

STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION

In the Matter of the Amendment of OAR:

- 436-001, Procedural Rules, Attorney Fees, and General Provisions,
- 436-030, Claim Closure and Reconsideration, and
- 436-060, Claims Administration

SUMMARY OF
TESTIMONY AND
AGENCY RESPONSES

This document summarizes the significant data, views, and arguments contained in the hearing record. The purpose of this summary is to create a record of the agency's conclusions about the major issues raised. Exact copies of the written testimony are attached to this summary - pending.

The proposed amendment to the rules was announced in the Secretary of State's *Oregon Bulletin* dated March 1, 2022. On March 15, 2022, a public rulemaking hearing was held as announced at 9 a.m. via telephone and videoconference from the Labor & Industries Building, 350 Winter Street NE, Salem, Oregon. Fred Bruyns, from the Workers' Compensation Division, was the hearing officer. The record was held open for written comment through March 21, 2022.

Testimony list:

Exhibit	Testifying
<u>1</u>	Hearing transcript (no testimony)
<u>2</u>	Julene M. Quinn, Quinn & Heus , LLC

Testimony: OAR 436-001-0435

Exhibit 2

“In this rule change, the Director proposes to add a regular annual adjustment; however, the director has failed to increase the based attorney fee. The last time the amounts of \$275 to \$400 were set was 2018. Beginning July 1, 2018, the State Average Weekly Wage (SAWW) has gone up 27.034 percent. Thus, the amounts need to be adjusted upwards to \$349 to \$508. Otherwise, they will be perpetually behind. It is typical that amounts be increased periodically in the rules, but the way the rule is now, the increases over the last four years will never be realized.

“I request that the numbers be adjusted in this rule to \$349 to \$508, and then allow the regular increase based on the SAWW.”

Response:

Thank you for your testimony. When the range for hourly rate was set in 2018 at \$275-\$400, the rule contained no provision for automatic or regular increases; accordingly, the rates have not increased since 2018. The division does believe annual adjustments to the rates are appropriate, prospectively. Effective July 1, 2022, the average weekly wage will increase 6.26 percent. Because the proposed rule will likely not become effective before July 1, the division will re-propose the rule with increased rates, with automatic annual adjustments beginning July 1, 2023.

Attorneys who believe they should get a higher fee in a reclassification review may submit a statement of services under OAR 436-001-0400(2).

Testimony: OAR 436-001-0438

Exhibit 2

“The Workers’ Compensation Division asked for attorneys who represent injured workers to be involved in the committee meetings to formulate a rule to address the issue of WCD awards of attorney fees as required by the court in the case of *Dancingbear v. SAIF*, 314 Or App 538 (2021). Then, WCD promptly ignored our comments.

“The initial rule concept has not been adjusted to address our serious concerns. We ask that the proposed rule be amended.

“In *Dancingbear*, the court concluded ‘that ORS 656.383(1) entitles claimants’ attorneys to fees after they obtain temporary disability benefits for claimants in proceedings on reconsideration pursuant to ORS 656.268.’ ORS 656.383 provides: ‘The claimant’s attorney shall be allowed a reasonable assessed attorney fee if’

“The attorney fee that ‘shall be allowed’ is a ‘*reasonable ... attorney fee.*’ As several of us claimants’ attorneys discussed in the meetings, the rule concept (and now a proposed rule) fails to provide for a *reasonable* attorney fee.

“One concept that is important to consider is that workers’ compensation benefits substitute for a constitutionally guaranteed remedy. The concepts of due process apply. It is important both that any rule provide for a reasonable attorney fee and that any rule provide for a fair process to determine that fee. The rule does neither.

“* * * * *

“... If you adopt the rule in its present form, I and other claimants’ attorneys will challenge the rule as *ultra vires*, among other violations of law. ...”

Response:

In developing the proposed rule, the division sought out input from all stakeholders. Although the proposed rule did not reflect all of the input received, all input was fully considered. After thoughtful consideration of the testimony, the rule will not be adopted as originally proposed. The division will propose a revised rule that addresses concerns raised about a reasonable fee and about the process to determine and challenge the amount of the fee. The division’s responses to the specific issues raised are below.

