

**UTAH SUPREME COURT ADVISORY COMMITTEE**

**ON RULES OF CIVIL PROCEDURE**

**Meeting Minutes – October 24, 2018**

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**PRESENT:** Chair Jonathan Hafen, Heather Sneddon, Judge Andrew Stone, Judge Kent Holmberg, Larissa Lee, Susan Vogel, Barbara Townsend, Judge Clay Stucki, Leslie Slaugh, Judge Amber Mettler, Trystan Smith, Lincoln Davies, Lauren DiFrancesco, Justin Toth, Judge James Blanch, Timothy Pack, Rod Andreason, Dawn Hautamaki (phone), Katy Strand (Recorder)

**EXCUSED:** Paul Stancil, Judge Kate Toomey, Trevor Lee, Judge Laura Scott, James Hunnicutt, Michael Petrogeorge, Lincoln Davies

**STAFF:** Nancy Sylvester

**GUESTS:** Dennis Lloyd, Hans Scheffler, Phil Shell, Dawn Atkin, Paul Burke, Patricia Owen, Kenneth Atkin, Jeff Rowley, Jaceson Maughan, Jinks Dabney, Stony Olsen, Cathy Dupont

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**(1) WELCOME.**

Jonathan Hafen welcomed the committee and guests. He stated the importance of the Labor Commission and committee's processes and thanked those who were in attendance to speak with the committee.

**(2) LABOR COMMISSION PETITION AND RESPONSE TO OBJECTIONS.**

Jaceson Maughan from the Labor Commission gave background. On May 18, 2016, the Supreme Court found the statutory provisions governing attorney fees for workers compensation to be unconstitutional. The Commission found that when only medical benefits or a small amount of compensation was at issue, without the ability to order attorney fees, workers were not able to obtain counsel. This was also a problem for the plaintiff's attorneys who could no longer accept cases. The Workers' Compensation Workgroup, which was created statutorily in response to the Supreme Court's decision, met at least 7 times in 2017 to discuss the issues and recommended a statutory change that would require attorney fees as allowed by a rule from the Supreme Court. This rule is now being presented to the Civil Rules Committee ("the Committee") as well as proposed legislation. Before the Committee are also two objections. Mr. Maughan said the objections to the rule rely on statements and motivations that the Commission contends are not true. Mr. Maughan said this is not a Labor Commission issue; all work was done as requested by the Legislature and there was broad representation in the Workgroup. He said the major concern is that currently a small group of injured workers do not have access to counsel.

Leslie Slaugh questioned how proposed new Rule 73A is procedural rule, although he has other concerns. He said he believed the setting of attorney fees was a substantive change to the law and

did not believe this was something the Committee could do. Mr. Maughan answered that the Court directed this. Mr. Slaugh questioned why the provisions of the rule were not a part of the statute. This rule would provide for an add-on award and is purely substantive.

Larissa Lee asked how the attorney fees worked before the decision. Mr. Maughan stated that the only part of the statute that was unconstitutional was the add-on fee, and so this will be the same. Before some fees were done through the add-on, and some were from the indemnity. Ms. Lee questioned who would be paying this.

Lauren DiFrancesco questioned how the math worked because the cases were for under \$5,000 indemnity with an undefined medical benefit and she was not sure how the amount could work as written in the rule. This was clarified that \$5,000 was only for the indemnity, but that the medical was additional. The add-on fee cap on these cases was then \$25,000.

Mr. Slaugh questioned if something in the statute limited attorneys from requesting a percentage of the medical fees. Dawn Atkin clarified that the defendants must pay the doctors' bills directly to the doctors, so no money can be taken by the attorney.

Susan Vogel asked for an example to clarify how this works. Phil Shell gave an example where a person gets hurt and ends up with a large medical bill, but he gets better in a month, so his indemnity is only \$3,000. He takes only 25% of the indemnity. Mr. Shell took a loss of 40% of his cases with this change as he could no longer take these for business purposes. With attorney fees as an add-on he is able to take more cases to help the workers.

### **(3) OBJECTIONS TO LABOR COMMISSION PETITION.**

Jinks Dabney stated that as proposed, the rule includes the regulation of his fees, which hurts his ability to practice law. The Rules of Professional Conduct cover agreed-upon attorney fees. The statute included add-on attorney fees but the Supreme Court determined that it is unconstitutional. He expressed concern that the rule will face a constitutional challenge because there are caps included in it. Mr. Dabney argued that under this rule there is a risk that he may take on a case where indemnity is under \$5,000, but in the course of the case, the indemnity amount rises. And if there is more indemnity, there are no fees for the attorneys. He argued this makes no sense, as the doctors should be paid, and in all cases (irrespective of the amount of indemnity), the carrier should have to pay the fees. The \$5,000 cap creates an unfair system.

