WORKERS' COMPENSATION DIVISION
STAKEHOLDER ADVISORY COMMITTEE

Attorney Fees Under ORS 656.383(1) at Reconsideration Under ORS 656.268

Location of meeting: Virtual Zoomgov meeting

Date & time: Oct. 8, 2021, 1 p.m.

Committee members attending:

Andrew Evenson	SBH Legal
Ashley Willard	Travelers Insurance
Catherine Shaw	Sedgwick
Chris Moore	Moore & Jensen
Dan Schmelling	SAIF Corporation
Elaine Schooler	SAIF Corporation
Jaye Fraser	SAIF Corporation
Jennifer Flood	Ombudsman for Injured Workers
John Powell	John Powell and Associates
Julene Quinn	Quinn & Heus LLC
Keith Semple	OTLA
Kirsten Adams	AGC
Melissa Douglas	Goehler & Associates
Sue Quinones	City of Portland
Ted Heus	Quinn & Heus LLC

Department of Consumer and Business Services staff present:

Amelia Vargas
Cathy Ostrand-Ponsioen
Doris Olivan
Fred Bruyns
James Burke
Jim Van Ness
Joy Dougherty
Matt West
Monte Marshall
Sally Coen
Sara Claessens
Steve Passantino
Troy Painter
Yesenia Gonzales

Meeting summary:

Fred Bruyns welcomed the committee members and explained that the meeting would be very informal. He added that the division is unsure if rulemaking will be required, but requested advice about possible fiscal impacts in case rulemaking is necessary. After introductions, Fred turned the conduct of the meeting over to Cathy Ostrand-Ponsioen.

Cathy guided the committee through the agenda, which has been copied in below. "Minutes" have been added below each "ISSUE" and at the end. Most of the recorded conversation is paraphrased, though quotation marks are used for some verbatim comments.

In the minutes:

> ALJ means administrative law judge
> ARU means Appellate Review Unit

The Workers' Compensation Division seeks input regarding attorney fees under ORS 656.383(1) and the division's role in assessing a fee at reconsideration under ORS 656.268, in light of the Court of Appeals opinion in *Dancingbear v. SAIF*, 314 Or App 538 (2021).

ORS 656.383 provides:

> "**Attorney fees in cases prior to decision or after request for hearing.** The claimant's attorney shall be allowed a reasonable assessed attorney fee if:
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> "(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
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> "(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 Workers' Compensation Board had previously held (*In the Matter of the Compensation of Mekayla N. Dancingbear*, 70 Van Natta 550 (2018)) that ORS 656.383(1) did not apply to the reconsideration process. According to the Court of Appeals, "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."

Neither the statute nor the court's opinion provide guidance regarding the process or the division's role in awarding a fee under ORS 656.383(1). The division would like to get input from stakeholders regarding how the process should work.

This meeting is intended to be a preliminary conversation. While an outcome of the conversation may be future rulemaking, rules are not the primary focus of this meeting.

Minutes:

Cathy explained that division staff are here to listen to stakeholders and that we want this to be an informal conversation. We are aware this is a new area where people may not agree. This is a new issue for us – attorney fees under ORS 656.383(1). We want to know what the issues are moving forward. If there are areas of consensus, we want to know about that, and we also want to know about areas where there isn't consensus. We aren't going to resolve any issues today. We really just want to hear your thoughts before moving forward.

We know some issues are still subject to litigation, so we have many unanswered questions still. And, *Dancingbear*, the Court of Appeals case, is not final yet. It was only issued a few weeks ago. It's remanded back to the Board too, so there are many questions that we don't have answers to. For purposes of our conversation today, we want to talk about process, now that we know the court's views on attorney fees under ORS 656.383 applying to reconsideration. What does that look like? We want to keep the conversation general and about hypotheticals, and not talk about actual cases that might still be in progress. The statutes and the court's opinion don't have much guidance for how this will affect processing by the ARU and the division. That will be the starting point for our conversation, and after we talk today we'll go back and talk about next steps. We don't know what that looks like yet, but when we do we will follow up with this group and go from there.

Cathy then reviewed the relevant statute, ORS 656.383(1), and some background for the meeting – see above.

