



MEMORANDUM

April 16, 2019

To: Connie Wold, WCB
From: Cecily Warren, CSD
Subject: 2018 Attorney fee review

The Workers' Compensation Board (WCB) is conducting the required Attorney Fee Biennial Review. The goals of the review are to:

- 1) Recognize the contingent nature of workers' compensation representation;
- 2) Assure claimants' access to justice and a qualified pool of attorneys; and
- 3) Compare fees for each side of the litigation.

When looking at attorney fees, it is important to understand how claims and disputes have changed over time.

Calendar year	Accepted disabling claims ³	Claim closures and resolutions ⁷	Admin disputes ¹⁰	Hearing requests ¹¹	Board review requests ¹²	Court of Appeals requests ¹³	Claim disposition agreements ¹⁴
2009	18,949	20,919	7,054	8,568	601	75	3,473
2010	18,011	19,208	6,401	8,183	588	76	3,361
2011	18,693	19,184	5,263	7,631	517	77	3,209
2012	18,643	19,296	5,056	7,638	492	88	3,039
2013	18,633	19,315	5,215	7,581	426	63	3,038
2014	19,724	19,747	5,273	7,373	404	74	2,978
2015	19,568	19,635	4,904	7,165	385	71	3,129
2016	20,455	20,180	4,821	6,975	363	61	2,939
2017	20,989	21,424	4,604	6,862	308	88	3,082

Overall accepted disabling claims (ADCs) have increased from 2009 to 2017, while the number of hearing requests and board reviews have decreased in that same period. (See [Appendix 1](#) for notes on data).

Research assisted in the first review of attorney fees in 2016. At that time, it was noted that the assessed attorney fees had been relatively steady through 2013 and then increased in 2014 and 2015. With three more years of data, it is evident that:

- Claimant attorney representation at the various levels of litigation remains high. ([Appendix 2](#))

- The average assessed attorney fees have generally risen at the board review and hearing levels. ([Appendix 3](#))
- The average assessed attorney fees for overturned denials by case at hearing have increased 53% from 2009 to 2018. ([Appendix 4](#)).

Another goal of the review is to identify how the fees for representation for both the insurers and claimants compare. Research conducts an annual Defense Legal Cost Survey on behalf of the Workers' Compensation Division (WCD) and the WCB in accordance with ORS 656.388(7) and OAR 436-060-011(11). This cost data is reported by insurers or service companies and the methodology is described in [Appendix 5](#). Defense legal fees and claimant attorney fees have both increased since 2009. The defense legal cost per claim rose 59% between 2009 and 2017 ([Appendix 6](#)).

[Appendix 7](#) provides an explanation of how the WCB data regarding attorney fees and cases is captured.

[Appendix 8](#) is a comparison of claimant attorney fees relative to economic growth in Oregon over time.

Appendix 1 – Claims Characteristics Footnotes

The data is from the Various Claims Characteristics -

<https://www.oregon.gov/dcbs/reports/Documents/general/char/18-2940.pdf>

3. Accepted disabling claims: Any injury is classified as disabling if it causes the worker temporary disability (time-loss), permanent disability, or death. The worker will not receive time-loss benefits for the first three days unless he or she is off work and not released to return to any work for the first 14 consecutive days or is admitted to a hospital as an inpatient during the first 14 consecutive days. The claim can also be classified as disabling if there is a reasonable expectation that permanent disability will result from the injury. The counts are the numbers of claims accepted as disabling by insurers or upon appeal. Counts are reported by the date the claim was reported to DCBS as accepted and disabling.

7. Claim closures and resolutions: The claims closure process involves closing a claim, halting temporary disability payments, and determining permanent disability when an injured worker is found to be medically stationary. While for many claims this process ends the benefits, some medical benefits are available after claim closure, and claims may be reopened for claim aggravation, new conditions, or vocational training. The claim closure process does not occur when a claims disposition agreement (CDA) is reached before the claim closure; CDAs were authorized by law in 1990 to resolve the indemnity portion of the claim. The series is the sum of the numbers of claim closures, including multiple closures per claim but excluding reclassifications, amending and correcting closures, and the numbers of CDAs that resolved the claim before the closure. Recent numbers may be revised.

10. Administrative disputes: Counts of the major portions of the DCBS Workers' Compensation Division (WCD) administrative dispute review process. The counts include reconsideration requests on claim closures (but not correcting closures), review requests on disabling classifications, medical dispute requests, and vocational dispute requests. These dispute resolution processes were expanded and made mandatory by law in July 1990.

11. Hearing requests: Case counts of the requests for hearings to the Workers' Compensation Board. The board has original jurisdiction on insurer claim denials and certain claims-processing issues, such as time loss and time-loss rate when the claim is open. It also hears appeals of cases decided by WCD administrative review. Count includes settlements received without a prior hearing request. Count does not include supplemental hearing requests made after the original hearing request, nor additional issues raised orally at hearing.

