

The following has special meaning:
green underline denotes added text
~~red struck out text denotes deleted text~~

4122 CITATION: OAR 438-015-0005, -0015, -0019, -0025, - 0029, -0035, -0038, -0050, -0055, -0-0100
AGENCY: Department of Consumer and Business Services/Workers' Compensation Board
VERSION: Adopted Rule
VERSION 11/13/2012
DATE:

Department of Consumer and Business Services,

Workers' Compensation Board

Chapter 438

Rule Caption: OAR Chapter 438 provisions for attorney fees.

Adm. Order No.: WCB 2-2012

Filed with Sec. of State: 11-13-2012

Certified to be Effective: 1-1-13

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Rules Amended: 438-015-0005, 438-015-0015, 438- 015-0019, 438-015-0025, 438-015-0029, 438-015-0035, 438-015-0038, 438-015- 0050, 438-015-0055, 438-015-0095, 438-015-0110

Subject: After considering comments to its Notice of Rulemaking Hearing regarding proposed amendments to its attorney fee rules, the Board proposes to: (1) amend OAR 438-015-0005(7) to clarify the definition of "denied claim" to include claims under ORS 656.386(1) (b)(B), (C), or (D);

(2) amend OAR 438-015-0015 by adding ORS 656.262(11) (a) and 656.308(2)(d) to the list of statutes that authorize attorney fees;

(3) amend OAR 438-015-0019(5) to clarify when payment of costs are due;

(4) amend OAR 438-015-0025 by adding reference to OAR 438-015-0055(2) and (3) to complete the list of out-of-compensation attorney fee rules;

(5) amend OAR 438-015-0029(2)(a) and (3)(a) by changing the filing of requests and responses for assessed attorney fees on Board review to "no later than 14 days" from certain events;

(6) amend OAR 438-015-0029(2)(c) and (3)(b) by providing that copies of requests and "responses" for assessed attorney fees on Board review are served on "attorneys";

(7) amend OAR 438-015-0035 to provide that this rule "applies to denials under OAR 438-015-0005(7)";

(8) amend OAR 438-015-0038, OAR 438-015-0055(5), and OAR 438-015-0110 to provide the manner of calculation and notification of the maximum fee awardable under ORS 656.308(2)(d) and ORS 656.262(11)(a);

(9) amend OAR 439-015-0050(1) to delete typographical error (“Administrative Law Judge”); (10) amend OAR 438-015-0055(5) to refer to section (2) of ORS 656.308; and (11) amend OAR 438-015-0095 to include reference to entire range of third party law (“ORS 656.576 through 656.596”).

Rules Coordinator: Karen Burton—(503) 934- 0123

438-015-0005

Definitions

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 by an attorney on behalf and at the request of a claimant under ORS Chapter 656.
- (5) “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.
- (6) “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).
- (7) “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.
- (8) “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.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.388(3) & 656.726(5)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2- 1989, f. 3-3-89, ef. 4-1-89; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08; WCB 2-2012, f. 11-13- 12, cert. ef. 1-1-13

438-015-0015

Charge for Legal Services Must Be Authorized

No charge for legal services for representation of claimants in connection with any matter concerning a claim before the Board or its Hearings Division under ORS Chapter 656 is valid unless the charge has been authorized in accordance with ORS 656.262(1)(a), 656.307, 656.308(2)(d), 656.382 to 656.390 or 656.593 or these rules.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.388(1)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 4- 1988(Temp), f. & ef. 11-15-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 7- 1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 2-2012, f. 11-13-12, cert. ef. 1-1-13

438-015-0019

Cost Bill Procedures

(1) If a claimant finally prevails against a denial under ORS 656.386(1), the Administrative Law Judge or the Board may order payment of the claimant's reasonable expenses and costs for records, expert opinions, and witness fees incurred in the litigation of the denied claim(s).

(2) In ordering payment under section (1), an Administrative Law Judge or the Board may award reasonable expenses and costs that the claimant incurred as a result of the litigation of the denied claim (s) under ORS 656.386(1). If the parties stipulate to the specific amount of the reasonable expenses and costs, the Administrative Law Judge's or the Board's award of expenses and costs shall be included in the order finding that the claimant finally prevails against a denied claim(s) under 656.386(1). In the absence of the parties' stipulation, the Administrative Law Judge or the Board may award reasonable expenses and costs as described in section (1), which the claimant may claim by submitting a cost bill under section (3) to the insurer or the self-insured employer, not to exceed \$1,500, unless the claimant demonstrates extraordinary circumstances justifying payment of a greater amount.

