedule of fees for claimants, insurers and self-insured employers since that time, Member Ousey posited that the remaining directive to establish a schedule is a "vestigial tail" of the former statute.

Member Curey agreed with Members Lanning and Ousey regarding the history of the statute and added that the Board at that time was required to approve carrier-paid attorney fees. That everything but that sentence was repealed is odd. However, the statute says "we shall" so the Board must determine what a schedule entails and how to carry out the directive. Curey also supported clarifying the application of .388(4). Member Woodford asked what the Board should be doing with the statute, if anything.

Chair Wold asked for public comment. There was no comment from Portland, Eugene, or Medford. From Salem, Theodore Heus testified that the Members could go to the Board of Governors as the statute says but the Board does not have the authority to ignore the statute. He suggested that "schedule of fees" refers to all fees, not only out-of-compensation fees, as those have never been awarded to defense counsel.

Chair Wold stated that SAIF's December 10, 2018, letter to the Board offered that "schedule" refers only to out-of-compensation fees. Elaine Schooler of SAIF further contended that when the last biennial fee review occurred, the Advisory Committee determined that "schedule" referred only to out-of-compensation fees. The current Advisory Committee, however, had questions about what fees were encompassed by the schedule.

Julene Quinn reminded the Board of Exhibit 30 that she had submitted containing a letter from Representative Holvey to the Board regarding the legislative intent of HB 2764 that specifically addressed this question. He stated that attorney fees referenced in ORS 656.388(4) and (5) refer to all fees under this chapter.

Jodie Phillips Polich advised the Board that what past advisory committees recommended and past Boards did is separate from what the current Board decides. She continued that the Board has the ultimate statutory authority under Chapter 656 and the Board should be considering all fees. She observed that absent from the discussion were the administrative law judges who award these fees, despite having the single most impact on them. Phillips Polich urged the Board to consider assessed fees, as injured workers should not be alone in bearing the burden of closing the fee gap.

Member Curey moved to interpret “schedule” in .388(4) to mean all fees, including assessed fees. Member Ousey observed that the Board also has a statutory mandate to consider defense fees. Member Woodford moved to advance to rulemaking language that would establish an attorney fee schedule for attorneys representing insurers/self-insured employers. Chair Wold seconded, motion carried.

Regarding the rule concept of bifurcating attorney fee issues from substantive issues, Julene Quinn testified regarding her vision for how the rule would work procedurally. Member Curey expressed concern that the process would increase litigation, reduce judicial efficiency, and that benefit would not outweigh the agency costs.

Ronald Atwood stated that the parties must be ready to present all issues at hearing, including fees. He reasoned if claimants attorneys want to submit a statement of services, it needs to be presented to the fact-finder at the same time as other arguments. He stated it would add to the length of the process, delay compensation to the worker, and reduce judicial economy.

Theodore Heus contested Atwood’s assertions, stating that hearings are continued and decisions are delayed for many reasons, this would be only one. He cited the successful processes of federal jurisdictions. Additionally, it would indirectly help close the fee gap.

Jodie Phillips Polich recommended that this be a voluntary rule without creating more administrative work. Phillips Polich expressed concern that an attorney fee request may have an adverse effect on an ALJ’s decision. She stated that the focus should be on the injured worker and the issues. She added that it is rare she’s able to stipulate to a reasonable fee with defense.

Elaine Schooler reiterated the concerns expressed by Atwood that the process would disrupt judicial efficiency, draw out litigation, and add costs.

Member Curey reported that in her discussions with the claimants’ bar regarding submissions of statements of service and bifurcation all of them expressed the desire to make a rule voluntary. She also expressed concern at the administrative costs of implementing such a system when it would only benefit a few. Member Woodford expressed frustration in the lack of information when awarding fees while acknowledging many practitioners do not want to spend time creating a statement of services before a

decision is reached. Woodford supported a rule modeled on the current cost bill system that would be efficient and simple. Member Lanning supported a rule dependent on the language. Member Ousey observed that the current modes of raising claimant fees have been unsatisfactory but was willing to support a rule that may assist in the Board's statutory directive. He moved that rule language be prepared that, for a trial period, that would allow the bifurcation of issues at the Board level when claimant finally prevails. Member Lanning seconded. Motion carried 4-1.

The Members discussed consideration and disclosure of a defense attorneys' fees when determining a reasonable attorney fee for a claimant's attorney. There was a consensus that the Board needs additional information and there is currently limited data available to the Board. Member Ousey moved for rule language that would require information about the hourly rate billed from all defense attorneys who are charging a client-paid fee. Ousey further clarified that the purpose is to know how the defense bar is valuing their own time. Member Lanning seconded.

Kimberly Wood of Perlo Construction expressed concern that without information from SAIF, who retains 50 percent of the total market share, defense attorney fee amounts will be inaccurately skewed to the higher end. Only looking at out-of-house counsel or boutique workers' compensation firms would exclude consideration of the legal costs of small businesses.

Member Curey agreed that in order to ascertain median costs, the Board has to look at all defense attorney fees as well as parse out what services they include. Curey moved to have rule language prepared that would require the consideration of defense fees, hours worked, including legal services, and billing rates. Woodford seconded the motion. Ousey asked that the proposal include "costs," however, Curey objected to the inclusion of costs and Woodford pointed out that the statute only allows for the consideration of "fees earned by attorneys."

Member Ousey said that he would support the rule language with a provision addressing the effect if the defense did not comply with the submission of a statement of services. Member Woodford added that defense would lose their right to object to a claimant's counsel's attorney fee requests. Motion passed as amended.

Next, the Board discussed the concept of a multiplier wherein the Advisory Committee had voted 2-2 with one abstention.

Ted Heus testified that using a multiplier based on the win/loss ratio of claimants' bar, a reasonable hourly rate, and a reasonable number of hours would reduce the number of appeals to the court and be in line with other areas of practice.

Elaine Schooler expressed concern that a multiplier would increase litigation and attorneys would raise issues that do not have merit. The attorney fee award is up to the fact finder's discretion. The recent decisions from the Court of Appeals regarding

attorney fees have taken issue with the basis of the fees, not the factors being insufficient. She offered that the court was looking for an appropriate and adequate explanation from the Board for fee awards.

Member Lanning clarified that a definition of contingent fee is needed and some kind of modifier versus a hard and fast, absolute formula. He said that a modifier would be another factor in “0010(4).” Ousey seconded. Curey believed that determining a fee was too complex to use a formula. Woodford stated that workers’ compensation is a complex area of practice and those cases that are more complex deserve higher attorney fee rates than more mundane cases. She said that the Board either needs to use the factors to determine a reasonable fee or a multiplier. Curey further observed that she would not feel comfortable requiring an attorney to state their annual average win/loss ratio and could not envision a tenable solution that could be justified in a Board order.

Chair Wold asserted that due to the language in the factors, that the Board must consider both the contingent nature of the practice and the risk of going uncompensated, that these are two separate considerations. She continued that there must be an incentive for attorneys to represent injured workers. Wold did not support having a purely mathematical formula to assess fees and could not support the presented formula and definition of “contingent nature of the practice.”

Wold moved to have draft language prepared for a “multiplier” rule, despite uncertainty in supporting it, which could be discussed at the Board’s next meeting.

Public Comment

As above.

Announcements

None.

Adjournment

There being no further business, the meeting adjourned.