Workers' Compensation Board
Thursday, May 16, 2024
1:00 p.m.

MEETING MINUTES

In-Person Staff:
Joy Dougherty, Board Chair
Sally Curey, Member
Roger Ousey, Member
Moises Ceja, Member
Jenny Ogawa, Member
Kerry Anderson, Project Manager
Jacqueline Jacobson, Presiding Administrative Law Judge
Lauren Eldridge, Interim Managing Attorney
Catherine Potter, Staff Attorney
Katy Gunville, Board Executive Assistant
Katelyn Crowe, Transcription Coordinator

In-Person/By Phone Attendees:

Elaine Schooler, SAIF Corporation
Jovanna Patrick, Hollander Lebenbaum & Patrick
Keith Semple, Johnson Johnson Lucas et al

Call to Order
Chair Dougherty called the meeting to order. The public and WCB staff are participating in this meeting via telephone and in-person in the Salem Office.

Roll Call
Lauren Eldridge, Interim Managing Attorney, took roll, reflected in the attendee list above.

Approval of Agenda and Order of Business
Chair Dougherty asked for a motion to approve the agenda and order of business. Member Curey moved for approval of the agenda and order of business. Member Ogawa seconded. Motion passes.

Approval of Past Minutes
Member Ousey moved for approval of minutes from the April 23, 2024, meeting. Member Curey seconded. Motion passes.

Division Reports/Updates
There were no division updates.

New Business

Discussion of potential amendments to the Board's Division 438 rules regarding mandatory denial language in OAR 438-005-0055 proposed by the advisory committee.

Chair Dougherty asked for the Members to comment on the proposed language and the advisory committee's report. The public will then address those comments.

Member Curey had a couple comments regarding the proposed language. In Paragraph 1, she suggested that the word "appeal" be changed to "request a hearing." Then in Subsection 4 under "physical delivery," she suggested adding the physical addresses for WCB offices so claimant's don't have to search for them. Also, in Paragraph 5, regarding worker requested medical exams (WRME), she cannot support the advisory committee's suggested language. Consistent with her dissent in *Bret V. Barton*, she suggests that the language reflect ORS 656.325(1)(e). Her proposed revision would be to remove "does not comment" and replace with "does not concur." She thanked the committee for putting their report together and for doing so in a timely and organized manner.

Member Ogawa agreed with Member Curey to add the physical addresses for the Salem and Portland WCB offices to Paragraph 1. She further suggested adding the main WCB phone number. She also expressed similar concerns as Member Curey regarding Paragraph 5 and the WRME language. She agreed that the language should reflect ORS 656.325(1)(e) for consistency's sake and until litigation for *Barton* is resolved. From her perspective, a rule can't expand the scope of a statute. She thinks it would be best for the denial language to mirror the statutory language.

Member Ousey thanked the advisory committee for their report. He noted that their proposed revisions considered the Access to Justice Committee's objective of improving readability, but was consistent with the necessary rules and statutes. He expressed concern about the portions of the language pertaining to the mailing of a hearing request to WCB's fully staffed offices (Salem and Portland). Previously, requests for hearing had been stamped in at other staffed WCB offices. Removing Medford and Eugene from the language reduces access. In regards to Paragraph 5 and WRMEs, he doesn't think the proposed denial language promises a worker a WRME. He pointed out that the Workers' Compensation Division's (WCD) language regarding a WRME is similar to the language proposed. He doesn't think the words "you may" used in Paragraph 5, upset the statute.

Member Ceja overall liked the advisory committee's recommendations. He thinks the proposed language will be clearer for claimants to understand, especially with regards to WRME entitlement. He is ready for the proposed language to be moved to further rulemaking.

Member Curey noted that the advisory committee's report is dated March 13th, and *Barton* issued after that date. The issues presented in *Barton* were not considered by the advisory committee at that time. She further noted Paragraph 5 is not consistent with

OAR 436-060-0140(8)(b)(A)(i-iii).

