

Workers' Compensation Division  
Rulemaking advisory committee meeting – issues document  
Jan. 26, 2022, 9:30 a.m. (virtual)  
**OAR chapter 436, div. 001 (and other divisions) | Attorney Fee Rules**

**Location of meeting:** Virtual Zoomgov meeting

Date & time: Jan. 26, 2022, 9:30 a.m.

**Committee members attending:**

Kevin Anderson	SBH Legal
Dave Barenberg	SAIF Corporation
Melissa Douglas	Goehler & Associates
Jennifer Flood	Ombudsman for Injured Workers
Jaye Fraser	SAIF Corporation
Ted Heus	Quinn & Heus LLC
Stacey Hewitt	Kaiser Permanente
Chris Moore	Moore & Jensen
John Powell	John Powell and Associates
David Pyle	CareMark Comp MCO
Julene Quinn	Quinn & Heus LLC
Julie Riddle	The Hartford
Dan Schmelling	SAIF Corporation
Elaine Schooler	SAIF Corporation
Kitty Schrantz	Kaiser Permanente
Catherine Shaw	Sedgwick CMS
Diana Winther	IBEW Local 48
Kimberly Wood	Wood Risk Management Services

**Department of Consumer and Business Services staff connected:**

Rob Andersen	Monte Marshall
Fred Bruyns	Jennifer Millemann
James Burke	Cathy Ostrand-Ponsioen
Sara Claessens	Troy Painter
Stan Fields	Steve Passantino
Yesenia Gonzalez	Summer Tucker
Shawn Haywood	Amelia Vargas
Daneka Karma	Matt West

**Meeting summary:**

Fred Bruyns welcomed the committee members and explained that the meeting would be very informal. He requested advice about possible fiscal impacts, as well as any impacts on racial equity in Oregon. After introductions, Fred turned the conduct of the meeting over to Cathy Ostrand-Ponsioen.

Cathy guided the committee through the agenda, which has been copied in below. “Minutes” have been added below each “ISSUE” and at the end. Most of the recorded conversation is paraphrased, though quotation marks are used for some verbatim comments.

In the minutes,

ALJ means administrative law judge  
ARU means Appellate Review Unit

---

*See “DRAFT Proposed Rules – Attorney Fees Under Chapter 436, 1/26/22”*

Issues are not listed rule number sequence.

## **ISSUE #1**

**Rule:** New rule, 436-001-04XX, Attorney Fees Under ORS 656.383(1)

**Issue:** The division does not have a rule or guidance 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.

**Background:** ORS 656.383(1) provides for an attorney fee when “[t]he claimant’s attorney is instrumental in obtaining temporary disability compensation benefits pursuant to ORS \*\*\* 656.268 \*\*\* prior to a decision by an Administrative Law Judge[.]” This statute has been in place since Jan. 1, 2016. The division had previously taken the position, upheld by the Workers’ Compensation Board (*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. In September 2021, the Court of Appeals issued its opinion in *Dancingbear v. SAIF*, [314 Or App 538 \(2021\)](#), holding 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.”

Neither the statute nor the court’s opinion provide guidance regarding the process or the division’s role regarding fees under ORS 656.383(1). Many issues regarding the interpretation and application of ORS 656.383(1) are still subject to litigation.

The division held an initial meeting with stakeholders on Oct. 8, 2021. Considering the input from that meeting<sup>1</sup>, the division has drafted a rule providing for an attorney fee when, as a result of a reconsideration order modifying the temporary disability dates shown on the Notice of Closure, additional temporary disability compensation benefits become due and payable to the worker. The rule requires the insurer to determine the amount of the fee after the order is issued. This is consistent with the 10% fee under ORS 656.268(6)(c). At the time the reconsideration

---

<sup>1</sup> The agenda and minutes of the meeting are posted on the division’s “Rule hearings and meetings” web page at <https://wcd.oregon.gov/laws/Pages/rule-meetings.aspx>.

order is issued the division will not know if additional temporary disability compensation benefits will be due and payable as a result of the order, or if an attorney fee will be due.

In determining the dollar amounts in section (2) of the rule, the division looked at fees awarded by ALJs and the board under ORS 656.383 and at fees awarded by the division under ORS 656.385(1). The division's goal is for the amount of the fee to be in line with fees awarded in other types of cases before the division, and for the fee to be based, in part, on the benefit to the worker. The range of fees that would be paid under the draft rule is \$500 to \$2,000 and up.

