

NOTICE OF PUBLIC MEETING
WORKERS' COMPENSATION
MANAGEMENT-LABOR ADVISORY COMMITTEE
SUBCOMMITTEES

July 24, 2008
3:00 p.m. to 4:30 p.m.
Labor & Industries Building, Conference Room 260
350 Winter Street NE, Salem, Oregon

Committee Members Present:

Linda Barno, ESIS, Inc., Portland
Tracy Brill, Portland Fire Fighters Association, Portland
Lon Holston, Laborers' International, Local 483, Portland
Kathy Nishimoto, Duckwall-Pooley Co., Hood River
Greg Miller, Gunderson LLC, Portland
Mike O'Rourke, Plumbing and Steamfitters UA 290, Tualatin
Jeri Ray, Timber Products Company, Springfield
Sheri Sundstrom, Hoffman Construction Company, Portland

Committee Members Excused:

John Kirkpatrick, IUPAT District Council, Portland
Bob Shiprack, Oregon Building Trades Council, Portland
Cory Streisinger, Ex-Officio Member, Department of Consumer and Business Services, Salem

ATTORNEY FEES SUBCOMMITTEE

Greg Miller, subcommittee chair, called the meeting to order at 3:11 p.m.

Mr. Miller introduced the attorney fee issue. He said the beneficiaries in the system are the injured workers and employers. The attorneys are providing professional services to assist the injured worker in understanding the laws and helping them through the system or for the employers to defend their position in the rules and laws of the system. He said attorneys should be paid a professional rate according to the quality of work they do and the amount of time they put in. Mr. Miller said to keep in mind this is to compensate for professional work and not to make attorneys the beneficiaries of the workers' compensation system.

Lon Holston said historically labor has always said the real value is in the work that you do and you should be compensated for it. He said there is a serious need after 17 years to take a look at attorney fees. Mr. Holston said he attended a meeting at the Workers' Compensation Board regarding this topic. He said there are less claimant attorneys than before and there is not much backfill. Mr. Holston is looking forward to discussing this issue and making a full recommendation to MLAC.

Mr. Miller recommends looking at a holistic approach to the history of attorney fees. He would like to see this issue come to resolution within six months. Mr. Miller suggested looking at some more objective numbers paid according to a fee for work and not so much subjectivity.

Mr. Holston said he would like to see who pays and under what circumstances who pays the attorney fees.

Mr. Miller submitted a letter from Chris Davie, SAIF, for the record. Mr. Miller asked the attorneys to use consistent terms to describe which party they represent, not what organization they are from, using the terms “claimant attorney” if representing the interests of the injured worker or “defense attorney” if representing the interests of the employer.

Attorney Fees in the Oregon Workers' Compensation System – Power Point Presentation by Mike Manley

Mike Manley, Research Coordinator, Information Management Division (IMD), submitted the power point presentation for the record. He said the information presented is high level and he may be able to suggest areas where IMD can probe deeper if the subcommittee desires.

The following are brief points covered in the presentation:

- Five system objectives at the start of the workers' compensation law (ORS 656.012) to frame the attorney fees discussion.
- General principles for a “reasonable” fee: time devoted, complexity of the issues, value of the interest involved, skill of the attorneys, nature of the proceedings, benefit secured, risk of the attorney going uncompensated and frivolous issues or defenses.
- Reasons for claimant attorney fees: reversing a denial, getting an increase in compensation, preventing a decrease in compensation, getting penalties/sanctions and negotiating settlements.
- Recent history of attorney fee changes since 1999.
- Areas of attorney involvement.
- Statistics regarding defense fee trends, claimant fee trends, percent of claimant fees by level of decision, workload and average fees and average fees compared to inflation.
- Defined some terms to promote clarity in further discussion:
 - Rate: a percentage of a dollar amount obtained.
 - Threshold: a point where a percentage rate changes.
 - Cap: a fixed dollar amount that can't be exceeded in ordinary circumstances.

