Agenda 1 of 2

Advisory Committee on Rules of Civil Procedure

October 24, 2018

5:00 to 7:00 p.m.

Scott M. Matheson Courthouse

450 South State Street

Education Room

Administrative Office of the Courts, Suite N31

Welcome, introductions.		Jonathan Hafen, Chair
Labor Commission Petition and Response to Objections	Tab 1	Chris Hill, Ron Dressler, Jaceson Maughan
Objections to Labor Commission Petition	Tab 2	Virginius “Jinks” Dabney, Stony Olsen
Proposed New Rule 78A	Tab 3	Committee

Committee Webpage: http://www.utcourts.gov/committees/civproc/

Tab 1

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IN THE UTAH SUPREME COURT

IN RE: **UTAH LABOR COMMISSION** Petitioner.	Petition For A Rule To Award Attorney's Fees In Medical-Only Workers' Compensation Cases

Pursuant to Supreme Court Rule of Professional Practice 11-104(1), the Utah Labor Commission (the "Commission"), by and through its General Counsel, petitions the Court to adopt a rule to award attorney's fees in medical-only workers' compensation cases.

On May 18, 2016, the Court issued a decision in *Injured Workers Ass'n of Utah v. State*, 374 P.3d 14, wherein the Court held that the "state constitution explicitly grants the supreme court the exclusive authority to govern the practice of law[]", "[t]he regulation of attorney fees undoubtedly falls within the practice of law[]", the supreme court "cannot delegate the power to govern the practice of law to the legislature or the Labor Commission[]", and "Utah Code section 34A-1-309 and Utah Administrative Code

R602-2-4(C)(3) violate both article VIII, section 4 and article V, section 1 of our state constitution, and are therefore invalid encroachments upon the powers of the judiciary." *Id.* at 24.

Prior to the Court's decision in the *Injured Workers* case, attorney fees were awarded to attorneys representing injured workers by the Commission, with the authority to do so coming from statute. Attorney's representing injured workers in any workers' compensation claims received their fees out of the compensation awarded to the injured worker. The legislature passed Utah Code §34A-1-309 which delegated the authority to regulate these fees to the Commission. In Utah Administrative Code R602-2-4(C)(3) the Commission created a sliding scale fee schedule and a cap on the amount of attorney fees for these attorneys. Both this statute and the administrative rule were invalidated as unconstitutional by the Court's decision in the *Injured Workers* case.

The *Injured Workers* case created an issue for injured workers in medical-only cases in that it made it very difficult for those injured workers to adequately obtain legal representation. Traditionally, in the workers' compensation area of law, the term "medical-only case" refered to a workers' compensation case where only medical fees were at issue, or where there were medical fees and a limited amount of indemnity benefits at issue. This amount was up to $4,000 pursuant to Utah Code Ann. §34A-1-309(4)(a)(iv), which was the statute the Court found to be unconstitutional in the *Injured Workers* case.

After the *Injured Workers* decision, injured workers are now required to obtain legal representation by paying legal fees either out-of-pocket or by using the award of limited indemnity benefits from the case. There are no additional indemnity benefits, or very limited indemnity benefits, awarded in these type of cases where only medical benefits are at issue. This has caused a hardship for injured workers to obtain legal representation in medical-only cases.

In the 2017 Utah Legislative Session, Senate Bill 170 was passed which created a workgroup to review and make recommendations regarding numerous issues dealing with workers' compensation. This bill became Utah Code Ann. §34A-2-107.1. The workgroup was made up of the Labor Commissioner, a member of the Senate, a member of the House of Representatives, four representatives of the workers' compensation insurance industry and four representatives from labor. One of those issues was "the award of attorney fees in workers' compensation cases, including a draft rule to propose to the Utah Supreme Court[.]" Utah Code Ann. §34A-2-107.1(7)(a).

The workgroup met several times throughout the interim period after the 2017 Utah Legislative Session and discussed the several issues set forth in Utah Code Ann. §34A-2-107.1. Regarding the attorney fee issue in workers' compensation cases, all members of the workgroup had input on and agreed with the draft of the Attorneys Fee Rule attached hereto as Exhibit A.

In the 2018 Utah Legislative Session, Senate Bill 92 was passed which amended Utah Code Ann. §34A-1-309 to state, "For an adjudication of a workers' compensation

claim where only medical benefits are at issue, reasonable attorney fees may be awarded in accordance with and to the extent allowed by rule adopted by the Utah Supreme Court and implemented by the Labor Commission." Utah Code Ann. §34A-1-309. Exhibit A attached hereto is the draft of the proposed Utah Supreme Court rule which was agreed to by the Senate Bill 170 workgroup, the Commission and the Workers' Compensation Advisory Council.

Summary of New Rule

Members of the Senate Bill 170 workgroup, representing injured workers, workers' compensation insurance companies, the Commission and the Utah Legislature, met several times during 2017, agreed to and drafted the proposed rule regarding the award of attorney fees in medical-only workers' compensation cases.

The proposed rule is for medical-only cases where the workers' compensation carrier, self-insured employer or Uninsured Employers' Fund has unconditionally denied liability for medical expenses that are later ordered to be paid or are accepted by the carrier, and the indemnity compensation at issue is less than $5,000.00. *See* Exhibit A, lines 1-5. If these conditions exist, then the rule will allow the Commission to award an add on fee for the injured workers' attorney. *Id.* at lines 5-6. This add on fee will be 25% of the cost of the medical expenses ordered to be reimbursed, paid or accepted by the carrier. *Id.* at lines 6-7. The add on fee is capped at $25,000.00 for all legal services rendered through a final order of the Commission, at $30,000.00 for all legal services rendered through an appeal before the Utah Court of Appeals, and at $35,000.00 for all

legal services rendered through an appeal before the Utah Supreme Court. *Id.* at lines 11-18.

The proposed rule also contains definitions of indemnity compensation "at issue" as well as "unconditional denial." *Id.* at lines 22-24 and 31-33. Further, the proposed rule allows for an adjustment of the fee caps every five years beginning on July 1, 2020. Id. at lines 34-37.

The Commission believes that this proposed rule will protect injured workers and allow them to more easily obtain legal representation in cases where they have been unconditionally denied medical expense liability by their workers' compensation carrier or self-insured employer who were later ordered to pay such liability. This proposed rule will allow the injured worker to be awarded and retain the medical costs he/she was originally denied, and allow for that injured worker to more easily obtain legal representation where there is an add on attorney fee provision in medical-only cases.

