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October 27, 2026

Oregon Workers' Compensation Board
2601 25th St. SE, Suite 150
Salem 97302-1280
Via Email Only: autumn.k.blake@wcb.oregon.gov

RE: October 29, 2026 Public Meeting – Attorney Fee Biennial Review

Dear Board Members,

Thank you for the opportunity to submit formal comments for the Oregon Workers' Compensation Board's (WCB) public meeting concerning the biennial attorney fee review under ORS 656.388(4). I submit this written comment along with my oral testimony to offer constructive recommendations on how claimant attorney fees are calculated, reviewed, and awarded across contested proceedings.

To support statutory directives requiring the Board to award reasonable attorney fees that reflect market realities and compensate counsel for the contingent nature of practice, I encourage the Board to consider rule changes that foster greater consistency, transparency, and balance across the workers' compensation system.

To ensure adherence to Oregon statutes, I urge the Board to consider two critical rule enhancements:

- **Lodestar Calculation**: Require Administrative Law Judges (ALJs) and the Board on review to calculate assessed attorney fees using the lodestar method (reasonable hours multiplied by a reasonable contingent hourly rate) when claimant's counsel requests that method and submits a supporting statement of services.

- **Limiting Review to Raised Objections:** Establish a process where opposing parties may file specific, written objections within 14 days of a fee request, approve uncontested fee requests in full, and guide the ALJs and the Board to rely on the evidentiary record rather than initiating unprompted fee modifications.

The Lodestar

Reducing Ad Hoc Fee Reductions

For decades, fee determinations issued by ALJs and the Board have suffered from an absence of articulated mathematical or legal methodology. Orders routinely resort to a single-paragraph stating that the ALJ or Board "considered" the factors listed in OAR 438-015-0010(4), before

arbitrarily awarding a lump sum, often significantly below the requested amount. Nearly thirty years ago, the Oregon Supreme Court explicitly rejected this practice in *Schoch v. Leupold & Stevens*, 325 Or 112, 119 (1997), holding that a mere recitation of rule factors without explaining how those factors justify the final dollar figure fails to satisfy the requirement of substantial reason. Despite *Schoch*, the Board continues to issue orders using the single-paragraph approach rejected by the Supreme Court. *See e.g.*, *David Green*, 78 Van Natta 568 (2026).

Schoch has been reinforced by the Oregon Court of Appeals in a consistent line of decisions remanding fee orders to ensure a clear connection between the factual findings and the amount awarded:

- *SAIF v. Acuna*, 346 Or App 29 (2025): Remanding fee award because the Board failed to articulate any connection between OAR 438-015-0010(4) factors and its determination of reasonable hours.

- *Peabody v. SAIF Corp*., 326 Or App 132 (2023) (*Peabody II*); 297 Or App 704 (2019) (*Peabody I*): Reversing Board for erroneously claiming lack of authority to award 'fees on fees' incurred in litigating fee reasonableness and holding that orders lacking mathematical explanation fail substantial reason.

- *Cascade In-Home Care v. Hooks*, 296 Or App 695 (2019): Remanding because the Board failed to explain which rationale led to its reduced award or why it departed from the requested amount.

- *Taylor v. SAIF Corp*., 295 Or App 198 (2018): Remanding due to the Board's failure to articulate a rational connection between the factors considered and its fee conclusion.

- *Wal-Mart Assocs. v. Lamb*, 278 Or App 622 (2016): Remanding because the record lacked sufficient rationale to enable appellate review of the fee award's reasonableness.

- *Cayton v. Safelite Glass Corp*., 257 Or App 188 (2013): Holding Board findings inadequate to evaluate whether the fee awarded was reasonable.

- *City of Albany v. Cary*, 201 Or App 147 (2005): Remanding where the Board failed to explain how factors influenced its decision to award substantially less than requested.

Universal Acceptance of the Lodestar Method

Adopting a lodestar calculation (reasonable hours × reasonable hourly rate, subject to factor-based adjustments) aligns Oregon workers' compensation practice with almost every state and federal fee-shifting forum.

The United States Supreme Court has explained that the lodestar method is the dominant, objective, and most reasonable framework for statutory fee shifting. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Blum v. Stenson*, 465 U.S. 886 (1984)).

