



## **House Bill 2764**

# **Attorney Fees Advisory Committee Memorandum**

**September 23, 2015**

**To:** Workers' Compensation Board Members

**From:** PALJ Joy Dougherty                      Ms. Kathryn Olney  
                 Mr. Nelson Hall                              Mr. Bill Replogle  
                 Ms. Betsy Wosko

**Subject:** House Bill 2764

Dear Board Members:

Consistent with the July 22, 2015, letter from Board Chair Somers, the House Bill 2764 Attorney Fee Advisory Committee (AC) offers the following comments and recommendations regarding the implementation of the statutory changes brought about by House Bill 2764. Our instructions were to attempt to provide guidance in the following areas:

1. Offer our advice regarding proposed rule amendments, as well as any new rules, necessary in response to this recent legislation.
  - a. This may or may not include suggested specific rule language.
2. Offer our advice on the fiscal impact to the workers' compensation system resulting from any potential rule changes.

The bill is divided into 11 sections. Our responses follow the same numbering. For ease of reference, the memorandum includes much of the new statutory language, summaries from the July 7, 2015, memorandum to the Board and provided to the AC, proposed rule language and the AC's response to each section.

## Section One

Statutory Change: The following bold language is being added to ORS 656.012(1)(b).

To provide a fair and just administrative system for delivery of medical and financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceedings, to the greatest extent practicable, **while providing for access to adequate representation for injured workers;**

Summary: There were no comments in the summary provided to the AC regarding this statutory change.

Response: The committee members do not feel this requires Board action or any rule changes.

## Section Two

Statutory Change: This section amends ORS 656.262(11) and ORS 656.262(14). It appears there are three main changes in ORS 656.262(11) and one major change in ORS 656.262(14)(a). They are addressed separately.

**ORS 656.262(11)(a):** If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, **attorney fees or costs**, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees assessed under this section. The fees assessed by the director, an Administrative Law Judge, the board or the court under this section shall be [proportionate to the benefit to the injured worker] **reasonable attorney fees. In assessing fees, the director, an Administrative Law Judge, the board or the court shall consider the proportionate benefit to the injured worker.** The board shall adopt rules for establishing the amount of the attorney fee, giving primary consideration to the results achieved and to the time devoted to the case. An attorney fee awarded pursuant to this subsection may not exceed [\$3,000] **\$4,000** absent a showing of extraordinary circumstances.

Summary: The summary provided to the AC noted that this statute has been amended such that an unreasonable delay or refusal to pay attorney fees or costs can result in a penalty/ associated attorney fee under amended ORS 656.262(11)(a). The second change impacts the “consider[ing] the proportionate benefit to the injured worker.” The final change raises the statutory limitation on the penalty-related attorney from \$3,000 to \$4,000.

Proposed Rule Language: It was noted that OAR 438-015-0110 could provide as follows:

If the Director, an Administrative Law Judge, the Board, or the Court find that the insurer or self-insured employer unreasonably delayed or unreasonably refused to pay compensation, **attorney fees or costs**, or unreasonably delayed acceptance or denial of a claim an assessed attorney fee shall be awarded in a reasonable amount that:

- (1) [*Is*] **Considers the** proportionate [*to the*] benefit to the claimant;
- (2) Takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and to the time devoted to the case; and
- (3) Does not exceed [*\$3,000*] **\$4,000**, absent a showing of extraordinary circumstances. The maximum attorney fee awarded under this section is subject to an annual adjustment on July 1 as calculated by the Workers' Compensation Division (on behalf of the Director) by the same percentage increase as made to the average weekly wage defined in ORS 656.211, if any. Before July 1 of each year, the Board, by bulletin, will publish the maximum fee, after adjusting the fee by the same percentage increase, if any, to the average weekly wage. Dollar amounts will be rounded to the nearest whole number.

Response #1: The first change to include an unreasonably delayed or unreasonably refused to pay **attorney fees or costs** to the list of items for which an assess attorney fee can be awarded mirrors the statutory change. No other rule change appears necessary relative to that language.

