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Feed Bruyns

Workers' Compensation Division

By email to: Fred.H.BRUYNS@dcbs.oregon.gov

Re: Attorney Fees under ORS 656.383

Dear Mr. Bruyns,

The Workers' Compensation Division asked for attorneys who represent injured workers to be involved in the committee meetings to formulate a rule to address the issue of WCD awards of attorney fees as required by the court in the case of *Dancingbear v. SAIF*, 314 Or App 538 (2021). Then, WCD promptly ignored our comments.

The initial rule concept has not been adjusted to address our serious concerns. We ask that the proposed rule be amended.

Comments on OAR 436-001-0438.

In *Dancingbear*, the court concluded "that ORS 656.383(1) entitles claimants' attorneys to fees after they obtain temporary disability benefits for claimants in proceedings on reconsideration pursuant to ORS 656.268." ORS 656.383 provides:

The claimant's attorney shall be allowed a reasonable assessed attorney fee if:

(1) The claimant's attorney is instrumental in obtaining temporary disability compensation benefits pursuant to ORS 656.210, 656.212, 656.262, 656.268 or 656.325 prior to a decision by an Administrative Law Judge; or

(2) The claimant finally prevails in a dispute over temporary disability compensation benefits pursuant to ORS 656.210, 656.212, 656.262, 656.268 or 656.325 after a request for hearing has been filed.

The attorney fee that "shall be allowed" is a "*reasonable ... attorney fee.*" As several of us claimants' attorneys discussed in the meetings, the rule concept (and now a proposed rule) fails to provide for a *reasonable* attorney fee.

One concept that is important to consider is that workers' compensation benefits substitute for a constitutionally guaranteed remedy. The concepts of due process apply. It is important both

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that any rule provide for a reasonable attorney fee and that any rule provide for a fair process to determine that fee. The rule does neither.

Subsection (1)

OAR 436-001-0438(1) (proposed) provides that the “insurer must determine the amount” of the attorney fee. This rule delegates to the insurer – the party against whom the fee is being assessed – the authority to determine the amount of the reasonable attorney fee. An insurer has no authority to take the place of the Director in assessing a reasonable attorney fee, because the insurer has no authority over the reconsideration process and has no authority over a dispute about temporary disability. Either the Director has authority while the Director has jurisdiction over the reconsideration process, or the Board (and Hearings Division) has authority when it has jurisdiction over a dispute. The statutes do not allow the insurer to resolve a dispute or determine an attorney fee in either forum.

This highlights the difficulty of conditioning the amount of the attorney fee on the temporary disability obtained. That construct prevents the Director from doing the Director’s job to determine a reasonable attorney fee. The Director must get rid of that portion of the rule, and determine an appropriate fee schedule.

Subsection (2)

ORS 656.383 does not allow for the Director to condition the amount of the fee based upon the compensation obtained. Yet, OAR 436-001-0438(2) limits attorney fees to the amount of compensation obtained. This is *ultra vires*. The law is clear that administrative rules cannot amend, alter, enlarge or limit the terms of a statute. *Cook v. Workers’ Compensation Department*, 306 Or 134, 138 (1988). Rules inconsistent with the statutes cannot be adopted. *Franzen v. Liberty Mutual Fire Ins. Co*, 154 Or App 503, 507-508 (1998).

ORS 656.383 places no limitation on the amount of the attorney fee, only that it be reasonable. The base fee provided in OAR 436-001-0438(2) (proposed) of \$500 plus a small increase based on the workers’ benefits fails to compensate an attorney who must spend significant work to obtain the temporary disability. It is not the case that preparing a reconsideration request is limited to one hour. While all WCD sees is the form filled out, an attorney and her office spends significant time obtaining and reviewing the claim file, communicating with the client, and then formulating whether temporary disability (or medically stationary date which triggers additional temporary disability) is an issue that should be raised at reconsideration. An attorney often obtains additional evidence from the attending physician, of too often must review and defend work by the defense attorney, and often has to cull through the file to submit those documents significant on the issue. The rule proposed fails to compensate for this time.

For example, if \$1000 is at issue, even if the time to request reconsideration and obtain a correct medically stationary report from a physician takes 5 hours, the attorney will receive \$500 plus 15 percent of \$1000, for a total of \$650. This amounts to \$130 per hour, which the Director’s own rule of 436-001-0435 recognizes does not compensate even the newest attorney. The insurer can pepper claimant with multiple medical reports and evidence, without regard to any attorney fee limitation in the rules, but this rule ties the hands of injured workers and limits their access to representation by limiting the attorney fees that may be paid. This is contrary to the underlying policy requirements of access to representation for workers.

The rule provides no mechanism whereby an attorney may submit information regarding the full work that was necessary to obtain the temporary disability. The rule, instead, has a one-size-fits-all only adjusted for the amount at issue. This does not address the time an attorney may have to spend to obtain the temporary disability (or later medically stationary date). This is contrary to concepts of due process, where a party must have the opportunity to be heard on the issue. If the Director does not want to provide that process, the Board is uniquely capable of determining disputes. However, the Director needs to clarify that the matter may be appealed to the Board (Hearings Division) so that injured workers and their attorneys (and the system as a whole) understand that is where they may obtain a reasonable attorney fee.

Mr. Heus and I have spent easily 15 hours on this issue, and probably significantly more, not to mention the other attorneys who spent their time to provide input. Under OAR 436-001-0435 (without a SAWW increase), the fee we would receive would be anywhere from \$4125 to \$6000. Under proposed OAR 436-001-0438(2), the attorney fee would be \$500. I hope this makes my point about the rule.

Subsection (3)

The rule must either allow for input on the issue of the amount of a reasonable attorney fee, or clarify that a worker may request a hearing in front of the Board to provide evidence on a reasonable attorney fee **unrestricted** by the Director's extremely limited matrix. OAR 436-001-0438(3) (proposed) should be amended to provide clarity to the issue, by adding: "Any attorney fee decision under ORS 656.383 may be appealed to the Board (Hearings Division) and is not restricted by this rule."

Comments regarding changes to OAR 436-001-0435

In this rule change, the Director proposes to add a regular annual adjustment; however, the director has failed to increase the based attorney fee. The last time the amounts of \$275 to \$400 were set was 2018. Beginning July 1, 2018, the State Average Weekly Wage (SAWW) has gone up 27.034 percent. Thus, the amounts need to be adjusted upwards to \$349 to \$508. Otherwise, they will be perpetually behind. It is typical that amounts be increased periodically in the rules, but the way the rule is now, the increases over the last four years will never be realized.

I request that the numbers be adjusted in this rule to \$349 to \$508, and then allow the regular increase based on the SAWW.

If you adopt the rule in its present form, I and other claimants' attorneys will challenge the rule as *ultra vires*, among other violations of law. I urge the Director to make the changes suggested above.

Sincerely,



Julene M. Quinn, Attorney at Law

cc: Theodore P. Heus, Attorney at Law
Christopher Moore, Attorney at Law
Keith Semple, Attorney at Law
Jovanna Patrick, Attorney at Law