

**OAR 436–001 Rules, Addressing the Implementation of
House Bill 2764 and Other Proposed Changes**

**Issues Document for
Stakeholders Advisory Committee**

August 19, 2015

1:30 to 4:00 p.m., Room F, Labor & Industries Building, Salem, Oregon

Committee members attending:

Kevin Anderson, Sather, Byerly & Holloway, LLP
Guy Boileau, Louisiana-Pacific Corp./MLAC
Zachary Brunot, Randy M. Elmer, AAL, PC
Betsy Earls, Associated Oregon Industries
Randy Elmer, Randy M Elmer Atty at Law PC
Jennifer Flood, Ombudsman for Injured Workers
Jaye Fraser, SAIF Corporation
Theodore Heus, Preston | Bunnell, LLP
Holly O'Dell, SAIF Corporation
John Powell, Liberty Northwest Insurance
Michael Orlando, The Gilroy Law Firm PC
Sheri Sundstrom, Hoffman Construction
Mike Taylor, NCCI
Sommer Tolleson, Maher & Tolleson
Thomas Dyke, Olson Vu & Dickson LLP
Julie Riddle, The Hartford

Agency staff members attending:

Ryan Delatorre
Steve Passantino
Mike Manley
Daneka Karma
Cara Filsinger
Michelle Miranda
Fred Bruyns

Fred welcomed the committee members and requested input on fiscal impacts of potential rule changes discussed.

Meeting minutes have been entered below in italicized text. The following is not a transcript, and some comments have been paraphrased for brevity.

BACKGROUND AND SUMMARY OF HOUSE BILL 2764

Statute is the sole source for the authorization of attorney fees in Oregon's workers' compensation system. Chapter 656 permits defense lawyers to negotiate their fees with insurance carriers or self-insured employers. However, workers' attorneys are compensated only in defined

**Rulemaking advisory committee meeting
August 19, 2015**

circumstances and in the manner and amount permitted by statute; they may not negotiate hourly or contingent fees with their clients. Depending on the circumstance, workers' attorney fees are either paid by an insurer in addition to any compensation awarded to a worker (assessed fees) or paid by a worker out of the worker's compensation award (out-of-compensation fees). In some situations, the law sets a dollar cap on the assessed attorney fee that may be awarded. It also establishes the jurisdictions that may award fees: the Workers' Compensation Division ("WCD"), Administrative Law Judges ("ALJs"), Workers' Compensation Board ("WCB"), or the courts.

House Bill 2764 ("HB 2764") contains several provisions expanding the circumstances in which WCD is authorized to issue attorney fees, or the amount of attorney fees WCD may award:

1. ORS 656.262(11)(a) is amended to provide for an award of "reasonable attorney fees" and adds that any jurisdiction awarding that fee must "consider the proportionate benefit to the worker." Prior to the passage of HB 2764, ORS 656.262(11)(a) made no reference to a reasonable fee and simply stated that the fee awarded must be proportionate to the benefit to the worker.
2. ORS 656.262(11)(a) is further amended to increase the dollar cap on the assessed attorney fee that may be awarded to \$4,000 (adjusted annually based on increases to the State Average Weekly Wage).
3. ORS 656.277(1) is amended to add that WCD may award a reasonable assessed attorney fee if the worker's attorney is instrumental in obtaining an order reclassifying a claim from nondisabling to disabling.
4. ORS 656.313(1)(b) is amended to add that attorney fees and costs withheld pending appeal accrue interest.
5. ORS 656.385(1) is amended to increase the dollar cap on the assessed attorney fee that may be awarded to \$4,000 (adjusted annually based on increases to the State Average Weekly Wage).
6. ORS 656.385(2) is amended to add a new reasonable assessed attorney fee when the insurer refuses or unreasonably resists payment of attorney fees that are related to medical or vocational benefits and due pursuant to an order of WCD or an ALJ.
7. ORS 656.385(3) is amended to add a new reasonable assessed attorney fee when the insurer initiates an appeal and attorney fees awarded under 656.385(1) and (2) are not disallowed or reduced on appeal.
8. ORS 656.385(3) is further amended to expand the circumstances in which an attorney fee is assessed when an insurer initiates an appeal disputing medical or vocational benefits, by adding that a reasonable fee must be awarded if all or part of the compensation awarded to the worker is not disallowed or reduced on appeal.
9. ORS 656.388(1) is amended to delete a prohibition on attorney fees for representation before WCD in a non-contested case hearing.

HB 2764 will apply to orders issued and attorney fees incurred on or after January 1, 2016, regardless of the date on which the claim was filed.

Many of the provisions relating to WCD are unlikely to require rule changes. First, adjustments to the maximum attorney fee that may be awarded under ORS 656.262(11)(a) and 656.385(1) are published in WCD Bulletin No. 356. As a result, provisions in the bill impacting those maximum

**Rulemaking advisory committee meeting
August 19, 2015**

fee amounts do not need to be implemented by formal rulemaking. Further, a number of the amendments impacting WCD are only applicable after an underlying administrative order is appealed, and will only be issued by an ALJ or in a Director Review of a Proposed and Final Order. See, e.g., the amendments to ORS 656.313(1)(b), 656.385(3), and 656.388(1). WCD has, historically, not promulgated rules relating to attorney fees that are issued only in those circumstances.

As a result, the primary focus of this Stakeholders Advisory Committee is on HB 2764's amendments to ORS 656.262(11)(a), 656.277(1), and 656.385(2).

Additionally, WCD is exploring several rule changes that are unrelated to HB 2764, but which relate to the conduct of hearings under WCD's jurisdiction. Those potential rule changes are discussed in detail below in Issues 5, 6, and 7.

ISSUE #1

Re: Should WCD adjust or cease its use of a fee matrix for determining attorney fees awarded under ORS 656.262(11)(a)?

- a) Should WCD continue to use the fee matrix at OAR 436-001-0410 as a guide in determining attorney fees awarded under ORS 656.262(11)(a)?
- b) Should WCD adopt a separate fee matrix for use as a guide in determining attorney fees awarded under ORS 656.262(11)(a)? If so, what factors should be utilized in that fee matrix?
- c) If WCD ceases to use the fee matrix at OAR 436-001-0410 as a guide in determining attorney fees awarded under ORS 656.262(11)(a), what mechanism should WCD use for the determination of the appropriate fee?