The anticipated effect of the proposed rule is that it will put the parties in medical-only cases back to the same or similar position they were in prior to the *Injured Workers* case. Injured workers in medical-only cases will now be able to more easily obtain legal representation because of the opportunity to be awarded the add on attorney fee. Injured workers will not have to come up with money out-of-pocket or use the limited award of indemnity benefits.

Additionally, representatives from all sides of this issue agree that the proposed rule should be enacted, including: representatives of workers' compensation insurance

carriers, self-insured employers, attorneys representing injured workers, attorneys representing workers compensation insurance carriers, state legislators, and representatives of the Commission.

Conclusion

The Commission respectfully submits this Petition For A Rule To Award Attorney's Fees In Medical-Only Workers' Compensation Cases in an effort to put the parties back to the same position they were prior to the *Injured Workers* case, and more easily allow injured workers to obtain legal representation under the narrow circumstances outlined in the proposed rule.

DATED this 4th day of June, 2018.

Christopher C. Hill
Utah Labor Commission General Counsel

EXHIBIT A

Add on Attorney Fee

1. In cases where the workers' compensation carrier, self-insured employer, or Uninsured Employers' Fund has unconditionally denied liability for medical expenses that are later ordered to be paid or are accepted by the carrier, and indemnity compensation at issue is less than $5,000, the Commission may award an add-on fee to the injured worker's attorney. The add-on fee is 25% of the cost of medical expenses (or any specific medical treatment) ordered to be reimbursed/paid or are accepted by the carrier after an unconditional denial.

2. The following caps shall apply to add-on fees paid by the workers compensation insurance carrier:

   a. For all legal services rendered through final Commission action, the add on fee shall not exceed $25,000.

   b. For all legal services rendered in prosecuting or defending an appeal before the Utah Court of Appeals, the add-on fee shall be 30% of the medical expenses, not to exceed $30,000.

   c. For all legal services rendered in prosecuting or defending an appeal before the Utah Supreme Court the add-on fee shall be 35% of the medical expenses, not to exceed $35,000.

3. The add-on fee shall be calculated on the basis of the amounts paid or to be paid by the injured worker, or amounts to be paid by the workers' compensation carrier, self-insured employer, or Uninsured Employers' Fund.

4. Indemnity compensation "at issue" is defined to include any claim for indemnity benefits that did arise or may directly arise from the denied medical procedure or medical expense.

5. Denial of Liability

   a. Claims must be accepted or denied in accordance with the Utah Administrative Code. However, a denial made due to a deadline in the rules does not trigger the add-on fee under this rule if the carrier needs to do additional investigation. Any investigation that goes beyond 90 days shall be deemed an "unconditional denial" for purpose of this rule.

b. "Unconditional denial" means the carrier has completed its investigation and denied the claim, recommended care or medical expense, or that 90 days have passed since the claim for the disputed benefit was submitted to the carrier.

6. The caps on add-on fees and the limit on indemnity compensation at issue for add on fees to apply shall be adjusted every 5 years beginning July 1, 2020 by applying the same adjustment as the change in the Average Weekly Wage for that five year period. The cap at the time the Application for Hearing is filed will apply in the case.

7. Nothing in this rule is intended to affect other rules in the Utah Administrative Code, including the injured worker being personally liable for non-approved medical providers fees under R612-300-2.D.4, and the necessity of pre-authorization for hospitalization and surgery (except in cases of emergency) as a condition of payment under Rule R612-300-2.E.

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IN THE UTAH SUPREME COURT

IN RE: **UTAH LABOR COMMISSION** Petitioner.	Response to Objections to the Petition For A Rule To Award Attorney Fees In Medical Only Workers' Compensation Cases

The statutory workgroup created by Utah Code Ann. §34A-2-107.1 (the "Workgroup"), by and through the Utah Labor Commission ("Commission") and its General Counsel, hereby submits this Response to Objections to the Petition for a Rule to Award Attorney Fees in Medical Only Workers' Compensation Cases ("Response").

FACTS

1. On May 18, 2016, the Court issued a decision in *Injured Workers Ass'n of Utah v. State*, 374 P.3d 14, wherein the Court held that the "state constitution explicitly grants the supreme court the exclusive authority to govern the practice of law[]", "[t]he regulation of attorney fees undoubtedly falls within the practice of law[]", the supreme court "cannot delegate the power to govern the practice of law to the legislature or the

Labor Commission[]", and "Utah Code section 34A-1-309 and Utah Administrative Code R602-2-4(C)(3) violate both article VIII, section 4 and article V, section 1 of our state constitution, and are therefore invalid encroachments upon the powers of the judiciary." *Id.* at 24.

2. In the 2017 Utah Legislative Session, Senate Bill 170 was passed which created the Workgroup to review and make recommendations regarding numerous issues dealing with workers' compensation. This bill became codified as Utah Code Ann. §34A-2-107.1.

3. The Workgroup was made up of the Labor Commissioner (Jaceson Maughan), a member of the Senate (Karen Mayne), a member of the House of Representatives (Jim Dunnigan), four representatives of the workers' compensation insurance industry (Kristy Bertelsen, attorney; Ford Scalley, attorney; Dennis Lloyd, Sr. VP General Counsel for WCF Insurance ("WCF"); and Jeff Rowley, Director of Risk Management for Salt Lake County) and four representatives from labor and the injured workers' side (Scott Lythgoe, attorney; Phil Shell, attorney; Dawn Atkin, Attorney; and Brandon Dew, President of the Operating Engineers Local Union #3).

4. One of the issues which the Workgroup was required to review and make recommendations on was "the award of attorney fees in workers' compensation cases, including a draft rule to propose to the Utah Supreme Court[.]" Utah Code Ann. §34A-2-107.1(7)(a).

5. The Workgroup met at least seven times between May, 2017 and November, 2017 and discussed the issues set forth in Utah Code Ann. §34A-2-107.1.

6. Regarding the attorney fee issue in medical only/limited indemnity workers' compensation cases, all members of the Workgroup contributed to the discussions, had input on and agreed with the draft of the Attorneys Fee Rule ("Proposed Rule") attached to the Petition For A Rule To Award Attorney's Fees In Medical-Only Workers' Compensation Cases ("Petition") as Exhibit A.

