

Workers' Compensation Board
Tuesday, June 23, 2020
1:00 p.m.

Meeting Minutes

Present:

Connie Wold, Board Chair
Sally Curey, Member
Barbara Woodford, Member
Steve Lanning, Member
Roger Ousey, Member
Ian Brown, Managing Attorney
Roger Pearson, Former Managing Attorney
Kayleen Swift, Executive Assistant
Greig Lowell, Project Manager
Lauren Eldridge, Staff Attorney
Autumn Blake, Administrative Staff
Elaine Schooler, SAIF
Cathy Ostrand-Ponsioen, Workers' Compensation Division
Ron Atwood, Attorney
Jaye Fraser, SAIF
Jodie Phillips Polich, Attorney
Julene Quinn, Attorney
Holly O'Dell, SAIF
Ted Heus, Attorney
Kevin Anderson, Attorney
Aaron Clingerman, Attorney
Jill Gragg, SAIF
David Barenberg, SAIF
Keith Semple, Attorney
Lauren Kuenzi, Associated General Contractors
Sheri Sundstrom, Hoffman Construction
Jennifer Flood, Ombudsman for Injured Workers
Olivia Geidl, Gallagher Bassett
Paloma Sparks, Oregon Business & Industry
Matt Lawrence, 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 Ousey seconded. Motion carried.

Approval of Past Minutes

Minutes from previous meetings were 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 opened the meeting by explaining that, due to the Governor's executive order in response to the pandemic, the April 7, 2020, Board meeting was rescheduled to June and members of the public were attending by phone. She also indicated that Member Lanning was participating by phone while the remainder of the Board was gathered in Salem.

Continue discussion of possible language for a “contingent hourly” “rate” rule (“015-0010,” “General Principles”). Continue discussion of possible language for a “bifurcation/attorney fee” rule for certain cases on Board Review (proposed “015-0125”).

Chair Wold stated that Member Lanning and Member Ousey had each submitted memos with proposed draft rule language concerning a contingent hourly rate. Attorney Julene Quinn and the Board's former managing attorney, Jim Moller, offered memos regarding proposed rule language for the “bifurcation/attorney fee” rule. Those memos were posted to the Board's website in March 2020.

Additionally, written comments were submitted by Attorney Adian Martin, Attorneys Jodie Phillips Polich and Keith Semple on behalf of the Oregon Trial Lawyers Association (OTLA). Greig Lowell, WCB project manager, submitted attorney fee data responsive to stakeholder and Members requests.

Chair Wold opened the meeting for public comment. Attorney Julene Quinn appreciated the work the Board had done in preparing draft language regarding the “bifurcation rule.” She stated that the rule language she had proposed was similar to Jim Moller's but with additional timelines. She believed that the rule would streamline

the process of assessing an attorney fee and appreciated the voluntary nature of the concept. She stated that she would endorse the draft language proposed by Moller.

Chair Wold asked the Members to comment on the “bifurcation” rule language. Member Lanning stated that he was happy with the end result and would support it. Member Woodford said that she was pleased with the work Moller did and was comfortable with the process as outlined in the rule. Member Ousey pointed out that after discussion at the Board’s February meeting, Moller incorporated comments from Quinn. He believed the two proposals coincided well. Member Curey withheld comment.

Member Woodford moved to adopt the proposed rule language contained in Moller’s memo dated March 4, 2020, and send it to rulemaking. Member Lanning seconded. Motion passed 4-1 with Member Curey voting against.

Chair Wold introduced discussion of the contingent hourly rate rule as contained in Member Ousey’s and Member Lanning’s submissions.

Attorney Jodie Phillips Polich stated that she and Attorney Keith Semple on behalf of OTLA had submitted an alternative proposal (Exhibit 38) that outlined their preferred language, however, she acknowledged that attorney fee discussion would be ongoing as the Board and practitioners determine what does and does not work.

Member Ousey asked Phillips Polich whether her proposal would be voluntary. Phillips Polich confirmed.

Member Lanning expressed his support for Exhibit 38.

Attorney Ron Atwood asked that, due to the complexity and recent submission of Exhibit 38, the Board allow time for further discussion and review by defense bar to respond. He asked the Board not to take action that day. Sheri Sundstrom of Hoffman Construction and Paloma Sparks of Oregon Business & Industry expressed similar requests and asked that the Board allow time to respond to OTLA’s proposal.

Attorney Ted Heus asked for clarification regarding any new mandatory processes for claimants’ attorneys that would take effect should the proposed rules be adopted. In response, Member Ousey stated that he would support the proposed rules on a purely voluntary basis. He asked that the language of the rules be revised to make that clarification before being sent to rulemaking.

Heus also asked if the reference to “litigated cases in which claimant’s attorney did not prevail and went uncompensated” in Member Lanning’s proposed language under “0010” referred to the individual claimant’s attorney in that particular case or the claimants’ bar overall. Member Lanning clarified that his rule was a broad outline of the

concept, but that OTLA's alternative proposal in Exhibit 38 was more in line with his desired objective.

Chair Wold then opened the meeting for Member discussion.

Member Lanning stated that he was not moving his proposal nor OTLA's proposal, although he did prefer Exhibit 38.

Member Ousey noted that nearly everyone expressed a need for further discussion of OTLA's proposal. He appreciated that the factors used in the example given in Exhibit 38 could also be used in determining a contingent hourly rate. The primary difference was in the process by which ALJs and the Board set fees. Member Ousey thought that the proposal in Exhibit 38 gets closer to that used by the appellate courts and simplifies the application of a contingent hourly rate. However, it was unclear how the concept would be applied. He encouraged OTLA and claimants' bar to submit whatever information would be helpful in determining the reasonableness of a contingent hourly rate. While he considered Exhibit 38 intriguing, Member Ousey commented that the Members had not had a chance to ensure its workability. He found it difficult to determine what the present value of money would be as applied to services rendered two or three years in the past, and how a cost of living adjustment would be applied, as well as establishing general fees for different regions of the state as the proposal suggested.

Member Curey appreciated the submissions and the attempts made at simplifying the process of determining a reasonable attorney fee. She wanted to know how the key concepts would be defined which would determine how a fee would be assessed, such as how would the market rate be determined; would it be based on statewide or geographic data; how would those geographic regions be determined; would individual or general loss rates be considered; and would settlement proceeds be included in the data?

Member Woodford said she was in favor of making participation in the proposed rules voluntary and that she looked forward to additional submissions and arguments. She hoped for a helpful formula that would aid in determining a contingent hourly rate.

Chair Wold agreed with the comments from the other Members. She thought that Exhibit 38 provided a new concept which needed further discussion and study. She also agreed that the concepts could be instituted on a voluntary basis.

Member Ousey moved that the concept he had previously sponsored at the February 2020 meeting advance to rulemaking, with the addition that a contingent hourly rate would be a factor that needed to be considered if a claimant's attorney submitted information regarding that contingent hourly rate, as well as any information the attorney chose to submit to establish a reasonable contingent hourly rate. Member Curey seconded. Motion carried 5-0.

Member Ousey stated an additional factor in determining a reasonable assessed attorney fee under “0010(4)” would provide that, if a claimant’s attorney submits such information, the determination shall also include consideration of an attorney’s contingent hourly rate, as well as the basis on which the rate was calculated.

Member Ousey proposed the additional language as stated be moved to a rulemaking hearing. Member Curey seconded. Motion carried 5-0.

Managing Attorney Brown suggested the Members hold the rulemaking hearing on July 31, 2020, and the Members agreed.

Public Comment

As above.

Announcements

None.

Adjournment

Member Curey moved that the meeting be adjourned. Member Ousey seconded. Motion carried. There being no further business, the meeting adjourned.