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None

## BOARD NEWS

## Biennial Review of Schedule of Attorney Fees Under ORS 656.388(4)

The Board is planning to begin its 2024 biennial review of its schedule of attorney fees under ORS 656.388(4). At this time, the Board is seeking written public comments from stakeholders. Those written comments should be directed to Katelyn Crowe, WCB Rules Coordinator by mail at 2601 25<sup>th</sup> St SE, Ste. 150, Salem, OR 97302, by email at [katelyn.crowe@wcb.oregon.gov](mailto:katelyn.crowe@wcb.oregon.gov), or by fax at (503) 373-1684.

All written comments will be posted on the Board's website and compiled for discussion at public Board meetings, where the Members will also consider public testimony. To assist in planning, the Board will schedule three meetings over the next few months. Those meeting dates are: October 8, November 19, and December 17. The Board will accept written and oral public comment from stakeholders through the November 19 meeting.

The first meeting, set for Tuesday, October 8, 2024, will be at 10 a.m. in Hearing Room A at the Board's Salem, Oregon office. A formal announcement regarding this meeting has been electronically distributed to those individuals, entities, and organizations who have registered for these notifications at <https://service.govdelivery.com/accounts/ORDCBS/subscriber/new>. Electronic notification of the November and December meetings will be electronically distributed in advance of those meetings.

## 2024 Attorney Fee Report Now Online

The Workers' Compensation Board has published its 2024 Attorney Fee Report. The report contains attorney fee data through the end of the 2023 calendar year and can be found on the WCB statistical reports webpage [here](#).

## CASE NOTES

ATTORNEY FEES: ORS 656.383(1) Attorney Fee Was Awardable Because Claimant's Attorney Was Instrumental in Obtaining Additional Temporary Disability Benefits in Reconsideration Proceeding – Claimant's Attorney Also Awarded Fees for Work Litigating the Attorney Fee Issue

*Melinda S. Griffin*, 76 Van Natta 486 (September 3, 2024) (en banc). Analyzing ORS 656.383(1), the Board held that the claimant's counsel was

entitled to an assessed attorney fee under ORS 656.383(1) for services at a reconsideration proceeding because the record established that the claimant's attorney was instrumental in obtaining additional temporary disability benefits awarded by the reconsideration order. In reaching its decision, the Board acknowledged that the specific amount of the worker's additional temporary disability benefits was a claim processing matter that had yet to be determined. However, the Board concluded that the worker's counsel was, nevertheless, instrumental in obtaining an Order on Reconsideration that had awarded additional temporary disability benefits. In addition, citing *Taylor v. SAIF*, 329 Or App 135 (2023), and *Peabody v. SAIF*, 326 Or App 132 (2023), the Board awarded an assessed attorney fee for subsequent work at the hearing level and on Board review litigating the ORS 656.383(1) attorney fee issue.

Member Ousey concurred to provide additional authority for the claimant's counsel's entitlement to an attorney fee for subsequent work at the hearing level and on Board review litigating the attorney fee issue. Citing *Shearer's Foods v. Hoffnagle*, 363 Or 147 (2018) and *TriMet v. Aizawa*, 362 Or 1 (2017), he explained that absent an indication from the legislature to the contrary, a party who is entitled to recover an attorney fee incurred in litigating the merits of a fee-generating claim is entitled to an attorney fee for litigating the amount of the resulting award. Member Ousey noted that ORS 656.383(1) contains no indication that the legislature intended to depart from this general rule.

Members Curey and Ogawa concurred in part and dissented in part. They agreed that the claimant's counsel was entitled to an ORS 656.383(1) attorney fee for services at the reconsideration proceeding. However, they disagreed that an ORS 656.383(1) attorney fee was awardable for services at the hearing level and on Board review. They noted that ORS 656.383(1) applies to services performed in obtaining additional temporary disability benefits before a hearing, not services at the hearing level and on review for litigating an attorney fee issue. In addition, Members Curey and Ogawa distinguished *Taylor* and *Peabody* because those cases pertained to ORS 656.386(1), not ORS 656.383(1).

**ON REMAND: ORS 656.383(1) Attorney Fee Was Awardable Because Claimant's Attorney Was Instrumental in Obtaining Additional Temporary Disability Benefits in Reconsideration Proceeding Despite Suspension Order – Claimant's Attorney Also Awarded Fees for Work Litigating the Attorney Fee Issue**

*Mekayla N. Dancingbear*, 76 Van Natta 507 (September 5, 2024). On remand from the court, the Board held that the claimant's attorney was entitled to an assessed attorney fee under ORS 656.383(1) because the record established that the claimant's counsel was instrumental in obtaining temporary disability benefits at a reconsideration proceeding. In reaching its conclusion, the Board acknowledged that the Order on Reconsideration, which granted additional

temporary disability benefits, also suspended the worker's benefits for not attending a medical arbiter examination. Nonetheless, emphasizing that the reconsideration order had explicitly determined that the worker was entitled to benefits, the Board concluded that the eligibility requirements for an attorney fee award under ORS 656.383(1) had been satisfied.

Finally, relying on its decision in *Melinda S. Griffin*, 76 Van Natta 486 (2024) (summarized above), the Board awarded an assessed attorney fee for the claimant's counsel's services litigating the ORS 656.383(1) issue at the hearing level, on Board review, and on remand.

Members Curey concurred with the outcome of the case based on the Board's decision in *Griffin* and the principles of *stare decisis*. However, citing her dissenting/concurring opinion in *Griffin*, she reiterated that she did not believe that ORS 656.383(1) provides a basis for an assessed attorney fee for subsequent work performed in litigating the ORS 656.383(1) attorney fee issue.

## PENALTIES: Unreasonable Claim Closure – WCD Rule Required Strict Compliance and Language of Rule Was Unambiguous

*Nataliya Shmigel*, 76 Van Natta 528 (September 6, 2024). Applying OAR 436-030-0034(1)(a), the Board held that penalties and attorney fees were awardable for unreasonable claim closure when the carrier did not strictly comply with the rule and the language of the rule was unambiguous. In reaching this conclusion, the Board noted that the Order on Reconsideration determined that the claim closure was premature because the carrier did not strictly comply with the requirements of the rule. Specifically, the carrier's letters did not inform the claimant that her claim would be closed unless within 14 days from the date of the letters that treatment had resumed by attending an existing appointment or scheduling a new appointment. See OAR 436-030-0034(1)(a)(C)(i), (ii). Under such circumstances, the Board reasoned that, because the unambiguous language of the rule required the carrier to include specific information in the notice to claimant, it did not have a legitimate doubt when it did not include that required information.

Member Curey dissented. She found that the claimant did not seek authorized treatment or respond to either of the carrier's letters, which provided the carrier with a legitimate doubt regarding its duty to close the claim. In addition, she noted that the Order on Reconsideration had determined that the claim closure was premature because the employer did not strictly comply with OAR 436-030-0034(1). However, she would have found that the language of the rule was ambiguous because it did not describe specific or exacting procedures by which the carrier was to close the claim and, thus, strict compliance was not required. Moreover, to the extent that the carrier's letters outline the claimant's obligations to establish care with an authorized provider or confirm that she was unable to treat, she would find that those letters complied with the rule's general requirements.

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## WORKER REQUESTED MEDICAL EXAMINATION: Claimant Was Eligible For a WRME - Carrier's Denial Was Based on IME Report Where Post-Denial Amendments to Report Supported Denial and Were Introduced at Hearing Regarding Denial – Attending Physician Did Not Concur With Amendments to IME Report

*Jon C. Landry*, 76 Van Natta 543 (September 16, 2024). Applying ORS 656.325(1)(e), the Board held that the claimant met the eligibility requirements for a worker-requested medical examination (WRME). Citing *Teitelman v. SAIF*, 332 Or App 72 (2024), the Board explained that, although the carrier issued its denial before an independent medical examination (IME) physician provided an opinion that did not support compensability, the record established that the carrier's denial was based on the IME report because the carrier submitted the IME physician's opinion as evidence in support of the denial. Accordingly, the Board concluded that the claimant was entitled to a WRME.

Member Ogawa dissented. She stated that the carrier's denial was not based on an IME report because the IME physician's initial report supported compensability. In addition, Member Ogawa noted that the IME physician's subsequent opinions were not IME reports for purposes of ORS 656.325(1)(e) because they were based on an additional records review, not an in-person examination.

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## APPELLATE DECISIONS UPDATE

No Board related decisions issued from the appellate courts in September.