Workers' Compensation Board
Tuesday, July 30, 2024
9:00 a.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, Managing Attorney
Heidi Havercroft, Senior Staff Attorney
Catherine Potter, Staff Attorney
Katelyn Crowe, Transcription Coordinator
Melanie Chin, Board Review Specialist
Baaba Ampah, Personnel Contact

In-Person/By Phone Attendees:

Elaine Schooler, SAIF Corporation
Jovanna Patrick, Hollander Lebenbaum & Patrick
Aaron Clingerman, Dunn & Roy PC
Julene Quinn, Quinn & Heus Law
Jodie Phillips Polich, Jodie Phillips Polich
Keith Semple, Johnson Johnson Lucas et al
Kevin Anderson, SBH Legal
Isabel Hernandez, Healthe Systems
Maggie Gerlicher, Associated General Contractors – Oregon Columbia Chapter

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
Katelyn Crowe, Transcription Coordinator, 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 Ousey moved for approval of the agenda and order of business. Member Curey seconded. Motion passes.

Approval of Past Minutes
Member Ousey moved for approval of minutes from the May 16, 2024, meeting. Member Curey seconded. Motion passes.

Division Reports/Updates

Kerry Anderson, Project Manager, provided the update for WCB IT. WCB IT's latest project has been converting agency cell phone software over to Microsoft Intune. IT staff conducted sessions in both the Salem and Portland offices to help staff with the conversion. Ms. Anderson thanked all the IT staff involved with the conversion process. Regarding updates on modernization, Ms. Anderson shared that they have concluded process mapping and job duty meetings with WCB staff. The information gathered has been sent over to DCBS to further assist with the project. WCB Project Management staff has been continuing to preview and test different case management software, and will keep the Board updated on any decisions made. Also, almost all WCB hearing room computers and mixers have been upgraded so that they are compatible with FTR recording software. The Salem, Portland, Pendleton, and Bend hearing rooms have all been updated. Florence and Eugene hearing rooms are next to be updated.

Lauren Eldridge, Managing Attorney, provided the update for Board Review. Ms. Eldridge provided a staffing update. Former Board Executive Assistant, Katy Gunville, has accepted a position as a Business Operations Supervisor for the Oregon Water Resources Department. Board Review staff members, Justin Herr and Katelyn Crowe will be handling her duties in the meantime.

There was no update for the Hearings Division.

There was no update for the Administrative Services Division.

New Business

Discussion of bifurcation of attorney fees at the hearing level.

Chair Dougherty asked the Members for their comments. The Members started the discussion of bifurcation of attorney fees at the hearing level by commenting on the July 15, 2024, Report on Bifurcation of Attorney Fees on Board Review. Member Ousey mentioned that when the bifurcation process was implemented at Board Review the goal was efficiency. During the first year and a half since adopting the project, most cases resulted in a stipulation and the process was working as intended. However, recently many cases have not resulted in stipulation. Member Ousey thinks that the process at Board Review needs to be refined before moving it to the Hearings Division. At this time, he is not in favor of moving the concept to rulemaking.

Next, Member Curey provided her remarks regarding bifurcation of attorney fees at the hearing level. She is in agreement with Member Ousey. Per the July 15th, 2024, report, bifurcation at Board Review is only being utilized by three attorneys. Early on, bifurcation at Board Review seemed to be working. She thinks the concept of bifurcation at the hearing level should not proceed.

Member Ogawa was the next member to provide comments on the concept. She has not had the opportunity yet to have a bifurcated case, so her comments stem from her experience as an ALJ. In her experience, most claimant's attorneys ask for a range when asking for a fee at hearing. She is not sure how popular a bifurcation process would be at the hearing level if only three attorneys use it at the Board Review level. Member Ogawa wondered, if implemented, would ALJs be under a timeframe to issue a bifurcated attorney fee order? She further

commented that there would need to be research into the statutory authority of ALJs and awarding bifurcated attorney fees. At this time she is a firm "no" on the concept, and thinks staff resources could be better used elsewhere for the agency.

