

**NOTICE OF PUBLIC MEETING
WORKERS' COMPENSATION
MANAGEMENT-LABOR ADVISORY COMMITTEE
ATTORNEY FEES SUBCOMMITTEE**

October 10, 2008
10:00 a.m. – 11:30 a.m.
Conference Room 260, Labor & Industries Building
350 Winter Street NE, Salem, Oregon

Committee Members Present:

Linda Barno, ESIS, Inc., Portland
Lon Holston, Laborers' International, Local 483, Portland
Greg Miller, Gunderson LLC, Portland
Mike O'Rourke, Plumbing and Steamfitters UA 290, Tualatin
Bob Shiprack, Oregon Building Trades Council, Portland

Committee Members Excused:

Tracy Brill, Portland Fire Fighters Association, Portland
Kathy Nishimoto, Duckwall-Pooley Co., Hood River
Jeri Ray, Timber Products Company, Springfield
John Kirkpatrick, IUPAT District Council, Portland
Cory Streisinger, Ex-Officio Member, Department of Consumer and Business Services, Salem
Sheri Sundstrom, Hoffman Construction Company, Portland

ATTORNEY FEES SUBCOMMITTEE

Greg Miller, subcommittee chair, called the meeting to order at 10:40 a.m.

There was unanimous consent by the subcommittee that the minutes from September 25, 2008 be adopted.

Follow-up Information from Prior Meeting – DCBS

Cathy Ostrand-Ponsioen, Workers' Compensation Division (WCD), discussed two memos: data regarding attorney fees awarded in disputes before the division and a breakdown of the Oregon Trial Lawyers Association's (OTLA) PowerPoint presentation from the previous meeting.

Mr. Savage asked if the number of hours an attorney would put in is all over the map? Ms. Ostrand-Ponsioen said the hours would be all over.

Presentation from Insurer Representatives

Chris Davie, SAIF Corporation, submitted a document for the record addressing OTLA's suggestions for attorney fee changes. He said SAIF can support some of the proposals from the claimants' bar, however, he does not agree that workers' attorneys are not adequately compensated already.

Mr. Davie said insurance companies are required to record expenses. He said the basis for the claimants' bar's claim that they are compensated less than defense bar came from a comparison of DCBS data on individual claimant fee awards and a summary of insurer reports of annual defense expenses. He said this is not an apples to apples comparison.

Mr. Davie said SAIF reported \$7.70 million in claimant attorney awards in 2007. SAIF is required to report medical costs in those reports that are not charged to the claim. Mr. Davie explained the breakdown of reported costs less medical and deposition costs.

Mr. Davie explained defense expenses compared to the claimants' bar attorney fees totaling \$18.9 million for all insurer types. The total claimant fees less SAIF's percentage leaves \$7.77 million in fees for SAIF cases. Mr. Davie further explains claimant vs. defense attorney fees as outlined in his testimony.

The following is SAIF's response to the OTLA presentation from September 25th:

Issue #1 – Disclose defense fees before closing the record

- SAIF opposes this proposal for several reasons:
 - The amount spent on defense is not a relevant factor in setting attorney fees.
 - It is impossible for SAIF to report its case-by-case defense cost since their attorneys are salaried employees who do not record billable hours.

Issue #2 – Fees for depositions and statements

- SAIF opposes this proposal for the following reasons:
 - Mr. Davie said there are virtually no depositions of injured workers.
 - He believes there is no basis for compensating an attorney for work performed when the worker has not been harmed and there is no dispute.
 - If the claim is denied and the attorney succeeds in overturning the denial, the attorney is already compensated for all work performed on the case.
 - Mr. Davie believes there is no reason to differentiate this service from any other service to a client.

Issue #3 – Caps on fees

- Mr. Davie said in each case a fee above a cap can be awarded upon a showing of extraordinary circumstances that warrant a higher fee.
- SAIF suggests a review of the caps and the addition of an inflation escalator.

Issue #4 – Uncompensated services

- SAIF v. Terrien: SAIF would not oppose legislation to change the outcome of future cases.

- Attorney fees for defending attorney fees: SAIF responded there is no precedent in any form of civil litigation for awarding attorney fees for defending an attorney fee award.
- Defending penalties, reclassification, and rescission of a notice of closure: SAIF agrees that fees should be awarded.
- Fees when an award is reduced: SAIF responded there is no precedent in civil litigation.

Issue #5: Overturned denials

- SAIF does not understand this concern.

Issue #6: Unreasonable Conduct

- SAIF does not agree that fees should be paid for late action.
- They also disagree that an attorney fee should be assessed when a penalty is awarded to the worker for an increase in PPD on reconsideration.

Issue #7: Partially overcoming denials

- SAIF does not agree with reversing *AIG v. Cole*. Mr. Davie said there should be no fee for winning half the case, when the benefit to the worker is zero.

Reconsideration fees

- SAIF does not support raising the fee from 10% to 25% of the award.

Chris Moore, attorney representing injured workers, OTLA, said he does not have access to SAIF information. He does not know if the \$7.70 million is also reporting other things such as office expenses, copying, etc. He said SAIF has a unique position since their lawyers do not pay professional fee and are indemnified while other law firms pay this fee. SAIF does run operation at lower cost than other defense firms. Mr. Moore said he would come back at a later time in response to the numbers that are being compared in the SAIF document.

Mr. Moore said for uncompensated services if someone appeals an attorney fee it delays payment of that fee while waiting for the board decision and it requires that the attorney work to defend the fee, which they are not compensated for. Other attorneys or insurers, other than SAIF or Liberty, are the ones that appeal the attorney fees.

Mr. Moore said in the *AIG vs. Cole* case there is a request for medical care. The request ends up in front of the medical review unit and the insurer says this case is being directed at a condition that they do not believe is work related. The case then goes to the Workers' Compensation Board (WCB) and they establish the condition is work related. The claimant's attorney has established benefit for the worker, but they do not get an attorney fee.

Mr. Shiprack asked if the insurer can dispute the claimant's attorney fee at the board? What happens to the worker when the fee is disputed? Mr. Moore said they can carve out the attorney fee issue on its own without it affecting the worker.

Mr. Shiprack asked if two of the board members dispute a fee what happens to the claim? Abbie Herman, WCB, said if there was a dispute of the amount of the fee by two board members there would be a resolution of the issue. Mr. Shiprack asked if this is a timely resolution? Ms. Herman said she believes this is timely. She said it is more common compensability and attorney fee amount come up together and the board resolves everything at the same time.

Mr. Savage asked, on the statement issue, is there a range or average on the amount of time an attorney would spend on the case? Mr. Moore said mental cases they take half a day while others can take hours.

Mr. Miller asked SAIF and Liberty makeup what percent of defense? Mr. Davie said SAIF and Liberty make up 55% of defense. The other 45% there are issues and problems, where money is tied up and attorneys are not compensated.

Mr. Savage asked if the department has enforcement over attorney fees? Mr. Moore said not that he is aware of.

Jerry Managhan, Deputy Administrator, Workers' Compensation Division, said the department has civil penalty authority over insurers who fail to comply with the rules. When the rules require payment pursuant to the final order, the department has the authority to come in and enforce that against any party that fails to follow the rules in a timely manner. This includes the amounts awarded in the order.

Mr. Miller thanked SAIF and others for getting the ideas out there and bringing some proposals to the table. He said there are some gaps that must be filled and the subcommittee will continue to look at those.

The next subcommittee meeting is November 17th at 2:00 p.m.

Meeting adjourned at 11:54 p.m.