Mr. Dabney said that if attorneys get the add-on attorney fees, it may not be ethical to demand additional fees for getting the client's medical bills paid. He also questioned if this rule would hinder abilities to get an attorney. The regulation of what the insurer pays impacts the fees of the attorneys. He did not believe that who paid the fees changed the acceptability of these limits.

Stony Olsen stated that it is important to understand that when the medical fee case is won, there is no real benefit to the client, only to the doctor. Because of this, the attorney is unlikely to be able to get fees from the client for that case. Paul Burke questioned whether there were no benefits to the client, as they would have been paying the bills themselves. Mr. Olsen stated that in most cases, the clients are not paying the bills themselves anyway.

Trystan Smith questioned how, practically, an injured worker would accrue the type of expenses discussed without having a party able to pay. Kenneth Atkin stated that when injuries happen, hospitals often take action without preauthorization. Mr. Smith also questioned whether the injured worker is waiting to get a medical procedure until the case is over. Mr. Olsen pointed out that often this occurs when the insurer states that the injury is not related, so it should not pay.

Heather Sneddon asked if the real problem they had with the rule was based upon the limit for the add-on. Mr. Olsen agreed that the limit being \$5,000 was putting too much of a limit on the attorney fees. Essentially, attorneys must work pro bono for the medical bills if the indemnity is over \$5,000. He questioned why there would be this block if the issue is access to justice for the worker. Mr. Slauch asked the objecting parties what they would like. He believed they were asking for attorney fees in any case. He again questioned if this was procedure. Mr. Dabney stated that the problem was just the \$5,000 limit, and that without it there would be more bills paid and attorneys could take cases. He believed that the add-on fee should always be available and separate from the indemnity question.

Lincoln Davies also questioned if this was a substantive question. Mr. Olsen said that in *Injured Workers Ass'n of Utah v. State*, 374 P.3d 14, the Supreme Court stated that the Court governs all attorney fees, which would include this rule. The Legislature may not have the power to create the caps and percentages. He agreed this was in part substantive, and pointed out that the rules of procedure don't even apply to these hearings. Mr. Slauch pointed out that the rules do claim to apply to all statutory proceedings. He also questioned why this should be different from other injury-type cases. Mr. Olsen reported that the Legislature may still create add-on fees. They are concerned that this would be the only fee the attorney can get. He also argued that this scheme is very close to the rules that the Supreme Court stated the Legislature could not create.

Mr. Peck questioned who could create this rule if not through this committee. Mr. Slauch argued that the statute should provide an add-on fee. This would not be regulating the fees the attorney could charge. Mr. Hafen stated that the Legislature stated there would be a fee, but could not create a cap. The Court is looking to hear the solution to this problem.

Judge Blanch stated that if the rules of civil procedure don't apply to workers compensation cases, this committee should not be involved. He then added that the default is that the prevailing party would get no fees without a statute. With a statute, they should get a reasonable fee. He questioned why this should be different from any other case. Judge Holmberg addressed why he thought this could not be done in a similar manner to personal injury. The medical expenses are paid based upon a schedule in workers compensation. Additionally, the medical providers must be paid by the insurance company, without going through the attorney. This is different than a personal injury case, where some of the fees go through the attorneys. Everything is statutory in workers compensation; attorneys cannot be creative in their solutions.

Ms. Atkin said that the reason it was different is because the Legislature must create another benefit for insurance companies to be required to pay. She then added that this would not work without limits, as it would not pass as a statute. The idea was a compromise to allow for some attorney fees, but not overly impact the insurance companies. Mr. Burke stated that the difference between the

standard was that all of this was occurring within a compromise creating workers compensation. Because this was done legislatively, additional compromise is required.

Mr. Burke then questioned whether there was also philosophical objection to the proposed rules and statutes. Mr. Olsen agreed with the philosophical idea behind the add-on fees. Currently, there is no penalty for denying a claim, and he believes there should be a penalty, and these fees could serve as one. The rule has changed since the objections were written. Judge Blanch questioned if it would be possible to create this fee without it being called an attorney fee. Calling it simply a fee would allow the attorneys to contract for this, without the Legislature limiting attorney fees. Mr. Davies stated that this would also help pro se litigants, as they would be able to keep those fees. The Court did say that they had the power to adopt a scheme for these fees.

