

**HM83 Task Force
In Person Meeting
November 7, 2023; 11:30 – 11:30**

Attendance:

Michael Holt, WCA General Counsel and Director’s Designee

Ben Sherman – Workers’ Attorney

Kathryn Lueker-Eaton – Workers’ Attorney

Victoria Bratton- Injured Worker

Marsha Schmidt - Injured Worker

Chris Elmore - E/I Attorney

Megan Kuhlman - E/I Attorney

Johnna Padilla – Employer (SPO)

Matt Sanchez – Employer (Jaynes Corp.)

Dan Giralmo – Insurer (NM Mutual Casualty)

Michael Hamsing for Randy Akin - SI Group
(Builders Trust of NM)

Jeffrey Steele - Ironworkers Local 495

Greg Montoya - IAFF Local 244

(Highlighted names did not attend)

Non-Task Force Members

Ruili Yan – Economic Bureau

Rinda Dewhirst, WCA GC Paralegal

Charles Cordova – Economic Bureau

Megan Aragon, WCA GC Paralegal

Diana Sandoval-Tapia, WCA PIO

Michael Holt – WCA General Counsel and Director’s Designee

Introductions...

Michael Holt – We (WCA General Counsel and the Economic Bureau) have been working on the attorney survey. It was emailed out in mid-October. Prior to this, we worked with the task force’s 4 attorney members to finalize it. WCA decided that, as an agency, there was no good way to formulate a different survey and send it out to carriers. This was Dan Giralmo’s idea from last meeting. However, it proved difficult to identify a sufficient pool of claims’ individuals to make it a statistically significant survey. Also, there will be more opportunity for the carriers to have their input into whether or not to do an attorney fee cap raise or not as the task force and future legislative process moves forward. Mike thinks we are in the second inning only of where this attorney fee issue may be going. After the task force writes its report, it will go to the advisory council and maybe a bill is introduced, or maybe not. The foregoing decision (to not do a second survey) was a WCA decisions that was made since our last task force meeting. Another decision that the WCA made was that we could not do a deep dive into

specific attorney fee cap cases. WCA just does not have the resources to do such a deep dive at this time. Maybe the WCA can do this in the future but, between now and when the task force has to finalize its report, the WCA does not have the ability to do the deep dive. Plus, with the attorney survey, everyone will see some of the drivers of the fee cap cases.

Charles, is the survey still open or closed?

Charles Cordova – Technically we closed on November 3rd, but he left it open in case we had late arrivals but no more came in.

Michael Holt – Today’s handouts are abbreviated because the WCA is working towards the WCA website having a “task force” tab. We expect to post anything he has handed out such as agendas, meeting notes, other items, but with the important exception of the raw data we received from the carriers - we are treating that data as confidential. The WCA Director has the legal authority to ask carriers for this data, but the data is protected by statutory confidentiality. WCA is creating this task force webpage because there is a lot of interest out there in the task force’s work from WC attorneys and carriers. One thing we can do as an agency is put the information out there so the public can see the work of the task force, not merely its conclusions or recommendations.

The report on the TV screen, which is also part of the handout, is part of the Economic Bureau’s attorney survey analysis. Our Economic Bureau is not attempting to suggest any conclusion from the attorney survey responses received. Instead, it is a pure economist’s view of the survey’s results. This is the survey of the lawyers who are just one stakeholder in this process, so keep that in mind; the carriers and the employers may have a different opinions on these questions that were posed to the WC bar.

There were roughly three hundred and fifteen emails that went out for this survey, and we received back about two hundred and seventy-two, that correlates to a 30% response rate, if I’m wrong, I’ll let Charles respond.

Charles Cordova – He does have a correction: WCA sent out three hundred-fifteen but some of them bounced back due to invalid email addresses. Two hundred and seventy-two went through and were received. He does not know if they were opened but they did not bounce back to the WCA. Of those, the WCA received back (eighty-one responses), only seventy-four were attorney who were practicing workers’ comp in New Mexico. The rest of them were screened out. We have a 29.8% survey response rate, which is the eighty-one out of the two hundred and seventy-two and the two hundred seventy-two is the actual valid response rate that are margin of error is based off of. He would also note the margin of error is for the questions everyone answered, if you are looking at the

cross tabs in there that is going to have a larger margin of error because it obviously a sample of a sample.

Michael Holt – What is up on the screen now is about a seventy-five-page document; he only printed about 10-12 pages of it. The survey results will be posted on our website. He gives kudos to Kate for coming up with this idea and to Charles who is a survey guru. Per the pie chart, WCA received a bigger response on the worker side than the employer side (54% to 39%). There are some people who do both worker and employer sides, but the practice ratio was so extreme in one direction or another that the WCA was able to pigeonhole those responses into the worker side or the employer side.

