

**Workers' Compensation Board
Tuesday, December 12, 2023
10:00 a.m.**

MEETING MINUTES

In-Person Staff:

Joy Dougherty, Board Chair
Sally Curey, Member
Roger Ousey, Member
Moises Ceja, Member
Jenny Ogawa, Member
Jacqueline Jacobson, Presiding ALJ
Amanda Pletcher, Hearings Division Support Manager
Terry Bello, Administrative Services Manager
Kerry Anderson, Project Manager
Lauren Eldridge, Interim Managing Attorney
Katy Gunville, Board Executive Assistant
Heidi Havercroft, Senior Staff Attorney
Pete Wogsland, Senior Staff Attorney
Katelyn Crowe, Transcription Coordinator
Melanie Chin, Board Review Specialist

In-Person/By Phone Attendees:

Cathy Ostrand-Poinson, Workers' Compensation Division
Elaine Schooler, SAIF Corporation
Julene Quinn, Julene M. Quinn LLC
Ted Heus, Heus Law LLC
Jovanna Patrick, Hollander Lebenbaum & Patrick
Aaron Clingerman, Dunn & Roy PC
Catie Theisen, AFL-CIO
Maggie Gerlicher, Associated General Contractors – Oregon
Columbia Chapter

Call to Order

Chair Dougherty called the meeting to order.
The public and WCB staff are participating in this meeting via telephone and in-person in the Salem Office.

Approval of Agenda and Order of Business

Curey moved for approval of the agenda and order of business. Member Ogawa seconded.
Motion passes.

Approval of Past Minutes

Member Ousey moved for approval of minutes from the September 18, 2023, meeting. Member Ogawa seconded. Motion passes.

Roll Call

Interim Managing Attorney, Lauren Eldridge, took roll, reflected in the attendee list above.

Division Reports/Updates

Administrative Services Division: Administrative Services Manager, Terry Bello, provided the report for the Administrative Services Division (ASD). In early January, WCB staff will be making a trip to the Florence location to make final preparations to the facility for hearings. The Bend location's lease has been renewed for the next five years. WCB is in the process of making facility and safety improvements to the Bend location.

Board Review: Interim Managing Attorney, Lauren Eldridge, provided a brief staffing update. CDA Coordinator, Nancy Coffelt, is out on leave until January. Board Review staff member, Melanie Chin, will be taking on the CDA coordinator duties in her absence.

Hearings Division: Presiding Administrative Law Judge, Jacqueline Jacobson, had no new updates.

WCB Projects: WCB project manager, Kerry Anderson, provided the update. DCBS's internal database system, NetCenter, is scheduled to be retired in the next few years. WCB is currently in the process of looking into new database vendors for this transition. Ms. Anderson will be job shadowing WCB staff to get a full understanding of what technology is needed.

New Business

Biennial Attorney Fee Review: Chair Dougherty started the discussion of the Biennial Attorney Fee Review by using Oregon Trial Lawyers Association's (OTLA) May 17, 2022, letter as a guide, specifically the five bullet points or topics outlined in the letter.

Review of Fee Caps for Settlement Attorney Fees: The first topic was the request that the Board review the fee caps in settlement attorney fees under OAR 438-015-0050 and OAR 438-015-0052. The floor was opened for public comments; none were made. There were written comments regarding this topic previously submitted by the public. The floor was then opened to the Board to discuss.

Member Ousey commented that he thinks OTLA's request regarding settlement attorney fee caps could help increase fees for claimant's bar overall. No other Board members commented. Member Ousey suggested input from injured workers' representatives as well as labor in furthering this discussion. He then made a motion to move the discussion to an advisory committee. Member Ceja seconded the motion. The motion carried.

Bifurcated Attorney Fees at the Hearing Level: Chair Dougherty opened the discussion of the concept to the public. Attorney Julene Quinn was the first member of the public to provide comment. She stated that bifurcation of attorney fees at the hearing level would be a

voluntary process and from her perspective it has been successful at the Board Review level. This concept could be a great tool for claimant's attorneys and would help them focus on their clients and not on the fee. She asked the Board to move forward with consideration. No further public comment was made, but a December 11, 2023, written comment from attorney Ted Heus was received. The floor was then opened to Board for discussion.

