

**ADMINISTRATIVE ORDER NO. 95-054
EFFECTIVE JULY 14, 1995**

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 001**

TEMPORARY PROCEDURAL RULES GOVERNING RULEMAKING AND HEARINGS

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

436-01-000 Notice of Agency Action Concerning Rules

(1) Except when acting in an emergency to adopt a temporary rule, pursuant to ORS 183.335 the director will give prior notice of the adoption, amendment or repeal of administrative rules, as provided in this rule.

(2) The notice of the proposed action will be published in the Secretary of State's Bulletin referred to in ORS 183.360 at least 15 days prior to the effective date of the adoption, amendment or repeal of the rule.

(3) Upon request, the division will mail copies of all notices of proposed action to any party making such a request. Such parties may also be added to the division's mailing list.

(4) As a matter of routine practice, depending on the subject matter of the proposed action, copies of the notice will be sent to the following persons and organizations on the division's mailing list, including:

- (a) Workers' compensation insurers;
- (b) Self-insured employers;
- (c) Third-party administrators;
- (d) Insurance adjusters and adjusting firms;
- (e) Workers' compensation attorneys;
- (f) Medical providers and managed care organizations;
- (g) News reporting organizations;
- (h) Vocational rehabilitation organizations;
- (i) Labor unions;
- (j) Employer groups and associations;
- (k) Management-Labor Advisory Committee;
- (l) Employers and employees;
- (m) Oregon Chambers of Commerce;
- (n) State Advisory Council on Occupational Safety and Health ; and
- (o) Other interested parties.

Stat Auth. : ORS 656.704(2), 656.726 (3)
Stats. Implemented: ORS 183.335
Hist: WCB 16-1975, f. & ef. 10-20-75
WCD 4-1977 (Admin) (Temp f. & ef. 11-7-77 ;
WCD 4-1978 (Admin) f. 7 ef. 3-6-78 ;
Renumbered from 436-90-505, 5-1-85 ;
WCD 3-1986 f. & of 5-15-86 ;

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Amended 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92

436-01-001 Authority

These rules are promulgated under the director's general rulemaking authority under ORS 656.726 and the director's specific authority and responsibility under ORS chapter 183 and ORS 656.245[(3)(a)], 656.248, **656.260**, 656.262, **656.268**, **656.283**, **656.327**, **656.385**, **656.388**, 656.447, and 656.704.

Stat Auth.: ORS 656.704(2), 656.726(3)

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. 5-22-92

Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-002 Purpose

These rules establish [uniform] procedures for rulemaking and contested case hearings held on behalf of the director, and designate which orders of [hearing officers] **administrative law judges** are final appealable orders, and which are preliminary orders subject to revision by the director.

Stat Auth. :656.726(3)

Stats. Implemented :656.704(2)

Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92

Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-003 Applicability

(1) The rules apply beginning with the effective date contained in the order of adoption.

(2) These rules apply to **all** hearings before the director or director's designee and to all hearing requests received by the director on or after the effective date of these rules and to all contested cases [pending on that date] **pursuant to 1995 Oregon Laws, chapter 332, section 66.**

Stat Auth.: ORS 656.726(3)

Stats. Implemented :ORS 656.704(2) and 183.310 through 183.550

Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92

Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-004 Definitions

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

(1) "Administrator" means the administrator of the Workers' Compensation Division and designated representative of the director for administration of the division, ORS chapter 656 and OAR chapter 436.

(2) "Administrative Law Judge" means a person designated by the director to conduct hearings on the director's behalf.

[(1)]**(3)** "Contested case" has the meaning prescribed in ORS 183.310(2).

[(2)]**(4)** "Department" means the Department of Consumer and Business Services, the director and all employees.

[(3)]**(5)** "Director" means the director of the Department of Consumer and Business Services or the director's designee for the particular contested case matter.

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[(4)](6) "Division" means the Workers' Compensation Division of the Department of Consumer and Business Services.

[(5)](7) "Ex parte communication" means an oral or written communication to the [hearing officer] **administrative law judge** or director, not made in the presence of all parties, concerning a fact [or] **in** issue in the hearing. It does not include communication from department staff or counsel about facts in the record.

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

[(7)](9) "Good cause" means a cause beyond a person's reasonable control.

[(8) "Hearing officer" means a person designated by the director to conduct hearings on the director's behalf.]

[(9)](10) "Legal argument" means arguments on the jurisdiction of the director to hear the contested case, the constitutionality of a statute or rule or the application of a constitutional requirement to the director, and the application of court precedent to the facts of the particular contested case hearing. It does not include: presentation of evidence; examination and cross-examination of witnesses; presentation of factual arguments on the application of the statutes or rules to the issues and facts; comparisons of prior actions of the director in handling similar situations; the literal meaning of the statutes or rules directly applicable to the issues; or the admissibility of evidence or the correctness of procedures being followed.