Issues for discussion:

1. SCENARIOS

In what circumstances are temporary disability compensation benefits "obtained" at reconsideration? If the worker disagrees with the temporary disability dates shown on the Notice of Closure (NOC), the Order on Reconsideration will state the duration of time loss (the beginning and ending dates of each authorized period, under ORS 656.268(5)(c)(B)(ii) and OAR 436-030-0036). It is not known at the time the Order on Reconsideration is issued if additional time loss benefits will be due and payable.

Possible scenarios:

- If the Order on Reconsideration changes the beginning or ending dates of authorized time loss.

- If the Order on Reconsideration changes the medically stationary date.

- If the Appellate Review Unit (ARU) rescinds the NOC.

- If ARU suspends the worker's compensation for not attending an arbiter exam. (*The court remanded this issue to the board in *Dancingbear*.)

Minutes:

Cathy asked about scenarios when a claimant obtains disability benefits pursuant to ORS 656.268. The Order on Reconsideration will address the beginning and ending dates of time loss if the claimant raises that issue. But, is it known at the time of the Order that time loss will be due and payable? There are other factors that go into that. Cathy asked the committee for input.

Elaine Schooler said they have wondered about when dates have been modified by the order, but the closure is still in place – one idea they had was that after the order is final, then the insurer would go back and adjust to determine if any time loss payments were due as a result of the modification. If there were benefits paid out, then an attorney fee could be assessed by the division at that point in time, utilizing a matrix, potentially, tied to the benefit amount secured for the worker, like what is used for vocational benefits when attorney fees are awarded.

Cathy said she wanted to be sure to understand Elaine's comment. The division could award a fee after the Order on Reconsideration has gone final?

Elaine said that is correct. Set a time period after the order has gone final, perhaps 30 days, and the insurer would have to determine whether time loss is payable as a result of the modification the division made to the dates. The insurer would notify the division of the amounts paid. The division could then apply a matrix to assess an attorney fee that is tied to the benefit secured for the worker.

Cathy noted that this input overlaps with our process discussion (Issue #2), which is fine. As far as when a fee would be awarded, under Issue #2, second bullet, the division could award a fee after the Order on Reconsideration is issued based on information provided by the insurer regarding time loss benefits due and payable.

Elaine said she thinks of this as a similar mechanism as was put in place for the Workers' Compensation Board, where the attorney fees can be bifurcated from the underlying dispute piece, and then the parties would later submit arguments. Similar to that, the division would modify the dates and say there is an attorney fee and put in place a process to assess that after the order has gone final and we know what benefits are being paid to the worker.

Julene Quinn said she thinks there is a real question about jurisdiction. The injured worker's position is that anything in the order that reflects additional temporary disability – that is extending the dates or moving the medically stationary date, which should be accompanied by continuing temporary disability, unless ended earlier because of a regular return to work, for example, or if time loss authorization actually ends, as opposed to continuing as permanent disability – anything that extends temporary disability triggers the entitlement to an attorney fee.

It is their position that once you rescind a Notice of Closure, if that results in the legal position that the injured worker is being paid either procedural or substantive temporary disability compensation, that is the obtaining of temporary disability compensation.

Julene continued that the statute is not limited to the ALJ, the board, the director, or whoever can award it; it just triggers the awarding without specifying the forum. When you look at jurisdictional questions, then that attaches to whoever has jurisdiction over the issue that the temporary disability is then obtained. In the reconsideration process, you don't have unfettered jurisdiction like you do in .245 questions. You have very temporary jurisdiction while the reconsideration process is in front of you. Once you issue your order ending the reconsideration process all jurisdiction transfers to the Hearings Division and then the board. Any appeal or further issues would then go to the board. You can award a fee while the reconsideration is in front of you. After that it is going to have to go to the board for an award of an attorney fee, because your jurisdiction has ended. We see .383 as attaching to the jurisdictional issue, so it is going to have to pass at that point. For example, if you rescind a Notice of Closure and that triggers the payment of temporary disability, then that is a question for the Hearings Division to award the attorney fee. It is their position that anything that extends days of temporary disability, despite what the insurer does or doesn't pay, that question later might be one of proper payment, but it is not a question of entitlement or obtaining benefits – anything you do to extend it – they believe a fee is triggered.

