



Oregon

Theodore R. Kulongoski, Governor

Department of Consumer and Business Services
Workers' Compensation Division
350 Winter St. NE
PO Box 14480
Salem, OR 97309-0405
1-800-452-0288 or 503-947-7810
www.wcd.oregon.gov

April 17, 2008

Proposed Changes to Workers' Compensation Rules

The Department of Consumer and Business Services, Workers' Compensation Division proposes changes to OAR chapter 436, affecting hearings before the director, medical services and fee schedules, managed care organizations, workers' compensation insurance coverage, insurers' record keeping and reporting, the Preferred Worker Program, and electronic data interchange of medical bill payment records.

Please review the attached documents for more information about proposed changes and possible fiscal impacts.

The department welcomes public comment on proposed changes and has scheduled a public hearing.

- When is the hearing?** May 19, 2008, 9:00 a.m.
- Where is the hearing?** Labor & Industries Building
350 Winter Street NE, Room 260 (2nd Floor),
Salem, Oregon 97301
- How can I make a comment?** Come to the hearing and speak, send written comments, or do both. Send written comments to:
Fred Bruyns, rules coordinator
Workers' Compensation Division
350 Winter Street NE (for courier or in-person delivery)
PO Box 14480, Salem, OR 97309-0405
Email - fred.h.bruyns@state.or.us
Phone - (503) 947-7717; Fax - (503) 947-7581

The closing date for written comments is May 22, 2008.

How can I get copies of the proposed rules?

On the Workers' Compensation Division's Web site –
<http://www.cbs.state.or.us/external/wcd/policy/rules/rules.html#proprules>
Or call (503) 947-7627 to get free paper copies

Questions?

Contact Fred Bruyns, (503) 947-7717.

Secretary of State
NOTICE OF PROPOSED RULEMAKING HEARING
A Statement of Need and Fiscal Impact accompanies this form.

Department of Consumer and Business Services,
Workers' Compensation Division

OAD CHAPTER 436

Agency and Division

Administrative Rules Chapter Number

Fred Bruyns ^{FB}	PO Box 14480, Salem, OR 97309-0405;	(503) 947- 7717
Rules Coordinator	350 Winter Street NE, Rm 27, Salem, OR 97301-3879	Fax (503) 947-7581
	Address	Telephone

RULE CAPTION

Proposed rules affecting workers' compensation insurance, claims processing, medical treatment, and return-to-work assistance.

May 19, 2008	9:00 a.m.*	Room 260 (2 nd Floor, Labor & Industries Building)	Fred Bruyns
Hearing date	Time	Location	Hearings Officer

***NOTE: The hearing will begin at 9:00 a.m. and end when all present who wish to testify have done so. Written testimony will be accepted through May 22, 2008.**

**The site of the hearing is accessible for individuals with mobility impairments.
Auxiliary aids for persons with disabilities are available upon advance request.**

RULEMAKING ACTION

ADOPT: OAR 436-050-0025

AMEND: OAR 436-001, 436-009, 436-010, 436-015, 436-050, 436-160 and

436-030-0003, 436-040-0003, 436-045-0003, 436-110-0320, 436-110-0330, 436-110-0240^{FB}

REPEAL: OAR 436-040-0100

ORS 656.726(4)

Stat. Auth.

Other Authority

ORS chapter 656

Stats. Implemented

RULE SUMMARY

General changes to OAR chapter 436: The agency proposes to correct typographical and citation errors, delete duplicate requirements, clarify or relocate some provisions, and streamline processes. To the extent that these changes may substantially affect the meaning of the rules, they are described below.

The agency proposes to amend OAR chapter 436, division 001, "Procedural Rules Governing Rulemaking and Hearings." These proposed rules address: The applicability of the rules; notice of rulemaking; distribution of exhibits; content of exceptions; stay of director review; time limits for attorneys to submit statements of services; and administrative law judge authority to approve settlements and dismiss cases.

The agency proposes to amend OAR chapter 436, division 009, "Oregon Medical Fee and Payment Rules." These proposed rules address: Adoption of updated medical fee schedules and resources for the payment of health care providers; time frames for refunds of overpaid medical bills and related appeal rights; compensability of lumbar artificial disc replacements; electronic data interchange medical reporting requirements; adjustment of the conversion factors for evaluation/management (increase) and surgery (decrease); reduction of the maximum allowable fee for brand and generic drugs from 88% to 83.5% of the average wholesale price; and reduction of the dispensing fee from \$8.70 to \$2.00.