**Alternatives:**

- Propose the draft rule as-is.
- Make changes to the draft rule:
  - 
  - 
  -
- 

**Recommendation:**

**Fiscal Impacts, including cost of compliance for small business:**

**How will adoption of this rule affect racial equity in this state (see HB 2993 (2021))?**

**Minutes:**

- Cathy Ostrand-Ponsioen described the issue (see above).
- Julene Quinn said she appreciated the department's efforts. This is not an easy issue to get your hands around. Most reconsideration cases are easy – file review, including temporary disability – a regular-type effort. A smaller percentage, almost the 80/20 rule in life, where you have litigated the temporary disability at hearing and reconsideration, a closure was issued by the insurer to cut off that litigation, and you have to take that litigation and put it into the reconsideration, requiring an extraordinary amount of time. They think there should be some type of base fee for the effort to review a file and determine the temporary disability at issue, plus an opportunity for a claimant attorney to file a statement to ask for an additional fee. Also, ORS 656.383 was instituted to get away from fees that were attached to the amount of compensation. Julene explained that she has had to litigate cases all the way to the Court of Appeals regarding a fraction of a week affecting the average weekly wage, which may have a small effect on temporary disability, but greater impacts on permanent partial disability; this required an extraordinary effort, but was important to the worker; the statute was intended to compensate attorneys for their efforts to allow litigation to go forward. Julene added that they do not think the attorney fee table that ties the attorney fee to the amount of compensation is the wisest way to implement the statute. Perhaps just a base fee and an opportunity to file another statement of services that would then follow the jurisdiction,

not the reconsideration order, would be a better way to go. Julene added that the fee should be determined by the agency, either at the department or the Hearings Division, whoever has jurisdiction. They don't think that initially it should be determined in any way by the insurance company. Adding this to the insurer's burdens does not seem to be helpful, and it is not a good policy for the insurance company to be the determiner of a fee. Julene invited comments from others, especially other claimants' attorneys.

- Chris Moore said he agreed with Julene, but added that his interest is in starting a little further upstream. (The term) "due and payable" is problematic. The statute says "obtained." The Court of Appeals said that is a broader term than "awarded." Chris said he has a case at the Workers' Compensation Board where his client did not appear to be entitled to additional temporary disability benefits with the initial rescission of the Notice of Closure, but the subsequent closure demonstrates that he was in fact entitled to additional temporary disability benefits. As discussed before, this is an extremely complicated situation. The definition of "obtained" is probably going to be litigated. It is broader than awarded. The question isn't whether the money actually gets paid. It is whether there is an entitlement to obtain. There can be a variety of reasons why it doesn't get paid, such as when it reduces an overpayment, but the benefit was obtained, and the attorney is entitled to a fee. The issue in *Dancingbear* of the suspension – if the benefit is obtained but it is not paid because of some other technical reason, it looks like an attorney fee is warranted. Chris added that he echoed Julene's comments; the change in the law, and the Court of Appeals even cited this, this was a change that was designed to make sure lawyers are willing to take these cases on. You need to make sure the amount paid ensures that will happen. Chris described a case that went to the Supreme Court, and because of the way attorney fees were paid on time-loss at the time, he received a \$35 attorney fee. Chris said he thinks our legislature notices that it is crazy to ask him to donate – at that time it would have been about \$15,000, now significantly more. A significant majority of cases are going to be pretty straightforward; you get an additional two weeks or a month of time loss, and we can likely agree on a reasonable method for compensating claimant's counsel. The tricky part is solving these more complex cases when your Notice of Closure is set aside.
- Elaine Schooler said they appreciate the department's gathering of information and review of orders so there is consistency in the system in terms of the amounts awarded and so it is streamlined and easy for the parties to implement. SAIF already has systems in place for completing audits of time loss awards when there is an adjustment in the reconsideration order. Issuing payment for that or applying it to an overpayment and issuing attorney fees – they feel that the system in the rule is very workable for them. It could be folded into existing processes in a manner that is not overly burdensome. Regarding overpayment recoveries, they would agree that when there is an overpayment, and time loss that would otherwise have been paid to the worker is applied toward the overpayment, that is a benefit that is payable to the worker and it should not diminish an attorney fee. Regarding "due and payable" versus "obtained" that is a little trickier. In some instances time loss dates are modified, but there is no overpayment and no time loss that the worker obtains even with the time loss modification, resulting in a net zero payment to the worker. The approach WCD has taken seems to align with that situation and also can align with the overpayment situation, though it may require some additional clarification that in that instance an attorney fee would still be warranted. Elaine added

that regarding the suggestion to have a base fee and having claimant attorneys submit statements of services, they do see that before the Hearings Division; it is something that is selectively used. One thing they are looking to avoid is an argument or fight over attorney fees as part of the reconsideration order – regarding time devoted to a case or complexity of the issues. The majority of cases are pretty simplistic. For those 20 percent of cases where there are more time loss benefits at issue, and that results in a significant award to the worker, they feel that the rule contemplates that in the current attorney fee matrix by increasing the percentage that is paid to the claimant’s attorney in addition to the base fee. They feel that the rule as a whole is workable; it is reasonable and consistent with what is being awarded by other bodies in this area of litigation.