Cathy said, based on what Julene is saying, so long as reconsideration proceeding is still open, ARU should be able to award a fee. After the reconsideration order has issued, the ability to award the fee would transfer to the Hearings Division.

Julene said yes, though there is one exception where ARU will do a reconsideration of a reconsideration.

Cathy continued, and said if ARU rescinds the Notice of Closure, the Unit is not going to know if there are additional time loss benefits to be paid at some point in the future. Would that issue be resolved by an ALJ? If benefits are paid, then the worker can go to hearing?

Julene replied that ARU may or may not know. The record may be clear that the worker has continuing disability or permanent disability. ARU may know that this person is disabled at the time you the closure is rescinded, and that automatically triggers temporary disability. That may be evident from the record. If it is not evident from the record, then if temporary disability becomes due thereafter, then they would have the option to go to the Hearings Division.

Chris Moore said that it seems the crucial question is the one the division asked at the very beginning. What does it mean to obtain temporary disability benefit? Chris thinks it means that they are necessarily paid and that there is an entitlement to those benefits. As an example, if the injured worker is working in a modified job, and the Notice of Closure is set aside and the modified job post-reconsideration is withdrawn by the employer, claimant would receive time loss benefits. The inchoate right to get those benefits equals obtaining. Chris thinks an attorney fee comes due then, regardless of whether the benefits are actually paid. As Cathy earlier noted, *Dancingbear* has been remanded to the board, and this "obtained" issue is going to be argued

there. We don't know that we'll have a final decision from the board, as the board's decision may be appealed to the Court of Appeals. But, this issue will be argued.

Cathy replied that some of these questions we will not be able to answer. In the meantime, there may be some things that are more clear than others.

Ashley Willard said that in the scenario of where a worker is released to modified duty, and they are not working for the employer at injury but for a new employer, the worker is required to provide the documentation. Otherwise the insurer has to assume they are getting their same (or higher) wages. How would that correlate into this, because they do ask the worker for that information, but if the insurer doesn't receive it, they have to make that assumption. It isn't clear how the benefits obtained could be determined in that scenario.

Cathy replied that the question is a good one, and asked if anyone has thoughts to add to that.

Julene said that is a payment issue, not an entitlement or obtained issue.

Chris said he agrees and that obtained means securing the rights to those benefits, regardless of whether claim processing means they actually get paid.

Julene added that we don't want to have a system where you encourage a party not to pay things out, and we shouldn't interpret that into something. They don't want to have to prove that their client actually received the benefits, because that is a whole different fight. They would have to do a second litigation to prove that they received the benefits. That's not the better approach as it doesn't encourage appropriate processing. If there is a very clear rule with insurers that is an easier process.

Andrew Evenson said there are instances where a worker may be medically stationary and continues to receive procedural temporary disability benefits up to the time of closure. The closure establishes an overpayment, but in that circumstance if the Order on Reconsideration were to move the medically stationary date, it sounds like under Chris Moore's position, even in that circumstance the attorney would be entitled to a fee based on the moving of the medically stationary date, despite the worker receiving temporary disability benefits all throughout that period. There are plenty of circumstances where the worker simply would not obtain additional benefits, which is what is called for by the statute. Andrew added that he cannot imagine that under every one of those circumstances the worker's attorney would be entitled to an attorney fee.

Chris replied that if the medically stationary date is moved out, then in essence an overpayment is reduced, and he thinks additional temporary disability benefits were obtained. The benefit to the worker is that they will get to keep more of their permanent disability if awarded. Reducing an overpayment probably gives rise to an attorneys fee. Chris added that he hasn't played through every scenario. Probably the board will give us a definition "obtained" in *Dancingbear* on remand. They will continue to litigate and refine that as they go forward.

Andrew responded that he also has not played through every scenario, but he thinks the most appropriate interpretation of "obtained" is that the worker actually receives additional benefits, above and beyond what he or she would have received otherwise.

Chris said we will find out from the board, and at this point he will be arguing a different position.