Member Curey asked to see statistics on who and how often bifurcation is requested at the Board Review level before further consideration at the hearing level. She requested that WCB internally gather those statistics. Then Member Ousey asked attorney Ted Heus a few questions regarding the written comment he submitted. First, Member Ousey asked if any of the other practice areas referenced in Mr. Heus's written comment were voluntary? Mr. Heus responded that to his knowledge none were purely voluntary. Member Ousey then shifted the discussion to how the Oregon Appellate Courts award fees and mentioned the process of a cost-bill after winning. The Court has discretion, especially on a remand case, whether they will consider a fee request at the appellate court level or whether they will remand that fee determination to the remanding forum. Mr. Heus concluded his remarks saying that if the bifurcation process weren't voluntary it could harm the portion of claimant's bar who request attorney fees under the older fee structure of simply requesting an amount. Member Ogawa asked Mr. Heus if he would request bifurcation on every case before the ALJ or would it depend on who the ALJ was? Mr. Heus responded that for nearly every one of his cases he prepares a detailed fee petition, and if a case pertained to a substantive issue he would certainly request bifurcation at the hearing level. Then Member Curey asked Mr. Heus if any of the jurisdictions in his written comment calculate attorney fees like the Board (based on factors)? Mr. Heus was unsure, but offered to submit further comment after reaching out to a colleague who does workers' compensation law in Washington. Member Curey further commented that she has a hard time getting on board with the Board's fee structure when the Court of Appeals uses the rate times hours method (lodestar method) for determining fees. Managing attorney, Lauren Eldridge, commented on the topic of the Court's method for calculating attorney fees. Ms. Eldridge confirmed that the Court does use a lodestar method, but their calculation can be adjusted based on certain factors. Those certain factors don't exactly mirror the Board's factors for determining attorney fees, but are similar. Some of the Court's orders address those factors. Chair Dougherty opened the floor back up for additional public comment.

Attorney Julene Quinn stated that Court doesn't often issue orders addressing attorney fee factors because there is often no objection from opposing counsel as to the fee amount. Even when there are published orders addressing the factors for determining the fee, they are typically addressed in limited detail by the Court. Ms. Quinn mentioned there is a specific statute for how the Court awards attorney fees and she is able to send it to the Board if needed. Next, attorney Elaine Schooler from SAIF Corporation provided her comments on the proposed bifurcation of attorney fees at the hearing level. Ms. Schooler recalled that the ALJ's provided their opinion on this idea in 2018. SAIF is interested in what they think about it now. No additional public comment. Chair Dougherty then allowed the Board Members to provide further comments on the proposed concept.

Member Ousey was curious about what problems the Hearings Division might encounter when trying to implement this process. He would like to see how the process would affect the

Hearings Division internally before he takes a position. Member Ogawa shared that as a former ALJ she wouldn't favor bifurcation at hearing level. Based on the contents of Mr. Heus's December 11, 2023, letter, she is worried about "judge shopping." She suggests that if this concept were in place, that the bifurcation should be at the judge's discretion and that bifurcation should be with the same judge who decided the case. In her past experience, attorneys were usually prepared to litigate their fee amount so she doesn't see the need to implement this process. Overall, she is against the bifurcation of attorney fees at the hearings level. Next, Member Ceja commented he would like more detailed information about how the process would be implemented at the hearing level. He suggested that by requesting the bifurcated fee before a case is assigned to a judge, it could eliminate "judge shopping." Member Ousey thinks this discussion proves the Board needs to do some investigation into the proposed process. He doesn't think Board Review has had many bifurcated fee cases since its implementation in 2018; therefore, there is not enough of a trial period to determine if Board Review's bifurcation of attorney fees process is a success. He is not ready to decide on the issue. Chair Dougherty would like to have ASD gather some information including what the cost of bifurcation of attorney fees at the Board Review level is. She would also like to see what the projected costs would be to the Hearings Division if the process was implemented there. Member Ceja responded to Chair Dougherty's remarks. He wondered if there is a savings with the parties negotiating their own fees versus the judge deciding. Member Curey made a motion to conduct an in-house evaluation of Board Review's bifurcated attorney fee process. She would like the evaluation to answer the following questions: 1) how many attorneys have used bifurcation at Board Review since 2018; 2) what was the outcome; 3) and how many parties took advantage of the process? She would like a report in the next few months from Board Review and ASD regarding this information. Member Ousey seconded the motion. Members Curey, Ceja, Dougherty and Ousey approved the motion; Member Ogawa abstained from the vote.

Board Statistics: Chair Dougherty moved the discussion to OTLA's third bullet point from their May 17, 2022, letter which was the review of the Board's statistics regarding the contingent nature of claimant's practice under ORS 656.388(5). Their requested statistics included win/loss data delineated by issue, and total at hearing, at the Board, the Court of Appeals, and the Supreme Court. Their request also included data on the number of attorneys representing injured workers, as well as the number of "new" attorneys to claimant's bar. Chair Dougherty opened the floor for public comment. Attorney Julene Quinn shared that there used to be litigation statistics provided by the Workers' Compensation Division (WCD). When she approached WCD about this she said they told her that the Board told them they didn't need to produce those statistics anymore. These statistics are import to claimant's firms in how they run their businesses. Ms. Quinn urged the Board to produce these statistics and would like a statement from the Board on whether they will try to get these statistics. She asked the Board to care about claimant and defense bar's viability and would hate to see the workers' compensation sector in the same situation as Oregon's public defense system. Ms. Quinn stated that the Board's rules and processes should facilitate the most money that claimant's attorneys can make. Without the litigation statistics it's difficult to predict and make decisions for her business for the future. Chair Dougherty responded that she was with WCB when WCD stopped producing those statistical reports; she is unsure why they stopped producing the litigation statistics, but noted there were a lot of errors. She invited Ms. Quinn to be a part of the process of collecting statistics, especially as WCB migrates to a new data system. Ms.

