



## SATHER BYERLY & HOLLOWAY LLP

NORMAN COLE  
Licensed in Oregon  
Direct Dial: 503.595.2131  
ncole@sbhlegal.com

March 10, 2016

Workers' Compensation Board  
2601 25th St. SE, Suite 150  
Salem, OR 97302-1282

Re: OAR 438 Rule Changes

Dear Board Members:

At SAIF Corporation's request, I reviewed an October 30, 2015 letter from Theodore Heus to the Board, advocating rules that would award fees in Oregon workers' compensation claims commensurate with fees received by Oregon's top earners in other fields. Some of the information Mr. Heus provided, especially with respect to Longshore & Harbor Workers' Compensation Act claims is misleading, inaccurate, or both. I respectfully offer a different perspective.

I began my workers' compensation defense practice in 1979 as a trial counsel for SAIF Corporation. In the early 1980's I began defending Longshore and Harbor Workers' Compensation Act claims in addition to Oregon Workers' Compensation Act claims. In 2005 I left SAIF Corporation to join Sather, Byerly & Holloway LLP, where I am now a partner and where I have continued my Oregon and LHWCA defense practice. I have authored chapters in OSB Workers' Compensation CLE publications and have been a speaker at Oregon and LHWCA CLE seminars. I am a past chair of Workers' Compensation Section of the Oregon State Bar. I have argued cases before the Oregon Court of Appeals, the Benefits Review Board, and the Circuit Court for the 9<sup>th</sup> Circuit. I have a broad understanding of the Oregon Act and the LHWCA, especially with respect to attorney fees.

In general §26 of the LHWCA (33 USC §526) entitles attorneys to fees and costs when they secure compensation for a claimant when the employer or insurer either refused to pay compensation or refused to pay the full amount claimed. Like the Oregon Act, all fees must be approved by an administrator (the District Director) or a court, so there is no true market rate for these services. An attorney cannot require an injured worker to agree to pay an agreed rate. Therefore, like other federal fee shifting statutes, the trier must determine the rate charged by other attorneys in the same locality who charge an hourly rate for their services and apply their skills in practice areas reasonably comparable to workers' compensation and who have reasonably comparable skill, experience, and reputation. *Christensen*

*v. SSA*, 557 F3d 1049 (9th Cir. 2009); *Blum v. Stenson*, 465 U.S. 886, 104 S. Ct. 1541 (S. Ct. 1984).

When fees are sought under the LHWCA, attorneys must submit an itemized petition that supports their proposed market (lodestar) rate. It is insufficient to merely cite rates that historically have been awarded by other judges unless these decisions are based on an assessment of the market rate for similarly skilled attorneys practicing in a comparable area of law. The trier must make findings regarding the appropriate rate when services were performed, inasmuch as rates might be different in different years, and must evaluate other objections to the petition, such as whether the time claimed is excessive or unnecessary. In LHWCA claims, it is assumed experienced attorneys will be more efficient and should bill fewer hours but receive a higher hourly rate than less experienced attorneys who take more time but receive a lower rate. The proposed rate must be relevant to the community in which the litigation occurs. *Shirrod v. Director, OWCP*, 809 F.3d 1082 (9<sup>th</sup> Cir. 2015). A sole practitioner in Burns, Oregon probably cannot command the same hourly rate for comparable services as an attorney in Portland, Oregon. A one year attorney in any area of practice in any locality cannot command the same hourly rate as the senior partner in a 50 lawyer firm.

An aggrieved party can appeal the trier's decision. Many appeals have been filed, creating a large body of caselaw on which some of my comments to the Board are based.

Mr. Heus states the Benefits Review Board excludes consideration of Oregon workers' compensation fees when determining a reasonable fee under federal statutes. It is more accurate to state the Board views civil plaintiff litigation with and without personal injury, but not business litigation, as reported in the Oregon State Bar's Economic Survey, as requiring skills comparable to those required to represent injured workers under the Oregon Compensation Act. The Board and the Court of Appeals also does not view rates reported in the OSB survey for workers' compensation as comparable because fees in workers' compensation claims are capped when fees are awarded out of compensation. *Christensen v. SSA*, 2010 WL 2256182 (BRB 03-0302, 2010); *Shirrod v. Director, OWCP*, 809 F.3d 1082 (9<sup>th</sup> Cir. 2015).