[(10)](11) "License" means any permit, certificate, approval, registration, authorization or similar form of permission required by law or rule to pursue any commercial activity, trade, occupation, or profession.

[(11)](12) "Limited party" means a party who has an interest in the outcome of a specific portion of a contested case proceeding.

[(12)](13) "Party" has the meaning prescribed in ORS 183.310(6).

[(13)](14) "Person" means any individual (including but not limited to a worker, alleged worker, employer, and alleged employer), partnership, corporation, **limited liability company and partnership**, association, governmental subdivision or public or private organization of any character other than a state agency.

[(14)](15) "Preliminary order" means an order subject to revision by the director.

(16) The other words and phrases used in OAR 436-01 have the same meaning as given in ORS 183.310, where applicable.

Stat Auth.: ORS 656.726(3)

Stats. Implemented :ORS 656.704(2), ORS 183.310 through 183.550

Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92

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436-01-005 Model Rules of Procedure Governing Rulemaking

Pursuant to ORS 656.726(3), and in accordance with ORS 183.341, the director adopts, by reference, OAR chapter 137, Division 01, Attorney General's Model Rules of Procedure under the Administrative Procedures Act, which became effective November 4, [1991]**1993**.

Stat Auth. :ORS 656.726(3)

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Stats. Implemented: ORS 183.325 through 183.410 and ORS 656.704 (2)
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 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-007 Designation of Preliminary or Final Order

(1) Unless provided otherwise by statute or administrative rule, an order issued by [hearing officer] **an administrative law judge** on behalf of the director is a preliminary order subject to revision by the director.

Stat Auth.: ORS 656.726(3)
Stats. Implemented :ORS 656.704(2) and 656.447
Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-010 Review of Orders Issued Pursuant to ORS 656.447

Any order of suspension or revocation of an insurer's authority to issue guaranty contracts pursuant to ORS 656.447 is a preliminary order subject to revision by the director.

Stat Auth.: ORS 656.726(7)
Stats. Implemented: ORS 656.704(2) and 656.447
Hist : Filed 1/4/90 as WCD Admin. Order 2-1990, eff. 1/4/90 (Temporary)
Filed 11/27/90 as WCD Admin. Order 29-1990, eff 11/28/90
Amended 5/22/92 as WCD Admin. Order 9-1992, eff 5-22-92

436-01-020 Contested Case Notice

[Reasonable n] **Notice of a contested case hearing shall be [served on] mailed or delivered to all parties.** The notice shall include:

- (1) The time and place of the hearing;
- (2) A statement of the authority and jurisdiction under which the hearing is held;
- [(3) Reference to the particular statutes and rules involved; and
- (4) A statement of the matters asserted or charged.]

Stat Auth.: ORS 656.726(3)
Stats. Implemented: ORS 183.415 and 656.704(2)
Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-030 Role of the Workers' Compensation Division

(1) In any proceeding under these rules, the division is entitled to notice of all matters, copies of all documents and to present evidence, testimony, and argument, **as well as exercise all authority and rights authorized by law.** The division may appear and be represented by a contested case representative, **assistant attorney general or special assistant attorney general,** as authorized by the Department of Justice. However, the Department of Justice reserves the right [to make legal argument on behalf of the division] **to otherwise appear on behalf of the division or state.** If necessary, the [hearing officer] **administrative law judge** shall continue the hearing to allow the presentation of oral or written legal argument by the Department of Justice.

Stat Auth.: ORS 656.726(3)
Stats. Implemented :ORS 180.220(2), 180.235, 183.450(7), and 656.704(2)
Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92

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Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-040 [Rights] **Representation of Parties in Contested Cases**

(1) [Notwithstanding ORS 183.315, the department will provide the information required in 183.415(7). Before commencing a contested case hearing, the department shall inform a party, i] **If the party is a state agency or other governmental authority, corporation, limited liability company, partnership, limited liability partnership or an unincorporated association, it must be represented by an attorney licensed in Oregon, unless statutes applicable to the contested case proceeding specifically provide otherwise.**

[(2) Except as otherwise required by ORS 183.415(7), the information in section (1) may be given in writing or orally before commencement of the hearing.]

Stat Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92

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436-01-050 **Request by a Person to Participate as a Party or Limited Party**

(1) A person who has an interest or who represents a public interest in the outcome of a contested case hearing may request to participate as a party or limited party.