Julene asked that we go back to the purpose of the attorney fee statute. For a long time in this system it has been acceptable for attorneys to work for free to get their clients benefits or have a claim processed correctly. In 2015 we took some action to paper up some of those gaps, so that attorneys could be paid for work that they do. Much processing goes on by the defense attorneys, and by the time they get to reconsideration, they are behind the eight ball and have to do some work and get other benefits for their clients. This is one of the areas, temporary disability compensation, where they are taking a percentage of their clients benefits – they did not want that and they wanted to expand the ability of attorneys to get paid so that they could properly litigate temporary disability claims. 100, 200, or 500 bucks to a client is gold to them, but 25 percent of that isn't going to pay for the work the attorney has to do when the insurance company doesn't step up to the bat and process that claim correctly. The purpose of the statute is to pay attorneys for their work. Arguments that attorneys should be paid only if their clients receive a check – these are arguments that cut out payments to attorneys for the work they do. That should not be the policy that we have.

Julene continued and said regarding the example of moving a medically stationary date, the insurer is trying to close one of her clients with a medically stationary date of years ago, and in another case the insurer is trying to use a medically stationary date of about one year ago. They get these battles back and forth with the doctors regarding medically stationary dates and whether the worker is released to regular work, etc. If the medically stationary date is moved, that can do one of two things. Yes, maybe the worker has already received that money, but that money doesn't become an overpayment that cuts out most of their permanent disability. That is important work. Even if it is already paid, attorneys are getting more money for their client because they have moved the medically stationary date, and now it is not an overpayment. Julene said they encourage the broadest interpretation of the statute so that attorneys can be paid for the work that they do. Ultimately we will get to the amount issue – did we just check a box or did we spend hours reviewing the file and providing information – but the interpretation of when attorneys "obtain" really needs to be the broadest possible to get at entitlement and not simply receipt. Receipt of the money allows for a lot of monkeying around regarding how or whether it gets paid. That will frustrate the client obtaining the benefits. It will also put pressure on the insurers to avoid payment of additional benefits.

Melissa Douglas said she hears what Julene and Chris are saying, and she thinks a lot of this seems be related to the definition of obtained. A likely reasonable interpretation of that is some process or mechanism to have a showing or proof of obtainment, maybe not through payment by the insurer, but at least by showing that something new – even if they are able to agree that the overpayment was not reduced and that is additional money the worker gets to keep – there should be some sort of showing that there was benefit to the worker. Melissa thinks that is consistent with the law's use of "obtained" in the past tense. There should be a showing that new

moneys were due and payable. This should address Julene's concern about the disincentive to pay benefits, because if the benefits are due and payable there are consequences if the insurer does not do so.

Cathy responded that, as Chris said, the board will likely provide more direction on what "obtained" means. Cathy added that she appreciates hearing everyone's perspective, and this will be informative to the division moving forward. Cathy added that we knew going into this that we probably would not receive an answer today, and this is something we are waiting for more direction on.

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2. PROCESS

The division has identified the following possible processes by which a fee under ORS 656.383(1) could be awarded. Are there other possible processes?

- ARU awards a fee (or a contingent fee) in the Order on Reconsideration.

- The division awards a fee (or a contingent fee) after the Order on Reconsideration has issued, based on information provided by the insurer regarding time loss benefits due and payable.

- The parties stipulate to a fee, subject to approval by an Administrative Law Judge, after the reconsideration proceeding has been completed.[1]
- The claimant requests a hearing seeking a fee, after the reconsideration process has been completed.

Minutes:

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[1] See Members Lanning and Ousey's opinion concurring in part and dissenting in part in *Mekayla N. Dancingbear*, 70 Van Natta 550, 559 n 8 (2018):

> "We illustrate the process as follows. First, to be entitled to an assessed attorney fee under ORS 656.383(1), a claimant is not required to request a hearing from the reconsideration order. If a claimant's attorney is satisfied with an Order on Reconsideration award (including a mandatorily-awarded 'out-of- compensation' fee under ORS 656.268(6)(c)), it is unnecessary to request a hearing on that order to seek an ORS 656.383(1) fee award. Instead, a claimant's counsel can simply request such a fee from the carrier and if it is not opposed to such a fee (*i.e.*, it believes the claimant's attorney was instrumental in obtaining additional temporary disability benefits) and the parties can agree on the amount, a stipulation can be submitted for ALJ approval. If a carrier opposes a claimant's entitlement to an assessed attorney fee, the claimant can request a hearing and attempt to establish that his/her attorney was instrumental in obtaining additional temporary disability benefits prior to the ALJ's decision (*i.e.*, before, during, or after the reconsideration process). In this way, the record would not be subject to the evidentiary limitations of ORS 656.283(6) or ORS 656.268(8)(h). Also, no conflict would exist between ORS 656.268(6)(c) and ORS 656.383(1) if the claimant's attorney could meet the requirements of an award under the latter statute (*i.e.*, was instrumental in obtaining additional temporary disability benefits prior to a decision by an ALJ)."