- Melissa Douglas asked, regarding the example of \$934.80, if that would be an assessed fee, and if there would also be the 10 percent fee out of additional compensation.
- Cathy Ostrand-Ponsioen said yes.
- Melissa Douglas asked if claimants’ counsel gets 10 percent in compensation for a reduction in overpayment due to an order on reconsideration.
- Cathy Ostrand-Ponsioen said she is unsure if she is in a position to answer that, because right now the statute just says the worker’s attorney gets 10 percent of the additional compensation awarded, which includes temporary disability and permanent disability; the reconsideration order includes boilerplate wording to that effect. WCD does not know what is actually paid by the insurer once the reconsideration order is issued.
- Melissa said she thinks it is not, but that is a guess. Maybe different insurers are handling that differently. Melissa explained that the reason she asked about this is because it might help us to apply the same procedure for assessed fees.
- Cathy Ostrand-Ponsioen asked if anyone else has comments about the draft rule or what we have heard so far. Cathy asked Julene, regarding those more complex cases, when you would want the ability to ask for more – in the reconsideration proceeding before ARU, where there is a set time frame, and once the order issues, how does she see that working, or is that something that would go to the Hearings Division to determine?
- Julene said that she believes that the ability of the department to award a fee sits with the department’s jurisdiction at the time the department has the matter in front of them. For example, in a case where an attorney did a lot of work before – such as litigating time loss at a hearing and suddenly it gets roped into reconsideration – an attorney might have an opportunity to submit a statement to ARU for ARU to award a fee based upon the effort. That is an option and a possibility jurisdictionally. Once you issue the reconsideration order, then it goes to the board’s jurisdiction. Julene added that she somewhat disagrees with section (3) of the proposed new rule, because an ORS 656.383 fee may arise out of the reconsideration process, but it is not tied to the reconsideration process, in the sense that it is not bound by the limitations of ORS 656.268 for a frozen record or to actually having to raise that issue or that it is tied time-wise for any appeal. Julene referred to Chris Moore’s example of where a reconsideration rescinds a closure; you should not have to appeal that reconsideration order and ask for a 656.383 fee and hold it in abeyance until you can prove later that the next closure awarded additional time loss; because of your efforts in getting the closure rescinded, triggering your client’s entitlement. Julene said she doesn’t think that ORS 656.383 has those time limitations. Julene added that she agrees with the second sentence that it is not a dispute under the director’s jurisdiction under ORS 656.704(2)(a). (Julene added that she would write it a

little differently.) Julene said that sometimes she has to appeal the reconsideration order because of a penalty if it seemed to be an unreasonable closure, putting that rescission at issue at the hearing; this may tie her client's benefits to a hearing in a way she does not want to happen. It pits her client's penalty against the propriety of the order, and the employer may be prompted to assert that the closure was fine. Benefits should not be tied to attorney fees in a way that causes the benefits to be pulled along with the litigation. A rule should not prevent the option to just argue for the fee. Julene said she envisions a rule that would provide a base fee that is not tied to the amount of compensation, so we do not have these tricky calculations later, but that gives the claimant the right to either request a different fee from reconsideration, if that is possible, if you can provide that information, and that would allow the worker to request a fee at a hearing and provide evidence about that, since it would not be a closed record according to Julene's review of ORS 656.268 and 656.383.

- Cathy Ostrand-Ponsioen thanked Julene and said she provided good feedback. Cathy asked if anyone has input regarding Julene's comments about section (3) of the proposed rule. Cathy explained that the wording of section (3) was an attempt to clarify the differing jurisdiction of the director and the board; there are different appeal routes, and some fees should be determined by the Hearings Division.
- Julene Quinn said she did want to discuss their general feelings about the amount of the base fee. The world does not see all of the effort that goes into a reconsideration request – five to fifteen plus hours of reviewing a case on average, in order to get to reconsideration. We would want to discuss the amount of the base fee. If you look at \$5000 time 30 percent - \$1,500; when the statute was changed, the cap for temporary disability was \$1,500, and that was clearly not sufficient (and that is why the statute was changed). The base fee is less than what the cap used to be. If someone shows other effort, those dollars are probably not sufficient. We would want to have more of a discussion about this, perhaps canvas attorneys who do more reconsiderations to determine the actual cost of getting to reconsideration.
- Jennifer Millemann asked for clarification about the amount.
- Julene Quinn said it was 30 percent times \$5,000, which is \$1,500, plus the \$500. This is the top fee listed, and Julene had wanted to point out that everything below that is less, regardless of how many hours you spend to get that. There was a case at the Court of Appeals involving how to calculate the average weekly wage. Maybe it meant \$25 a week, but the effect is greater when you apply that over a long period of time, plus the effects on PPD (permanent partial disability) calculation (because wage is a multiplier in determining that benefit). It seems on the surface to be a small amount, but over the life of a claim may make a large difference.
- Cathy Ostrand-Ponsioen said she appreciated having this perspective.
- Ted Heus said he wanted to echo some of what Julene said. Ted added that he also has concerns about the term “due and payable,” as that may restrict beyond what *Dancingbear* and the statute uses, in terms of being “obtained.” Ted said he is curious how the \$500 base fee was determined. If he successfully obtain an extra \$500 for a client through the reconsideration proceeding, his fee would be \$550, and he is struggling to figure out how someone could do it for that little money. You have to work with your client, get records, and review the records to find out whether there is a discrepancy. Ted continued that they also have to make sure they are not going to end up reducing

