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ARCHIVES DIVISION

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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 436
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION

FILED

02/17/2022 4:35 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Attorney fees under OAR chapter 436

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 03/21/2022 11:55 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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350 Winter Street NE
PO Box 14480
Salem, OR 97309

Filed By:
FREDERICK BRUYNS
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 03/15/2022

TIME: 9:00 AM

OFFICER: Fred Bruyns

ADDRESS: Virtual hearing - video and telephone

350 Winter Street NE

PO Box 14480

Salem, OR 97309

SPECIAL INSTRUCTIONS:

ZoomGov videoconferencing instructions are under "Need for the Rule(s)" below.

NEED FOR THE RULE(S)

Virtual hearing - ZoomGov connection information:

<https://www.zoomgov.com/j/1611750644?pwd=N0lqUjRKWHg5SzdPSndMR3M1N2lXdz09> | Meeting ID: 161 175 0644 | Passcode: 653301 | Dial: 1-833-568-8864 US Toll-free | Meeting ID: 161 175 0644

Rulemaking is needed to adopt a rule regarding attorney fees under ORS 656.383(1), which the Court of Appeals recently held apply after temporary disability compensation benefits are obtained at reconsideration under ORS 656.268. See *Dancingbear v. SAIF*, 314 Or App 538 (2021). Rule amendment is also needed to provide for annual adjustments to the hourly rate for attorney fees under ORS 656.277(1) based on increases, if any, to the state average weekly wage.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Dancingbear v. SAIF, 314 Or App 538 (2021); rulemaking advisory committee records and written advice. These documents are available for public inspection upon request to the Workers' Compensation Division. Please contact Fred Bruyns, rules coordinator, 971-286-0316, WCD.Policy@dcbs.oregon.gov.

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

Increased compensation for workers' attorneys should promote continued or enhanced access to legal representation in workers' compensation claims. This may be especially helpful to BIPOC* communities that historically may have had unequal access to legal representation, by increasing each worker's chances of finding an attorney to represent them in their claim. Enhanced attorney fees will also assist attorneys who represent BIPOC workers in building and maintaining their practice. The agency does not have data regarding the extent of attorney representation according to race, but invites public input regarding the effects of proposed rules on racial equity in Oregon.

*BIPOC means Black, Indigenous, and People of Color

FISCAL AND ECONOMIC IMPACT:

The agency projects the proposed amendments to these rules and the proposed new rules, if adopted, will not affect the agency's cost to carry out its responsibilities under ORS chapter 656 and OAR chapter 436. Possible impacts on stakeholders are included under "Statement of Cost of Compliance" below.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

- a. The agency estimates that proposed rule changes will not affect costs to state agencies for compliance with the rule.
- b. The agency estimates that proposed rule changes will not result in any direct costs to units of local government for compliance with the rule, with the exception of cities and counties that are self-insured. Possible impacts to self-insured cities and counties are described in part c. with costs to the public.
- c. The agency estimates that proposed rule changes will result in some costs to the public for compliance with the rule. A proposed new rule would require insurers and self-insured employers to pay fees under ORS 656.383(1) to the worker's attorney in a limited number of cases after the reconsideration proceeding under ORS 656.268 concludes. The agency estimates a maximum annual cost of about \$60,000 for insurers and self-insured employers, with a corresponding benefit for attorneys who represent workers in reconsideration proceedings. This cost estimate is approximate, and the agency invites testimony from insurers and self-insured employers regarding anticipated costs.

Proposed rule amendments would require insurers and self-insured employers to pay higher fees under ORS 656.277(1) – for claim reclassifications – as ordered by the Workers' Compensation Division. The hourly rate for such fees will be adjusted annually based on the increase, if any, to the state average weekly wage (SAWW). Indexing the hourly rate to the SAWW will ensure ongoing adjustments that account for inflation and that correspond with adjustments to some worker benefits. Higher fees will increase costs for insurers and self-insured employers, with a corresponding benefit for attorneys who represent workers in claim reclassification reviews. The extent of any increase will not be known until the Oregon Employment Department announces the applicable SAWW, probably in May of 2022. The overall impact should be minor, because the Workers' Compensation Division reclassifies only about 20 claims from nondisabling to disabling each year. Annual updates to the SAWW are published in Bulletin 111.

