

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
PROCEDURAL RULES GOVERNING RULEMAKING AND HEARINGS

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

EFFECTIVE SEPTEMBER 15, 1998

OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 001

NOTE: Only adopted, amended, and repealed rules are included in this document:

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436-001-0000 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] **provided** 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;

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- (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. & eff. 10-20-75
WCD 4-1977 (Admin) (Temp f. & eff. 11-7-77;
WCD 4-1978 (Admin) f. 7 eff. 3-6-78;
Renumbered from 436-90-505, 5-1-85;
WCD 3-1986 f. & eff. 5-15-86;
Amended 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0003 Applicability and Purpose

(1) The rules contained in OAR 436, Division 001 establish procedures governing rulemaking and contested case hearings and carry out the provisions of ORS Chapter 183 and Chapter 656.

(2) These rules apply to all hearings [requests received by] **before** the director on or after the effective date of these rules.

(3) Applicable to these rules, the director may, unless otherwise obligated by statute, waive any procedural rules as justice so requires.

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. 5/25/92
Amended 02/12/96 as WCD Admin. Order 96-055 eff. 02/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0004 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 representatives of the director for administration of the division, ORS chapter 656 and OAR chapter 436.

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

(3) "Department" means the Department of Consumer and Business Services, the director and all employees.

(4) "Director" means the director of the Department of Consumer and Business Services or the director's designee for the particular contested case matter.

(5) "Division" means the Workers' Compensation Division of the Department of Consumer and Business Services.

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(6) "Filing" means mailed, faxed or physically delivered.

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

[7] **(8)** "Good cause" [means a cause beyond a person's reasonable control] **includes, but is not limited to, mistake, inadvertence, surprise or excusable neglect.**

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

(10) "Party" includes, but is not limited to, a worker, an employer, an insurer, a self-insured employer, a managed care organization or a medical provider.

[8] **(11)** "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.

[9] **(12)** "Presiding officer" means a person designated by the director to conduct hearings on the director's behalf.

[10] **(13)** The other words and phrases used in OAR 436-001 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. 5/25/92
Amended 02/12/96 as WCD Admin. Order 96-055 eff. 02/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0005 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 September [9, 1995] **15, 1997**, except OAR 137-01-007(2) and (3).

Stat. Auth.: ORS 656.726(3)

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 2/12/96 as WCD Admin Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

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

Pursuant to ORS 656.726(3) and in accordance with ORS 183.341, the director adopts, by reference, OAR chapter 137, Division 03, Attorney General's Model Rules of Procedure under the Administrative Procedures Act that became effective September [9, 1995] **15, 1997**, except as modified by ORS chapter 656 and these procedural rules.

Stat. Auth: ORS 656.726(3)

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

Hist: Filed 12/2/91 as WCD Admin. Order 9-1991, eff. 12/2/91 (Temporary)
Filed 11/2/95 as WCD Admin. Order 95-066 eff. 11/1/95 (Temporary)
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

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436-001-0025 Contested Case Notice

In addition to the requirement of ORS 183.415(2), a contested case notice may include a statement that the record of the proceeding to date, including information in the division file or files on the subject of the contested case, automatically becomes part of the contested case record upon default for the purpose of proving a prima facie case.

Stat. Auth.: ORS 656.726(3)
Stats. Implemented: ORS 183.415 and 656.704(2)
Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

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

(1) In any proceeding under these rules, the [division] **director's designee, the WCD**, is entitled to notice of all matters, copies of all documents and to present evidence, testimony[,] and argument.

(2) The [division] **director's designee, the WCD**, 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.

(3) If necessary, the presiding officer shall continue the hearing to allow the presentation of oral or written legal argument by the Department of Justice.

(4) In any proceeding where the director's **designee, the WCD**, [has chosen] **chooses** to be represented, the director's representative shall be served with notice of hearing and all documents provided to and by the parties.

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. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0045 Rights of Parties in Contested Cases

(1) The presiding officer shall explain the issues and the matters the party must prove or disprove. The presiding officer shall also inform a party, if the party is an agency, corporation, or an unincorporated association, that such party must be represented by an attorney licensed in Oregon, unless statutes applicable to the contested case proceeding specifically provide otherwise. This information may be given in writing or orally before the commencement of the hearing.