The Ninth Circuit consistently applies the lodestar. *See, e.g., Gonzalez v. City of Maywood*, 729 F3d 1196 (9th Cir 2013); *Morales v. City of San Rafael*, 96 F3d 359 (9th Cir 1996). Federal District courts in Oregon utilize it for statutory attorney fee calculations. *See, e.g., Rosalio v. Nunez*, CV 04-379-BR (D. Or. 2005) (applying lodestar under ORS 652.200).

Established market benchmarks, such as the Oregon State Bar Economic Survey, provide objective, empirical data on prevailing market rates. Oregon courts find the OSB Survey competent and relevant evidence when calculating hourly rates. *See Moro v. State*, 360 Or 467, 484, 384 P3d 504 (2016) (citing 2012 Oregon State Bar Economic Survey to help establish hourly rate).

The federal courts also rely on the survey. *Nat'l Fam. Farm Coal v. EPA*, 2023 US App LEXIS 28562 (9 CA 2023) ("Petitioner's Portland-based evidence, including the Oregon State Bar Economic Survey (OSB Survey), is sufficiently specific and reliable to establish that the requested rates are in line with prevailing Portland market rates.") (9th Circuit Attorney Fee Order); *see also, Aragon v. Rise Law Group, Inc.*, 2024 US Dist LEXIS 197058 (D Or Oct 30, 2024) ("The best evidence of the prevailing rates in Oregon is the Oregon State Bar Economic Survey, most recently issued in 2022.").

Economic Disparity and Access to Justice

The Board's August 2026 Attorney Fee Report provides official statistics demonstrating that unarticulated, under-market fee awards directly threaten injured workers' access to legal representation and widen the gap between defense and claimant legal expenditures:

Economic & System Metrics	Board Data & Administrative Impact
Widening Defense vs. Claimant Legal Expenditure Gap **Takeaway:** A **$2.4 million widening** of the claimant/defense fee gap from the prior year.	Employer and insurer defense legal costs surged to **$50.70 million** in 2025 ($49.17M reported + $1.53M estimated for unreported file numbers). In contrast, total claimant attorney fees across Hearings and Board Review reached **$35.04 million** in 2025. Defense legal spending exceeded total claimant attorney compensation by **$15.66 million**, leaving claimant fees at only **69.1%** of defense costs.
Per-Disputed Claim Cost vs. Uncompensated Contingent Risk **Takeaway:**	In 2025, defense legal costs averaged **$7,756 per disputed claim** across 6,537 claims (paid win or lose). At the Hearings Division, claimant attorneys prevailed with an attorney fee award in only **47.9%** of litigated cases. Consequently, in **52.1%** of

Claimant's attorneys are *paying* $2,000 per case to assume the risk of litigation.	litigated cases, claimant counsel received **zero compensation**. Although winning a complete or partial denial yielded an average fee of **$17,368** (median fee of **$15,000**), the average fee across all litigated cases (including losses) was only **$5,623** per case, more than **$2,000 less** than average defense legal costs per case.
Shift of Fee Burden to Injured Workers (Out-of-Compensation Fees) **Takeaway:** The first time *decrease* in employers'/insurers' share of attorney fees.	Out of $35.04 million in total claimant attorney fees in 2025, **$27.46 million (78.4%)** was paid out of compensation directly by injured workers, an increase of **$3 million** over 2024. In contrast, assessed fees paid by employers/insurers totaled only **$7.58 million.**
Persistent Unrepresented (*Pro Se*) Injured Workers **Takeaway:** The *number and percentage* of unrepresented workers appearing at hearing and entering into CDAs **increased** between 2024 and 2025.	Due to under-market fee awards that make complex contingent cases economically unfeasible. The number of unrepresented workers at hearing and entering into CDAs increased between 2024 and 2025.

Adopting a lodestar framework is an economic necessity for Oregon's workers' compensation system. Although the lodestar method serves as the universal standard across federal courts, Oregon state courts, and federal longshore workers' compensation practice, the Oregon system remains an outlier. Establishing the lodestar method as the mandatory baseline when requested by a claimant's attorney along with a statement of services fulfills the statutory directives of ORS 656.388(5) and ORS 656.012(2)(b). It directly counters the alarming $15.66 million legal expenditure gap between insurers and injured workers, compensates for the 52.1% contingent risk of non-payment in litigated hearings, and restores the economic feasibility required to ensure injured workers retain meaningful access to skilled legal representation.

