State of New Jersey
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
PO BOX 381
TRENTON, NEW JERSEY 08625-0381

RICHARD J. CODEY
Acting Governor

A.J. SABATH
Commissioner

November 10, 2005

Supervising Judge Beverly Karch, Chairperson
Counsel Fee Review Committee
Division of Workers' Compensation
100 Hamilton Plaza, 8th Floor, Clark Street
Paterson, New Jersey 07505-2109

Re: Final Report

Dear Supervising Judge Karch:

I want to thank you and the other Counsel Fee Review Committee members for the thorough and expeditious review of the Workers' Compensation Court's counsel fee policy. Your Final Report presents a fair and logical framework to annually adjust the counsel fee guidelines. A memorandum to implement the Committee recommendations effective January, 2006 will be issued shortly.

The Counsel Fee Review Committee represented the interests of the judiciary and workers' compensation attorneys in a skilled and productive manner. I know that service on the Committee required leave from other activities and travel for the meetings. Your bench and bar colleagues greatly appreciate the time, interest and support of the Committee members in improving our Court.

A copy of this letter will be provided to the other Committee members and Ms. Shravani Kosnik who provided staff assistance to the Committee.

Very truly yours,

Peter J. Calderone
Director and Chief Judge

c: Richard E. Hickey, Administrative Supervisory Judge
Joshua Friedman, Supervising Judge
Michael Mullen, Judge of Compensation
George Pollard, Judge of Compensation
William Barrett, Esq.
Julius Feinson, Esq.
Marcia Stander Freedman, Esq.
Bruce Miller, Esq.
Michael O'Brien, DAG
Ms. Shravani Kosnik

COMMITTEE TO REVIEW THE WORKERS' COMPENSATION COURT COUNSEL FEE POLICY

OFFICE OF THE DIRECTOR & CHIEF JUDGE
2005 NOV -7 PM 3:54

4 November 2005

The Hon. Peter J. Calderone
Division of Workers' Compensation
P.O. Box 381
Trenton, N.J. 08625-0381

Re: Final Report

Dear Director and Chief Judge Calderone:

The report of the Counsel Fee Review Committee is enclosed for your review. Essentially, the Committee felt that the threshold concept should be kept, but that it should be raised to $35,000 for 2006 and should be adjusted each year thereafter by the percentage increase or decrease in the state average weekly wage rounded up or down to the nearest $1,000.

Although not expressed in the report, the committee also felt that training is an important component in properly addressing the concerns of the petitioner's and respondent's bars vis à vis counsel fees. For example, in addition to the points stated in the report, the respondent's bar felt that the judges should be amenable to assessing less than a 20% fee in some situations where minimal effort was expended.

We hope this report is responsive and helpful. Thank you for asking us to serve on the committee.

Respectfully submitted,

Beverly Karch, chairman

Phone: 973-977-4526 Fax: 973-977-1916

COMMITTEE TO REVIEW THE WORKERS' COMPENSATION COURT COUNSEL FEE POLICY

4 November 2005

Recommendation to Revise the Current Policy

Dear Director and Chief Judge Calderone,

The Counsel Fee Review Committee met on September 27 and October 26 to consider whether the Division's current counsel fee policy should be revised. Please accept this as the Committee's report.

The Issue

The Division's current policy regarding counsel fees as reflected in Your Honor's directive of May 3, 2004 is that "in those cases where a counsel fee allowance is greater than $30,000.00, judges of compensation are required . . . to include in the record . . . information on which the judge's counsel fee allowance is based." As requested by you, the Counsel Fee Review Committee has met and considered whether in its judgment the Division's current counsel fee policy should be revised and if so, how.

It has been the experience of the petitioner's bar that the current policy acted for a fair number of judges as a de facto ceiling to the awarding of a counsel fee in excess of $30,000. That is, some judges may have felt that the directive implied disapproval of a fee in excess of $30,000 -- even though it and your subsequent memo of August 2, 2005 expressly did not -- and so those judges were not disposed to allow a greater fee in any case. The petitioner's bar felt this was detrimental to their law practices and sought a clarification of the Division's policy.