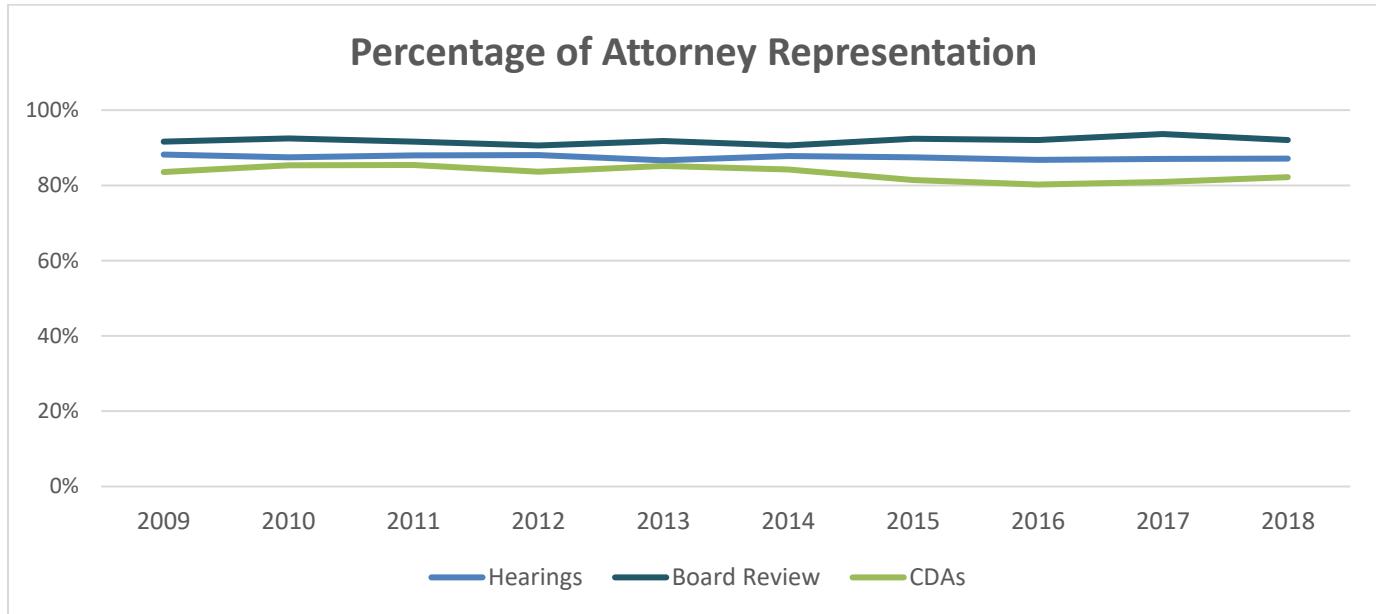
12. Board review requests: Counts of hearings orders appealed to board review. Excludes third-party, crime victim, noncomplying employer, and no subjectivity determination cases.

13. Court of Appeals requests: The number of board-review orders appealed to the Oregon Court of Appeals.

14. Claim disposition agreements: A claim disposition agreement (CDA) is an agreement between the parties to a workers' compensation claim. The worker agrees to sell back rights (e.g., rights to compensation, attorney fees, and expenses) excluding medical and preferred-worker benefits, on an accepted claim, in exchange for a lump-sum payment from the insurer. In other states, this is often referred to as a "compromise and release." CDAs were authorized by law starting in July 1990. The figures provided are the CDA orders approved by the Workers' Compensation Board.