Response #2: The committee agreed that the language of this rule should mirror, as closely as possible, the statutory language, so that the change to the “consideration” of the proportionate benefit to the claimant effectuates a meaningful change. Unlike the prior statutory language, it was noted that it looks like the attorney fee will not be awarded strictly proportionate to the worker’s benefit. The former language stated it “shall be proportionate.” Rather, now, the language states the decision maker “shall consider” the proportionate benefit. It is important that this change not be weighed more or less significantly than the intention of the legislatively approved provision. The proposed language of OAR 438-015-0110(1) mirrors the language of the House Bill and seems to sufficiently implement the changes.

Response #3: The change to the amount from \$3,000 to \$4,000 is consistent and requires no additional change.

**ORS 656.262(14)(a):** Injured workers have the duty to cooperate and assist the insurer or self-insured employer in the investigation of claims for compensation. Injured workers shall submit to and shall fully cooperate with personal and telephonic interviews and other formal or informal information gathering techniques. Injured workers who are represented by an attorney shall have the right to have the attorney present during any personal or telephonic interview or deposition. **If the injured worker is represented by an attorney, the insurer or self-insured employer shall pay the attorney a reasonable attorney fee based upon an hourly rate for actual time spent during the personal or telephonic interview or deposition. After consultation with the Board of Governors of the Oregon State Bar, the Workers’ Compensation Board shall adopt rules for the establishment, assessment and enforcement of an hourly attorney fee rate specified in this subsection.**

Summary: The summary provided to the AC stated the bill amends ORS 656.262(14)(a) to provide that, if the worker is represented by an attorney in a personal/telephone interview or deposition, the carrier “shall pay the attorney a reasonable attorney fee based upon an hourly rate for actual time spent during the personal or telephonic interview or deposition.” The amended statute further states that “[a]fter consultation with the Board of Governors of the Oregon State Bar, the Workers’ Compensation Board shall adopt rules for the establishment, assessment and enforcement of an hourly attorney fee rate specified in this subsection.”

Although not originally provided with rule language, the Committee requested to see what a draft rule applying the cost procedures to the attorney fee would look like. We were provided with the following.

Proposed Rule Language:

**438-015-003\***

**Attorney Fee Award under ORS 656.262(14)(a)**

**(1) In accordance with ORS 656.262(14)(a), a reasonable hourly rate for an attorney's actual time spent during a personal or telephonic interview or deposition conducted under that statute is \$ \_\_\_\_\_.**

**(2) If the claimant is represented by an attorney, the insurer or self-insured employer shall pay a reasonable attorney fee award, which is based upon the hourly rate prescribed in section (1) multiplied by the actual time spent by the attorney during the personal or telephonic interview or deposition conducted under ORS 656.262(14)(a).**

**(3) To obtain the attorney fee described in section (2), the claimant's attorney shall submit a bill to the insurer or self-insured employer. The bill, which may be submitted on a form prescribed by the Board, shall contain, but is not limited to, the following information:**

**(a) An itemization of the actual time spent by the claimant's attorney during the personal or telephonic interview or deposition; and**

**(b) The claimant's attorney's signature confirming that the claimed time was actually spent during the personal or telephonic interview or deposition conducted under ORS 656.262(14)(a).**

**(4) If the parties disagree regarding the attorney's bill under section (3), a party may request a hearing seeking resolution of that dispute. The resolution of disputes under this section shall be made by a final, appealable order.**

**(5) Unless it files a request for hearing, the insurer or self-insured employer must pay the attorney fee described in section (3) as an award under this rule within 30 days of its receipt of the bill.**

Response#1: Jurisdiction.

There was some concern amongst the committee that if the only issue raised in a request for hearing was this attorney fee, that it could be argued that jurisdiction rest with the Director. Additionally, historically, the Board's procedural rules did not "kick in" until a request for hearing was filed. However, the new statute specifically directs the Board to create rules for this pre-hearing process and the committee focused in on the statutory language that states the Board shall adopt rules for "assessment and enforcement," which implies it is within the Board's jurisdiction. However, relative to the proposed rule language, the Board may want to consider including in the rule language that addresses assignment to a WCB ALJ, the PALJ, or their designee to resolve the dispute. (Perhaps this could go in proposed (4).)

