

BEFORE THE WORKERS' COMPENSATION BOARD OF
THE STATE OF OREGON

Adoption of Permanent Amendments to the Rules)
of Practice and Procedure for Contested Cases)
under the Workers' Compensation Law, Relating)
to Board Policy (OAR 438-005-0035); General)
Principles (OAR 438-015-0010); Cost Bill)
Procedures; Assessed Attorney Fees When)
the Claimant Prevails in a Cost Bill Dispute)
(OAR 438-015-0019); Maximum Attorney)
Fees Out of Compensation (OAR 438-015-0025);)
Attorney Fee Award Under ORS 656.262(14)(a),)
(OAR 438-015-0033); Attorney Fees When a)
Claimant Requests a Hearing on Extent of)
Temporary Disability (OAR 438-015-0045);)
Attorney Fees When a Claimant Requests a Hearing)
on a Claim Reclassification (OAR 438-015-0048);)
Attorney Fees When a Claimant Requests Review)
by the Board (OAR 438-015-0055); Attorney Fees)
When Insurer or Self-Insured Employer Requests)
a Hearing (OAR 438-015-0065); Attorney Fees)
When Insurer or Self-Insured Employer Requests)
or Cross-Requests Review by the Board)
(OAR 438-015-0070); Attorney Fees in Cases)
Involving ORS 656.262(11)(a) (OAR 438-015-0110).)

WCB ADMIN. ORDER 1-2015
ORDER OF ADOPTION

1. On October 9, 2015, the Workers' Compensation Board filed a Notice of Proposed Rulemaking Hearing with the Secretary of State, giving notice of its intent to amend permanent rules of practice and procedure relating to the aforementioned rules. Copies of the notice were electronically provided to the *Oregonian*, the *Associated Press*, and the *Capitol Press* on October 12, 2015. The notice was published in the Secretary of State's November 2015 *Administrative Rule Bulletin*.

On October 12, 2015, copies of the notice and proposed rules were electronically provided to the appropriate legislators. In addition, members of the Workers' Compensation Section of the Oregon State Bar were notified by e-mail about the notice, rules, and the rulemaking hearing on October 12, 2015. On October 13, 2015, notice of this hearing was posted on the Board's website at: <http://www.wcb.oregon.gov/wcbrule/rules.htm>. On October 15, 2015, copies of the notice, as well as the proposed rules, were mailed to all interested parties whose names appear on the Board's mailing list. Finally, notice of the hearing was published in the September and October 2015 issues of the Board's News and Case Notes, which were posted on the Board's website on October 8 and November 9, 2015, respectively.

Thereafter, in accordance with the notice, a public hearing was conducted by Debra L. Young, Staff Attorney, on December 4, 2015 at Salem, Oregon. The record of the public hearing was closed at 5:00 p.m. on December 4, 2015.

2. Six individuals offered testimony at the scheduled hearing. Written comments were submitted by 24 individuals (claimants' attorneys, carriers' attorneys, claim administrators, carriers, business trade associations, the Oregon State Bar (OSB) Board of Governors, the National Council on Compensation Insurance (NCCI), the Chair of the House Business and Labor Committee, and a co-chair of the Management Labor Advisory Counsel (MLAC)). Copies of the transcript of the public hearing and of all written comments received are available for public inspection and copying at the offices of the Board, 2601 25th St. SE, Suite 150, Salem, Oregon 97302-1280, during normal working hours from 8:00 a.m. to 5:00 p.m., Monday through Friday.

3. Summary of House Bill (HB) 2764 (2015) and Advisory Committee Report.

HB 2764 (2015) amends several statutes that concern attorney fees under the Workers' Compensation Law. A number of those statutory amendments effect practices and procedures involving the Board and its Hearings Division. Those amendments are summarized below.

Section 1 of HB 2764 amends ORS 656.012(2)(b) to add "while providing for access to adequate representation for injured workers" to the objective of providing "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."

