

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION



**Procedural Rules Governing
Rulemaking and Hearings
Oregon Administrative Rules
Chapter 436, Division 001**

Effective January 2, 2006

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NOTE: This rule division has been substantially revised throughout, so we have not placed bold lines in the margins to indicate changes. To view a copy that has all of the changes marked, please go to the Workers' Compensation Division's Web site:
<http://www.wcd.oregon.gov/policy/rules/rules.html>

and click on the links under "w/marked revisions."

**BEFORE THE DIRECTOR
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION**

In the Matter of the Amendment of Oregon Administrative Rules)
(OAR) chapter 436, division:)
001, Procedural Rules Governing)
Rulemaking and Hearings.....05-061)
009-0008, Oregon Medical Fee and Payment.....05-062)
045-0008, Reopened Claims Program05-063)
070-0008, Workers' Benefit Fund Assessment05-064)
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085-0008, Premium Assessment.....05-067)
140-0008, Construction Carve-Out Programs05-069)
150-0008, Workers' Benefit Fund Claims Program..05-070)
))
In the Matter of the Repeal of Oregon Administrative)
Rules (OAR) chapter 436, division:)
130, Rehabilitation Facilities05-068)

**ORDER OF
ADOPTION**

The Director of the Department of Consumer and Business Services, under the general rulemaking authority in ORS 656.726(4), and in accordance with the procedure provided by ORS 183.335, amends OAR chapter 436.

On August 12, 2005, the Workers' Compensation Division filed with the Secretary of State a *Notice of Proposed Rulemaking/Hearing* and *Statement of Need and Fiscal Impact*. The division mailed copies of the *Notice* and *Statement* to interested persons and legislators in accordance with ORS 183.335 and OAR 436-001-0000, and posted copies to its Web site. The Secretary of State included notice of the public hearing in its September 2005 *Oregon Bulletin*.

On September 26, 2005, a public hearing was held as announced. In addition, the record was held open for written testimony through September 30, 2005. The Workers' Compensation Division received written testimony about proposed revisions to this rule. A summary of this testimony and the agency's responses are on file and available for public inspection upon request during regular business hours, 8:00 a.m. to 5:00 p.m., Monday through Friday, in the Administrator's Office, Workers' Compensation Division, Labor & Industries Building, 350 Winter Street NE, PO Box 14480, Salem, Oregon 97309-0405.

RULE SUMMARY

The Workers' Compensation Division has amended OAR chapter 436, division 001, "Procedural Rules Governing Rulemaking and Hearings," and several related rules in divisions 009, 045, 070, 075, 080, 085, 140, and 150. Most of the changes are related to passage of House Bill 2091 (Oregon Laws 2005, chapter 26), which moves hearings on workers' compensation matters currently processed by the Office of Administrative Hearings to the Workers' Compensation Board, for all hearings held on or after January 2, 2006. The division has repealed several rules

**Order of Adoption
OAR 436-001**

in OAR 436-001 because the Workers' Compensation Board already has rules in place that govern the conduct of hearings. In addition, OAR 436-001 has been reorganized to place rules in a sequence more aligned with the sequence of appeals and hearings.

The Workers' Compensation Division has repealed OAR chapter 436, division 130, "Rehabilitation Facilities," in its entirety. ORS 656.530, the statute implemented by OAR 436-130, was repealed by Oregon Laws 1999, chapter 273, section 1.

FINDINGS

Having reviewed and considered the record and being fully informed, I make the following findings:

- a) The applicable rulemaking procedures have been followed.
- b) These rules are within the director's authority.
- c) The rules being adopted are a reasonable administrative interpretation of the statutes and are required to carry out statutory responsibilities.

IT IS THEREFORE ORDERED THAT

- 1) Amendments to OAR chapter 436, as set forth in Exhibit "A", are attached, incorporated by reference, and **adopted on this 19th day of October 2005, to be effective January 2, 2006.**
- 2) A certified copy of the adopted rules will be filed with the Secretary of State.
- 3) A copy of the amended rules with revision marks will be filed with the Legislative Counsel under ORS 183.715 within ten days after filing with the Secretary of State.