Member Ogawa wanted clarification from any advisory committee members as to why they departed from the current language in OAR 438-005-0055.

Chair Dougherty then opened the floor to the public to respond to the Board's comments regarding the proposed language.

Attorney Jovanna Patrick, on behalf of Oregon Trial Lawyers Association (OTLA), provided comments. Ms. Patrick is also a member of the Access to Justice Committee. She shared that the revisions to OAR 438-005-0055 resulted from the objectives of various committees within the Oregon Bar Association to improve the readability of materials that the public accesses. Initial proposals by Access to Justice mirrored the statute, but due to rule changes in 2022, the proposed language changes were made. Ms. Patrick responded to the comment by Member Curey regarding the word "appeal" versus "request for hearing." She noted that "appeal" is used throughout the remaining language and thinks the language should be consistent throughout. In regards to the comments about physical WCB office addresses, she shared that she does have workers who are not technologically savvy and prefer to deliver documents in-person. She would want to make sure that the addresses listed are offices that can accept requests for hearing. Ms. Patrick then responded to the WRME language comments. Her understanding was that the advisory committee was focused on readability when they revised this portion of the denial the language. She believes the proposed language of "comment on" is consistent with the current case law and rules, and accurately conveys the worker's options when requesting a WRME. Overall, she agrees with the proposed language and thanked the advisory committee.

Attorney Elaine Schooler, from SAIF Corporation, also provided comments. Ms. Schooler noted that this rule review coincides with simplification being done at WCD. She shared that when WCD initially reviewed their language it was scored at a first-year-of-college reading level. In response to some of the Board Members comments, Ms. Schooler shared that she recalled the advisory committee also discussing adding physical addresses to the portion of the language about physical delivery of a request for hearing. In regards to the WRME portion of the denial language, she echoed Member Curey's comment in that *Barton* issued after the advisory committee had met, so that case was not discussed in their meetings. It is SAIF's position that the language should mirror the statutory language until there is a final determination by the courts of what "does not concur" means.

Member Ogawa asked Ms. Schooler whether claims adjusters follow WCB's or WCD's rule when issuing a denial. Ms. Schooler responded that SAIF adjusters use WCB's rule, because their rule is tied to the statute. Member Ogawa noted that WCB and WCD's rules don't match.

Member Ceja commented that the advisory committee's report said that the committee had come to a consensus without any stated minority positions. He asked Ms. Schooler why SAIF has changed their position since the advisory committee meetings.

Ms. Schooler responded that SAIF shifted its position due to recent interpretations of ORS 656.325, which hadn't issued prior to the committees meetings. While *Barton* is being litigated, she believes it would be best practice for the language to reflect the statute.

Member Ousey discussed with Ms. Schooler the comparisons between WCD's and WCB's WRME requirements. It was mentioned that WCD's rule had changed in 2018, whereas the statute has not changed in many years. It is SAIF's understanding that if *Barton* is overturned at the court, WCD's rule would have to be revised. It was agreed that a denial cannot promise a WRME.

Attorney Keith Semple, also a member of OTLA, provided comments. He opposes the use of "do not concur" in the WRME portion of the denial language, because it is difficult to understand. He agreed with Member Ousey that the proposed words, "does not agree," do not promise a worker a WRME. He mentioned that WCD has adopted new rules while cases are being litigated or on appeal. His position is that the Board should not wait for all appeals to be exhausted with a case in order to make revisions to its rules.

Member Curey further commented that she is in agreement that the language needs to be understandable. In a perfect world, WCD and WCB's rules would be consistent with one another. She still has difficulty departing from the language that is in the statute ("does not concur").

Mr. Semple shared that WCD's rule changed because there was a legislative proposal at a Management Labor Advisory Committee (MLAC) meeting. There were thorough discussions about what "does not concur" means. There was legislation lined up to change the statute, but ultimately the bill failed and the statute was not modified.

Member Ousey concluded he had no concerns with the presented language. He is uncertain if replacing "appeal" with "request for hearing" would improve readability. He moved to forward the proposed denial language to rule making. Member Ceja seconded. Member Ogawa said nay. Member Curey responded with an alternative motion to put forward the proposed language except for Paragraph 5 (WRME), and revise it to reflect the statutory language. Member Ogawa suggested to also add the physical addresses for physical delivery of a hearing request. Member Curey then posed the question of whether they can send two alternative versions of Paragraph 5 to the rule making committee. Lauren Eldridge responded that they are only able to send one version to the Secretary of State.

Member Ousey amended his motion of adopting the advisory committee's proposed language of OAR 438-005-0055 to include the physical addresses for mailing and delivering a hearing request to WCB's Portland or Salem offices. Also within that motion was to have the reading level of the language analyzed. Member Ceja said aye. Member Curey said nay. Member Ousey said aye. Member Ogawa said nay. Chair Dougherty said aye.

Next, Member Curey raised a secondary motion to adopt the proposed language of OAR 438-005-0055, but with a revision to Paragraph 5 to reflect the statute, plus the addition of the physical addresses. Member Curey said aye. Member Ogawa said aye. Member Ousey said nay. Member Ceja said nay. Chair Dougherty said nay. Chair Dougherty concluded that she sees merit in both positions regarding Paragraph 5's language; however, she is swayed by the fact that the language is intended for the injured worker. The proposed language is also consistent with WCD's language. She also mentioned in the event that *Barton* is overturned, it will require WCD to change their rule as well.

Discussion of potential amendments to the Board's Division 438 rules regarding attorney fee caps for claims disposition agreements and disputed claim settlements in OAR 438-015-0050(1) and OAR 438-015-0052(1) proposed by the advisory committee.

Chair Dougherty opened the floor for Board comment regarding the proposed changes to OAR 438-015-0050(1) and OAR 438-015-0052(1). The Board Members had no substantive comments, but thanked the advisory committee for their work on the proposed changes.

Ms. Patrick, who was an advisory committee member for this rule review provided some comments. She shared that Access to Justice has discussed the issues of having an increased number of unrepresented claimants. The consensus of these discussions was that there are simply not enough claimants attorneys and that claimants attorneys are helpful in moving the litigation process along and helping workers understand workers' compensation. She also noted that she often hears from attorneys in other forums, that representing injured workers is hard work for not a lot of money. Unfortunately, this perception often seems to dissuade law students from wanting to pursue a career as a claimants attorney. Ms. Patrick also shared that she found it helpful and insightful to have an injured worker as a member of the advisory committee. He happened to have gone through the settlement process with his claim. He also shared that he appreciated having an attorney during the process and wouldn't change his mind about hiring an attorney if these recommended fee caps were in effect back then. Also, in her experience, most claimants aren't opposed to attorney fees in settlements. Ms. Patrick concluded by thanking the Board on behalf of OTLA for reviewing the settlement fee caps.

Member Ceja started the Board member discussion. He stated that he appreciated the advisory committee and that the outcome is a move in the right direction. Member Ousey agreed that the advisory committee's proposal is a step in the right direction. He appreciated the various advisory committee members with their different backgrounds coming to an agreement. He thinks there is still room for improvement in increasing the fee percentage and noted that other contingent practices would not accept a 25% fee. Member Curey had no comments. Member Ogawa shared that in her experience as an ALJ mediator, a straight 25% fee is easier for all parties involved.

Member Ousey asked for a motion to forward the proposed amendments to OAR 438-015-0050(1) and OAR 438-015-0052(1) to rulemaking. Member Ceja seconded.

Motion passed. Chair Dougherty then requested that the Board staff prepare the necessary documents to move the proposals to the next step of the rulemaking process.

Final Public Comment
None were made.

Announcements
None were made.

Adjournment
Chair Dougherty asked for a motion to adjourn. Member Ousey moved to adjourn. Member Curey seconded. Motion carried. Meeting was adjourned.