Response #2: Procedure.

The committee all agreed that the WC system has successfully implemented the cost bill procedure and there would be a benefit in having this attorney fee request follow a similar processing path. As noted above, one potential major difference is that these cases are less likely to come before an ALJ because the statement, and so the entitlement to a fee, occurs pre-litigation. This is an important difference that should be considered when finalizing the procedure.

Response #3: Amount.

The committee did not reach a consensus on the hourly rate at the first meeting. One member commented that there is a need to encourage attorneys to practice in this area and a fee of \$150 to \$200 an hour would not accomplish that goal. The committee reviewed the fact that an OSB Economic Survey referenced an hourly rate of \$350-375 an hour.

There was another comment that, in consideration for the amount listed here, it is of note that this fee is not "contingent" in nature. Thus, the factors of OAR 438-015-0010 would not apply. This was in response to two Court of Appeals cases supporting an hourly fee of \$410 an hour in cases where the fee was contingent in nature. Continuing into the second meeting, two of the defense attorneys present added that they were paid \$175 an hour, or less, for their work representing employers/carriers.

Considering a variety of factors, the committee narrowed the gap between \$175 and \$410 fairly quickly. There was discussion on whether the committee should settle on a specific number as a recommendation to the Board or to recommend a range and leave it to the Board to come to consensus. It was not lost on the committee that the individuals from both sides could face pressure from their respective sides if they were to actually settle on a number. But, they were determined to do just that... compromise and settle on an amount. There were references to this being similar to our mediated cases where both sides have to "give" some to meet in a reasonable range. The committee would like to emphasize that they considered arguments from both the claimant's attorney's and the employer's attorney's perspectives.

While assessing a "fiscal impact" was extremely difficult, if not impossible to do regarding many of the changes brought about by HB 2764, this was the one area it was included in the lengthy discussions. Among the many comments, a public member commented that this could basically occur in every case because interviews are conducted in every case, denied or not. A claimant's attorney commented that the majority of her clients come to her after the interview has already taken place and estimated the impact at 20 to 40 percent of cases. Yet another commented that the interview process seems to be "ratcheting-up" with defense attorneys doing the interviews, as opposed to a general "investigator," and that worker attorney appearance may see a comparable increase.

There was also discussion on the importance of access to justice and that having attorneys to represent injured workers was one of the three sides that keep our system running smoothly. However, this needed to be balanced against starting conservatively as this is totally new to the system, it is unknown to what extent it will have a fiscal impact and, finally, because it is highly unlikely that when the Board conducts its biennial review, it would ever get reduced.

It was a respectful, but hard fought debate. The committee ultimately unanimously decided on an hourly amount. The committee respectfully requests the Board adopt the recommended hourly rate of \$275 an hour.

Response #4: Cross-over.

A concern of the committee that seemed to recur over the two meetings was whether, in determining a “reasonable” assessed attorney fee, there would be cross-over from the amount set in this section. The implication was that decision makers would look to the set fee amount in assessing reasonable fees for other activities, for example, in compensability disputes. The committee had no answer for this concern and only time will tell if this comes to pass.

**Section Three**

Statutory Change: The bill amends ORS 656.277 to provide for a carrier-paid attorney fee if the attorney is instrumental in obtaining a Director (WCD) order reclassifying the claim to disabling. The award is granted by the Director (WCD). (Language omitted).

Summary: There were no comments in the summary provided to the AC regarding this statutory change.

Response: The committee members do not feel that this requires Board action or any rule changes.

**Section Four**

Statutory Change: The bill amends ORS 656.313(1)(b) to include “attorney fees and costs” along with the “withheld benefits” for which a carrier must pay interest once an appealed order has become final (if the carrier stayed the payments of such benefits/fees/costs during its appeal). (Language omitted.)

Summary: There were no comments in the summary provided to the AC regarding this statutory change.

Response: The committee members do not feel that this requires Board action or any rule changes.