The agency proposes to amend OAR chapter 436, division 010, "Medical Services." These proposed rules address: Treatment and time-loss authority time limits applicable to several health care provider types; how the enrollment of a nonsubject worker in an MCO affects the worker's maximum number of choices of attending

physician; contraindications to lumbar artificial disc replacement; and requirements for the worker's social security number on Form 827.

The agency proposes to amend OAR chapter 436, division 015, "Managed Care Organizations" (MCOs). These proposed rules address: MCO certification requirements relevant to the definition of the terms "group" (of medical service providers) and "non-qualifying employer"; requirements for MCOs to contract with multiple insurers; documentation requirements for prospective MCOs (applicants); MCO quarterly data reporting; wording of appeal rights notices that MCOs must provide to parties that may appeal an MCO's decision; appeal time frames; and the process for making complaints about rule violations.

The agency proposes to amend OAR chapter 436, division 030, "Claim Closure and Reconsideration," division 040, "Workers with Disabilities Program," and division 045, "Reopened Claims Program." These proposed rules: Correct the applicability provisions in rules 030-0003, 040-0003, and 045-0003; and repeal OAR 436-040-0100, "Suspension and Revocation of Authorization to Issue Guaranty Contracts" (because this rule duplicates OAR 436-050-0015).

The agency proposes to amend OAR chapter 436, division 050, "Employer/Insurer Coverage Responsibility." These proposed rules address: The definition of "complete records"; service of penalty orders; the definition of "owner of the private home" to include any person related by an Oregon registered domestic partnership; effect on a guaranty contract of an employer's cancellation of coverage; in-state claims processing requirements and allowance for claims to be "dispatched" from any location, record-keeping, including record-keeping for supplemental disability benefits; elimination of the requirement to include workers' social security numbers on lists of claims provided to the director when an insurer or self-insured employer transfers claims to a new processor/location; that excess insurance coverage may include a deductible endorsement acceptable to the director; time frames for a self-insured municipality to provide its annual report to the director; notice to the director when the self-insured employer changes its operation in a manner that affects its workers' compensation claims liability; and in-state record-keeping, claims processing, auditing procedures, and required reporting of contact information specific to self-insured employers.

The agency proposes to amend OAR chapter 436-110, "Preferred Worker Program." These proposed rules address: Issuance of Preferred Worker cards to workers determined eligible before claim closure; and time frames for insurers to request claim cost reimbursement from the Workers' Benefit Fund.

The agency proposes to amend OAR chapter 436-160, "Electronic Data Interchange." These proposed rules address: Requirements for trading partner agreements; address reporting requirements; adding and deleting coverage for non-subject workers; time frames for notice to the director of guaranty contract terminations (correction to ten days from seven days to be consistent with requirements in OAR 436-050); elimination of the requirement that insurers submit cancellations of medical bills before resubmitting; and EDI medical reporting requirements.

Request for public comment: The Workers' Compensation Division requests public comment on whether other options should be considered for achieving the rules' substantive goals while reducing the negative economic impact of the rules on business.

Address questions to:

Fred Bruyns, Rules Coordinator; phone 503-947-7717; fax 503-947-7581; e-mail fred.h.bruyns@state.or.us

Proposed rules are available on the Workers' Compensation Division's Web site:

<http://wcd.oregon.gov/policy/rules/rules.html#proprules>

or from WCD Publications, 503-947-7627 or fax 503-947-7630.

May 22, 2008

Last Day for Public Comment

/s/ John L. Shilts

Authorized Signer and Date

4/10/08

John L. Shilts, Administrator, Workers' Compensation Division

Printed name

*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 pm 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 pm on the preceding workday.

Secretary of State
STATEMENT OF NEED AND FISCAL IMPACT

A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

Department of Consumer and Business Services,
Workers' Compensation Division

OAR CHAPTER 436

Agency and Division

Administrative Rules Chapter Number

In the Matter of)
The Amendment of OAR:)
436-001, Procedural Rules Governing Rulemaking and Hearings)
436-009, Oregon Medical Fee and Payment Rules)
436-010, Medical Services)
436-015, Managed Care Organizations)
436-030, Claim Closure and Reconsideration)
436-040, Workers with Disabilities Program)
436-045, Reopened Claims Program)
436-050, Employer/Insurer Coverage Responsibility)
436-110, Preferred Worker Program)
436-160, Electronic Data Interchange)

Rule Caption:

Proposed rules affecting workers' compensation insurance, claims processing, medical treatment, and return-to-work assistance.