Section 2 of HB 2764 amends ORS 656.262(11)(a) to add "attorney fees or costs" to the phrase "If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation * * *, or unreasonably delays acceptance or denial of a claim[.]" Thus, under amended ORS 656.262(11)(a), the unreasonable delay or refusal to pay attorney fees or costs can result in a penalty and a penalty-related attorney fee.

Section 2 of HB 2764 further amends ORS 656.262(11)(a) by replacing the phrase "proportionate to the benefit to the injured worker" with "reasonable attorney fees." Thus, the statute directs the Administrative Law Judge (ALJ), the Board, or the court to award "reasonable attorney fees." In addition, a sentence is added to the statute, which provides that "In assessing fees, the director, an Administrative Law Judge, the board or the court shall consider the proportionate benefit to the worker." HB 2764 § 2. Finally, ORS 656.262(11)(a) is amended to increase the "statutory maximum" for an assessed attorney fee to \$4,000, absent a showing of extraordinary circumstances. HB 2764 § 2.

Section 2 of HB 2764 also amends ORS 656.262(14)(a) to provide that, if the worker is represented by an attorney in a personal or telephonic 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 "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." HB 2764 § 2.

Section 5 of HB 2764 amends ORS 656.382(2) to provide that an assessed attorney fee is awardable if the ALJ, Board, or court finds, after a carrier's appeal of an order, that "all or part of" the compensation awarded to a claimant by the appealed order should not be disallowed or

reduced. ORS 656.382(2) is also amended to provide that an assessed attorney fee is awardable if “all or part of” the compensation awarded by a reconsideration order issued under ORS 656.268 should not be reduced or disallowed after a carrier’s appeal of that order. HB 2764 § 5.

In addition, Section 5 of HB 2764 adds a new section (3) to ORS 656.382. This new section 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, the ALJ, Board or court “shall award reasonable additional attorney fees to the attorney for the claimant for efforts in defending the fee, penalty or costs.” HB 2764 § 5.

Section 5 of HB 2764 also includes a new section (4) to ORS 656.382. This provision states that if the carrier initiates an appeal to the Board or the Court of Appeals “and the matter is briefed,” but the carrier withdraws the appeal before 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.” HB 2764 § 5.

Section 7 of HB 2764 amends ORS 656.386(3) to include “claimant” in the list of parties who may request a hearing, review, or court appeal of a claim reclassification decision and, if the decision results in a “disabling” reclassification, the ALJ, Board or court “may assess a reasonable attorney fee.” In other words, the statutory amendment provides for an assessed attorney fee award when the claimant successfully appeals from a “nondisabling” classification.

Section 7 of HB 2764 adds new section (4) to ORS 656.386. This new section provides that, in a dispute involving a claim for costs, “if the claimant prevails on the claim for any increase in costs,” the ALJ, Board, or court “shall award a reasonable assessed attorney fee to the claimant’s attorney.” HB 2764 § 7.

Section 8 of HB 2764 amends ORS 656.388(4) by adding the sentence “The Workers’ Compensation Board shall review all attorney fee schedules biennially for adjustment.”

Section 8 of HB 2764 also adds new section (5) to ORS 656.388. This new section requires that the Board “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 allowed by attorneys for insurers and self-insured employers.” HB 2764 § 8.

Finally, sections 9 and 10 of HB 2764 add a new statute, which provides for a reasonable assessed attorney fee if a claimant’s attorney is instrumental in obtaining temporary disability compensation benefits pursuant to ORS 656.210, 656.212, 656.268 or 656.325 prior to a decision by an ALJ or if the claimant prevails in a dispute over temporary disability compensation pursuant to those listed statutes after a hearing request has been filed.

HB 2764 becomes effective January 1, 2016. ORS 171.022. The statutory amendments apply to orders issued and attorney fees incurred on or after January 1, 2016, the effective date of the Act, regardless of the date on which the claim was filed. HB 2764, § 11.