2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:

Insurers, self-insured employers, and claimant attorneys are primarily affected. Insurers and self-insured employers are generally larger employers. Approximately 200 attorneys represent the interests of workers, and most of these attorneys work for firms that are small businesses.

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:

Proposed rule changes should not affect small business costs for reporting, recordkeeping, or other administrative activities required for compliance, including costs of professional services.

c. Equipment, supplies, labor and increased administration required for compliance:

Proposed rule changes should not affect small business costs for equipment, supplies, labor or administration required for compliance.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Attorneys from small businesses participated on the rulemaking advisory committee.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

436-001-0003, 436-001-0400, 436-001-0410, 436-001-0420, 436-001-0430, 436-001-0432, 436-001-0435, 436-001-0438, 436-001-0440, 436-030-0175, 436-060-0018

AMEND: 436-001-0003

RULE SUMMARY: Amended rule 0003 has descriptive subheadings to clarify the subject matter of the rules and additional statutory references to better explain which statutes are implemented by the rules.

CHANGES TO RULE:

436-001-0003

Purpose and Applicability and Purpose of these Rules ¶¶

(1) Rules related to rulemaking. OAR 436-001-0005 through 436-001-0009 establish supplemental procedures for rulemaking under ORS chapter 183 and apply to all division rulemaking on or after the date the rules are effective.¶¶

(2) Rules related to hearings. OAR 436-001-0019 through 436-001-0296 establish supplemental procedures for hearings on matters within the director's jurisdiction.¶¶

(a) In general, the rules of the Workers' Compensation Board in OAR chapter 438 apply to the conduct of hearings, unless these rules provide otherwise.¶¶

(b) Except for OAR 436-001-0030, these rules do not apply to hearings requested under ORS 656.740.¶¶

(c) These rules do not apply to hearings on reconsideration orders issued under ORS 656.268. ¶¶

(d) These rules apply to hearings held on or after the date the rules are effective.¶¶

(3) Rules related to attorney fees. OAR 436-001-0400 through 436-001-0440 apply to attorney fees awarded by the director under ~~ORS 656.262~~ under ORS 656.262(11) and (12), 656.268(6)(c), 656.277, and (1)(b), 656.386(1), and to attorney fees awarded by the director or administrative law judge under ORS 656.385(1).¶¶

~~(a) These rules apply to orders issued on or after the date the rules are effective, regardless of the date the claim was filed.¶¶~~

~~(b) For attorney fees that are ordered to be paid in reconsideration proceedings under ORS 656.268(6), OAR 436-030-0175 applies.¶¶~~

~~(4) or closed.¶¶~~

(4) General provisions. OAR 436-001-0500 applies to any refund or credit processed by the director on or after

the date the rule is effective, regardless of the date the payment was received.¶

(5) Procedural waiver. The director may waive procedural rules as justice requires, unless otherwise obligated by statute.

Statutory/Other Authority: ORS 656.726(4)

Statutes/Other Implemented: ~~ORS 656.704, ORS 262, ORS 656.268, ORS 656.277, ORS 656.383, ORS 656.385, ORS 656.704, ORS chapter 183~~

AMEND: 436-001-0400

RULE SUMMARY: Amended rule 0400 has revised wording to enhance clarity.