(2) A person so requesting shall file a petition with the [hearing officer] **administrative law judge** and mail **or deliver** a copy to each party, at least 14 days before the date set for the hearing. Each party has seven (7) days from the date of mailing to file a response. Petitions filed untimely shall be considered only if the [hearing officer] **administrative law judge** determines good cause has been shown for failure to file timely. The petition shall include:

(a) The name and address of the petitioner and of any organization the petitioner represents;

(b) The name and address of the petitioner's attorney, if any;

(c) Whether the request is for participation as a party or limited party and, if as a limited party, the precise area in which participation is sought;

(d) If the petitioner seeks to protect a personal interest, a precise factual statement of such interest and how it may be affected by the outcome of the hearing;

(e) If the petitioner seeks to represent a public interest, a precise factual statement of such interest, how it may be affected by the outcome of the proceeding, and the petitioner's qualifications to represent such interest; and

(f) The reasons why the original parties cannot adequately represent the interests identified in subsections (2)(d) or (2)(e) of this rule.

(3) If the [hearing officer] **administrative law judge** determines good cause has been shown for failure to file a timely petition, the [hearing officer] **administrative law judge** may shorten the time within which answers to the petition shall be filed, or postpone the hearing until disposition is made of the petition.

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(4) In ruling on petitions to participate as a party or limited party, the [hearing officer] **administrative law judge** shall consider:

(a) Whether the petitioner has demonstrated a personal or public interest that could reasonably be affected by the outcome of the proceeding;

(b) Whether such interest is within the scope of the [hearing officer] **administrative law judge**'s jurisdiction and the scope of the notice of hearing;

(c) When a public interest is alleged, the qualifications of the petitioner to represent that interest; and

(d) The extent to which the petitioner's interest will be represented by existing parties.

(5) The [hearing officer] **administrative law judge** may grant petitions for persons to participate as a party or a limited party. The [hearing officer] **administrative law judge** shall specify areas of participation and procedural limitations.

(6) A petition to participate as a party may be treated as a petition to participate as a limited party.

(7) The [hearing officer] **administrative law judge** shall rule on the petition by written order, [served promptly on] **promptly mailed or delivered to** the petitioner and all parties. [If the petition is allowed, the hearing officer shall also serve the petitioner with the notice of rights contained in ORS 183.413(2).]

(8) If a person is granted participation as a party or a limited party, the [hearing officer] **administrative law judge** may postpone or continue the hearing to a later date if necessary to avoid placing an undue burden on one or more of the parties.

Stat Auth.: ORS 656.726(3)

Stats. Implemented :ORS 183.310 through 183.510 and 656.704(2)

Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92

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436-01-060 Request by Agency to Participate as a Party or an Interested Agency

(1) The director may name any **other** agency with an interest in the outcome of a contested case hearing as a party, upon the director's initiative or upon the request of an agency, with written authorization of the Attorney General of the State of Oregon.

(2) Each party and the other state agency shall have seven days from the date of [personal service] **delivery** or mailing of the notice to file objections.

(3) The director's decision to name another state agency as a party or as an interested agency shall be by written order and [served promptly on] **promptly mailed or delivered to** the parties and the named state agency.

(4) A state agency named as a party or as an interested agency has the same procedural rights and shall be given the same notices as any party in the proceeding. An interested agency, unlike a party, has no right to judicial review.

Stat Auth.: ORS 656.726(3)

Stats. Implemented :ORS 183.310 through 183.550 and 656.704(2)

Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92

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436-01-070 Decision Without Hearing

(1) The director encourages streamlining of the contested case process by such means as settlement; submission of cases for decision on stipulated records; entry into stipulations regarding uncontested facts; and mediation.

(2) Issues may be settled by agreement of the parties and the division. Such agreements either shall be in writing executed by the representative for the parties and the division and placed in the contested case record, or shall be read into the hearing record and acknowledged by all parties on the record.

Stat Auth.: ORS 656.726(3)
Stats. Implemented :ORS 183.310 through 183.550, and 656.704(2)
Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-080 Place of Hearing

Contested cases under these rules shall be set for hearing in Salem, Oregon. However, the [hearing officer] **administrative law judge** may subsequently select another place for the hearing for the convenience of all the parties.

Stat Auth.: ORS 656.726(3)
Stats. Implemented :ORS 183.310 through 183.550 and 656.704(2)
Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-090 Postponement and Continuance of Hearing

The [hearing officer] **administrative law judge** may postpone or continue the hearing for good cause or if necessary to develop a complete record.