BACKGROUND:

ORS 656.262(11)(a) requires the assessment of an attorney fee when an insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, attorney fees or costs, or unreasonably delays acceptance or denial of a claim. HB 2764 amends ORS 656.262(11)(a) to provide for an award of "reasonable attorney fees" and adds that any jurisdiction awarding that fee must "consider the proportionate benefit to the worker." Prior to the passage of HB 2764, ORS 656.262(11)(a) made no reference to a reasonable fee and simply stated that the fee awarded must be proportionate to the benefit to the worker. Further, under both current law and HB 2764, the Workers' Compensation Board must adopt rules for establishing the amount of the attorney fee awarded under ORS 656.262(11)(a), giving primary consideration to the results achieved and to the time devoted to the case. The Workers' Compensation Board is currently conducting rulemaking to implement HB 2764 and may promulgate rules to address the statutory revisions to ORS 656.262(11)(a). WCD will be monitoring the Board's rulemaking process closely and may need to revise its rules in order to maintain consistency with relevant standards adopted by the Board.

Under WCD's current administrative rules, 436-001-0420 cross-references the WCB's rules at OAR 438-015-0110 and states WCD may use the WCD's fee matrix in OAR 436-001-0410 as "a

**Rulemaking advisory committee meeting
August 19, 2015**

guide in determining the amount of the fee.” The WCD’s fee matrix in OAR 436-001-0410 applies to attorney fees awarded under ORS 656.385(1) and gives primary consideration to the monetary benefit to the injured worker as well as the time the attorney devoted to the case:

Estimated Benefit Achieved	Professional Hours Devoted (Fees as percentage of adjusted maximum attorney fee under ORS 656.385(1))		
	1-4 hours	4.1-8 hours	over 8 hours
\$1-\$2,000	5.0% - 35.0%	15.0% - 50.0%	40.0% - 62.5%
\$2,001-\$4,000	10.0% - 40.0%	30.0% - 65.0%	52.5% - 75.0%
\$4,001-\$6,000	15.0% - 50.0%	40.0% - 72.5%	65.0% - 87.5%
Over \$6000	20.0% - 65.0%	52.5% - 90.0%	77.5% - 100.0%

ORS 656.385(1) requires the assessment of an attorney fee when a worker prevails in a dispute, or the worker’s attorney is instrumental in obtaining settlement in a dispute, related to medical or vocational benefits pursuant to ORS 656.245, 656.247, 656.260, 656.327 or 656.340. Similar to the amended text of ORS 656.262(11)(a), attorney fees awarded per ORS 656.385(1) must be “reasonable” and “proportionate to the benefit to the injured worker.” Further, the Workers’ Compensation Division must adopt rules for establishing the amount of the attorney fee awarded under ORS 656.385(1), giving primary consideration to the results achieved and to the time devoted to the case. Per WCD’s administrative rules, when awarding a fee under ORS 656.385(1) the fee must fall within the ranges of the matrix. When determining what amount within that range should be awarded, WCD may consider the factors listed at OAR 436-001-0400(3).

RULES:

- OAR 436-001-0410 and 436-001-0420.

ALTERNATIVES:

- Do nothing (continue to use the existing matrix as a guide for the determination of reasonable attorney fees awarded under ORS 656.262(11)(a)).
- Adopt a separate attorney fee matrix for the determination of reasonable attorney fees awarded under ORS 656.262(11)(a).
- Eliminate usage of the attorney fee matrix for the determination of reasonable attorney fees awarded under ORS 656.262(11)(a).

*Speaker &
Time*

Committee Comments

00:00
Fred Bruyins

Welcome and introductions. Should WCD continue to use the fee matrix at OAR 436-001-0410 as a guide in determining attorney fees awarded under ORS 656.262(11)(a)?

14:27
Randy Elmer

The idea behind changing the language to a reasonable fee was not to have the fee determined so rigidly by the matrix. We wanted the process to be more fluid, flexible, and discretionary in terms of awarding a reasonable fee by looking at the facts and circumstances. Sometimes there is a lot of effort that is

**Rulemaking advisory committee meeting
August 19, 2015**

expended and it won't be a very big benefit, or someone might be very proficient in preparing and presenting a case that will look like the hours are not as large as might be with a lesser experienced attorney, but it is a bigger benefit. In each case it's the fact finder and the person that issues the order that has to look at that particular case and not get rigidly pushed into some predetermined idea of what it should be.

16:28
Jaye Fraser *Where was the language you read from?*

16:31
Randy Elmer *It is from what we gave to Shemia Fagan, and Representative Holvey read it on the floor. It was the trial lawyer's statement, and Holvey read it into House record.*

16:57
Jaye Fraser *We were actively involved in the process as well. We would like to see the department generally continuing to use matrixes to establish the fees with the idea that that would be if the matrix are set up appropriately. That would be an opportunity to create consistency and to take into account what would be considered reasonable.*

17:39
Guy Boileau *We did not contemplate getting rid of the matrix. What we perceived was that by making it proportionate to the benefits seemed very formulaic. The fact finder still has all these other factors to consider. We like the idea of giving the fact finder a little bit more room, but not our intention to get rid of the matrix.*

18:37
Fred Bruyins *Randy, were you wanting to get rid of the matrix or is this something you would want us to do in addition to using the matrix?*

18:44
Randy Elmer *I am open to suggestions. I can't imagine how we can eliminate the rigidity of a matrix if we keep one. I would like to see us free ourselves of that rigidity.*

19:10
Sommer
Tolleson *Guy pointed out that the rules provide the flexibility for the judge to consider those other factors. It sounds like on one hand you're suggesting the ALJ should have complete determination but on the other hand you're saying they are not smart enough to work outside of the matrix.*

20:20
Randy Elmer *It predisposes them to a set fee before they consider all the factors. For many years in jurisprudence work comp the judges have been setting assessed fees without any kind of boxes to have to consider, they just had to check the factors and OARs and they put together good results. We are trying to bring that same type of analysis to this situation and discussion.*

20:50
Guy Boileau *My perception was an attorney could get in a great deal of work but still the benefit to the worker could be very modest. There is a built in inequity in that. It allowed some consideration for the fact finder, let's not get rid of the matrix, but let's use common sense and not do injustice to the attorney representing the*

**Rulemaking advisory committee meeting
August 19, 2015**

worker.