CHANGES TO RULE:

436-001-0400

General Provisions and Requirements for Attorney Fees ~~Awarded by the Director~~ ¶

In addition to the specific provisions in OAR 436-001-0410 through 436-001-043540, the following provisions apply ~~when the director awards an~~ attorney fee: ¶

- (1) ~~In order to be awarded an attorney fee,~~ ¶ The attorney must file with the director a signed attorney retainer agreement. ¶
- (2) In cases in which time devoted is a ~~factor~~ required to be considered in determining the amount of the fee: ¶
 - (a) The attorney should submit a statement of the number of hours spent on the case. ¶
 - (b) The director may request the attorney to submit additional information to support or clarify the statement of hours. ¶
 - (c) If the attorney does not submit a statement of hours or other information requested by the director before an order is issued, the director will presume the attorney spent one to two hours on the case. ¶
- (3) In cases in which a reasonable fee is to be ~~assess~~ determined, the director may consider the following factors: ¶
 - (a) The time devoted to the case for legal services. ¶
 - (b) The complexity of the issue(s) involved. ¶
 - (c) The value of the interest involved. ¶
 - (d) The skill of the attorneys. ¶
 - (e) The nature of the proceedings. ¶
 - (f) The benefit secured for the represented party. ¶
 - (g) The risk in a particular case that an attorney's efforts may go uncompensated and the contingent nature of the practice. ¶
 - (h) The assertion of frivolous issues or defenses.

Statutory/Other Authority: ORS 656.385(1), ORS 656.726(4)

Statutes/Other Implemented: ORS 656.262, ~~656.385, 656.388~~, ORS 656.277, ORS 656.383, ORS 656.704385

AMEND: 436-001-0410

RULE SUMMARY: Amended rule 0410 has revised wording to enhance clarity.

CHANGES TO RULE:

436-001-0410

Attorney Fees ~~Awarded u~~ Under ORS 656.385(1) (Medical and Vocational Disputes) ¶

(1) In cases in which the director or administrative law judge ~~award~~orders a fee to be paid under ORS 656.385(1):¶

(a) The fee must fall within the ranges of the matrix in subsection ~~(1)~~(d), unless extraordinary circumstances are shown or the parties otherwise agree.¶

(b) Extraordinary circumstances are not established merely by exceeding eight hours or a benefit of \$6,000.¶

(c) The matrix in subsection ~~(1)~~(d) shows the maximum fee and fee ranges as percentages of the maximum fee under ORS 656.385(1), as adjusted annually by the same percentage increase, if any, to the average weekly wage defined in ORS 656.211. Before July 1 of each year the director will publish in Bulletin 356 (available on the division's website at http://wcd.oregon.gov/Bulletins/bul_356.pdf) the matrix showing the maximum fee and fee ranges as dollar amounts after the annual adjustment to the statutory maximum fee. Dollar amounts will be rounded to the nearest whole dollar. If the average weekly wage does not change or decreases, the maximum attorney fee ~~awarded~~ under ORS 656.385(1) will not be adjusted for that year.¶

(d) [See attached table.]¶

(2) For purposes of applying the matrix in medical disputes under ORS 656.245, 656.247, 656.260, and 656.327, the following may be considered in determining the value of the results achieved or the benefit to the worker:¶

(a) The fee allowed by the medical fee schedule in OAR 436-009 for the medical service at issue.¶

(b) The overall cost of the medical service at issue.¶

(3) For purposes of applying the matrix in vocational disputes under ORS 656.340, the value of vocational assistance or a training plan, unless determined to be otherwise, falls within the highest range of the matrix for benefit achieved. In addition, the following may be considered in determining the value of the results achieved or the benefit to the worker:¶

(a) The actual or projected cost of the service at issue.¶

(b) The maximum spending limit in the fee schedule for vocational assistance costs in OAR 436-120-0720 (as published in Bulletin 124, available on the division's website at http://wcd.oregon.gov/Bulletins/bul_124.pdf) for the service at issue.¶

~~Table is attached.~~

Statutory/Other Authority: ORS 656.385(1), ORS 656.726(4)

Statutes/Other Implemented: ~~ORS 656.262, 656.385, 656.388, 656.704~~385

RULE ATTACHMENTS DO NOT SHOW CHANGES. PLEASE CONTACT AGENCY REGARDING CHANGES.