Stat Auth.: ORS 656.726(3)
Stats. Implemented :ORS 183.310 through 183.550 and 656.704(2)
Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-095 Specification of Issues

(1) The request for hearing shall be in writing on a form prescribed by the director. A copy of the order appealed shall be attached to the request. A copy of the request shall be mailed or delivered to the administrator and all parties

(2) Within ten days from the mailing date of the Notice of Hearing, all parties shall specify all issues to be raised at hearing on a form prescribed by the director.

Stat Auth.: ORS 656.726(3)
Stats. Implemented :ORS 183.310 through 183.550 and 656.704(2)
Hist : Filed 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-100 Pre-hearing Conference

(1) The [hearing officer] **administrative law judge** may conduct pre-hearing conferences to facilitate resolution of the case. The purpose of a pre-hearing conference may include, but is not limited to :

(a) Facilitating discovery and resolving disagreements about discovery;

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- (b) Identifying, simplifying and clarifying issues;
 - (c) Eliminating irrelevant issues;
 - (d) Obtaining stipulations of fact;
 - (e) Providing the [hearing officer] **administrative law judge**, department and parties, in advance of the hearing, copies of all documents intended to be offered as evidence and the names of all witnesses expected to testify;
 - (f) Authenticating documents ;
 - (g) Deciding the order of proof and other procedural matters pertaining to the conduct of the hearing; and
 - (h) Discussing settlement or other resolution of the case.
- (2) The pre-hearing conference may be conducted in person or by telephone.
- (3) The [hearing officer] **administrative law judge** may make an audio or stenographic record of the pertinent portions of the conference, or place the substance of stipulations, rulings and agreements in the record by oral or written summary. Stipulations to facts and to the authenticity of documents, and agreements to narrow issues, shall be binding upon the division and the parties unless good cause is shown. Settlement discussions shall be made part of the record only to the extent that the discussions result in agreement.

Stat Auth.: ORS 656.726(3)
 Stats. Implemented :ORS 183.310 through 183.550 and 656.704(2)
 Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-110 Consolidation or Separation

- (1) If the substantive rights of the parties will not be prejudiced, the [hearing officer] **administrative law judge** shall consolidate cases in which there are common parties or common issues of law and fact if consolidation is necessary for full determination of the issues.
- (2) If the substantive rights of the parties will not be prejudiced, the [hearing officer] **administrative law judge** may consolidate cases in which there are common issues of law and fact or may divide issues into separate cases as will promote efficient disposition of the matters.

Stat Auth. :ORS 656.726(3)
 Stats. Implemented :ORS 183.310 through 183.508 and 656.704(2)
 Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-120 Motions

- (1) Unless otherwise agreed by the parties and approved by the [hearing officer] **administrative law judge**, pre-hearing and post-hearing motions shall be filed in writing, and contain a clear and plain statement of the relief sought.
- (2) Each party shall have five (5) days from the date of service of the motion, or such greater or lesser time as the [hearing officer] **administrative law judge** may allow, to file a response to the motion.

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(3) Unless otherwise allowed by the [hearing officer] **administrative law judge**, pre-hearing motions shall be filed at least fifteen (15) days prior to hearing and post hearing motions within ten (10) days after the close of the hearing.

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. 5-22-92
 Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-130 Discovery

(1) [In his or her] **Using** discretion, the [hearing officer] **administrative law judge** may order discovery by the department and any party in appropriate cases. This rule does not require the [hearing officer] **administrative law judge** to authorize discovery at all. If the [hearing officer] **administrative law judge** does authorize discovery, the [hearing officer] **administrative law judge** shall control the methods, timing and extent of discovery, but nothing in this rule prevents informal exchanges of information.

(2) Discovery may include but is not limited to one or more of the following:

- (a) Depositions;
 - (b) Disclosure of names and addresses of witnesses expected to testify at the hearing;
 - (c) Production of documents, which may, but need not, be limited to documents which the party producing the documents plans to offer as evidence;
 - (d) Production of objects for inspection or permission to enter upon land or other property;
 - (e) Requests for admissions;
 - (f) Written interrogatories; and
 - (g) Prehearing conferences, as provided in **OAR** 436-01-070.
- (3) Before requesting a discovery order, a party must seek the discovery through an informal exchange of information.

(4) A **party cannot compel discovery without a discovery order from the administrative law judge. The** request for a discovery order [must] **shall** be in writing and [must] **shall** include a description of the attempts to obtain the requested discovery informally. The request shall be mailed or delivered to the [hearing officer] **administrative law judge**, with a copy to the other parties. The [Director] **administrative law judge** shall consider any objections by the party from whom discovery is sought.

(5) Any discovery request [must] **shall** be reasonably likely to produce information that is generally relevant to the case. If the relevance of the requested discovery is not apparent, the [hearing officer] **administrative law judge**, may require the party requesting discovery to explain how the request is likely to produce relevant information. If the request appears to be unduly burdensome, the [hearing officer] **administrative law judge**, may require an explanation of why the requested information is necessary or is likely to facilitate resolution of the case.