The Members appointed an advisory committee to consider amendments to its rules resulting from HB 2764.¹ The Members also requested that this committee consider a proposal from Chris Moore, Attorney at Law, “that OAR 438-015-0010(4)(g) be changed again to reflect the intent as I understand HB 2764 to require consideration of the contingent nature of claimant attorneys’ practices.” After two public meetings to review the matter, the committee issued a report on September 23, 2015. On September 29 and October 6, 2015, at public meetings, the Members reviewed and discussed the report and after doing so, and considering comments expressed by practitioners (representing claimants and carriers), carriers, and a representative from the Department of Consumer and Business Services (DCBS), the Members proposed the adoption of permanent amendments.

For the reasons explained in the Members’ October 9, 2015 Statement of Need (incorporated by this reference), as well as those presented below, the Board has reached the following conclusions regarding the proposed amendments and rules, which are contained in Exhibits A through L (attached and incorporated by this reference).

4. Order of Adoption for Rules (Exhibits A through L). Before their December 10, 2015 public meeting, the Members thoroughly reviewed and considered all comments pertaining to the proposed permanent rules. A written summary and analysis of the comments is also included in the record.

OAR 438-005-0035(1)

For the reasons addressed in the October 2015 Statement of Need, the Members proposed to amend the first sentence of OAR 438-005-0035(1) to provide as follows: “It is the policy of the Board to expedite claim adjudication and amicably dispose of controversies, while providing for access to adequate representation for injured workers.”

After considering the comments received in response to this proposed amendment, the Members find for the reasons expressed in the Statement of Need, and those discussed herein, that the proposed amended rule is reasonable, necessary, and proper. Accordingly, the Members adopt this proposed rule as a permanent rule, contained in Exhibit A and incorporated by this reference.

OAR 438-015-0010(2)

For the reasons addressed in the October 2015 Statement of Need, the Members proposed to amend OAR 438-015-0010(2) to include reference to “House Bill 2764 (2015), sections 9 and 10” in the list of statutory exceptions to the requirement that attorney fees for representing a claimant shall be paid out of the claimant’s compensation award.²

¹ The advisory committee was comprised of the following individuals: Nelson Hall, claimant’s practitioner; M. Kathryn Olney, carrier’s practitioner; William Replogle, carrier’s practitioner; and Marybeth Wosko, claimant’s practitioner. Presiding Administrative Law Judge Joy Dougherty served as the facilitator for the committee. The Members extend their grateful appreciation to the committee for their valuable participation in this endeavor.

² The statute number will be inserted after it is codified by the Legislative Counsel.

After considering the comments received in response to this proposed rule amendment, the Members find for the reasons expressed in the Statement of Need, and those discussed herein, that the proposed amended rule is reasonable, necessary, and proper.³ Accordingly, the Members adopt this proposed rule as a permanent rule, contained in Exhibit B and incorporated by this reference.

OAR 438-015-0019(6)

For the reasons addressed in the October 2015 Statement of Need, the Members proposed to add the following phrase to the title of this rule: “Assessed Attorney Fees When the Claimant Prevails in a Cost Bill Dispute.” In addition, the Members proposed to add section (6) to this rule, providing that: “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.”

After considering the comments received in response to this proposed rule amendment, the Members find for the reasons expressed in the Statement of Need, and those discussed herein, that the proposed amended rule is reasonable, necessary, and proper. Accordingly, the Members adopt this proposed rule as a permanent rule, contained in Exhibit C and incorporated by this reference.

OAR 438-015-0025

Sections 9 and 10 of HB 2764 add a new statute that provides for a reasonable assessed attorney fee if: (1) The claimant’s attorney is instrumental in obtaining temporary disability compensation under ORS 656.210, 656.212, 656.262, 656.268, or 656.325 before a decision by an ALJ; or (2) The claimant finally prevails in a dispute over temporary disability compensation under those same statutes after a request for hearing has been filed. Before this statutory amendment, attorney fees for obtaining temporary disability compensation were payable out of increased compensation.