21:35 *How do you suggest the matrix be fashioned?*
Randy Elmer

21:39 *That is why I'm relying on you folks to put the matrix together. I'm talking*
Guy Boileau *qualitatively not quantitatively.*

22:00 *End of discussion for issue 1 (a).*

22:05 *Should WCD adopt a separate fee matrix for use as a guide in determining*
Fred Bruyns *attorney fees awarded under ORS 656.262(11)(a)? If so, what factors should*
 be utilized in that fee matrix?

22:37 *Part of the idea was the fee matrix in rule 410 that is specifically applicable to*
Ryan Delatorre *awards under ORS 656.385(1) – the rules in 420 for awards in 262(11)(a)*
 refers to that as a guide in determining the amount of the fee to be awarded
 under 262(11)(a). So the ideas is, do we need separate fee matrixes for
 262(11)(a) and another for 385(1)?

26:16 *We like the matrix.*
Jaye Fraser

23:28 *Agree with Jaye Fraser. Asked Ryan to explain what they would get from*
Sheri *something different. Would there be more or less money? I thought this was just*
Sundstrom *a starting point.*

24:00 *Applicable to 656.385(1) the range in the matrix is described as a mandatory*
Ryan Delatorre *range. It can fall anywhere within that range, but it does say it is mandatory.*
 656.262(11)(a) refers to the matrix as a guide, and there isn't that mandatory
 range. Under current law 656.262(11)(a) and 656.385(1) describe different
 standards for the amount of the fee that is to be awarded. 656.262(11)(a) refers
 to apportionment fee, and 656.385(1) refers to a reasonable fee. Do there need
 to be different factors considered for each section or are we comfortable with
 the same matrix applying to both?

25:17 *If you look at the blank matrix on page 3 it doesn't have the dollar figures. I*
Holly O'Dell *could imagine that sitting at the top, professional hours devoted, and then fees*
 as a percentage of adjusted maximum attorney fee and you fill in the blanks for
 both. The matrix could apply to 656.385 and 656.262(11)(a). It would tie to a
 percentage of the maximum fee allowed under the respective statute. When you
 look at the left side, estimated benefit achieved, one question for
 656.262(11)(a) – would you change those ranges? It goes \$1-2 thousand
 dollars, \$2-4 thousand dollars, \$4-6 thousand dollars, and over \$6 thousand
 dollars. The purpose of this matrix as a tool is to help the fact finder assess the
 proportionality. For 656.262(11)(a) given that the cap on the attorney fee is

**Rulemaking advisory committee meeting
August 19, 2015**

\$4000 dollars to be increased over time. The ranges are still a good way to determine whether (inaudible) that is proportionate to the fee. If you achieve a benefit for the worker under 656.262(11)(a) over \$6000 it makes sense to compare that over \$6000 to a higher end of attorney fee that goes up to \$4000. This matrix still helps compare for the purposes of 262(11)(a). The way you would use it differently, is that the matrix would help the fact finder assess the proportionality and meet the requirement of considering that. There are other factors that we consider less often than number of hours, that the fact finder could use to adjust what comes out of the matrix if those factors applied more clearly than usual to any given case.

27:23
Randy Elmer *There are still a number of other factors considered. For example, when an ALJ assesses a fee, because there are eight factors in their administrative rules. One takes into account if there were any frivolous issues raised by the parties, if one side impeded the progress of reaching a resolution. If there were some reference to these other factors that are normally used to assess a reasonable fee, then these two in the matrix being the primary guides, that would be more flexible than what I think we're suggesting with the matrix that almost looks identical to the one we have now.*

28:06
Jaye Fraser *You are suggesting in the event of extraordinary circumstances that these additional factors be used?*

28:16
Randy Elmer *In all cases they would be.*

28:24
Holly O'Dell *Often those factors wrap up into time spent and benefits obtained.*

28:40
Unknown *Estimated benefits are pretty easy to ferret out in medical service issues, or certain services or bills that are submitted as evidence and disputed, but in the context of penalties or penalty related fees, like a late denial, I don't know how often if ever the estimated benefit achieved is actually in evidence. For the most part it is yet to be determined. That a big difference between using the matrix under 656.385, and at least those factors in 656.262, and I don't know why that would take precedence over things like Randy suggested. I don't know if you can determine the benefit was \$1.00 or \$6000.00 in a case.*

29:36
Ryan Delatorre *For vocational disputes where it's another situation where it's difficult to put dollar amounts on the benefit achieved, the rules state the presumption that the benefit achieved is the highest under the matrix and automatically falls under the \$6000.00 category unless there is evidence to the contrary. That's how that situation is addressed with respect to vocational disputes.*

30:10
Unknown *Where does that presumption come from?*

**Rulemaking advisory committee meeting
August 19, 2015**

30:14 *The rules state that.*
Ryan Delatorre

30:43 *Are there thoughts on how to quantify the benefit under 262(11)(a), the benefit
Fred Bruyns achieved?*

30:50 *I was under the impression that under 262(11)(a), the benefit to the worker was
Jaye Fraser the penalty.*

31:35 *A lot of the time that benefit isn't determined until the order is issued and
Randy Elmer remanded back to the insurer to look at a period of time that was in discussion.
They calculate what that is and they will determine what the amount of the
penalty is.*

32:03 *The benefit obtained for the worker is the penalty itself because there is a
Holly O'Dell separate attorney fee for setting aside a denial. Yes, sometimes that benefit is
undetermined.*

32:52 *My only response to that is, I think there is case law about penalty issues
Unknown before an ALJ or WCB that determined that the benefit to the worker is not
necessarily the penalty, but things that flow from acceptance of the claim.*

34:19 *If WCD ceases to use the fee matrix at OAR 436-001-0410 as a guide in
Fred Bruyns determining attorney fees awarded under ORS 656.262(11)(a), what
mechanism should WCD use for the determination of the appropriate fee?
No comments.*

ISSUE #2

Re: Should WCD develop rules to implement its authority, under ORS 656.277(1)(b), to assess a reasonable attorney fee when the worker's attorney is instrumental in obtaining an order from WCD reclassifying a claim from nondisabling to disabling?