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(6) The [hearing officer] **administrative law judge**, shall issue an order granting or denying a discovery request in whole or in part.

(7) Only the [D]director, [or the hearing officer] **administrative law judge or their designated representative** may issue subpoenas in support of discovery. The [D]director, **administrative law judge or their designated representative may** apply to the circuit court to compel obedience to a subpoena.

(8) The [hearing officer] **administrative law judge** may refuse to admit evidence which has not been disclosed in response to a discovery order, unless the party that failed to provide discovery offers a satisfactory reason for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry [under ORS 183.415(10)]. If the [hearing officer] **administrative law judge** admits evidence which was not disclosed as ordered, the [hearing officer] **administrative law judge** may grant a continuance to allow an opportunity for the Department or other party to respond.

Stat Auth.: ORS 656.726(3)
Stats. Implemented :ORS 183.310 through 183.550 and 656.704(2)
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-140 Subpoenas

(1) The attendance and testimony of witnesses, and the production of documents or physical evidence under the witnesses' control or possession, may be compelled by subpoena in a form prescribed by the director.

(2) Subpoenas to appear at hearing shall be issued by the director, [the hearing officer] **administrative law judge, or** other designees of the director[, or the attorney of the party in whose behalf the witnesses are required to appear].

[(3) Any person present at the hearing may be required to testify as if the person had been subpoenaed.]

(4)](3) Witnesses appearing by subpoena, unless a party[, or an officer or employee of the department,] shall be paid the fees and mileage [required by ORS 44.415(2)] by the party who **initiated the request for a subpoena**[s them], other than employers, their officers and representatives subpoenaed by the director.

Stat Auth.: ORS 656.726(3)
Stats. Implemented :ORS 183.310 through 183.550 and 656.704
Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-150 Change of [Hearing officer] Administrative Law Judge

(1) If the [hearing officer] **administrative law judge** has a potential conflict of interest as defined in ORS 244.020[(8)](1), the [hearing officer] **administrative law judge** shall withdraw from the case or advise the parties of the nature of the conflict.

(2) Any party may request by motion that the [hearing officer] **administrative law judge** be removed from a case on the grounds of personal bias or conflict of interest by filing with the director promptly upon discovery of the alleged facts, an affidavit which sets forth the grounds for disqualification.

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(3) The [hearing officer] **administrative law judge** may withdraw if the [hearing officer] **administrative law judge** believes the motion has merit.

(4) If the director finds the request for disqualification is filed with due diligence, and the supporting affidavit is sufficient on its face, the director shall either disqualify the [hearing officer] **administrative law judge** and assign another [hearing officer] **administrative law judge** to the case, or order a hearing on the allegation in the affidavit.

(5) If the director does not disqualify the [hearing officer] **administrative law judge**, the director shall state the grounds and so rule on the record.

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. 5-22-92
Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-155 Manner of Filing

(1) Requests for hearing, motions and hearing papers may be filed by mail or delivered to the division.

(2) Delivery means physical delivery to the division's Salem office or delivery by facsimile transmission.

(3) A facsimile transmission shall constitute a valid filing, provided:

(a) The document transmitted indicates at the top that it has been delivered by FAX and the division facsimile transmission number used;

(b) The original of the document is simultaneously mailed to the director or assigned administrative law judge, with a copy of the original confirmation of receipt and a certificate of service listing the parties served; and

(c) The parties are simultaneously mailed a copy of the original hearing request with a copy of the original confirmation of receipt and certificate of service.

(4) As used in this rule, "facsimile transmission" means any method of transmitting images or printed matter by electronic means.

Stat Auth.: ORS 656.726(3)
Stats. Implemented :ORS 183.310 through 183.550 and 656.704(2)
Hist: **Filed 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)**

436-01-160 Extension of Time for Filing

Requests for extension of time for filing documents must be received before the date on which the document is due, unless otherwise allowed by the [hearing officer] **administrative law judge**.

Stat Auth.: ORS 656.726(3)
Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)
Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
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436-01-170 Duties and Powers of the [Hearing officer] Administrative Law Judge

The [hearing officer] **administrative law judge** shall conduct a fair and impartial hearing, and avoid delay. The [hearing officer] **administrative law judge's** [has] authority **includes, but is not limited** to:

- (1) Issue subpoenas;
- (2) Order depositions to be taken, or the production of documents or other potential evidence;
- (3) Hold conferences to settle the case or simplify issues;
- (4) Dispose of procedural requests, motions and similar matters;
- (5) Administer oaths and affirmations;
- (6) Rule upon offers of evidence;
- (7) Regulate the course of the hearing and exclude persons from the hearing;
- (8) Require a party to state their position on any issue and the legal basis for that position;
- (9) Order a party to produce a witness or other evidence;
- (10) Call and examine any party or witness;
- (11) Close and reopen the hearing record as the needs of justice require; and

[(12) Take any other action necessary for a full and fair disposition of the case.]