Statutory Authority: ORS 656.726(4)

Other Authority:

Statutes Implemented: ORS chapter 656

Need for the Rule(s): The agency is proposing changes: to update the medical fee schedules as required by ORS 656.248; to implement House Bill 2007 affecting domestic partners; to begin to implement Senate Bill 559 affecting how insurers report proof of workers' compensation insurance coverage to the agency; to establish standards for electronic data interchange of medical and coverage data; to ensure insurers and self-insured employers keep sufficient records in Oregon for agency audits; to streamline certain procedures affecting the Preferred Worker Program; and to make other changes consistent with the director's responsibilities under ORS 656.726(4).

Documents Relied Upon, and where they are available: "Issues" documents presented to stakeholder advisory committees; advisory committee meeting minutes; written advice from advisory committee members and other interested parties. These records are available for public inspection in the Administrator's Office, Workers' Compensation Division of the Department of Consumer and Business Services, 350 Winter Street NE, Salem, Oregon 97301-3879, upon request and between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday. Please call (503) 947-7717 to request copies.

Fiscal and Economic Impact, including Statement of Cost of Compliance: Unless stated otherwise, references to "insurers" (below) include "self-insured employers." The following is a list of significant estimated fiscal/economic impacts on persons and organizations affected by OAR chapter 436:

OAR chapter 436, division 009, "Oregon Medical Fee and Payment Rules"

- Adoption by reference of Centers for Medicare & Medicaid Services (CMS) 2008 Medicare Resource-Based Relative Value Scale (RBRVS), Addendum B and Addendum C, 72 Federal Register No. 227, Nov. 27, 2007, as the fee schedule for payment of medical service providers, except as otherwise provided in the rules

The agency projects, due to some changes in the CMS relative value units for 2008, that adoption of the RBRVS would decrease overall medical payments that are subject to the RBRVS by approximately \$350,000, or -0.18%.

- Increasing the conversion factor for the service category "Evaluation/Management" (E&M) from \$59.79 to \$64.79 and decreasing the conversion factor for Surgery from \$93.66 to \$86.44

The agency projects an annual increase in E&M reimbursements of approximately \$2 million and a decrease in Surgery reimbursements of approximately \$2 million. Data available to the agency shows payments for E&M services average 9% above the maximums allowed during calendar year 2007, while payments for surgery average 26% below the maximums allowed. The purpose of these changes is to better align these components of the fee schedule with reimbursement generally received for the services provided, as required under ORS 656.248(1); in addition, access to high quality E&M services is critical in promoting early, effective treatment, improving long-term outcomes, and promoting early return to work.

- Maintaining the other conversion factors at 2007 levels

Overall, the agency projects that keeping the conversion factors at 2007 levels will result in reduced net income for some medical providers, because providers' business costs are rising. Between 2006 and 2007, the Physicians' Services Component of the Consumer Price Index increased by 4.04%. Relative to increasing the conversion factors by the 2006-2007 CPI increase, 4.04% is the approximate, potential, maximum effect on Oregon medical providers as a whole; effects on individual providers may be more or less depending on the types of services provided. However, available medical billing data shows that average payments in the following service categories are below the maximums allowed during calendar year 2007: Surgery, Radiology, Lab & Pathology, Medicine, Physical Medicine and Rehabilitation, and Multidisciplinary/Other Oregon-Specific Codes. For those medical providers that bill below the maximums, maintaining the 2007 levels will have no direct fiscal impact.

- Reducing the maximum allowable fee for brand and generic drugs from 88% to 83.5% of the average wholesale price (AWP); reducing the dispensing fee from \$8.70 to \$2.00

Under ORS 656.248(1), the director must adopt fee schedules that “* * * represent reimbursement generally received for the services provided.” The proposed rates are more consistent with rates paid for brand name drugs in other parts of the health care system, while generic drug fees would remain above fees under some widely accepted benefit plans. The agency projects that proposed rule changes would reduce annual drug payments by approximately \$3.6 million, or 21.8% of total pharmacy payments.

- Restricting compensability of lumbar artificial disc replacements

Under ORS 656.245(3), the director may exclude from compensability any medical treatment the director finds to be unscientific, unproven, outmoded, or experimental. Based on the advice of the Medical Advisory Committee, the director proposes to exclude artificial disc replacements from compensability unless the devices and the patients meet specific conditions – with the goal to improve patient outcomes. Improved patient outcomes should lower overall medical costs paid by insurers. Restrictions affecting artificial disc replacement could have a slight negative fiscal impact on surgeons who perform disc replacements, though surgeons may perform other procedures on patients that do not meet the criteria for disc replacement. Artificial disc replacement is not a commonly used procedure, so the overall fiscal impact should be small.