7. In the 2018 Utah Legislative Session, Senate Bill 92 was passed which amended Utah Code Ann. §34A-1-309 to state, "For an adjudication of a workers' compensation claim where only medical benefits are at issue, reasonable attorney fees may be awarded in accordance with and to the extent allowed by rule adopted by the Utah Supreme Court and implemented by the Labor Commission." Utah Code Ann. §34A-1-309.

8. The concept of having add-on attorney fees in medical only/limited indemnity workers' compensation cases was discussed, voted on, and approved by the Workers' Compensation Division of the Utah Association for Justice.

9. On June 4, 2018, on behalf of the Workgroup and with its full support, the Commission submitted the Petition to the Administrative Office of the Utah Supreme Court.

10. On August 20, 2018, the Utah Labor Commissioner, Deputy Commissioner, and Industrial Accidents Division Director met with the Appellate Court Administrator, Associate General Counsel for the Administrative Office of the Courts, and the chairmen of the Civil Rules Committee and Appellate Rules Committee to discuss the Petition and Proposed Rule.

11. After this meeting and with the input from the Appellate Court Administrator, Associate General Counsel for the Administrative Office of the Courts, and the chairmen of the Civil Rules Committee and Appellate Rules Committee, it was agreed upon by the Workgroup to proceed forward with the issue of attorney fees in medical only/limited indemnity workers' compensation cases on parallel tracks to accomplish the intent of the Workgroup.

12. One track is statutory which included a statutory change to §34A-1-309. This statutory change describes how the Commission can implement the awarding of attorney fees based on a new rule of civil procedure to be drafted by the Court. A draft of this proposed bill is attached hereto as Exhibit A.

13. The second track is the new rule of civil procedure which will set out the attorney fee percentage and cap the carrier will be required to pay for attorney fees in medical-only cases where the workers' compensation carrier, self-insured employer or Uninsured Employers' Fund has unconditionally denied liability for medical expenses that are later ordered to be paid or are accepted by the carrier, and the indemnity compensation at issue is less than $5,000.00.

14. On September 4, 2018, Virginius Dabney submitted his Objection to Proposed Rule in Part Regulating Attorneys Fees in Medical Only Cases in Workers Compensation as an Exception to Rule 1.5 URPC ("Dabney Objection").

15. On September 11, 2018, Stony Olsen submitted his Objection to Proposed Rule in Part Regulating Attorney's Fees in Medical Only Cases in Worker's Compensation as an Exception to Rule 1.5 URPC ("Olsen Objection.")

RESPONSE

The Workgroup, through General Counsel for the Commission, hereby responds to the Dabney Objection and Olsen Objection. The result of the Petition and Proposed Rule was never intended to be an exception to Rule 1.5 of the Utah Rules of Professional Conduct as the Dabney Objection and Olsen Objection contend, but was intended to be a way to provide access to justice for injured workers who cannot afford to hire an attorney to represent them in medical only/limited indemnity workers' compensation cases.

A. Dabney Objection

In paragraph 3 of the Dabney Objection, Mr. Dabney states that the Proposed Rule was "proposed by the Labor Commission and orchestrated by the Workers Compensation Fund." This statement is incorrect. The Proposed Rule and Petition were submitted by the General Counsel of the Commission on behalf of the Workgroup. Pursuant to Utah Code Ann. §34A-2-107.1, the "commissioner or the commissioner's designee is the chair of the workgroup," and the "commission shall provide staff support to the workgroup." Utah Code Ann. §34A-2-107.1(3) and (6).

The Proposed Rule was not orchestrated by WCF, but rather was the unanimous result of several meetings of the Workgroup which was made up of representatives of workers' compensation insurance carriers, self-insured entities, attorneys representing insurance carriers and self-insured entities, injured workers' attorneys, and representatives from labor unions.

Furthermore, the statement that the Proposed Rule was orchestrated by WCF is nonsensical in that the Proposed Rule will now require WCF, as well as other workers'

compensation insurance providers, to pay attorney fees in certain cases in which they currently are not required to. The Proposed Rule was negotiated by all members of the Workgroup and was not orchestrated by one entity over any other.

Paragraph 3 of the Dabney Objection also mischaracterizes the Proposed Rule as an exception to Rule 1.5 of the Utah Rules of Professional Conduct. This is not the case. Rule 1.5 deals with fee arrangements between the client and attorney and the reasonableness thereof. The Proposed Rule does not affect the fee arrangement between a client and attorney but rather allows for an award of attorney fees to be paid by a carrier if certain criteria within the case are met, in addition to the carrier having to pay the medical bills and limited indemnity amount. The Proposed Rule will allow greater access to justice for an injured worker in that the injured worker will more easily be able to obtain legal representation with the possibility of attorney fees being awarded in the case rather than the injured worker having to pay for legal representation out of his/her own pocket.

In paragraph 4 of the Dabney Objection, Mr. Dabney claims that the Commission is attempting to regulate attorney fees and avoid the outcome of the *Injured Workers* case.

Again, the Workgroup is the entity which was statutorily created and which unanimously approved the submittal of the Petition and Proposed Rule. The Proposed Rule is the compromised result of the efforts of the Workgroup, including support from the Workers' Compensation Division of the Utah Association for Justice, and will provide access to justice for injured workers who may not have such access otherwise.

The Workgroup has petitioned the Supreme Court to adopt the attorney fee structure and framework which will be implemented by the Commission in medical only/limited indemnity workers' compensation cases which fit the narrow criteria provided for in the Proposed Rule.

In paragraph 5 of the Dabney Objection, Mr. Dabney claims that the Proposed Rule addresses only a small number of cases and, therefore, should not be adopted.

The Proposed Rule is the result that the Workgroup concluded to remedy an access to justice problem. Simply because the Proposed Rule would only affect a small number of cases is no reason to deny the Petition. It is true that the Proposed Rule would affect a small number of cases, however, to those injured workers who could now find an attorney to represent them and take their case, this would have a huge impact. The Proposed Rule will have no effect on any of the other cases which do not fit within the criteria of the Proposed Rule and statute.

In Paragraph 6 of the Dabney Objection, Mr. Dabney again claims that WCF is "the real party pushing this Proposed Rule" and that "legal counsel for the Fund opened the discussion" at the first Workgroup meeting "by saying that the *IWAU* case has resulted in attorney's becoming greedy and taking unconscionable attorneys [sic] fees."