In the LHWCA system, fees are not awarded out of compensation except in extremely rare claims when a fee is owed by the claimant, rather than the employer or insurer. Even then, the fee is based on the time devoted to the claim. In the Oregon system, an attorney can receive a fee for establishing entitlement to a penalty, a fee for reversing a denial, and an out of compensation fee. In the LHWCA system, penalties may be assessed for untimely payment, but the attorney receives a fee based on the time devoted to securing compensation, rather than a fee in addition to all other fees due.

The 2012 OSB Economic Survey reports rates for Portland attorneys in 25<sup>th</sup>, 75<sup>th</sup>, and 95<sup>th</sup> percentiles<sup>1</sup>. In the categories deemed comparable to workers' compensation, the rates are:

Category	25 <sup>th</sup> Percentile	75 <sup>th</sup> Percentile	95 <sup>th</sup> Percentile
Civil plaintiff litigation without personal injury	\$205.00	\$300.00	\$400.00
Civil plaintiff litigation with personal injury	\$239.00	\$350.00	\$385.00
Average	\$222.00	\$325.00	\$392.50

Mr. Heus states "federal case law and regulations include the reasonable rate and time spent by staff." It is more accurate to state an attorney can receive payment for services provided by paralegals and law clerks, albeit at lower market rates, but not receive payment for secretarial services, which is considered overhead expense. To obtain payment, the attorney must provide an itemized statement and evidence of the appropriate market rate.

Mr. Heus, citing *Christensen v. SSA*, 44 BRBS 39 (BRB 2010), states "longshore attorneys, working under a contingent fee shifting system, earn \$400 for prevailing at hearing, \*\*\* and the most experienced attorneys in other fields earned over \$450 per hour in 2011." He contends hourly rates for any competent attorney should be \$350 per hour, practitioners with greater experience should expect rates of \$550 per hour, and the best attorneys should earn an hourly rate commensurate with Oregon's top earners in other fields.

*Christensen* concerned a fee request by Charles Robinowitz, a Portland attorney who has represented injured workers under the LHWCA for more than 40 years. Mr. Robinowitz was the first to convince the 9<sup>th</sup> Circuit fees should be based on evidence of market rate rather than historical rates. In so doing, he submitted affidavits and other materials suggesting he was in the 95<sup>th</sup> percentile of practicing attorneys and therefore deserved the highest fee for his services. The Board, based on the evidence Mr. Robinowitz submitted, and in the absence of any contrary evidence submitted by defense counsel, held:

According to the 2007 Oregon Bar Survey, the base hourly rate for 2006 is \$350, based on the 95<sup>th</sup> percentile rate for general plaintiff civil litigation, both personal injury and non-personal injury. Use of the percentage increase in the Federal locality pay

<sup>1</sup> The percentiles represent the point in the range of responses at which 5%, 75%, and 95% of the responses occur for a specific question. For example, the 95<sup>th</sup> percentile amount is the amount at which 95% of the reported amounts were below and 5% of the amounts were above

for Portland results in these rates: (1) 2007 – 2.11% - \$357.50;  
(2) 2008 – 3.45% - \$370; (3) 2009 – 3.76% - \$384; (4) 2010 - 2.04%  
- \$392.

*Christensen v. SSA*, 44 BRBS 39 (BRB, 5/13/10). Note: The 95<sup>th</sup> percentile rate based on the 2007 OSB survey, adjusted for inflation, in 2010 was \$392. According to the 2012 OSB survey the 95<sup>th</sup> percentile rate is \$392.50. In a poor economy, market rates did not necessarily increase.

