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December 4, 2015

Debra L. Young, Rulemaking Hearing Officer
Oregon Workers' Compensation Board
2601 25th Street, SE, Ste. 150
Salem, OR 97302-1280

sent via email:
rulecomments.wcb@state.or.us

Re: Proposed Regulation Implementing HB 2764, WC Attorney's Fees Awards - NAMIC's Written Comments and Recommendations

Dear Debra L. Young, Rulemaking Hearing Officer:

Thank you for affording the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written comments and recommended revisions to the Proposed Regulation Implementing HB 2764, WC Attorney's Fees Awards.

NAMIC is the largest property/casualty insurance trade association in the country, serving regional and local mutual insurance companies on main streets across America as well as many of the country's largest national insurers. NAMIC's 1300 member companies serve more than 135 million auto, home and business policyholders and write more than \$208 billion in annual premiums, accounting for 48 percent of the national automobile/homeowners market and 33 percent of the business insurance market. NAMIC has 153 members who write property/casualty insurance in the State of Oregon, which represents 46 percent of the insurance marketplace.

Through our advocacy programs we promote public policy solutions that benefit NAMIC companies and the consumers we serve. Our educational programs enable us to become better leaders in our companies and the insurance industry for the benefit of our policyholders.

NAMIC appreciates the efforts of the Workers' Compensation Board and its Advisory Committee in drafting a proposed regulation to implement the statutory provisions of HB 2764, WC Attorney's Fees Awards. In the spirit of contributing to the Board's efforts to implement a reasonable interpretation of the letter and spirit of the legislation, we respectfully submit the following comments and recommendations:

1) Proposed Regulation implementing amendment to ORS 656.262 (14)(a) – NAMIC is concerned by the advisory committee's recommendation of a reasonable hourly rate of \$275 for calculation of the "assessed attorney's fees".

HB 2764 amended ORS 656.388(5) to state that, “the board *shall*, in establishing the schedule of attorney fees awarded under this chapter . . . *give consideration to fees earned by attorneys for insurers and self-insured employers.*” (Emphasis added).

NAMIC is concerned that the proposed reasonable hourly rate of \$275 for claimant attorney’s fees is inconsistent with the standard WC attorney’s fees rate in the legal marketplace and significantly exceeds the reasonable hourly fee rate of \$140-\$160 charged by WC defense counsel representing certain NAMIC member companies. NAMIC believes that the \$140-160 hourly fee rate is likely to be fairly representative of WC defense counsel attorney’s fees rates in Oregon. Common sense and common experience dictate that it is reasonable to conclude that WC defense counsel in a state are going to offer an hourly fee rate that is competitive within their professional peers in the marketplace. Consequently, the board should consider this rate when evaluating what is a fair and appropriate claimant attorney’s fee hourly rate for “assessed attorney’s fees”.

Since there is no legitimate public policy rationale to support awarding WC claimant attorneys an hourly rate that is almost *double* the rate of WC defense counsel, NAMIC respectfully requests that the proposed \$275 hourly fee rate be reconsidered. NAMIC appreciates that the board is required to consider the “contingent nature of the practice of workers’ compensation law”, but the proposed WC claimant attorney’s fees hourly rate is excessive, and will financially encourage and reward litigious behavior by WC claimant attorneys.

ORS 656.012(2)(b) specifically states that, “the objectives of the workers’ compensation law are to . . . *reduce litigation* and eliminate the adversary nature of the compensation proceeding.” (Emphasis added). NAMIC is concerned that proposed \$275 hourly fee rate in conjunction with the increased attorney’s fees cap of \$4000 will lead to more protracted litigation and less timely settlements of disputed WC claims to the detriment of injured workers.

Moreover, ORS 656.012(2)(b) also states that, “the objectives of the workers’ compensation law are to . . . to provide *a fair and just* administrative system” (Emphasis added). How is it “fair and just” to award WC claimant attorneys an “assessed attorney’s fees” award based upon an hourly fee rate that greatly exceeds what WC defense counsel earn for comparable legal expertise and effort?

Although NAMIC appreciates the fact that HB 2764 specifically states that the bill is intended to “provide for access to adequate representation for injured workers”, this statement should not be read so as to negate the fundamental principle that procedural fairness (administrative due process) is a cornerstone of the legal system. The calculation of the “assessed attorney’s fees” award should NOT be improperly skewed in favor of either litigant.