As stated above, WCF is not the party pushing the Proposed Rule, but rather this was a unanimous effort on behalf of the statutorily created Workgroup to submit the Proposed Rule. Furthermore, after listening to the audio recordings of all of the meetings of the Workgroup, at no time did legal counsel for WCF or any member of the Workgroup state that the *Injured Workers* case has resulted in attorneys becoming greedy

and taking unconscionable attorney fees. Mr. Dabney did not participate in the meetings of the Workgroup either in person or by telephone and the audio recordings of the Workgroup meetings do not support Mr. Dabney's claim.

Additionally, in paragraph 6 of the Dabney Objection, Mr. Dabney claims that "This discussion went on for months until the question was asked, who are the injured workers who are complaining and who are the attorneys charging the outlandish attorneys [sic] fees?" A review of the audio recordings of the meetings of the Workgroup reflect no such discussion.

In paragraph 7 of the Dabney Objection, Mr. Dabney states, "A follow-up question subsequently asked was whether there were any Bar Complaints filed since the IWAU decision was issued, and if so, what were the results as to whether the fees charged were reasonable as required by Rule 1.5."

After a review of the audio records of the Workgroup meetings, it was conformed that this question was never asked by any member of the Workgroup.

Paragraph 9 of the Dabney Objection states, "this Proposed Rule is not just about getting unpaid medical expenses caused by industrial accidents and occupational diseases paid, it is all about the Labor Commission and the Workers Compensation Fund and other carriers regulating how much attorneys can get paid for collection on a very small number of unpaid medical expense cases because if the Court were to accept the Proposed Rule, the next Proposed Rule would be to set fees in all workers [sic] compensation cases. This is a trial run to see if the camel can get its nose in the tent."

This statement is false and without merit. As stated above, the Proposed Rule was a unanimous effort of all members of the Workgroup to remedy an access to justice problem for injured workers in medical only/limited indemnity workers' compensation cases. Furthermore, the claim that there will be a "next Proposed Rule" to "set fees in all workers compensation cases" is completely without merit or substance. Once the issue of add-on attorney fees in medical only/limited indemnity workers' compensation cases is concluded, the Workgroup will be finished with its limited statutory review of attorney fees. There is no evidence of any discussion among the members of the Workgroup nor any intent to set fees in all workers' compensation cases. A review of the audio recordings of every meeting of the workgroup clearly reveals that no such discussion took place. The Proposed Rule was the result of the Workgroup following the statutory requirement to review and make recommendations on "the award of attorney fees in workers' compensation cases, including a draft rule to propose to the Utah Supreme Court[.]" Utah Code Ann. §34A-2-107.1(7)(a).

Additionally, the Proposed Rule will only be a cap on what carriers will have to pay in medical only/limited indemnity workers' compensation cases for add-on attorney fees. The injured worker and attorney are free to negotiate additional payment of attorney fees above the amount to be paid by the carrier.

In paragraph 10 of the Dabney Objection, Mr. Dabney claims that "By placing percentages and dollar caps on fees" . . . "the Proposed Rule will have limited use or effect [sic] very many cases because only the large bills will be considered by attorneys .

. .." He then claims that "This will only discourage attorneys from even getting involved in them as well."

The Proposed Rule is about access to justice for injured workers who cannot afford to obtain legal representation without this attorney fee rule. The injured workers attorneys who were members of the Workgroup represented that they have had instances since the *Injured Workers* case where they have declined to represent injured workers in workers' compensation cases because the injured workers cannot afford to hire them and there is no chance to recoup attorney fees through the case as a result of the *Injured Workers* case. The Proposed Rule would allow for an award of attorney fees to be paid by a carrier in medical only/limited indemnity workers' compensation cases. Without this rule in place, there will continue to be injured workers who are not able to obtain legal representation, and thereby, not be able to receive the benefits to which they may be entitled.

In paragraph 11 of the Dabney Objection, Mr. Dabney states that the Proposed Rule is shameful and by adopting the Proposed Rule, it would "directly affect injured workers [sic] ability to obtain legal counsel.

There is nothing shameful about providing access to legal representation to those who cannot afford to pursue a medical only/limited indemnity workers' compensation case. Adoption of the Proposed Rule will allow greater access to justice in that injured workers will now, more easily, be able to obtain legal representation because there is the possibility of add-on attorney fees if the injured worker prevails in a medical only/limited indemnity workers' compensation case.

Paragraph 13 of the Dabney Objection states, "One final point needs to be made. I have been trying to get copies of the various drafts of this Proposed Rule for the "work group" over the past two years with marginal success. I never received a copy of the Petition until I heard a rumor that one was sent to the Court, and then I contacted the Court and finally received a copy of it. This conduct and process by the Labor Commission and the Workers Compensation Fund is wrong and shameful. No poll or agreement has been taken or offered to the Injured Workers Attorneys Bar and if it were, I personally have no doubt that it would be rejected."

The statement that Mr. Dabney has been unable to get copies of various drafts of the Proposed Rule from the Workgroup is false. Utah Code Ann. §34A-2-107.1(6) clearly states that the Commission shall provide staff support to the Workgroup. Commission staff kept notes and recorded all of the Workgroup meetings except for the first one. At no time did Mr. Dabney request copies of the minutes, notes, recordings or drafts of rules from the Commission.

Additionally, on at least two separate occasions during the time the Workgroup was meeting, Mr. Dabney did request a copy of different drafts of the Proposed Rule from at least one member, individually, of the Workgroup. This particular Workgroup member provided the requested drafts of the Proposed Rule to Mr. Dabney every time such a request was made.

Regarding a copy of the Petition submitted by the Workgroup, Mr. Dabney obtained a copy from the Court. There was no obligation to provide Mr. Dabney a copy of the Petition which was submitted to the Court. Additionally, Mr. Dabney did not

request a copy of the Petition from the Commission. Each member of the Workgroup had a copy of the Petition, three of whom, like Mr. Dabney, represent injured workers. He did not request a copy of the Petition from any of the Workgroup members.

As discussed previously, the concept of having add-on attorney fees in medical only/limited indemnity workers' compensation cases was discussed, voted on, and approved by the Workers' Compensation Division of the Utah Association for Justice.

B. Olsen Objection

In section I of the Olsen Objection, Mr. Olsen argues that the Proposed Rule violates the separation of powers clause in the Utah Constitution. This is not the case. The Proposed Rule which was submitted by the Workgroup has subsequently changed based on the meeting held on August 20, 2018 with the Utah Labor Commissioner, Deputy Commissioner, Industrial Accidents Division Director, Appellate Court Administrator, Associate General Counsel for the Administrative Office of the Courts, and the chairmen of the Civil Rules Committee and Appellate Rules Committee.