- a) Should WCD develop a rule for determining a reasonable fee awarded under ORS 656.277(1)? If so, what factors should be considered? How should the amount of the award be established?
- b) Should a reasonable fee awarded under ORS 656.277(1) include the workers' attorney's efforts in requesting reclassification from the insurer (before the dispute is submitted to WCD for review)?
- c) Does a workers' attorney have any obligation, beyond submitting a request for reclassification, to attempt to resolve a classification dispute with an insurer before seeking an order from WCD?

BACKGROUND:

**Rulemaking advisory committee meeting
August 19, 2015**

HB 2764 amends ORS 656.277(1) to add that WCD may award a reasonable assessed attorney fee if the worker’s attorney is instrumental in obtaining an order reclassifying a claim from nondisabling to disabling.

Before a worker may obtain an order from WCD reclassifying a claim from nondisabling to disabling, the worker must submit a request for reclassification to the insurer. If the insurer denies the request for reclassification, the worker may ask WCD to review the insurer’s classification of the claim.

Currently, workers’ attorneys often do substantial work in obtaining and providing to the insurer information relative to a request for reclassification. Such requests often center on the calculation of the worker’s average weekly wage (AWW), and, consequently, whether the worker qualifies for temporary partial disability benefits because of lost wages. The worker’s attorney may obtain wage records, various employment/working condition facts, employment contract information, etc., and provide that to the insurer to prove time loss is due. Some of the information provided by the worker’s attorney in these situations may not be available to the insurer

Under HB 2764, an attorney’s work in obtaining and providing to the insurer information relative to a request for reclassification will not be compensated if the insurer agrees to reclassify the claim as disabling, because the worker’s attorney was not instrumental in “obtaining an order from the director”. On the other hand, if the workers’ attorney obtains and provides such information to WCD, after initially requesting reclassification from an insurer, and successfully obtains an order from WCD reclassifying the claim as disabling, the attorney would receive a reasonable assessed attorney fee.

RULES:

- N/A

ALTERNATIVES:

- Do nothing (do not adopt rules relating to the award of attorney fees under 656.277(1)(b)).
- Develop rules to implement WCD’s authority to assess a reasonable attorney fee under ORS 656.277(1)(b).

<i>Speaker & Time</i>	<i>Committee Comments</i>
<i>38:00 Fred Bruyns</i>	<i>Should WCD develop a rule for determining a reasonable fee awarded under ORS 656.277(1)? If so, what factors should be considered? How should the amount of the award be established?</i>
<i>38:07 Randy Elmer</i>	<i>Once again I think that the idea was to bring a reasonable fee into alignment with what a reasonable assessment fee is awarded in front of a judge who at the board awards fees on a regular basis. A tried and true method that has worked for a number of years is the eight factors that are in the board’s rule OAR 438-015-0010. I see no reason why we would not just make reference in the WCD rules to the exact same factors and have those be the same guiding principles from assessed fees to choose.</i>

**Rulemaking advisory committee meeting
August 19, 2015**

- 39:27 *I don't remember that discussion about the board's attorney fees.*
Sheri
Sundstrom
- 39:59 *When you get a request to reclassify a claim or request for hearing or to reclassify a rate, there is absolutely no explanation. I can see a situation where a request is made to reclassify a claim with nothing but a letter. Discussion on the communication process between insurer and attorney during processing of the request for claim reclassification.*
- 43:42 *In response to Sheri's comment...we were talking in very general terms of creating as a policy that an assessed fee be paid to attorneys for their time and effort for them helping to process these claims including reclassification. We didn't get into the "how" we would do that. We did not exclude the possibility of using the eight factors the board typically uses to set fees. I think it is a good model to use.*
- 47:00 *We are talking about situations in which you are making a guess about the benefit to the worker. Reclassifying a claim from non-disabling to disabling is a big deal.*
- 48:14 *We set a matrix up with certain factors and when you go through those factors the fee gets bigger. We need to be careful that the fees we are talking about are related to the insurer/self-insured employer acting unreasonably.*
- 49:34 *Significance of fiscal impact. This could end up being significant in the long run when looking at your example. I would rather see that money go directly into the injured worker's pockets by efficiently resolving those issues.*
Sheri
Sundstrom
- 50:01 *If consistency is that big of an issue you will see a compensability hearing...*
Zachary
Brunot
- 50:32 *Question on how the forms for request for reclassification are submitted, and we're saying it might be nice to have it outlined. I believe there is a form for appealing to the department for reclassification, so were you thinking of a form for asking the insurer? Discussion on form.*
- 52:26 *One reason that maybe WCD has had so much success is that litigation is limited and disputes are resolved quickly. There is this element of quantity, where these should go through quickly and it will be resolved multiple times in one case, and if you have a matrix which has a dollar figure attached to it that's different then what the board is doing. Even though it's hard to put a value to these things we have to in order to assess an attorney fee.*
Committee
Members

**Rulemaking advisory committee meeting
August 19, 2015**

Discussion on the difference between WCD and WCB.

Discussion on attorney fees and how matrix assists in keeping the injured worker as the focus.

57:12
Ryan Delatorre *As I read 656.277 it would only be applicable to an initial order reclassifying a claim. There wouldn't be any litigation of previously awarded attorney's fees at this point. Litigation of previously awarded attorney's fees fall under other statutory attorney fees.*

57:39
Sommer
Tolleson *What I'm speaking of is in the dispute – part the dispute is there's an award of an attorney fee.*

57:53
Ryan Delatorre *Actually it's just the amount not the battle of the fees on fees.*

58:06
Jaye Fraser *That's not the point. If we want to drive the expenses into the system that we drive them in the way that best benefits the worker – we don't add more litigious opportunity into the system. Having a matrix, having a rule around what's required when there is a request for reclassification would help.*

58:43
Fred Bruyins *I think of the matrix as a simple chart, but the factors will have to be different. What kind of factors are you envisioning? The ones already listed in rule 400, like the board uses, or different factors entirely?*

59:00
Sommer
Tolleson *Asked for clarification of what factors were being referred to in the discussion.*

59:18
Randy Elmer *We went from the board where all disputes were heard in front of trained members of the Oregon State Bar, where most of them have had practice in private sector. Then we upset the system in 1990 and split the jurisdiction over to a body that had to make decisions and award some fees, and they had no experience and no lawyers and no judges deciding how they were going to award fees. So we created these simple little boxes.*

Discussion on attorney fees.

