

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

September 25, 2008  
2:00 p.m. – 3:30 p.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  
John Kirkpatrick, IUPAT District Council, Portland  
Greg Miller, Gunderson LLC, Portland  
Kathy Nishimoto, Duckwall-Pooley Co., Hood River  
Jeri Ray, Timber Products Company, Springfield  
Sheri Sundstrom, Hoffman Construction Company, Portland

***Committee Members Excused:***

Tracy Brill, Portland Fire Fighters Association, Portland  
Mike O'Rourke, Plumbing and Steamfitters UA 290, Tualatin  
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 2:13 p.m.

There was unanimous consent by the subcommittee that the minutes from August 20, 2008 be adopted with minor corrections.

Mr. Savage said the attorney fees information from the department regarding other states' attorney fees is provided in a memo by Mike Manley, Information Management Division. The department will provide additional information requested by the subcommittee at the next meeting.

Mr. Miller said he would like claimant attorney feedback on the attorney fees issue. He mentioned a few discussions have taken place between the defense lawyers and claimant attorneys.

***Oregon Trial Lawyers Association (OLTA) Presentation***

Chris Moore, an attorney representing injured workers, OLTA, said claimant attorneys would like to obtain a fair wage for their work. Mr. Moore presented a PowerPoint on reviewing the problem and proposed solutions to the attorney fees issue. The following are brief points covered in the presentation:

- Claimant's bar identified attorney fees are not proportional to work performed. As a consequence, attorneys have been leaving the practice in large numbers and new attorneys cannot be recruited. The Claimant's bar proposed changes in the fees awarded out of CDAs and DCSs.
- Mr. Moore explained several graphs which detailed the difference between defense fees vs. claimant attorney fees awarded. He said there is an 11 million dollar gap between the fees awarded.
- Why is the difference in defense vs. claimant attorney fees awarded a problem?
  - To insure injured workers have the same access to justice as employers, they need access to quality attorneys, however, if an injured worker's budget for attorney fees is only 60% of their employer's budget, they are at a significant disadvantage.
  - Disincentive for new attorneys to become part of a bar that is paid significantly less in comparison to the other side.
  - Less claimant lawyers led to an over-stressing of those remaining in the practice and the inability to serve all injured workers equally and adequately.
- Mr. Moore explained further graphs comparing the numbers of claimant attorneys vs. defense attorneys, which illustrates there are significantly more defense attorneys compared to claimant attorneys.
- Mr. Moore proposed solutions for Workers' Compensation Board (WCB) to increase assessed fees, a rule change, and asking MLAC for legislative fixes.
- Issues noted and proposed solutions:
  - #1 – Fair & Equitable Treatment
    - Solution: Disclose defense fees on claim prior to closure of the record.
  - #2 – Lack of Compensation for Pre-Trial Work
    - Solution: Pay attorneys for claimant depositions and statements.
  - #3 – Externally-imposed Limits
    - Solution: Eliminate caps in DCBS litigation, responsibility cases, and on the issue of reasonableness.
  - #4 – Lack of Compensation for Appeals & Hearings
    - Solution: Pay attorneys for successfully defending all insurer appeals and requests for hearing, including fees for defending attorney fees and penalties and defending reclassification orders and rescission of a notice of closure.
  - #5 – Lack of Compensation in Overturned Denials
    - Solution: Amend statute to allow an attorney fee when a defacto denial of an initial claim is overturned.
  - #6 – Unreasonable Conduct
    - Solution: Allow attorney fees when there is unreasonable conduct regardless of whether compensation is due and amend ORS to award an assessed fee when a penalty is due.
  - #7 – Lack of Compensation Overcoming Denials

- Solution: Allow an assessed fee for overcoming a denial of a condition regardless of whether the treatment proposed for the denied condition is reasonable.
- Reconsideration Proposal – Increase the percentage paid at reconsideration to 25% of the increased compensation with caps set by the WCB.

Mr. Savage asked if the graph comparing defense attorney vs. claimant awards is an aggregate number? Does this not include costs? Mr. Moore said these numbers are what defense attorneys have reported to the department and they are the best he was able to pull together.

Mr. Savage asked if there is a sanction authority the WCB has? Mr. Moore said unless they write it into the contract, no there is no sanction authority. Mr. Savage asked what about during the litigation in terms of failure to provide discovery? Mr. Moore said if you can prove there was a delay in compensation as a consequence of failure to provide discovery you can get a penalty and a penalty based fee.

