



# MEMORANDUM

November 5, 2015

**To:** Board Members

**From:** Roger C. Pearson, Managing Attorney

**Subject:** Attorney Fee Rule Concept from Julene M. Quinn

## Rule Concept

At the July 9, 2015 Board Meeting, Ms. Quinn presented the following attorney fee rule concept:

“[A] concept where claimants would have the option of selecting a separate process to determine an attorney fee award if they are successful on the merits. The courts have this process (particularly I am familiar with the Court of Appeals and Supreme Court process) and it works very well. It can be more convenient than preparing a Statement of Services for every case before the outcome has been determined.”

## Rule Drafting

From a drafting perspective, the Board could propose rules to establish a procedure consistent with this attorney fee petition concept. Such rules could identify a deadline for the claimant’s counsel to assert an intention to implement this voluntary process. For the Hearings Division, the deadline could be the date the record closes for a hearing or an “on the record” hearing. For Board review, the deadline could be the filing of the claimant’s last appellate brief.

In order for the ALJ or Board to determine whether to award an attorney fee with the decision on the merits, or to await a later petition by claimant’s counsel, the deadline for asserting an intention to file a petition must be before the order issues.

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Once the claimant's attorney has initiated the voluntary process, the issuance of the ALJ/Board order would trigger the attorney fee petition procedures (if all or part of the decision was in claimant's favor). The claimant's opening petition could be due within a reasonable time (*e.g.*, 14 days from the issuance of the order), the carrier's response could be due within a reasonable time (*e.g.*, 14 days from the date of filing of the claimant's petition), and the claimant's reply could be due within a reasonable time (*e.g.*, 14 days from the date of filing of the carrier's response). These procedures could also include an extension process for the filing of these documents.

### Administrative Process

The implementation of this attorney fee procedure would necessitate a number of modifications to WCB's existing systems. Several of the more significant alterations are summarized below.

Currently, all issues arising from a WCB case number are encompassed in a single ALJ/Board order. Likewise, for data retention purposes, the resolution of each of these issues is categorized/coded within the same WCB case number in WCB's case tracking/coding system.

If the proposed attorney fee procedure was implemented, these systems would need to be bifurcated for those cases where the claimant's counsel opted to file an attorney fee petition once the substantive decision was reached. This bifurcation would either require: (1) The decision maker to issue an interim order and hold the file during the attorney fee petition process, followed by a final order on the merits and the attorney fee; or (2) the creation of two separate case numbers and physical files (one being a "final" order on the merits of the underlying compensability, responsibility, penalty issue(s) and the other pertaining to the attorney fee issue). (A memo from Greig Lowell, WCB's Project Manager, is attached, which describes the two case/file processing systems, and their accompanying procedural challenges more fully.)

Because the "second file" approach would have an impact on WCB's file administration systems, several changes in internal procedures would be necessary to implement that concept. Either the parties or WCB staff would need to create a duplicate file for the "attorney fee" matter when the file on the merits moves to the next appellate body. The attorney fee cannot be determined without access to a full record of the proceedings. Because the "attorney fee" procedure would be voluntary, it could be necessary for the requesting party's counsel to provide the duplicate record when initiating the process. Alternatively, WCB staff would have to duplicate the record.

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This method would also require WCB coding staff to duplicate its work by compiling the results of two case files/numbers (merits and attorney fee) arising from the same proceeding. The staff's internal procedures would need to be adjusted to distinguish those files/cases where the claimant had prevailed and the attorney had chosen to initiate the special "attorney fee" process (where the attorney fee decision would be issued after the "merit" decision) from those cases where the claimant prevailed and the attorney had not opted into the "attorney fee" process (where all case-related information, including attorney fees, would be encased in one order).

The implementation of this process would also require adjustment of the WCB data system to distinguish cases where the ALJ/Board order did not award attorney fees from those orders where the claimant's counsel was entitled to an attorney fee (but the award would not be granted until a later date – likely several weeks to a month later). Such a modification would require the programmers/coders to correlate the WCB case on the "merits" to the particular WCB case where the attorney fee was granted. (As previously noted, the current system allows for simultaneous coding for both the "merits" and "attorney fee" decisions.)

WCB's administrative staff would also need to institute an internal procedure in which its judicial assistants/appellate specialists would notify the "new requests" section to create the "attorney fee" file/case number. Thereafter, the new requests staff would create that "attorney fee" case in the electronic data compilation system and forward that new physical file to the requesting section. Similarly, WCB staff who scan the final orders to WCD and coordinate the purging process for unappealed orders would need to alter their procedures to accommodate these "attorney fee" orders (and to shelve/monitor the additional files resulting from this system).

### Summary

Because the attorney fee concept would be optional, it is unknown how many practitioners would choose to initiate the process. Thus, it is likewise unclear the number of additional WCB "electronic data" cases/"physical" files that the staff would be required to create, process, code, monitor, and purge. Nonetheless, as discussed above, these changes would present new challenges to WCB's administrative staff (as well as DCBS's system analysts) to re-tool the data compilation system to accommodate this optional bifurcation of attorney fees from the standard "one order" system, and to coordinate the processing of such "electronic" cases/"physical" files throughout the hearings/review levels. If I can address any questions, please let me know.

RCP: kb

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Attachment