

Workers' Compensation Board
Thursday, February 27, 2020
1:00 p.m.

Meeting Minutes

Present: Salem
Connie Wold, Board Chair
Sally Curey, Member
Barbara Woodford, Member
Steve Lanning, Member
Roger Ousey, Member
James Moller, Managing Attorney
Roger Pearson, Former Managing Attorney
Kayleen Swift, Executive Assistant
Autumn Blake, Administrative Staff
Elaine Schooler, SAIF
Cathy Ostrand-Ponsioen, Workers' Compensation Division
Kimberly Wood, Perlo Construction
Ron Atwood, Attorney
Jaye Fraser, SAIF

Portland

Joy Dougherty, Presiding ALJ
Jodie Phillips Polich, Attorney
Julene Quinn, Attorney
Matt Fisher, Attorney

Eugene

Justin Herr, Administrative Staff

Medford

Greig Lowell, Project Manager

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 Ousey seconded. Motion carried.

Approval of Past Minutes

Minutes from October and December meetings are in progress.

Reports of Administrative Staff

Administrative Services Division: No report.

Board Review: No report.

Hearings Division: No report.

Unfinished Business

No report.

New Business

Chair Wold noted that consideration of contingent hourly fee rule language will be held at the meeting on April 7, 2020.

Discussion of written/oral comments submitted at the January 31, 2020, rulemaking hearing regarding proposed amendments to OAR 438, Division 15 (Attorney Fees) administrative rules. Among other proposals, these amendments: (1) adopt a rule regarding fees for attorneys representing insurers and self-insured employers (OAR 438-015-0115); (2) adopt a rule regarding the voluntary bifurcation of the attorney fee award on Board review (OAR 438-015-0125); (3) amend a rule regarding the factors used in the determination of a reasonable attorney fee for claimant's counsel (OAR 438-015-0010(4)); and (4) amend the rule concerning the hourly rate for an attorney's time spent during an interview or deposition under ORS 656.262(14)(a) (OAR 438-015-0033).

Chair Wold began by discussing OAR 438-015-0010(4)(h).

Member Curey reviewed the rule and shared her concern that attorneys may request or move for an Order requiring attorneys for employers/insurers to provide their specific fees on their specific case which was not the intent of the rule. Subsections 5 and 7 should mirror ORS 656.388. She proposed to change the language in the proposed rule to, "fees earned by attorneys for insurers and self-insured employers as compiled in the Director's annual report under ORS 656.388(7) of attorney salaries and other costs of legal services incurred by insurers and self-insured employers pursuant to ORS Chapter 656."

Member Ousey agreed with Member Curey's proposed amendment to the language of the rule. He noted that during discussions at the December meeting, they made multiple references to the gap that was seen in the Director's information, and they were trying to look at that as an aggregate as opposed to one specific case. He felt that the proposed amendment addressed and clarified that.

Chair Wold next turned to OAR 438-015-0125.

Member Ousey discussed the December 2019 rulemaking hearing. Based on the feedback from that hearing, there was some unintended merging of rule concepts to enforce compliance with the need to provide a statement of services. Members Ousey and Woodford determined that this did not reflect the intent of the bifurcation rule. Members Ousey and Woodford recommended removing subsections 6 and 8, and changing section 9, reflecting that the matter is subject to future litigation. Under the proposed amendment, if either party determines that a settlement may not be reached, they could contact the Board, request bifurcation, and ask them to implement a briefing schedule.

Member Curey withheld comment.

Consideration of written/oral comments from the public presented in advance of, and during, the meeting. Those comments will include memos from Members Curey and Ousey, as well as Members Ousey and Woodford.

Matthew Fisher commented regarding proposed OAR 438-015-0010(4)(a). He indicated his support for the amended version of the rule as proposed by Members Curey and Ousey, and felt that it addressed the concerns brought up at the December 2019 Board meeting.

Julene Quinn commented regarding proposed OAR 438-015-0125. She expressed support for a means of efficiency that mirrors the Court of Appeals, in which an attorney does not file a statement of services until they know they have prevailed on a case. She said she supports a system that encourages settlement of attorney fees, but noted that she has had mixed results in her ability to settle attorney fee issues. The process should be streamlined, and she expressed her concerns that if the process is too cumbersome, attorneys will not utilize the system to collect attorney fees. She proposed that the language in subsection 6 of the proposed rule could be amended to, "If the parties are unable to reach an agreement concerning a reasonable attorney fee a party may file a written notice with the Board." She recommended being able to send a statement of services to an attorney for an insurer or self-insured employer at the same time that she sends written notice thereof to the Board, so that it does not delay resolution of the attorney fee.