Ms. Vogel asked who was affected by the add-on fee scheme: the attorneys; healthcare providers; or injured workers? Mr. Olsen said when a case is over there is no benefit to the injured worker because they never have to pay the medical bills themselves. Ms. Vogel questioned the accuracy of Mr. Olsen's assertion regarding the medical debt. She then questioned if the injured worker would be able to recover the add-on fees that would go to the attorney if they proceeded without one.

Ms. DiFrancesco repeated her question as to what was being requested by those objecting. She also asked if the fees would be increased if the bills continued past the resolution of a medical benefits case. Ms. Atkin reported that the fees would not continue to accrue past the conclusion of the case; only the bills accrued before the conclusion would be included. Mr. Dabney said he did not object to the language of proposed rule 73A, however, he would remove the indemnity limit in the statute. He added that he believed the Court was saying a statutory fee was acceptable, but the regulation on the amount was not.

Judge Stucki questioned if the Legislature has ceded its authority to this committee, which would solve the problems with the substantive issues. Mr. Dabney stated he had asked the Legislature to go as far as he believed they could. He believed that the amount of the fee must be created by the court. Judge Stucki stated that this would mean that the question of when the add-on fees were allowed would not be the purview of this committee. Judge Blanch said that the Legislature is allowed to create a fee, but not regulate the fee. The problem is the cap is required as a practical matter with the insurance companies.

Dennis Lloyd from Workers' Compensation Fund (WCF) said he did not speak for the entire industry. He said, however, that an expansion of the indemnity amount was beyond the scope of the legislatively-created committee's charge. He said WCF may not be able to support such a proposal. The scope of this rule was dramatically changed in this discussion. Mr. Smith questioned what the costs would really be. Mr. Lloyd reported that this would change the marketplace, and the rates would be changed. Some may even leave the market all together. Mr. Slauch asked if the fee is already allowed by the statute. Mr. Lloyd stated the Workers Compensation Fund had supported the statute, but only because of the compromises. Mr. Lloyd may support a capped fee, but without removing the \$5,000 indemnity limit.

Mr. Hafen closed this discussion and thanked everyone for their participation. He said that the committee will discuss this further and make a recommendation to the Supreme Court about next steps.

**(4) APPROVAL OF MINUTES.**

Mr. Hafen asked for approval of the September minutes. Judge Stone moved to approve them; Judge Stucki seconded. Ms. Vogel requested that page 5 reflect that not all pro se litigants have or provide email addresses, but those who create OCAP accounts are required to provide emails. The motion passed as amended by Ms. Vogel.

**(5) FINALITY: CIVIL RULES 73, 58A AND APPELLATE RULE 4.**

Judge Mettler reported that the Civil Rules Committee had discussed and approved a version of Rule 58A and Appellate Rule 4 at the last meeting. However, the Appellate Rules Committee did not agree with the recommended changes. The joint subcommittee met and discussed a fix to the finality issues raised by *McQuarrie v. McQuarrie*, 2017 UT App 209, and *Chaparro v. Torero*, 2018 UT App 181, by amending Utah Rule of Civil Procedure 73 to control all requests for attorney fees. Judge Mettler said she believed that the ruling was not so narrow. The consensus was that even if Rule 58A and Appellate Rule 4 were changed, Rule 73 must be changed. The changes were proposed, along with a committee note. The joint committee requested additional instruction from the Court regarding the scope of the requests, as they proposed two options: an option that tracks the federal rules and an option that is consistent with the current finality scheme. Mr. Slauch clarified that this would still only apply to post-judgment fees, not to those fees which can be awarded by a jury. Ms. Vogel proposed under paragraph (d) changing “filed” to “served,” as a pro se litigant doesn’t know when things are filed, only when they are served. Judge Blanch argued that in most cases, and soon all cases, service and filing would occur at the same time. He also stated that filing dates are clear and known to the court. Mr. Slauch moved that the committee accept the Rule 73 amendments as shown below and present proposed Rules 58A and Appellate Rule 4 to the Court once the Appellate Rules Committee has had a chance to weigh in. Paul Stancil seconded. The motion passed.

**Rule 73. Attorney fees.**

(a) **Time in which to claim.** Attorney fees must be claimed by filing a motion for attorney fees no later than 14 days after the judgment is entered, except as provided in paragraph (f) of this rule, or in accordance with Utah Code § 75-3-718, and no objection to the fee has been made.