Testimony: OAR 436-001-0438(1)

Exhibit 2

“OAR 436-001-0438(1) (proposed) provides that the ‘insurer must determine the amount’ of the attorney fee. This rule delegates to the insurer – the party against whom the fee is being assessed – the authority to determine the amount of the reasonable attorney fee. An insurer has no authority to take the place of the Director in assessing a reasonable attorney fee, because the insurer has no authority over the reconsideration process and has no authority over a dispute about temporary disability. Either the Director has authority while the Director has jurisdiction over the reconsideration process, or the Board (and Hearings Division) has authority when it has jurisdiction over a dispute. The statutes do not allow the insurer to resolve a dispute or determine an attorney fee in either forum.

“This highlights the difficulty of conditioning the amount of the attorney fee on the temporary disability obtained. That construct prevents the Director from doing the Director’s job to determine a reasonable attorney fee. The Director must get rid of that portion of the rule, and determine an appropriate fee schedule.”

Response:

The division respectfully disagrees that the proposed rule delegates authority to the insurer to assess a fee or to resolve a dispute. Rather, the insurer is required to pay the worker’s attorney a fee based on the specific criteria and formula set forth in the rule. The only determination that must be made by the insurer is the amount of additional temporary disability compensation benefits that are due and payable to the worker as a result of the modification of temporary disability dates in the Order on Reconsideration. That is a claims processing function that does not happen until after the Order on Reconsideration is issued. The insurer has no discretion in applying the rule or determining whether a fee is due or the amount of the fee under the matrix. If the criteria are met, the insurer applies the formula to calculate the dollar amount. This is consistent with the out-of-compensation attorney fee in ORS 656.268(6)(c); the Order on Reconsideration orders the insurer to pay the fee based on the formula in statute. The insurer, not the division, has the information necessary to apply the formula.

Testimony: OAR 436-001-0438(2)

Exhibit 2

“ORS 656.383 does not allow for the Director to condition the amount of the fee based upon the compensation obtained. Yet, OAR 436-001-0438(2) limits attorney fees to the amount of compensation obtained. This is *ultra vires*. The law is clear that administrative rules cannot amend, alter, enlarge or limit the terms of a statute. *Cook v. Workers’ Compensation Department*, 306 Or 134, 138 (1988). Rules inconsistent with the statutes cannot be adopted. *Franzen v. Liberty Mutual Fire Ins. Co*, 154 Or App 503, 507-508 (1998).

“ORS 656.383 places no limitation on the amount of the attorney fee, only that it be reasonable. The base fee provided in OAR 436-001-0438(2) (proposed) of \$500 plus a small increase based on the workers’ benefits fails to compensate an attorney who must spend significant work to obtain the temporary disability. It is not the case that preparing a reconsideration request is limited to one hour. While all WCD sees is the form filled out, an attorney and her office spends significant time obtaining and reviewing the claim file, communicating with the client, and then formulating whether temporary disability (or medically stationary date which triggers additional temporary disability) is an issue that should be raised at reconsideration. An attorney often obtains additional evidence from the attending physician, of too often must review and defend work by the defense attorney, and often has to cull through the file to submit those documents significant on the issue. The rule proposed fails to compensate for this time.

“For example, if \$1000 is at issue, even if the time to request reconsideration and obtain a correct medically stationary report from a physician takes 5 hours, the attorney will receive \$500 plus 15 percent of \$1000, for a total of \$650. This amounts to \$130 per hour, which the Director’s own rule of 436-001-0435 recognizes does not compensate even the newest attorney. The insurer can pepper claimant with multiple medical reports and evidence, without regard to any attorney fee limitation in the rules, but this rule ties the hands of injured workers and limits their access to representation by limiting the attorney fees that may be paid. This is contrary to the underlying policy requirements of access to representation for workers.