Member Curey asked Quinn to clarify whether she was proposing the removal of subsections 3, 4, and 5 of existing Exhibit E.

Quinn said that subsection 3 is fine, but could be modified to say that the statement of services could be sent to the Board and insurer simultaneously. Settlement negotiations should not cause a delay to the injured worker's relief. She said subsections

4 and 5 are fine. She suggested that subsection 6 be modified such that the insurer must respond to the statement of services filed with the Board within 21 days if the parties are unable to reach an agreement.

Member Curey asked Quinn what she proposed should happen if the insurer does not respond to the statement of services within 21 days.

Quinn recommended that the Board should then make their decision on the attorney fee award, based on the statement of services.

Chair Wold asked Quinn whether she proposed that claimant's attorney be allowed a reply to the employer's response to the attorney fee statement.

Quinn stated that if the Board finds a reply argument necessary or helpful, then yes, a reply should be allowed. However, if no response to a statement of services is filed, then a reply should not be necessary.

Quinn also commented regarding the proposed removal of subsection 9 of OAR 438-015-0125. She disagreed that .382(3) is triggered by the proposed rule because the insurer is not raising an issue, they are asking for a determination. The law already allows claimant attorneys to be paid for the time spent preparing and defending an attorney fee award. In *Shearer's Foods*, 363 Or 147 at 156, the Supreme Court found that any decision under .386(1) is the controlling attorney fee statute for compensability issues, as opposed to transferring to .382. In *Shearer's*, citing *TriMet v. Aizawa*, 362 Or 1 at 3, the court found that it was reasonable for counsel to be compensated for time spent litigating an attorney fee issue. She expressed that the system should not be used to water down attorney fees or harass injured workers. She recommended that proposed subsection 9 should remain but be amended such that a reasonable attorney fee could also be awarded for an attorney's efforts in determining the attorney fee award. Claimant's counsel should include time spent on attorney fee issue on statement of services submitted to counsel for insurer or self-insured employer and the Board.

Member Ousey asked Quinn for clarification; based on *Hoffnagle*, whether she would include in request for a fee, if asking for the Board to establish the attorney fee award, the time spent on doing that.

Quinn agreed that she would include the time spent on the attorney fee issue on her statement of services. She would expect to be paid for time spent in responding to objections and researching issues raised on an attorney fee issue. She also commented she recognized that it is difficult for the Board to balance all parties' interests. She has made a list of what needs to change in the system in order to have a viable appellate practice, and the time spent on collecting attorney fees is one of the issues on her list.

Deliberations concerning the adoption of the proposed amendments as permanent rules.

Member Curey moved to adopt Exhibit A, the proposed amendments to OAR 438-015-0005, as provided in the January 7, 2020 Notice of Proposed Rulemaking Hearing and adopt those amendments as drafted. Member Ousey seconded. Motion carried.

Member Curey moved to adopt Exhibit B, the proposed amendments to OAR 438-015-0010, as provided in the January 7, 2020, Notice of Proposed Rulemaking Hearing. Additionally, Member Curey moved to replace the language in (h) to “The fees earned by attorneys for insurers and self-insured employers as compiled in the Director’s annual report under ORS 656.388(7) of attorney salaries and other costs of legal services incurred by insurers and self-insured employers pursuant to ORS Chapter 656.” Member Ousey seconded. Motion carried.

Member Ousey moved to adopt proposed OAR 438-015-0033, as provided in the January 7, 2020 Notice of Proposed Rulemaking Hearing. Member Woodford seconded. Motion carried.

Member Woodford moved to adopt proposed OAR 438-015-0115, as provided in the January 7, 2020 Notice of Proposed Rulemaking Hearing. Member Curey seconded. Motion carried.

Member Woodford moved to send Exhibit E, proposed OAR 438-015-0125, back for additional discussion and amendments. Member Ousey seconded. Motion carried.

Managing Attorney Jim Moller recommended the Board ask that revisions be made to the bifurcation rule and that they discuss those at the April 7, 2020, meeting and proceed from there. All were in favor.

Managing Attorney Jim Moller recommended the Board adopt an effective date for the new rules. He recommended an effective date of May 1, 2020 at the earliest, but felt June 1, 2020 would be better.

Members Curey, Ousey, and Woodford agreed that June 1, 2020, would be the best effective date for the new rules.

Member Ousey moved for the new adopted rules to become effective by June 1, 2020. Member Woodford seconded. Motion carried.

Member Curey moved to adjourn. Member Woodford seconded. Motion carried.

Public Comment

As above.

Announcements

None.

Adjournment

There being no further business, the meeting adjourned.