In the years after *Christensen*, when the defense bar submitted market rate evidence contesting the evidence Mr. Robinowitz submitted, none of the administrative law judges from San Francisco (the judges who routinely preside at Mr. Robinowitz' LHWCA hearings) concluded Mr. Robinowitz was a 95<sup>th</sup> percentile attorney. For example, Presiding Judge Gee held:

Despite these strengths, he has no experience comparable “to the highest paid civil litigators with expertise in areas such as antitrust, corporate and international tax, or securities. \* \* \* Because he is a solo practitioner, Mr. Robinowitz also “lacks skills for managing teams of associates over years of extended litigation or communicating with large complex organizations as clients.” While Mr. Robinowitz’s accomplishments no doubt qualify him as an above-average attorney, the limitations on experience due to the nature and size of his practice do not place him in the 95<sup>th</sup> percentile of practicing attorneys. \*\*\*\* “I find that while his skills are above average, they only warrant inclusion in the 75th percentile of practitioners.

*Castillo v. Sundial Marine Tug and Barge Works* (2010-LHC-00341, 3/6/13). Judge Berlin agreed:

I cannot agree with the Board that Mr. Robinowitz ranks in the 95<sup>th</sup> percentile of Oregon trial lawyers. \* \* \* The fact that an attorney has over 40 years' experience does not necessarily even suggest, not to mention conclusively demonstrate, that the lawyer ranks among the very best attorneys in the state. Mr. Robinowitz is a fine, intelligent, hard-working, dignified, erudite, careful, and zealous attorney with extensive experience in the Longshore arena. He has an exemplary and profound respect for the law and the legal process. He has served many clients extremely well. But he has no experience parallel to the highest paid civil litigators with expertise in areas such as anti-trust, corporate and international tax, and securities. He lacks skills for managing teams of associates over years of extended

litigation for communicating with complex corporate organizations as clients. He requires too many postponements and extensions of time to complete required work, and this can cause delays to his clients who are awaiting remedies. He settles many cases, often with good results. But, while his judgment in pursuit of settlement is certainly adequate, it is not always outstanding. He has no history of publication of which I am aware<sup>2</sup>, nor does he have a record of extensive contributions to the bar. I do not wish to demean or minimize Mr. Robinowitz's established and strong history of accomplishment. He is a fine lawyer and a real asset to the Longshore bar. It simply is a stretch to place him in the 95<sup>th</sup> percentile of all Oregon trial-level attorneys.

*Wilson v. Honeywell Technology Solutions, Inc.* (2010-LDA-00074, 6/29/11). Judge Gee and Judge Berlin's observations could easily apply to Oregon's best workers' compensation attorneys -- fine, intelligent, hard-working, dignified, erudite, careful, and zealous with extensive experience but not in the same category as the highest paid litigators in the state.

In post *Christensen* decisions, the San Francisco administrative law judges generally awarded Mr. Robinowitz \$350 to \$367 per hour for services performed in 2013 through 2015. Mr. Robinowitz continues to file appeals in an effort to secure a higher rate. Other Portland LHWCA plaintiff attorneys almost always received less than Mr. Robinowitz when fees were contested, usually \$300 to \$350 per hour. For example, in *Pierce v. Georgia Pacific* (2009-LHC-00915, 7/10/14), Judge Berlin awarded Mr. Bunnell \$336 per hour for services in 2013 and awarded Ms. Flynn \$305 per hour for services in 2011. Mr. Bunnell is a partner in the firm where Mr. Heus now works, and Ms. Flynn left Preston, Bunnell, and Flynn to accept a seat on the Oregon Court of Appeals. \$550 per hour might be paid to an appellate specialist in Washington, D.C., but not to a trial attorney in Oregon. No LHWCA attorney in Oregon has, to my knowledge been awarded \$550 per hour fee when fees were contested.

In LHWCA claims workers almost always receive more compensation than workers with a similar injuries subject to the Oregon Compensation Act. LHWCA settlements frequently exceed \$100,000. We sometimes wait two years for an ALJ decision. Discovery is subject to rules of procedure before Administrative Law Judges, comparable to Federal Rules of Civil Procedure. The claimant is routinely deposed. Parties may submit interrogatories, requests for production, and requests for admission. Written closing arguments, after formal hearing, are almost always required. Physicians and other expert witnesses usually testify at hearing or via

---

<sup>2</sup> Mr. Robinowitz subsequently authored a chapter in a LHWCA publication.

perpetuation depositions. LHWCA procedure and practice is not comparable to Oregon workers' compensation claims. The lodestar rate for an attorney who has an Oregon compensation practice is not equal to the lodestar rate for an attorney with a LHWCA practice.