“The rule provides no mechanism whereby an attorney may submit information regarding the full work that was necessary to obtain the temporary disability. The rule, instead, has a one-size-fits all only adjusted for the amount at issue. This does not address the time an attorney may have to spend to obtain the temporary disability (or later medically stationary date). This is contrary to concepts of due process, where a party must have the opportunity to be heard on the issue. If the Director does not want to provide that process, the Board is uniquely capable of determining disputes. However, the Director needs to clarify that the matter may be appealed to the Board (Hearings Division) so that injured workers and their attorneys (and the system as a whole) understand that is where they may obtain a reasonable attorney fee.

“Mr. Heus and I have spent easily 15 hours on this issue, and probably significantly more, not to mention the other attorneys who spent their time to provide input. Under OAR 436-001-0435 (without a SAWW increase), the fee we would receive would be anywhere from \$4125 to \$6000. Under proposed OAR 436-001-0438(2), the attorney fee would be \$500. I hope this makes my point about the rule.”

Response:

The division respectfully disagrees that considering the benefit to the worker exceeds the division’s statutory authority. Rather, the division believes that the benefit to the worker is one factor to be considered in determining the amount of a reasonable attorney fee. See ORS 656.262(11)(a), ORS 656.385(1), and OAR 436-001-0400(3), all of which provide that the benefit to the worker is a factor to consider in determining the amount of a reasonable attorney fee under those provisions.

However, based on the testimony, the division will publish a revised proposed rule to add the time the attorney devoted to the issue of temporary disability compensation as a factor to also be considered in determining the amount of the fee. If the attorney has spent more than two hours on the issue and wishes their time to be considered in the calculation of the fee, the attorney may submit a statement of services to the Appellate Review Unit (ARU) within 14 days of the start of the reconsideration proceeding. ARU will make a finding regarding the number of hours for the insurer to use in applying the matrix.

Another consideration in determining what is a reasonable fee is the 10 percent out-of-compensation fee under ORS 656.268(6)(c), which will be paid in addition to the fee under ORS 656.383(1).

Language has also been added to make it clear that a party may request a hearing on the attorney fee, and the parties, ALJ, and board will not be bound by the matrix or the rule.

Testimony: OAR 436-001-0438(3)

Exhibit 2

“The rule must either allow for input on the issue of the amount of a reasonable attorney fee, or clarify that a worker may request a hearing in front of the Board to provide evidence on a reasonable attorney fee **unrestricted** by the Director’s extremely limited matrix. OAR 436-001-0438(3) (proposed) should be amended to provide clarity to the issue, by adding; ‘Any attorney fee decision under ORS 656.383 may be appealed to the Board (Hearings Division) and is not restricted by this rule.’ ”

Response:

The division agrees that the worker can request a hearing regarding the amount of the attorney fee. In addition, the insurer can request a hearing regarding the entitlement to a fee. In either case, the ALJ and board are not bound by the matrix or rule. The original proposed rule was not intended to provide otherwise. However, language has been added to the revised proposed rule to make it clear.

Dated this 17th day of May, 2022.

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
OF THE STATE OF OREGON**

PUBLIC RULEMAKING HEARING

In the Matter of the Amendment of OAR:)	
• 436-001, Procedural Rules, Attorney Fees, and General Provisions,)	TRANSCRIPT OF TESTIMONY
• 436-030, Claim Closure and Reconsideration, and)	
• 436-060, Claims Administration)	

The proposed amendment to the rules was announced in the Secretary of State’s Oregon Bulletin dated March 1, 2022. On March 15, 2022, a public rulemaking hearing was held as announced at 9 a.m. via telephone and videoconference from the Labor & Industries Building, 350 Winter Street NE, Salem, Oregon. Fred Bruyns, from the Workers’ Compensation Division, was the hearing officer. The record will be held open for written comment through March 21, 2022.

INDEX OF WITNESSES

Witnesses	Page
No testimony given at hearing	NA

TRANSCRIPT OF PROCEEDINGS

Fred Bruyns:

Good morning and welcome. This is a public rulemaking hearing. My name is Fred Bruyns, and I’ll be the presiding officer for the hearing.

The time is now 9:02 a.m. on Tuesday, March 15, 2022. We are conducting this hearing from the Labor & Industries Building in Salem Oregon. However, we are doing so virtually, by video and telephone conferencing. We are making a digital recording of the hearing.