After this meeting and with the input from the Utah Supreme Court through the Appellate Court Administrator, Associate General Counsel for the Administrative Office of the Courts, and the chairmen of the Civil Rules Committee and Appellate Rules Committee, it was agreed upon by the Workgroup to proceed on parallel tracks to accomplish the intent of the Workgroup.

One track is statutory which includes a statutory change to §34A-1-309. This statutory change describes how the Commission can implement the awarding of attorney

fees based on a new rule of civil procedure to be drafted by the Court. A draft of this proposed bill is attached hereto as Exhibit A.

The second track is the new rule of civil procedure which will set out the attorney fee percentage and cap on attorney fees in medical-only cases where the workers' compensation carrier, self-insured employer or Uninsured Employers' Fund has unconditionally denied liability for medical expenses that are later ordered to be paid or are accepted by the carrier, and the indemnity compensation at issue is less than $5,000.00.

This outcome will not violate the separation of powers clause in the Utah Constitution as the Utah Supreme Court will be drafting a rule of civil procedure in which it will regulate attorney fees in medical only/limited indemnity workers' compensation cases. The Commission will not be regulating attorney fees but, rather, will be implementing the rule in which the Utah Supreme Court will regulate attorney fees.

The rule which the Utah Supreme Court will draft will not be an administrative rule, but rather will be a rule of civil procedure. This rule will allow access to justice for injured workers who are presently unable to obtain legal representation because there is no award of indemnity benefits or limited indemnity benefits awarded from which to pay attorney fees.

In section II of the Olsen Objection, Mr. Olsen claims that the Court should refuse to adopt a fee schedule for injured worker attorneys. As stated previously, this is not an attempt to make an exception to Rule 1.5 of the Utah Rules of Professional Conduct.

Rule 1.5 deals with fee arrangements between the client and attorney and the reasonableness thereof. The Proposed Rule does not affect the fee arrangement between a client and attorney but rather allows for an award of attorney fees to be paid by a carrier to an injured worker if certain criteria within the case are met. The Proposed Rule does not preclude the injured worker and attorney negotiating and agreeing for payment in addition to the add-on attorney fees to be paid by the carrier. The Proposed Rule is an access to justice issue, not a reasonable attorney fee issue.

In section III of the Olsen Objection, Mr. Olsen argues that the Proposed Rule will have very little impact and will affect only a small number of cases. The Workgroup argues that this is a reason to adopt the Proposed Rule. After the *Injured Workers* case, the injured worker must obtain and pay for legal representation, with no hope for an award of attorney fees, should the injured worker prevail. If the Proposed Rule is adopted, an injured worker who prevails in a medical only/limited indemnity workers' compensation case will have an add-on attorney fee awarded to the judgment with which to pay for legal representation.

The Workgroup believes that this Proposed Rule will protect injured workers and allow them to more easily obtain legal representation in cases where they have been unconditionally denied medical expense liability by their workers' compensation carrier or self-insured employer who were later ordered to pay such liability. This Proposed Rule will allow the injured worker to be awarded the medical costs he/she was originally denied, and allow for that injured worker to more easily obtain legal representation where there is an add-on attorney fee provision in medical only/limited indemnity workers'

compensation cases. The injured worker will have the chance to obtain an add-on award for attorney fees.

Conclusion

The Workgroup respectfully submits this Response to Objections to the Petition For A Rule To Award Attorney's Fees In Medical Only Workers' Compensation Cases to respond to the Dabney Objection and Olsen Objection.

DATED this 17th day of October, 2018.

Christopher C. Hill
Utah Labor Commission General Counsel

/s/ Jaceson R. Maughan
Electronically signed with permission of Jaceson R. Maughan
Chair, Workers' Compensation Workgroup,
Commissioner, Utah Labor Commission

/s/ Dawn Atkin
Electronically signed with permission of Dawn Atkin
Attorney at Atkin & Associates

/s/ Karen Mayne
Electronically signed with permission of Karen Mayne
Utah State Senator

/s/ James A. Dunnigan
Electronically signed with permission of James A. Dunnigan
Utah State Representative

/s/ Kristy Bertelsen
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Attorney at Blackburn & Stoll

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Attorney at Scalley Reading Bates Hansen & Rasmussen, P.C.

/s/ Dennis Lloyd
Electronically signed with permission of Dennis Lloyd
Sr. VP, General Counsel
WCF Insurance

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Attorney at Day Shell & Liljenquist, L.C.

/s/ Brandon Dew
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President, Operating Engineers Local Union #3

/s/ Scott Lythgoe
Electronically signed with permission of Scott Lythgoe
Attorney at Mountain View Law Group

/s/ Jeff Rowley
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Director of Risk Management for Salt Lake County

EXHIBIT A

WORKERS' COMPENSATION ATTORNEY FEES AMENDMENTS

2019 GENERAL SESSION

STATE OF UTAH

LONG TITLE

General Description:

This bill modifies provisions related to attorney fees in workers' compensation cases.

Highlighted Provisions:

This bill:

- defines terms; and
- in accordance with Utah Supreme Court rule, allows the Labor Commission to award attorney fees to a claimant in certain cases involving a workers' compensation claim for medical expenses or medical procedures.

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill provides a special effective date.

Utah Code Sections Affected:

REPEALS AND REENACTS:

34A-1-309, as repealed and reenacted by Laws of Utah 2018, Chapter 273

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **34A-1-309** is repealed and reenacted to read:

34A-1-309. Attorney fees.

(1) As used in this section:

(a) "Carrier" means a workers' compensation insurance carrier, the Uninsured Employers' Fund, an employer that does not carry workers' compensation insurance, or a self-insured employer as defined in Section 34A-2-201.5.

(b) "Indemnity compensation" means a workers' compensation claim for indemnity benefits that arises from or may arise from a denial of a medical claim.

(c) "Medical claim" means a workers' compensation claim for medical expenses or recommended medical care.

(d) "Unconditional denial" means a carrier's denial of a medical claim:

(i) after the carrier completes an investigation; or

(ii) 90 days after the day on which the claim was submitted to the carrier.

(2) (a) In accordance with court rule, commission may award attorney fees to a claimant to be paid by the carrier if:

(i) a medical claim is at issue;

(ii) the carrier issued an unconditional denial of the medical claim;

(iii) after issuing the unconditional denial, the carrier was ordered to pay or agreed to pay the medical claim; and

(iv) any award of indemnity compensation is less than $5,000.