ORDER NO. 22-XXX

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
Proposed amendments to OAR chapter 436

436-001-0410 Attorney Fees ~~Awarded~~ Under ORS 656.385(1) (Medical and Vocational Disputes)

(1) In cases in which the director or administrative law judge ~~awards orders~~ a fee to be paid under ORS 656.385(1):

* * * *

(d)

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%

* * * *

AMEND: 436-001-0420

RULE SUMMARY: Amended rule 0420 has revised wording to enhance clarity.

CHANGES TO RULE:

436-001-0420

Attorney Fees Awarded ~~u~~Under ORS 656.262(11)-(Late Payment of Compensation) ¶

In cases in which the director ~~award~~orders a fee to be paid under ORS 656.262(11):¶

(1) OAR 438-015-0110 applies.¶

(2) The director may use the matrix in OAR 436-001-0410 as a guide in determining the amount of the fee.¶

(3) The director must consider the proportionate benefit to the worker when determining the amount of the fee.

Statutory/Other Authority: ORS 656.726(4)

Statutes/Other Implemented: ORS 656.262 & ~~2015 OL, ch. 521, sec. 2~~

AMEND: 436-001-0430

RULE SUMMARY: Amended rule 0430 has revised wording to enhance clarity.

CHANGES TO RULE:

436-001-0430

Attorney Fees ~~Awarded~~Assessed Under ORS 656.262(12) (Late Payment of DCS Proceeds) ¶

The matrix for determining the amount of the attorney fee ~~assessed~~ under ORS 656.262(12) is in OAR 436-060, Appendix C (OAR 436-060-0400).

Statutory/Other Authority: ORS 656.726(4)

Statutes/Other Implemented: ORS 656.262

ADOPT: 436-001-0432

RULE SUMMARY: Adopted rule 0432 has provisions for attorney fees under ORS 656.268(6) that have been moved in from OAR 436-030-0175, thus consolidating rules on attorney fees in division 001.

CHANGES TO RULE:

436-001-0432

Attorney Fees Under ORS 656.268(6)(c) (Additional Compensation at Reconsideration)

For attorney fees under ORS 656.268(6)(c):¶

(1) In addition to a signed retainer agreement required under OAR 436-001-0400(1), the attorney must submit the request for reconsideration on behalf of the worker.¶

(2) The insurer must pay the attorney 10 percent out of any additional compensation awarded. "Additional compensation" includes an increase in a permanent or temporary disability award.

Statutory/Other Authority: ORS 656.726(4)

Statutes/Other Implemented: ORS 656.268(6)(c)

AMEND: 436-001-0435

RULE SUMMARY: Amended rule 0435:

- Has revised wording to enhance clarity; and
- Includes annual adjustments to the hourly rate for attorney fees under ORS 656.277(1) – for claim reclassifications – based on increases, if any, to the state average weekly wage as defined in ORS 656.211.

CHANGES TO RULE:

436-001-0435

Attorney Fees ~~Awarded~~ Under ORS 656.277(1) (Reclassification) ¶

(1) Attorney fees ~~awarded~~ under ORS 656.277(1) will be based on a reasonable hourly rate multiplied by the time devoted by the attorney to obtaining the reclassification order. ¶

(2) The director will determine a reasonable hourly rate of no less than \$275 per hour and no more than \$400 per hour. These amounts will be adjusted annually by the same percentage increase, if any, to the average weekly wage defined in ORS 656.211. Adjusted amounts will be published before July 1 of each year in Bulletin 356 (available on the division's website at http://wcd.oregon.gov/Bulletins/bul_356.pdf). Dollar amounts will be rounded to the nearest whole dollar. If the average weekly wage does not change or decreases, amounts will not be adjusted for that year. ¶

(3) When determining the time devoted by the attorney to obtain the reclassification order, the director may consider time devoted by the attorney to request reclassification from the insurer or self-insured employer and investigate issues related to the classification of the worker's claim.