Jumping forward to question 4a -average hour lost per case (last three years): workers side was about ninety hours; defense side was sixty-seven hours. Doing some basic math: if we assume a \$250 hourly billing rate, money lost in theory was about twenty-two thousand lost per year, per attorney on the worker side, and about sixteen thousand on the employer side. That is a big picture of what attorneys are losing or what is being suggested according to the data.

The next slide is not on the handout but I wanted to bring attention to it: we asked what should the fee cap increase be, if any? One of the choices is no fee cap at all, we received 31% of respondents said there should be no fee cap. He and Charles were talking before this meeting, and they are going to break this down to the employer side and worker side before they post the final survey on the WCA website.

Victoria Bratton – Her husband and her were talking about this task force, she received an article that there's a case before the supreme court to throw out the fee caps, is that correct?

Michael Holt – It is Mr. Hanrahan's case – there are two different cases with the same issue. General Counsel wrote a friend of the court brief on that issue. The cases were in the appellant court, but they punted it up to the supreme court. If Mr. Hanrahan is successful in those cases, the court may throw out the \$22,500 fee cap as unconstitutional.

This next slide is not in the handout material, but we will get this posted to our website soon enough. Roughly 30% of respondents thought we should have no fee cap at all. WCA also asked that, if we could raise the fee cap, what amount would you raise it to? The consensus response was between ten to fifteen thousand dollars. The worker side wants it raised more than the employer side. The employer side said raise it by \$10,000; the worker side by \$15,000. If you put this into perspective regarding where the Bob Scott bill was at, the bill suggested a raise of around that \$10,000 range.

Dan Giralmo – In his opinion, that is a big jump.

Michael Holt – This next slide asks if the fee cap should be increased at all? The response: a very strongly agree - a 77% response rate that said it should be raised. He thinks that is significant if we ever come to a consensus on this issue.

Question 7: New judicial Discretion to award fee cap increases: workers' attorneys responded as "yes"; employers' attorneys were 44% in favor and 56% against.

Question 8: Refusal of clients due to fee cap: Regarding an access to justice issue, the opinion is stronger on the worker side than the employer side.

Charles Cordova – One thing he wanted to mention was the outliers in the center one, there were only nineteen responses for that category for this question, of those three of them were above one hundred and fifty, if you cut those out it drops way down. In addition, we do not know why they put that many responses, the question should be if a worker was turned down because of the fee cap but there is a possibility the responses were because anybody was turned down. The data for that question was questionable in his opinion; that is why he wanted to point out the outliers in it.

Michael Holt – The next question 10: Average discovery limit cases in the last 3 years by amount exceeded. There is a difference of opinion between workers side vs. employer side, the left side of the chart tends to suggest how many cases in the last three years the discovery limit was exceeded, it is not a lot. These are three-year averages, right?

Charles Cordova – Total in three years, he did not annualize it.

Michael Holt – It is not annualized but there is not a lot of cases that exceeded the three thousand dollars limit according to our results. And, if it was exceeded, it was not by that much.

On the right side, question 11 if we raise it, how much? The breakdown: 33% say raise it to \$5,000, 16% says to raise it to \$1,700, 17.6% says to raise to \$10,000 and 27% says to keep it as it is. Data suggests: if there is going to be an increase of the \$3,000 limit, survey suggests it should be modest.

Question 12: Please include any additional comments you would like to share with the HM83 task force on attorney fee caps. The comments make for a fun read in terms of what attorneys are thinking on whether it should be raised or not.

The entire document to be posted will have the economic bureau's (Charles) analytical workup, and it also has the survey instrument the actual survey we sent out. Also, when we post it, it will have all the textual responses; people will be able to read what everyone had to say in terms of when the survey asked for narrative comments.

Victoria Bratton – She has an obscure question, does the cost of living take account in all this?

Michael Holt – No, on the \$22,500 fee cap; it was last raised in 2013. That is the problem that lawyers are talking about. Inflation does not stop for them; \$22,500 is frozen in time. That appears to be the consensus of the lawyers on why it needs to be raised. There is no real mechanism in our statute for it to adjust.

Charles Cordova – He would also mention the open-ended verbatim responses and also his mathematical analysis the responses indicate that there is a fair amount of people saying that it should be tied to inflation in some manner.

Michael Holt – If everyone remembers the last meeting, we had a handout of the economic data in a preliminary report that we provided to the task force. Charles is working on another project – a “Data Dashboard” which will tabulate and display the economic data WCA received from the data call. The introduction page explains what it is and what it is not; the next page is all the data we received - a sample size of about 5300. We originally received about 90,000 data points. Charles derived a representative study sample of roughly 5300 data points over 2013-2022 period. Charles deserves all the credit for creating this dashboard. What is cool about this dashboard is that, well after the task force is concluded, this information will be out there. Charles is still updating this dashboard; and WCA is thinking of the week of Thanksgiving before the holidays to go live with the dashboard on the task force webpage.