Appendix 2 – Attorney Representation

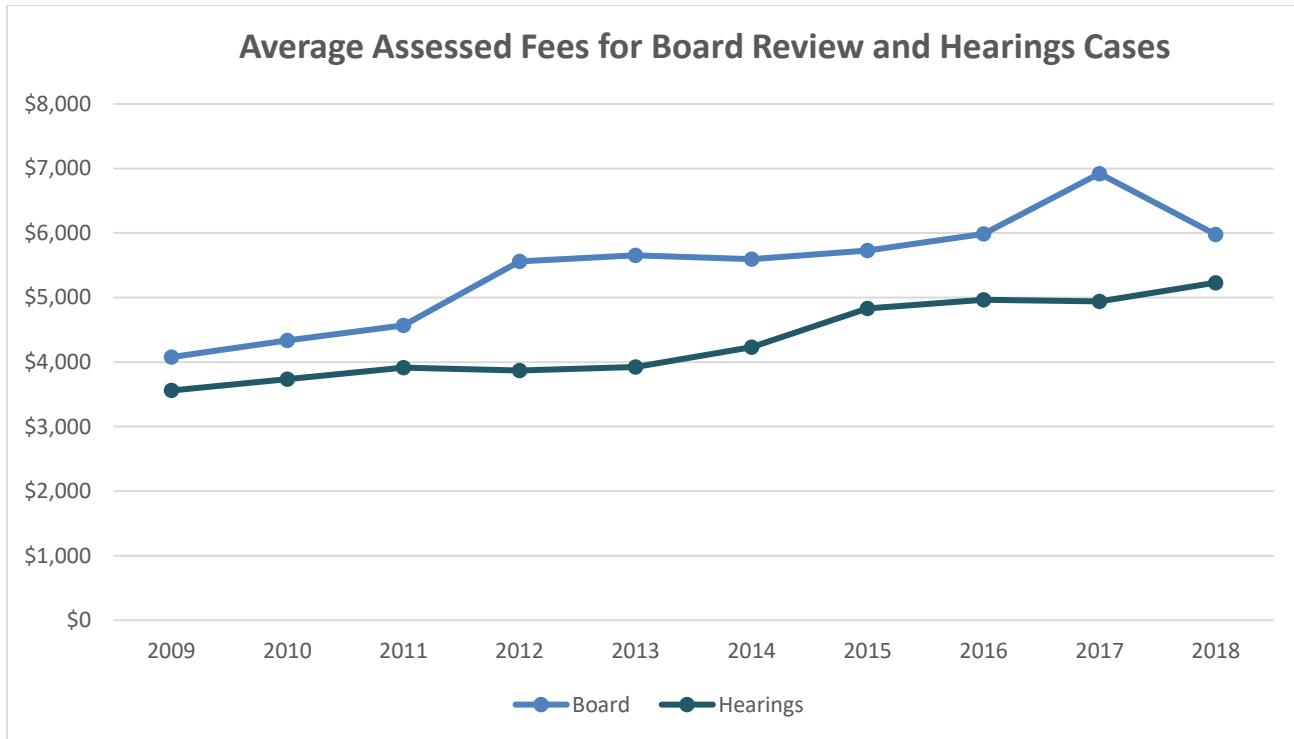
For hearings and board review, the below table and graph illustrate the percentage of claimants represented by attorneys at each level of the dispute process. The dates are based on the first order date at hearings and board review, respectively. These cases do not include those that resulted in a claim disposition agreement (CDA). To capture cases that resulted in a CDA, we used the hearing request date rather than the order date.



Hearings level representation				Board level representation			Claim Disposition Agreements (CDAs)		
Year	Represented	Not Represented	Percent	Represented	Not Represented	Percent	Represented	Not Represented	Percent
2009	8,014	1,070	88.2%	529	48	91.7%	2,938	577	83.6%
2010	7,569	1,077	87.5%	567	46	92.5%	2,869	492	85.4%
2011	6,937	945	88.0%	509	46	91.7%	2,726	465	85.4%
2012	6,678	905	88.1%	444	46	90.6%	2,613	511	83.6%
2013	6,706	1,028	86.7%	441	39	91.9%	2,724	473	85.2%
2014	6,604	914	87.8%	363	37	90.8%	2,770	517	84.3%
2015	6,280	899	87.5%	363	30	92.4%	2,660	606	81.4%
2016	6,224	949	86.8%	325	28	92.1%	2,455	605	80.2%
2017	6,088	908	87.0%	340	23	93.7%	2,558	602	80.9%
2018	6,327	936	87.1%	244	21	92.1%	2,492	541	82.2%

Appendix 3 – Assessed Attorney Fees at the Board Review and Hearing Levels

At the board, cases are “banded” together into groups (See [Appendix 7 - Effects on statistics due to banding](#)). The Board Review Group table below shows the average assessed attorney fee, per group. Since the claimant’s attorney also provided services at hearings, but was not awarded a fee for those services, these awards are included within the board review assessed fees. The group counts are based on the first board order date. The Hearings Cases table below shows when the claimant has requested the hearing. The case counts are based on the first hearing order date.



Board Review Group Average Assessed Fee*				
Year	Count	Total	Average	
2009	168	\$ 685,150	\$ 4,078	
2010	185	\$ 801,820	\$ 4,334	
2011	158	\$ 722,247	\$ 4,571	
2012	141	\$ 784,091	\$ 5,561	
2013	130	\$ 735,258	\$ 5,656	
2014	123	\$ 688,498	\$ 5,598	
2015	134	\$ 767,687	\$ 5,729	
2016	99	\$ 592,637	\$ 5,986	
2017	98	\$ 678,347	\$ 6,922	
2018	60	\$ 358,761	\$ 5,979	

Hearings Cases Average Assessed Fee				
Year	Count	Total	Average	
2009	1525	\$ 5,429,612	\$ 3,560	
2010	1458	\$ 5,448,982	\$ 3,737	
2011	1205	\$ 4,718,762	\$ 3,916	
2012	1198	\$ 4,637,833	\$ 3,871	
2013	1182	\$ 4,635,772	\$ 3,922	
2014	1242	\$ 5,257,126	\$ 4,233	
2015	1116	\$ 5,392,914	\$ 4,832	
2016	1015	\$ 5,040,772	\$ 4,966	
2017	1056	\$ 5,215,714	\$ 4,939	
2018	958	\$ 5,011,083	\$ 5,231	

*Assessed fees at board review can include services at hearings

Appendix 4 – Assessed Attorney fees by Case at Hearings

This data captures the assessed attorney fee trends at hearings. When a denial, a partial denial, or an aggravation (re-injury of the original workplace injury) is being litigated, a claim is considered compensable. When an insurer decides not to compensate a claim, the claimant can appeal to hearings to try to overturn the original denial, partial denial, or the aggravation. If the claimant's appeal is successful, the original decision made by the insurer is overturned and the claimant's case is "affirmed", which ensures the claimant receives compensation.