Consistent with this new statute, the Members proposed to amend OAR 438-015-0025 (which provides for maximum attorney fees out of compensation) by deleting the references to OAR 438-015-0045 and OAR 438-015-0055(1), which currently provide the maximum dollar amounts for “out-of-compensation” attorney fees for temporary disability benefits awarded by an ALJ and the Board, respectively.⁴

³ To the extent that some of the comments addressed section (4) of OAR 438-015-0010 (which concerns the “factors” to be considered in the determination of a reasonable assessed attorney fee), those comments will be referred to an Advisory Committee that will be considering other “attorney fee-related” rule concepts in the coming year.

⁴ As addressed below, the Members also proposed to amend OAR 438-015-0045 and OAR 438-015-0055(1) to provide for assessed attorney fees regarding increased temporary disability benefits, in compliance with this new statute.

In addition, OAR 438-015-0025 references “OAR 438-015-0080,” which addresses attorney fees in Own Motion cases and provides the maximum dollar amounts for “out-of-compensation” attorney fees for temporary disability benefits (sections (1) and (2)) and permanent disability benefits (section (3)). The Members proposed to amend OAR 438-015-0025 by adding section (3) to OAR 438-015-0080, to specify that “out-of-compensation” attorney fees only apply to increased awards for permanent disability benefits in Own Motion cases.

Consistent with their reasoning regarding OAR 438-015-0080, the Members have ultimately concluded that the new statutory provision does not apply to Own Motion claims. Therefore, the Members have decided not to adopt the proposed addition to the reference to “OAR 438-015-0080” in OAR 438-015-0025.

After considering the comments received in response to this proposed rule amendment, the Members find for the reasons expressed in the Statement of Need, and those discussed herein, that the proposed amended rule (subject to the aforementioned exception), is reasonable, necessary, and proper. Accordingly, the Members adopt this permanent amended rule, as detailed in Exhibit D and incorporated by this reference.

OAR 438-015-0033

Section 2 of HB 2764 amends ORS 656.262(14)(a) to add the following:

“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.” HB 2764 § 2.

Considering the effectiveness of OAR 438-015-0019 in implementing the cost bill provisions in ORS 656.386(2), the Members proposed providing similar procedures to implement the new attorney fee provisions under ORS 656.262(14)(a). Specifically, the Members proposed adding a new rule, OAR 438-015-0033, to provide for “Attorney Fee Award Under ORS 656.262(14)(a).” In addition, a majority of the Members proposed adding section (1) to OAR 438-015-0033 to provide a reasonable hourly rate of \$300 for an attorney’s actual time spent during a personal or telephonic interview or deposition conducted under ORS 656.262(14)(a).⁵

As detailed in their Statement of Need, the Members proposed the following sections in this new rule.

⁵ Members Curey and Johnson and Chair Somers proposed a reasonable hourly rate of \$300, whereas Members Weddell and Lanning proposed a reasonable hourly rate of \$400.

Section (2), which provides that, if the claimant is represented by an attorney, the carrier shall pay a reasonable attorney fee award based on the hourly rate 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).

Section (3), which provides the procedures to obtain the attorney fee in section (2). Specifically, the claimant's attorney shall submit a bill to the carrier within 30 days of completion of the personal or telephonic interview or deposition. The bill, which may be submitted on a form prescribed by the Board, shall contain, but is not limited to the following: (a) An itemization of the actual time spent by the claimant's attorney during the interview or deposition; (b) The claimant's attorney's signature confirming that the claimed time was actually spent during the interview or deposition under ORS 656.262(14)(a); and (c) A copy of the executed retainer agreement, unless previously provided.

Section (4), which provides that, if the parties disagree regarding the attorney's bill under section (3), a party may request a hearing seeking resolution of that dispute, which shall be made by a final, appealable order.

Finally, section (5), which provides that, unless it files a request for hearing, the carrier must pay the attorney fees described in section (3) as an award under this rule within 30 days of its receipt of the bill.