(3) If an order under section (2) does not specify the amount of a reasonable award for expenses and costs, the claimant shall submit, within 30 days after the order under section (2) becomes final, a cost bill to the insurer or self-insured employer. The cost 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 incurred expenses and costs for records, expert opinions, and witness fees that are due to the denied claim(s); and

(b) The claimant's signature confirming that the claimed expenses and costs were incurred in the litigation of the denied claim (s).

(4) If the parties disagree whether a claimed fee, expense, or cost is reasonable, 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 a hearing is requested by the insurer or self-insured employer under section (4), payments for witness fees, expenses, and costs shall be made by the insurer or self-insured employer within 30 days of its receipt of the cost bill submitted in accordance with section (3) or within 30 days after the order under section (2) becomes final, whichever is later, and are in addition to compensation payable to the claimant and in addition to attorney fees.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.386(2), 656.726(5)

Hist.: WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08; WCB 2-2012, f. 11-13-12, cert. ef. 1-1-13

438-015-0025

Maximum Attorney Fees Out of Compensation

Except in situations where a claimant's attorney fee is an assessed fee, in settlement of disputed claims or claim disposition agreements and in cases under the third-party law, unless there is a finding in a particular case by an Administrative Law Judge or the Board that extraordinary circumstances justify a higher fee, the established fees for attorneys representing claimants are as set forth in OAR 438-015-0040, 438-015-0045, 438-015-0055(1), (2), (3), and 438-015-0080.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.236(4), 656.289(4), 656.386(2), 656.388(3) & 656.593(1)(a)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 2-2012, f. 11-13-12, cert. ef. 1-1-13

438-015-0029

Request at Board Review Level for Assessed Fees

(1) On Board review of an Administrative Law Judge's order, to assist the Board in determining the amount of a reasonable assessed fee for services at the hearing level and/or for services on Board review, a claimant's attorney may file a request for a specific fee, which the attorney believes to be reasonable.

(2) The request shall be considered by the Board if:

(a) The request is filed no later than 14 days from the date of filing of the last appellate brief under OAR 438-011-0020;

(b) The request describes in detail the manner in which the factors set forth in OAR 438-015-0010(4) specifically apply to the case, as well as any other information deemed relevant; and

(c) A copy of the request is simultaneously served upon the attorneys who appeared at hearing and on Board review in the manner provided in OAR 438-005-0046(2)(a) and proof of such service is provided in accordance with 438-005-0046(2)(b).

(3) A written response raising objection to the request shall be considered by the Board if:

(a) The response is filed no later than 14 days from the date of filing of claimant's attorney's request for a specific fee under subsection (2)(a) of this rule; and

(b) A copy of the response is simultaneously served upon the attorneys who appeared at hearing and on Board review in the manner provided in OAR 438-005-0046(2)(a) and proof of such service is provided in accordance with 438-005-0046(2)(b).

(4) A request or response that does not comply with this rule shall not be considered by the Board in determining the amount of a reasonable assessed fee.

Stat. Auth.: ORS 654.025(2) & ORS 656.726(5)

Stats. Implemented: ORS 656.382(2), 656.386(1) & 656.388(3)

Hist.: WCB 1-1992, f. 3-5-92, cert. ef. 4-6-92; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95; WCB 2-2012, f. 11-13-12, cert. ef. 1-1-13

438-015-0035

Attorney Fees When a Claimant Requests a Hearing on a Denied Claim

If the Administrative Law Judge orders the acceptance of a previously denied claim, the Administrative Law Judge shall award a reasonable assessed fee. This rule applies to denials under OAR 438-015-0005(7).