Further, since there is no specific evidence in the record that would support the conclusion that using an attorney’s fee hourly rate commensurate with what WC defense counsel typically charge in the marketplace to their clients would adversely impact “access” to adequate legal representation for claimants, NAMIC recommends that WC claimant attorneys and WC defense counsel be treated similarly in their hourly fee rate so that *both* claimant and insurer/self-

employer litigants have reasonable and comparable “access” to cost-effective legal representation.

2) Proposed requirement that “carrier must pay the attorney’s fees award under this rule within 30 days of its receipt of the bill” – NAMIC is concerned that this proposed language fails to specifically state or take into consideration two important and legitimate legal qualifiers to the WC insurer’s duty to pay the attorney’s fees award: a) that the 30 days deadline for payment of attorney’s fees should only apply to *undisputed* awards of attorney’s fees; and b) that the duty to pay the award is conditioned upon the fact that the attorney’s fees award for the legal action in question shall not exceed the statutory \$4000 cap.

3) Proposed expansion of \$4000 attorney’s fees award cap to “additional compensation” for temporary disability compensation and “own motion” claims – NAMIC is concerned that the advisory committee’s recommendation is inconsistent with a reasonable interpretation of the letter and spirit of HB 2764. Specifically, none of the 12 detailed pages and the 11 statutory provisions addressed in HB 2764 state that “assessed attorney’s fees” shall be applied to “additional compensation” claims for temporary disability compensation or “own motion” permanent disability compensation claims.

NAMIC is concerned that several provisions in the proposed regulation attempt to improperly expand the scope of the “assessed attorney’s fees” provision in HB 2764 to include claims disputes that were not addressed by the state legislature in their comprehensive legislation.

NAMIC is further concerned that the advisory committee has proposed that the statutory reference to the increased attorney’s fees award cap of \$4000 be applied independently to related parts of the same WC claims, i.e. that there be a \$4000 awards cap for disputes relating to the temporary disability claim and then also to the “additional compensation” claim for temporary disability compensation. This proposed expansion of the scope of the “assessed attorney’s fees” provision in HB 2764 is antithetical to the legislative objective of “reducing litigation.” If a WC claimant attorney is allowed to separate out related parts of the WC claim so as to increase the attorney’s fees award cap, the WC claims settlement process will become needlessly more protracted in scope and more costly to WC insurers and their employer-policyholders. These increased litigation costs are likely to adversely impact affordability of WC coverage for businesses in the state of Oregon.

If the state legislature had intended to require an award of “assessed attorney’s fees” for “additional compensation” claims disputes it could have and should have expressly stated so in its detailed legislation. The proposed regulation assumes a legislative intent that does not conform to the specific substantive language of HB 2764. NAMIC believes that any expansion of the scope of HB 2764 should be directly addressed by the Oregon State Legislature, via amending legislation.

4) Proposed definition of when a matter has been “briefed” in Section 5 (4) of HB 2764 –

The statutory provision states that, “the *claimant’s attorney* is entitled to a reasonable attorney fee for *efforts in briefing the matter* to the board or court.” (Emphasis added).

The advisory committee has recommended that “a matter is considered ‘briefed’ *when the insurer or self-insured employer files its initial brief.*”

NAMIC is concerned that this subtle, but significant expansion of the scope of the statute is inconsistent with the very purpose and language of the provision. A reasonable interpretation of the plain meaning of Section 5 (4) of HB 2764 supports a definition of “briefed” that relates to the *actual work done* by the claimant’s attorney in regard to the insurer’s appeal. The statutory language expressly refers to the claimant attorney’s “*efforts in briefing* the matter” to the board or court. HB 2764 does not say that the claimant’s attorney is entitled to an award of “assessed attorney’s fees” when the insurer merely files an appeal. The claimant’s attorney should reasonably be required to engage in affirmative appellate work, like drafting a brief for the board or court responding to the insurer’s filed initial brief, before the claimant’s attorney is entitled to compensation for legal services rendered.

Thank you for your time and consideration. Please feel free to contact me at 303.907.0587 or at crataj@namic.org, if you would like to discuss NAMIC’s written comments.

Respectfully,



Christian John Rataj, Esq.
NAMIC Western State Affairs Manager