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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

05/23/2022 9:03 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Attorney Fees Under OAR chapter 436

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 06/22/2022 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: 06/16/2022

TIME: 11:00 AM

OFFICER: Fred Bruyns

ADDRESS: Room F (basement) Labor & Industries Building

350 Winter Street NE

PO Box 14480

Salem, OR 97309-405

SPECIAL INSTRUCTIONS:

See virtual connection instructions under "Need for the Rule(s)."

NEED FOR THE RULE(S)

ZoomGov link to hearing:

<https://www.zoomgov.com/j/1607585782?pwd=RVhsV0VnZzE5M3ZWalpMOGVkdWZCZz09>

Meeting ID: 160 758 5782 | Passcode: 431059 | Dial-in (US toll-free): 1 833 568 8864

Rulemaking is needed to adopt a rule regarding attorney fees under ORS 656.383(1), which the Court of Appeals has held apply after temporary disability compensation benefits are obtained at reconsideration under ORS 656.268. See *Dancingbear v. SAIF*, 314 Or App 538 (2021).

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Dancingbear v. SAIF, 314 Or App 538 (2021); rulemaking advisory committee records and written advice; public testimony on prior proposed OAR 436-001-0438. 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 new rule, 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 adoption will not affect costs to state agencies for compliance with the rule.

b. The agency estimates that proposed rule adoption 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 adoption will result in some costs to the public for compliance with the rule. Proposed amendment to OAR 436-001-0435 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. Current hourly rates are increased by 6.26 percent, from a range of \$275 to \$400 per hour to \$292 to \$425 per hour. The hourly rates will be adjusted annually, beginning July 1, 2023, 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 overall impact should be minor, because the Workers' Compensation Division reclassifies only about 20 claims from nondisabling to disabling each year and paid fees involve, on average, less than two hours of attorney time. The proposed 6.26 percent increase should raise payments by less than \$1,000 per year. Future increases in the hourly rates will be correlated to increases in the Oregon SAWW. Annual updates to the SAWW are published in Bulletin 111. Proposed adoption of new rule OAR 436-001-0438 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. When proposed adoption of OAR 436-001-0438 was previously published for public comment, the agency estimated a maximum annual cost of about \$60,000 for insurers and self-insured employers. The revised proposal includes provision for an additional factor for time devoted by the attorney of \$500 (up to 2 hours), \$1,000 (2.1 to 4 hours), \$1,500 (4.1 to 6 hours), or \$2,000 (for more than 6 hours). The agency cannot forecast how many hours attorneys will spend, on average. But, assuming an average between 2.1 and 4 hours, the maximum annual

cost to insurers and self-insured employers would increase to about \$90,000 per year, with a corresponding benefit to attorneys who represent workers in reconsideration proceedings and obtain temporary disability compensation benefits for their clients. This cost estimate is approximate, and the agency invites testimony from insurers, self-insured employers, and attorneys regarding anticipated impacts.

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 workers' attorneys are primarily affected. Insurers and self-insured employers are generally larger employers. At least 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:

436-001-0435, 436-001-0438

AMEND: 436-001-0435

RULE SUMMARY: Proposed rule 0435:

- Has revised wording to enhance clarity;
- Increases the minimum and maximum hourly rates by 6.26 percent, which is equal to the July 1, 2022, increase in the state average weekly wage as defined in ORS 656.211; 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~~92 per hour and no more than ~~\$400~~25 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: Proposed (new) rule 0438:

- Explains that an attorney fee under ORS 656.383(1) is payable after an order on reconsideration under ORS 656.268 is issued, as provided in this rule; however, if attorney fees under ORS 656.383(1) are at issue at hearing or on board review, the rules in OAR chapter 438 apply;
- Prescribes criteria for when attorney fees are to be paid under ORS 656.383(1) after reconsideration proceedings under ORS 656.268;
- Prescribes a matrix and formula for calculating the amount of the fee, subject to a maximum of \$5,600; the maximum to be adjusted annually by the same percentage increase, if any, to the average weekly wage defined in ORS 656.211 – to be published in Bulletin 356;
- Explains that the formula in the matrix is intended to result in a reasonable fee that considers the time devoted by the attorney to the issue of temporary disability compensation, that is proportionate to the benefit to the worker, and that takes into account the out-of-compensation fee under ORS 656.268(6)(c);
- Explains that, if certain criteria in the rule are met, the director will make a finding in the order on reconsideration issued under ORS 656.268 regarding the number of hours the attorney devoted to the issue of temporary disability compensation; a statement of services will be considered if submitted within 14 days of the date the reconsideration proceeding begins; if not timely submitted, the director will presume the attorney devoted one to two hours to the issue of temporary disability compensation; however, late submissions will be included in the record;
- Clarifies that if a party disputes the entitlement to or the amount of an attorney fee under this rule, that party may request a hearing before the Workers' Compensation Board; clarifies that the Administrative Law Judge and board are not bound by this rule in determining whether a fee under ORS 656.383(1) is due or in determining the amount of the fee;
- States that 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); 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) An attorney fee under ORS 656.383(1) is payable after an order on reconsideration under ORS 656.268 is issued, as provided in this rule. If attorney fees under ORS 656.383(1) are at issue at hearing or on board review, the rules in OAR chapter 438 apply.¶