OAR chapter 436, division 010, “Medical Services”

- Contraindications to lumbar artificial disc replacement

See analysis under OAR 436-009 regarding “Restricting compensability of lumbar artificial disc replacements”

OAR chapter 436, division 015, “Managed Care Organizations” (MCOs)

- Reduced documentation requirements for prospective MCOs (applicants)

The agency projects a small savings for applicant MCOs.

OAR chapter 436, division 050, “Employer/Insurer Coverage Responsibility”

- Required record-keeping for supplemental disability benefits (SDB)

The agency projects that insurers that have elected to process SDB will incur small initial costs to establish record-keeping procedures, plus some on-going costs to track eligibility and payments. The majority of insurers have elected to refer affected claims to the agency's contracted agent for processing;

for these companies there would be no fiscal impact. The few companies that process their own SDB claims are reimbursed by the agency for SDB claims costs from the Workers' Benefit Fund. Included in these reimbursements is an administrative cost factor, most recently 17.15%, which is intended to cover the costs to process claims, including associated record-keeping.

OAR chapter 436-110, "Preferred Worker Program"

- Issuance of Preferred Worker cards to workers determined eligible before claim closure
The agency projects a small positive fiscal impact on affected workers - those who can receive Preferred Worker cards earlier and use them to obtain employment.
 - Expanded time frames for insurers to request claim cost reimbursement from the Workers' Benefit Fund
The agency projects a small positive fiscal impact on employers whose insurers can obtain reimbursement of claims costs even if the insurer is informed about eligibility late – after existing deadlines for requesting reimbursement would have expired. Affected insurers would reimburse their insured employers for any premiums and premium assessments paid during the premium exemption period.
-

Regarding additional proposed changes to chapter 436, including amendments to OAR 436-001, 030, 040, 045, and 160

The agency estimates that additional changes will not have a significant economic impact on any persons or businesses, including small businesses.

How were small businesses involved in the development of this rule?

Representatives of small businesses participated in the stakeholder advisory committee. Small businesses affected by these rules are primarily medical providers and pharmacies.

Cost of compliance effect on small businesses:

Estimated number of small businesses subject to the proposed rule:

Based on available data, we estimate approximately 12,000 medical providers and 110 pharmacies are small businesses, as defined in ORS 183.310(10).

Identify the types of businesses and industries with small businesses subject to the proposed rule:

Oregon medical providers
Oregon pharmacies

Describe the projected reporting, record-keeping and other administrative activities required for compliance with the proposed rule, including costs of professional services:

Reporting: The proposed changes do not require increased reporting for small businesses.

Record-keeping: The proposed changes do not require increased record-keeping for small businesses.

Other administrative activities and costs of professional services:

The agency projects that, due to some changes in the Centers for Medicare & Medicaid Services (CMS) relative value units for 2008, adoption of the CMS schedule would decrease overall medical payments that are subject to the schedule by approximately \$350,000, or -0.18%.

The agency projects that increasing the conversion factor for the service category Evaluation/Management (E&M) from \$59.79 to \$64.79 will increase reimbursements for E&M services by approximately \$2 million.

The agency projects that decreasing the conversion factor for Surgery from \$93.66 to \$86.44 will decrease reimbursements for surgical services by approximately \$2 million.

Overall, the agency projects that keeping the remaining conversion factors at 2007 levels will result in reduced net income for some medical providers, because providers' business costs are rising. Between 2006 and 2007, the Physicians' Services Component of the Consumer Price Index increased by 4.04%. Relative to increasing the conversion factors by the 2006-2007 CPI increase, 4.04% is the approximate, potential, maximum effect on Oregon medical providers as a whole; effects on individual providers may be more or less depending on the

types of services provided. However, available medical billing data shows that average payments in the following service categories are below the maximums allowed during calendar year 2007: Surgery, Radiology, Lab & Pathology, Medicine, Physical Medicine and Rehabilitation, and Multidisciplinary/Other Oregon-Specific Codes. For those medical providers that bill below the maximums, maintaining the 2007 levels will have no direct fiscal impact.

The agency projects that reducing the maximum allowable fee for drugs from 88% to 83.5% of the average wholesale price, and reducing the dispensing fee from \$8.70 to \$2.00 would reduce annual drug payments by approximately \$3.6 million, or 21.8% of total pharmacy payments.