Claimants can also appeal permanent or temporary disability payments, penalties, and/or other issues. The difficulty with aggregating data based on issues is that multiple issues can be litigated simultaneously. This aggregation makes it impossible to narrow the data down to "how much attorneys are compensated per litigated issue". Some compensability cases may include many issues, so several things may be decided within one hearing. As an example, consider WCB# 14-00622, where the claimant challenged "...the compensability of a new or omitted medical condition...[and] a period of temporary disability, together with a penalty and attorney fee based on the insurer's allegedly unreasonable failure to pay that compensation."¹ Although compensability was one of the issues challenged by the claimant in this case, it was not the only consideration at hearings.

The first section of the table below – "All Hearings" – does not limit the data to O&Os. The data represents all claims where the claimant requested the hearing, regardless of the outcome at hearing, and where there was an assessed attorney fee.

Cases in which one or more denials are overturned shows assessed attorney fees for opinion and order (O&Os) cases where denials, partial denials, or aggravation claims have been overturned, and where the claimant has requested the hearing. Again, compensability cases may also be litigated with other issues.

The section of the table below titled, "Other Than Compensability" is the difference between the "All Hearings" and "Overturned Denials" data columns. This includes stipulations and DCS cases, as well as O&Os.

Additionally, it represents all other issues besides compensability cases that may be challenged at hearings. For example, claims challenging both permanent and temporary disability awards, as well as penalties fall into this category. Rather than a decision of whether the claimant should be compensated for their injury or occupational disease, the payments granted for permanent or temporary disability may or may not change. Similarly, if time loss payments due to the claimant are delinquent, the claimant can contest a penalty fee. WCB# 16-04664 provides an example of a non-compensable "other" claim, where the claimant alleged that the insurer refused to provide timely discovery and made late temporary disability payments, as well as challenging the time period for disability payments and their entitlement to an assessed attorney fee for any additional temporary disability awarded.²

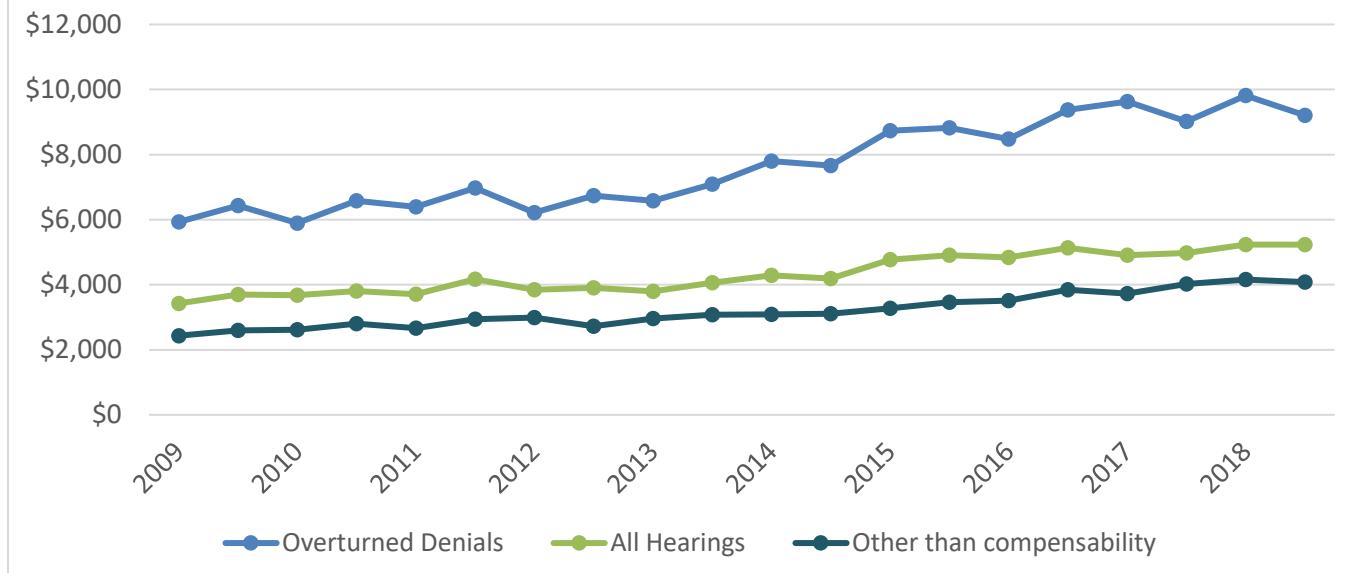
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Average Assessed Attorney Fees by Case at Hearings

(data presented by half year)