temporary disability. Even the risk itself seems out of proportion to the fee. The scale doesn't go up that much. For a \$5,000 increase in the benefit you are looking at a \$2,000 fee. Ted said he doesn't understand the policy incentives or reasoning behind tracking with the amount. Ted referred to a goal of the legislature to encourage accurate and competent representation and to encourage insurers to award the correct amounts. WCD's proposed fees are not aligned with fees awarded by the Workers' Compensation Board, which Ted noted in his experience are always higher than what is on the top of the list here (in the draft rule). Ted concluded that he disagrees with tying the fee to the amount of compensation and also to the fee being so low.

- Cathy Ostrand-Ponsioen thanked Ted for his input.
- Kevin Anderson said he echoed Elaine Schooler's / SAIF's support for the proposed rule. After talking with the attorneys in their office, Kevin said they like the matrix, as it is not overly burdensome to calculate the amounts; their clients can understand fairly easily. Regarding whether the \$500 base is enough, even though the statute says this is about awarding a reasonable fee, the assessed fee is not the only fee going out. It is the assessed fee plus the out-of-compensation fee. On the example of \$5,000 of time loss and a \$2,000 fee, there is also the 10 percent out-of-compensation fee. The only other issue that came up was about rescinded closures and how to calculate that fee. Maybe some calculation of a set fee based on the worker's TTD (temporary total disability) rate, as in  $4.35 \times$  the weekly time loss or the average weekly wage, so the assessed fee on a reopened case would roughly equal about a month of time loss. That would be about consistent with the matrix. Kevin concluded in saying that these are just a few quick thoughts from the attorneys in his office, and he said they generally support the draft proposed rule.
- Cathy Ostrand-Ponsioen thanked Kevin for his input.
- Melissa Douglas said, to clarify, that the proposed rule is specific to reconsideration orders regarding an explicit modification of the temporary disability dates. Melissa noted that Kevin mentioned rescinded closures, and the rule doesn't appear to address that.
- Cathy Ostrand-Ponsioen said that the way the draft rule is written, it would only apply when there is an order on reconsideration issued that does modify the temporary disability dates. Cathy added that she thinks that is what Kevin was referring to. And, there is some thought that the rule should be expanded to apply if the Notice of Closure is rescinded – beyond what the draft proposed rule says. Cathy added that we have gotten some really good feedback. If anyone has additional thoughts later in the meeting, we can come back to this.

---

## ISSUE #2

**Rule:** 436-001-0440, Time Within Which Attorney Fees Must be Paid

**Issue:** If the new rule (Issue #1) is adopted, is there a need to change or clarify the rule providing the timeframe within which attorney fees must be paid?

**Background:** Current rule provides that attorney fees must be paid within 14 days of the date the order awarding the fees becomes final. The board's rule, 438-015-0082, Timely Payment of Attorney Fees, provides:

“(1) An approved attorney fee shall be paid within the time required for payment of the compensation out of which the approved fee is to be paid.

“(2) An assessed attorney fee shall be paid within 14 days of the date the order authorizing the fee becomes final.”

The division would like to avoid unintended consequences if the new rule is adopted.

**Alternatives:**

- Leave the current rule regarding the timeframe as-is.
- Amend the rule:
- 

**Recommendation:**

**Fiscal Impacts, including cost of compliance for small business:**

**How will adoption of this rule affect racial equity in this state (see HB 2993 (2021))?**

**Minutes:**

- Cathy Ostrand-Ponsioen described the issue – see above.
- No discussion.

---

**ISSUE #3**

**Rule:** 436-001-0435(1)(a), Attorney Fees Under ORS 656.277(1)

**Issue:** The hourly rate for an attorney fee for obtaining an order that reclassifies the claim from nondisabling to disabling has not been increased since 2018.