Member Ceja shares the concerns of the other members regarding the concept. He is uncertain if the process could effectively transfer over to the Hearings Division. He mentioned the process for "complex" case designations used by the civil courts. He is curious if bifurcation of attorney fees at the hearing level could replicate that process.

The floor was then opened for public comment. Jovanna Patrick, of Oregon Trial Lawyers Association (OTLA), provided comment on the concept. Ms. Patrick thinks an advisory committee would be helpful in flushing out the details of how bifurcation of attorney fees at the hearing level could work. Claimant's attorneys are focused on their client's case and often times the fee is an afterthought. If claimant doesn't prevail, the hours of time spent on preparing a fee statement would be a waste of time. Ms. Patrick also noted that bifurcation seems to encourage parties to settle. Also, she said the July 15, 2024, Bifurcation Report is a little misleading since appellate matters are handled by appellate attorneys. She would ask that the Board be open to having an advisory committee for the concept.

Member Ousey asked Ms. Patrick how opposing counsel typically responds at hearing if she were to submit her fee statement post-hearing. He also asked how many of her records she closes at the time of hearing. Ms. Patrick responded that she closes about 20% of her records at the time of hearing. Member Ogawa followed with another question for Ms. Patrick, asking her how she keeps her time records? Ms. Patrick shared she uses an Excel spreadsheet, but she knows that for a fee statement she needs more details than what is on her spreadsheet. Member Ogawa then asked if other trial attorneys keep their time. Ms. Patrick shared that it's divided about 50/50 amongst claimant's bar; some do and some don't at all.

Aaron Clingerman then provided public comment. He asked Member Ogawa to elaborate her concerns regarding jurisdiction and bifurcation at the hearing level. Member Ogawa stated that once the Opinion and Order becomes final that the ALJ loses jurisdiction of the case. She thinks there would need to be a statutory fix in order to allow bifurcation at the hearing level. Chair Dougherty shared that on Page 4 of the Bifurcation Report that the case would be held in abeyance, but agreed that bifurcation at the Hearings Division raises a lot of statutory concerns. Mr. Clingerman shared that through his experience in immigration law, there were ways that decisions can be made on a case while it's in abeyance. Member Ousey then asked Mr. Clingerman how many records he closes at hearing. Mr. Clingerman shared that he tried to have the medical record complete before testimony, but estimated that he closes between 20-50% of this records at the time of hearing. He also shared that he doesn't track his time, because in his opinion it is not part of a modern practice. Chair Dougherty then asked Mr. Clingerman if bifurcation at the hearing level proceeded, would he start tracking his time? Mr. Clingerman responded, that he doesn't think he would use the process unless it was mandatory.

Elaine Schooler, attorney for SAIF Corporation, provided comments regarding bifurcation at the hearing level. She shares similar concerns as some of the Board Members in regards to the jurisdiction and efficiency of bifurcation at the hearing level. She has noticed that the Board's orders addressing bifurcation are often lengthy and detailed, and often require additional briefing. SAIF has concerns that mirroring that process at the Hearings Division

would lessen efficiency and resources for both the ALJs and for trial attorneys. Ms. Schooler stated that at this time SAIF Corporation is opposed to further rulemaking or an advisory committee regarding the concept.