Although workers' compensation is an honorable and fulfilling area of practice, it is not as lucrative as other areas of the law. Attorneys who have a business litigation, tax, or patent and trademark practice, among other areas of the law, earn more than attorneys who specialize in workers' compensation. Attorneys who practice in large firms tend to earn more than attorneys who practice in small firms. Attorneys who practice in large cities tend to earn more than attorneys who practice in small, rural communities. Young attorneys tend to earn less than older, experienced attorneys. And, in my experience, attorneys who represent workers, employers, or insurers in LHWCA claims have a higher market rate than attorneys who represent workers, employers, and insurers in state compensation claims.

The current Oregon system allows the ALJ or Board to consider (a) The time devoted to the case; (b) The complexity of the issue(s) involved; (c) The value of the interest involved; (d) The skill of the attorneys; (e) The nature of the proceedings; (f) The benefit secured for the represented party; (g) The risk in a particular case that an attorney's efforts may go uncompensated; and (h) The assertion of frivolous issues or defenses. LHWCA claims take a different approach.

- The time devoted to the claim is based on an itemized petition. Sometimes employers and insurers contend the time listed was excessive or unnecessary.
- The complexity of the issues is not considered. The lodestar rate assumes an experienced attorney is capable of dealing with complex issues. A younger attorney with less experience will receive a lower rate but might devote more time to the issue;
- The value of the interest involved and the benefit secured are not considered. If the attorney secures compensation the insurer refused to pay, the attorney is entitled to a full fee, assuming the time devoted to that pursuit was reasonable.
- The nature of the proceedings is relevant only to the extent fees must be based on the market rate in other comparable matters;
- The skill of the attorney is considered when determining a lodestar rate.
- The risk an attorney's efforts may go uncompensated is *not* considered. The lodestar rate in a LHWCA (and fee shifting statute) claim may not consider

the contingency nature of recovery. *City of Burlington v. Dague*, 505 U.S. 557 (1992).

In LHWCA claims, if an attorney is partially successful the attorney should receive a partial fee if it can be determined how much time was devoted to the unsuccessful claim. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Judges and the Board follow this concept now by awarding a lesser fee when one denial is reversed and another is affirmed.

It would be a mistake to adopt a one size fits all approach to fees in Oregon workers' compensation claims. Just as the Oregon legislature recently concluded there is a different minimum wage in three sectors of Oregon's economy, there are different lodestar rates for different attorneys in different communities. These rates will never be as high as the rates charged by Oregon's top earners in other fields. If Oregon required injured workers to pay their attorneys for services performed, does anybody seriously believe an injured worker would pay \$550.00 per hour for that representation?

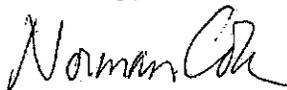
If the Board wants to adopt the LHWCA system, it should direct attorneys to submit an itemized petition in each claim, provide evidence to justify the market rate, and provide employers and insurers an opportunity to object and offer evidence opposing the proposed fee. This approach will lead to additional expense and litigation. In *Baker Botts LLP v. ASARCO LLC*, 135 S.Ct. 2158 (2015), the Supreme Court held "no attorneys, regardless of whether they practice in bankruptcy, are entitled to receive fees for fee-defense litigation absent express statutory authorization." Oregon now has a statute that allows fees for litigating fees under limited circumstances. Requiring litigants to submit fee petitions will encourage fee litigation.

The Supreme Court, in *Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011), stated

[t]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection.

The current system, in which attorneys may but need not submit fee petitions and the trier awards a fee does rough justice without encouraging additional litigation. The changes Mr. Heus requests are not necessary.

Sincerely,



Norman Cole

Page | 8  
Workers' Compensation Board  
Re: OAR 438 Proposed Rule Changes

NC:  
cc: Jill Gragg, SAIF Corporation