(2) Upon the agreement of the division and the parties, and unless otherwise precluded by law, alternative methods of dispute resolution may be used in contested case matters. Such alternative methods of resolution may include non-binding arbitration, modified contested case proceedings, non-record abbreviated hearings or any collaborative method designed to encourage the division and the parties to work together to develop a mutually agreeable solution, such as negotiation, mediation, use of a neutral facilitator or settlement conferences, but may not include binding arbitration.

(3) Final disposition of contested cases may be by a final hearing order or, unless

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precluded by law, by stipulation, agreed settlement, consent order or final order by default. Informal settlement may be made in license revocation proceedings by written agreement of the parties and the director consenting to a suspension, fine or other form of intermediate sanction.

Stat. Auth.: ORS 656.726(3)
Stats. Implemented: ORS 183.415 and 656.704(2)
Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0055 Request by a Person to Participate as a Party or Limited Party

(1) When the division gives notice that it intends to hold a contested case hearing, persons who have an interest in the outcome of the proceeding or who represent a public interest in such result may request to participate as parties or limited parties.

(2) A person requesting to participate as a party or limited party shall file a notice of appearance with the presiding officer at least 14 days before the hearing and shall copy all other parties with the notice.

(3) The notice of appearance shall include the following:

(a) Name and address of the party;

(b) Name and address of the party's attorney, if any;

(c) If the party wishes to limit its participation to that of a limited party, the notice should so indicate and state the precise area in which participation is sought;

(d) If the party seeks to protect a personal interest in the outcome of the proceeding, a detailed statement of the party's interest economic or otherwise, and how such interest may be affected by the results of the proceeding;

(e) If the party seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the party's qualifications to represent such public interest; and

(f) A statement of the reasons why existing parties to the proceeding cannot adequately represent the interests identified in subsections (3)(d) or (e) of this rule.

(4) Each party shall have seven days from the date of mailing to file a response to the notice of appearance.

Stat. Auth.: ORS 656.726(3)
Stats. Implemented: ORS 183.415 and 656.704(2)
Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0065 Request by Agency to Participate as a Party or an Interested Agency

(1) When the division gives notice that it intends to hold a contested case hearing, it may also notify the parties that it intends to name any other agency that has an interest in the outcome of that proceeding as a party or as an interested agency, either on its own initiative or upon request by that other agency.

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(2) Each party shall have seven days from the date of personal service or mailing of the notice to file objections.

(3) The division's decision to name an agency as a party or as an interested agency shall be by written order and served promptly on the parties and the named agency.

(4) An 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.

(5) An agency may not be named as a party under this rule without written authorization of the Attorney General.

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0080 Place of Hearing

[(1) In-person contested case hearings shall be heard in Salem, Oregon, except where the presiding officer authorizes a hearing outside of Salem.

(2) In-person hearings outside of Salem may be authorized subject to the requirements of the presiding officer.

(3) A person desiring an in-person hearing shall make a written request, providing details on numbers of witnesses intended to be called, location desired and reason for an in-person hearing. If an in-person hearing is approved, the person requesting the in-person hearing shall be responsible for coordinating the hearing date between the presiding officer and other parties.

(4) Upon prior arrangement and approval of the presiding officer, a party or witness may appear by telephone.]

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. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Repealed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0090 Postponement and Continuances

(1) The presiding officer may postpone or continue the hearing for good cause [or if necessary to develop a complete record].

(2) **A party** [R]requesting [for] postponement[s] of a hearing [date must be in writing and] shall [be filed as soon as a conflict in hearing dates is noted,] **do so as soon as the party is aware of the need for postponement. The request may be in writing or orally.** [containing the following:

(a) A good cause reason for resetting the hearing date;

(b) Whether the reset is opposed by any other party; and

(c) Three to five reset dates that are mutually agreeable to all parties. The party requesting the reset is responsible for contacting the other parties and arranging reset dates.]

(3) [A telephone request for postponement may be made if a written request would not provide adequate notice to the parties provided the requestor includes all parties in a conference call with the presiding officer. A party who agrees to a reset and waives participation or is not available need not be included with leave from the presiding officer provided the requestor notifies and requests leave from the presiding officer prior to the conference call.] **If one or more of the parties objects to the postponement, the presiding officer may schedule a conference call with the parties.**

(4) [When a postponement is allowed under subsection (3), the requestor is responsible for notifying any party that was not included in the telephone conference call.

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(5) Should a continuance be needed, the presiding officer will schedule] **When a continuance is necessary, additional hearing dates shall be scheduled** [at the close of proceedings].