Extent of economic impact: The proposed changes to the conversion factors and pharmacy fees for brand name drugs would better align the medical fee schedules with reimbursement generally received for the services provided, as required under ORS 656.248(1). The proposed changes to pharmacy fees for generic drugs continue to provide a significantly higher reimbursement than some widely accepted pharmacy benefit plans. There is no basis to say that economic impacts would be “significantly adverse” (under ORS 183.540), but we invite public testimony on the probable extent of the impact.

Identify equipment, supplies, labor and increased administration required for compliance with the proposed rule:

Equipment: The proposed changes do not require the purchase of equipment to achieve compliance.

Supplies: The proposed changes do not require the purchase of supplies to achieve compliance.

Labor: The proposed changes do not require that small businesses hire additional staff to achieve compliance.

Administration: The proposed changes do not require increased administration to achieve compliance.

Extent of economic impact: There is no basis to say that any impacts would be “significantly adverse” (under ORS 183.540), but we invite public testimony on the probable extent of the impact.

Administrative Rule Advisory Committee consulted:

Yes, advisory committees met on Jan. 25, Feb 11, and Feb. 25, 2008.

The agency asked the committees for advice on the economic impacts of the discussed changes, including impacts on small businesses.

/s/ John L. Shilts

4/10/08

Signature and Date

John L. Shilts, Administrator, Workers' Compensation Division

Printed name

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION



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

Proposed Rules

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Proposed amendments are marked as follows:

Deleted text has a "strike-through" style, as in
Added text is bold and underlined, as in

~~Deleted~~
Added

HISTORY LINES: These rules include only the most recent "History" lines. The history line shows when the rule was last revised (or "filed" if the rule has never been revised) and its effective date. To obtain a comprehensive history for OAR chapter 436, please call the Workers' Compensation Division, (503) 947-7627, or visit the division's Web site: http://www.wcd.oregon.gov/policy/rules/full_set.html

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION

Proposed PROCEDURAL RULES GOVERNING FOR RULEMAKING AND HEARINGS

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

General Provisions

436-001-0003 Applicability and Purpose of these Rules

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

(2) ~~Except as provided in section (4), These~~ these rules apply to hearings on matters within the director's jurisdiction that are held on or after ~~January 2, 2006~~ July 1, 2008. Matters within the director's jurisdiction are matters other than those concerning a claim, as defined by ORS 656.704.

(3) In general, the rules of the Workers' Compensation Board, in OAR chapter 438, apply to the conduct of hearings, unless these rules provide otherwise.

(4) These rules do not apply to hearings requested under ORS 656.740.

(3) ~~(5)~~ These rules apply to all division rulemaking on or after ~~January 17, 2006~~ July 1, 2008.

(4) ~~(6)~~ 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: Amended 1/13/06 as WCD Admin. Order 06-050, eff 1/17/06
Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

436-001-0004 Definitions

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

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

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

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

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

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

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

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

(8) ~~(h)~~ "Filed" means mailed, faxed, e-mailed, ~~or delivered,~~ or otherwise submitted to

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

the division **in a method allowable under these rules.**

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

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

(11) **(k)** "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) **(l)** "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) **(2)** 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: Amended 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06
Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

Rulemaking

436-001-0005 Model Rules of Procedure Governing For Rulemaking

The Model Rules of Procedure, OAR 137-001-0005 through 137-001-0100, in effect on January 1, ~~2006~~ **2008**, 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: Amended 1/13/06 as WCD Admin. Order 06-050, eff 1/17/06
Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

436-001-0009 ~~Notice of Agency Action Concerning Rules~~ Division Rulemaking

(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 **rulemaking** action in the Secretary of State's Oregon Bulletin at least 21 days prior to the effective date of the ~~action, and~~ **rule**;

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

(c) Providing notice to legislators as required by ORS 183.335(15).

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

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***Proposed* PROCEDURAL RULES GOVERNING FOR RULEMAKING AND HEARINGS**

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: Amended and renumbered from 436-001-0000, 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

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 in section (6) (7) 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) Whether the party making the request is the worker, insurer, medical provider, employer, any other party, or an attorney on behalf of a party;

~~(b)~~ **(c) The division's administrative order number of the administrative order being appealed;**

~~(c)~~ **(d)** The worker's name, address, and phone number;

~~(d)~~ **(e)** The name, address, and phone number of the worker's attorney, if any;

~~(e)~~ **(f)** The date of injury;

~~(f)~~ **(g)** The insurer's or self-insured employer's claim number;

~~(g)~~ **(h)** The division's **(WCD)** file number; and

~~(h)~~ **(i)** The reason for requesting a hearing.

