

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION



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

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[Bracketed 8 point text is deleted]; **bold/underlined text is added**

Effective January 2, 2006

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

General Provisions

436-001-0000 Notice of Agency Action Concerning Rules (*Renumbered to Rule 0009*)

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 (*Repeal*)

[The director adopts these rules under the general rulemaking authority in ORS 656.726, and the director's specific authority and responsibility under ORS chapters 183 and 656.]

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Repealed 10/19/05 as WCD Admin.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 [contested case] hearings, and carries out the provisions of ORS chapters 183 and 656.

(2) These rules apply to [all contested case] hearings [and rulemaking] on matters within the director's jurisdiction that are held on or after [the effective date] 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.

[(3)](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 [L]law [J]judge" or "ALJ" means an [A]administrative [L]law [J]judge

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[assigned by the Office of Administrative Hearings] **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.

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

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

[4] **(5) "Department" means the Department of Consumer and Business Services.**

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

[6] **(7) "Division" means the department's Workers' Compensation Division.**

[7] **(8) "Filed" means mailed, [electronically transmitted by telephonic facsimile] faxed, [or] e-mailed, or delivered to the division.**

[8] **(9) "Final order" means a final, written action [by] of the director[, expressed in writing].**

[9] "Good cause" includes, but is not limited to, mistake, inadvertence, surprise, or excusable neglect.]

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

(11) "Party" **may** include[s], but is not limited to, a worker, an employer, an insurer, a self-insured employer, a managed care organization, [or] 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.

[13] **(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

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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
 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 (*Repeal*)

[(1) Unless provided otherwise by statute or administrative rule, an order issued by an administrative law judge is a proposed and final order subject to revision by the director.

(2) An order suspending or revoking the insurer's authority to issue guaranty contracts under ORS 656.447 is a proposed and final order subject to revision by the director.]

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 (*Repeal*)

[These rules supplement the Attorney General's Model Rules of Procedure for Contested Cases, OAR 137-003-0501 to 137-003-0700, which govern the procedures for a contested-case hearing before the Office of Administrative Hearings. If there is a conflict between these rules and the model rules, the provisions of the model rules will control.]

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 (*Renumbered from Rule 0000*)

(1) Except when adopting a temporary rule, the division will give prior **public** notice of the **proposed** adoption, amendment, or repeal of any rule [(s), as provided in ORS 183.335 and this rule.] **by:**

[(2)] **(a)** [The division will p] **ublishing** notice of [a] **the** proposed action in the Secretary of State's Oregon Bulletin at least 21 days prior to the effective date of the action[.], **and**

[(3)] **(b)** [The division will n] **otifying** interested persons and organizations on the division's notification lists of proposed rulemaking actions under ORS 183.335.

[(4)] **(2) The division will add a** [A] person or organization [may be included on the division's] **to its** notification list [as follows] **if the person or organization:**

(a) [To receive electronic notification through] **Subscribes to** the division's e-mail notification service, [by subscribing] through the division's [w] **Web** [board] **site** at [www.oregonwcd.org] **wcd.oregon.gov**[. The on-line subscription form requires a first name, last name, password, e-mail address, and phone number.], **or**

(b) **Requests in writing** [T] **to** receive hard-copy notification, **and** [by submitting a written request,]

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includes^[ing] the person or organization's full name and **mailing** address.

[(5) The division's notification list includes persons and organizations receiving electronic and hard-copy notification of proposed actions. The list complies with the requirements of the mailing list as required by ORS 183.335(8), and the Uniform Electronic Transactions Act, ORS 84.001 to 84.061.]

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 [Manner of Filing a Contested-Case Hearing] **Requests for Hearing** (Renumbered from rule 0155)

(1) A request for hearing **on a matter within the director's jurisdiction** must be **filed with the administrator** [mailed to the division] no later than the filing deadline. The date and time of receipt for electronic filings is determined under ORS 84.043. [Parties are responsible for submitting a request timely, which] **Filing deadlines** will not be extended except as provided in section (6) of this rule. The requesting party [should] **must** [be copied] **send a copy of the request** to all known parties and their legal representatives, if any.

