

OSIA & AOI SYNOPSIS OF HB 2764

PROPOSED CHANGES	AREAS OF AGREEMENT	AREAS OF DISAGREEMENT
<p>Policy Change: Adds new objective to the Act of ensuring injured workers have access to adequate representation to obtain full benefits allowed. (Section 1(1)(c))</p>	<p>Management would recommend adding proposed Section 1(1)(c) to existing Section 1(1)(b): “and ensuring injured workers have access to adequate representation when needed.”</p>	<p>Management opposes the proposed wording of the provision because the goal of the Act is to provide fair and reasonable benefits.</p>
<p>Policy Change: Adds new policy that, in recognition of exclusive remedy, the Act shall be interpreted to allow benefits if a reasonable reading of the law would allow. (Section 1(4))</p>		<p>Management strongly opposes adopting the proposed new policy statement “recognizing the exclusive remedy” and interpreting the Act to allow benefits if reasonable. (Section 1(4))</p>
<p>Adds Interest Provision for Penalties, Fees and Costs that are stayed pending appeal. (Sec 4)</p>	<p>Management would support adoption of a compromise provision that allows for interest paid on accrued attorney fees awards and costs that are withheld pending appeal.</p>	<p>Management disagrees penalties should accrue interest. Management also disagrees with wording that equates attorney fees, costs, and penalties to “benefits”.</p>
<p>Creates New Basis for Attorney Fees: Investigation This provision would create a new hourly attorney fee for efforts a worker’s attorney expends in scheduling, preparing for, or attending any investigative process. (Sec 2)</p>	<p>Management would recommend adopting a <u>compromise</u> of the OTLA proposed provision that would create a new hourly attorney fee for a worker’s attorney’s <u>attendance</u> at a deposition or recorded statement of a worker when the insurer/employer has an attorney present.</p>	<p>As originally proposed, the provision has too broad an application and would impede the routine, early investigation conducted on claims and greatly increase claims costs with only speculative benefit to workers. The proposed OTLA amendment remains too broad, as it vaguely applies to “all efforts” and any interviews, not those formal statements or depositions conducted by attorneys.</p>

<p>Creates New Basis for Attorney Fees: Reclassification Adds an assessed attorney fee award for a worker's attorney who is instrumental in obtaining reclassification of a claim from nondisabling to disabling before the Director. (Sec. 3(1))</p>	<p>Management would recommend adopting this new assessed fee in Section 3(1) as a matter of good policy, so that when a worker's attorney is instrumental in obtaining reclassification of a claim before the Director, the attorney is paid for those efforts, but would make the amount pursuant to the Director's rules.</p>	
<p>Creates New Basis for Attorney Fees: Temporary Disability Benefits. Adds an assessed attorney fee award for a worker's attorney who is instrumental in obtaining temporary disability benefits (wage replacement benefits). (Sec. 9, 10)</p>	<p>Management would recommend adopting an assessed attorney fee award for a worker's attorney who is instrumental in obtaining temporary disability benefits (wage replacement benefits).</p>	
<p>Creates New Basis for Attorney Fees: Proceedings before MCO. Adds a fee award for representation during MCO proceedings. Also adds provision that an attorney fee awarded by the Director must include all work performed on the claim before the proceeding, not just for the proceeding itself. (Sec. 6)</p>		<p>Management does not agree with a fee for representation during MCO proceedings, and also believes the provision too broadly seeks to obtain a fee for everything done on a claim without relation to the issue in litigation.</p>
<p>Creates New Basis for Attorney Fees: Partially prevailing regardless of overall outcome. Removes requirement that an attorney fee is awarded only if compensation to worker is not disallowed or reduced. Adds language that if an insurer or employer initiates a request for hearing or appeal on any issue, and the insurer/employer does not prevail on all issues raised regardless of the decision on the merits, a reasonable attorney fee is awarded. (Sec. 5)</p>	<p>Management would recommend adopting a <u>compromise</u> provision that would allow a proportionate attorney fee when the insurer/employer initiates litigation and a worker's attorney is instrumental in maintaining or increasing some element of compensation, even if other elements are reduced or disallowed and the net outcome is a decrease in compensation. The proposed OTLA amendment is essentially the compromise provision proposed by Management, except that it still includes prevailing on attorney fees, costs, or penalty issues as an independent basis for more attorney fees.</p>	<p>Management does not agree that prevailing on an attorney fee, cost, or penalty issue should result in an additional fee. Such a provision does not benefit injured workers but would increase litigation.</p>