Concerns and Impact

The representatives of the petitioner's bar stressed that practice in the Division has become ever more complicated and time consuming. Just for example, questions of liens -- Medicare, child support and TDB -- must be considered in every case, and the increasing incidence of insolvent carriers and uninsured employers often make recovery in even a simple case extremely

difficult. The representatives of the petitioner's bar also noted that in many of their cases they do not break even and that without the larger cases and the potential of a 20% fee greater than $30,000, they could not sustain their practices and continue to represent injured workers in the Division.

While sympathetic to these concerns, the representatives of the respondent's bar were also mindful of their clients' interests. In particular, without some upward limit, it was felt that the traditional 60/40 counsel fee split would result in an excessive and inappropriate expense to their clients.

Finally, a statistical review by the Division indicates that eligibility for a counsel fee in excess of the current $30,000 threshold occurs in a very small percentage of cases. In particular, of the approximately 40,000 claims filed each year, only some 700, or less than 2%, could result in an award greater than $150,000. However, the overwhelming majority of those, by a factor of approximately 15 to 1, did not result in a counsel fee greater than $30,000.

Relevant Law

The awarding of workers' compensation counsel fees is governed by statutory and case law as well as "by directive from the Director and Chief Judge of the Division." (*See Ferraro v. G&R Operation Corp.*).

In particular, section 64 of the Workers' Compensation Act states that "[a judge of compensation may allow] a *reasonable* attorney fee, not exceeding 20% of the judgment . . . ." N.J.S.A. 35:15-64 (emphasis supplied).

In *Gromack v. Johns Manville,* 147 N.J. Super. 131 (1977), the Appellate Division noted that the import of the qualifier "reasonable" in §64 is that while the judge has discretion in fixing the counsel fee, that discretion is not unbridled: the judge should consider factors such as the need for the claim, the difficulty of the issues, the extent of the attorney's services, and the expertise of the attorney in determining what fee up to the maximum 20% should be allowed. The court in *Gromack* acknowledged that a counsel fee in workers' compensation is of a contingency nature, but then went on to caution that "[t]here is no place . . . for the judge to take into account the number of cases in the Division in which the attorney has received no fee or only a minimal fee . . . . These are risks which the attorney in required to assume by virtue of the nature of the practice under the Worker's Compensation Act." This, of course, would rather contradict the nature and purpose of a contingency fee.

Finally, the Division historically and periodically has issued directives periodically essentially indicating what fee is per se reasonable without there being an explicit discussion of those factors on the record. Thus, faced with a situation in which a counsel fee of $30,000 was allowed without an affidavit (or

apparently any other record), the court in *Ferraro v. G&R Operating Corp.* stated that the compensation judge "adhered to the memorandum issued by Director Calderone on May 3, 2004 [and therefore] "the counsel fee in the amount of $30,000 was not an abuse of the judge's discretion."

Recommendation

It is within this framework and for these reasons that the Committee recommends a revision to the Division's current policy. In particular, while the Committee believes that the Director should continue to issue a directive as to what the Division considers a reasonable counsel fee without the necessity for the judge's placing the basis for his determination on the record, the Committee also recommends that the current threshold of $30,000 be raised. In particular, the Committee recommends an increase to $35,000 for 2006; the Committee also recommends that there be an adjustment to this threshold every year thereafter in accordance with the percentage increase or decrease in the state average weekly wage over that of the previous year, with such adjustment being rounded up or down to the nearest $1,000.

Thank you for allowing us to serve on the Counsel Fee Review Committee and for the opportunity to address this issue of concern.

Respectfully submitted,

Beverly Karch, Chairman
Richard Hickey, Administrative Supervising Judge
Joshua Friedman, Judge of Compensation
Michael Mullen, Judge of Compensation
George Pollard, Judge of Compensation
William Barrett, Esq.
Julius Feinson, Esq.
Marcia Stander Freedman, Esq.
Bruce Miller, Esq.
Michael O'Brien, Deputy Attorney General