

Workers' Compensation Board
Tuesday, December 15, 2020
10:00 a.m.

MEETING MINUTES

By Phone: Connie Wold, Board Chair
Sally Curey, Member
Barbara Woodford, Member
Roger Ousey, Member
Terry Bello, Administrative Services Division Manager
Autumn Blake, Administrative Staff
Ian Brown, Managing Attorney
Joy Dougherty, Presiding ALJ
Tamara Elias, Executive Assistant
Katy Gunville, Executive Assistant
Greig Lowell, Project Manager

Kirsten Adams, Associated General Contractors, Oregon-Columbia Chapter
Kevin Anderson, Sather Byerly & Holloway, LLP
David Barenberg, SAIF Corporation
Jennifer Flood, Ombudsman for Injured Workers, State of Oregon
Jaye Fraser, SAIF Corporation
Matthew Lawrence, Tolleson Conratt Nielsen Maher & Replogle, LLP
Cathy Ostrand-Ponsioen, Oregon Workers' Compensation Division
Julene Quinn, Julene M Quinn, LLC
Elaine Schooler, SAIF Corporation

Call to Order

Chair Wold called the meeting to order.

In accordance with the Governor's executive order regarding the coronavirus pandemic, the Board's offices remain closed to the public. Consequently, the public, the Board Members and Workers' Compensation managers participated via teleconference. A small number of WCB staff were present in training room providing technical assistance. They were masked and distanced.

Roll Call

Greig Lowell took roll reflected in attendee list above.

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 Curey moved for approval of minutes from December 17, 2019, June 23, 2020 and August 18, 2020. Member Ousey seconded. Motion carried.

Reports of Administrative Staff

Administrative Services Division: ASD Manager, Terry Bello, reported that employees are on rotating pandemic schedules to ensure coverage on floor at all time, while additional risk mitigation in the form of remote work is offered when the position supports that. If any issues arise, schedules are adjusted, and any changes are posted outside of Terry's office.

Kayleen Swift, ASD Assistant Manager, will be out on medical leave soon. An employee from Board Review, Justin Herr, will cover her position during this time. Terry thanked Board Review management for allowing him to assist, in addition to his position as Own Motion Coordinator.

Furniture that had been in a storage unit since our remodel was transported to our Coos Bay location recently. The office at this location will be used as our template for when the state reopens to the public. Moveable Plexiglass barriers, air cleaners, hand sanitizing stations, cleaning supplies, gloves, disposable masks, signage and repositioning furniture in the lobby and hearing rooms to comply with social distance requirements were all addressed at this time. The same process will take place in our Pendleton location this week.

We are getting ready to release a new WCB Visitor Policy and WCB Travel Policy. We are hoping to include them at the time of our regular Policy Acknowledgment Form signing at the beginning of the year.

The Governor's Food Drive is coming up in February, and the expectation is that it will look much different than in past years. No other details available at this time.

Hearings Division: Presiding Administrative Law Judge, Joy Dougherty reported that, as Terry mentioned, the team in Pendleton is getting ready for eventual reopening. In March and April (2020), the Hearings Division worked fast and diligently to change to telephonic hearings. Thanks to Kathy Ocasio, Thomas Taylor and Greig Lowell for helping to get processes switched. In August and September, that same crew, plus a few more, helped switch over to Zoom hearings. Hearings Division also has people on the floor every day making sure business is flowing smoothly.

Board Review: Acting Managing Attorney, Ian Brown reported that the pandemic did affect the way things are done as regards to employees working in the office and remotely. They continue to complete tasks and resolve Workers' Compensation disputes on appeal. Socially distanced operations have been improving since May.

Mr. Brown came on board as Acting Managing Attorney in mid-June. Roger Pearson, former Managing Attorney, officially retired September 1, 2020, although he's continued to offer his services on an hourly basis for the time being.

Filled staff attorney position with Brian Branch who began September 1, 2020.

Hired a new supervising executive assistant, Katy Gunville, who began September 21, 2020. She succeeded Kayleen Swift who moved to ASD.

Also hired a new board support specialist, Katelyn Miller, who began December 1, 2020. There are currently no vacancies or recruitments in the Hearings Division.

Unfinished Business

No report.

New Business

Chair Wold announced that the meeting was a regularly scheduled quarterly meeting under Board rules and allows the Board to provide the updates that everyone just heard.