Cathy noted that we have already talked some about process. There are different ways by which a fee could be awarded. When a fee is awarded, the statute doesn't say the director or the board. ARU could award a fee or a contingent fee in the order. We talked a little bit about the division awarding a fee after the order issued, and that raises questions about jurisdiction. In the *Dancingbear* case from the board, in the concurring-in-part and dissenting-in-part opinion, members Lanning and Ousey put forward a process that wouldn't involve ARU at all. The parties could potentially stipulate to a fee, and if not able to agree on a fee would request a hearing; or the worker's attorney could request a hearing directly to the Hearings Division, requesting a fee. We would like to know from the practitioners who are out there, with these cases, what sort of a process makes sense. Are there other possible processes for how this could work?

Julene said she doesn't believe the division can order or award a contingent fee. Julene added that she knows that there is a question about contingent fees when the causation piece is done at the Hearings Division, but there is a reasonable and necessary process over at the director. That is an illegal thing to do. There is no statute that allows a contingent fee like that. There are in appellate cases before someone finally prevails, but that's a different legal process. The statute says "shall." If you meet the terms of the statute, then you "shall."

Chris said he would echo one of Julene's earlier comments, and that is where does jurisdiction lie; when the department loses jurisdiction relative to the Order on Reconsideration. Chris said he thinks they probably lose jurisdiction as soon as the order issues unless – if you ask a question of the medical arbiter, that information comes into the hearing record, not into the reconsideration record. The real question is whether ARU will issue an attorney fee with the Order on Reconsideration rather than say that the attorney is entitled to a fee – you have to go figure it out between yourselves or in front of the Hearings Division. The court in *Dancingbear* said this is a reasonable attorney fee. If the claimant pays part of the attorney fee out of his or her compensation, then the fee is going to be reduced by including that in determining what a reasonable fee is. Wherever the fee is granted, the fee has to be a reasonable attorney fee.

Chris continued that one way to go is to grant a flat award as an attorney's fee, and the other way is to tie it in some degree to the amount of compensation that the claimant got. Chris repeated that he doesn't think actual receipt of benefits is necessary to trigger the entitlement to a fee. Or, you could say that the department is unable to assess what a reasonable attorney fee is in this situation, so we grant that you are entitled to an attorney's fee, but you will have to obtain it later – determine the amount of the fee in a different forum. Chris said he doesn't have a really good answer for this; the process for this is complicated.

Andrew said he wanted to piggyback on something Chris said. Andrew said he too doesn't have a perfect idea for how this should work; it is a difficult calculus. There has to be some degree of this attorney fee being tied to the additional amounts obtained or awarded to the worker. Perhaps the board defines "obtained" as the opportunity to obtain, but still, even if that were the case, there has to be some degree of it being tied to the amount, some sort of proportion to the amount obtained or potential obtained by the worker. Otherwise they sometimes have to litigate the fees,

and some attorneys may treat these as "hostage situations," and often there is no tie to the benefits for the worker.

Elaine said regarding Andrew's and Chris's remarks, there will be different situations or mechanisms for how fees could be awarded. In this scenario, Chris kind of touched on it about a flat fee maybe being appropriate in some instances. Elaine said she talked earlier about how the matrix is used for awarding fees in other areas. When a closure is rescinded and time loss may resume, that may be an instance where a flat fee would be appropriate, and there would be a matrix when the claim is eventually closed that could potentially adjust that fee upward if the time loss benefits were to exceed a certain threshold. Similarly, to Andrew's point, taking into consideration the benefit that is achieved for the worker, when time loss is going out, the parties could use the matrix to determine what the fee amount would be. That could be a mechanism, then, where the division assesses a fee saying that the time loss dates have been modified, and then depending on what that is, within a certain range, whether zero triggers an automatic fee, like a baseline fee, and then that increases for amounts that the worker then receives – in a matrix-like way.