**Background:** This rule was originally adopted effective Jan. 1, 2016. At that time, the hourly rate was no less than \$150 and no more than \$400. Effective April 1, 2018, the minimum was increased to \$275 per hour, but the \$400 cap was not changed. Attorney fees awarded in reclassification reviews are generally on the low end (\$275/hour for 1-2 hours), as attorneys rarely submit statements of services and it is unclear how much time is devoted.

The division is considering adding language to the rule providing for an annual adjustment to the dollar amounts based on the percentage increase, if any, to the average weekly wage under ORS 656.211. Adjusted amounts would be published in bulletin.

Other attorney fees that are subject to an annual adjustment include:

- Fees for finally prevailing in a dispute over medical services or vocational assistance under ORS 656.385(1).

- Fees for unreasonable delay under ORS 656.262(11)(a).
- Fees for finally prevailing against a responsibility denial under ORS 656.308(2)(d).
- The hourly rate for personal or telephonic interviews or depositions under ORS 656.262(14)(a) and [OAR 438-015-0033\(1\)](#) (see [WCB Bulletin No. 1](#)).

**Alternatives:**

- Provide for an annual adjustment to the dollar amounts for the hourly rate
- 

**Recommendation:**

**Fiscal Impacts, including cost of compliance for small business:**

**How will adoption of this rule affect racial equity in this state (see HB 2993 (2021))?**

**Minutes:**

- Cathy Ostrand-Ponsioen described the issue – see above.
- Julene Quinn said the board is paying up to \$450 for appellate matters, so the \$400 cap is a little bit low. Julene added that she would agree to a regular change of the amount. The board awards fee increases every year. 2015 legislation occurred because some fees were capped for about 14 years. Julene suggested the possibility of increasing the fee based on inflation since 2015 when the fee was set. Based on changes to the average weekly wage, it would be \$525, and then provide for a regular increase.
- Cathy Ostrand-Ponsioen said to confirm that the recommendation is to increase the \$400 to \$525, and then to do the annual adjustment if there is an increase in the state average weekly wage.
- Julene Quinn confirmed that would bring the fee current.
- Cathy Ostrand-Ponsioen asked if the committee had additional thoughts.
- Elaine Schooler said they agree an annual adjustment makes sense. The \$450 mentioned as an appellate rate before the board – in this case it makes sense to start at the \$400, provide for an annual adjustment, and it will naturally increase on its own. Increasing to \$525 is well in excess of what the board is granting claimants’ attorneys.
- Cathy Ostrand-Ponsioen thanked Elaine for her input.
- Kevin Anderson asked if the WCD has kept track of how many attorney fees have been awarded for reclassification disputes, or if this is something the division could find.
- Cathy Ostrand-Ponsioen said she doesn’t think we have been. We have the number of cases that come before us for reclassification review and the number that we reclassify, but Cathy said she does not know that we keep track of the specific attorney fees.
- Steve Passantino said he is not aware that we track that or if that data is available. Steve added that he made a note about this.
- Kevin Anderson said thank you.

- Cathy Ostrand-Ponsioen said it sounds like an annual adjustment is agreeable, but the starting rate is something we need to look at, whether we stay with the current amounts or increase them.

---

## **ISSUE #4**

**Rule:** 436-030-0175(4), Fees and Penalties within the Reconsideration Proceedings

**Issue:** Should the section of this rule related to attorney fees be moved to division 001?

**Background:** Section (4) of this rule applies to attorney fees ordered by the Appellate Review Unit (ARU) in reconsideration proceedings under ORS 656.268. Previously, the only fee at reconsideration was under ORS 656.268(6)(c), which provides for a fee equal to 10 percent of any additional compensation awarded to the worker. With the *Dancingbear* decision, there will now be two possible attorney fees addressed by ARU in orders on reconsideration.

In 2009, the division made the decision to consolidate rules relating to attorney fees in division 001; previously they were spread across divisions 001, 010, 060, and 120. The rulemaking advisory committee at the time recommended consolidating all the rules into one division that is applicable to all attorney fee-related issues.

### **Alternatives:**

- Move the content of 436-030-0175(4) to division 001 and include a cross-reference in its place.
  - If 436-030-0175(4) is moved to division 001, 436-001-0003(3)(b) can be deleted and ORS 656.268(6)(c) should be added to the list of statutes in section (3) of 436-001-0003.
- Leave 436-030-0175(4) where it is. If it is not moved to division 001:
  - 436-030-0003(2)(a) will need to be amended to clarify applicability, as attorney fees will depend on the date the order on reconsideration is issued, not the date the claim was closed.
  - A new subsection should be added specific to attorney fees under ORS 656.383(1), with a cross-reference to the new rule in division 001.