Mr. Miller asked Mr. Moore to give example of the 10% attorney fee for reconsideration cases where he felt it was not the right amount. Mr. Moore described a case where he represented a rape victim with serious emotional trauma. The woman's claim was closed with a relatively small PTD amount. Mr. Moore scheduled several conferences with the victim and her therapist regarding various items such as describing administrative rules. He spent 10-15 hours on the case and the attorney fee awarded was \$3,000, while the PTD received an increase in \$30,000.

John Kirkpatrick said the defense attorneys are paid by insurers through the money they collect from employers that pay premiums. Defense attorneys are paid by enlarge from the settlement the worker receives if they prevail. Some attorneys are reimbursed from the insurers. He said if he were an employer, he would say that is where most of his money is going – to the defense attorneys.

Ms. Barno asked if claimants attorneys file for legal costs? Mr. Moore said in order for claimants attorneys to be paid any attorney fee ,it must be approved by the WCB, administrative law judge, court of appeals, supreme court, or ordered at DCBS. Every time a fee is approved, it is through an order of the court.

Ms. Barno asked how do claimant attorneys track their time? Do they do an itemized bill? Mr. Moore said the problem is claimant attorneys have not been asking for specific attorneys fees. As a contingent fee practice, there are other factors that go into consideration. It is not simply time or an hourly rate because no one negotiated on those when considering an attorney fee award. He said no he does not submit an itemized billing. Occasionally he will go through and make a reasonable estimate on the time spent or the bills involved. This will be used for the basis on asking for a particular attorney fee.

Mr. Savage said the difference in total number of claimant vs. defense lawyers is fairly significant. There could be a number of reasons for this. It could be defense lawyers are not

actually doing the cases, but doing supervision or they are doubling up on cases. He asked if there is any sense as to why the difference in the numbers? Mr. Moore said maybe the defense lawyers have figured out a way to make money where they can hire lawyers to pay at a low rate and bill their time out at a higher rate. He knows lawyers that spend most of their time generating business. Mr. Moore said he does not know why or have an explanation. He said he wanted to make sure people did not take his interpretations and presentation as an attack on the defense part.

Anthony Miller, Oregon Self-Insurers Association (OSIA), discussed the initial reforms to the workers' compensation system in 1990. He said Oregon has a model system as litigation rates are down. Mr. A. Miller said the insurer pays all of the defense and claimant attorney fees. Insurers also have to pay whether we win or lose. He said there is not an equilibrium in attorney fees. In terms of total costs, there are other things in there that are expenses, such as a PI (private investigator). Mr. A. Miller's theory behind the differences in numbers for claimant vs. defense attorneys are that defense attorneys are getting a tremendous amount of business in Washington and so there is a larger need for defense attorneys. He said he hopes the committee will take a look at Oregon's attorney fees since we do have a good system.

Mr. Savage asked Mr. A. Miller how many different lawyers he uses? Mr. A. Miller said OSIA uses approximately three firms and one primary. The primary firm has 13-20 attorneys on staff.

Mr. Savage asked when OSIA has a case do they contact the defense or pick a particular lawyer within a firm? Mr. A. Miller said he picks a certain lawyer within a firm.

Mr. G. Miller said Chuck Lundeen from Liberty Mutual spoke of reducing staff since there is less litigation.

Mr. A. Miller said it is sometimes cheaper to settle rather than litigate things since the attorney costs are so much.

Mr. Kirkpatrick said on behalf of the workers he would like to say the only time a defense attorney is needed is when there is a dispute. An insurer in Oregon is only on the hook for their attorney costs. The worker has to accept the denial and walk away or get an attorney. The attorney fees come out of the settlement, which they would have gotten if they hadn't been denied to begin with. Mr. Kirkpatrick believes it costs too much on both sides. He said there is some ground to provide a more seamless transition for the worker to receive the benefits they are entitled.

Mr. G. Miller said he would like to have Chris Davie, SAIF Corporation, and Chuck Lundeen, Liberty Mutual, at the next subcommittee meeting present proposed solutions. The department is working on follow up data regarding division attorney.

Ms. Barno said Mr. Moore outlined and identified issues where claimants' attorneys are not paid. She said maybe we should focus on those areas where attorneys provide a service and are not paid?

The department offered to frame the issues and discuss them with Liberty and SAIF.

The next subcommittee meeting will be on Friday, October 10<sup>th</sup>.

Russ Reed, Information Management Division, offered to provide information on the risk factors associated with fees and why claimant attorney fees differ from defense at the next subcommittee meeting.

Meeting adjourned at 3:25 p.m.