DATED this 19th day of October 2005.

DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES

/s/ John L Shilts

John L. Shilts, Administrator
Workers' Compensation Division

Under the Americans with Disabilities Act guidelines, alternative format copies of the rules will be made available to qualified individuals upon request.

If you have questions about these rules or need them in an alternate format, contact the Workers' Compensation Division at (503) 947-7810.

Distribution: WCD-ID, NM, ML, S0, S1, S2, S3, S4, S5, S6, S7, S8

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
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PROCEDURAL RULES GOVERNING RULEMAKING AND HEARINGS**

**EXHIBIT "A"
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 001**

General Provisions

436-001-0000 Notice of Agency Action Concerning Rules

Stat. Auth.: ORS 656.704(2), 656.726 (4)
Stats. Implemented: ORS 183.335 and 84.022
Hist: WCB 16-1975, f. & eff. 10-20-75
 WCD 4-1977 (Admin) (Temp f. & eff. 11-7-77;
 WCD 4-1978 (Admin) f. 7 eff. 3-6-78;
 Renumbered from 436-90-505, 5-1-85;
 WCD 3-1986 f. & eff. 5-15-86;
 Amended 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
 Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
 Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
 Amended and renumbered to 436-001-0009, 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0001 Authority

Stat. Auth.: ORS 656.704(2), 656.726(4)
Stats. Implemented: ORS Chapter 183, ORS 656.245, 656.248, 656.260, 656.262, 656.268, 656.283, 656.327, 656.385, 656.388, 656.447
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
 Amended 02/12/96 as WCD Admin. Order 96-055 eff. 02/12/96
 Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
 Repealed 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0003 Applicability and Purpose

(1) This rule division establishes supplemental procedures governing rulemaking and hearings, and carries out the provisions of ORS chapters 183 and 656.

(2) These rules apply to hearings on matters within the director's jurisdiction that are held on or after January 2, 2006. In general, the rules of the Workers' Compensation Board, in OAR chapter 438, apply to the conduct of hearings, unless these rules provide otherwise.

(3) These rules apply to all division rulemaking on or after January 2, 2006.

(4) Unless otherwise obligated by statute, the director may waive any procedural rules as justice so requires.

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 656.704, ORS ch. 183, OL 2005 ch 26
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
 Amended 02/12/96 as WCD Admin. Order 96-055 eff. 02/12/96
 Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
 Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
 Amended 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0004 Definitions

The following definitions apply to these rules, unless the context requires otherwise.

(1) "Administrative law judge" or "ALJ" means an administrative law judge appointed by the Workers' Compensation Board, as defined in OAR 438-005-0040.

(2) "Administrator" means the administrator of the Workers' Compensation Division or the administrator's designee.

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(3) "Board" means the Workers' Compensation Board and includes its Hearings Division.

(4) "Delivered" means physical delivery to the division's Salem office during regular business hours.

(5) "Department" means the Department of Consumer and Business Services.

(6) "Director" means the director of the Department of Consumer and Business Services or the director's designee.

(7) "Division" means the department's Workers' Compensation Division.

(8) "Filed" means mailed, faxed, e-mailed, or delivered to the division.

(9) "Final order" means a final, written action of the director.

(10) "Mailed" means correctly addressed, with sufficient postage and placed in the custody of the U. S. Postal Service.

(11) "Party" may include, but is not limited to, a worker, an employer, an insurer, a self-insured employer, a managed care organization, a medical provider, or the division.

(12) "Proposed and final order" means an order subject to revision by the director which becomes final unless exceptions are timely filed or the director issues a notice of intent to review the proposed and final order.

(13) Matters within the director's jurisdiction are matters other than those concerning a claim, as defined by ORS 656.704.

(14) Other words and phrases have the same meaning as given in ORS 183.310, where applicable.