Half Year	All Hearings			Cases in which one or more denials are overturned*			Other than compensability		
	Number of Cases	Total	Average	Number of Cases	Total	Average	Number of Cases	Total	Average
H1 2009	760	\$2,603,292	\$3,425	216	\$1,280,015	\$5,926	544	\$1,323,277	\$2,432
H2 2009	765	\$2,826,320	\$3,695	219	\$1,408,990	\$6,434	546	\$1,417,330	\$2,596
H1 2010	737	\$2,707,743	\$3,674	238	\$1,403,125	\$5,895	499	\$1,304,618	\$2,614
H2 2010	721	\$2,741,239	\$3,802	191	\$1,256,220	\$6,577	530	\$1,485,019	\$2,802
H1 2011	654	\$2,423,326	\$3,705	183	\$1,169,250	\$6,389	471	\$1,254,076	\$2,663
H2 2011	551	\$2,295,436	\$4,166	167	\$1,165,117	\$6,977	384	\$1,130,319	\$2,944
H1 2012	621	\$2,387,598	\$3,845	165	\$1,025,850	\$6,217	456	\$1,361,748	\$2,986
H2 2012	577	\$2,250,235	\$3,900	169	\$1,138,200	\$6,735	408	\$1,112,035	\$2,726
H1 2013	619	\$2,352,218	\$3,800	144	\$947,657	\$6,581	475	\$1,404,561	\$2,957
H2 2013	563	\$2,283,554	\$4,056	137	\$971,969	\$7,095	426	\$1,311,585	\$3,079
H1 2014	598	\$2,561,749	\$4,284	152	\$1,185,247	\$7,798	446	\$1,376,502	\$3,086
H2 2014	644	\$2,695,377	\$4,185	153	\$1,171,539	\$7,657	491	\$1,523,838	\$3,104
H1 2015	577	\$2,749,484	\$4,765	158	\$1,379,209	\$8,729	419	\$1,370,275	\$3,270
H2 2015	539	\$2,643,430	\$4,904	145	\$1,279,346	\$8,823	394	\$1,364,084	\$3,462
H1 2016	569	\$2,750,822	\$4,834	152	\$1,289,100	\$8,481	417	\$1,461,722	\$3,505
H2 2016	446	\$2,289,950	\$5,134	104	\$974,479	\$9,370	342	\$1,315,471	\$3,846
H1 2017	544	\$2,668,669	\$4,906	109	\$1,049,550	\$9,629	435	\$1,619,119	\$3,722
H2 2017	512	\$2,547,045	\$4,975	98	\$884,097	\$9,021	414	\$1,662,948	\$4,017
H1 2018	457	\$2,391,434	\$5,233	87	\$853,747	\$9,813	370	\$1,537,687	\$4,156
H2 2018	501	\$2,619,649	\$5,229	112	\$1,030,536	\$9,201	389	\$1,589,113	\$4,085

*May include issues besides compensability

Appendix 5 – Defense Legal Cost Survey

How does the defense legal cost survey work?

The defense legal cost survey (DLCS) is the reporting tool for insurers, or insurers' service companies (also known as third party administrators) to submit the amount spent on defense legal costs for a given calendar year. This reporting of cost data is required by ORS 656.388(7) and OAR 436-060-011(11).

Insurance carriers and self-insured employers with three or more litigated claims are required to report. For the purposes of the DLCS, a litigated claim is a claim where a change in litigation status was reported within the given calendar year. Those insurance carriers and self-insured employers with fewer than three litigated claims in a given calendar year are not required to report, though some do choose to report. Defense legal costs are estimated for those insurance carriers and self-insured employers with fewer than three litigated claims, based on the average cost per litigated claim for insurers similar in class and number of litigated claims.

What is included in defense legal costs?

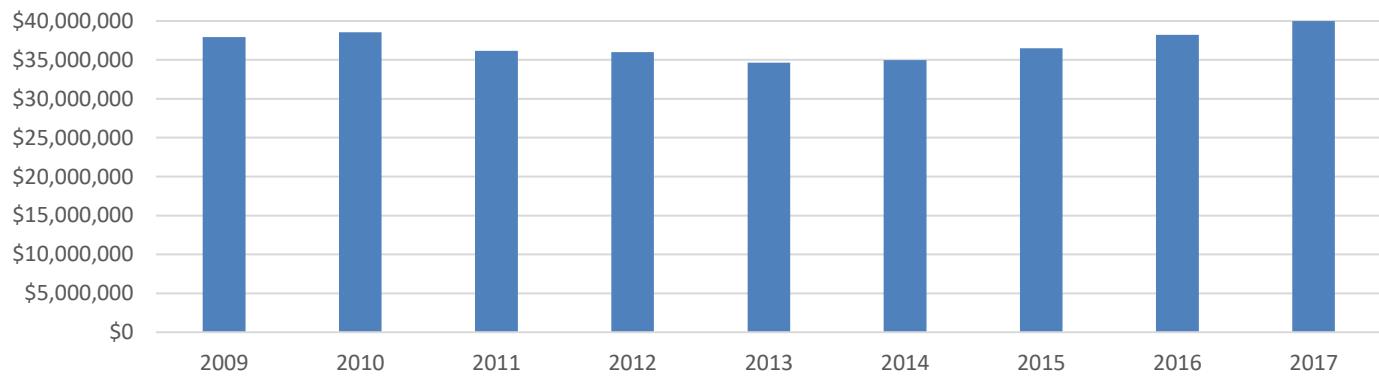
Insurer defense legal costs are those costs that insurers spend defending against workers' compensation related claims or benefits they believe to be unwarranted. Defense legal costs can also include costs for representing the insurer in responsibility disputes (outcomes may not directly affect workers) and for services outside of litigation, like negotiating claim disposition agreements (CDAs). Defense legal costs are reported as attorney salaries and benefits, administrative support staff salaries and benefits, other costs related to in-house legal services, retained counsel, and insurer-paid costs in support of retained counsel.

