

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

August 20, 2008
11:00 a.m. – 12:30 p.m.
Conference Room 260, Labor & Industries Building
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
Greg Miller, Gunderson LLC, Portland
Kathy Nishimoto, Duckwall-Pooley Co., Hood River
Mike O'Rourke, Plumbing and Steamfitters UA 290, Tualatin
Jeri Ray, Timber Products Company, Springfield
Bob Shiprack, Oregon Building Trades Council, Portland
Sheri Sundstrom, Hoffman Construction Company, Portland

Committee Members Excused:

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

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Greg Miller, subcommittee chair, called the meeting to order at 11:16 a.m.

There was unanimous consent by the subcommittee that the minutes from July 24, 2008 be adopted.

Workers' Compensation Board Presentation

Abbie Herman, Chair, Workers' Compensation Board (WCB), presented a Power point on attorney fee awards before the WCB. The following are brief points covered in the presentation:

- Authority to award fees through statute, rule or case law.
- Carrier paid assessed fees
 - ORS 656.386(1) – When claimant finally prevails over a carrier's claim denial
 - ORS 656.382(2) – Compensation award granted to claimant has not been disallowed or reduced
 - ORS 656.382(2) – does not authorize an attorney fee when a carrier seeks a large reduction in TTD/PPD and claimant is only partly successful, no award for prevailing on premature claim closure issue unless order reinstates temporary disability and no award for prevailing on claim classification dispute.
- Fees for unreasonable claim processing
- Determining amount of assessed attorney fees:

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- Legal factors – Administrative Law Judge (ALJ) and board members take the following into account for each claim: time devoted, complexity of the issues, value of the interest involved, nature of proceedings, skill of the attorneys, benefit secured, risk of going uncompensated and frivolous issues/defenses.
- General considerations
- Basis for award – Opinion & Orders and Orders on Review
- Approved/Out of Compensation Fees
 - Hearings: If a claimant requests a hearing seeking increased temporary/permanent disability and ALJ increases claimant's award
 - Temporary disability – 25 percent of increased TTD, not to exceed \$1,500
 - Permanent disability – 25 percent of increased PPD, not to exceed \$4,600
 - Permanent total disability – 25 percent of PTD award, not to exceed \$12,500
 - Board Review: If a claimant requests board review of an ALJ's temporary/permanent disability award, and board members increase claimant's award, claimant is awarded an attorney fee.
 - Temporary disability – 25 percent of increased TTD, not to exceed \$5,000
 - Permanent disability – 25 percent of increased PPD, not to exceed \$6,000
 - Permanent total disability – 25 percent of PTD award, not to exceed \$16,300
- Settlements
 - Claim Disposition Agreements
 - Disputed Claim Settlements
 - Stipulated Orders
- Reconsideration/appeal of attorney fee awards
 - Hearings
 - Board Review
 - No fee for fees

Mr. Shiprack asked in reference to the chart on hearings in 2007 presented by Ms. Herman, what happens to the worker when you have a dispute at this level of attorney fees? If the worker won an award but there is a dispute over the attorney fee is the award held up until the fee is resolved? Ms. Herman said it is all decided within each case based on the Opinion & Order or Orders on Review. She said the worker would be paid their award while the attorney fee issue is being resolved.

Lou Savage asked if the ALJ or Board has to approve any settlement on attorney fees. Could that settlement be an assessment of the insurer or coming out of the worker's benefits. Ms. Herman said a settlement could be either one of those and it would be approved by the judge or board members.

Mr. Shiprack said he is curious about the history of attorney fees and wished to know how out of compensation fees came about where the worker goes forward and wins. Is there public policy involved or is something missing?

Ms. Herman said there is a specific statute that says all other fees will come out of compensation. The Board is launched into rulemaking to clarify what the fees look like. She said she does not know how long the statute has been out there or what the policy decisions looked like. Ms. Herman offered to research Mr. Shiprack's question for the next subcommittee meeting.

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Mr. Savage said entitled to disability cases the attorney gets paid from some of the retro active benefit.

Chuck Lundeen, Liberty Mutual, said on attorney fees it is a broader issue on assessed vs. accrued. He said California and Washington takes exclusively out of compensation fees. Sister states have made similar policy decisions. He said he did not think this was something quirky about Oregon.

Workers' Compensation Division Presentation

Cathy Ostrand-Ponsioen, Workers' Compensation Division (WCD), discussed where WCD awards attorney fees. There are four general areas the WCD awards fees: medical and vocational disputes ORS 656.385(1), requests for penalties for late payment of compensation ORS 656.262(1), and reconsiderations of an insurer's notice of closure ORS 656.268(6)(c).

For the medical and vocational disputes the director has adopted a matrix, which is provided in the handout submitted by Ms. Ostrand-Ponsioen for the record. Attorney fees may not fall outside of the matrix unless parties agree upon an amount.