- 

### **Recommendation:**

**Fiscal Impacts, including cost of compliance for small business:**

**How will adoption of this rule affect racial equity in this state (see HB 2993 (2021))?**

**Minutes:**

- Cathy Ostrand-Ponsioen described the issue (see above).
- Chris Moore said he was curious about the department's understanding of the effects of moving the rule. What difference would it make?
- Cathy Ostrand-Ponsioen said it is just a matter of where the rules are located, in one place versus spread throughout. It should not make a substantive difference. The question is whether it makes it more user friendly to have all of the attorney fee rules in one place. When ORS 656.385 was first effective, we had attorney fee rules in divisions 001, 010, and maybe division 120. Every time we needed to change the attorney fee rules we had to do it in three different places, so we decided to put the all in division 001 so they could be in one place. Maybe this is a situation where the fees are so different, it doesn't matter. That's fine too.
- Chris Moore said that from his perspective, that if the division doesn't think this would result in a substantive change in how attorney fees are awarded, he doesn't care about the location, so long as there is a cross reference from the old location to the new location in division 001.
- Cathy Ostrand-Ponsioen said okay.
- Julene Quinn said she was going to echo Chris Moore's statement. It doesn't seem like it is substantive. Perhaps in the reconsideration rules there could just be in the process a reference that attorney fees are determined under division 001. Julene added that she does like having the fees all in one location because it makes it easier to find.
- Cathy Ostrand-Ponsioen thanked Julene for her input.

---

**ISSUE #5**

**Rule:** 436-001-0003, Purpose and Applicability of these Rules

**Issue:** There has been some confusion about whether division 001 rules regarding hearings apply to hearings held by ALJs on review of reconsideration orders issued under ORS 656.268. (This issue does not relate to attorney fees.)

**Background:** The rules in division 001 that relate to hearings, 436-001-0019 through 436-001-0296, apply to hearings in matters within the director's authority under ORS 656.704(2). Matters include, but are not limited to, disputes regarding medical services, medical fees, managed care, and vocational assistance. The rules in division 001 do not apply to hearings held by ALJs on review of reconsideration orders issued under ORS 656.268. Hearings on reconsideration orders are requested under ORS 656.283 and subject to the rules in OAR chapter 438. A recent Court of Appeals opinion, *Precision Castparts Corp. – PCC Structural v. Cramer*, 316 Or App 18 (2021), incorrectly cited to 436-001-0225(1)(a) and (b) as applying in a hearing on review of a reconsideration order.

**Alternatives:**

- Add language in 436-001-0003(2) clarifying that the rules in division 001 do not apply to hearings on reconsideration orders issued under ORS 656.268.

- 

**Recommendation:**

**Fiscal Impacts, including cost of compliance for small business:**

**How will adoption of this rule affect racial equity in this state (see HB 2993 (2021))?**

**Minutes:**

- Cathy Ostrand-Ponsioen described the issue (see above).
- Julene Quinn said thank you; she saw Cramer and explained she did not argue that WCD's rules applied. The court struggles with a very confusing double jurisdiction. The clarity is helpful.
- Cathy Ostrand-Ponsioen said she didn't think that any of the parties had necessarily argued that to the court. In a couple of places they referenced rules in division 001 that simply don't apply to hearings on reconsideration orders.

**Housekeeping**

Throughout the rules – Language has been modified to not use “awarded” or “assessed,” which are used inconsistently in the current rules.

436-001-0003

- The title of the rule has been revised consistent with recent revisions to other divisions of rules in chapter 436.
- Subheadings have been added to clarify the applicability of each section of the rule.

436-001-0003(3) – Statutory references have been made more specific.

436-001-0003(3)(a) – Clarify that the attorney fee rules apply to orders issued on or after the effective date of the rules, regardless of the date the claim was filed or closed. Rules related to reconsideration orders in division 030 apply based on the date the claim was closed; this change is intended to avoid confusion over which claims are affected by the new rule for attorney fees under ORS 656.383(1).

436-001-0400(2) – Clarify that section (2) only applies when time devoted is required to be considered.

436-001-0410, 436-001-0420, 436-001-0430, 436-001-0435, 436-001-04XX – Brief descriptors have been added to the rule titles with the intent of making the rules more user-friendly.

436-060-0018(3)(e) – Added a cross-reference to 436-001-0435, which provides for how the amount of the fee is determined.

**Minutes:**

- Cathy Ostrand-Ponsioen said the remaining issues on the document are really housekeeping issues – trying to clarify and make things a little more user friendly. We added subheadings to the applicability rule to make it more clear what each section of the rule applies to. In the rule titles, as we add more rules, having just the statutory references is not necessarily helpful. We added parentheticals to the rule titles to help with navigation.