(2) Using the matrix in section (5) of this rule, the insurer must calculate the amount of and pay to the worker's attorney a fee 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. ¶

(3)(a) The total fee under this rule, not including any fee under ORS 656.268(6)(c), may not exceed \$5,600. The maximum amount will be adjusted annually by the same percentage increase, if any, to the average weekly wage defined in ORS 656.211. The adjusted amount 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). If the average weekly wage does not change or decreases, the maximum will not be adjusted for that year. ¶

(b) The formula in the matrix is intended to result in a reasonable fee that considers the time devoted by the attorney to the issue of temporary disability compensation, that is proportionate to the benefit to the worker, and that takes into account the out-of-compensation fee under ORS 656.268(6)(c).¶

(4) If the criteria in subsections (2)(a), (b), and (d) are met, the director will make a finding in the order on

reconsideration issued under ORS 656.268 regarding the number of hours the attorney devoted to the issue of temporary disability compensation.¶

(a) A statement of services will be considered if submitted within 14 days of the date the reconsideration proceeding begins as provided in OAR 436-030-0145(2).¶

(b) If a statement of services is not submitted within 14 days of the date the reconsideration proceeding begins, the director will presume the attorney devoted one to two hours to the issue of temporary disability compensation.¶

(c) A statement of services submitted more than 14 days after the reconsideration proceeding begins will not be considered by the director, but will be included in the record.¶

(5) The amount of the attorney fee under this rule is to be calculated by adding (a) a base amount for the time devoted by the attorney to the issue of temporary disability compensation to (b) a percentage of the additional amount of temporary disability compensation benefits due and payable to the worker. Dollar amounts should be rounded to the nearest whole dollar. [See attached matrix.]¶

(6) If a party disputes the entitlement to or the amount of an attorney fee under this rule, that party may request a hearing before the Workers' Compensation Board. The Administrative Law Judge and board are not bound by this rule in determining whether a fee under ORS 656.383(1) is due or in determining the amount of the fee.¶

(7) 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).¶

(8) 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. [Ed. Note: Rule 0432 is available here:

https://wcd.oregon.gov/laws/Documents/Proposed_rules_and_testimony/001-2022-03-15/1-22XXX-prop.pdf.]

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.

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
 WORKERS' COMPENSATION DIVISION
Proposed Procedural Rules, Attorney Fees, and General Provisions

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

* * * *

(5) The amount of the attorney fee under this rule is to be calculated by adding (a) a base amount for the time devoted by the attorney to the issue of temporary disability compensation to (b) a percentage of the additional amount of temporary disability compensation benefits due and payable to the worker. Dollar amounts should be rounded to the nearest whole dollar.

(a) Base amount for time devoted by the attorney	
Up to 2 hours	\$500
2.1-4 hours	\$1,000
4.1-6 hours	\$1,500
More than 6 hours	\$2,000
PLUS	
(b) Percentage of additional amount of temporary disability compensation benefits due and payable to the worker	
If the additional amount of temporary disability compensation benefits due and payable is:	Add the following percentage of the additional amount of temporary disability compensation benefits due and payable:
Up to \$500	10%
\$501-\$1,000	15%
\$1,001-\$2,500	20%
\$2,501-\$5,000	25%
\$5,001 or more	30%
The maximum fee is \$5,600, subject to annual adjustment as provided in subsection (3)(a) of this rule.	

Example: If the attorney spent 4-1/2 hours on the issue of temporary disability compensation and the amount of additional temporary disability compensation benefits due and payable to the worker is \$2,174, the attorney fee is the base amount of \$1,500 plus \$435 ($\$2,174 \times 0.20 = \434.80 , round up to \$435), for a total fee of \$1,935.