Statutory/Other Authority: ORS 656.726(4)

Statutes/Other Implemented: ORS 656.277(1)

ADOPT: 436-001-0438

RULE SUMMARY: Adopted rule 0438:

- Has criteria insurers and self-insured employers must use for determining attorney fees to be paid under ORS 656.383(1) after reconsideration proceedings under ORS 656.268;
- Includes a matrix for calculating a reasonable fee that considers a minimum amount of time devoted to the case and that is proportionate to the benefit to the worker;
- Clarifies jurisdiction over disputes regarding attorney fees under ORS 656.383(1) in reconsideration proceedings under ORS 656.268; and
- Specifies that an attorney fee under ORS 656.383(1) must be paid in addition to an attorney fee under ORS 656.268(6)(c).

CHANGES TO RULE:

436-001-0438

Attorney Fees Under ORS 656.383(1) (Temporary Disability Compensation Benefits)

(1) The insurer must determine the amount of and pay to the worker's attorney a fee under ORS 656.383(1) when:

(a) The worker disagrees with the temporary disability dates shown on the Notice of Closure and raises it as an issue in the request for reconsideration under ORS 656.268;

(b) The reconsideration order issued under ORS 656.268 modifies the temporary disability dates shown on the Notice of Closure;

(c) As a result of the modification of the temporary disability dates, the insurer determines additional temporary disability compensation benefits are due and payable to the worker; and

(d) The worker was represented by an attorney in the reconsideration proceeding.

(2) The amount of the attorney fee to be paid under section (1) must be determined according to the matrix below. The formula is intended to calculate a reasonable fee that considers a minimum amount of time devoted to the case and is proportionate to the benefit to the worker. Dollar amounts must be rounded to the nearest whole dollar. [See attached table.]

(3) Disputes regarding attorney fees under ORS 656.383(1) in reconsideration proceedings under ORS 656.268 are not matters under ORS 656.704(2)(a).

(4) An attorney fee under ORS 656.383(1) and this rule must be paid in addition to an attorney fee under ORS 656.268(6)(c) and OAR 436-001-0432.

Statutory/Other Authority: ORS 656.726(4)

Statutes/Other Implemented: ORS 656.383(1)

RULE ATTACHMENTS DO NOT SHOW CHANGES. PLEASE CONTACT AGENCY REGARDING CHANGES.

ORDER NO. 22-XXX

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
Proposed amendments to OAR chapter 436

436-001-0438 Attorney Fees Under ORS 656.383(1) (Temporary Disability Compensation Benefits)

* * * *

(2) The amount of the attorney fee to be paid under section (1) must be determined according to the matrix below. The formula is intended to calculate a reasonable fee that considers a minimum amount of time devoted to the case and is proportionate to the benefit to the worker. Dollar amounts must be rounded to the nearest whole dollar.

<u>Additional temporary disability compensation benefits due and payable:</u>	<u>Amount of attorney fee:</u>		
	<u>Base fee</u>	<u>Plus</u>	<u>Percentage of additional temporary disability compensation benefits due and payable:</u>
<u>Up to \$500</u>	<u>\$500</u>	<u>±</u>	<u>10%</u>
<u>\$501-\$1,000</u>	<u>\$500</u>	<u>±</u>	<u>15%</u>
<u>\$1,001-\$2,500</u>	<u>\$500</u>	<u>±</u>	<u>20%</u>
<u>\$2,501-\$5,000</u>	<u>\$500</u>	<u>±</u>	<u>25%</u>
<u>\$5,001 or more</u>	<u>\$500</u>	<u>±</u>	<u>30%</u>

Example: If the amount of additional temporary disability compensation benefits due and payable is \$2,174, the attorney fee is \$500 plus \$435 (\$2,174 x 0.20 = \$434.80, round up to \$435), for a total fee of \$935.

AMEND: 436-001-0440

RULE SUMMARY: Amended rule 0440 has revised wording to enhance clarity.