Julene Quinn provided public comment regarding the concept of bifurcation at the hearing level. She requested that the Board send this issue to an advisory committee this biennium or next. Her observation is that change is difficult, especially if it has been done a certain way for a long time. She believes introducing this concept to the Hearings Division is worth the challenges. From her perspective, bifurcation at Board Review has been easy and efficient. Addressing some of the data points in the July 2024 Bifurcation Report, she commented that the reduction in stipulations in the last year (2023) is just one year and an anomaly. The cases that did not result in a stipulation, are complex cases. Ms. Quinn also noted that there are a lot of legal forums and practices where fees are stipulated upon. She cited the Board case of *Marvin A. McGuire*, 71 Van Natta 762 (2019), where claimant's attorney filed an additional statement of services after the record closed and the ALJ's order issued. The ALJ used their discretion to not reopen the record to consider claimant's attorney's additional fee statement. Ms. Quinn noted that the claimant's attorney in *McGuire* was a long shore attorney and that procedural nuances like this can prevent other legal practitioners from entering into the workers' compensation system. Bifurcation at the Hearings Division would be an opportunity to expand the legislature's intent to award reasonable attorney fees. Ms. Quinn believes that creating an advisory committee could help answer some of the questions regarding jurisdiction. In terms of the ALJ's deadline, she believes that the ALJ would get 30 additional days to decide the fee amount if bifurcation is raised. Since the ALJ decides independently, they would be quicker at deciding the fee amount than the Board who have to come to a consensus. Attorney fees are important to injured workers in obtaining good representation and expanding the practice. She sees bifurcation as the future of the workers' compensation system. She again, requested that the Board consider moving this concept to an advisory committee to help flush out the details of the process.

Jodie Phillips Polich provided public comment regarding bifurcation of attorney fees at the Hearings Division. She noted that while she was not listed on the Bifurcation Report as someone who has used the bifurcation process at Board Review, she still finds it is important in promoting adequate representation for injured works, and that attorneys have multiple ways to obtain fees. She highlighted that the workers' compensation system has an aging bar, which is a concern. Also, for new attorneys the workers' compensation system can be overwhelming and dissimilar to other legal forums. She is hoping the Board can be flexible in assessing attorney fees. As many in the workers' compensation community know, she takes a lot of mental health cases, which are difficult to win. She thinks that there needs to be multiple ways to obtain fees, which encourage attorneys to participate in the workers' compensation system. Ms. Phillips Polich also commented on the data point in the Bifurcation Report, that only three attorneys have utilized bifurcation on Board Review. She noted that three attorneys isn't that small, relative to the size of claimant's bar, especially appellate attorneys. She also would volunteer Julene Quinn to be a part of any advisory committee for the concept of bifurcation at the hearing level. She agrees there is work to be done on figuring out the details of the process, but believes it should proceed. Ms. Phillips Polich then addressed Member Ousey's earlier question regarding how many records attorneys close at the hearing. For her personally, she closes about 80% of her records at the initial hearing. As far as tracking her time, she does not keep time records except on her appellate cases and does some level of notation on her mental health cases. And with that

she concluded her comments. Public comment was then closed.

Chair Dougherty then allowed the Board to make further comments regarding the concept. Member Ousey started by saying that he still has some of the same concerns after hearing the public's comments. He isn't as concerned about the jurisdictional issue as Member Ogawa. Under ORS 656.283(7), ALJ's have discretion to run a hearing as they see fit to obtain substantial justice. What he would like answered is how the process would work if a case is remanded by the Court of Appeals, but has a pending bifurcation request at the hearing level and at the Board Review level? Those are the types of fine details that would need to be figured out. Member Ousey isn't a "hard no." He would be open if some of the questions and concerns presented today could be addressed, but at this time he is a no.

Member Curey provided further comments regarding bifurcation of attorney fees at the hearing level. She appreciated the comments provided by the public. She shared her experience from when she was counsel at Liberty, that they introduced a new software program to track their time. Initially staff did not like it, but eventually it became a habit. Based on that experience, she has a hard time agreeing with the argument that attorneys don't have enough time to track their time. She also doesn't believe that bifurcation at the Board Review level has been mostly successful based on the statistics that show that of the 23 cases that were bifurcated only 12 have been resolved. The 11 cases that haven't been resolved are complicated and time-consuming cases. In her opinion, the Board Review bifurcation rule should probably be eliminated at its 5-year rule review. She understands that a few people are benefiting from bifurcation, but knows that State resources are being used to implement the process. If State funds are being used, more than just a few people should benefit from the process. At this time, she is a "hard no" on the concept of bifurcation at the hearing level moving forward.