01:01:09
Sommer
Tolleson *What I hear you saying is that you're not disagreeing with the rules, you're just saying the WCD staff that administers them is not applying them the way that the ALJ's and the board do.*

01:01:19
Randy Elmer *Seems rigid over here. It is difficult to get a fee that represents the true amount of effort that is put into the case.*

**Rulemaking advisory committee meeting
August 19, 2015**

- 01:01:32 *Less of a rule issue and more of a staff issue.*
Sommer
Tolleson
- 01:01:43 *I don't think anyone has said that. There are situations where things take longer than they should, but not every time. The matrixes give you certainty as well.*
- 01:02:32 *Should a reasonable attorney fee awarded under ORS 656.277(1) include the workers' attorney's efforts in requesting reclassification from the insurer (before the dispute is submitted to WCD for review)?*
- 01:03:01 *Where does the bulk of the work get done, prior to submission? I think it's important to understand where all the labor is.*
- 01:03:24 *Clarified question. That work is part of the case that you present.*
Sommer
Tolleson
- 01:04:13 *In typical re-class case, as soon as we see a non-disabling notice of acceptance, what we typically do is set a conference with the doctor or have them fill out a questionnaire.*

Discusses the different layers of work that goes into the re-classification process.
- 01:05:50 *Would like everyone to make note of this - If you need a re-class why cant you just pic up the phone and call. How long does this actually go on before the worker gets their benefits? The process described sounds like a lot of work.*
Sheri
Sundstrom
- 01:06:22 *That's why we need it to change, because it is a lot of time and it needs to be paid for. How it gets to the insurer isn't all that important.*
- 01:06:28 *But why didn't you pick up the phone as Sheri suggested? Why wouldn't you just pick up the phone and call the insurer/self-employed insurer.*
- 01:07:00 *Zachary made a good point. Why would you pick up a phone if it's for free. Is that what you said?*
Sheri
Sundstrom
- 01:07:06 *That's not what I meant. If I'm going to sit for seven hours, or a foot of discovery trying to find the mistake in it or time loss issue, and that's a lot of work to say hey I found a mistake can you fix that. I would never be able to make any money period as an attorney.*
Zachary
Brunot
- 01:07:32 *See the question was making a phone call when the worker notifies you and informs you that they are not working and inquires if there is something going*
Sheri

**Rulemaking advisory committee meeting
August 19, 2015**

- Sundstrom on with their claim... that's the difference between this and going through a discovery.*
- 01:07:50 We don't pile on new or arbitrary omitted conditions just to see what happens.
Zachary
Brunot*
- 01:08:30 These questions address some of the concern about some attorneys that may
Jennifer Flood prior to going to the department put in very little effort. That attorney maybe
wouldn't get as much as the attorney that did put in the effort; the effort should
be compensated.*
- 01:09:28 I agree with Jennifer.
Sommer
Tolleson*
- 01:09:57 It sounds like this answers the question. They're looking to include the account
Guy Boileau of work done, but it's also suggested to look at the amount of work not done.*
- 01:10:16 You should get paid for all of the effort to try to get it right up front.
Jennifer Flood*
- 01:10:45 I have an opinion that is different than what's being discussed. There are out of
Holly O'Dell compensation fees and there are assessed fees. Assessed fees have a triggering
event, such as a denial. The work that's paid for is the work between the denial
and setting aside the denial. Out of compensation fee is something like time
loss, which is work that is spread out over time. This would be the first time
that you take something that doesn't have a triggering event and attach an
assessed attorney fee. This is what we do in federal (inaudible) law. If the
assessed fee is based on all work before refusal or reclass, every meeting you
have had with the worker is in the pot, every doctor's conference, all
conversations with the worker about their employment – that is the federal
system. I think .277 only allows for the triggering event to be the refusal of
reclass in the statutory language.*
- 01:12:22 What you are saying is from the time they call or send a letter to the carrier or
Sheri self-insured employer and they say no - the work that they put to figure that
Sundstrom out. At first it's just an initial inquiry where you get no response or a "no" and
this is where you begin to start your work. You wouldn't put your work into the
project that you present to the department.*
- 01:12:50 When you get an untimely response or a "no" that is when your time-line
Holly O'Dell would start. I know this is ironic, because an attorney that completed good
work up front would probably get a reclassification and the insurer can figure
out what the worker is talking about and the attorney is not going to get a
penny. I don't think that you can go back and measure the work before reclass.*

**Rulemaking advisory committee meeting
August 19, 2015**

- 01:13:28
Jennifer Flood *There is an incentive to not do the work up front which delays the benefits for the worker. This is why I strongly feel that the attorneys should be paid. If they do the work up front and the insurer denies it, and it's determined that the denial is unreasonable, and the attorney prevails, they should get paid for that work.*
- 01:13:53
Unknown *It's not that it is unreasonable but it turns out to be wrong. If the attorney puts in the time and gets the doctor to say the claim should be disabling it's likely going to be reclassified. If the attorney doesn't put in the time and the insurer tries their best to put in the time it might then be classified as disabling. So back to what Randy suggested and let the insurer do the work. If the attorney does the work after the insurer is asked and fails to do its own work, that is when the attorney starts getting paid.*
- 01:14:23
Ted Heus *Do you think the fee should be the same if someone was to spend ten minutes filing a reclassification with a two sentence letter, and gets a "no," and then it goes to hearing and gets reclassified. Should that attorney be paid less than an attorney who does all that up front?*
- 01:15:10
Sommer
Tolleson *They shouldn't get paid the same.*
- 01:16:02
Guy Boileau *Does a matrix address some of those concerns? Rather than get a precisely broken down billable hours statement for all the work done. If this is done in the context of a matrix, as suggested earlier it feels as if it will address both of those needs.*
- 01:16:45
Ted Heus *I have no problem with matrix in general. I think the factors are good and have been used for a long time. The problem is that matrix may incite more litigation. The matrix is still sort of a rigid objective way to determine a fee no matter how many factors are involved.*
- 01:17:25
Guy Boileau *Do you know if the matrixes currently precipitate a lot of litigation?*
- 01:17:29
Ted Heus *Probably not, because one is a guideline and one is a requirement. It gets more complicated as you add more factors to the matrix. I don't know if it's better just having the factors to consider.*
- 01:18:10
Randy Elmer *Kind of like how you have a list of check the boxes that ask did you consider all these factors or did you shove them into some type of configuration. It gets itself into this abbreviated box and I don't know if we can do that. We need something that's manageable.*

