



**Cost Impact Analysis  
Oregon House Bill (HB) 2764  
As Requested on 1/22/2015**

**NCCI estimates that Oregon HB 2764, if enacted, could result in a significant<sup>1</sup> increase in workers compensation (WC) system costs in Oregon.**

**The magnitude of the increase is dependent on subsequent adjudication of claims based on the revised objectives of the WC law, the degree to which attorney fee schedules and penalties are increased, and the degree to which attorney involvement increases as a result of the higher attorney fees available.**

**In order to better understand the possible cost impact of HB 2764 in Oregon, it may be useful to observe changes that occurred in Florida due to claimant attorney compensation. Since the implementation of Senate Bill (SB) 50A, enacted in 2003, workers compensation rates in Florida decreased by more than half and the elimination of reasonable hourly fees for attorneys has been credited with a material portion of this decrease. In 2009, the Florida Supreme Court decision in *Murray v. Mariner Health/ACE USA* reinstated hourly fees and NCCI's cost estimate of the change was +18.6% based on a review of pre- and post-reform costs on overall workers compensation costs in Florida. It is possible that Oregon could experience an increase in workers compensation costs similar to what was estimated for the Florida Supreme Court decision in *Murray v. Mariner Health/ACE USA*.**

**The bill would be expected to have a retroactive impact because it would apply to cases regardless of the injury date. Such a retroactive application would result in an unfunded liability, as the additional costs expected would likely not have been contemplated in the premiums charged for policies written prior to the effective date of HB 2764.**

### **Summary of Changes and Actuarial Analysis of HB 2764**

#### **Changes in System Objectives -- Section 1 – Amends ORS 656.012**

Two passages in HB 2764 propose to revise system objectives. The first passage is, "... declare[s] that the provisions of the WC Law shall be interpreted to allow benefits if a reasonable reading of the law so allows." If enacted, Administrative Law Judges (ALJs) would use this passage for guidance in determining compensability, but would review legislative history and intent, as well as how this passage relates to others, such as the passages located just prior to it ("provisions of this law shall be interpreted in an impartial and balanced manner"). To the extent that ALJs apply this provision, it could lead to a material increase in WC claim frequency as additional claims would enter the WC system

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<sup>1</sup> Significant in this context is defined as an impact on overall system costs in excess of 5%



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that are not currently considered compensable, and average claim costs may increase from upward pressure on claim durations and awards/settlements.

The second passage proposes that an objective of the WC Law is, "To ensure that injured workers have access to adequate representation to assist them in obtaining the full benefits allowed..." It is unclear how this provision would relate to other statutory provisions (such as, "to provide a fair and just administrative system... that reduces litigation"). If the WC Board relies heavily on this new language when awarding attorney fees and penalties, attorney fee dollars and attorney involvement may increase.

Changes in Attorney Fee Schedules and Maximums -- Section 8 -- Amends ORS 656.388

This section increases the amount of attorney fees which are paid out of workers' benefits with the following revisions: (1) The WC Board shall adjust the maximum compensation in the attorney fee schedule biennially based on increases made to the state average weekly wage (SAWW) since the last fee schedule adjustment; (2) Attorney fee schedule percentages shall, "... consider the contingent nature of the practice of WC law... allowing the broadest access to attorneys by injured workers...and shall be equitable in the aggregate in relation to fees earned by attorneys for insurers/self-insured employers".

The WC Board would be required to adjust attorney fees in the schedule biennially based on changes in the SAWW. It is unclear as to whether the attorney fee change associated with this provision would consider the percentage changes in the SAWW since the current schedule became effective in 1999 (which would imply an immediate increase of approximately +50%, or if this adjustment is solely to be applied prospectively based on a fee schedule judgmentally set by the WC Board as described above.

In addition, under HB 2764, the WC Board would be required to consider the "contingent nature" of fees when revising the schedule, which also shall be "equitable in the aggregate" in relation to fees earned by attorneys for insurers/employers (presumably, this refers to the percentages). Per the current schedule, a typical percentage is 25% of the increase in the employee's compensation. It is unclear how the WC Board might interpret this provision and how it would determine whether the schedule was equitable in the aggregate. Thus, it is uncertain what the resulting percentages would be.

HB 2764 would be expected to increase the amount of attorney fees paid out of workers' benefits via the attorney fee schedule. In recent years, approximately \$19 to \$23 million in attorney fees were paid annually in Oregon, with roughly two-thirds of these attorney fees coming out of the claimant's compensation (approximately \$12-\$15 million).<sup>2</sup>

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<sup>2</sup> Source: Oregon Department of Consumer and Business Services, *2012 Report on the Compensation System*, Eleventh Edition, September 2012



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As a result of changes to the schedule, system costs may increase to the extent that ALJs increase awards to injured workers in response to increased attorney fees so that the workers' net benefits would not be diminished.

Changes in Attorney Fees, Injured Worker Penalties, and Circumstances Under Which Attorney Fees Are Paid -- Sections 2-11 -- Amends Several Statutory Sections

If enacted, HB 2764 would broaden circumstances under which attorney fees are paid by the insurer/employer; increase amounts of attorney fees paid by insurers/employers as penalties awarded, and increase penalties paid to workers in certain situations.