(b) An award of attorney fees under this section is in addition to the amount awarded for the medical claim or indemnity compensation.

(c) The court rule in effect at the time the claimant files an application for hearing with the Division of Adjudication governs an award of attorney fees under this section.

Section 2. **Effective date.**

If approved by two-thirds of all the members elected to each house, this bill takes effect upon approval by the governor, or the day following the constitutional time limit of Utah Constitution, Article VII, Section 8, without the governor's signature, or in cast of a veto, the date of veto override.

Tab 2

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SUPREME COURT OF UTAH

IN RE:	:	OBJECTION TO PROPOSED RULE
UTAH LABOR COMMISSION,	:	IN PART REGULATING ATTORNEYS
Petitioner.	:	FEES IN MEDICAL ONLY CASES IN
	:	WORKERS COMPENSATION AS AN
	:	EXCEPTION TO RULE 1.5 URPC
	:	Case No.: 20180411 - SC

COMES NOW Virginius "Jinks" Dabney, a long time member of the Utah State Bar who was lead counsel in the landmark decision of this Court in Injured Workers Association of Utah v. State of Utah, 2016 UT 21, 374 P.3d 14, and files this Objection to the Utah Labor Commission's Proposed Rule, and in support thereof, submits the following:

1. The IWAU decision held that the Utah Constitution granted to this Court the exclusive authority to regulate the practice of law which includes the regulation of attorneys fees charged by attorneys in Utah.

2. The Utah Rules of Professional Conduct (URPC), Rule 1.5, regulates attorney fees of all members of the Utah State Bar in all areas of legal practice by mandating that all attorneys fees must be "reasonable". A list of factors that must be applied to determine what is "reasonable" is part of Rule 1.5. Disputes between clients and attorneys may be submitted to the Utah State Bar and that arm of this Court reviews and determines what is reasonable based upon the facts of each case.

3. The Rule proposed by the Labor Commission and orchestrated by the Workers Compensation Fund, would regulate attorneys fees by percentages and dollar caps - exactly

like those invalidated in the IWAU decision - of attorneys but only in workers compensation cases where medical expenses are disputed and a successful claim to get them paid results. It would allow percentages and dollar caps on attorneys fees in an extremely small number of cases before the Labor Commission, and only if several steps are taken, any one of which eliminates an attorneys fee if not met. In effect, the Proposed Rule would constitute an exception to Rule 1.5 URPC which applies to 14,000 attorneys in the State of Utah in all areas of legal practice. Adoption of it by this Court would define what a reasonable fee would be with percentages and dollar caps in a very small number of cases, and such an exception would be unusual to say the least.

4. As this Court stated in the IWAU decision, the legislature is not foreclosed from designating statutory attorneys fees[1], but, the Labor Commission by placing percentages and caps on attorneys fees, violates the Judiciary's exclusive constitutional authority to regulate attorneys and their fees - and this is where the Proposed Rule crosses the line. By asking this Court to approve the Proposed Rule by the Labor Commission, it is attempting to regulate attorneys fees and avoid the import of the IWAU decision. This Court has already determined that all attorneys fees in Utah must be reasonable. To ask this Court to adopt percentages and dollar caps in certain and limited cases ignores the long history of this Court's determination that all fees be reasonable.

5. There are fewer than 150 attorneys in Utah who on occasion handle a workers compensation case, and fewer that 50 who routinely handle more than 10 cases in one year. Medical Only cases are handled by fewer than 10 or 15 attorneys at most, and most of them have only one or two cases they are involved in; and the prior law before it was invalidated resulted in a very small number of attorneys fee awards - likely less than 100 but probably closer to under 25 awards - out of approximately 100,000 reported and unreported industrial accidents a year. The percentages and dollar caps discourage attorneys from taking such cases and concurrently make it difficult for injured workers to find attorneys who are willing to handle such cases, unless the amount of the medical expenses are really large which means

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[1] IWAU at f.n. 7.

there are thousands of medical only bills involving millions of dollars of unpaid medical bills that never get paid if they are denied. This Proposed Rule which requests this Court adopt the modified provision which the IWAU decision invalidated is unconscionable, and does not improve the situation - it makes it even worse. The Proposed Rule is not designed to get all medical expense cases paid when they are the result of an industrial accident or occupational disease. In short, this Proposed Rule addresses a very small number of cases, which begs the question of why this Rule is being proposed at all.

6. The reason is actually quite simple. At the first meeting of the "work group" created by statute by the Labor Commission and the Workers Compensation Fund (the real party pushing this Proposed Rule), legal counsel for the Fund opened the discussion by saying that the IWAU case has resulted in attorneys becoming greedy and taking unconscionable attorneys fees. This discussion went on for months until the question was asked, who are the injured workers who are complaining and who are the attorneys charging the outlandish attorneys fees? No names to support the claim were ever provided to the "work group".

7. A follow-up question subsequently asked was whether there were any Bar Complaints filed since the IWAU decision was issued, and if so, what were the results as to whether the fees charged were reasonable as required by Rule 1.5. Nothing was proffered so I decided as an injured workers attorney to call the Utah State Bar myself and find out if there was a problem. I was informed that no complaints had been filed. A follow-up contact to the Bar Office again today resulted in the same answer: no bar complaints had been filed regarding attorneys fees in workers compensation cases.

8. After this was finally flushed out, the conversation moved on to how to get the Workers Compensation Fund and other carriers to pay industrial medical expenses which they have denied or simply ignored. The work group then used the former rule on medical expenses that was invalidated by this Court in the IWAU decision, made some changes some to the percentages and dollar caps, and filed the Proposed Rule with this Court. The "Work Group", knew that the limitations on attorneys fees violated the pronouncement by this Court in the IWAU decision, so devised the Proposed Rule to work around the limitations by seeking this Court's permission and approval to regulate attorneys fees in this very, very small number of

cases contrary to the decision of this Court in the IWAU case.

9. However, this Proposed Rule is not just about getting unpaid medical expenses caused by industrial accidents and occupational diseases paid, it is all about the Labor Commission and the Workers Compensation Fund and other carriers regulating how much attorneys can get paid for collecting on a very small number of unpaid medical expense cases because if this Court were to accept the Proposed Rule, the next Proposed Rule would be to set the fees in all workers compensation cases. This is a trial run to see if the camel can get its nose in the tent.

