



Increased claimants' attorney fee exposure inevitable as Oregon HB 2764 passes into law

By Ned A. Arenberg ■ September 3, 2015

New amendments to existing Oregon Statutes in workers' compensation¹ will likely increase existing claimants' attorney fees and create new cost exposure. Governor Kate Brown signed House Bill 2764 into law in June 2015, which takes effect January 1, 2016. Below are some highlights of the effects on insurers and self-insured employers.

The bill increases the maximum statutory limit on assessed penalty related attorney fees—for any unreasonable delay in the payment of compensation—from \$3,000 to \$4,000. The maximum fee will still be adjusted yearly by the Workers' Compensation Division. In extraordinary circumstances a larger fee may be assessed.

In perhaps the most controversial change to existing law, claimants' attorney fees are now provided for investigative statements or depositions of the claimant taken prior to or absent any litigation. As a result of the change, Oregon statutes now provide claimant attorneys a "reasonable fee based on an hourly rate for actual time spent during the personal or telephonic interview or deposition." The bill leaves it to the Workers' Compensation Board to adopt new rules for establishing, assessing and enforcing an appropriate hourly fee. These investigatory statements or depositions are routinely taken during the 60 day period to accept or deny a workers' compensation claim, and are an instrumental part of the insurers' investigation of compensability. This is an entirely new fee awarded to claimants' attorneys and will likely have an impact on claim costs from the outset. Claimants' attorneys will likely become more involved in the preliminary stages of a claim.

The good news is that previous versions of the bill would have had a much more extensive cost impact regarding this investigative attorney fee. The bill originally proposed claimants' attorney fees for "any investigative process" not just depositions or statements of the claimant. The bill also provided a fee for efforts in scheduling, providing or attending any investigation process, not just for time spent during the statement or deposition. This fee could have been manipulated to essentially pay for non-litigation administrative and scheduling tasks, conferences with medical doctors, review of medical records or claim documents and any other activity that could be "investigative" in nature. Thanks to the lobbying efforts of Oregon's Management-Labor Advisory Committee

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(MLAC), the fee is now limited to only "actual time spent" during an interview or deposition of the injured worker.

A newly-assessed fee is now available to claimants' attorneys who are "instrumental in obtaining an order from the director that reclassifies" a claim from non-disabling to disabling. Thus, even absent a hearing, claimants' attorneys may receive significant fees for disputing the initial classification of a claim.

The bill also provides for a significant alteration to the assessed claimants' attorney fee related to reconsideration disputes raised by employers or insurers. If the insurer or employer requests a hearing, review by the Board or appeals a decision to the Court of Appeals or to the Oregon Supreme Court, and the fact finder ultimately decides that "all or part of" the compensation awarded to the claimant should not be disallowed or reduced, the claimant is entitled to an assessed attorney fee. Thus, even if the insurer or employer succeeds in reducing the overall compensation due to the claimant, if the claimant prevails in some part, the claimant's attorney is likely entitled to a fee.

In addition, claimants' attorneys are now entitled to a new assessed fee when they are "instrumental" in obtaining temporary disability compensation benefits prior to any decision by an Administrative Law Judge or if claimants' attorneys prevail in any dispute after a request for hearing.

A new penalty-related fee is also now available for an unreasonable delay or refusal to pay claimant attorney fees or costs. This penalty was previously limited to an unreasonable refusal or delay in paying compensation to the injured worker. As a result, insurers may now have exposure for a fee on top of fees; however this is also capped at \$4,000 (with adjustment yearly by the WCD). An additional claimant attorney fee is also available if the insurer requests a hearing or appeal regarding claimants' attorney fees, penalties or costs, and the forum ultimately finds that the attorney fees, penalties or costs should not be reduced.

Finally, the bill provides for the accrual of nine percent interest on claimants' attorney fees and costs if they are stayed pending appeal or further litigation. This interest-rate accrual was previously limited to benefits to the injured worker. This interest charge will likely further deter reasonable appeals of unfavorable litigation opinions, on top of the increased assessed fees available to attorneys for prevailing in appellate venues. Now insurers must also pay interest on attorney fees.

The net impact of these new provisions is yet to be seen. That said, insurers and employers are sure to see increases in claimants' attorney fee exposure on routine cases, and perhaps an increase in claimants' attorney involvement in the early stages of a workers' compensation claim, outside of any litigation.

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If you have any questions about HB 2764, please do not hesitate to contact the author of this article or any of the attorneys at Reinisch Wilson Weier PC. ■

To read the full text version and see the legislative process, please go to: <http://gov.oregonlive.com/bill/2015/HB2764/>

¹ The bill significantly amends ORS 656.262, 656.277, 656.313, 656.385, 656.386, and 656.388.

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