Limiting Consideration to Raised Objections

Respecting Party Positions

In recent years, ALJs and the Board have increasingly engaged in *sua sponte* reductions of submitted statements of services in cases where insurers or self-insured employers filed no

objections whatsoever. This practice fundamentally compromises administrative neutrality. When an adjudicator unilaterally reduces hours, hourly rates, or fee requests in the absence of opposing evidence or objections, the Board steps out of its role as an impartial tribunal and assumes the voice of an adverse party.

Appellate Precedent Against Uncontested Reductions

Encouraging fee determinations to center on contested objections respects the adversarial process and fosters administrative efficiency. In *Cascade In-Home Care v. Hooks*, 296 Or App 695 (2019), the Court of Appeals addressed and reversed the Board's *sua sponte* reduction of an uncontested fee petition. The Court emphasized that where the employer had full opportunity to file objections but chose not to, the Board committed reversible error by failing to explain what portion of the fee request it rejected or why, particularly in light of the uncontradicted evidentiary record.

Indeed, the Hearings Division and Board are "intended to resolve the parties' objections, not give rise to them." *SAIF v. Bacon*, 160 Or App 596, 603 (1999). For example, when the Board reduces a fee to which the insurer has no objection, only to be reversed by the court, the insurer, through no fault of its own, is now liable for a *Peabody II* fee payable to claimant's attorney for efforts in overcoming the Board's own *sua sponte* objections. Creating disputes where none exist burdens the administrative process and forces claimants' attorneys to endlessly litigate their compensation while making the non-objecting party pay for it.

Proposed Rule Language

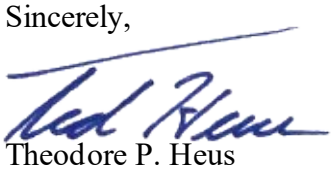
To implement these principles, I urge the Board to adopt the attached proposed amendments to OAR 438-015-0010 and OAR 438-015-0027. The proposed amendments address both the method of calculating a reasonable attorney fee and limit consideration to any objections raised by the parties.

Conclusion

The 2026 Biennial Review presents the Board with an opportunity to enhance fairness, transparency, and predictability in attorney fee disputes. Adopting a lodestar framework upon request and focusing review on contested objections honors Oregon Supreme Court and Court of Appeals precedent, fulfills statutory goals, and safeguards access to representation for Oregon's injured workers.

I appreciate the Board's consideration of these proposed rule concepts and look forward to participating in the upcoming public meeting.

Sincerely,



Theodore P. Heus
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OAR 438-015-0010(4)

Current Rule:

(4) In any case where an Administrative Law Judge or the Board is required to determine a reasonable attorney fee, the following factors shall be considered:

(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 necessity of allowing the broadest access to attorneys by injured workers;

(h) The fees earned by attorneys representing the insurer/self-insured employer, as compiled in the Director's annual report under ORS 656.388(7) of attorney salaries and other costs of legal services incurred by insurers/self-insured employers pursuant to ORS Chapter 656;

(i) The risk in a particular case that an attorney's efforts may go uncompensated;

(j) The contingent nature of the practice of workers' compensation law;

(k) The assertion of frivolous issues or defenses; and

(l) Claimant's counsel's contingent hourly rate, if asserted, together with any information used to establish the basis upon which the rate was calculated.

Proposed Rule: OAR 438-015-0010(4)

(Additions in Bold)

(4) **Subject to subsection (5)**, in any case where an Administrative Law Judge or the Board is required to determine a reasonable attorney fee, the following factors shall be considered:

(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 necessity of allowing the broadest access to attorneys by injured workers;

(h) The fees earned by attorneys representing the insurer/self-insured employer, as compiled in the Director's annual report under ORS 656.388(7) of attorney salaries and other costs of legal services incurred by insurers/self-insured employers pursuant to ORS Chapter 656;

(i) The risk in a particular case that an attorney's efforts may go uncompensated;

(j) The contingent nature of the practice of workers' compensation law;

(k) The assertion of frivolous issues or defenses; and

(l) Claimant's counsel's contingent hourly rate, if asserted, together with any information used to establish the basis upon which the rate was calculated.

(5) **Method of Calculation when Statement Submitted.**

If the claimant's attorney submits a statement of services and requests that an attorney fee be determined by multiplying the reasonable time devoted to the case by a reasonable contingent hourly rate for legal services, the Administrative Law Judge or Board shall calculate the attorney fee using that method.