Specifically:

- When the insurer/employer unreasonably delays or refuses to pay compensation, “reasonable attorney fees” would be due, replacing the current fee as “proportionate” to the change in injured workers benefit, and the attorney fees would no longer be subject to the current \$3,000 cap (Section 2, amending ORS 656.262).
- Explicitly mandates that when an attorney represents an injured worker before the Department of Consumer and Business Services (DCBS) and is instrumental in getting the claim reclassified from nondisabling to disabling, the attorney would be awarded a reasonable attorney fee, where no such fees are due currently (Section 3, amending ORS 656.277).
- Currently, an attorney may not be awarded fees for appearances before a managed care organization (MCO) or the DCBS except for contested cases; this prohibition would be removed (Section 8, amending ORS 656.388).
- Regarding attorney representation in hearings over disputes in compensation benefits, HB 2764 would remove the current \$3,000 cap and expand:
  - the areas of dispute to include costs, attorney fees, or penalties
  - the type of proceeding to include those before an MCO
  - the nature of fees to include “all work” at or prior to the proceedings (Section 6, amending ORS 656.385).
- For reviews or appeals initiated by the employer or insurer, HB 2764 broadens conditions under which attorney fees are payable by the insurer/employer if the insurer/employer does not fully prevail on all issues raised, which would replace the currently narrower list of conditions (Section 5, amending ORS 656.382).
- Introduces a new attorney fee payable by the insurer/employer for cases in which the claimant prevails on a petition for an increase in costs or penalties (Section 7, amending ORS 656.386).

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- Allows a reasonable attorney fee if the attorney is instrumental in obtaining temporary disability (TD) benefits prior to a decision by an ALJ, or helps the claimant to prevail in a dispute over TD benefits after a request for hearing has been filed (Section 10, amending ORS 656.210, 656.212, 656.262, 656.268, and 656.325).

Based on the *2012 Report on the Compensation System*, NCCI estimates that current WC employee assessed attorney fees in Oregon are approximately \$7-\$8 million annually. These attorney fees could increase by an unquantifiable but notable amount due to: (1) Broadening of situations in which attorney fees are paid; (2) Larger attorney fees due to removal of caps; and (3) Larger attorney fees due to the requirement that they are to be “reasonable” and not necessarily proportionate to the change in the injured worker’s benefit. Therefore, system costs may increase due to the increase in attorney fees.

Institution of Hourly Attorney Fees for Investigations -- Section 2 – Amends ORS 656.262

HB 2764 proposes to institute payment of attorney fees at an hourly rate by the insurer/ employer in situations where the injured worker must cooperate and assist the insurer/ employer when it conducts a claim investigation. Currently, attorneys cannot receive fees for their efforts in attending these types of investigations, and the extent to which attorneys currently perform these services on an unpaid basis is unknown. The WC Board would be tasked with establishing rules to govern such hourly fees. It is unclear if such rules would include limitations on the number of hours allowed for such investigatory work, or just the hourly rate and types of applicable activities. System costs would increase due to the institution of these attorney fees.

Expansion of Interest Payable -- Section 4 – Amends ORS 656.313

Interest is currently payable on benefits if ultimately found compensable. HB 2764 would require payment of interest on the attorney fees, penalties, and costs in certain situations.

Outstanding Application -- Section 11

The provisions of HB 2764, if enacted in its current form, would apply to all outstanding claims. This provision creates an unfunded liability since the increases in attorney fees and subsequent behavioral changes would likely not have been anticipated when premiums were calculated for prior years’ policies that have outstanding claims.

Additional Consequences of HB 2764 – All Sections

The increased attorney fee schedules may provide greater incentive for attorneys to get involved in workers compensation claims. Increased attorney involvement could result in

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new claims entering the system, as well as an increase in the average benefit cost per claim for claims already in the system.

Based on sampled data reported to NCCI, Oregon had slightly lower-than-average attorney involvement as a percentage of lost-time claims compared to the countrywide average<sup>3</sup>; this percentage would be expected to increase if HB 2764 were enacted.

The average cost per case with attorney involvement is about five times greater in Oregon than the average cost per case without attorney involvement<sup>3</sup>. It must be noted that while the involvement of an attorney may drive up the cost of a particular case, it is also true that attorneys are more likely to get involved in cases that are relatively more severe or complex. Nevertheless, the cases that shift from “without” to “with” attorney involvement would be expected to have a greater average cost.

The average cost per case for those cases already with attorney involvement would also be expected to increase, since the attorneys would have greater incentive to spend additional time and effort on these cases if the attorney fee schedule percentages and caps are greater.

Further, if claimant attorney involvement increases, LAE would likely increase on average because insurers/employers may incur additional legal costs to defend these claims. (LAE is not included in NCCI advisory loss costs in Oregon.) There could be upward cost pressure on claim settlements as well, given the implicit potential for increased costs of the dispute resolution process.

The additional costs of increased attorney involvement in Oregon’s workers compensation system are unclear, since these impacts are driven by the behavioral changes of claimants, attorneys, insurers/employers, and others in the workers compensation system.

**NCCI estimates that HB 2764 would increase overall system costs in Oregon. Several provisions of HB 2764 are subject to interpretation: (1) New passages regarding the objectives of the WC law in terms of compensability and attorney representation; (2) Definition of “reasonable” and “equitable” fees in the schedule; and (3) The definition of “reasonable attorney fees” for those that were previously proportional to changes in injured worker benefits.**

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<sup>3</sup> Source: NCCI Detailed Claim Information for accident years 2004-2008



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**Depending on the interpretation of these items, and the incentives for more attorney involvement and expected increases in attorney fees and costs created by the proposed provisions, the increase in system costs could be significant. Any additional system costs from additional claimant attorney fees and additional claim costs would be reflected in future Oregon loss cost filings.**

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