CHANGES TO RULE:

436-001-0440

Time Within Which Attorney Fees Must ~~B~~be Paid ¶

Attorney fees ~~assessed~~ under OAR 436-001-0400 to 436-001-0440~~38~~ must be paid within 14 days of the date the order ~~award~~addressing the fees becomes final.

Statutory/Other Authority: ORS ~~656.385(1)~~, 656.726(4)

Statutes/Other Implemented: ORS 656.262, ~~656.385, 656.388~~, ORS 656.268, ORS 656.277, ORS 656.283, ORS 656.704385

AMEND: 436-030-0175

RULE SUMMARY: Amended rule 0175 removes provisions for attorney fees (that are moved to division 001) while providing a cross reference to rules in OAR 436-001 regarding attorney fees under ORS 656.268(6)(c) and ORS 656.383(1).

CHANGES TO RULE:

436-030-0175

Fees and Penalties Within the Reconsideration Proceeding ¶

(1) An insurer failing to provide information or documentation as set forth in OAR 436-030-0135, 436-030-0145, 436-030-0155 and 436-030-0165 may be assessed civil penalties under OAR 436-030-0580. Failure to comply with the requirements set forth in OAR 436-030-0135, 436-030-0145, 436-030-0155, and 436-030-0165 may also be grounds for extending the reconsideration proceeding under ORS 656.268(6).¶

(2) If upon reconsideration of a Notice of Closure there is an increase of 25 percent or more in the amount of permanent disability compensation from that awarded by the Notice of Closure, and the worker is found to be at least 20 percent permanently disabled, the insurer will be ordered to pay the worker a penalty equal to 25 percent of the increased amount of permanent disability compensation. Penalties will not be assessed if an increase in compensation results from one of the following:¶

(a) An order issued by the director that addresses the extent of the worker's permanent disability that is not based on the standards adopted under ORS 656.726(4)(f);¶

(b) New information is obtained through a medical arbiter examination, for claims with medically stationary dates or statutory closure dates on or after June 7, 1995; or¶

(c) Information that the insurer or self-insured employer demonstrates they could not reasonably have known at the time of claim closure.¶

(3) For the purpose of section (2) of this rule, a worker who receives a total sum of 64 degrees of scheduled or unscheduled disability or a combination thereof, will be found to be at least 20 percent disabled.¶

For example: A worker who receives 20 percent disability of a great toe (3.6 degrees) is not considered 20 percent permanently disabled because the great toe is only a portion of the whole person. A worker who is 100 percent permanently disabled is entitled to 320 degrees of disability. A worker who receives 64 degrees (20 percent of 320 degrees), whether scheduled, unscheduled or a combination thereof, will be considered the equivalent of at least 20 percent permanently disabled for the purposes of this rule.¶

(4) ~~Attorney fees may only be authorized when a Request for Reconsideration is submitted by an attorney representing a worker or the attorney provides documentation of representation, and a valid signed retainer agreement has been filed with the director. The insurer must pay the attorney 10 percent out of any additional compensation awarded. "Additional compensation" includes an increase in a permanent or temporary disability award~~ under ORS 656.268(6)(c) are addressed in OAR 436-001-0432. Attorney fees under ORS 656.383(1) are addressed in OAR 436-001-0438.

Statutory/Other Authority: ORS 656.726

Statutes/Other Implemented: ORS 656.268, ~~27~~, ch. 252, ~~OL 2007~~ ORS 656.799

AMEND: 436-060-0018

RULE SUMMARY: Amended rule 0018 inserts a cross reference to OAR 436-001 regarding attorney fees under ORS 656.277, in subsection (3)(e) of the rule.