<p>Creates New Basis for Attorney Fees: For litigation over attorney fees, penalties & costs. Adds prevailing in part on an issue of “attorney fees, penalties or costs” as a new basis for a reasonable attorney fees. (Section 5(2)) Adds finally prevailing on disputes over “attorney fees, penalties or costs” as a new basis for an award of an attorney fee before the Director or issues under the Director’s purview. (Sec 6(1)) Adds prevailing on a claim for increased penalties and costs as a basis for a reasonable assessed attorney fee. (Section 7(4))</p>		<p>Management opposes the proposed insertion of penalties or attorney fees awarded based on litigation of attorney fees, penalties or costs. These “fees on fees” provisions give no benefit to workers but will greatly drive up litigation and claim costs.</p>
<p>Creates New Basis for Attorney Fees: For delay or refusal to pay attorney fees, penalties & costs. Adds “delay or refusal to pay attorney fees, penalties, or costs” as new basis for a penalty (Section2(11)(a)) Adds refusal to pay “attorney fees, penalties or costs” due under an order as a new basis for an attorney fee award. (Section 5(1), Section 6(2))</p>		<p>Management opposes the proposed insertion of penalties or attorney fees awarded based on attorney fees, penalties or costs. These are not compensation or benefits to workers, and should not be equated to benefits.</p>
<p>Removes Statutory Caps on Attorney Fees. Removes caps for attorney fees related to obtaining penalties for unreasonable claim processing. (Section 2(11)(a)). Removes caps for attorney fees related to disputes before the Director. (Section 6(1)).</p>		<p>Management opposes the removal of the cap as bad policy. In 2009, the cap was raised to \$3000 plus an annual increase based on increases made to average weekly wage (essentially a COLA increase). The cap provisions all include an exclusionary clause that allows an extraordinary fee above the cap when the Director or ALJ feels the cap should not apply.</p>

<p>Changes the Factors Considered in Assessing Fees</p> <p>Removes proportionality to benefit in fees related to obtaining penalty for unreasonable claim processing. (Section 2(11)(a))</p> <p>Requires consideration of the contingent nature, necessity of giving workers broad access to attorneys regardless of amount at issue, and equitability in the aggregate to fees earned by attorneys for insurers and employers. (Section 8(5))</p>	<p>Management would support adoption of a <u>compromise</u> provision to Section 8(5) that states that among other factors, the contingent nature of the practice, is a factor to be considered in setting fees. The proposed OTLA amendment to Section 8(5) is largely the compromise provision proposed by Management.</p>	<p>Management disagrees with the removal of proportionality requirement.</p> <p>Management does not want the originally proposed concept of an “aggregate” of fees earned by insurer/employer attorneys to be part of the factor; the factors should relate to the issue being litigated, not general statistics.</p>
<p>Declares Emergency & Make Changes Retroactive</p> <p>Applies to any claim for which an order is not final. (Section 11). Declares emergency, effective on passage. (Section 12)</p>	<p>Management would propose that the new legislation be effective 1/1/16 and apply to all litigation initiated after that date.</p>	<p>No plausible emergency has been presented by OTLA that would support the emergency clause. Management strongly opposes the retroactive application of the law, as it creates unfunded or underfunded liabilities, disrupts or undermines litigation in process, and violates constitutional due process protections.</p>