**Rulemaking advisory committee meeting
August 19, 2015**

01:19:18
Ted Heus *Why would the statute allow consideration of work performed on the front end versus work performed from the triggering event? What part of the statutory change would prevent WCD from considering the work on the front end, or is it just the general understanding of how.*

01:19:46
Cara Filsinger *The law says the attorney is instrumental in obtaining an order from the director that reclassifies a claim from non-disabling to disabling. The attorney is instrumental in obtaining in front of the director. It doesn't say. That is why we are asking.*

01:20:06
Ryan Delatorre *That is the triggering event from when the director can award a fee, the question is whether, when determining what is reasonable, can we consider what happened before they submitted the initial request to the insurer?*

01:20:20
Ted Heus *I think this is answered by the statutory changes.*

01:20:22
Unknown *It is going to be answered by what happened contemporaneously. Either the record is going to show that the claimant's attorney received a report from a doctor and send it to the insurer or report there is nothing going on and all there is will be a two line letter. The record will speak for itself.*

01:20:53
Unknown *The fact finder decision maker has to reach a decision on whether the attorney was instrumental and the next question is what act was the instrumental act.*

01:27:17
Fred Bruyns *Introduced c) Does a workers' attorney have any obligation, beyond submitting a request for reclassification, to attempt to resolve a classification dispute with an insurer before seeking an order from WCD?*

01:22:08
Unknown *Wasn't this just answered in .277 (1)(a)? It tells us that we must submit it first.*

01:22:17
Ryan Delatorre *Do we just do the submittal saying reclassify the claim, or please reclassify the claim because of x, y, and z? Here is our supporting evidence.*

01:22:34
Unknown *There should absolutely not be a rule requiring someone to submit something beyond statutory requirements.*

01:23:00
Ryan Delatorre *We did raise the possibility of a check-the-box form.*

01:23:09
Unknown *Sometimes our area of law is so specialized, that we can lose sight. It is not an uncommon practice to request specific pleadings. In civil procedure you have to say your position with some specificity. I agree that it can't be too rigid but I don't think it's an unreasonable request to have some specificity.*

**Rulemaking advisory committee meeting
August 19, 2015**

WCD does not currently have administrative rules addressing the manner in which it will award and establish the amount of reasonable attorney fees under ORS 656.385(2).

RULES:

- N/A

ALTERNATIVES:

- Do nothing.
- Develop rules to implement WCD's authority to assess a reasonable attorney fee under ORS 656.385(2).

<i>Speaker & Time</i>	<i>Committee Comments</i>
<i>01:29:27</i>	<i>Should WCD develop a rule for determining a reasonable fee awarded under ORS 656.385(2)?</i>
<i>01:30:58 Randy Elmer</i>	<i>How is the .385(2) fee awarded?</i>
<i>01:31:14 Ryan Delatorre</i>	<i>It's almost never awarded. We have not identified any specific circumstances of when we do award that fee. It seem that the fee under 262(11)(a) has largely subsumed the .385(2) fee in WCD's practices. They are similar, except .385(2) applies to medical and vocational disputes and does not have a fee cap.</i>
<i>01:32:03 Randy Elmer</i>	<i>I don't think it was intended that the amendment change the way the attorney fee is awarded. It just expanded a group of issues in which a fee can be awarded. I'm thinking there doesn't really need to be a change.</i>
<i>01:32:30</i>	<i>End of discussion.</i>

ISSUE #4

Re: Should WCD develop rules identifying distinctions between medical service disputes under ORS 656.245 and medical fee disputes under ORS 656.248?

- a) Is it necessary to clarify the manner in which disputes should be categorized between ORS 656.245 and ORS 656.248 for the purpose of the award of attorney fees under ORS 656.385(1)?
- b) If so, what guidelines or kinds of guidelines would be useful for drawing that distinction?
- c) Are there certain kinds of disputes that are more at risk for being incorrectly categorized?
- d) Please feel free to submit examples of cases in which, in your opinion, WCD has incorrectly categorized a dispute under ORS 656.248 rather than 656.245.

BACKGROUND:

**Rulemaking advisory committee meeting
August 19, 2015**

ORS 656.385(1) requires the assessment of an attorney fee when a worker prevails in a dispute, or the worker's attorney is instrumental in obtaining settlement in a dispute, related to medical or vocational benefits pursuant to ORS 656.245, 656.247, 656.260, 656.327 or 656.340. As a result, under ORS 656.385(1), workers' attorneys do not earn an attorney fee for any work done relative to a ORS 656.248 medical fee dispute. In discussions relating to House Bill 2764, parties expressed concern regarding the manner in which WCD has been categorizing ORS 656.245 and 656.248 disputes. Specifically, their opinion was that WCD occasionally incorrectly categorizes certain kinds of disputes under ORS 656.248 rather than 656.245, and thereby incorrectly precludes any award for attorney fees for work done in connection with the dispute.

RULES:

- OAR 436-001-0410

ALTERNATIVES:

- Do nothing (do not develop rules identifying distinctions between medical service disputes under ORS 656.245 and medical fee disputes under ORS 656.248).
- Develop rules identifying distinctions between medical service disputes under ORS 656.245 and medical fee disputes under ORS 656.248.