Detailed defense legal costs for 2014-2017 are listed in the table below. While there has been no change to the data that is collected, the analysis procedures applied to the data prior to 2014 do not facilitate reporting detailed defense legal costs. The bar chart below shows the change in total defense legal costs from 2009 through 2017.

Detailed Insurer Defense Legal Costs, 2014-2017

	Attorney salaries	Non-atty. Salaries	Other in-house	Retained counsel	Support Ret. Cnsl.	Total costs
2014	\$5,369,000	\$1,713,000	\$2,847,000	\$22,294,000	\$2,750,000	\$34,973,000
2015	\$6,133,000	\$1,959,000	\$3,213,000	\$22,727,000	\$2,478,000	\$36,510,000
2016	\$3,590,000	\$2,228,000	\$3,533,000	\$23,058,000	\$2,796,000	\$35,205,000
2017	\$5,531,000	\$2,042,000	\$4,619,000	\$23,976,000	\$3,826,000	\$39,994,000

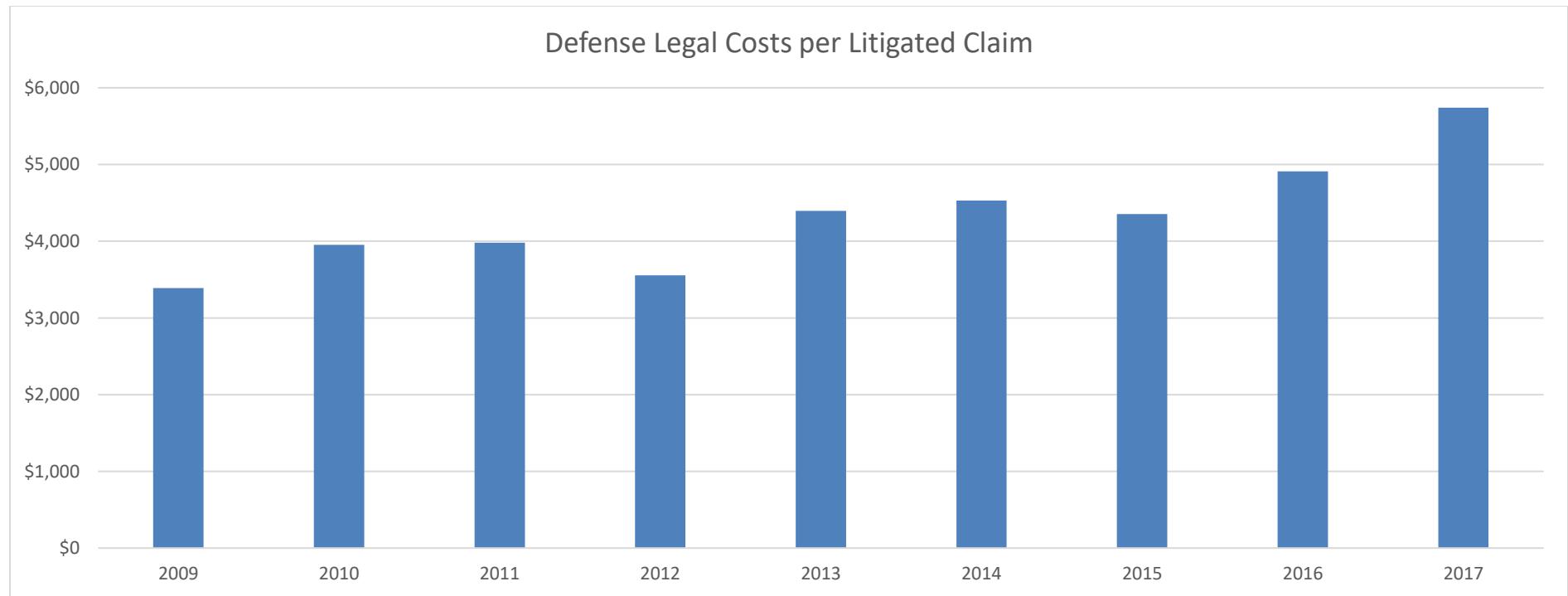
Total Defense Legal Costs, 2009-2017



Appendix 6 – Defense Legal Cost per Litigated Claim.