10. By placing percentages and dollar caps on fees for getting unpaid industrial bills paid - and by requiring a number of steps in order to do so - the Proposed Rule will have limited use or effect very many cases because only the large bills will be considered by attorneys, and even in those cases, their fees would be set with percentages and dollar caps - as well as multiple steps that have to be taken in order to even claim an attorneys fee. This will only discourage attorneys from even getting involved in them as well. The tens of thousands of unpaid medical bills every year will never be paid because no attorneys are now or will be in the future willing to handle them under limitations like these. The Utah Medical Association should become involved in sponsoring a better piece of legislation to get their bills paid than the one proffered by the Labor Commission and the Workers Compensation Fund of Utah in the Proposed Rule.

11. The shamefulness of the Proposed Rule is that since its inception, the right of an injured worker to obtain an attorney and to contract with an attorney to help secure compensation and medical care denied by a workers compensation insurance carrier has been central to the workers compensation law. By attempting to put limitations on what would otherwise be a reasonable fee with percentages and dollar caps discourages attorneys from handling such cases and, more importantly, directly affects injured workers ability to obtain legal counsel. This is bad public policy and was never intended to be part of the original Workers Compensation Act in 1917. A reasonable attorneys fee has always been a linchpin to the constitutionality of the workers compensation law.

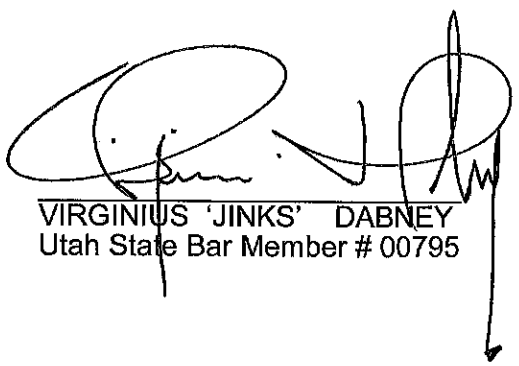
12. The workers compensation system has become increasingly complex since 1988

when major changes were made to the Utah Workers Compensation Act to the detriment of injured workers. Every year since then, the Workers Compensation Fund has been lobbying for more changes designed to minimize their liability and make it difficult for injured workers to prevail in their cases. Workers Compensation has become virtually a right without a remedy which further erodes the constitutional base of the Utah Workers Compensation Act.

13. One final point needs to be made. I have been trying to get copies of the various drafts of this Proposed Rule from the "work group" over the past two years with marginal success. I never received a copy of the Petition until I heard a rumor that one was sent to the Court, and then I contacted the Court and finally received a copy of it. This conduct and process by the Labor Commission and the Workers Compensation Fund is wrong and shameful. No poll or agreement has been taken or offered to the Injured Worker Attorneys Bar and if it were, I personally have no doubt that it would be rejected.

In conclusion, I hope that this Court will reject this Proposed Rule for the above reasons and others I may have missed.

DATED the 4th day of September, 2018.



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SUPREME COURT OF UTAH

In Re: UTAH LABOR COMMISSION Petitioner.	OBJECTION TO PROPOSED RULE IN PART REGULATING ATTORNEY'S FEES IN MEDICAL ONLY CASES IN WORKER'S COMPENSATION AS AN EXCEPTION TO RULE 1.5 URPC Case No.: 20180411-SC

COMES NOW Stony Olsen, a member of the Utah State Bar who was assistant counsel in the landmark decision of Injured Workers Association of Utah v. State, 2016 UT 21, 374 P.3d 14 ("IWAU"), and files this Objection to the Utah Labor Commission's proposed rule, and in support thereof submits the following:

I. THE PROPOSED RULE VIOLATES THE SEPARATION OF POWERS CLAUSE IN THE UTAH CONSTITUTION.

There are many issues with the Labor Commission's proposed rule. This Court should decline to adopt the proposed rule.

A. Creating Administrative Rules Is Solely A Legislative Prerogative

It is well settled by this Court that the three branches of government should not trespass on each others territory. Indeed, the Utah Constitution clearly reserves to each

branch its respective powers. Utah Const., Art V, §1. This separation of powers lead this Court to strike down the Legislature's attempt to regulate attorney fees in IWAU.

Now, the Legislature has passed a statute explicitly requiring this Court to assume responsibility for an administrative agency rule. Utah Code §34A-1-309 now states: "For an adjudication of a worker's compensation claim where only medical benefits are at issue, reasonable attorney fees may be awarded in accordance with and to the extent allowed by rule adopted by the Utah Supreme Court and implemented by the Labor Commission." (emphasis added).

With all due respect, it is uncertain whether the Utah Supreme Court has the power to establish rules for administrative agencies. Additionally, it is highly unlikely that this Court wants to become involved in creating rules that govern administrative agencies, nor does this Court likely want to subject itself to the requirements of the Administrative Rulemaking Act. This Court can review the rules and either uphold them or strike them down, but not create them, as rule-making power is a legislative power, delegated to the agency but upheld by the Legislature as long as the proper procedures are met. See Utah Code §63G-3-202(2).

B. THE LEGISLATURE AND LABOR COMMISSION CANNOT REGULATE ATTORNEY FEES

A more basic problem with the statute is that this Court has already promulgated rules on Attorney's Fees: Rule 1.5 of the Utah Rules of Professional Conduct. As this Court recognized in IWAU, attorney's fees are governed by this Court.

What does the Labor Commission's proposed rule do? It allows for an add on contingency fee in medical only cases; but caps that fee at certain amounts, depending on how far into the legal process the injured worker must pursue a remedy. This is substantially the same setup that this Court declared unconstitutional in IWAU. This Court stated that regulating attorney's fees is "squarely within the practice of law" and thus the Utah Legislature and the Labor Commission cannot do so. IWAU, ¶33.

The Legislature and the Labor Commission, of course, recognize their lack of power to regulate fees, and have approached this Court to essentially grant them the power to do so as part of this Court's Constitutional prerogative to regulate attorney fees. This appears to be a misplaced and inappropriate request which this Court should reject.

C. THIS RULE IS PROPOSED AS AN AGENCY RULE CAUSING INSURMOUNTABLE PROBLEMS.

This proposed rule is set up as an Administrative Rule of the Labor Commission. See Paragraph 7 of the proposed rule, which refers to "other rules in the Utah Administrative Code."