Lou Savage asked what the 5% WCD was on the ‘percent of claimant fees by level of decision’ pie chart? Mr. Manley said the 5% WCD slice covers mostly reconsideration and also vocational, medical fees, and other administrative processes.

Mr. Holston clarified the CPI U.S. Legal Services mentioned were not specific to workers' compensation or Oregon but nationwide.

Mr. Savage offered to provide color copies of the power point presentation to the subcommittee members.

Framework for Subcommittee Review of Attorney Fees - Claimant Attorneys Testimony

Chris Moore, Oregon Trial Lawyers Association (OTLA) and an attorney from Eugene, explained the access to justice issue is the claimants bar is shrinking because many are leaving the practice. Recruitment is also a problem in the workers' compensation area. He said as the number of attorneys for injured workers goes down, there is a lowering of supply while the demand on the claimant's side is increasing. Attorneys are more particular on what cases they are willing to take in. Mr. Moore said there are some issues that an attorney has a chance to make a reasonable amount of money on and others where the opportunity is very small.

Mr. Moore said the statutes on attorney fees haven't changed much since 1965. He mentioned several ways attorneys get paid: salary, hourly, or by a flat fee. Compensation for the claimant's attorney is contingent on a win or a negotiated settlement, while the defense attorneys get paid on hire. Mr. Moore said there are original jurisdiction cases with WCD, which are capped at two thousand dollars and he would like the subcommittee to review this cap and the reconsideration cap. He also asked the subcommittee to review and evaluate other attorney fees that are in statute.

Mr. Miller thanked Mr. Moore for the overview and asked him for more details at future meetings.

Mr. Savage asked if there was anything in addition to what the department found regarding attorney fees that would be useful. Mr. Moore said possibly a survey that the bar provides.

Keith Semple, OLTA, representing injured workers as an attorney, discussed the shortage of attorneys to represent injured workers. He said there are not many new/young attorneys and the challenge is to keep them with the practice. He is concerned many attorneys who continue to represent injured workers are limiting the services they provide particularly with medical, time loss, and PPD disputes.

Mr. Semple said based on DCBS data, defense attorneys receive approximately eleven million more than claimant's attorneys annually. He also described claimant's fees in other states compared to Oregon. Mr. Semple said it is unlikely injured workers will have access to quality representation as more experienced attorneys retire or shift their practice and new attorneys refuse to take less money. He said claimant's attorneys are working much harder for less than half the money. He personally believes it is unethical to turn an injured worker away if they want representation.

Mr. Semple asked the subcommittee to examine the issue and find ways to increase claimant's attorney fees in order to attract new attorneys to the practice and give more experienced attorneys a reason to stay.

Elizabeth Cushwa, OLTA, posed four questions/concepts for the subcommittee to consider:

1. If this is a policy decision, do you believe injured workers need representation in this complex area of the law?
 - a. If you do not, then there can't be an equitable system because you can't have a highly trained adjuster and a farm worker talking about the same thing.
 - b. If you do believe injured workers need representation, then what can be done to keep a balance of qualified attorneys in the field protecting injured workers and representing them fairly?
2. Since 1990, look at the changes made to attorney fees which have eliminated the ways claimants have been paid.
3. What work are attorneys for injured workers doing now for which they are not compensated for, both litigated and non-litigated cases?
4. What work are they doing now for which claimant attorneys are underpaid?

Framework for Subcommittee Review of Attorney Fees - Defense Attorneys Testimony

Chuck Lundeen, Liberty Mutual Group, discussed his willingness to provide resources to the subcommittee to be able to evaluate the attorney fees system. Mr. Lundeen presented fee summary documents for the subcommittee that breakdown attorneys fees from ORS Chapter 656 and OAR Division 438.