Stat. Auth.: ORS 656.726(4)
 Stats. Implemented: ORS 656.704, ORS ch. 183, OL 2005 ch 26
 Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
 Amended 02/12/96 as WCD Admin. Order 96-055 eff. 02/12/96
 Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
 Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
 Amended 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

Rulemaking

436-001-0005 Model Rules of Procedure Governing Rulemaking

The Model Rules of Procedure, OAR 137-001-0005 through 137-001-0080, in effect on December 9, 2003, as promulgated by the Attorney General of the State of Oregon under the Administrative Procedures Act are adopted as the rules of procedure for rulemaking actions of the Workers' Compensation Division.

{**ED. NOTE:** The full text of the Attorney General's Model Rules of Procedures is available from the Office of the Attorney General or the Workers' Compensation Division. }

Stat. Auth.: ORS 656.726(4)
 Stats. Implemented: ORS 183.325 through 183.410
 Hist: Filed 5/15/86 as WCD Admin. Order 3-1986, eff. 5/15/86
 Amended 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
 Amended 2/12/96 as WCD Admin Order 96-055 eff. 2/12/96
 Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

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Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Amended 1/14/05 as WCD Admin. Order 05-050, eff. 1/14/05

436-001-0007 Designation of Proposed or Final Order

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 656.704(2) and 656.447
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 2/12/96 as WCD Admin Order 96-055 eff. 2/12/96
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Repealed 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0008 Model Rules of Procedure in Contested Cases

Stat. Auth: ORS 656.726(4)
Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2) (and §7, ch. 75, OL 2003)
Hist: Filed 12/2/91 as WCD Admin. Order 9-1991, eff. 12/2/91 (Temporary)
Filed 11/2/95 as WCD Admin. Order 95-066 eff. 11/1/95 (Temporary)
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Repealed 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0009 Notice of Agency Action Concerning Rules

(1) Except when adopting a temporary rule, the division will give prior public notice of the proposed adoption, amendment, or repeal of any rule by:

(a) Publishing notice of the proposed action in the Secretary of State's Oregon Bulletin at least 21 days prior to the effective date of the action, and

(b) Notifying interested persons and organizations on the division's notification lists of proposed rulemaking actions under ORS 183.335.

(2) The division will add a person or organization to its notification list if the person or organization:

(a) Subscribes to the division's e-mail notification service, through the division's Web site at wcd.oregon.gov, or

(b) Requests in writing to receive hard-copy notification, and includes the person or organization's full name and mailing address.

Stat. Auth.: ORS 656.726 (4)
Stats. Implemented: ORS 183.335 and 84.022
Hist: WCB 16-1975, f. & eff. 10-20-75
WCD 4-1977 (Admin) (Temp f. & eff. 11-7-77;
WCD 4-1978 (Admin) f. 7 eff. 3-6-78;
Renumbered from 436-90-505, 5-1-85;
WCD 3-1986 f. & eff. 5-15-86;
Amended 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Amended and renumbered from 436-001-0000, 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

Hearings**436-001-0019 Requests for Hearing**

(1) A request for hearing on a matter within the director's jurisdiction must be filed with the administrator no later than the filing deadline. The date and time of receipt for electronic filings is determined under ORS 84.043. Filing deadlines will not be extended except as provided

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in section (6) of this rule. The requesting party must send a copy of the request to all known parties and their legal representatives, if any.

(2) A request for hearing must be in writing. A party may use the division's Form 2839. A request for hearing must include the following information, as applicable:

- (a) The identity, name, address, and phone number of the party making the request;
- (b) The division's administrative order number;
- (c) The worker's name, address, and phone number;
- (d) The name, address, and phone number of the worker's attorney, if any;
- (e) The date of injury;
- (f) The insurer or self-insured employer claim number;
- (g) The division's file number; and
- (h) The reason for requesting a hearing.

(3) A request for hearing may be e-mailed to wcd.hearings@state.or.us, the division's hearing electronic mail address. If the request for hearing is an attachment to the e-mail, it must be in a format that Microsoft Word 2000® (.doc, .txt, .rtf) or Adobe Reader® (.pdf) can open. Image formats that can be viewed in Internet Explorer® (.tif, .jpg) are also acceptable. The division will acknowledge receipt of the e-mail. A party filing a request for hearing by e-mail consents and agrees to conduct the request for hearing transaction electronically. The party's electronic mailing address qualifies as its electronic signature.