(6) **Uncontested Statements of Services.**

When an attorney representing a claimant submits a statement of services, the opposing party shall have 14 days from service of the statement to file specific, written objections. If the opposing party fails to file a timely objection, the Administrative Law Judge or the Board shall approve the requested fee in full.

(7) Substantial Reason.

Any order awarding an amount less than requested in the statement of services must provide substantial reason based upon specific findings of fact in the record, including a specific explanation of which facts warranted the reduction and how the final dollar amount was calculated. Any reduction shall be based only on the opposing party's specific objections, timely submitted under subsection (6).

(8) Percentage limitations on fees established by these rules apply to the amount of compensation paid the claimant exclusive of medical, hospital or other expenses of treatment.

OAR 438-015-0005

Current Rule

In addition to the definitions set forth in OAR 438-005-0040:

(1) "Approved fee" means an attorney fee paid out of a claimant's compensation.

(2) "Assessed fee" means an attorney fee paid to a claimant's attorney by an insurer or self-insured employer in addition to compensation paid to a claimant.

(3) "Attorney" means a member of the Oregon State Bar.

(4) "Attorney fee" means payment for legal services performed on behalf and at the request of a claimant under ORS Chapter 656.

(5) "Client paid fee" means an attorney fee paid by an insurer or self-insured employer to its attorney.

(6) "Compensation" means all benefits, including medical services, provided for a compensable injury to a subject worker or the beneficiaries of a subject worker pursuant to ORS Chapter 656.

(7) "Cost bill" means an itemized statement from the claimant of the amount of expenses and costs for records, expert opinions, and witness fees incurred as a result of the litigation involving a claim denial under ORS 656.386(1).

(8) “Denied claim” means a claim for compensation which an insurer or self-insured employer refuses to pay on the express ground that the injury or condition for which compensation is claimed is not compensable or otherwise does not give rise to an entitlement to any compensation or a claim under ORS 656.386(1)(b)(B), (C) or (D) to which the insurer or self-insured employer does not timely respond.

(9) “Expenses and costs” reimbursable under ORS 656.386(2) mean reasonable expenses and costs incurred by the claimant for things and services reasonably necessary to pursue a matter, but do not include attorney fees. Examples of expenses and costs referred to include, but are not limited to, costs of records, expert witness opinions, witness fees and mileage paid to execute a subpoena and costs associated with travel.

Proposed Rule

(Additions in Bold)

In addition to the definitions set forth in OAR 438-005-0040:

(1) “Approved fee” means an attorney fee paid out of a claimant’s compensation.

(2) “Assessed fee” means an attorney fee paid to a claimant’s attorney by an insurer or self-insured employer in addition to compensation paid to a claimant.

(3) “Attorney” means a member of the Oregon State Bar.

(4) “Attorney fee” means payment for legal services performed on behalf and at the request of a claimant under ORS Chapter 656.

(5) “Client paid fee” means an attorney fee paid by an insurer or self-insured employer to its attorney

(6) “Compensation” means all benefits, including medical services, provided for a compensable injury to a subject worker or the beneficiaries of a subject worker pursuant to ORS Chapter 656.

(7) **“Contingent hourly rate” means the prevailing market rate in the relevant geographic community for legal services, adjusted for the average loss rate for litigated cases according statistics published by the board and the reduction in value for delay between the time a fee is awarded and the time the services were performed.**

(**8**) "Cost bill" means an itemized statement from the claimant of the amount of expenses and costs for records, expert opinions, and witness fees incurred as a result of the litigation involving a claim denial under ORS 656.386(1).

(**9**) "Denied claim" means a claim for compensation which an insurer or self-insured employer refuses to pay on the express ground that the injury or condition for which compensation is claimed is not compensable or otherwise does not give rise to an entitlement to any compensation or a claim under ORS 656.386(1)(b)(B), (C) or (D) to which the insurer or self-insured employer does not timely respond.

(**10**) "Expenses and costs" reimbursable under ORS 656.386(2) mean reasonable expenses and costs incurred by the claimant for things and services reasonably necessary to pursue a matter, but do not include attorney fees. Examples of expenses and costs referred to include, but are not limited to, costs of records, expert witness opinions, witness fees and mileage paid to execute a subpoena and costs associated with travel.

(11) "Statement of services" means a request for an attorney fee that proposes a contingent hourly rate for legal services and describes the time devoted to the case.