At the very end of the draft rules there is a division 060 rule on claim reclassification. The process for that is in division 060, but there is one spot that refers to the attorney fee under ORS 656.277, which we talked about on a previous issue. We have added a cross reference to the division 001 rule to help the reader know that there is another rule that applies to that fee.

Cathy asked if anyone has additional questions or comments.

Cathy thanked the committee members for their time and feedback.

- Fred asked that if anyone joined the meeting after it started if they can stay on after the meeting ends so he can get their contact information and copy them on minutes, etc. Fred said we usually provide some time after the meeting for people to send additional comments, but asked Cathy if she could help provide that time frame given our planning for when to file proposed rules.
- Cathy Ostrand-Ponsioen asked that additional input be sent by the end of next week, Feb. 4 for additional written input. Cathy again thanked everyone for their help.

DRAFT Proposed Rules – Attorney Fees Under Chapter 436  
1/26/22

**436-001-0003 Purpose and Applicability 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 under ORS 656.262(11) and (12), 656.277(1), 656.383(1), and 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 or closed.

(b) For attorney fees that are ordered to be paid in reconsideration proceedings under ORS 656.268(6)(c), OAR 436-030-0175(4) applies.

**(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 authority: ORS 656.726(4)  
Statutes implemented: ORS 656.262, 656.268, 656.277, 656.383, 656.385, 656.704, ORS ch. 183  
Hist: Amended 3/14/18 as WCD Admin. Order 18-052, eff. 4/1/18  
Amended 3/11/19 as WCD Admin. Order 19-050, eff. 4/1/19  
See also the *Index to Rule History*: [http://wcd.oregon.gov/laws/Documents/Rule\\_history/436\\_history.pdf](http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf)

## Attorney Fees

### **436-001-0400 General Provisions and Requirements for Attorney Fees**

In addition to the specific provisions in OAR 436-001-0410 through 436-001-04\_\_\_, the following provisions apply to attorney fees:

- (1) The attorney must file with the director a signed attorney retainer agreement.
- (2) In cases in which time devoted is 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 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 authority: ORS 656.385(1), 656.726(4)

Statutes implemented: ORS 656.262, 656.277, 656.383, and 656.385

Hist: Amended and renumbered 12/1/09 from OAR 436-001-0265 as WCD Admin. Order 09-053, eff. 1/1/10

Amended 3/14/18 as WCD Admin. Order 18-052, eff. 4/1/18

See also the *Index to Rule History*: [http://wcd.oregon.gov/laws/Documents/Rule\\_history/436\\_history.pdf](http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf).

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

- (1) In cases in which the director or administrative law judge orders a fee to be paid under ORS 656.385(1):
  - (a) The fee must fall within the ranges of the matrix in subsection (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 (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](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 under ORS 656.385(1) will not be adjusted for that year.

(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
<b>\$1-\$2,000</b>	5.0% - 35.0%	15.0% - 50.0%	40.0% - 62.5%
<b>\$2,001-\$4,000</b>	10.0% - 40.0%	30.0% - 65.0%	52.5% - 75.0%
<b>\$4,001-\$6,000</b>	15.0% - 50.0%	40.0% - 72.5%	65.0% - 87.5%
<b>Over \$6000</b>	20.0% - 65.0%	52.5% - 90.0%	77.5% - 100.0%

(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](http://wcd.oregon.gov/Bulletins/bul_124.pdf)) for the service at issue.

Statutory authority: ORS 656.385(1), 656.726(4)

Statutes implemented: ORS 656.385

Hist: Amended 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16

Amended 3/14/18 as WCD Admin. Order 18-052, eff. 4/1/18

See also the *Index to Rule History*: [http://wcd.oregon.gov/laws/Documents/Rule\\_history/436\\_history.pdf](http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf).

**436-001-0420 Attorney Fees Under ORS 656.262(11) (Late Payment of Compensation)**

In cases in which the director 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 authority: ORS 656.726(4)  
Statutes implemented: ORS 656.262  
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12  
Amended 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16  
See also the *Index to Rule History*: [http://wcd.oregon.gov/laws/Documents/Rule\\_history/436\\_history.pdf](http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf).

**436-001-0430 Attorney Fees Under ORS 656.262(12) (Late Payment of DCS Proceeds)**

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

Statutory authority: ORS 656.726(4)  
Statutes implemented: ORS 656.262  
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12  
Amended 3/14/18 as WCD Admin. Order 18-052, eff. 4/1/18  
See also the *Index to Rule History*: [http://wcd.oregon.gov/laws/Documents/Rule\\_history/436\\_history.pdf](http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf).