Dan Giralmo – Good job putting this together.

Charles Cordova – When he built the attorney survey invite/email list, it was anybody who was active on any claim or case number that had a pleading of any kind filed at the WCA in the last three years - that was the 315 number including all those people that have been listed once in our database in the last three years on a single case. The ones that had 10 or more matters like separate claim numbers was about 120 (if he’s remembering correctly off the top of his head) that had 10 or more within 3 years or on an average of 3-4 cases a year.

When they received the data call, they received ten sets of data from 10 different companies and each of them was different. Some of them were able to separate workers attorney’s fees vs. employer’s attorney’s fees in terms of what was actually paid. For some of the organizations their systems did not allow them to separate out legal fees by what was paid to each attorney; in those instances that total legal cost included not only attorney fees but anything related to legal fees, some of which is not applicable to the cap because it is not an attorney fee.

Kathryn Lueker-Eaton – for example paralegal fees?

Charles Cordova – Paralegals would be applicable to the cap because that is what is being paid to the attorney. That could also include depositions, discovery fees (it was a long list, he would need to go back and review all we received that could be included in total legal fees). Some of these companies gave them “just legal” with no breakdown whatsoever.

He wants to mention this is not an analysis tool, it is a visualization tool. It is about transparently showing people what the data the WCA is looking at, it is a little bit wonky. If you want to know what is in this data, you can only simplify it.

Michael Holt – He (Mike) does not know if the task force has to do another in-person meeting. He does not know how everyone else is feeling about this. In December we can do a zoom meeting. He wants to post on our website everything but the raw data, that is again confidential.

In January, the task force will need to put pen to paper regarding our report. He is thinking about what it needs to include: the history of the fee cap; where did it come from; why do we have one; how the legislature came up with it; and since initiated its been raised a few times. It should explain how WCA judges award attorney fees - the Fryer factors, right? There is going to be the economic data component and attorney survey component and what that all suggests. Then, at the end, there will be task force recommendations. Who wants to volunteer to help write this.

Victoria Bratton – Do the “dabbler” attorneys affect the data?

Michael Holt – We have tried to differentiate those folks from the regular workers comp attorneys. With any set of statistics, we should be careful. He (Mike) is not fearful of the task force asserting something that has not been established. We can only say what the data suggests.

Kathryn Lueker-Eaton – She is glad to hear Mike say “what the data suggests” because she does not feel like it represents a complete picture; she does not want to disparage the work we have done. It is obvious this has been an enormous project. From the practice of a sole practitioner, pretty much exclusively does this, she does not have time to track her billable hours. She only starts to keep track of cases that go into litigation. She does not keep track of cases when she turns one away. She knows of two cases from 2006 that the previous attorney never got paid but also never settled it so she thinks there is a lot that is not fully captured by the numbers. She thinks the issue if the fee cap could be an artificial barrier that forces settlement. Only workers have to get approval from a Judge for their fees. It is not just a numbers issue; it is a political issue, too. One of the comments from the handouts (#18) the response: “Our legal system, courts, and the legislature trust in the ethics and professionalism of lawyers, in all areas except for workers’ compensation.” She would add there is

no other level of scrutiny that she is aware of on employee's attorneys. She does not get paralegal fees when she settles a case, and she knows employer's attorney's do. She thinks it's not only a number issue but a due process consideration and only one party has to sing for their fee; it is apparently flawed.

Chris Elmore – The worker is not paying his fee though, that's the difference. We are paying half of your fee, and you are taking some from the worker. We have to make sure the attorney is not taking advantage of the worker and that is why it has to be approved.

Kathryn Lueker-Eaton – That is a good point.

Michael Holt – He agrees there are issues.

Kathryn Lueker-Eaton – What she is trying to say is why should there be a difference on how worker's attorney gets paid vs. employee's attorney. She understands what Chris is saying.

Michael Holt – When you go through this attorney survey, you are going to have a lot of confidence in it, especially when you read the comments. It is very representative.

Is there a consensus of meeting in person or is a zoom meeting good? December 12th at 11:30? Our office will set up the zoom meeting. He wants to confirm we have everything up on the task force portal and then talk about an outline for what is going to go into the report. He will have to rely on Charles to put in plain language what this data suggests and what it does not. He will ask for volunteers to write up certain sections; the task force has until April 30, 2024, to get it done. A lot of leg work has been done. He said in the beginning there were a lot of limitations to what the task force can and cannot accomplish.