(4) A request for hearing may be faxed, provided the document transmitted indicates that it has been delivered by fax, is sent to the correct fax number, and indicates the date the document was sent.

(5) The director will refer timely requests for hearing to the board for a hearing before an administrative law judge. The director may withdraw a matter that has been referred if the request for hearing is premature, if the issues in dispute become moot, or if the director otherwise determines that the matter is not appropriate for hearing at that time.

(6) The director will deny requests for hearing that are filed after the filing deadline. The party may request a limited hearing on the denial of the request for hearing within 30 days after the mailing date of the denial. The request must be filed with the administrator. At the limited hearing, the administrative law judge may only consider whether:

- (a) The denied request for hearing was filed timely; or
- (b) If good cause existed that prevented the party from timely requesting a hearing on the merits. For the purpose of this rule, "good cause" includes, but is not limited to, mistake, inadvertence, surprise, or excusable neglect.

Stat. Auth.: ORS 656.726(4) and ORS 84.013
Stats. Implemented: ORS 656.704, OL 2005 ch 26
Hist: Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Amended and renumbered from 436-001-0155, 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

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436-001-0023 Other Filings and Submissions

(1) Except as provided in section (3) of this rule, any filing, motion, request, document, or correspondence filed or submitted in a matter within the director's jurisdiction must be filed or submitted:

(a) To the division before the dispute is referred to the board;

(b) To the administrative law judge after the dispute is referred to the board but before the ALJ issues a proposed and final order; and

(c) To the division after the ALJ issues a proposed and final order, unless it is a request for correction of errors in the proposed and final order under OAR 436-001-0246(6).

(2) A copy of any filing, motion, request, document, or correspondence must be sent to the other parties, or their legal representatives, at the same time it is filed or submitted to the division or administrative law judge.

(3) A party must notify the division and the other parties of any changes in the party's mailing address or legal representation.

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 656.704, OL 2005 ch 26
Hist: Adopted 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0027 Timeliness; Calculation of Time

(1) Timeliness of any document required by these rules to be filed or submitted to the division is determined as follows:

(a) If a document is mailed, it will be considered filed on the date it is postmarked.

(b) If a document is faxed or e-mailed, it must be received by the division by 11:59 p.m. Pacific time to be considered filed on that date.

(c) If a document is delivered, it must be delivered during regular business hours to be considered filed on that date.

(2) Time periods allowed for a filing or submission to the division are calculated in calendar days. The first day is not included. The last day is included unless it is a Saturday, Sunday, or legal holiday. In that case, the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday. Legal holidays are those listed in ORS 187.010 and 187.020.

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 656.704, OL 2005 ch 26
Hist: Adopted 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0030 Role of the Workers' Compensation Division

(1) In any hearing, the director may request to:

(a) Receive notice of all matters;

(b) Receive copies of all documents; and

(c) Present evidence, testimony, and argument.

(2) The director may appear by providing the administrative law judge and parties with an entry of appearance in the hearing. The director may be represented by an agency

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representative, assistant attorney general, or special assistant attorney general as authorized by the Department of Justice. If the director enters an appearance, all notices and documents in the hearing must be provided to the director's representative.

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 180.220(2), 180.235, and 656.704
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Amended 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0110 Consolidation or Separation

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 183.310 through 183.508 and 656.704(2)
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Repealed 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0150 Change of Administrative Law Judge

Stat. Auth.: ORS 656.726(3)
Stats. Implemented: ORS 183.310 through 183.550, 656.704(2)
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Repealed 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0155 Manner of Filing a Contested-Case Hearing Request

Stat. Auth.: ORS 656.726(4) and ORS 84.013
Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)
Hist: Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Amended and renumbered to 436-001-0019, 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0160 Extension of Time for Filing

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Repealed 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0170 Duties and Powers of the Administrative Law Judge

(1) The administrative law judge may conduct the hearing in any manner, consistent with these rules, that will achieve substantial justice.