Defense legal costs per litigated claim have increased between 2009 and 2017; 2018 data is currently being collected. For the purposes of the defense legal cost survey (DLCS) a litigated claim is a claim where a change in litigation status was reported within the given calendar year. The total defense legal costs in a given year are divided by the number of litigated claims in that year to determine the defense legal cost per litigated claim.

	Defense Legal Costs per Litigated Claim									
	2009	2010	2011	2012	2013	2014	2015	2016	2017	
Defense Legal Costs	\$37,930,000	\$38,561,000	\$36,183,000	\$36,006,000	\$34,659,000	\$34,972,000	\$36,510,000	\$38,204,000	\$39,995,000	
Litigated Claims Count	11,186	9,755	9,093	10,131	7,887	7,717	8,383	7,778	6,967	
Defense Legal Costs per Litigated Claim	\$3,391	\$3,953	\$3,979	\$3,554	\$4,394	\$4,532	\$4,355	\$4,912	\$5,741	



Appendix 7 – Effects on WCB Statistics Due to Banding, and How It's Been Done

At the WCB there is a business practice called banding which creates challenges in analyzing the WCB data contained in our data storage system. Although the practice makes sense for WCB business processes, it can complicate statistical analysis by the Research Unit. Banding is when multiple cases with related issues for the same claimant are viewed as one group and receive a single, common order. Our data system handles this by grouping these multiple, related cases and treating them as one. Every case is assigned to a group. Most groups contain one case, but a group can contain multiple cases.

For the workers' compensation system report and past WCB reports at the hearings level, requests are counted at the case level (each case is counted separately), but the orders are counted at the group level. This occurs because one order covers all the cases in the group. Since most groups have only one case, the counts of hearings requests and orders do not differ greatly when grouped by year.

Another business practice is that for attorney fees at hearings and the board, the fees are split up among the cases in the group if there are multiple cases in the group. For example, a group containing two cases and an order with a \$10,000 attorney fee would show up in the data system as \$5,000 for each case in the group. If there are three cases in the group and a \$9,000 fee then \$3,000 would show for the attorney fee in each of the three cases. The same thing is done for CDAs and DCSs, both for their attorney fees and their total award amounts. Because of this, total attorney fees must be caught at the case level and added together. To get a count for attorney fees at the hearings order level, groups must be counted instead. So, even with three cases in the group, each with \$3,000 in attorney fees, it would be considered as one order with a \$9,000 attorney fee. The logic for this is that there was one order and in that order there was an attorney fee of \$9,000. If we instead count each of the three fees of \$3,000 there would be a lower value for the average attorney fee calculation.

Assessed Attorney Fees at Hearings, 2015 - 2018

Year	Cases	Orders	Total fees	Avg. Attorney fees	
				by case	by order
2015	1,130	1,104	5,459,500	\$4,831	\$4,945
2016	1,208	1,166	5,775,687	\$4,781	\$4,953
2017	1,088	1,047	5,361,769	\$4,928	\$5,121
2018	985	953	5,138,333	\$5,217	\$5,392

Over this same period, there was one group with 5 cases, 4 groups with 4 cases each, 16 groups with 3 cases each, and 120 groups with 2 each, out of a total of 4,270 groups. Multi-case groups made up 3.3% of the orders during this four year period. As evidenced in the table above, the difference in average attorney fee based on how it is calculated is not large.