Stat Auth. :ORS 656.726(3)

Stats. Implemented :OR 183.310 through 183.550 and 656.704(2)

Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92

Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-180 Conducting a Contested Case Hearing

(1) Subject to the director's authority, the hearing shall be conducted by and under the control and discretion of the [hearing officer] **administrative law judge**, so as to include:

- (a) The statement and evidence of each party in support of their position;
- (b) The statement and evidence of opponents, interested agencies and other parties. Limited parties may address only subjects within the area to which they have been limited;
- (c) Rebuttal evidence; and
- (d) Closing arguments.

(2) The [hearing officer] **administrative law judge**, division and parties or their representatives, have the right to question witnesses.

(3) The [hearing officer] **administrative law judge** may continue the hearing with recesses.

(4) The [hearing officer] **administrative law judge** may set reasonable time limits for oral presentation.

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(5) Exhibits shall be marked pursuant to OAR 436-01-[145]**240** and maintained by the [hearing officer] **administrative law judge** as part of the record.

Stat Auth.: ORS 656.726(3)
Stats. Implemented :ORS 183.310 through 183.550 and 656.704(2)
Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
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436-01-185 Telephone Hearings

(1) Hearings shall be by telephone, unless the director or designee determines that the circumstances warrant otherwise.

(2) Notwithstanding subsection (1), nothing in this rule precludes the administrative law judge from allowing some parties or witnesses to attend by telephone while others attend in person.

(3) The administrative law judge shall make an audio record of any telephone hearing.

(4) Prior to commencement of an evidentiary hearing that is held by telephone, each party and the division shall provide to all other parties, administrative law judge and to the division copies of documentary evidence that it will seek to introduce into the record.

(5) Nothing in this rule precludes any party or the division from seeking to introduce documentary evidence in addition to evidence described in subsection (4) during the telephone hearing and the administrative law judge shall 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. If any evidence introduced during the hearing has not previously been provided to the administrative law judge, the division and to the other parties, the hearing may be continued upon the request of any party or the division for sufficient time to allow the party or the division to obtain and review the evidence.

(6) As used in this rule, "telephone" means any two-way electronic communication device.

Stat Auth.: ORS 656.726(3)
Stats. Implemented :ORS 183.310 through 183.550 and 656.704(2)
Hist : **Filed 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)**

436-01-190 Evidence

(1) Evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible, **unless precluded by law.**

(2) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded.

(3) All offered evidence not objected to, [will] **may** be received by the [hearing officer] **administrative law judge** subject to the [officer]**judge's** power to **control the hearing, including but not limited to the power to** exclude irrelevant, immaterial, or unduly repetitious matter.

(4) Evidence objected to may be received by the [hearing officer] **administrative law judge.** Rulings on its admissibility or exclusion, if not made at the hearing, shall be made on the record at or before the time a final order is issued.

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(5) The [hearing officer] **administrative law judge** shall accept an offer of proof made for excluded evidence.

Stat Auth. : ORS 656.726(3)
Stats Implemented: ORS 183.310 through 183.550 and 656.704(2)
Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-200 Failure to Appear

(1) Except as provided in section (2), failure of a party to appear at the hearing shall be considered a default and a waiver of all rights except the right to be served with a copy of the department's decision and the right to request judicial review in accordance with ORS 183.480 to 183.500.

(2) Upon a showing of good cause, the [hearing officer] **administrative law judge** may excuse a party's failure to appear, and postpone or reconvene the hearing.

Stat Auth. : ORS 656.726(3)
Stats. Implemented : ORS 183.310 through 183.550 and 656.704(2)
Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-210 Record and Transcript of Hearing

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

(2) At any time before the decision becomes final, the [hearing officer] **administrative law judge**, director or designee 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 [person] **party** may order a transcript at that [person] **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(3)
Stats. Implemented : ORS 183.310 through 183.550 and 656.704(2)
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
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436-01-220 Burden of Proof

(1) A party challenging an order or proposed order of the director has the burden of proof on the issues contested.

(2) The party with the burden of proving a fact must establish it by a preponderance of the evidence, unless otherwise provided by law.

(3) An order or proposed order issued by the director is prima facie correct and requires no further proof for substantial evidence review.