***Speaker &
Time***

Committee Comments

01:34:33

Is it necessary to clarify the manner in which disputes should be categorized between ORS 656.245 and ORS 656.248 for the purpose of the award of attorney fees under ORS 656.385(1)?

01:34:35

Randy Elmer

There was a discussion that revolved around if we need to add .248 to the laundry list of items before the director before we get paid for them. A lot of the medical service disputes, non-payment of medical services, which should be a .245 issue, but whoever issued the order made it a .248 dispute, which isn't in the statute so you don't get paid for resolving it. If we are characterizing the nonpayment of medical service as a .248 dispute which only deals with CPT codes, but they were taking the .245 disputes and putting them out as .248 and depriving us of a fee. It was agreed that we would come back here and make it clear to the decision makers that the nonpayment .245 medical payment bill issues are .245(1) disputes.

01:36:24

*Sommer
Tolleson*

Do they explain how they put it into a .248? It seems like it is clear.

01:36:56

Randy Elmer

They re-characterize it as a fee dispute.

01:37:12

Cara Filsinger

We had asked for examples, we were not able to identify any examples so we agreed to put the issue down and we are still waiting for examples. Without those it's a challenge to figure it out.

**Rulemaking advisory committee meeting
August 19, 2015**

- 01:38:05 *I can't remember how they got sidetracked over into CPT codes.*
Randy Elmer
- 01:38:19 *The general question about non-payment may need more discussion, because .248(12) states when a dispute exist between an injured worker and direct insurer/self-insurer employer/medical service provider, for the amount of the fee or nonpayment of bills for compensable medical services that is something that needs to be addressed by the director under .248. It does talk about nonpayment of bills under .248.*
Ryan Delatorre
- 01:38:46 *In the meeting we were clear about why we were eliminating .248 out of our bill.*
Randy Elmer
- 01:38:54 *It seems you have an issue with how the department is administering some rules. We think the statute is clear, and there is no need for a rule. The department can take care of this with internal training. If you have examples they could use those examples to do that. We don't see this as an issue.*
Jaye Fraser
- 01:39:24 *My question is about the statute. The question is who the dispute is between.*
Ted Heus
- 01:40:38 *Scenario: There is a medical bill and it's not paid. Provider bills the injured worker for the medical service because they haven't received payment. Worker's attorney files a dispute with MRT because insurer didn't pay the bill. Is that dispute between the medical service provider and the insurer, or who are the parties to this dispute?*
Ryan Delatorre
- 01:41:02 *That would be between the worker and the insurer, and traditionally a .245.*
Randy Elmer
- 01:41:10 *By virtue of who brought the claim we are going to categorize it as a .245 rather than a .248.*
Ryan Delatorre
- 01:41:29 *Examples would really help*
Jennifer Flood
- 01:41:56 *We are very open to direction through contested case hearing, court of appeals and such as it dictates what we do. We look at if there is an entitlement issue when we are categorizing. If the denial is based on an entitlement vs just ignoring the bill; that is kind of a fluke in the threshold. We would like to see the examples.*
Steve Passantino
- 01:42:43 *Cited case law about .245 and .248.*
Holly O'Dell

**Rulemaking advisory committee meeting
August 19, 2015**

01:43:37 *It was agreed that 656.248 would be dropped from the bill, because disputes
Randy Elmer that were being characterized as .248 disputes – that would not happen in the
future, based on an internal change here.*

01:44:35 *The agreement was that we would talk about the examples.*
Cara

Filsinger

01:44:55 *End of discussion.*

ISSUE #5

Re: Should WCD adopt a rule stating that when a claimant mistakenly sends a request for hearing to an insurance carrier, and not WCD, the carrier must forward the misdirected request for hearing to WCD?

- a) Does an insurer have a duty to promptly forward a request for hearing to WCD?
- b) If WCD adopts such a rule, how should WCD enforce the insurer's obligation to forward hearing requests?

BACKGROUND:

The Workers' Compensation Board has a rule (OAR 438-005-0075) stating that when a claimant mistakenly sends a request for hearing to an employer or carrier, and not the Board, the carrier must promptly forward the misdirected request for hearing to the Board. WCD has no such rule. Adopting a rule would specify that employers and insurers have a duty to forward misdirected requests for hearing and help to ensure that WCD maintains jurisdiction of otherwise valid disputes.

RULES:

- N/A

ALTERNATIVES:

- Do nothing.
- Adopt a rule stating that when a claimant mistakenly sends a request for hearing to an employer or carrier, and not WCD, the carrier must promptly forward the misdirected request for hearing to WCD.

***Speaker &
Time***

Committee Comments

01:45:15 *Does an insurer have a duty to promptly forward a request for hearing to
WCD? If WCD adopts such a rule, how should WCD enforce the insurer's
obligation to forward hearing requests?*

01:46:06 *What constitutes a request for hearing in WCD? Isn't a phone call to the
Sommer reconsideration folks considered a request for reconsideration? You don't even
Tolleson have to put something in writing in WCD. I would say it needs to clarify if you
do have a rule that it needs to be a written request.*

**Rulemaking advisory committee meeting
August 19, 2015**

- 01:47:17 *Request for hearing may not be the right phrase, because these are not
Ryan Delatorre hearings.*
- 01:47:28 *Are you saying if a worker calls the adjuster and say I want xyz that doesn't
Jennifer Flood count?*
- 01:47:51 *The majority of the items we see are in writing. I can't think of any specific
Steve instance where we are going to initiate a review from a phone call. We even
Passantino return things because the written submission isn't adequate, so I don't know
 that we initiate off from just a phone call.*
- 01:48:35 *I think the only example of this is a request for reconsideration. We actually
Fred Bruyns complete the form here based upon the phone call and then distribute back to
 the parties.*
- 01:48:48 *I stand by the same position that if there's a rule that it is a written request. I
Sommer would not want a rule that would require the insurer then to forward a phone
Tolleson call.*
- 01:49:29 *Is this a problem?
Jaye Fraser*
- 01:49:33 *There are times that we receive documents where the person is really trying to
Jennifer Flood request a hearing or director review. Making sure the insurer is a taking an
 imitative and not putting it in a pile, and saying they are not taking any action
 on it.*
- 01:50:09 *A few times a month we receive items forwarded from insurers that they
Steve perceive to be misdirected request for administrative review. Sometimes they
Passantino will actually file on the workers behalf for a review with WCD.*
- 01:50:33 *Good portions of people are reacting to it but there isn't a rule in place that
Jennifer Flood would require them to.*
- 01:51:20 *Discussion on request for hearing.
Holly O'Dell*
- 01:51:40 *Discussion on request for hearing.
Jennifer Flood*
- 01:52:39 *The board had a case on the application of their rule last year. It was found
Ryan Delatorre that the insurer did not forward the request for hearing, and by the time it got
 to the board the filing was late. The question was, what was the board
 supposed to do about it. They determined that it was a jurisdictional issue, and
 they were not allowed to take the request for hearing even though it sat with*