John Shilts, Administrator, WCD, asking why does WCD have a matrix? He said the idea of attorney fees for medical and vocational disputes hasn't been around long and a few sessions ago it passed through legislature. The matrix idea passed through legislative committees to discuss how this was going to be done. The parties that were agreeing to this bill and brought the concept forward to MLAC and the legislature had asked for the matrix approach. He said they might not all agree the matrix approach is most appropriate today. Reconsideration, where most of the disputes are found, is not part of the matrix because that fee comes out of compensation. He said this is small compared to the Board in terms of the amount of money that comes out. Mr. Shilts said Mike Manley, Information Management Division, presented at the last subcommittee meeting that WCD has only 10% of all attorney fees.

Ms. Ostrand-Ponsioen discussed WCD awards attorney fees for requests for penalties for late payment of compensation. The delay must be found to be unreasonable and the fee must be proportionate to the benefit to the worker. This fee cannot exceed \$2,000 absent a showing of extraordinary circumstances.

Ms. Ostrand-Ponsioen said the fourth area WCD awards attorney fees is for reconsideration of an insurer's notice of closure. In this case the additional compensation must be awarded to the worker and the fee is equal to ten percent of any additional compensation awarded.

Ms. Ostrand-Ponsioen discussed attorney fee statistics for medical and vocational disputes and reconsideration.

Mr. Savage asked with the number of orders that are awarded attorney fees can it be determined where a lawyer represented someone and did not get a fee or they did not have a lawyer or all? This would be all cases not specific to reconsideration.

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Martin Alvie, Oregon Trial Lawyers Association (OTLA), introduced Chris Ross also representing OTLA. Mr. Alvie said Chris Moore is working on a presentation for the next subcommittee meeting. He did want the committee to consider the integrity of the hearings process. He said OTLA wants a neutral judge to assess attorney fees and continue to have the authority to assess fees based on the eight factors presented by WCB to tailor to the facts of each individual case.

Mr. Alvie said another concern is the fee on fees concept. The attorney fee has gone down in real terms by the amount of time they have taken to defend it. If the fee is appealed there could be several thousand dollars that do not come into a small practice that month and there are bills to pay. He said this has a very real effect on claims practitioners.

Ms. Ross said there is a disincentive for attorneys to work through the system to get what attorneys consider a fair fee. Before the matrix system from WCD, claimant's attorneys represented injured workers and were not getting paid. She said they are very grateful to have some compensation for representing injured workers. The fees are not based on any contingent basis. She said how many of these injured workers representing themselves and winning vs. how many injured workers have attorneys and are winning? She believes having attorneys at this level it is critical for the worker to have an attorney. Since attorney fees are not based on contingent basis there may be an injured worker that cannot get an attorney to represent them because they cannot afford to take the case – the fee is so low that the attorney will not take the case.

Lon Holston said a claimant goes in front of an ALJ and there are some out of pocket fees the attorneys pay, you go through the process and then the attorney is awarded the fee. Then the defense says they think the claimant's attorney is awarded too much so they appeal that fee. Then the attorney does not get paid for something they were awarded for already.

Mr. Miller asked is it a cash flow issue? Mr. Alvie said yes it is a cash flow issue. The attorney has to spend time on defending the fee for free when they could be using that time on other cases. Mr. Alvie said appeals on attorney fees don't happen very often but they do happen. He said fees on fees might appear funny but when it happens its not funny.

Linda Barno asked how often is someone requesting a hearing on the fee? Where is the assessment coming from? From the matrix cases or the extraordinary cases? Mr. Alvie said his experience is disputes on fees are mainly happening at the Workers' Compensation Board and Workers' Compensation hearings on assessed fee cases.

Chuck Lundeen, Liberty Mutual, said he wished to comment on the 8 factors used to assess attorney fees but his intention is not be critical of the Board. He asked the committee to look at an objective way to get these fees. Mr. Lundeen said in his 20 years of experience in workers compensation he has seen extraordinary cases but there are many standard cases. There is a significant range of fees applying to similar cases. The 8 factor approach should be refined. The orders themselves are very well written but do not give any guidance on what determines the fee in the assessment by the ALJ. Mr. Lundeen said if the committee is really looking at this they might expand their inquiry beyond what was said today.

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Mr. Miller asked are there other states that have an objective way to do attorney fees? Mr. Miller requested examples of how other states determine attorney fees. Mr. Manley and the department said they would prepare information regarding other states attorney fees for the next subcommittee meeting.

Mr. Lundeen said assessed fees are really uncommon among other states.

Mr. Miller said he would like to see a holistic approach to where the attorney fees have come today and get a comprehensive lay of the land. He said OLTA is prepared to make a presentation at the next subcommittee meeting.

The next subcommittee meeting will be September 25, 2008.

Mr. Shiprack asked if there has been any discussion at the Board level regarding the claimant's attorney and defense where one says the matrix is ok and the other does not agree? To resolve disputes it might be good to look at this area. He said it might be useful if there is an opportunity for bar discussions to come to the subcommittee. He agrees that the eight steps are subjective and the subcommittee should at least look at it.

Meeting adjourned at 12:20 p.m.