M E M O R A N D U M

October 26, 2015

To: Roger Pearson

From: Greig Lowell

Subject: Attorney Fee Rule Concept from Julene M. Quinn

Julene Quinn proposed an attorney fee rule concept in which a claimant attorney could elect to provide a Statement of Services (SOS) after the claimant has prevailed on the merits at hearing or on Board review. She explained that it would be more convenient than preparing an SOS for every case before the outcome has been determined. She noted that this process is followed by the Court of Appeals and Supreme Court.

To implement this proposal, the Board has two main options. One would be to create a second file to decide the attorney fee. The other option is to retain one file for both the merits of the case and the attorney fee.

1. "Second File Concept." The Hearings Division or Board would create a separate "attorney fee" file to write an order awarding an attorney fee. At some point during the hearing or review process, before the order has been written, claimant's counsel could elect to assert a SOS should the claimant prevail. If claimant's counsel elects to provide an SOS, it would be done following the issuance of an order on the merits in which claimant prevails. The "attorney fee" file would then be created by WCB staff to decide the attorney fee. Both sides would have the opportunity to submit their positions with an order to be issued later.

   Under this approach, a decision on the merits would be a final order with appeal rights, as would the attorney fee decision. The files would travel in tandem whenever possible, but it is likely, given the 30-day appeal period, that there would be occasions when the file on the merits would be routed to the next appellate level while the attorney fee file remains pending before the lower level. This presents some internal processing challenges, as WCB has only one "record" (file of exhibits). The file may have to be shared and transferred internally, or a second copy made, in order to process both orders. WCB data systems would also need re-tooling and modification in order to track the cases to their final conclusion.

There are legal challenges with disconnecting the merits of a case and the attorney fee award. Would an appeal on the merits of the claim automatically constitute an appeal of the attorney fee award? In that regard, the order on the attorney fee decision may need to be referred to as a "contingent" award, dependent on the final outcome of the merits of the case. Moreover, it is far from certain that the "merits" and the "attorney fee" can always be decided independently, as many cases are about attorney fee/penalty issues. For example, the merits of a case may find that there was an unreasonable delay in an acceptance/denial, but all benefits were paid and there is nothing due on which to base a penalty. That would be the interim order, followed by a separate order for an attorney fee under *Nancy Ochs*, 59 Van Natta 2940 (2007). A dissatisfied party would have to appeal both orders. Furthermore, a carrier's decision on whether to appeal the "merits" of a case may depend in part on the amount of the attorney fee award, which may encourage appeals for precautionary purposes.

2. "<u>One File Concept</u>." This approach would require the ALJ or Board to issue an "interim" decision on the merits, without appeal rights, and then implement a briefing schedule regarding the attorney fee (if claimant's counsel elects to prepare an SOS). After a fee is determined, a "final" order is published, which would include the full interim order plus the attorney fee award. Appeal rights would trigger from the date of the final order.

   This approach would more closely mirror the Court of Appeals process, which involves a slip opinion followed by a later "appellate judgment," both of which are based on one appellate record. Benefits become payable following the judgment award. *SAIF v. Castro*, 60 Or App 112 (1983).

   The advantages to this approach are that the reviewing body maintains full control of the file until the final judgment order issues. The decision on the merits and the attorney fee would travel together at all times through the appeal process.

   A significant disadvantage is that benefits would be delayed as the attorney fee issue is briefed and decided. This approach would delay the claimant's receipt of compensation and could place the interests of claimants and their attorneys in opposition. Also, the ALJ and Board would have to create and mail two orders to all parties/counsels, plus continue to track and monitor the case during the SOS time period.

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