(2) Unless provided otherwise by statute or administrative rule, any order issued by an administrative law judge regarding a matter within the director's jurisdiction is a proposed and final order subject to review by the director under OAR 436-001-0246.

(3) Notwithstanding section (2), an administrative law judge may issue a final order of dismissal when the requesting party withdraws the request for hearing and no cross-request for hearing has been filed.

(4) If the parties settle as provided in OAR 436-001-0296(3), the administrative law

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judge may issue a proposed and final order of dismissal. If the parties settle as provided in OAR 436-001-0296(1) or (2), the director will dismiss the request for hearing.

(5) Where appropriate, the administrative law judge may remand a dispute to the director for further administrative action.

(6) The administrative law judge may consolidate matters in which there are common parties or common issues of law or fact.

(7) The administrative law judge may separate matters which will promote efficient disposition of the matters.

(8) Consolidation of matters under section (6) of this rule or under ORS 656.704(3)(c) is only for the purpose of hearing. The administrative law judge must issue a separate order for matters other than those concerning a claim.

(9) On the motion of a party, the division, or the administrative law judge, the ALJ may continue a hearing to allow the presentation of oral or written legal argument by the Department of Justice.

(10) The administrative law judge may send the division a written question regarding which rules or statutes apply to the matter, or regarding the division's interpretation of the rules and statutes. If the administrative law judge sends such a question, the ALJ must provide a written summary of the context in which the question arises, provide a reasonable time for the division to respond, and send a copy to all parties.

(11) The administrative law judge may conduct a hearing by telephone if all parties agree.

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 656.704, OL 2005 ch 26
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Amended 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0185 Hearings

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)
Hist: Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Repealed 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0201 Failure to Appear

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 183.415 and 656.704(2)
Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Repealed 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0210 Record and Transcript of Hearing

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

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Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Repealed 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0225 Scope of Review/Limitations on the Record

(1) Except for the matters listed in sections (2) and (3), the administrative law judge reviews all matters within the director's jurisdiction de novo, unless otherwise provided by statute or administrative rule.

(2) In medical service and medical treatment disputes under ORS 656.245, 656.247(3)(a), and 656.327, and managed care disputes under ORS 656.260(16), the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law. New medical evidence or issues may not be admitted or considered.

(3) In vocational assistance disputes under ORS 656.340, new evidence may be admitted and considered. Under ORS 656.283(2), the administrative law judge may modify the director's order only if it:

- (a) Violates a statute or rule;
- (b) Exceeds the director's statutory authority;
- (c) Was made upon unlawful procedure; or
- (d) Was characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 656.245, 656.247, 656.260, 656.283, 656.327, 656.704
Hist: Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Amended 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0226 Notice of Expert Testimony

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 183.415 and 656.704(2)
Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Repealed 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0240 Exhibits and Evidence

(1) Within 21 days after referral of the request for hearing to the board, the division will provide the parties and the administrative law judge legible copies of all exhibits that were relied upon in the underlying action or order, together with an index.

(2) Not less than 28 days before the hearing, or within seven days of receipt of the division's document index and documents, whichever is later, the petitioner(s) must provide legible copies of any additional exhibits that they will offer at hearing to the other parties, the director's representative, and the administrative law judge. The additional exhibits must be marked and accompanied by a supplemental exhibit index, numbered to coincide in chronological order with the division's exhibits and exhibit list. For example, an exhibit which is chronologically between the division's exhibits 5 and 6 would be marked as "Exhibit 5a" or "Ex. 5a."

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(3) Not less than 14 days before the hearing, the respondent(s)/cross-petitioner(s) must provide legible copies of any additional exhibits that they will offer at hearing to the other parties, the director's representative, and the administrative law judge. The exhibits must be marked and indexed in the same manner as provided in section (2).

(4) Unless withdrawn, all exhibits offered will be part of the record in the case, whether or not admitted into evidence.

(5) At the discretion of the administrative law judge, an accurate description or photograph of an object or real evidence may be substituted for the object or real evidence. The party offering the evidence is responsible for providing the description or photograph, and for retaining custody of the object until the case is closed.