The Workers’ Compensation Division of the Department of Consumer and Business Services proposes to amend chapter 436 of the Oregon Administrative Rules, primarily rules relevant to attorney fees in OAR chapter 436:

- Division 1, Procedural Rules, Attorney Fees, and General Provisions,
- Division 30, Claim Closure and Reconsideration, and
- Division 60, Claims Administration.

The department has:

- Summarized the proposed rule changes and prepared an estimate of fiscal and economic impacts in the notice of proposed rulemaking filed with the Oregon Secretary of State on Feb. 17, 2022;

Transcript of public rulemaking hearing
March 15, 2022

- Distributed the notice to its postal and electronic mailing lists;
- Notified Oregon legislators as required by ORS chapter 183; and
- Posted public notice and the proposed rules to its website.

The Oregon Secretary of State published the hearing notice in its *Oregon Bulletin* dated March 1, 2022.

This hearing gives the public the opportunity to provide comment about the proposed rules. In addition, the division will accept written comment through and including March 21, 2022, and will make no decisions until all of the testimony is considered.

We are ready to receive public testimony. Is there anyone else who would like to testify at this time? ... Hearing no one, in a moment I will recess the hearing, but we will resume for additional testimony, or testimony, if anyone wishes to testify before 10 a.m.

Again, the record remains open for written testimony through and including March 21, 2022. You may submit testimony in any written form. I encourage you to submit your testimony by email or as attachments to email. However, you may also use US mail. I will acknowledge all testimony received.

This hearing is recessed at 9:04 a.m.

This hearing is resumed at 9:59 a.m.

Is there anyone with us who would like to testify today?

Hearing no one, the time is now 10 a.m. Thank you for coming. This hearing is adjourned.

Transcribed from a digital audio recording by Fred Bruyns, March 15, 2022.

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Julene M. Quinn

Theodore P. Heus

March 21, 2022

Feed Bruyns

Workers' Compensation Division

By email to: Fred.H.BRUYNS@dcbs.oregon.gov

Re: Attorney Fees under ORS 656.383

Dear Mr. Bruyns,

The Workers' Compensation Division asked for attorneys who represent injured workers to be involved in the committee meetings to formulate a rule to address the issue of WCD awards of attorney fees as required by the court in the case of *Dancingbear v. SAIF*, 314 Or App 538 (2021). Then, WCD promptly ignored our comments.

The initial rule concept has not been adjusted to address our serious concerns. We ask that the proposed rule be amended.

Comments on OAR 436-001-0438.

In *Dancingbear*, the court concluded "that ORS 656.383(1) entitles claimants' attorneys to fees after they obtain temporary disability benefits for claimants in proceedings on reconsideration pursuant to ORS 656.268." ORS 656.383 provides:

The claimant's attorney shall be allowed a reasonable assessed attorney fee if:

(1) The claimant's attorney is instrumental in obtaining temporary disability compensation benefits pursuant to ORS 656.210, 656.212, 656.262, 656.268 or 656.325 prior to a decision by an Administrative Law Judge; or

(2) The claimant finally prevails in a dispute over temporary disability compensation benefits pursuant to ORS 656.210, 656.212, 656.262, 656.268 or 656.325 after a request for hearing has been filed.

The attorney fee that "shall be allowed" is a "*reasonable ... attorney fee.*" As several of us claimants' attorneys discussed in the meetings, the rule concept (and now a proposed rule) fails to provide for a *reasonable* attorney fee.

One concept that is important to consider is that workers' compensation benefits substitute for a constitutionally guaranteed remedy. The concepts of due process apply. It is important both

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that any rule provide for a reasonable attorney fee and that any rule provide for a fair process to determine that fee. The rule does neither.

Subsection (1)

OAR 436-001-0438(1) (proposed) provides that the “insurer must determine the amount” of the attorney fee. This rule delegates to the insurer – the party against whom the fee is being assessed – the authority to determine the amount of the reasonable attorney fee. An insurer has no authority to take the place of the Director in assessing a reasonable attorney fee, because the insurer has no authority over the reconsideration process and has no authority over a dispute about temporary disability. Either the Director has authority while the Director has jurisdiction over the reconsideration process, or the Board (and Hearings Division) has authority when it has jurisdiction over a dispute. The statutes do not allow the insurer to resolve a dispute or determine an attorney fee in either forum.