After considering comments received in response to this proposed rule,⁶ the Members unanimously agreed to adopt all sections of the proposed language in this rule, with the exception of the proposed hourly rate in section (1). The majority of the Members ultimately decided that a reasonable hourly rate in section (1) was \$275.⁷ This decision was reached after consideration of the fees earned by carriers' attorneys and access to attorneys for injured workers, as well as the contingent nature of claimants' attorneys' practice. See ORS 656.388(5).

In addition, all Members stressed that this hourly rate was intended for the specific purpose addressed in *amended* ORS 656.262(14)(a): to provide "an hourly rate for actual time spent during the personal or telephonic interview or deposition." The Members emphasized that this hourly rate was for that limited purpose only and was not intended for consideration in awarding any other attorney fee; *i.e.*, it was not intended to have any bearing on the determination of a reasonable assessed attorney fee under OAR 438-015-0010(4).

⁶ These comments included a response to the Board's request for consultation with the OSB Board of Governors under ORS 656.262(14)(a) and ORS 656.388(4), in which the OSB Executive Director stated that, after consulting with the OSB Workers' Compensation Section, the Board of Governors had no comments to offer. Specifically, the Executive Director reported that the OSB Board of Governors was "satisfied that the proposed rules will be effective to carry out the legislature's intent." In addition, comments were received from claimants' attorneys, carriers' attorneys, claim administrators, carriers, business trade associations, NCCI, the Chair of the House Business and Labor Committee, and a co-chair of MLAC.

⁷ Members Curey and Johnson and Chair Somers proposed a reasonable hourly rate of \$275, whereas Members Weddell and Lanning proposed a reasonable hourly rate of \$300.

Consequently, the majority of the Members finds for the reasons expressed in the Statement of Need, and those discussed herein, that the proposed rule (subject to the modification to section (1) described above), is reasonable, necessary, and proper. Accordingly, the majority of the Members adopts this rule as a permanent rule, as detailed in Exhibit E and incorporated by this reference.

OAR 438-015-0045

For the reasons addressed in the October 2015 Statement of Need, the Members proposed amending OAR 438-015-0045 to delete language providing for ALJ approval of an “out-of-compensation” attorney fee from an award of additional temporary disability benefits and to add language that, if the ALJ awards additional compensation for temporary disability “benefits,” the ALJ shall “award a reasonable assessed attorney fee.”

After considering the comments received in response to this proposed rule amendment, the Members find for the reasons expressed in the Statement of Need, and those discussed herein, that the proposed amended rule is reasonable, necessary, and proper. Accordingly, the Members adopt this proposed rule as a permanent rule, contained in Exhibit F and incorporated by this reference.

OAR 438-015-0048

For the reasons addressed in the October 2015 Statement of Need, the Members proposed to add OAR 438-015-0048 to provide: “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.”

After considering the comments received in response to this proposed rule amendment, the Members find for the reasons expressed in the Statement of Need, and those discussed herein, that the proposed amended rule is reasonable, necessary, and proper. Accordingly, the Members adopt this proposed rule as a permanent rule, contained in Exhibit G and incorporated by this reference.

OAR 438-015-0055(1), (6)

For the reasons addressed in the October 2015 Statement of Need, the Members proposed amending OAR 438-015-0055(1) to delete language providing for Board approval of an “out-of-compensation” attorney fee from a Board’s award of additional temporary disability compensation and to add language that, if a claimant requests review of an ALJ’s order on the issue of temporary disability compensation and the Board awards additional compensation, the Board shall “award a reasonable assessed attorney fee.” In addition, the Members proposed to amend OAR 438-015-0055 by adding section (6) as follows: “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.”

After considering the comments received in response to this proposed rule amendment, the Members find for the reasons expressed in the Statement of Need, and those discussed herein, that the proposed amended rule is reasonable, necessary, and proper. Accordingly, the Members adopt this proposed rule as a permanent rule, contained in Exhibit H and incorporated by this reference.