(2) A [contested case hearing] request **for hearing** must be in writing. A party may use the division's Form 2839. [If filing by electronic mail and attaching a word processing document, the document must be in Microsoft Word 97 format.] 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 [review] **a hearing.** [; and]

[(i) If applicable, the justification for holding an in-person hearing.]

(3) [A request for hearing may be mailed or delivered to the division.]

[(4) A request for hearing may be [electronically transmitted] **e-mailed** to [“]wcd.hearings@state.or.us[“], the division's [contested-case] 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**

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viewed in Internet Explorer® (.tif, .jpg) are also acceptable. The division will acknowledge receipt of the [transmission] **e-mail** [by electronic response]. A party [submitting] **filing** a request for hearing [under this section] **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.

[(5) **(4)** A [telephonic facsimile] request for hearing **may be faxed,** [will be accepted] provided the document transmitted indicates that it has been delivered by [FAX] **fax, is sent to the correct fax** [uses the division's facsimile transmission] number, and **indicates the date the document was sent** [the original signed document is simultaneously mailed to the division. The complete facsimile copy must be received by the filing deadline. When reception of a document begins after 5 p.m., the receipt date will be the date of the next regular workday.]

(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 [if the request is] **that are filed** [submitted or received] after the filing deadline. The party may request a [show-cause] **limited** hearing **on the denial of the request for hearing** within 30 days after the **mailing** date of the denial [notice]. **The request must be filed with the administrator. At the limited hearing,** [T]the administrative law judge may only consider whether:

(a) The **denied** request for [contested case] 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

436-001-0023 Other Filings and Submissions (*New rule*)

(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.

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(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 (*New rule*)

(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 [contested-case proceeding] **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 [contested-case] hearing. The director may be represented by **an agency** [contested-case] 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 [dispute] **hearing** must be provided to the director's representative.

- [(3) In every contested-case proceeding the administrative law judge must copy the director with all:
- (a) Notices and reset notices of hearing;
- (b) Substitution of Counsel notices;
- (c) Addition of a party notices; and
- (d) All orders.]

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

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436-001-0110 Consolidation or Separation (Repeal)

[(1) The administrative law judge may consolidate cases in which there are common parties or common issues of law and fact.

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

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 (Repeal)

[The director adopts OAR 471-060-0005, by reference.]

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 (Renumbered to Rule 0019)

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 (Repeal)

[Requests for extension of time for filing documents other than a request for hearing must be received by the director, or the administrative law judge if the contested case has been referred to the Office of Administrative Hearings, on or before the document's filing deadline.]

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 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.

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

[2] Unless otherwise provided in writing, the director delegates to an administrative law judge conducting a contested case hearing on the director's behalf the authority to:

- (a) Rule on a petition to participate as a party or as a limited party under OAR 137-003-0535;
- (b) Issue subpoenas in support of a discovery order, and manage discovery motions, under OAR 137-003-0572(10) when a motion for an order requiring discovery has been filed with the administrative law judge under OAR 137-003-0520(2);
- (c) Issue a written order granting or denying a deposition, or issue a subpoena to compel a deposition, of persons other than department employees under OAR 137-003-0572;
- (d) Determine whether a party is unable to pay for a qualified interpreter under OAR 137-003-0590;
- (e) Execute and issue final orders of dismissal when the requesting party has withdrawn the request, and no cross-request for hearing was filed; and
- (f) Execute and issue final orders by default under OAR 137-003-0670.]

(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) [Oregon Laws 2005, chapter 26, section 15] is only for the purpose of hearing. The administrative law judge must issue a separate order for matters other than those concerning a claim.

[3] **(9) [If necessary] On the motion of a party, the division, or the administrative law judge, the [administrative law judge shall] 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 (*Repeal*)

- [1] At the discretion of the administrative law judge, hearings may be conducted either by telephone or in-person.
- (2) In-person contested case hearings are held in Salem, Oregon except when the administrative law judge authorizes a hearing outside of Salem.
- (3) Upon prior arrangement and approval of the administrative law judge, a party or witness for an in-person hearing may appear by telephone.
- (4) The administrative law judge shall make an audio recording of all hearings.
- (5) Prior to the hearing, each party and the division must provide copies of documentary evidence that it will seek to introduce into the

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record to all other parties, the director's representative under OAR 436-001-0030(2), and the administrative law judge.