## Section Five

Statutory Changes: The following bold language is being added to ORS 656.382. There are four subsections being changed by section five. They are addressed separately.

**ORS 656.382(1):** If an insurer or self-insured employer refuses to pay compensation, **costs or attorney fees** due under an order of an Administrative Law Judge, **the** Board or **the** court, or otherwise unreasonably resists the payment of compensation, **costs or attorney fees**, except as provided in ORS 656.385, the employer or insurer shall pay to the attorney of the claimant a reasonable attorney fee as provided in subsection (2) of this section. To the extent an employer has caused the insurer to be charged such fees, such employer may be charged with those fees.

Summary: Subsection (1) is amended to include “costs or attorney fees” accordingly: “If the insurer or self-insured employer refuses to pay compensation, **costs or attorney fees** \* \* \* due under an order \* \* \* or otherwise unreasonably resists the payment of compensation, **costs or attorney fees** \* \* \* the employer or insurer shall pay to the attorney of the claimant a reasonable attorney [.]” In other words, if a carrier engages in such conduct regarding the payment of “costs or attorney fees,” a reasonable attorney fee will be awardable. It was noted that no Board rule was impacted by this change.

Response: Because ORS 656.382 is already listed in OAR 438-015-0010 (and 0015) as a statute under which an assessed fee can be awarded and the changes in ORS 656.382(1) just add another circumstance for that assessed fee, it would appear no additional changes need to be made to the rules.

**ORS 656.382(2):** If a request for hearing, request for review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court is initiated by an employer or insurer, and the Administrative Law Judge, Board or court finds that **all or part of** the compensation awarded to a claimant should not be disallowed or reduced, or, through the assistance of an attorney, that an order rescinding a notice of closure should not be reversed or **all or part of** the compensation awarded by a reconsideration order issued under ORS 656.268 should not be reduced or disallowed, the employer or insurer shall be required to pay to the attorney of the claimant a reasonable attorney fee in an amount set by

the Administrative Law Judge, Board or [the] court for legal representation by an attorney for the claimant at and prior to the hearing, review on appeal or cross-appeal.

Summary: Section (2) of the statute is also amended to provide that a carrier-paid attorney fee is awardable if the ALJ, Board, or court finds that “all or part of” the compensation award should not be disallowed or reduced. It was noted that OAR 438-015-0065 and OAR 438-015-0070 would need to be amended to address this statutory change.

Proposed Rule Language:

OAR 438-015-0065 – amend sections (1) and (3). Rule could provide as follows:

(1) If an insurer or self-insured employer requests a hearing or otherwise seeks a reduction in compensation and the Administrative Law Judge finds that **all or part of** the compensation awarded to the claimant should not be disallowed or reduced, the Administrative Law Judge shall award a reasonable assessed fee to the claimant’s attorney.

\* \* \*

(3) If an insurer or self-insured employer requests a hearing regarding a reconsideration order, and the ALJ finds that **all or part of** the compensation awarded by the reconsideration order issued under ORS 656.268 should not be reduced or disallowed, the Administrative Law Judge shall award a reasonable assessed fee to the claimant’s attorney.

OAR 438-015-0070 – amend sections (1) and (3). Rule could provide as follows:

(1) If an insurer or self-insured employer requests or cross-requests review of the Administrative Law Judge’s order and the Board finds that **all or part of** the compensation awarded to the claimant should

not be disallowed or reduced, the Board shall award a reasonable assessed fee to the claimant's attorney.

\* \* \*

(3) If an insurer or self-insured employer requests or cross-requests review of the Administrative Judge's order regarding a reconsideration order, and the Board finds that **all or part of** the compensation awarded by the reconsideration order issued under ORS 656.268 should not be reduced or disallowed, the Board shall award a reasonable assessed fee to the claimant's attorney.

Response: Because these changes implement verbatim the change in language from the statute, additional recommendations to not appear necessary.