Quinn responded she would like to work on a committee, but she can't afford the time to participate because she only gets paid when she works. Chair Dougherty offered to keep Ms. Quinn apprised of any future statistical reports that are created during the implementation of WCB's new data system. Next, Member Curey commented that currently the Board doesn't have the tools to gather all of the requested statistics, but thinks with technology upgrades in the future the Board will, in time, be able to produce those data points OTLA requested. She proposed holding the statistics in abeyance as the technology becomes available. Attorney Spencer Aldrich mentioned he would have loved to have had those statistics when he started his practice two years ago. He stated he was willing to participate in any meetings involved in gathering litigation statistics. Attorney Elaine Schooler on behalf of SAIF Corporation stated that they are also interested in the data points requested by OTLA. She would also like SAIF's data points requested in their March 23, 2023, letter to be included with the Board's statistical reports. There was no further public comment. Chair Dougherty then opened the floor back up to the Board for discussion.

Member Curey started the Board discussion by recommending that the Board incorporate OTLA and SAIF's data point requests into WCB's new technology project. Member Ogawa was curious if, at this meeting, there would be discussion of the tracking of the statutory breakdown of attorney fees? Chair Dougherty responded that there has been discussion of that topic, but as of today the plan is to advance all exhibits submitted by the public regarding the biennial attorney fee review. WCB hopes their modernization project will start within the next 12 months and when that happens they plan to invite those who submitted exhibits to be a part of creating future data reports published by WCB.

Acknowledgement of Disparity of Fees between Claimant and Defense Counsels: Chair Dougherty opened the floor for public comment in regards to OTLA's bullet point regarding the disparity in fees between defense and claimant's counsel from their May 2022 letter. Attorney Elaine Schooler was the first from the public to provide comments. She noted defense costs are reported to WCD annually. She has questions on the scope of what is reported by WCD. Ms. Schooler would like to discuss this with WCD in order to help refine the scope of what is reported. Based on WCD's annual report, she thinks currently the comparison between counsel's fees is an "apples to oranges" comparison. Member Ousey asked Ms. Schooler if, in 2018, did SAIF share that they have the capability to breakdown its full-time salary employees' earnings into what was spent on litigation and counseling employers or claims adjusters? Ms. Schooler responded she would need to do more research since she is not a part of the work group that would be responsible for that. Chair Dougherty then asked Ms. Schooler if SAIF outlined in their March 23, 2023, letter what changes they would like WCD to make when gathering defense costs data? Member Curey added that she recalled receiving a letter several years back regarding what Member Ousey asked SAIF; she will try to find the letter for future reference. Attorney Julene Quinn then provided her comments on the issue. In 2015, the legislature gave the Board mandates for the Board to consider defense fees. In regards to defense fees vs. claimant's counsels fees, she has seen anecdotal evidence that defense counsels are paid significantly more than claimant's counsel. SAIF is an outlier based on their business model and tax status, compared to other defense firms. Ms. Quinn agrees with Ms. Schooler that you need to see the scope of the data provided to WCD. She thinks the playing field is uneven due to defense firms having more assets and financial resources. Ms. Quinn asks that the Board assist

in looking at the reporting of defense costs at WCD. Member Ogawa then asked Ms. Quinn if she knew what “costs” were included in OTLA’s final bullet point regarding disparity in fees and costs? Was it for litigation or did it include other costs? Ms. Quinn responded that her understanding is that it’s just litigation costs. There was no additional public comment and the Board then discussed the topic.

Member Curey noted the Board has been comparing “apples to oranges” for years. She looks forward to a solution. Next, Member Ousey commented he doesn't know how defense cost data was put together by WCD. He concluded that trying to figure out what the other side is paid is anecdotal. He would like to break down the numbers collected by WCD. Member Curey further commented that she has never seen claimant's bar come forward with how much they make annually so it’s difficult to compare. Member Ceja shared that during his time as a Board Member he has heard stories about the reality of being a claimant’s attorney that isn't captured in the data. He sympathizes with claimant's side where they can go months without paying themselves due to the contingent nature of the practice. Chair Dougherty commented that numbers are complicated. She shared that currently the Board does a lot of hand counting when gathering numbers. She expressed that the Board is committed to capturing that data in a more automated fashion and is also committed to working with WCD to help improve the data.

Chair Dougherty stated that 2024 will be the start of the next biennial review. WCB will be keeping the public aware of that process.

Public Comment

Attorney Elaine Schooler thanked the Board for their efforts to respond to all stakeholders concerns during this past biennial review process.

Announcements

None were made.

Adjournment

Member Curey moved to adjourn. Member Ousey seconded. Motion carried. Meeting was adjourned.