(6) Nothing in this rule precludes any party or the division from seeking to introduce documentary evidence in addition to evidence described in section (5) during the hearing. The administrative law judge may receive such evidence, subject to the applicable rules of evidence, if inclusion of the evidence in the record is necessary to conduct a full and fair hearing. When new evidence is introduced, the other parties may request an opportunity to submit rebuttal evidence. The administrative law judge may allow the admission of rebuttal evidence. If any evidence introduced during the hearing has not previously been provided to the administrative law judge, the director's representative, and to the other parties, the hearing may be continued for sufficient time to allow the party or the division to obtain and review the evidence.]

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 (*Repeal*)

[(1) If the petitioner fails to appear at the hearing, the administrative law judge may issue an order of dismissal or an order to show cause. An order to show cause shall allow the petitioner ten days to present argument establishing good cause reason for the failure to appear.

(2) If the respondent does not appear, the administrative law judge has the discretion to proceed with the hearing.]

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 (*Repeal*)

[(1) A verbatim record shall be made of all hearings, including all motions, rulings and testimony. The record shall be made by audio tape or reporter, at the discretion of the administrative law judge.

(2) At any time before the decision becomes final, the administrative law judge or director may order a full or partial transcript of the record.

(3) At any time before the reporter's notes or recordings of the hearing are destroyed, any party may order a transcript at that party's expense.

(4) Audio tapes, reporters' notes or records of a hearing may be destroyed six months after final disposition of the case.]

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

436-001-0225 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.

[(1)] **(2) In [Review of] medical service and medical treatment disputes under []ORS 656.245, [and] 656.247(3)(a)[], [and treatment (ORS 656.327 and 656.260) disputes], 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 [is for] substantial evidence in the record or if it reflects an error of law. New medical evidence or issues may not be admitted or considered [at the contested-case hearing].**

[(2)] **(3) In vocational assistance [(ORS 656.340)] disputes under ORS 656.340, new evidence may be admitted and considered. Under ORS 656.283(2), the administrative law judge may modify [The standard of review is to determine whether] the director's order only if it:**

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

[(3) The scope of review for medical fee (ORS 656.248 and 656.247(3)(b)) disputes is *de novo*.

(4) The scope of review in all other contested-case hearing disputes is *de novo*, unless otherwise prescribed by statute or administrative rule.]

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 (*Repeal*)

[At least 14 days before the hearing, a party shall provide written notice to the administrative law judge, all other parties, and the director's representative identifying each expert witness the party will call to testify at hearing. If a party fails to provide 14 days notice, the contested-case hearing will be continued to allow sufficient time for the parties to prepare.]

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 [Exchange of Exhibits] Evidence

(1) **Within 21 days after referral of the request for hearing to the board,** [T]the division will provide the parties and the administrative law judge legible copies of all [documents] **exhibits** that were relied upon in the underlying [administrative review] **action or order**, together with an index. [The index will include a description of each document, author, number of pages, and date of the document. The documents will be arranged in chronological order and designated by numbers in the lower right corner of each page, beginning with the document of earliest date. Pagination of multiple-page documents will be designated by the document number, followed by the page number. For example, page two of document five may be marked as "Exhibit 5, page 2" or "Ex. 5-2." etc.]

(2) Not less than [14] **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 [legible copies of any additional documents to be relied upon at hearing]. The additional [documents] **exhibits** must be marked and accompanied by a supplemental [document] **exhibit** index, numbered to coincide in chronological order with the division's exhibits and exhibit list. For example, an [document] **exhibit** which is chronologically between **the division's exhibits** [documents] 5 and 6 [of the division's exhibit list may] **would** be marked as "Exhibit 5a[.]" **or** "Ex. 5a[.]" [etc.]

(3) Not less than [seven] **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 [legible copies of any additional documents that they will offer at hearing]. **The exhibits must be marked and indexed** in the same manner as provided **in section (2)** [by the petitioner(s)].

