

WORKERS' COMPENSATION DIVISION  
STAKEHOLDER ADVISORY COMMITTEE

Attorney Fees Under ORS 656.383(1) at Reconsideration Under ORS 656.268

ZoomGov meeting  
10/8/21, 1 p.m.

Agenda/Issues Document

The Workers' Compensation Division seeks input regarding attorney fees under ORS 656.383(1) and the division's role in assessing a fee at reconsideration under ORS 656.268, in light of the Court of Appeals opinion in *Dancingbear v. SAIF*, [314 Or App 538 \(2021\)](#).

ORS 656.383 provides:

**“Attorney fees in cases prior to decision or after request for hearing. 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 Workers' Compensation Board had previously held (*In the Matter of the Compensation of Mekayla N. Dancingbear*, [70 Van Natta 550 \(2018\)](#)) that ORS 656.383(1) did not apply to the reconsideration process. According to the Court of Appeals, “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.”

Neither the statute nor the court’s opinion provide guidance regarding the process or the division’s role in awarding a fee under ORS 656.383(1). The division would like to get input from stakeholders regarding how the process should work.

This meeting is intended to be a preliminary conversation. While an outcome of the conversation may be future rulemaking, rules are not the primary focus of this meeting.

Issues for discussion:

## 1. SCENARIOS

In what circumstances are temporary disability compensation benefits “obtained” at reconsideration? If the worker disagrees with the temporary disability dates shown on the Notice of Closure (NOC), the Order on Reconsideration will state the duration of time loss (the beginning and ending dates of each authorized period, under ORS 656.268(5)(c)(B)(ii) and OAR 436-030-0036). It is not known at the time the Order on Reconsideration is issued if additional time loss benefits will be due and payable.

Possible scenarios:

- If the Order on Reconsideration changes the beginning or ending dates of authorized time loss.
- If the Order on Reconsideration changes the medically stationary date.
- If the Appellate Review Unit (ARU) rescinds the NOC.
- If ARU suspends the worker’s compensation for not attending an arbiter exam. (\*The court remanded this issue to the board in *Dancingbear*.)

## 2. PROCESS

The division has identified the following possible processes by which a fee under ORS 656.383(1) could be awarded. Are there other possible processes?

- ARU awards a fee (or a contingent fee) in the Order on Reconsideration.
- The division awards a fee (or a contingent fee) after the Order on Reconsideration has issued, based on information provided by the insurer regarding time loss benefits due and payable.
- The parties stipulate to a fee, subject to approval by an Administrative Law Judge, after the reconsideration proceeding has been completed.<sup>1</sup>

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<sup>1</sup> See Members Lanning and Ousey’s opinion concurring in part and dissenting in part in *Mekayla N. Dancingbear*, 70 Van Natta 550, 559 n 8 (2018):

“We illustrate the process as follows. First, to be entitled to an assessed attorney fee under ORS 656.383(1), a claimant is not required to request a hearing from the reconsideration order. If a claimant’s attorney is satisfied with an Order on Reconsideration award (including a mandatorily-awarded ‘out-of- compensation’ fee under ORS 656.268(6)(c)), it is unnecessary to request a hearing on that order to seek an ORS 656.383(1) fee award. Instead, a claimant’s counsel can simply request such a fee from the carrier and if it is not opposed to such a fee (*i.e.*, it believes the claimant’s attorney was instrumental in obtaining additional temporary disability benefits) and the parties can agree on the amount, a stipulation can be submitted for ALJ approval. If a carrier opposes a claimant’s entitlement to an assessed attorney fee, the claimant can request a hearing

- The claimant requests a hearing seeking a fee, after the reconsideration process has been completed.

### 3. AMOUNT

If the division awards a fee under ORS 656.383(1), how should the amount be calculated?<sup>2</sup>

- Fixed fee, sliding scale, matrix?
- How to determine benefit secured, if any, for the worker?
- Consideration of time devoted by the attorney. (See OAR 436-001-0400(2).)
- Consideration of other factors. (See OAR 436-001-0400(3).)

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and attempt to establish that his/her attorney was instrumental in obtaining additional temporary disability benefits prior to the ALJ's decision (*i.e.*, before, during, or after the reconsideration process). In this way, the record would not be subject to the evidentiary limitations of ORS 656.283(6) or ORS 656.268(8)(h). Also, no conflict would exist between ORS 656.268(6)(c) and ORS 656.383(1) if the claimant's attorney could meet the requirements of an award under the latter statute (*i.e.*, was instrumental in obtaining additional temporary disability benefits prior to a decision by an ALJ)."

<sup>2</sup> OAR 436-001-0400 provides, in part:

"(2) In cases in which time devoted is a factor 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 assessed, 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."

#### **4. NEXT STEPS**

Possible rules issues:

- OAR 436-001-0003(3) – amend to add a reference to ORS 656.383(1).
- OAR 436-001-0400 through 436-001-0440 – adopt a new rule to address attorney fees under ORS 656.383(1).
- OAR 436-030-0175(4) – amend, or adopt a new (5), to refer to attorney fees under ORS 656.383(1) and to refer to the new rule in division 001.

#### **5. OTHER ISSUES**

What other issues should the division consider regarding attorney fees under ORS 656.383(1)?

**THANK YOU!**