Andrew responded that to piggyback on what Elaine said, that is something that their firm has discussed in response to this. It does seem appropriate that there should be or may be different mechanisms for the circumstances of when the claim remains closed at reconsideration, but additional dates of temporary disability are identified, versus when the claim is reopened. The implications of those two findings are really quite different and disparate. The ultimate amounts to the worker may be great or small in either circumstance, but the circumstances of those findings by the ARU are such that it would lend well for a different mechanism for an award to be applied in each of those circumstances.

Cathy asked if anyone else has thoughts about process and noted that we have somewhat moved over into the issue concerning fee amounts.

Julene said she agrees that it is complex, but maybe the division can come up with a simple process that applies across the board so someone doesn't have to hire an appellate attorney to interpret it for them – perhaps for a rescission, a base fee. The division could do a one size fits all with a rule that has flexibilities so that attorneys are paid appropriately. Julene emphasized that she is pressing for a simple process.

Cathy said that looking at Page 3 of the agenda, she feels like we have talked about the amount – the ideas of a fixed fee, a sliding scale, and a matrix have been raised, and also the benefit secured for the worker – in some cases that is something the division doesn't know at the time the Order on Reconsideration is issued, so that might be something that needs to be addressed subsequently.

Ted Heus described the concept of coupling a base fee award for a rescission, where temporary disability is likely to resume, and then tack on a percentage of any temporary disability paid as a result of that rescission, similar to what the department does with the 10 percent-out-of-compensation fee. It seems like the same process could work but with the added fee on top rather than an out-of-compensation fee – an additional percentage of whatever amount they award. It

probably can't be just that, because if the client gets an extra month of temporary disability, that might not constitute a reasonable fee for the efforts of getting that compensation awarded as a result of a rescission. There might need to be a base fee or something along those lines. This approach may address concerns that the award have some relationship to the amount of compensation achieved as well.

Cathy noted that Julene and Ted both mentioned a base fee – Elaine did as well. If the department is going to come up with an amount, do committee members have a suggestion for where to start and how to determine the base fee and what factors would go into its determination? Again, we don't have to decide today. We just want to get input.

Julene responded that when you are on the insurance side of the house, you believe that the worker's attorney filled out a form and checked a box, but the department did all of the work to get the client's benefits. On this side you realize there is a lot more work you have to do. Either you are going to monitor the claim as discovery comes in, reviewing every day to see what is going on, with a legal assistant sorting and filing, etc., so there is work over a period of time; or, your client comes in the door and says they have a Notice of Closure – I don't like it – what do I do – so you have to request a claim file and spend four hours reviewing it. There may be exceptions, but most attorneys spend time, usually a handful of hours, monitoring the claim, and spend money on staff and overhead. That should be taken into consideration if the division does a minimum fee. There is a contingent nature to this work as well.

Elaine said they didn't have a set amount. It was just one idea of a way to approach this. Part of the challenge at this point is not knowing what the "obtained" piece really means. Depending on how that's interpreted and applied could further drive this conversation and how it should be approached. Reconsideration was created to reduce litigation and streamline closures and reviews of closures, so how do we do that in this arena too and not create more litigation for both sides. Simplicity would make it easier for everyone to apply it, but not knowing the trigger point makes it tough to say this amount or approach is the most reasonable.

Andrew hearkened back to the fees being tied to the amounts obtained. It would benefit both parties to have some variation of matrix, or percentage, or flat fee plus percentage – some variation of an objective algorithm by which the parties can identify a fee amount, as a means of reducing litigation over that. There is no perfect answer. Considering Chris's and Julene's concerns, it will reduce work on both sides. Hopefully, if we have an objective number out there, it would not then reduce the fee amounts being paid – versus leaving it discretionary – don't want to say arbitrary – ambiguous is maybe a better word.