Also on the agenda was a discussion of the biennial review of attorney fees schedule pursuant to ORS 656.388(4). This statute mandates a review of our attorney fees on a biennial basis. We are two years from the 2018 biennial review that culminated in the adoption of several rules and rule amendments. To maintain consistency, today's meeting is the commencement of the next biennial review. Chair Wold expressed that having just concluded a very robust, transparent, participatory process, she was inclined to wait for the rules that just became effective on October 1, 2020, to play out so we can study the data, using the tools and metrics refined over the last process, to see what these changes we all worked so hard to bring about will yield.

Member Ousey agreed that the Board just completed a very exhausting and exhaustive process and had not yet seen any appeals pertaining to the application of those rules or issues occurring from those rules being applied at the hearings division. There are cases currently before the Board in which they will have to apply those rules. He also believes that the Board needs to wait to see what comes from the rules enacted during part of the last biennial review and rule-making procedure that followed that. He understands that the biennial review was set to be opened now simply to serve as a

placeholder so that biennial reviews may continue to be expected in December of even numbered years. He reassured stakeholders that that is the goal and, in fact, statutory mandate. He did not believe any action was required at this time. He noted that although comments were invited prior to this meeting, none were received.

Member Woodford concurred with previous statements and said she understood that the Board has been capturing data to measure outcome of what was just done. She looks forward to viewing that on an annual basis.

Member Curey concurred as well and stated that a lot of work was done; it took two years and it's just starting to take effect. December of even-numbered years will be considered the beginning of biennial review. She expressed interest in seeing the statistics and data at least once a year or maybe every six months and recommended that it is posted so the public gets to see it.

Chair Wold opened the floor up to public comments.

Elaine Schooler with SAIF Corporation thanked the Board for the last two years of work. She thought Member Ousey's comments summed things up nicely. The process was exhaustive with lots of discussions and rewrites that were responsive to all of the concerns brought forward. Ms. Schooler appreciated the Board's willingness to open up the review process again but to take the time to see the affects of the rules that have been implemented and how the data changes in response to those rules. She encouraged the Board to continue to track the data and to publish it to keep stakeholders informed as to the effects. She thought that the timing indicated by Member Curey may be a point for further discussion—to see what would work well for the Board as well as stakeholders to see that data in real time. She agreed that it is important to understand what is being collected and what may be missing so that when this review is reinitiated in December of 2022 any gaps in the data being published can be addressed. She felt it would be helpful to revisit, perhaps at a later Board Meeting, what the data points are going to be for the Board to collect going forward and allow stakeholders to provide input on those data points and fill in those gaps from the outset. Ms. Schooler appreciated the Board's discussion and willingness to continue this important work and also be willing to take the time to see the effects of the changes we worked so hard to implement.

Keith Semple, chair of the Oregon Trial Lawyers Association (OTLA) Workers' Compensation Policy Group for claimant's attorneys, could not be present and asked attorney Julene Quinn to relay his opinion that it's important to have a full Board, particularly the new labor member appointed, as part of this biennial review and an opportunity to bring that Board member up to speed. He asked for that to occur before more decisions are made. Ms. Quinn appreciated the Board scheduling a biennial review or acknowledging to have one every two years. Claimants' attorneys want to avoid any further lengthy delay in increases of attorney fees in an effort to get rid of the gap that seems to be continuing between claimants' bar and defense bar. Statistics were one of the

issues they felt it was important to address. They hoped to discuss what statistics the Board is collecting, will be collecting and how they're going to be publicly reported. As Member Curey said, they should be posted and made public in some way. There are other issues that claimants' bar will be discussing in upcoming policy meetings. They would like to bring the new Board member up to speed and then address additional issues they feel are appropriate to bring forward in this biennial review.

Receiving no response to her request for further public comment, Chair Wold returned to the Members for discussion.

Member Ousey was aware that there are difficulties for both practitioners and Board members due to the pandemic. He doesn't know when a fifth member may be added to the Board, so he would be in favor of concluding our biennial review for this year sooner rather than later. In fact, with no comments having been offered prior to the meeting, he suggested that the biennial review be concluded now.

Member Woodford acknowledged hearing the stakeholders' interest in the data and that it be posted publicly, and ensure this is what the Board does going forward.

Member Curey agreed with Member Woodford. The more transparency, the less questions. She doesn't know if discussion regarding what types of data and statistics are going to be gathered comes under this biennial review or not. She was not prepared to address the issue of whether or not we open and close the biennial review today as suggested by Member Ousey.