The fact that this proposed rule is apparently intended to be placed in the Utah Administrative Code, not the Rules of Professional Responsibility, raises several issues. First, this proposed rule has not followed any sort of authorized procedure for comment on the Rule. Were this Court inclined to adopt the proposed rule the question is clear: what procedures would be required in order to put the proposed rule into action? Would

the Rule be required to follow the Utah Administrative Rulemaking Act[1] or would the Supreme Court publish the rule as an exception to Rule 1.5 and request comment from the Bar, as is the norm with all other Rules promulgated by the Supreme Court?

If the Rule is destined to be codified as part of the Administrative Procedures Act, but promulgated under this Court's exclusive authority to regulate the practice of law, then can the Labor Commission or the Legislature sunset this rule, thereby making it uniquely vulnerable to the Legislature's whims, alone among all Rules of this Court (save for the 2/3rd requirement for the Legislature to override rules of procedure and evidence)? Given that this Court's approval is necessary for this proposed rule to be enacted, does this Court now become subject to the Administrative Rulemaking Act?

Further, who is responsible for disciplining or otherwise enforcing this proposed rule? If this Rule is to be promulgated under this Court's inherent ability to regulate the practice of law – and attorney fees were recognized as part of the practice of law in IWAU – then how are violations of this proposed rule to be handled? Is the Labor Commission entrusted with this professional responsibility issue, or is the Utah Bar and the Office of Professional Conduct responsible, as they are for other matters of attorney

1. It is important to note that the Labor Commission has not filed their proposed rule with the Office of Administrative Rules, nor as far as counsel is aware has the Labor Commission complied with any of the requirements of Utah Code §63G-3-301, which establishes rule making procedures for agencies. Indeed, the Labor Commission has attempted to keep this proposed rule somewhat under wraps. Counsel was forced to ask Nicole Gray, Clerk of the Supreme Court, for a copy of the proposed rule as the rule was unavailable from any other source. She has been quite helpful in this matter.

discipline? Indeed, what is a violation of this proposed rule and is any violation even a matter for discipline? If not, why is this Court involved at all?

II.

THE COURT SHOULD REFUSE TO ADOPT A FEE SCHEDULE FOR INJURED WORKER ATTORNEYS

In IWAU, this Court declined to adopt a fee schedule to impose on attorneys who represent injured workers. The Court cited two reasons in so refusing: 1) policy reasons and 2) attorneys remain bound by Rule 1.5 of the Utah Rules of Professional Conduct and thus may only charge reasonable fees. IWAU, at ¶35.

This proposed rule by the Labor Commission completely fails to address either reason for this Court's refusal to adopt a fee schedule. While the proposed rule does not attempt to cap attorney fees for representing injured workers who have substantial claims for compensation, it does cap fees for attorneys who represent injured worker's in so-called "medical only" cases.

The Statute only allows an attorney fee for medical only cases as approved by this proposed rule. The proposed rule establishes a contingent add-on fee, which appears to be beyond what the statute allows. The proposed rule is silent, however, on "medical only" cases that do not fall within its confines. Is any attorney fee allowed, even from the medical benefit and not on an add-on basis, for cases where there is no "unconditional denial?" Or does the attorney work for free?

Additionally, there is nothing in the proposed rule that allows for a reasonable fee. The attorney representing the injured worker has their fee fixed and capped. Notably, the insurance side is not capped. As the Utah Court of Appeals noted in Aldrich, Nelson, Weight & Esplin v. Dep't. of Emp't Sec., 878 P.2d 1191, 1196 (Utah Ct. App. 1994), legislative fee limits on attorneys representing claimants can be unfair and inflexible.

The proposed regulatory scheme simply allows for no flexibility, no adjustments to the fee based on the complexity of the case, the skill of the attorney, or even the dollar amounts. What incentive does the attorney have to pursue medical benefits beyond $100,000, as their fee is capped at that amount? Indeed, how can the attorney charge a reasonable fee at all that is applicable to the case at hand? Would not this proposed rule again force attorneys to violate Rule 1.5 by forcing them to in some cases charge an unreasonable fee? In IWAU, this Court was satisfied that Rule 1.5 adequately protected the injured worker, and should decline to adopt this proposed rule.

III.

THIS PROPOSED RULE WILL HAVE VERY LITTLE IMPACT

The Labor Commission argues that the purpose of this proposed rule is to remedy the issue of the injured worker having to pay attorney fees in "medical only" cases after IWAU. However, this proposed rule only applies to cases where the compensation claim, or indemnity benefits, is less than $5,000. Indemnity benefits are the entire range of

worker's compensation benefits: temporary partial, temporary total, permanent partial, and permanent total disability benefits. These are awarded when an employee must miss work or is otherwise temporarily, partially, or permanently disabled due to an industrial accident.

How many cases will involve significant medical benefits or costs that at the same time will not disable the worker in some fashion? Chances are, if the claim for medical benefits and expenses is high, the worker will have been significantly injured or otherwise disabled and thus will have a claim for compensation that exceeds the $5,000 limit. This proposed rule simply will not have much of an impact. The add-on fee would seem to be much more valuable in regular cases, not just cases where there is high medical costs but somehow very low compensation benefits. Why should this Court struggle with all of the problems of this proposed rule when this rule has be written to apply to very few people? This Court should refuse to adopt such a troublesome rule.

CONCLUSION

The foregoing demonstrates several reasons why this Court should reject the proposed rule that the Labor Commission has submitted to this Court, and instead reiterate that Rule 1.5 governs attorney fees.

DATED this 11th day of September, 2018.

/s/ Stony V. Olsen

Utah Bar Member # 09287

Tab 3

Rule 73A. Attorney fees in worker's compensation claims where only medical benefits are at issue.

(a) An award of attorney's fees under Utah Code Section 34A-1-309 shall be the lesser of:

(a)(1) for legal services through the Labor Commission action, 25% of the medical expenses awarded by the Commission or $25,000;

(a)(2) for all legal services rendered in prosecuting or defending an appeal before the Utah Court of Appeals, 30% of the medical expenses awarded, or $30,000; or

(a)(3) for all legal services rendered in prosecuting or defending an appeal before the Utah Supreme Court, 35% of the medical expenses awarded, or $35,000.

(b) The amounts awarded under paragraph (a) shall be adjusted annually on January 1, beginning January 1, 2020, based on the Consumer Price Index, as defined in Utah Code Section 75-1-110 and as certified by the Office of General Counsel of the Administrative Office of the Courts. When the Office of General Counsel certifies the adjustment under this paragraph (b), the Labor Commission and the courts may award attorney fees based on the certified adjustment to the schedule in Subsection (a). The adjustment at the time the Application for Hearing is filed will apply in the case.