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 656.704, OL 2005 ch 26
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
Amended 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0246 Proposed and Final Orders - Exceptions, Correction, Director Review

(1) Under ORS 656.704(2)(a), a party must seek director review of a proposed and final order before petitioning for judicial review under ORS 183.482.

(2) The parties or the division may initiate director review of a proposed and final order by filing exceptions as follows:

(a) Written exceptions must be filed with the administrator within 30 days of the mailing date of the proposed and final order;

(b) A written response to the exceptions must be filed within 20 days of the date the exceptions were filed;

(c) A written reply to the response, if any, must be filed within 10 days of the date the response(s) was filed.

(3) If exceptions are timely filed, the director may issue a final order or an amended proposed and final order, request the administrative law judge to hold further hearing, or remand the matter for further administrative action.

(4) Within 30 days of the mailing date of the proposed and final order, the director may issue a notice of intent to review the proposed and final order, even if no exceptions are filed.

(5) All proposed and final orders must contain language notifying the parties of their right to file exceptions, how to file, and the timeframes.

(6) The administrative law judge may withdraw a proposed and final order for correction of errors within 10 calendar days of the mailing date of the order. The time for filing exceptions begins on the date the corrected proposed and final order is mailed.

(7) If no exceptions are timely filed or if no notice of intent to review is issued, the proposed and final order will become final 30 days after the mailing date of the order.

(8) Any requests for review or requests for reconsideration of a proposed and final order

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filed with the administrative law judge or board within 30 days of the mailing date of the order will be forwarded to the director and treated as timely exceptions under this rule.

Stat. Auth.: ORS 656.726(4)
 Stats. Implemented: ORS 656.704, OL 2005 ch 26
 Hist: Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
 Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
 Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
 Amended and renumbered from OAR 436-001-0275, 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0252 Stay of Director and Administrative Review in Consolidated Matters

(1) If matters are consolidated under ORS 656.704(3)(c), and a party requests board review of the order for those matters concerning a claim, and a party files exceptions on the proposed and final order for matters other than those concerning a claim, the director may stay director review of the proposed and final order. If director review is stayed, the parties will be provided the opportunity to file a written response and reply as provided in OAR 436-001-0246, and director review will then be stayed until the board issues an order for those matters concerning a claim.

(2) If matters are consolidated under ORS 656.704(3)(c), and a party requests board review of the order for those matters concerning a claim, and the administrative law judge remands the matters other than those concerning a claim to the director for further administrative action, the director may stay further administrative action until the board issues an order for those matters concerning a claim.

Stat. Auth.: ORS 656.726(4)
 Stats. Implemented: ORS 656.704, OL 2005 ch 26
 Hist: Adopted 10/19/05 as WCD Admin. Order 05-061 eff. 1/2/06

436-001-0259 Ex Parte Communication

An ex parte communication is an oral or written communication to the administrator or administrator's designee during director review of the matter not made in the presence of all parties to the dispute, concerning a fact in issue, but does not include communication from division staff or the Department of Justice about legal issues or facts in the record. Ex parte communications received during director review will be promptly disclosed to all parties, and the parties will be allowed a reasonable opportunity to respond.

Stat. Auth.: ORS 656.726(4)
 Stats. Implemented: ORS 656.704, OL 2005 ch 26
 Hist: Adopted 10/19/05 as WCD Admin. Order 05-061 eff. 1/2/06

436-001-0260 Unacceptable Conduct

Stat. Auth.: ORS 656.726(4)
 Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)
 Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
 Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
 Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
 Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
 Repealed 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0265 Attorney Fees

(1) In cases where the director or administrative law judge is required to assess an attorney fee under ORS 656.385(1):

(a) The fee must be based on the factors listed in ORS 656.385(1).