**Rulemaking advisory committee meeting
August 19, 2015**

the insurer for a month. They didn't have an enforcement mechanism, but just stated in the foot note a request that the insurer forward these more promptly. If WCD were to promulgate a rule should we put any enforcement mechanisms in the rule?

01:53:32 *Things that WCD does, they are not things with statutory time line, such as Sommer request for reconsideration. There is no triggering event. Tolleson*

01:54:15 *Request for reconsideration does have timelines. Ryan Delatorre*

ISSUE #6

Re: Should Division 001 prescribe a form or format for parties to request that WCD issue a subpoena?

BACKGROUND:

Under ORS 656.726(4)(d), WCD may issue and serve by representatives of the director, or by any sheriff, subpoenas for the attendance of witnesses and the production of papers, contracts, books, accounts, documents and testimony in any inquiry, investigation, proceeding or rulemaking hearing conducted by the director or the director's representatives. The director may require the attendance and testimony of employers, their officers and representatives in any inquiry under this chapter, and the production by employers of books, records, papers and documents without the payment or tender of witness fees on account of such attendance.

WCD's administrative rules currently contain no information on the form and format to request that WCD issue a subpoena.

A stakeholder has proposed that subpoena requests to the director should include:

1. A cover letter outlining the issues presented and including a statement of the purpose and need for the subpoena.
2. A copy of the proposed subpoena or subpoena duces tecum.
3. A document that designates a process server or other individual as a representative of the Director solely for the purpose of service of the subpoena(s).
4. Payment of any fees or costs related to service of process or other administrative expense.

RULES:

- OAR 436-001-0019 through 436-001-0300

ALTERNATIVES:

- Do nothing.
- Adopt a rule prescribing a form or format for parties to request that WCD issue a subpoena.

**Rulemaking advisory committee meeting
August 19, 2015**

<i>Speaker & Time</i>	<i>Committee Comments</i>
<i>01:56:21</i>	<i>Should Division 001 prescribe a form or format for parties to request that WCD issue a subpoena?</i>
<i>01:58:08 Fred Bruyins</i>	<i>Very broad issue.</i>
<i>Guy Boileau</i>	<i>Assume this is a lawyer making this request or any interested party</i>
<i>Sommer Tolleson</i>	<i>The board has other forms for subpoena forms. I don't know if this needs to happen. Rule citations would have to change.</i>
<i>01:59:03 Fred Bruyins</i>	<i>Would that be helpful?</i>
<i>01:59:07 Sommer Tolleson</i>	<i>I think that would be helpful.</i>
<i>01:59:51 Holly O'Dell</i>	<i>Discussion on subpoena process.</i>

ISSUE #7

Re: Should WCD adopt an administrative rule stating WCD will not refund civil penalty overpayments when the amount is below a stated minimum, unless the party submits a written request for a refund?

- a) Is WCD obligated to refund all civil penalty overpayments, regardless of the amount of overpayment?
- b) If not, should WCD adopt an administrative rule stating WCD will not refund civil penalty overpayments when the amount is below a stated minimum, unless the party submits a written request for a refund?
- c) What would be an appropriate minimum overpayment amount?

BACKGROUND:

WCD has the authority to issue civil penalties in a number of circumstances. Sometimes, civil penalties are overpaid. Overpayments may occur for a number of reasons, for example if an insurer and service company both paid the same penalty, if the penalty was amended or rescinded but the party paid the full amount, if the insurer mistakenly paid twice, simple typographical error, etc. Processing refunds for minimal overpayments (which may be for a few dollars or cents) imposes an administrative burden on WCD, which may outweigh the benefit of processing such refunds.

**Rulemaking advisory committee meeting
August 19, 2015**

RULES:

- N/A

ALTERNATIVES:

- Do nothing.
- Adopt a rule stating WCD will not refund civil penalty overpayments when the amount is below a stated minimum, unless the party submits a written request for a refund

<i>Speaker & Time</i>	<i>Committee Comments</i>
<i>02:02:20</i>	<i>Is WCD obligated to refund all civil penalty overpayments, regardless of the amount of overpayment? If not, should WCD adopt an administrative rule stating WCD will not refund civil penalty overpayments when the amount is below a stated minimum, unless the party submits a written request for a refund? What would be an appropriate minimum overpayment amount?</i>
<i>02:03:56 Guy Boileau</i>	<i>Is this an issue?</i>
<i>02:03:58 Fred Bruyns</i>	<i>Does happen with Workers' Benefit Fund and eventually all those funds go to State Lands Department. What would be an appropriate threshold?</i>
<i>02:05:09 Guy Boileau</i>	<i>Feels like a money grab. To the degree that good will is a consideration; I think that has to be factored into the final decision.</i>
<i>02:05:49 Randy Elmer</i>	<i>Who would be a typical recipient of a refund?</i>
<i>02:06:06 Ryan Delatorre</i>	<i>Typically insurers, employer, and TPAs. Sometimes the insurer and its TPA both pay the same civil penalty.</i>
<i>02:06:36 Jaye Fraser</i>	<i>I'm sure you all have some sense of what it would cost you. I have to admit that 20 dollars is a little high. SAIF would be fine with the department keeping the money and not issuing a check to save the system money.</i>
<i>02:07:40 Jennifer Flood</i>	<i>This would have a relatively larger effect on small employers/businesses.</i>