Julene said the statute requires a reasonable attorney fee. ORS 656.012(2) – in 2015, they added the policy of the worker's right to adequate representation. On this side, there is a real debate amongst attorneys as to whether they are going to take reconsideration cases, because the cases are time suckers. The fees don't justify them in many situations. Attorneys are shying away from that. That's not a good thing. That gives too much control to one side to work unfettered and unchecked, and that's not good for injured workers. It's a reasonable attorney fee, something that is supposed to allow for adequate counsel. That means there is no ceiling on an attorney fee. If the employer wants to spend $200,000 litigating, if an attorney on this side has to litigate that

issue, then the worker's attorney should be paid for that effort. Julene continued that she understands what people are saying about being paid based on the amount they get for their client. When they get $100,000 for their client, that may be something to consider, versus the attorney only getting 25 percent of the $250 gained for the client. They don't want workers nickeled and dimed, with a day here and a day there, and attorneys not being able to litigate that and be paid for their effort. So that is important to pay for the effort, while also considering the amount at issue. If the insurer is willing to litigate (for a small amount), the worker's attorney should be paid for their effort. It happens often where the attorney raises a procedural time loss issue, while the claim is open, and the insurer closes that claim and the ALJ has lost jurisdiction, so it now has to go to reconsideration; so this all has to be wrapped up and the matter submitted for the reconsideration – it may involve $1,000, which is meaningful to the worker. The system should be flexible enough so workers can have adequate representation and attorneys can be compensated for their work. Julene added that regarding the attorney fee issue, this is not a closed record. The closed record is over the reconsideration process, when the attorney fee is a separate statute. At hearing they will be able to prove what ever they need to prove for the amount of the attorney fee if ARU could not make that determination.

Andrew noted he earlier referred to a "hostage situation," and not suggesting that anyone on this call has presented him with this type of scenario, but the converse to Julene's description is a dispute over a minor amount, and the position in argument is that no matter how little time invested or amount in dispute, the attorney knows that if they put this in front of a judge, they will be awarded some dollars, so their demand is, for the sake of a round number, $10,000. It can be that amount or more over the issue of, say, a $175 attorney fee. It is then treated as a hostage situation. This type of scenario goes into their thought process in wanting some objectivity for this determination.

Ashley said they are often brought into litigation by the claimant or claimant's attorney. Insurers also have a right to representation. The attorney should be paid for their time invested in the reconsideration process, but does that mean they get 10 percent of what claimant is owed, as well as an assessed fee? Or, should they be entitled to an assessed fee, and the injured worker still gets their full benefit, with nothing taken out? The workers' compensation system is there to benefit the worker and to make them whole. Maybe we don't do the 10 percent plus assessed fees. We do assessed fees and the injured worker gets their full benefit without any deductions to claimant's attorney.

3. AMOUNT
If the division awards a fee under ORS 656.383(1), how should the amount be calculated?[2]

- Fixed fee, sliding scale, matrix?
- How to determine benefit secured, if any, for the worker?
- Consideration of time devoted by the attorney. (See OAR 436-001-0400(2).)
- Consideration of other factors. (See OAR 436-001-0400(3).)

Minutes:

See input about the amount of the fee under Issue #2.

[2] OAR 436-001-0400 provides, in part:

> "(2) In cases in which time devoted is a factor in determining the amount of the fee:
>
> "(a) The attorney should submit a statement of the number of hours spent on the case.
>
> "(b) The director may request the attorney to submit additional information to support or clarify the statement of hours.
>
> "(c) If the attorney does not submit a statement of hours or other information requested by the director before an order is issued, the director will presume the attorney spent one to two hours on the case.
>
> "(3) In cases in which a reasonable fee is to be assessed, the director may consider the following factors:
>
> "(a) The time devoted to the case for legal services.
>
> "(b) The complexity of the issue(s) involved.
>
> "(c) The value of the interest involved.
>
> "(d) The skill of the attorneys.
>
> "(e) The nature of the proceedings.
>
> "(f) The benefit secured for the represented party.
>
> "(g) The risk in a particular case that an attorney's efforts may go uncompensated and the contingent nature of the practice.
>
> "(h) The assertion of frivolous issues or defenses."