CHANGES TO RULE:

436-060-0018

Nondisabling and Disabling Claim Reclassification ¶

(1) General. If the insurer changes the classification of an accepted claim, the insurer must:¶

(a) Notify the director under OAR 436-060-0011;¶

(b) Send the worker and the worker's attorney, if any, a "Modified Notice of Acceptance" explaining the change in status; and¶

(c) Close the claim under ORS 656.268(5), if the claim qualifies for closure.¶

(2) Reclassification of a nondisabling claim. The insurer must reclassify a nondisabling claim to disabling:¶

(a) Within 14 days of receiving information that:¶

(A) Temporary disability is due and payable;¶

(B) The worker is medically stationary within one year of the date of injury and the worker will be entitled to an award of permanent disability; or¶

(C) The worker is not medically stationary, but there is a reasonable expectation that the worker will be entitled to an award of permanent disability when the worker does become medically stationary; or¶

(b) Upon acceptance of a new or omitted condition that meets the disabling criteria in this section.¶

(3) Worker request for reclassification. A worker may request the insurer review the classification of a nondisabling claim under ORS 656.277 if the claim has been classified as nondisabling for one year or less after the date of acceptance and the worker believes the claim was or has become disabling.¶

(a) The request for classification status review must be first made to the insurer in writing.¶

(b) Within 14 days of receipt of the worker's request, the insurer must review the claim and:¶

(A) If the classification is changed to disabling, provide notice under this rule; or¶

(B) If the insurer believes evidence supports denying the worker's request to reclassify the claim, the insurer must mail a "Notice of Refusal to Reclassify" to the worker and the worker's attorney, if any. The notice must include the following statement, in bold print:¶

"If you disagree with this Notice of Refusal to Reclassify, you may appeal by contacting the Workers' Compensation Division within sixty (60) days of the mailing date of this notice. You may appeal by using Form 2943, "Worker Request for Claim Classification Review," available on the division's website at wcd.oregon.gov.¶ Send written appeals to the Workers' Compensation Division, Appellate Review Unit, PO Box 14480, Salem OR 97309-0405¶

Or fax to: 503-947-7794¶

Or hand-deliver to: Workers' Compensation Division, Appellate Review Unit, 350 Winter Street NE, 2nd Floor, Salem OR 97301¶

You may appeal by phone by calling the Appellate Review Unit at 503-947-7816. A member of the Appellate Review Unit will complete and sign Form 2943 as the worker's designee and they will send a copy of the completed form to you, the insurer, and any attorneys involved in the claim.¶

If you do not appeal to the Workers' Compensation Division within 60 days of the mailing date of this notice, you will lose all rights to review of this decision. For assistance, you may call the Workers' Compensation Division at 503-947-7816, or the Ombudsman for Injured Workers at 503-378-3351 or 800-927-1271 (toll-free).¶

(c) If the worker disagrees with the insurer's decision in the Notice of Refusal to Reclassify, the worker may appeal to the director under section (7) of this rule:¶

(A) The appeal must be made no later than the 60th day after the mailing date of the Notice of Refusal to Reclassify; and¶

(B) A copy of the insurer's Notice of Refusal to Reclassify must be provided to the director.¶

(d) If the insurer does not respond to the worker's request for reclassification within 14 days of receipt of the worker's request:¶

(A) The worker may request review by the director under section (7) of this rule as if the insurer issued a Notice of Refusal to Reclassify;¶

(B) The director may assess civil penalties under OAR 436-060-0200; and¶

(C) The director may assess an attorney fee under ORS 656.386(3).¶

(e) If the worker is represented by an attorney, and the attorney is instrumental in obtaining an order from the director that reclassifies the claim from nondisabling to disabling, the director may ~~award the attorney order~~ a reasonable assessed attorney fee under ORS 656.277 and OAR 436-001-0435.¶