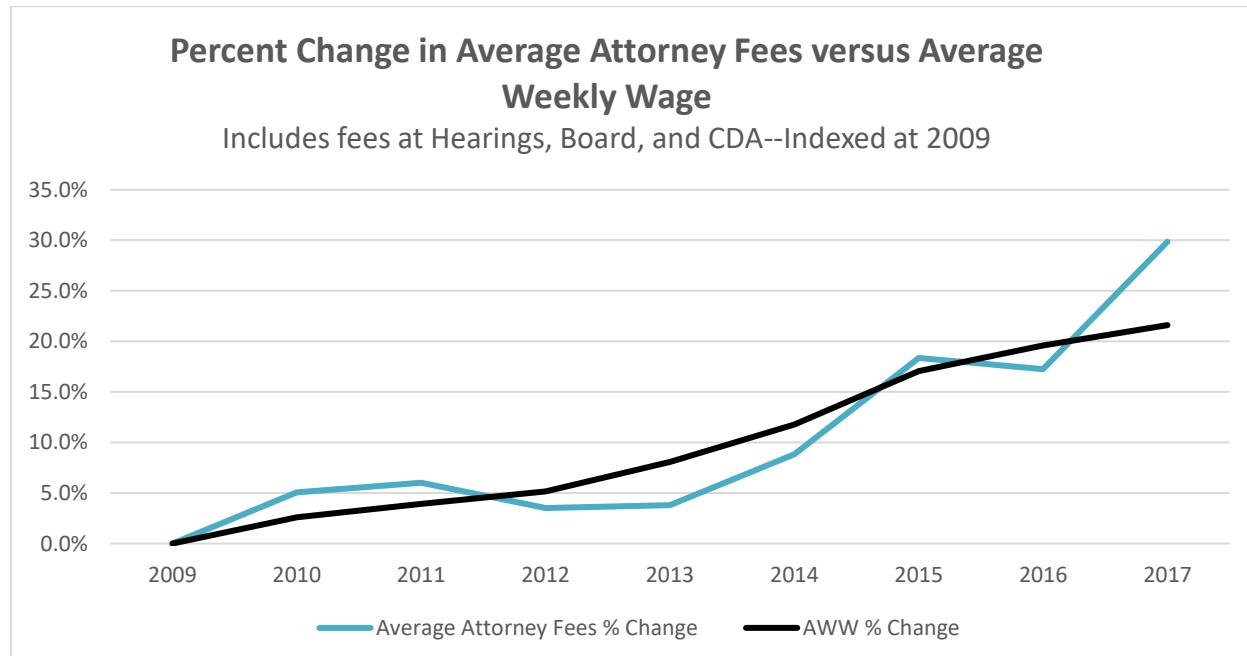
The data in the board review tables is kept by case, and the attorney fees are split among the cases in the group, just as at the hearings level. Although it might seem that the grouping of cases would be resolved at board review – because requests for board review are on order – the individual cases within the order are also tracked. So the same issue arises, but because the total number of cases is fewer we would expect to see a larger difference between the amount of the average attorney fee when calculated by case and by group.

Appendix 8 - Average Attorney Fees versus Average Weekly Wage

To assess attorney pay, both assessed and out of compensation fees awarded to attorneys at hearings, board review, and in the course of claim disposition agreements (CDA) were reviewed. At hearings and board review, the totals include all case types except CDAs. At board review, attorney fees can be reduced if the original decision at hearings is reversed; therefore, reduced fees are taken into account here by subtracting the reduced fees from the total fees. This allows for a more accurate assessment of the actual fees awarded to attorneys.

For cases ending in CDAs, fee totals were captured when claimants were represented by attorneys. This included cases where attorneys waived their fees, which results in no attorney fees. Those cases where attorneys waived their fees totaled between 1 percent and 3 percent of the number of cases per year between 2009 and 2017.

To compare the change in awarded attorney fees to economic growth in Oregon over time, the total attorney fees by year were averaged and the average weekly wage (AWW) was identified – as determined by the Oregon Employment Department – as a baseline for economic growth. The AWW is defined as the total payroll divided by the number of employees for the private sector and state and local government, in the fourth quarter of the previous year. Most workers' compensation benefits are tied to the AWW. This calculation is limited to the Oregon economy. By using 2009 as the index year, the year-over-year percent increase in both the average attorney fees and average weekly wage was calculated in order to compare the two sets of figures.



Year	2009	2010	2011	2012	2013	2014	2015	2016	2017
Hearings	\$11,262,337	\$11,603,857	\$10,482,634	\$10,056,140	\$10,772,903	\$11,712,344	\$11,642,091	\$11,890,003	\$12,055,572
Number of Cases	4,799	4,551	4,213	4,060	4,331	4,415	4,030	4,047	3,875
Board Review	\$457,604	\$637,834	\$514,612	\$667,809	\$585,755	\$513,776	\$748,326	\$604,435	\$571,173
Number of Cases	217	236	214	192	187	153	180	136	131
CDA	\$8,814,820	\$8,912,285	\$9,307,691	\$8,054,662	\$8,293,018	\$8,365,573	\$8,936,685	\$7,940,578	\$9,938,678
Number of Cases	2,695	2,773	2,766	2,560	2,591	2,537	2,556	2,362	2,519
Total Fees	\$20,534,761	\$21,153,976	\$20,304,937	\$18,778,611	\$19,651,676	\$20,591,693	\$21,327,102	\$20,435,016	\$22,565,423
Total Cases	7,711	7,560	7,193	6,812	7,109	7,105	6,766	6,545	6,525
Average Fees	\$2,663	\$2,798	\$2,823	\$2,757	\$2,764	\$2,898	\$3,152	\$3,122	\$3,458
Percent Change	0.0%	5.1%	6.0%	3.5%	3.8%	8.8%	18.4%	17.2%	29.9%
AWW*	\$809.99	\$830.95	\$841.89	\$851.77	\$875.33	\$905.39	\$948.30	\$968.61	\$985.03
Percent Change	0.0%	2.6%	3.9%	5.2%	8.1%	11.8%	17.1%	19.6%	21.6%

*AWW = The Oregon average weekly wage for covered employment, as determined by the Employment Department, for the last quarter of the calendar year. This is applied to the computation of benefits the following fiscal year. The fiscal year begins in July, so for each year we averaged two years of AWW data (e.g. average 2008 and 2009 AWW for 2009 figure) to arrive at the above numbers.