4. NEXT STEPS

Possible rules issues:

- OAR 436-001-0003(3) – amend to add a reference to ORS 656.383(1).
- OAR 436-001-0400 through 436-001-0440 – adopt a new rule to address attorney fees under ORS 656.383(1).
- OAR 436-030-0175(4) – amend, or adopt a new (5), to refer to attorney fees under ORS 656.383(1) and to refer to the new rule in division 001.

Minutes:

Cathy explained that we have identified some rules that may be affected, but we still have to figure out the process before we understand the effects. Cathy added that we have received really good feedback. We need to go back and have more conversations, but stay tuned.

Ted asked if the department has issued any reconsideration orders and how these are handled currently. *Dancingbear* is out, and there are supposed to be fees awarded.

Cathy replied that she is not aware that they have had any that have gone out since *Dancingbear*. But, we know they are coming. That is part of why we wanted to have this conversation and get some feedback.

Steve Passantino (ARU manager) confirmed that to date we have not had any come up yet, though we are watching for it.

Chris said that regarding an out-of-compensation fee, as opposed to a fee in addition to comp, the claimant's bar is discussing this. The statute is mandatory that attorneys are entitled to the out-of-compensation fee. Chris added that, speaking for himself, a reasonable fee would include some consideration of the amount of the out-of-compensation fee, but what if he agreed to waive his out-of-compensation fee and expected the assessed fee to be proportionally higher as a consequence of waiving his out-of-compensation fee? Chris continued that he has been fighting this because he would prefer that his clients not have to pay him out of money they need to live.

Ted said he agrees, and maybe the department should approach MLAC about getting rid of that 10 percent and making it a reasonable fee. This is temporary disability, probably the most essential benefit that clients get while they are disabled. Taking a portion of that, even though a small portion or 10 percent of that, is more important to them than it is to the system.

Ashley noted that the whole point of the workers' compensation system is to benefit the worker and bring the worker whole, and that (10 percent reduction) is not bringing them whole. Their should be fees for the work attorneys are doing with the reconsideration process – no different

from a compensability or any other hearing. At a compensability hearing they don't say that 10 percent will come from the worker if a denial is reversed.

Cathy said that is something to look at, but there would be a statutory issue. It says that, "The director shall order the insurer or self-insured employer to pay to the attorney out of the additional compensation awarded an amount equal to 10 percent of any additional compensation awarded to the worker." It is a question whether that could be waived in favor of an assessed fee.

Julene said that, after thinking about Andrew's and Elaine's input about reducing litigation, the process right now, for cost bills, for example – and then we have a bifurcated attorney fee rule at the board – allow for the worker's attorney to submit to the insurer a bill or pleading to say this is how much we would like, and then the insurer can agree to it or contest it. Perhaps there can be something that can be more easily agreed upon by the parties, or the process allows attorneys to submit a bill or a statement, and the insurer can say yes or contest it, or attorneys can contest it if the insurer doesn't respond. Something easier that would work.

Andrew said he would piggyback on Julene's comment, regarding not wanting a cap. Perhaps there is logic for a good cause clause. Every circumstance will be different. Perhaps a percentage or a matrix would work on 95 percent of the cases, but not on the other 5 percent, or vice versa. Or, a flat fee plus a percentage. There is not going to be a perfect answer, but in response to that, it seems like we could include some variation of what we see in other capacities of our world, such as a "good cause" type clause, where the worker's attorney can make a finding of why a higher fee is appropriate in the circumstance.

Julene said she would echo that. It could be something simple as at the Hearings Division, where attorneys often take the standard fee. It could be that way, some type of base fee or matrix or something that the department provides, and then there would be a process where you could go to a hearing with an ALJ for those cases where you disagree and you think the effort is worth it. If the fees are set appropriately at reconsideration, you will find most people will take the path of least resistance and will accept basic fees that cover basic work. You should not add in words that aren't contained in the statute, so you couldn't do a good cause, but you could do a base fee, and if the worker wants additional fees because the case justifies it, then they can go to hearing – some sort of easy process.

Cathy said that is definitely something to think about. We need to go back and digest the information and see if we can come up with an outline of something that is workable. We appreciate the suggestions and thoughts.

5. OTHER ISSUES

What other issues should the division consider regarding attorney fees under ORS 656.383(1)?

Minutes: See above. Meeting adjourned. **THANK YOU!**