(b) **Content of motion.** The motion must:

(b)(1) specify ~~the judgment and~~ the statute, rule, contract, judgment, or other basis entitling the party to the award;

(b)(2) disclose, if the court orders, the terms of any agreement about fees for the services for which the claim is made;

(b)(3) specify factors showing the reasonableness of the fees, if applicable;

(b)(4) specify the amount of attorney fees claimed and any amount previously awarded; and

(b)(5) disclose if the attorney fees are for services rendered to an assignee or a debt collector, the terms of any agreement for sharing the fee and a statement that the attorney will not share the fee in violation of Rule of Professional Conduct 5.4.

(c) **Supporting affidavit.** The motion must be supported by an affidavit or declaration that reasonably describes the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work, and establishes that the claimed fee is reasonable.

(d) **Liability for fees.** The court may decide issues of liability for fees before receiving submissions on the value of services. If the court has established liability for fees, the party claiming them may file an affidavit and a proposed order. The court will enter an order for the claimed amount unless another party objects within 7 days after the affidavit and proposed order are filed.

(e) **Fees claimed in complaint.** If a party claims attorney fees under paragraph (f), the complaint must state the basis for attorney fees, cite the law or attach a copy of the contract authorizing the award, and state that the attorney will not share the fee in violation of Rule of Professional Conduct 5.4.

(f) **Fees.** Attorney fees awarded under this rule may be augmented upon submission of a motion and supporting affidavit meeting the requirements of paragraphs (b) and (c) within a reasonable time after the fees were incurred, except as provided in paragraphs (f)(1), (f)(2) and (f)(3), and only where the augmented fees sought exceed those already awarded.

(f)(1) **Fees upon entry of uncontested judgment.** When a party seeks a judgment, the responding party does not contest entry of judgment by presenting at a hearing either evidence or argument, and the party seeking the judgment has complied with paragraph (e) of this rule, the request for judgment may include a request for attorney fees, and the clerk or the court shall allow any amount requested up to \$350.00 for such attorney fees without a supporting affidavit.

(f)(2) **Fees upon entry of judgment after contested proceeding.** When a party seeks a judgment, the responding party contests the judgment by presenting at a hearing either evidence or argument, and the party seeking the judgment has established its right to attorney fees, the request for judgment may include a request for attorney fees, and the clerk or the court shall allow any amount requested up to \$750 for such attorney fees without a supporting affidavit.

(f)(3) **Post Judgment Collections.** When a party has established its entitlement to attorney fees under any paragraph of this rule, and subsequently:

(f)(3)(A) applies for any writ pursuant to Rules [64](#), [64A](#), [64B](#), [64C](#), [64D](#), or [64E](#); or

(f)(3)(B) files a motion pursuant to Rules [64\(c\)\(2\)](#) or [58C](#) or pursuant to [Utah Code § 35A-4-314](#),

*the party may request as part of its application for a writ or its motion that the party's judgment be augmented according to the following schedule, and the clerk or the court shall allow such augmented attorney fees request without a supporting affidavit if it approves the writ or motion:*

Action	Attorney Fees Allowed
Application for any writ under Rules 64, 64A, 64B, 64C, or 64E, and first application for a writ under Rule 64D to any particular garnishee;	\$75.00
Any subsequent application for a writ under Rule 64D to the same garnishee;	\$25.00
Any motion filed with the court under Rule 64(c)(2), Utah Code § 35A-4-314, or Rule 58C;	\$75.00
Any subsequent motion under Rule 64(c)(2), Utah Code § 35A-4-314, or Rule 58C filed within 6 months of the previous motion.	\$25.00

(f)(4) **Fees in excess of the schedule.** If a party seeks attorney fees in excess of the amounts set forth in paragraphs (f)(1), (f)(2), or (f)(3), the party shall comply with paragraphs (a) through (c) of this rule.

(f)(5) **Objections.** Nothing in this paragraph shall be deemed to eliminate any right a party may have to object to any claimed attorney fees.

[Advisory Committee Notes](#)

New 2019 Committee Note

Rule 73 has been amended in response to *McQuarrie v. McQuarrie*, 2017 UT App 209, and *Chaparro v. Torero*, 2018 UT App 181, to clarify that it applies to all motions for attorney fees, not just post-judgment motions.

**(6) OTHER BUSINESS, COMMITTEE NOTES.**

Ms. Sylvester introduced the subcommittee assignments for the committee notes and the subcommittees were asked to be ready with their recommendations by the first meeting of 2019. The committee will take 30 minutes each meeting to review the proposals until they are done.

**(7) ADJOURNMENT.**

The remaining matters were deferred and the committee adjourned at 7:00 pm. The next meeting will be held on November 28, 2018 at 4:00 pm.

4813-0783-3984, v. 1