OAR 438-015-0065

For the reasons addressed in the October 2015 Statement of Need, the Members proposed to amend OAR 438-015-0065(1) to provide that, if a carrier requests a hearing and the ALJ finds that “all or part of” the compensation awarded to the claimant should not be disallowed or reduced, the ALJ shall award a reasonable assessed attorney fee. In addition, the Members proposed to amend section (3) of this rule to provide that, if a carrier requests a hearing regarding a reconsideration order, and the ALJ finds that “all or part of” the compensation awarded by the reconsideration order should not be reduced or disallowed, the ALJ shall award a reasonable assessed attorney fee. The Members also proposed to add a new section (2) to OAR 438-015-0065 to provide:

“If an employer or insurer raises attorney fees, penalties or costs as a separate issue in a request for hearing, 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 reasonable additional attorney fees to the attorney for the claimant for efforts in defending the fee, penalty or costs.”

This proposed change results in renumbering the current sections (2), (3), and (4) as sections (3), (4), and (5), respectively.

After considering the comments received in response to this proposed rule amendment, the Members find for the reasons expressed in the Statement of Need, and those discussed herein, that the proposed amended rule is reasonable, necessary, and proper. Accordingly, the Members adopt this proposed rule as a permanent rule, contained in Exhibit I and incorporated by this reference.

OAR 438-015-0070

For the reasons addressed in the October 2015 Statement of Need, the Members proposed amending OAR 438-015-0070(1) to provide that, if a carrier requests or cross-requests review of the ALJ’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 attorney fee. The Members also proposed to amend section (3) of this rule to provide that, if a carrier requests or cross-requests review of the ALJ’s order regarding a reconsideration order, and the Board finds that “all or part of” the compensation awarded by the reconsideration order should not be disallowed or reduced, the Board shall award a reasonable assessed attorney fee.

In addition, the Members proposed to add a new section (2) to OAR 438-015-0070 to provide:

“If an employer or insurer raises attorney fees, penalties or costs as a separate issue in a request for review, 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 reasonable additional attorney fees to the attorney for the claimant for efforts in defending the fee, penalty or costs.”

The Members also proposed adding a new section (3) to OAR 438-015-0070 to provide:

“(a) 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 the claimant’s attorney’s efforts in briefing the matter to the Board.

“(b) A matter is considered ‘briefed’ when the insurer or self-insured employer has filed its initial brief.”

These proposed changes result in renumbering the current sections (2), (3), and (4) as sections (4), (5), and (6), respectively.

After considering the comments received in response to this proposed rule amendment, the Members find for the reasons expressed in the Statement of Need, and those discussed herein, that the proposed amended rule is reasonable, necessary, and proper. Accordingly, the Members adopt this proposed rule as a permanent rule, contained in Exhibit J and incorporated by this reference.

OAR 438-015-0080(1), (2), (4)

Sections 9 and 10 of HB 2764 add a new statute that provides for a reasonable assessed attorney fee if: (1) The claimant’s attorney is instrumental in obtaining temporary disability compensation under ORS 656.210, 656.212, 656.262, 656.268, or 656.325 before a decision by an ALJ; or (2) The claimant finally prevails in a dispute over temporary disability compensation under those same statutes after a request for hearing has been filed.⁸ Before this statutory amendment, attorney fees for obtaining temporary disability compensation were payable out of increased compensation.

⁸ The new statutory language provides:

“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.” HB 2764 § § 9, 10.

At their October 6, 2015 meeting, the majority of the Members proposed to amend OAR 438-015-0080 to apply sections 9 and 10 of HB 2764 to Own Motion claims.⁹ Specifically, they proposed amending OAR 438-015-0080(1), (2), and (4) by deleting language considering Board approval of an “out-of-compensation” attorney fee from increased temporary disability compensation and adding language providing for the Board to “award a reasonable assessed attorney fee.”

After consideration of the comments received in response to the proposed rule amendment, the majority of the Members concluded that HB 2764 § 9, 10 did not provide the Board with the statutory authority to award assessed fees in Own Motion-related temporary disability claims.¹⁰ Therefore, the majority decided not to adopt any amendment to OAR 438-015-0080.¹¹ See Exhibit K.