- (4) Time frame for aggravation rights. A claim for aggravation under ORS 656.273 must be filed within five years after:¶
- (a) The first valid closure of a claim that is reclassified from nondisabling to disabling within one year from the date of acceptance; or¶
 - (b) The date of injury of a claim that is not reclassified from nondisabling to disabling within one year from the date of acceptance.¶
- (5) Claims for aggravation on nondisabling claims. When a claim has been classified as nondisabling for at least one year after the date of acceptance, a worker who believes the claim was or has become disabling may submit a claim for aggravation under ORS 656.273.¶
- (6) Reclassification of a disabling claim. If a claim has been accepted and classified as disabling:¶
- (a) All aspects of the claim are classified as disabling and may not be reclassified, unless:¶
 - (A) The claim has been classified as disabling for less than one year from date of acceptance;¶
 - (B) The insurer determines the criteria for a disabling claim were never satisfied; and¶
 - (C) The insurer has notified the worker and the worker's attorney, if any, by issuing a Modified Notice of Acceptance. The Modified Notice of Acceptance must include the following:¶

"Notice to Worker: Your claim has been reclassified to nondisabling. Generally, this means your insurer concluded no disability payments are due and all of the following are true:¶

You were able to return to work at full wages on or before the fourth calendar day after leaving work or losing wages as a result of your injury.¶

You did not lose time or wages from work as a result of your injury on or after that fourth calendar day.¶

It appears you will not have any permanent disability as a result of your injury.¶

If you think there is a mistake in the classification of your claim as nondisabling, contact the insurer within one year of the date the insurer first accepted your claim and request reclassification.¶

If you request reclassification, the insurer must complete its review and send you its decision within 14 days of receiving your request. If you disagree with the insurer's decision, you have the right, within 60 days of the date of the insurer's notice, to request that the Workers' Compensation Division review your claim to determine if it was correctly classified. If the insurer does not respond to your request for reclassification within 14 days of receiving your request, you may ask the Workers' Compensation Division to review your claim as though the insurer refused to reclassify your claim. For assistance, you may call the Workers' Compensation Division at 503-947-7816, or the Ombudsman for Injured Workers at 503-378-3351 or 800-927-1271 (toll-free)."
 - (b) Any subsequently accepted conditions or aggravations must be processed as disabling claims; and¶
 - (c) Claim closure must be processed under ORS 656.268.¶
- (7) Appeal of insurer's classification decision. If a worker disagrees with an insurer's decision to not reclassify the worker's claim from nondisabling to disabling, the worker may appeal the decision by requesting review by the director:¶
- (a) The request must be submitted to the division by mail, hand-delivery, fax, or phone within 60 days from the date of the insurer's notice;¶
 - (b) The worker may use Form 2943, "Worker Request for Claim Classification Review," for requesting review of the insurer's claim classification decision; and¶
 - (c) The worker does not need to be represented by an attorney to appeal the insurer's reclassification decision under section (3) or (6) of this rule. If a worker appeals an insurer's reclassification decision:¶
 - (A) The worker's appeal must be copied to the insurer;¶
 - (B) The director will acknowledge receipt of the appeal in writing to the worker, the worker's attorney, if any, and the insurer, and initiate the review;¶
 - (C) Within 14 days of the director's acknowledgement:¶
 - (i) The insurer must provide the director and all other parties with the complete medical record and all official actions and notices on the claim. The director may impose penalties against an insurer under OAR 436-060-0200 if the insurer fails to provide claim documents in a timely manner; and¶
 - (ii) The worker may submit any additional evidence for the director to consider. Copies must be provided to all other parties at the same time; and¶
 - (D) After receipt and review of the required documents, the director will issue an order:¶
 - (i) The worker and the insurer have 30 days from the mailing date of the order to appeal the director's decision to the board; and¶
 - (ii) The director may reconsider, abate, or withdraw any order before the order becomes final by operation of law.
- Statutory/Other Authority: ORS 656.268, ORS 656.277, ORS 656.386, ORS 656.726(4), ORS 656.745
 Statutes/Other Implemented: ORS 656.268, ORS 656.277, ORS 656.386, ORS 656.745, ORS 656.210, ORS 656.212, ORS 656.214, ORS 656.262, ORS 656.268, ORS 656.273, ORS 656.277