Chair Wold appreciated everyone's interest in the attorney fee data. She said that there were three different reports done—two in the context of the advisory committee and one issued in mid-May, 2020; the latter included data through 2019, and also included quite a bit of robust and useful data addressing concerns raised during the biennial review and rulemaking. She offered that the Board could have a meeting to go through and explain the data. The Board has already begun a process of looking back to see if there are gaps and she suggested that everyone starts by reviewing the data already published. At start of the biennium review the Board was unable to reconstruct or replicate a prior litigation report created by someone who has since retired, so it moved forward with available metrics and added additional inquiries based on member and stakeholder input. Quite a lot of work went into producing this data, so Chair Wold requested that everyone concerned please review what's already been published. If there are additional questions or concerns, she'd appreciate folks coming forward so we can establish a level of understanding of what is currently available. The Board worked with data research people to determine how long before there would be a relevant size sample of data, because you can't have too small a sample size or it's not meaningful. She acknowledged the comments of having it available at least annually or every six months, by Members Woodford and Curey respectively. The Board will inquire about that with the statisticians. Chair Wold then asked for member comment.

Member Ousey asked Ms. Quinn if she saw the information the Board collected internally at the end of the rule-making process. Ms. Quinn acknowledged that she did. Member Ousey asked if there was enough data there for her to feel comfortable extrapolating win/loss ratios and average and median fees. Ms. Quinn stated that on one hand the reports “were gold” but to determine if they were enough and to make a wish list of other statistics to provide for the Board, she’d have to go through them again. Member Ousey mentioned that the numbers were going to change as a result of the new rules put in place. He asked Ms. Quinn if she would have input as to how frequently the numbers would need to be replicated. She thought on an annual basis. She said they have been trying to capture both court and Board data to put together statistics for the Board but the extra work wasn’t going to happen due to COVID, and suggested it would be helpful for the Board to take that on. Member Ousey shared that from the Board’s perspective statistics would be ongoing. He asked Ms. Quinn if interpreting statistics already on hand—and those that will potentially be added, like fees from the court—is something the Board needs to leave the review process open for. She replied she was unsure because of wondering if it would lead to a more than two-year process if it were left open. Whether it is done as part of the biennial review or done just as part of the Board’s business, she liked Chair Wold’s suggestion of going through the statistics on hand and then taking suggestions for other statistic wish lists to see what could happen.

Elaine Schooler expressed her belief that the Board would track the data outside of the biennial review process, just as it would track other data points as part of its administrative functions; the biennial review would have its own process for determining next steps, with the data being one piece that review could consider. However, since the Board members have indicated they are not going to do another review but instead let the dust settle on the rules that were recently implemented, the data collection, distribution and further discussion of that is outside of the biennial review process itself. So, it would be something that could be reviewed by stakeholders and Board members at any time. Otherwise, it seems the review process would never close if anyone was continuing to ask for additional data points or changes as to how the data is being collected or published. She’d like increased nimbleness in the Board making any changes and collecting this information without tying it to the biennial review process, which is a separate function.

Member Woodford felt these matters need to be discussed by the Board internally. Maybe it’s a future agenda item. We should discuss what came up today. She knows a lot has been published, but when she goes on the website, it’s hard for her to find things. She said the Board should look at that and be sure it is being transparent.

Chair Wold stated that she has discussed with Greig Lowell the need to post the data in a different spot on the Board’s website. Right now, it’s posted as exhibits of the prior biennial review and rule making. She agreed with everything that was said. She does think it’s part of the Board’s regular business and that it’s important and needs to be

explained. People might be surprised at how much is there. The Board is already looking at how it's captured and where. For example, Member Curey wants to know about fees at the appellate level, so the Board is studying its inherited data collection and when such fees are captured and when they are not. There's a lot of work to do. Part of this is internal but, given the interest in the biennial review process, Chair Wold welcomes input from the public. She is mindful of what Ms. Quinn said about there being an empty seat on the Board right now. And, we also need to let the dust settle on what we just did. It wouldn't make sense to move forward and change anything until the Board is fully occupied and the new member is present. Chair Wold thought it would be appropriate to conclude the biennial review and move on to data review and explanation to the public.

Member Ousey stated that he believes we are all agreed that the two processes—data collection/publication and the annual review—are not mutually exclusive determinations that the Board needs to make. He moved that we close the biennial review process, but agreed that the Board—as a part of usual business—is going to collect more data, collect input from stakeholders, and publish that on no less than an annual basis. Member Curey seconded. Chair Wold asked for a vote. Motion carried 4-0.

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

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

Public Comment

As above.

Announcements

None.

Adjournment

There being no further business, the meeting adjourned.