OAR 438-015-0110

For the reasons addressed in the October 2015 Statement of Need, the Members proposed to amend OAR 438-015-0110 to add “attorney fees or costs” to the category of unreasonable actions/inactions by the carrier that result in the award of an assessed attorney fee by an ALJ or the Board. In addition, the Members proposed to change section (1) to read as follows: “Considers the proportionate benefit to the claimant.” Finally, the Members proposed to change section (3) to adjust the maximum attorney fee from \$3,000 to \$4,000, absent a showing of extraordinary circumstances.

After considering the comments received in response to this proposed rule amendment, the Members find for the reasons expressed in the Statement of Need, and those discussed herein, that the proposed amended rule is reasonable, necessary, and proper. Accordingly, the Members adopt this proposed rule as a permanent rule, contained in Exhibit L and incorporated by this reference.

⁹ An analysis of the *amended* statute and its potential effect on Own Motion claims is contained in the Board’s October 2015 Statement of Need. Member Curey did not support these proposed amendments. Chair Somers and Members Johnson, Lanning, and Weddell supported the proposed amendments to OAR 438-015-0080. All Members expressed a willingness to consider further public comment regarding the question of whether the statutory amendments extend to Own Motion-related temporary disability benefits.

¹⁰ Considering references in HB 2764 § 9, 10 to an ALJ’s decision and hearing requests (actions that do not accompany the resolution of Own Motion disputes), as well as the absence of any mention of ORS 656.278 (the statute concerning Own Motion claims), the majority of the Members (Chair Somers and Members Curey and Johnson) determined that, in the absence of direct statutory authority, the Board was currently unauthorized to adopt the proposed rule amendment. Member Curey further noted that any potential future legislation in this regard must take into consideration the possible effect on the reimbursement provisions of the Reopened Claims Program. See ORS 656.625.

¹¹ Members Weddell and Lanning supported the adoption of the proposed rule amendment. Considering the references in HB 2764 § 9, 10 to temporary disability statutes that also appear in ORS 656.278(1) (*i.e.*, ORS 656.210, 656.212(2), and 656.262(4)), and the express legislative policy to provide access to adequate representation for injured workers, they were persuaded that the scope of the statute extended to Own Motion-related temporary disability claims.

5. Under the authority granted by ORS 656.726(5), the Board finds that:
- a. All applicable rulemaking procedures have been followed; and
 - b. The rules being adopted are reasonable, necessary and proper.

**PURSUANT TO THE AMERICANS WITH DISABILITIES ACT GUIDELINES,
ALTERNATIVE FORMAT COPIES OF THE RULES WILL BE MADE AVAILABLE
TO QUALIFIED INDIVIDUALS UPON REQUEST TO THE BOARD.**

Consequently, in accordance with its Notice of Proposed Rulemaking, the Board adopts the attached amendments, as set forth in Exhibits "A" through "L" incorporated herein by this reference, as permanent amendments of the Workers' Compensation Board, to become effective January 1, 2016. The amendments are applicable as follows:

Amendments to OAR 438-005-0035, 438-015-0010, 438-015-0019, 438-015-0025, 438-015-0033, 438-015-0045, 438-015-0048, 438-015-0055, 438-015-0065, 438-015-0070, and 438-015-0110 apply to all claims for which an order is issued and attorney fees are incurred on or after January 1, 2016, regardless of the date on which the claim was filed. *See* HB 2764 § 11.

The Board further orders that a certified copy of the adopted rules be filed with the Secretary of State and that a copy of the Order of Adoption and the adopted rules with revision marks be filed with the Legislative Counsel within 10 days after filing with the Secretary of State as required by ORS 183.715.

Dated this 16th day of December, 2015.

WORKERS' COMPENSATION BOARD

by: 

Holly J. Somers, Board Chair



Sally Anne Curey, Board Member



Judy L. Johnson, Board Member



Steve Lanning, Board Member



Margaret F. Weddell, Board Member