Mr. Lundeen said the insurance defense is not a very lucrative area of practice and the workforce is aging. He said in the year 2000 he had fourteen full time workers' compensation defense lawyers and today he only has eight in the state of Oregon. He believes this reduction in lawyers demonstrates the success of the workers' compensation system with less claims, less litigation, and a decrease in attorney involvement. Mr. Lundeen referenced Mike Manley's presentation and thought the data displayed a strong level of attorney availability and involvement. Mr. Lundeen also discussed the following issues:

- Denial reversal rate? Is there a disadvantage to claimants in this system? Since mid 90's, it has hovered around 42% that claimants have succeeded in reversing denials.
- How do defense attorneys get paid? At Liberty Mutual the staff are salaried employees, for outside counsel flat fees apply (fee by issue – incentive to resolve cases), and defense attorneys on cases in appeal are paid hourly.
- According to the 25 million total in attorney fees statistic, the attorneys fees are comparable on both sides but are they reasonable?
- On the access to justice issue, California has a system where they have "hearing reps" which are skilled paralegals. The paralegals work under the oversight of an attorney and they present evidence in cases and negotiate settlements as a way to save costs in the firm for the volume or standard cases.
- Evaluate other systems examples:
 - California – total denials are percent of compensation
 - Washington – no assessed fees
 - Idaho – total claim denial matrix with no assessed fees

Mr. Lundeen said the documents he provided might be a good reference to look at if attorney fees are determined inadequate. He said less litigation is a good thing and Oregon has done a great job as part of the success story of delivering a lot of benefits with not a lot of friction costs. He said balancing the benefit/cost is important and he suggests going through the documents he provided to discuss if the cap is reasonable or not.

Mr. Miller, going over the compensation, said the claimants attorneys get paid if they win or if there is settlement. Mr. Lundeen agreed the board clearly takes this into account. He said to expect a higher rate when the case is won. Contingent fee takes into account the chance they might lose, also taking into the account the complexity and the hours spent to determine compensation.

Ms. Sundstrom described an example of a case she ended up settling. The case was worth approximately \$1,500, however if the case was lost in court it would cost Ms. Sundstrom's company \$3,000-4,000. She decided to settle the case for \$2,500 with a portion going to the injured worker and the attorney.

Mr. Miller said he would like to get a sense from the board how much they can authorize to pay out for the claimants attorneys. Mr. Lundeen suggested the committee could possibly develop a fee schedule to make it less subjective and this could easily be crafted as benefit achieved equals X amount.

Linda Barno said she can remember in the old days processing everything by hand and paper. There were many opportunities for small errors that gave rise to penalties. She said the current automated systems for processing took a lot of the little things that would monopolize a lot of the hearing time away, such as time loss calculation errors.

Mr. Lundeen said there are fewer claims because of safer workplaces. He said Liberty Mutual's lawyers deal with 60-70% denials and it never used to be that way.

Mr. Miller said in his opinion the whole system has shrunk down. He said the people that do need help should be paid fairly and professionally.

Ms. Sundstrom asked when young persons would make the decision to work in this area of workers' compensation. She is concerned maybe young people are not coming into this area because there is not enough room to spread out attorneys in this area. Mr. Lundeen said the other part is it is a complex system and a specialty system and if he were just entering into this area he would diversify his areas.

Mr. Miller said he would like to get the Workers' Compensation Board (WCB) to come and present. Mr. Holston said that this issue needs to be dealt with quickly.

Mr. Savage asked the subcommittee to give some direction of the WCB for the presentation on the next subcommittee meeting on August 20, 2008. Mr. Miller requested the following from WCB/Division:

- To invite Abbie Herman to come and present.
- The latitude of the ALJ to compensate attorneys more subjectively than objectively.
- How they justify the fee rate based on example cases claimants attorneys and defense?
- To provide more information on how the board determines the assessed fees.
- Basic information to make up for disparity of knowledge: such as what kind of cases come in hearings, drilling down deeper in assessed fees, etc.
- The division to discuss what fees are assessed in the division.

The meeting adjourned at 4:42 p.m.