



Workers' Compensation Management-Labor Advisory Committee



House Bill 3345 Report

House Bill 3345 (passed 2009; effective 1-1-2010) made a number of changes to Oregon Workers' Compensation law in the area of attorney fees. HB 3345 additionally mandated a study of some of the fee changes, limited to those in Section 1 of the bill affecting ORS 656.262. Two sections of 656.262 were changed.

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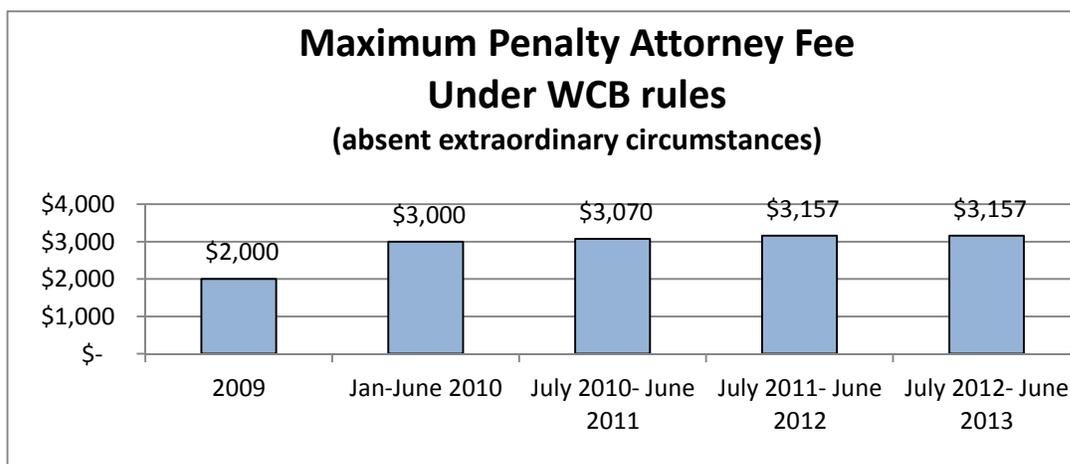
350 Winter Street NE, Rm 200
Salem, Oregon 97301-3878
Phone: 503-947-7866
Fax: 503-378-6444
E-Mail:

theresa.a.vanwinkle@state.or.us
victor.a.garcia@state.or.us

- There was a change in the "cap" on attorney fees that can be assessed in cases of unreasonable delay or unreasonable refusal to pay compensation under ORS 656.262(11)(a). These fees are in addition to penalty amounts. Such cases were previously subject to a \$2000 fee cap, absent extraordinary circumstances. This cap was raised to \$3000 and made subject to an annual adjustment with rising state average weekly wages.
- There is also a change that adds 262.656(12)(a) and (b), which instituted a penalty for a late-paid disputed claim settlement, following a notification process. The bill required the director to adopt a matrix for determining the penalties and fees.

In response to these changes the Workers' Compensation Division (WCD) and Workers' Compensation Board (WCB) both adopted new administrative rules, for all orders issued on or after 1-1-2010.

- The Workers' Compensation Division also amended its Claims Administration rules to implement the change. OAR 436-060-0400 describes the process, and the associated attorney fee matrix is in Appendix D of the rules. Logs of associated WCD sanctions indicate one such fee in the first year of applicability.
- The Workers' Compensation Board adopted rules to implement the change, and the initial \$3000 figure received annual adjustments on 7-1-2010 and 7-1-2011, and currently stands at \$3,157.09. This figure remained unchanged in July 2012, because the state average weekly wage had not increased.



The approach used in this study reflects the fact that we are examining the impact of a fee change can not be precisely determined, given that there is no strict formula involved, and the maximum can be exceeded in some circumstances. There is substantial discretion for the adjudicator in determining a reasonable fee, given the facts of the case.

Even in cases with formal decisions, adjudicators do not typically identify all the factors that are considered in any particular attorney fee decision. There is no way to be certain that all new cases above the old maximum (which could be exceeded, given extraordinary circumstances) would have been precisely at the old maximum. It is also possible that, with an increased maximum, some of the less-than-maximum cases might also have been affected. Thus, formal decisions provide only a rough indication of the change. Finally, increased potential penalty fees might provide an increased incentive for insurers to improve processes and avoid penalties on the one hand, or to change settlement decisions in some cases involving potential penalty situations.

Example 1: Facts of the case might have justified an “extraordinary circumstances” finding under the old law, with a fee of \$3000, exceeding the prior cap by \$1000. However, with a higher cap, the same fee could be awarded without the evidence needed to support an extraordinary circumstance finding.

Example 2: Circumstances justified a fee of \$1500, or half the new maximum. There is no way to tell what the fee would have been under the prior maximum.

Findings: While it is not possible to precisely quantify the impact of the changes, we can look at available data to get an idea of the relative size of impact, and the degree to which potentially affected cases (those over the old maximum) can be seen in periods following the changes. By way of comparison, these figures are in the context of a 2011 system-wide total of roughly \$21.4 million in claimant attorney fees.

To look at the set of cases with the most likely quantifiable fee impact, we identified WCB Hearings Opinion & Order cases where there was a) only a penalty issue that gave rise to an assessed fee, b) decision in favor of the claimant, and thus, c) gave rise to an assessed attorney fee. We compared the last year prior to the effective date of the bill (calendar year 2009) with three periods representing the initial cap change, and two successive increases in the maximum. Results are summarized below.

WCB Hearings Penalty Cases with Assessed Attorney Fees, pre- and post-HB 3345				
	Pre-change	Post-change		
	CY 2009	1st half 2010	FY 2011	FY 2012
Maximum penalty fee by statute/rule	\$2,000	\$3,000	\$3,070	\$3,157
Cases with penalties	119	47	81	71
Penalty-only cases				
Number of cases	47	13	38	36
As % of all cases awarding penalties	39%	28%	47%	51%
Penalty-only fees	\$77,085	\$26,350	\$55,850	\$78,859
Median fee	\$1,500	\$2,000	\$1,100	\$2,000
Average fee	\$1,640	\$2,027	\$1,470	\$2,191
Penalty-only cases with fee >\$2000	9	6	9	13
% Cases w/penalty fee >\$2000	19%	46%	24%	36%
Total penalty fees for this period	\$195,173	\$95,265	\$119,049	\$155,527

We focus on penalty-only cases, since the assessed fee in these cases is more likely to reflect only the change in the maximum fee. Using this data, the observable changes are neither consistent nor dramatic. The number of cases with such penalties has not increased, nor has the amount of penalty-only fees. The share of cases with a fee greater than \$2000 has been somewhat higher, although this has not had a major impact on the mean or median fees. Finally, the number of penalty cases has not risen, likely due to a combination of factors.