This highlights the difficulty of conditioning the amount of the attorney fee on the temporary disability obtained. That construct prevents the Director from doing the Director’s job to determine a reasonable attorney fee. The Director must get rid of that portion of the rule, and determine an appropriate fee schedule.

Subsection (2)

ORS 656.383 does not allow for the Director to condition the amount of the fee based upon the compensation obtained. Yet, OAR 436-001-0438(2) limits attorney fees to the amount of compensation obtained. This is *ultra vires*. The law is clear that administrative rules cannot amend, alter, enlarge or limit the terms of a statute. *Cook v. Workers’ Compensation Department*, 306 Or 134, 138 (1988). Rules inconsistent with the statutes cannot be adopted. *Franzen v. Liberty Mutual Fire Ins. Co.*, 154 Or App 503, 507-508 (1998).

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For example, if \$1000 is at issue, even if the time to request reconsideration and obtain a correct medically stationary report from a physician takes 5 hours, the attorney will receive \$500 plus 15 percent of \$1000, for a total of \$650. This amounts to \$130 per hour, which the Director’s own rule of 436-001-0435 recognizes does not compensate even the newest attorney. The insurer can pepper claimant with multiple medical reports and evidence, without regard to any attorney fee limitation in the rules, but this rule ties the hands of injured workers and limits their access to representation by limiting the attorney fees that may be paid. This is contrary to the underlying policy requirements of access to representation for workers.

The rule provides no mechanism whereby an attorney may submit information regarding the full work that was necessary to obtain the temporary disability. The rule, instead, has a one-size-fits-all only adjusted for the amount at issue. This does not address the time an attorney may have to spend to obtain the temporary disability (or later medically stationary date). This is contrary to concepts of due process, where a party must have the opportunity to be heard on the issue. If the Director does not want to provide that process, the Board is uniquely capable of determining disputes. However, the Director needs to clarify that the matter may be appealed to the Board (Hearings Division) so that injured workers and their attorneys (and the system as a whole) understand that is where they may obtain a reasonable attorney fee.

Mr. Heus and I have spent easily 15 hours on this issue, and probably significantly more, not to mention the other attorneys who spent their time to provide input. Under OAR 436-001-0435 (without a SAWW increase), the fee we would receive would be anywhere from \$4125 to \$6000. Under proposed OAR 436-001-0438(2), the attorney fee would be \$500. I hope this makes my point about the rule.

Subsection (3)

The rule must either allow for input on the issue of the amount of a reasonable attorney fee, or clarify that a worker may request a hearing in front of the Board to provide evidence on a reasonable attorney fee **unrestricted** by the Director's extremely limited matrix. OAR 436-001-0438(3) (proposed) should be amended to provide clarity to the issue, by adding: "Any attorney fee decision under ORS 656.383 may be appealed to the Board (Hearings Division) and is not restricted by this rule."

Comments regarding changes to OAR 436-001-0435

In this rule change, the Director proposes to add a regular annual adjustment; however, the director has failed to increase the based attorney fee. The last time the amounts of \$275 to \$400 were set was 2018. Beginning July 1, 2018, the State Average Weekly Wage (SAWW) has gone up 27.034 percent. Thus, the amounts need to be adjusted upwards to \$349 to \$508. Otherwise, they will be perpetually behind. It is typical that amounts be increased periodically in the rules, but the way the rule is now, the increases over the last four years will never be realized.

I request that the numbers be adjusted in this rule to \$349 to \$508, and then allow the regular increase based on the SAWW.

If you adopt the rule in its present form, I and other claimants' attorneys will challenge the rule as *ultra vires*, among other violations of law. I urge the Director to make the changes suggested above.

Sincerely,



Julene M. Quinn, Attorney at Law

cc: Theodore P. Heus, Attorney at Law
Christopher Moore, Attorney at Law
Keith Semple, Attorney at Law
Jovanna Patrick, Attorney at Law