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(4) [Any party using photographs as exhibits must provide each party, the director's representative, and the administrative law judge with a set of the photographs.]

(5) **Unless withdrawn, [A] all exhibits offered**[, whether or not admitted into evidence, unless withdrawn.] will be part of the record in the case, **whether or not admitted into evidence.**

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

(7) [If any party, in the regular course of the party's business or activity, had kept or recorded any memorandum, writing, entry, print, reproduction, or a combination thereof, of any act, transaction, occurrence, or event, and in the regular course of the party's business or activity has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, optical imaging, or other process that accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself whether the original is in existence or not at the time a party introduces into evidence such reproduction. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original.]

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 - [, Filing] Exceptions, Correction, Director Review
(Renumbered from rule 0275)

(1) **Under ORS 656.704(2)(a) [Oregon Laws 2005, chapter 26, section 15], a party must seek director review of a proposed and final order before petitioning for judicial review under ORS 183.482.** [When the administrative law judge serves a proposed and final order on the parties, the Office of Administrative Hearings shall notify the parties that written exceptions]

(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 service] of the proposed and final order[.];

(2) **(b) A** [w]ritten response[s] to **the** exceptions must be filed within 20 days of [service of] **the date** the exceptions **were filed**;

(c) [and a] **A written** reply **to the response**, if any, must be filed within 10 days of [service 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.

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(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.

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

[(4) Notwithstanding section (3) of this rule, the administrator may revise the proposed and final order under OAR 137-003-0501 to 137-003-0700, or these rules.]

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

[(5) "Date of service" means the date mailed or delivered.]

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
(New rule)**

(1) If matters are consolidated under ORS 656.704(3)(c) [Oregon Laws 2005, chapter 26, section 15], 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) [Oregon Laws 2005, chapter 26, section 15], 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 (New rule)

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)

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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 (*Repeal*)

[(1) Contested case hearings are not public meetings and are not open to the public, except with the consent of the parties and as authorized by the administrative law judge.

(2) The administrative law judge may expel a person from a contested case hearing if that person disrupts the proceeding.

(3) The administrative law judge may prohibit broadcasting, television, sound or video recording, and the taking of photographs of proceedings in the hearing room. These prohibitions, in the administrative law judge's discretion, may be applied to areas immediately adjacent to the hearing room where the activities may interrupt or interfere with entry or exit from the hearing room and distract or disturb the proceedings or interfere with the conduct of the 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
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).

(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;

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- (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

436-001-0275 Proposed and Final Orders, Filing Exceptions (*Renumbered to Rule 0246*)

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 (*New rule*)

(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**

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436-001-0300 Alternative Dispute Resolution

(1) The director may [contact] **offer** the parties to a [contested case dispute for the purposes of offering a] **matter within the director's jurisdiction alternative dispute resolution** [alternative] **as a way to resolve the matter prior** to a [contested-case] hearing.

(2) [If consent to attempt alternative dispute resolution is received prior to referral of the dispute to the Office of Administrative Hearings, the director will stay the referral. Once the dispute is settled, or it becomes clear that no resolution can be reached, the director will refer it.]

[(3)] If **the parties** consent to attempt alternative dispute resolution **before the director** [is received] after referral of the [dispute to the Office of Administrative Hearings] **matter to the board for hearing**, the director will notify the administrative law judge that the parties have agreed to **attempt** [use an alternative dispute] resolution [process], and that the hearing should be [suspended] **deferred** until the process is complete. [Once the dispute is settled, or it becomes clear that no resolution can be reached] **If the parties do not settle**, the director will notify the administrative law judge to [resume] **proceed with** the hearing.

[(4)] **(3)** If the parties [resolve only the issues under] **settle the matter within** the director's jurisdiction **through alternative dispute resolution before the director**, [related to the contested case notice, then the director will incorporate the agreement into a final order under OAR 137-003-0665] **the director will issue an order dismissing the request for hearing**.

(4) [(5) If the parties resolve any or all matters regarding the claim under ORS 656.236, or issues resolving disputes over compensability of a claim under ORS 656.289(4), the disposition must be submitted to the Workers' Compensation Board for approval.] **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