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(5)

Stats. Implemented: ORS 656.386(1) & 656.388(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 2-2012, f. 11-13-12, cert. ef. 1-1-13

438-015-0038

Attorney Fees When a Claimant Requests a Hearing on a Responsibility Denial

If the claimant's attorney appears in any proceeding regarding a responsibility denial issued under ORS 656.308(2), and actively and meaningfully participates, and finally prevails against that responsibility denial, the Administrative Law Judge shall award a reasonable assessed fee to be paid by the insurer or self-insured employer who issued the responsibility denial. Absent a showing of extraordinary circumstances, the assessed attorney fee shall not exceed \$2,500. The maximum attorney fee awarded under this rule 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.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(5)

Stats. Implemented: ORS 656.308(2), 656.386(1) & 656.388(3)

Hist.: WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96; WCB 1-2009, f. 10-7-09, cert. ef. 1-1-10; WCB 2-2012, f. 11-13-12, cert. ef. 1-1-13

438-015-0050

Attorney Fees in Connection with Disputed Claim Settlements

(1) When a denied and disputed claim is settled under the provisions of ORS 656.289(4) and OAR 438-009-0010, an attorney fee may be approved by the Administrative Law Judge or the Board in an amount up to 25 percent of the first \$17,500 of the settlement proceeds plus ten percent of any amount of the settlement proceeds in excess of \$17,500. Under extraordinary circumstances, a fee may be authorized in excess of this calculation.

(2) When the settlement proceeds are to be paid in more than one payment payable within a period of more than one year from the date of approval, for purposes of approving an attorney fee under section (1) of this rule, settlement proceeds shall be calculated based on the "present value" of the total settlement proceeds. "Present value" may be represented by the actual present value of the total settlement proceeds or the purchase price of any annuity designed to fund payment of the total settlement proceeds. The parties shall provide the Board with a written statement of the "present value" of the total settlement proceeds.

Stat. Auth.: ORS 656.388(4) & 656.726(5)

Stats. Implemented: ORS 656.289(4) & 656.388(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2- 1989, f. 3-3-89, ef. 4-1-89; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 6-1991(Temp), f. 8-29-91, cert. ef. 9-2-91; WCB 8-1991, f. 11-6-91, cert. ef. 11-7-91; WCB 1-1998, f. 11- 20-98, cert. ef. 2-1-99; WCB 2-2012, f. 11-13-12, cert. ef. 1-1-13

438-015-0055

Attorney Fees When a Claimant Requests Review by the Board

(1) 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.

(2) If a claimant requests review of an Administrative Law Judge's order on the issue of compensation for permanent 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 \$6,000.

(3) If a claimant requests review of an Administrative Law Judge's order on the issue of compensation for permanent total 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 \$16,300.

(4) If a claimant requests review of an Administrative Law Judge's order that upheld a denial of compensability for a claim and the Board orders the claim accepted, the Board shall assess a reasonable attorney fee to be paid by the insurer or self-insured employer to the claimant's attorney.

(5) If a claimant requests review of an Administrative Law Judge's order that upheld a responsibility denial issued under ORS 656.308(2) and the claimant's attorney actively and meaningfully participates in finally prevailing against the responsibility denial, the Board shall award a reasonable assessed fee to be paid by the insurer or self-insured employer who issued the responsibility denial. Absent a showing of extraordinary circumstances, the assessed attorney fee for prevailing over the responsibility denial shall not exceed \$2,500. 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.

Stat. Auth.: ORS 656.386(1), 656.386(2), 656.388(3) & 656.726(5)

Stats. Implemented: ORS 656.308(2), 656.386(1), 656.386(2) & 656.388(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 1- 1998, f. 11-20-98, cert. ef. 2-1-99; WCB 1-2009, f. 10-7-09, cert. ef. 1-1-10; WCB 2-2012, f. 11-13-12, cert. ef. 1-1-13

438-015-0095

Attorney Fees in Third-Party Cases

Unless otherwise ordered by the Board after a finding of extraordinary circumstances, an attorney fee not to exceed 33-1/3 percent of the gross recovery obtained by the plaintiff in an action maintained under the provisions of ORS 656.576 through 656.596 is authorized.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(5)

Stats. Implemented: ORS 656.593(1)(a) & 656.388 (3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2- 1989, f. 3-3-89, ef. 4-1-89; WCB 2-2012, f. 11-13-12, cert. ef. 1-1-13

438-015-0110

Attorney Fees in Cases Involving ORS 656.262(11) (a)

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, or unreasonably delayed acceptance or denial of a claim, an assessed attorney fee shall be awarded in a reasonable amount that:

- (1) Is 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, 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.

Stat. Auth.: ORS 656.283, 656.388 & 656.726(5)

Stats. Implemented: ORS 656.262(11)(a)

Hist.: WCB 3-2003, f. 12-12-03 cert. ef. 1-1-04; WCB 1-2009, f. 10-7-09, cert. ef. 1-1-10; WCB 2-2012, f. 11-13-12, cert. ef. 1-1- 13

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