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(b) Absent a showing of extraordinary circumstances or unless otherwise agreed by the parties, the fee may not exceed \$2,000 nor fall outside the ranges provided in the following matrix:

Estimated Benefit Achieved	Professional Hours Devoted				
	1-2 hours	2.1-4 hours	4.1-6 hours	6.1-8 hours	Over 8 hours
\$1-\$2000	\$100-400	\$200-700	\$300-750	\$600-1000	\$800-1250
\$2001-\$4000	\$200-500	\$400-800	\$600-900	\$800-1300	\$1050-1500
\$4001-\$6000	\$300-700	\$600-1000	\$800-1250	\$1000-1450	\$1300-1750
Over \$6000	\$400-900	\$800-1300	\$1050-1600	\$1350-1800	\$1550-2000

(c) Extraordinary circumstances are not established by merely exceeding eight hours or exceeding a benefit of \$6000.

(d) In cases under ORS 656.245, 656.247, 656.260, or 656.327, the factors listed in OAR 436-010-0008(13) may also be considered.

(e) In cases under ORS 656.340, the factors listed in OAR 436-120-0008(2) may also be considered.

(2) Except as provided in section (3), in cases where the administrative law judge or director assesses an attorney fee, the following factors may also be considered:

- (a) The complexity of the issue(s) involved;
- (b) The quality of the legal representation;
- (c) The value of the interest involved;
- (d) The nature of the proceedings;
- (e) The risk in a particular case that an attorney's efforts may go uncompensated;
- (f) The assertion of frivolous issues or defenses;

(g) A statement of services, if submitted within seven days of the hearing date, unless the administrative law judge instructs otherwise; and

(h) Any other relevant consideration deemed appropriate by the administrative law judge or director.

(3) In cases under ORS 656.262(11) where the issue is solely the assessment and payment of a penalty and attorney fee, OAR 438-015-0110 applies.

(4) If an attorney fee has been assessed by an administrative law judge in a proposed order, the opposing parties may file written exceptions to the fee under OAR 436-001-0275.

Stat. Auth.: ORS 656.385(1), 656.726(4)
 Stats. Implemented: ORS 656.262, 656.385, 656.388, and 656.704
 Hist: Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
 Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
 Amended 12/12/03 as WCD Admin. Order 03-067, eff. 1/1/04 (Temporary)
 Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
 Amended 6/9/05 as WCD Admin Order 05-056, eff. 7/1/05
 Amended 10/19/05 as WCD Admin. Order 05-061 eff. 1/2/06

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436-001-0275 Proposed and Final Orders, Filing Exceptions

Stat. Auth.: ORS 656.726(4)
 Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)
 Hist: Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
 Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
 Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
 Amended and renumbered to OAR 436-001-0246, 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

436-001-0296 Settlements and Dismissals

(1) If, after a request for hearing is filed but before a proposed and final order is issued, an agreement under ORS 656.236 or 656.289(4) is approved that resolves all issues in the matter within the director's jurisdiction, the party that filed the request for hearing must notify the director in writing that the request for hearing may be dismissed by the director.

(2) If, after a request for hearing is filed but before a proposed and final order is issued, the parties reach agreement on all issues in the matter within the director's jurisdiction, and only those issues, the parties must submit a written settlement agreement, signed by the parties, to the director for approval.

(3) If the matter within the director's jurisdiction is consolidated with matters concerning a claim and the parties reach agreement on all issues in the matter within the director's jurisdiction prior to issuance of a proposed and final order, the administrative law judge may issue a proposed and final order approving the agreement and dismissing the request for hearing.

Stat. Auth.: ORS 656.726(4)
 Stats. Implemented: ORS 656.704, OL 2005 ch 26
 Hist: Adopted 10/19/05 as WCD Admin. Order 05-061 eff. 1/2/06

436-001-0300 Alternative Dispute Resolution

(1) The director may offer the parties to a matter within the director's jurisdiction alternative dispute resolution as a way to resolve the matter prior to a hearing.

(2) If the parties consent to attempt alternative dispute resolution before the director after referral of the matter to the board for hearing, the director will notify the administrative law judge that the parties have agreed to attempt resolution, and that the hearing should be deferred until the process is complete. If the parties do not settle, the director will notify the administrative law judge to proceed with the hearing.

(3) If the parties settle the matter within the director's jurisdiction through alternative dispute resolution before the director, the director will issue an order dismissing the request for hearing.