(3) **Requests for hearing may be filed in any of the following ways:**

(a) By mail.

(b) By hand-delivery.

(c) By fax, if 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.

(d) By e-mail 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-

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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.~~

(e) By using the on-line form available on the division's Web site at wcd.oregon.gov.

~~(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.~~

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

(5) Timeliness of requests for hearing will be determined under OAR 436-001-0027.

~~(5)~~ **(6)** 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)~~ **(7)** 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: Amended and renumbered from 436-001-0155, 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

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 administrative law judge** issues a proposed and final order; and

(c) To the division after the **ALJ administrative law judge** 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

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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-eh-26~~
 Hist: Adopted 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06
Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

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) The date and time of receipt for electronic filings is determined under ORS 84.043.

~~(2)~~ **(3)** 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-eh-26~~
 Hist: Adopted 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06
Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

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 **in a matter** by ~~providing the administrative law judge and parties with~~ **filing** an entry of appearance ~~in the hearing~~. The director may be represented by an agency 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: Amended 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06
Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

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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.~~ **The administrative law judge may dismiss requests for hearing as provided in OAR 436-001-0296.**

(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.~~

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

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

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

(8) ~~(7)~~ Consolidation of matters under section ~~(6)~~ **(5)** 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) ~~(8)~~ On the motion of a party, the division, or the administrative law judge, the ~~ALJ~~ **administrative law judge** may continue a hearing to allow the presentation of oral or written legal argument by the Department of Justice.

(10) ~~(9)~~ The administrative law judge may send the division a written question regarding which rules or statutes apply to ~~the a~~ **a** matter, or regarding the division's interpretation of the rules and statutes. If the administrative law judge sends such a question, the ~~ALJ~~ **administrative law judge** 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) ~~(10)~~ 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-eh-26~~
Hist: Amended 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06
Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

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.

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(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: Amended 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~~ **documents** 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,~~ **and the director's representative, if the director has filed an entry of appearance.** The ~~additional~~ exhibits must be marked and ~~accompanied by~~ **include** a supplemental ~~exhibit~~ index, numbered to coincide in chronological order with the division's exhibits and exhibit list. For example, an exhibit ~~which~~ **that** is chronologically between the division's exhibits 5 and 6 would be marked as "Exhibit 5a" or "Ex. 5a."

(3) Not less than 14 days before the hearing, the respondent(s)/cross-petitioner(s) must provide ~~legible copies~~ **copies** of any additional exhibits ~~that~~ they will offer at hearing to the other parties, ~~the director's representative, and the administrative law judge,~~ **and the director's representative, if the director has filed an entry of appearance.** 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~~ **included in the hearing file**, whether or not **they are** admitted into ~~the evidence~~ **evidentiary record.**

(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.

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

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, **including any argument**, 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 filed with the **board or** 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: Amended and renumbered from OAR 436-001-0275, 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06
Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

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

(1) A party may request that director review be stayed if exceptions are timely filed and there is a pending matter concerning a claim that may make the matter within the director's jurisdiction moot.

(+) **(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 a party files exceptions on the

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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) **(3)** 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-eh-26~~
 Hist: Adopted 10/19/05 as WCD Admin. Order 05-061 eff. 1/2/06
Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

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-eh-26~~
 Hist: Adopted 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.

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(d) In cases under ORS 656.245, 656.247, 656.260, or 656.327, the factors listed in OAR ~~436-010-0008(13)~~ **436-010-0008(12)** 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 **before an order is issued** ~~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~~ **436-001-0246**.

Stat. Auth.: ORS 656.385(1), 656.726(4)

Stats. Implemented: ORS 656.262, 656.385, 656.388, and 656.704

Hist: Amended 10/19/05 as WCD Admin. Order 05-061 eff. 1/2/06

Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

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~~ **the administrative law judge may issue a proposed and final order dismissing the request for hearing.**

(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~~ **the administrative law judge may issue a proposed and final order approving the agreement and dismissing the request for hearing.**

(3) If the matter within the director's jurisdiction is consolidated with matters concerning

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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.

(4) Notwithstanding OAR 436-001-0170(2), the 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.

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
Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

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~~ **agree** 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: Amended 10/19/05 as WCD Admin. Order 05-061 eff. 1/2/06
Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx