

Agenda

Rulemaking Advisory Committee

Workers' Compensation Division Rules

- OAR 436-001, Procedural Rules, Attorney Fees, and General Provisions

Type of meeting:	Rulemaking advisory committee
Date, time, & place:	Jan. 26, 2022, 9:30 a.m., virtual meeting Join ZoomGov Meeting: https://www.zoomgov.com/j/1601337156?pwd=VEg2MVREdFZkcjRlpaZmNpcGZ3Zz09 Meeting ID: 160 133 7156 Passcode: 051610 Dial in: 1 833 568 8864 US Toll-free Meeting ID: 160 133 7156
Facilitators:	Cathy Ostrand-Ponsioen, Fred Bruyns, Workers' Compensation Division
9:30 to 9:40	Welcome and introductions; meeting objectives
9:40 to 10:30	Discussion of issues
10:30 to 10:45	Break
10:45 to 11:50	Discussion of issues continued
11:50 to 11:55	Summing up – next steps – thank you!

Attached: [Issues document](#)

[Draft rules:](#)

OAR chapter 436, division 001 Attorney Fee Rules

Issues Document

Rulemaking Advisory Committee
1/26/22, 9:30 a.m.-noon, ZoomGov

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 meeting¹, 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

¹ The agenda, minutes, and audio recording 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>.

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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))?

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?

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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:
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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))?

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
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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))?

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.
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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))?

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.
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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))?

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.

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(11) and (12), 656.277(1), 656.383(1), and 656.385(1) ~~and 656.386, 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 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

Attorney Fees

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 436-001-04__35, the following provisions apply ~~to when the director awards an~~ attorney fees:

- (1) ~~In order to be awarded an attorney fee, t~~The attorney must file with the director a signed attorney retainer agreement.
- (2) In cases in which time devoted is ~~required to be considered 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 ~~determined~~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.

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

Statutes implemented: ORS 656.262, ~~656.277, 656.383, and 656.385, 656.388, and 656.704~~

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.

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 ~~awards 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)~~(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 (4)(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)

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%

(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.

Statutory authority: ORS 656.385(1), 656.726(4)
 Statutes implemented: ORS ~~656.262~~, 656.385, ~~656.388~~, and ~~656.704~~
 Hist: Amended 12/10/15 as WCD Admin. Order 15-065, 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.

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

In cases in which the director ~~awards 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; ~~2015 Or Laws, ch. 521, section 2~~
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.

436-001-0430 Attorney Fees ~~Awarded u~~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 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.

436-001-0435 Attorney Fees ~~Awarded u~~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 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 ~~assessed~~ under OAR 436-001-0400 to 436-001-04__40 must be paid within 14 days of the date the order ~~addressing~~awarding the fees becomes final.

Statutory authority: ORS ~~656.385(1)~~, 656.726(4)
Statutes implemented: ORS 656.262, ~~656.268~~, ~~656.277~~, ~~656.383~~, 656.385, ~~656.388~~, and ~~656.704~~
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.

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.

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 [order award the attorney](#) 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

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