(4) Nothing in this rule prevents the parties from participating in the board's mediation program for those matters within the director's jurisdiction.

Stat. Auth.: ORS 656.726(4)
 Stats. Implemented: ORS 183.502, 656.704, OL 2005 ch 26
 Hist: Adopted 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04
 Amended 10/19/05 as WCD Admin. Order 05-061 eff. 1/2/06

Secretary of State
Certificate and Order for Filing
PERMANENT ADMINISTRATIVE RULES

I certify that the attached copies* are true, full and correct copies of the
PERMANENT Rule(s) adopted on

October 19, 2005 by the
Date prior to or same as filing date

Department of Consumer and Business Services
Workers' Compensation Division
Agency and Division

OAR chapter 436
Administrative Rules Chapter No.

Fred Bruyns (503) 947-7717
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to become effective January 2, 2006 Rulemaking Notice was published in the September 2005 *Oregon Bulletin*.**
Date upon filing or later Month and Year

RULEMAKING ACTION

List each rule number separately, 000-000-0000.

ADOPT: 436-001-0023, 436-001-0027, 436-001-0252, 436-001-0259, 436-001-0296

AMEND: 436-001-0003, 436-001-0004, 436-001-0030, 436-001-0170, 436-001-0225, 436-001-0240,
436-001-0265, 436-001-0300, 436-009-0008, 436-045-0008, 436-070-0008, 436-075-0008,
436-080-0070, 436-085-0008, 436-140-0008, 436-150-0008

REPEAL: 436-001-0001, 436-001-0007, 436-001-0008, 436-001-0110, 436-001-0150, 436-001-0160,
436-001-0185, 436-001-0201, 436-001-0210, 436-001-0226, 436-001-0260, 436-130-0000,
436-130-0010, 436-130-0020, 436-130-0030, 436-130-0040, 436-130-0050, 436-130-0060,
436-130-0070, 436-130-0080, 436-130-0090, 436-130-0100

AMEND AND RENUMBER:

From 436-001-0000 to 436-001-0009
From 436-001-0155 to 436-001-0019
From 436-001-0275 to 436-001-0246

ORS 656.726(4)
Statutory Authority

Other Authority

ORS 656.704, Enrolled House Bill 2091 – OL 2005, chapter. 26; OL 1999, chapter 273, section 1
Statutes being Implemented

RULE SUMMARY

The Workers' Compensation Division has amended OAR chapter 436, division 001, "Procedural Rules Governing Rulemaking and Hearings," and several related rules in divisions 009, 045, 070, 075, 080, 085, 140, and 150. Most of the changes are related to passage of House Bill 2091 (Oregon Laws 2005, chapter 26), which moves hearings on workers' compensation matters currently processed by the Office of Administrative Hearings to the Workers' Compensation Board, for all hearings held on or after January 2, 2006. The division has repealed several rules in OAR 436-001 because the Workers' Compensation Board already has rules in place that govern the conduct of

Certificate and Order for Filing Permanent Administrative Rules
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hearings. In addition, OAR 436-001 has been reorganized to place rules in a sequence more aligned with the sequence of appeals and hearings.

The Workers' Compensation Division has repealed OAR chapter 436, division 130, "Rehabilitation Facilities," in its entirety. ORS 656.530, the statute implemented by OAR 436-130, was repealed by Oregon Laws 1999, chapter 273, section 1.

Direct questions to: Fred Bruyns, Rules Coordinator; phone 503-947-7717; fax 503-947-7581; or e-mail fred.h.bruyns@state.or.us. Rules are available on the internet: <http://www.wcd.oregon.gov/policy/rules/rules.html>

For a copy of the rules, contact Publications at 503-947-7627, Fax 503-947-7630.

/s/ John L Shilts

Authorized Signer

10/19/05

Date

John L. Shilts, Administrator, Workers' Compensation Division

Printed name

*Copies include a photocopy of this certificate with paper and electronic copies of each rule listed in the Rulemaking Action.

**The *Oregon Bulletin* is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 p.m. on the 15th day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 p.m. the preceding workday.