Stat Auth.: ORS 656.726(3)
Stats. Implemented : ORS 183.310 through 183.550 and 656.704(2)
Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92

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436-01-225 Scope of review

The scope of review shall be de novo unless otherwise prescribed by statute or administrative rule.

Stat Auth. :ORS 656.726(3)
Slats. Implemented :ORS 656.260, 656.283, 656.327, 656.704(2)
Hist : Filed 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-230 Official Notice

(1) The [hearing officer] **administrative law judge** may take notice of judicially cognizable facts and may take notice of general, technical or scientific facts within the [hearing officer's] **administrative law judge's**, specialized knowledge.

(2) The [hearing officer] **administrative law judge** shall give the parties the opportunity to contest facts or other matters of which notice is being taken.

Stat Auth.: ORS 656.726(3)
Stats. Implemented :ORS 183.310 through 183.550 and 656.704(2)
Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-240 Exhibits

(1) Exhibits, except where impractical, shall be on one side of paper measuring 8-1/2" by 11", or folded in multiples thereof. Department records may be introduced in the manner in which they are maintained.

(2) Except where impractical, exhibits shall be arranged in chronological order and numbered by exhibit and page. Each party shall provide a list of exhibits, a brief description and the number and pages of each exhibit.

(3) Parties shall provide copies and the list of exhibits to the other parties, unless the [hearing officer] **administrative law judge**, finds it impractical. Unless the exhibit is to be used solely for impeachment, copies shall be provided to the other parties at least 10 days before the hearing begins, unless otherwise agreed upon by the parties or allowed by the [hearing officer] **administrative law judge**.

(4) All exhibits, whether or not admitted into evidence, shall be part of the record in the case.

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

Stat Auth.: ORS 656.726(3)
Stats. Implemented: ORS 183.310 through 183.550, 656.260, 656.327, 656.283 and 656.704(2)
Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
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436-01-250 Ex Parte Communication

(1) [Ex parte communication is discouraged.

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(2) If the [hearing officer] **administrative law judge** or director receives an ex parte communication, they shall:

(a) Give all parties notice of the substance of the communication, if oral, or a copy of the communication, if written; and

(b) Provide any party who did not present the ex parte communication an opportunity to rebut the substance of the **ex parte** communication at the hearing[.], at a separate hearing limited to the receipt of evidence relating to the ex parte communication[.] or[.] in writing.

(3) (2) [hearing officer] **administrative law judge** or director receives an ex parte communication, the department's record shall include:

(a) A statement of the substance of oral ex parte communication;

(b) A copy of written ex parte communication;

(c) A copy of the notice to the parties of the ex parte communication; and

(d) Any rebuttal evidence.

Stat Auth.: ORS 656.726(3)
Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)
Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-260 Unacceptable Conduct

(1) The [hearing officer] **administrative law judge** may expel a person from a contested case hearing if that person disrupts the proceeding.

(2) The [hearing officer] **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 [hearing officer] **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(3)
Stats. Implemented :ORS 183.310 through 183.550 and 656.704(2)
Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-265 Attorney Fees

(1) In cases where the director is authorized to assess a reasonable attorney fee by statute, the following factors shall be considered:

(a) The time devoted to the case;

(b) The complexity of the issue(s) involved;

(c) The value of the interest involved;

(d) The nature of the proceedings;

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(e) The benefit secured for the claimant;

(f) The risk in a particular case that an attorney's efforts may go uncompensated;

(g) The assertion of frivolous issues or defenses; and

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

(2) In assessing a reasonable attorney fee where a claimant finally prevails in a contested case order by the director, the administrative law judge or director shall consider the factors set forth in subsection (1) in determining an assessed fee.

(3) If the attorney representing a claimant is instrumental in obtaining a settlement of the dispute, after a hearing request is filed but prior to the director's decision, the administrative law judge or director may approve an assessed fee agreed to by the parties or may assess a fee considering the factors set forth in subsection (1).

(4) Attorney fees shall be authorized only for services rendered after a request for hearing is filed and only if an executed attorney retainer agreement has been filed with the administrative law judge.

Stat Auth.: ORS 656.726(3)

Stats. Implemented: ORS 656.385, 656.388 and 656.704(2)

Hist: Filed 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-270 Preliminary Orders; Finality of Decisions

(1) The order of a [hearing officer] **administrative law judge** issued after the record is closed is a preliminary order and is subject to the following:

(a) A copy of the preliminary order shall be mailed or delivered to each party or to the parties' representatives, and shall include all required elements of a final order as prescribed in OAR 436-01-[165]**280**

[(b) The director or designee may revise the preliminary order upon notice to the parties mailed within 30 days of service of the preliminary order. If no such notice is given, the order shall be final upon expiration of 30 days from its mailing or personal delivery to the parties.