Member Ceja provided that he is not in favor of moving forward today with this concept, but is open to revisiting in the future.

Member Ousey provided further comment. He shared that when he was in practice, he ran his practice similar to Mr. Clingerman, in that he didn't keep track of time. He made the point that time tracking software can be expensive for small firms in contrast to larger firms and entities. While bifurcation may only benefit a small amount of practitioners, he believes that is enough to warrant the process.

Member Ogawa provided her remarks. She noted that while there has been a lot of discussion on the process and rules, she believes that jurisdiction and statutory questions must be answered first. She highlighted the question that Member Ousey asked regarding how many records close at the time of the hearing. She knows that different ALJs have different practices, but thinks that if closing arguments are held separately without the claimant, it could be less awkward for attorneys to argue their fee amount. She overall appreciated the comments by the other Board members and by the public, but reminded the forum that the Workers' Compensation Board is not a civil court, but an administrative agency and is a directed by statute.

Chair Dougherty concluded the Board discussion by stating that this year there has been an anomaly of difficult cases. The Board has a lot of work to do to move forward in today's contemporary environment for new attorneys entering into the system. If bifurcation doesn't

move forward today, she assures claimant's bar that the Board is making efforts to help improve the attorney fee issue. She then asked for a motion. Member Ousey responded with a motion to as to whether the Board wished to move forward with the concept of bifurcation at the Hearings Division, as requested in OTLA's May 2022 letter. All Members responded nay. Motion did not pass.

Discussion and possible rulemaking action regarding proposed amendments to the Board's rules to simply and improve the readability of the required denial language in OAR 438-005-0055(1), (2).

Lauren Eldridge held a rulemaking hearing on June 28, 2024, regarding the proposed amendments to OAR 438-005-0055(1), (2). All written public comments have been posted online. There were no oral comments at the rulemaking hearing. Chair Dougherty asked for any final public comments regarding the proposed amendments, and none were made. The floor was opened for final Board discussion regarding the proposed amendments. Member Curey thinks it is great that the reading level was lowered. She thinks it should proceed to further rulemaking. Member Ousey is also pleased that the proposed language improved the readability. Moving to adopt as a permanent rule once other Board Members further comment. Joy: appreciated all the work done to get this rule amended. Member Ousey motioned to adopt Exhibit A, effective to November 1, 2024. Member Ceja seconds. Member Curey said ay. Member Ogawa abstained. The motion passed. Ms. Eldridge asked the Board for clarification on whether this language should be in effect for denials issued on or after November 1, 2024? The Board responded yes.

Discussion and possible rulemaking action regarding proposed amendments to the Board's rule regarding attorney fee caps for Claim Disposition Agreements and Disputed Claim Settlements. OAR 438-015-0050(1) and OAR 438-015-0052(1).

The June 28, 2024, rulemaking hearing held by Ms. Eldridge also pertained to the proposed amendments to OAR 438-015-0050(1) and OAR 438-015-0052(2). The floor was opened for any final public comments. No final comments were made. The Board Members then provided their final comments. Member Ousey has no desire to change any part of Exhibits A, B, and C. Chair Dougherty thanked all those involved in this rulemaking process. Member Ousey moved to adopt the proposed language found in Exhibits A, B, and C. It would be effective for all settlement documents submitted to the Board on or after September 3, 2024. Member Curey seconded the motion. Motion passed. Lauren Eldridge confirmed the proposed changes would be in effect for CDAs and DCSs received by the Board on or after September 3, 2024.

Final Public Comment
None were made.

Announcements
Chair Dougherty shared that WCB is committed to getting its biennial attorney fee report published as timely as possible. Currently, the report is a working draft which will include data that the community has been asking for; however, due to system limitations all community requested data points cannot be captured. The goal is to have the report posted in August. There were no further announcements.

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