**ORS 656.382(3): If an employer or insurer raises attorney fees, penalties or costs as a separate issue in a request for hearing, request for review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court initiated by the employer or insurer under this section, and the Administrative Law Judge, Board or court finds that the attorney fees, penalties or costs awarded to the claimant should not be disallowed or reduced, the Administrative Law Judge, Board or court shall award reasonable additional attorney fees to the attorney for the claimant for efforts in defending the fee, penalty or costs.**

Summary: Section (3) is new and provides that if the carrier raises attorney fees, penalties, or costs as a separate issue in a hearing request, request for Board review, or court appeal and the reviewing body finds that such awards should not be disallowed or reduced, a reasonable additional attorney fee award is mandated. It was noted that OAR 438-015-0065 and OAR 438-015-0070 would need to be amended to address this statutory change.

Proposed Rule Language:

OAR 438-015-0065 – add new section (2) as follows:

**(2) If an insurer or self-insured employer requests a hearing and raises attorney fees, penalties or costs as a separate issue and the Administrative Law Judge finds that the attorney fees, penalties or costs awarded to the claimant should not be disallowed or reduced, the Administrative Law Judge shall award an additional reasonable assessed fee to the claimant's attorney for efforts in defending the fee, penalty or costs.**

OAR 438-015-0070 – add new section (2) as follows:

**(2) If an insurer or self-insured employer requests or cross-requests review or otherwise challenges the Administrative Law Judge's order that awarded an additional reasonable assessed fee to the claimant's attorney for efforts in defending a fee, penalty or costs, and the Board finds that the attorney fees, penalties or costs awarded to the claimant should not be disallowed or reduced, the Board shall award an additional reasonable assessed fee to the claimant's attorney for efforts in defending the fee, penalty or costs.**

Response: The committee agreed on several occasions that the new rules should mirror the language of the legislatively approved changes as closely as possible. These rule changes appear to do that and the committee offers no additional recommendations to the suggested language.

**ORS 656.382(4): If an employer or insurer initiates an appeal to the Board or Court of Appeals and the matter is briefed, but the employer or insurer withdraws the appeal prior to a decision by the Board or court, resulting in the claimant's prevailing in the matter, the claimant's attorney is entitled to a reasonable attorney fee for efforts in briefing the matter to the Board or court.**

Summary: Section (4), also new, provides for an assessed attorney fee award if the carrier appeals to the Board or the Court of Appeals and “the matter is briefed,” but the carrier then withdraws its appeal before a Board/court decision.

Proposed Rule Language:

OAR 438-015-0070 – add new section (3) as follows:

**(3) If an insurer or self-insured employer requests or cross-requests review of the Administrative Law Judge’s order and the matter is briefed, but the insurer or self-insured employer withdraws the appeal prior to a decision by the Board, resulting in the claimant’s prevailing in the matter, the Board shall award a reasonable assessed fee for claimant’s attorney’s efforts in briefing the matter to the Board.**

Response: One committee member questioned whether the rule should note by whom it needed to be briefed. Does it need to be the employer? Both parties? A public member brought forth the legislative history which noted that the workers’ attorney’s work began once the employer/insurer had filed a brief and that the fee was not limited to the worker’s attorney’s actual brief. Other than the legislative history, the language of the statute does not necessarily make this clear. But, since the language of the proposed rule mirrors the legislatively approved statutory language, the AC does not make additional recommendations on alternate language.

## **Section 6**

Statutory Changes: The changes are lengthy and address ORS 656.385 and attorney fee awards available under the Director’s (WCD’s) authority. (Language omitted.)

Summary: No summary was provided to the AC.

Response: The committee members do not feel this requires Board action or rule changes.

## Section 7

Statutory Change: The following bold language is being added to ORS 656.386, subsection (3) and there is a new subsection (4). They are addressed individually.

**ORS 656.386(3):** If a claimant requests claim reclassification as provided in ORS 656.277 and the insurer or self-insured employer does not respond within 14 days of the request, or if the **claimant**, insurer or self-insured employer requests a hearing, review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court and the Director of the Department of Consumer and Business Services, Administrative Law Judge, Board or [the] court finally determines that the claim should be classified as disabling, the director, Administrative Law Judge, Board or [the] court may assess a reasonable attorney fee.

Summary: This section amends ORS 656.386(3) to include “claimant” in the list of parties who, if they request a hearing, review, appeal of a claim reclassification decision and receive a “disabling” reclassification, receive a reasonable attorney fee. The statutory amendment entitles a claimant to a carrier-paid attorney fee award when he/she successfully appeals from a “non disabling” classification. It was noted that a Board rule incorporating this statutory change will need to be amended/adopted.

### Proposed Rule Language:

OAR 438-015-003\* – add new rule providing for attorney fees when a claimant *requests a hearing* on a claim reclassification order from WCD and prevails. Rule could provide as follows:

#### **Attorney Fees When a Claimant Requests a Hearing on a Claim Reclassification**

**If a claimant requests a hearing regarding a claim reclassification order from the Workers' Compensation Division, and the Administrative Law Judge finally determines that the claim should be classified as disabling, the Administrative Law Judge may award a reasonable assessed fee.**

(\*Specific rule number must be approved by Secretary of State's office.)

OAR 438-015-0055(6) – add section (6) to provide for attorney fees when a claimant *requests Board review* of an ALJ's order on a claim reclassification order from WCD and prevails. Rule could provide as follows:

**(6) If a claimant requests review of an Administrative Law Judge's order regarding a claim reclassification order from the Workers' Compensation Division, and the Board finally determines that the claim should be classified as disabling, the Board may award a reasonable assessed fee.**

Response: The proposed rules appear to effectuate the intent of the statutory change. The committee does not offer additional recommendations relative to these changes.

**ORS 656.368(4): In disputes involving a claim for costs, if the claimant prevails on the claim for any increase of costs, the Administrative Law Judge, Board, Court of Appeals or Supreme Court shall award a reasonable assessed attorney fee to the claimant's attorney.**

Summary: This also adds a new subsection (4), which provides that if claimant successfully prevails in a dispute involving claim *costs* before an ALJ, Board, or court, a reasonable carrier-paid attorney fee is awardable. It was noted that a Board rule incorporating this statutory change will need to be amended/adopted.

Proposed Rules Language:

OAR 438-015-0019 – add section (6) to the “cost bill procedures” rule to provide for assessed attorney fee for prevailing on a claim for increase of costs. Also, amend title of this rule to include this assessed attorney fee provision. Rule could provide as follows.

**Cost Bill Procedures; Assessed Attorney Fees When the Claimant Prevails in a Cost Bill Dispute**

\* \* \*

**(6) In disputes involving a claim for costs, if the claimant prevails on the claim for any increase of costs, the Administrative Law Judge or the Board shall award a reasonable assessed attorney fee to the claimant's attorney.**

Response: The proposed rule language appears to address the changes allowed for in the statute. The committee offers no additional recommendations relative to these changes.

**Section 8**

Statutory Change: This section amends ORS 656.388(4) and (5). They are addressed together. The following bold language is being added to the statute.

(4) The Board shall, after consultation with the Board of Governors of the Oregon State Bar, establish a schedule of fees for attorneys representing a worker and representing an insurer or self-insured employer, under this chapter. **The Workers' Compensation Board shall review all attorney fee schedules biennially for adjustment. (5) The Board shall, in establishing the schedule of attorney fees awarded under this chapter, consider the contingent nature of the practice of workers' compensation law and the necessity of allowing the broadest access to attorneys by injured workers and shall give consideration to fees earned by attorneys for insurers and self-insured employers.**

Summary: Subsection (4) is amended by adding the sentence "The Workers' Compensation Board shall review all attorney fee schedules biennially for adjustment." Subsection (5) directs the Board, when establishing its "schedule of attorney fees" to "consider the contingent nature of the practice of workers' compensation law and the necessity of allowing the broadest access to attorneys by injured workers and shall give consideration to fees allowed by attorneys for insurers and self-insured employers." It was noted that to carry out this directive, the Board may wish to consider requesting the Director's annual "attorney fee" reports submitted by carriers under ORS 656.388(6) (soon to be renumbered (7), effective January 1, 2016).

It was also noted that the AC may want to suggest a process for the Board to follow when conducting this biennial review; e.g., a notification process to

interested parties/practitioners/public/Director, information/comments to seek, time period for seeking/reviewing such data, and reaching a determination.

Alternatively, it was noted the Board could follow the “informal” practice that it has traditionally followed when conducting its review of administrative rules.

Response #1: The committee recognizes that the Board has a process by which it notices its public hearings and provides notice regarding the issues it will be addressing. It also has a formal process established by law and rule relative to its rule making authority.

One member commented that it would be helpful for the practitioners to know in advance that this was going to be at issue, perhaps even in advance of the public meeting notice being issued. Ultimately, because the statute requires that this be done biennially, and because the statute is in effect January 2016, the committee felt that it would be sufficiently understood that the biennial review would occur every two years from that January 2016 date.

Response #2: There was a specific discussion regarding the changes in (5), which states, “**The Board** shall, in establishing the **schedule of attorney fees** awarded under this chapter, consider the contingent nature of the practice of workers’ compensation law and the necessity of allowing the broadest access to attorneys by injured workers and **shall give consideration to fees earned by attorneys for insurers and self-insured employers.**” (Emphasis supplied.) It was commented that perhaps consideration should be given to placing these as factors in OAR 438-015-0010(4), to be considered in determining a reasonable attorney fee.

However, the language of this subsection is directed toward the Board, as opposed to the ALJs. It also refers to the “schedule” of attorney fees. The prior version of ORS 656.388(4) states, “**The Board** shall, after consultation with the Board of Governors of the Oregon State Bar, **establish a schedule** of fees for attorneys representing a worker and representing an insurer or self-insured employer, under this chapter.” While this provision has applied to the Board’s task of setting scheduled amounts (percentages of attorney fees from settlements, cost bill caps, responsibility fee caps), it has not been applied to assessed attorney fee cases in individual cases that are based on the OAR 438-015-0010(4) factors. Nothing in the new provision, or the legislative history, seemed to indicate different handling of this provision.

Thus, the AC does not recommend additional rule changes relative to this change outside its rule making duties when reviewing the attorney fees on a biennial basis.

### **Section 9**

**Statutory Changes: Section 10 of this 2015 Act is added to and made a part of ORS chapter 656.**

Summary: This adds a new statute captured in section 10.

Response: No rule changes necessary for this section.

### **Section 10**

**Statutory Changes: The claimant's attorney shall be allowed a reasonable assessed attorney fee if: (1) The claimant's attorney is instrumental in obtaining temporary disability compensation benefits pursuant to ORS 656.210, 656.212, 656.262, 656.268 or 656.325 prior to a decision by an Administrative Law Judge; or (2) The claimant finally prevails in a dispute over temporary disability compensation benefits pursuant to ORS 656.210, 656.212, 656.262, 656.268 or 656.325 after a request for hearing has been filed.**

Summary: This change adds a new statute, which provides for a carrier-paid attorney fee if a claimant's attorney is instrumental in obtaining TTD benefits prior to an ALJ decision or prevails in a dispute after a hearing request has been filed. It was noted that OAR 438-015-0045, OAR 438-015-0055, and OAR 438-015-0080 will need to be amended to address this statutory change.

Proposed Rule Language:

OAR 438-015-0010(2) – add reference to this new provision (which is yet to be identified in Chapter 656) to list of “assessed” attorney fee statutes. Rule could provide as follows:

Attorney fees for an attorney representing a claimant shall be paid out of the claimant's compensation award except as provided by ORS 656.307, 656.382, **656.\*\*\*** and 656.386

OAR 438-015-0025 – delete references to OAR 438-015-0045 and 438-015-0055(1), which currently provide for “approved” fee for temporary disability.

OAR 438-015-0045 – delete language providing for ALJ “approved” fee for awards of temporary disability benefits and add language for ALJ to “award a reasonable attorney fee.” Rule could provide as follows:

If the Administrative Law Judge awards additional compensation for temporary disability **benefits**, the Administrative Law Judge shall [*approve a fee of 25 percent of the increased compensation, but not more than \$1,500, to be paid out of the increased compensation*] **award a reasonable assessed attorney fee.**

OAR 438-015-0055(1) – delete language providing for Board “approved” fee for awards of temporary disability benefits and add language for Board to “award a reasonable attorney fee.” Rule could provide as follows:

If a claimant requests review of an Administrative Law Judge’s order on the issue of compensation for temporary disability and the Board awards additional compensation, the Board shall [*approve a fee of 25 percent of the increased compensation, provided that the total of fees approved by the Administrative Law Judge and the Board shall not exceed \$5,000*] **award a reasonable assessed attorney fee.**

OAR 438-015-0080(1), (2) –delete language providing for Board “approved” fee for attorney being instrumental in obtaining increased temporary disability compensation (section (1)) or for obtaining voluntary reopening of an Own Motion claim that results in increased temporary disability compensation (section (2)) benefits and add language to both sections for Board to “award a reasonable attorney fee.” Rule could provide as follows:

(1) If an attorney is instrumental in obtaining increased temporary disability compensation, the Board shall [*approve a fee of 25 percent of the increased compensation, but not more than \$1,500, to be paid out of the increased compensation*] **award a reasonable assessed attorney fee.**

(2) If an attorney is instrumental in obtaining a voluntary reopening of an Own Motion claim that results in increased temporary disability compensation, the Board shall [*approve a fee of 25 percent of the increased compensation, but not more than \$1,500, to be paid out of the increased temporary disability compensation resulting from the voluntary reopening*] **award a reasonable assessed attorney fee.**

Response #1: Relative to the proposed changes to OAR 438-015-0045 and OAR 438-015-0055(1), the advisory committee agrees that they track the changes in the statutory language. However, relative to implementing it to the Board's Own Motion rules in OAR 438-015-0080, the AC would note that it could not find the language implementing these rule changes to ORS 656.278.

Response #2: The AC concluded that if this was added to OAR 438-015-0010, which applies to the Board and the Hearings Division, OAR 438-015-0045 and OAR 438-015-0055(1) could potentially be eliminated. One benefit to that would be the presence of the factors in OAR 438-015-0010(4), which are the factors to be considered. However, there is also a benefit to being able to find what fees apply in a specific situation and leaving it as is. The AC acknowledges that there are specific instances that are separated out that reference an assessed fee, but are not included in OAR 438-015-0010. (*See e.g.*, OAR 438-015-0035.) Changing the language to be consistent with the statute is reasonable.

### **Section 11**

**Statutory Language: Section 10 of this 2015 Act and the amendments to ORS 656.012, 656.262, 656.277, 656.313, 656.382, 656.385, 656.386 and 656.388 by sections 1 to 8 of this 2015 Act apply to orders issued and attorney fees incurred on or after the effective date of this 2015 Act, regardless of the date on which the claim was filed.**

Summary: It was noted that these statutory amendments are “retroactively” effective, which will require the Board to apply them to ALJ orders that were issued before the January 1, 2016 effective date.

Response: The AC questioned whether the adopting language of these changes is truly “retroactive” at the hearings level and whether the Board would (could) alter an attorney fee awarded by an ALJ pre-2016, if they were to affirm that order post-January 1, 2016. However, this is something that will likely be litigated and the AC offers up no additional recommendations for rule changes.

FISCAL IMPACT: Fiscal Impact was difficult to assess. As noted above, the only place where there was commentary on the fiscal impact was relative to the newly established attorney fees under ORS 656.262(14)(a). The impact was contemplated to be on 100 percent of the cases, down to 20 to 40 percent of the cases. Thus, until it is seen whether injured workers avail themselves of representation at this stage, the fiscal impact is unknown.

The statutory changes add several new attorney fees in areas where there, historically, were not any or they were limited by the amount of recovery for the injured worker. Absent additional information by which to provide more informed opinions, the AC focused on the rule implementation and reserved additional comment on the greater prospect of fiscal impact.

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We thank the Workers' Compensation Board for the opportunity to work on this meaningful and challenging project. We thank the members of the public who took time out of their day to attend and contribute to our meetings. We thank the Board review staff who put the materials together and provided the proposed rule language. Best wishes in moving forward.