(A) The director or designee has 30 days from the mailing of such notice, to review, revise, reverse or affirm the preliminary order, unless the parties agree to allow more time.]

(b) Within 30 days after the preliminary order is mailed or delivered, the director or designee may review, revise, reverse or affirm the preliminary order. The director shall give notice to the parties of each action. If no such notice is given, the preliminary order shall be final upon expiration of the 30 days from mailing or delivery.

[(B) **(A)** The director or designee may solicit further information or argument from the parties. A copy of the information shall be provided to all other parties by the party making such further submission.

(2) After an order has become final, the order may be withdrawn by the director for reconsideration at any time prior to expiration of the period allowed for filing a petition for review, if one has not been filed.

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(3) Reconsideration may be made upon the director's own motion, or upon motion of a party showing error, omission or misconstruction of a statute or rule.

(4) Written notice of withdrawal and reconsideration of the final order shall be given by the director to all parties.

(5) The director may affirm, modify or reverse a final order that has been withdrawn.

Stat Auth.: ORS 656.726(3)

Stats. Implemented: ORS 656.315(1) and 656.704(2)

Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92

Amended 7/14/95 as WCD Admin. Order 95-054, eff. 7/14/95 (temporary)

436-01-280 Final Orders

(1) Final orders on contested cases shall be in writing and shall include the following:

(a) Rulings on admissibility of evidence, when the rulings are not set forth in the record;

(b) Findings of fact including matters agreed to as fact, or so determined by the fact-finder by a preponderance of the evidence. A finding must be made on each fact needed to reach the conclusions of law on which the order is based;

(c) Conclusions of law and the legal results which arise from application of the controlling law to the facts found; and

(d) The order, which is the action taken by the department as a result of the facts found and the legal conclusions.

(2) The date [of service of] the order **is mailed or delivered** to the parties shall be specified in writing and shall be part of or be attached to the order on file with the department.

(3) A copy of any final order entered in a contested case shall be mailed or delivered to each party or representative with notice of the right to judicial review by the Court of Appeals as provided in ORS 183.480 to 183.500.

Stat Auth.: ORS 656.726(3)

Stats. Implemented : ORS 183.310 through 183.550 and 656.704(2)

Hist : Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92

436-01-290 Immediate Suspension or Refusal to Renew a License, Notice of Opportunity for Hearing, Service

(1) If the director finds there is a serious danger to public health or safety, the director may immediately suspend or refuse to renew a license by issuing an "emergency suspension order." An emergency suspension order is a written order, and is not a final order. It is not an order in a contested case and may be issued without notice or an opportunity for a hearing.

(2) The director shall provide the licensee with a pre-suspension notice and an opportunity to object prior to issuing the emergency suspension order, except where the director determines the danger to the public health or safety is so imminent that opportunity for the licensee to object under section (3) of this rule is not practicable. The pre-suspension notice shall:

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(a) Specify the acts of the licensee and the evidence which would be grounds for revocation, suspension or refusal to renew the license;

(b) Specify the reasons why the acts of the licensee seriously endanger the public's health or safety; and

(c) Identify the person authorized to issue the emergency suspension order or make recommendations regarding the issuance of the order.

(3) The director may provide the pre-suspension notice to the licensee by any means. When the pre-suspension notice is given orally, the director shall subsequently provide the licensee a written copy of the notice.

(4) After issuing the pre-suspension notice, the licensee shall have 10 days to object to the pre-suspension notice and make recommendations to the director regarding the issuance of the emergency suspension order.

(5) The director shall serve the emergency suspension order on the licensee by certified mail or in any manner provided by rule 7 D of the Oregon Rules of Civil Procedure. The order shall contain the following statements:

(a) That the licensee has the right to request a hearing to contest the order;

(b) That if the request for hearing is not received by the director within 90 days of the date of notice of the order, the licensee shall have waived the right to a hearing;

(c) The effective date of the order; and

(d) The specifications described in subsection (2)(a) of this rule.

(6) If timely requested by the licensee pursuant to subsection (5)(b) of this rule, the director shall hold a hearing on the emergency suspension order within 30 days. At the hearing, the director shall consider the facts and circumstances including, but not limited to:

(a) Whether the acts or omissions of the licensee pose a serious danger to the public's health or safety; and

(b) Whether circumstances at the time of the hearing justify affirmation, modification or rescission of the order.

Stat Auth.: ORS 656.726(3)
Stats. Implemented :ORS 183.310 through 183.550 and 656.704(2)
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92