**436-001-0435 Attorney Fees Under ORS 656.277(1) (Reclassification)**

(1) Attorney fees 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](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 authority: ORS 656.726(4)  
Statutes implemented: ORS 656.277(1)  
Hist: Adopted 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16  
Amended 3/14/18 as WCD Admin. Order 18-052, eff. 4/1/18

**436-001-04XX Attorney Fees Under ORS 656.383(1) (Temporary Disability Compensation Benefits) – NEW RULE**

(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 as follows:

<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 any payable is \$2,174, the attorney fee is \$500 plus \$434.80 (\$2,174 x 0.20 = \$434.80), for a total fee of \$934.80.

(3) Disputes regarding attorney fees under ORS 656.383(1) in reconsideration proceedings under ORS 656.268 arise out of the reconsideration order and may be addressed at a hearing on the reconsideration order. 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).

Statutory authority: ORS 656.726(4)

Statutes implemented: ORS 656.383(1)

Hist: Adopted XX/XX/XX as WCD Admin. Order XX-XXX, eff. XX/XX/XX

**436-001-0440 Time Within Which Attorney Fees Must be Paid**

Attorney fees under OAR 436-001-0400 to 436-001-04\_\_ must be paid within 14 days of the date the order addressing the fees becomes final.

Statutory authority: ORS 656.726(4)

Statutes implemented: ORS 656.262, 656.268, 656.277, 656.383, 656.385

Hist: Adopted 12/1/09 as WCD Admin. Order 09-053, eff. 1/1/10

Amended 3/14/18 as WCD Admin. Order 18-052, eff. 4/1/18

Related rules outside of division 001:

**436-030-0003 Purpose, Applicability, Forms, and Bulletins**

**(1) Purpose.** The purpose of the rules in OAR 436-030 is to provide standards, conditions, procedures, and reporting requirements for:

- (a) Requests for closure by the worker;
- (b) Claim closure under ORS 656.268(1);
- (c) Determining medically stationary status;
- (d) Determining temporary disability benefits;
- (e) Awards of permanent partial disability;
- (f) Determining permanent total disability awards;
- (g) Review for reduction of permanent total disability awards;
- (h) Review of prior permanent partial disability awards; and
- (i) Reconsideration of notices of closure.

**(2) Applicability of rules.**

- (a) Except as provided in subsections (b) and (c) of this section, the rules in OAR 436-030 apply to all accepted claims for workers' compensation benefits and all claims closed on or after the effective date of these rules.
- (b) All orders the division issues to carry out the statute and the rules in OAR 436-030 are considered orders of the director.
- (c) For claims in which the worker became medically stationary before July 2, 1990, OAR 436-030-0020, 436-030-0030, and 436-030-0050 as adopted by WCD Administrative Order 13-1987, effective January 1, 1988, will apply.
- (d) OAR 436-030-0055(3)(b), (3)(d), and (4)(a) apply to all claims with dates of injury on or after January 1, 2002.
- (e) The director may waive procedural rules as justice requires, unless otherwise obligated by statute.

**(3) Availability of forms and bulletins.** The forms and bulletins referenced in these rules are available on the division's website at <https://wcd.oregon.gov/forms/Pages/forms.aspx> and <https://wcd.oregon.gov/forms/Pages/bulletins.aspx>.

Statutory authority: ORS 656.268, 656.726

Statutes implemented: ORS 656.005, 656.206, 656.210, 656.212, 656.214, 656.262, 656.268, 656.273, 656.278, 656.325, 656.726

Hist: Amended 2/12/15 as WCD Admin. Order 15-057, eff. 3/1/15

Amended 2/7/20 WCD Admin. Order 20-050, eff. 3/1/20

See also the *Index to Rule History*: [http://wcd.oregon.gov/laws/Documents/Rule\\_history/436\\_history.pdf](http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf).

**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.

(a) **For fees under ORS 656.268(6)(c)**, 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.

(b) **For fees under ORS 656.383(1), OAR 436-001-04XX applies.**

Statutory authority: ORS 656.726

Statutes implemented: ORS 656.268 (§7, ch. 252, OL 2007)

Hist: Amended 11/1/07 as WCD Admin. Order 07-059, eff. 1/2/08

See also the *Index to Rule History*: [http://wcd.oregon.gov/laws/Documents/Rule\\_history/436\\_history.pdf](http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf).

#### **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](http://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 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 authority: ORS 656.268, 656.277, 656.386, 656.726(4), and 656.745

Stats. Implemented: ORS 656.210, 656.212, 656.214, 656.262, 656.268, 656.273, 656.277, 656.386, and 656.745

Hist: Amended 12/1/2009 as WCD Admin. Order 09-057, eff. 1/1/2010

Amended 11/28/16 as WCD Admin. Order 16-055, eff. 1/1/17

Amended 3/13/20 as WCD Admin. Order 20-054, eff. 4/1/20

See also the Index to Rule History: [http://wcd.oregon.gov/laws/Documents/Rule\\_history/436\\_history.pdf](http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf).