

Workers' Compensation Board
Tuesday, August 18, 2020
10:00 a.m.

MEETING MINUTES

Present:

Connie Wold, Board Chair
Sally Curey, Member
Barbara Woodford, Member
Roger Ousey, Member
Autumn Blake, Administrative Staff
Ian Brown, Managing Attorney
Lauren Eldridge, Staff Attorney
Tamara Elias, Executive Assistant
Greig Lowell, Project Manager
Roger Pearson, Former Managing Attorney

By Phone:

Steve Lanning, Member
Kevin Anderson, Attorney
David Barenberg, SAIF
Aaron Clingerman, Attorney
Jennifer Flood, Ombudsman for Injured Workers
Jaye Fraser, SAIF
Cathy Ostrand-Ponsioen, Workers' Compensation Division
Jodie Phillips Polich, Attorney
Julene Quinn, Attorney
Elaine Schooler, SAIF

Call to Order

Chair Wold called the meeting to order.

This public meeting was scheduled to consider the comments received at the Board's July 31, 2020, rulemaking hearing, which concerned proposed rule amendments to two attorney fee-related rules: (1) OAR 438-015-0010(6), which concerns a contingent hourly rate and, (2) OAR 438-015-0125, which establishes a voluntary procedure for the bifurcation of the determination of a reasonable assessed attorney fee from the merits of the claim for certain cases on Board Review.

In accordance with the Governor's executive order regarding the coronavirus pandemic, the Board's offices remain closed to the public. Consequently, outside meeting participation occurred via teleconference.

Approval of Agenda and Order of Business

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

Approval of Past Minutes

Member Ousey moved for approval of minutes from October 29, 2019 and February 27, 2020. Member Curey seconded. Motion carried.

Reports of Administrative Staff

No report.

New Business

Chair Wold reviewed discussion from the June 20, 2020 public meeting about comments submitted by the Attorney Fee Advisory Committee, practitioners, OTLA, and Board Members regarding the following rule concepts: (1) a contingent hourly rate for use in determining a reasonable assessed attorney fee under OAR 438-015-0010 and (2) a voluntary procedure for the bifurcation of a determination of a reasonable assessed fee from the merits of the claim for certain cases on Board Review (OAR 438-015-0125). These rule amendments are the culmination of the Board's comprehensive review of its attorney fee rules, which began in the summer of 2018.

This review generated several dozen comments, including some rule concepts, which were discussed in a public meeting in Salem, which was also accessible remotely, in December 2018. After discussion of comments, the rule concepts were referred to an advisory committee comprised of attorneys who represented workers and self-insured employees/insurance carriers, as well as the Ombudsman for Injured Workers.

In early summer of 2019, the committee issued its report, which was also posted on the Board's website, inviting public comment. A remotely accessible meeting was convened in October 2019 to discuss these rule concepts and comments. Following that meeting, staff were directed to draft proposed rule amendments consistent with deliberations. Those draft amendments were then posted on the Board's website and public comment was invited. Comments were considered at the remotely accessible December 2019 meeting. At that meeting, the Board proposed rule amendments and scheduled a January 31, 2020 rulemaking hearing for the public to present their written or oral comments.

A number of rule amendments were adopted at the February 27, 2020 Board meeting and those rules became effective on June 1, 2020.

Following further deliberations on June 20, 2020, the Board proposed rule amendments pertaining to the contingent hourly rate and a voluntary bifurcation procedure. A rulemaking hearing was scheduled for July 31, 2020 to receive public written and oral comments regarding the proposed rule amendments.

Chair Wold began by opening discussion of any written and oral comments submitted at the July 31, 2020, rulemaking hearing regarding a proposed rule concerning procedures for voluntary bifurcation of attorney fees from the merits of the claim for certain cases on Board Review (OAR 438-015-0125).

Member Curey stated that she does not support the rule.

Chair Wold pointed out that there were three exhibits submitted for the rulemaking hearing, which were posted on the Board's website. Exhibit A was a July 29, 2020, Statement of Filing Notice of Procedures. Exhibit B was a July 29, 2020, letter from Steven Bennett with American Property Casualty Insurance Association. Exhibit C was a July 30, 2020, memorandum from Members Curey and Ousey.

Exhibit B expressed American Property Casualty Insurance Association's opposition to the voluntary bifurcation rule. Managing Attorney Ian Brown's report noted that testimony was invited but no oral testimony was offered at that rulemaking hearing. Chair Wold reiterated that Exhibit B was the only public comment offered.

Member Ousey reminded those present that when the concept of bifurcation was started it was to see whether or not a bifurcation of fees from hearings on the merits could work. Early on it was proposed to be done at all stages of litigation and there were concerns as to whether that was doable. As a result, the Board opted to see if it would work at Board Review on a trial basis.

Shortly before the hearing in February, the Board received input from Attorney Julene Quinn, which was discussed and edited down with input from the SAIF Corporation and, ultimately, redrafted by the Board's then-Managing Attorney Moller. The final version then began the rulemaking process and a public hearing held at the end of July.

Member Ousey was in favor of adopting the rule as it was currently written and presented at the rulemaking hearing on July 31, 2020.

After reviewing the material submitted for the recent hearing, Member Woodford also supported the adoption of a permanent rule based on the language in Exhibit B of the June 25, 2020, Statement of Need.

Member Lanning expressed his support as well.

Chair Wold also expressed her support for this rule and asked for any public comments.

Julene Quinn thanked the Board for their efforts in creating the rule. She expressed her excitement about it and urged the Members to pass it.

Member Woodford moved to make proposed OAR 438-015-0125 a permanent rule. Member Ousey seconded. Motion carried 4-1, with Member Curey opposing.

Chair Wold next turned to discussion of written and oral comments submitted at the July 31 rulemaking hearing regarding a proposed rule amendment that would allow the consideration of a contingent hourly rate as the basis for its calculation in determining a reasonable assessed attorney fee. Such information could be submitted by claimant's counsel, (OAR 438-015-0010(6)).

Referring to Exhibit C, the July 30, 2020 memorandum from himself and Member Curey, Member Ousey stated the Board had resolved that rather than placing consideration of a contingent hourly rate in section (6), it should become part of section (4) with its language being set forth in subsection (l) of that rule. The language is the same as previously set forth in (6) but it made more sense as one of the many factors the Board considers in assessing fees.

Member Curey shared that before the hearing, she and Member Ousey put together a memo dated July 30 and provided it to the hearings officer. They proposed the modification of the contingent hourly rate be considered in section (4), not section (6), as Member Ousey indicated.

Member Curey pointed out that a correction needed to be made in (4)(l). The sentence should be changed from "claimant's contingent hourly rate" to "claimant's *counsel's* contingent hourly rate."

Chair Wold clarified that rather than being section (6) of OAR 438-015-0010, the proposed language be moved into section (4)(l). Also, there would be a slight change to (k), which reads, "the assertion of frivolous issues or defenses; and." The revised (l) would read "claimant's counsel's contingent hourly rate if asserted together with any information used to establish the basis upon which the rate was calculated."

In response to Chair Wold's opening up the floor for public testimony, Attorney Julene Quinn stated that the claimants' bar's multiplier proposal was the best way to account for the impact of the win-loss ratio when considering the contingent nature of the claimants' bar's practice under the statutory mandate enacted in 2015. She expressed appreciation for the Board's efforts in trying to codify and pay for the contingent nature of the practice. Quinn considered a multiplier essential to keep claimant attorneys working and recruit and retain claimant attorneys, as practitioners like herself retire. She

noted that a lot of work is done on a single case over years, all on a contingent basis; unlike their defense counterparts, who are paid regularly, claimant's attorneys are waiting for years to see if they're going to get paid at all. Adequate attorney fees are critical to the existence of the claimant's bar and their appellate practices. When injured workers lose below, then win at the higher appellate level, unlike a win below, which carries interest, the other fees do not carry interest. The multiplier method considers both the win/loss ratio and this delayed payment model.

Ms. Quinn stated that the multiplier was aggressively resisted by SAIF and other defense insurers. This rule was a compromise for that. She again appreciated the Board reaching across the aisle to agree to consider the contingent hourly fee in this rule. She understood this would allow the information from Oregon State Bar to be used, reflecting normal hourly rates for attorneys, or, affidavits from other attorneys, or any information that would help inform the Board as to the basis of the contingent hourly rate. She noted that Jodie Phillips Polich has tried to track wins/losses at the Board, which Quinn intends to put into a spreadsheet. Greig Lowell provided a win/loss assessment that accounted for contingent payments awarded by the Board. The whole point is to provide the Board with information so that it can award reasonable fees, so that claimants can continue to be represented in perpetuity. Although she preferred a multiplier method, this rule change is a good start; we'll see how it will work and determine if it leads to appropriate attorney fees. She thus agrees with the rule and urges the Board to pass it to assist injured workers in having access to representation.

Elaine Schooler of SAIF Corporation thanked the Board for all of their work. She urged Board to consider a data-driven approach to attorney fees moving forward so it can be taken into account by all parties in the future when it will be discussed further.

Member Curey moved to permanently adopt proposed rule 438-015-0010(4) as provided in the July 30, 2020, memorandum from Members Ousey and Curey with the addition in subsection (l) of the word "counsel" (*e.g.*, "claimant's counsel's contingent hourly rate if asserted"). Member Ousey brought up the language at the end of subsection (k) which should be changed to add a semicolon and the word "and," which is also part of the July 30 memorandum marked as Exhibit C. As that is drafted with addition of "counsel's" as noted, Member Ousey seconded. Motion carried 5-0 and the rule is amended.

Managing Attorney Ian Brown, said the effective date of October 1, 2020 for OAR 438-015-0010(4) would apply to all cases in which an order is issued on or after October 1, 2020, and the bifurcation rule, OAR 438-015-0125, would apply to all cases in which a request for Board Review is filed on or after October 1, 2020. Member Curey responded that this was fine, but asked if any members of the public had concerns about that date. Attorney Quinn questioned if the bifurcation rule would apply to any cases on remand as bifurcation would be the helpful for those. Quinn suggested the rule should apply to

cases that come to the Board after 10/1 that require a new order. Chair Wold pointed out that Quinn's request would be inconsistent with the rule as drafted and adopted.

Chair Wold requested Managing Attorney Brown to restate his suggested effective dates, rule by rule. In reply, Brown stated that assuming the effective date of October 1, the amendments to OAR 438-015-0010(4) would apply to all cases in which an order is issued on or after October 1, 2020. The amendment to OAR 438-015-0125 would apply to all cases in which a request for Board Review is filed on or after October 1, 2020.

Receiving no response to her request for further discussion from either Board Members or the public, Chair Wold asked for a vote. Motion carried 5-0.

Chair Wold thanked all Members, Board staff and the public for their efforts.

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

Public Comment

As above.

Announcements

None.

Adjournment

There being no further business, the meeting adjourned.