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. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0105 Pre-hearing Conference

(1) Prior to hearing, the presiding officer may conduct one or more prehearing conferences to facilitate the conduct and resolution of the case. At the presiding officer's own initiative or at a party's request, the presiding officer may convene the conference.

(2) The purposes of a prehearing conference may include, but are not limited to, one or more of the following:

(a) to facilitate discovery and to resolve disagreements about discovery;

(b) to identify, simplify and clarify issues, as well as eliminate irrelevant issues;

(c) to obtain stipulations of fact;

(d) to discuss settlement or other resolution or partial resolution of the case;

(e) for any other good cause determined by the presiding officer.

(3) The prehearing conference may be conducted in person or by telephone.

(4) The presiding officer shall make a record, either audio or stenographic, of any stipulations, rulings and agreements. Stipulations to facts and to the authenticity of documents and agreements to narrow issues shall be binding upon the parties unless good cause is shown for rescinding a stipulation or agreement. Settlement discussions are not a part of the record.

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0120 Motions

(1) [Unless otherwise agreed by the parties and approved by] **At the discretion of** the presiding officer, pre-hearing and post-hearing motions shall be filed in writing. Motions shall contain a clear and plain statement of the relief sought. **The moving party shall serve all parties with a copy of any written motion.**

(2) The other parties shall have [five] **seven** days from the date of service of the motion, or such greater or lesser time as the presiding officer may allow, to file a response to the motion.

[(3) Unless otherwise allowed by the hearing officer, pre-hearing motions shall be filed at least 14 days prior to hearing and post hearing motions within 14 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. 5/25/92
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Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0135 Discovery

(1) At the discretion of the presiding officer, discovery may be ordered in appropriate cases. If the presiding officer does authorize discovery, the presiding officer shall control the methods, timing and extent of discovery. Nothing, however, 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 that the party producing the documents plans to offer as evidence;

(d) production of objects for inspection or permission to enter upon land to inspect land or other property;

(e) requests for admissions;

(f) written interrogatories;

(g) prehearing conferences, as provided in OAR 436-001-0105.

(3) Before requesting a discovery order, a party shall seek the discovery through an informal exchange of information.

(4)(a) A party that seeks to take the testimony of a material witness by deposition shall file a written request with the presiding officer. The request shall set forth the name and address of the witness, an explanation of the materiality of the witness's testimony, an explanation of why a deposition rather than informal or other means of discovery is necessary, and a request that the witness's testimony be taken before an officer named in the request for the purpose of recording testimony.

(b) For all other forms of discovery, a request for discovery order shall be in writing and shall include a description of the attempts to obtain the requested discovery informally. The request shall be mailed or delivered to the presiding officer, with a copy to the other parties. The presiding officer shall consider any objections by the party from whom discovery is sought.

(5) Any discovery request 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 presiding officer 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 presiding officer may require an explanation of why the requested information is necessary or is likely to facilitate resolution of the case.

(6) The presiding officer may issue an order granting a discovery request in whole or in part.

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(7) The presiding officer 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 presiding officer admits evidence which was not disclosed as ordered, the presiding officer may grant a continuance to allow an opportunity for the other parties to respond.

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0140 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.

(2) Subpoenas [to appear at hearing] may be issued by the director, the presiding officer, other designees of the director[,] **any party authorized by the presiding officer**, or the attorney of the party in whose behalf the witnesses are required to appear.

(3) If the hearing is by telephone, [the witness shall provide on the subpoena return form the place and telephone number that he or she can be reached at the time of hearing.] **at least two days before hearing**, [T]the party who subpoenaed the witness shall provide [that information] to the presiding officer [no later than two days before hearing.], **the name of the witness and telephone number where the witness can be reached at the time of the hearing.**

(4) 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 subpoenas 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. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0150 Change of Presiding Officer

(1) If the presiding officer has a potential conflict of interest as defined in ORS 244.020, the presiding officer shall withdraw from the case or advise the parties of the nature of the conflict.

(2) Any party may request, by motion, that the presiding officer 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.

[(3)] **(a)** The presiding officer may withdraw [if the presiding officer believes the motion has merit] **from the case.**

[(4)] **(b)** 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 presiding officer and assign another presiding officer to the case, or order a hearing on the allegation in the

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affidavit.

[(5)] **(c)** If the director does not disqualify the presiding officer, 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. 5/25/92
 Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0155 Manner of Filing

(1) Requests for hearing, motions and **other** hearing [papers] **documents** may be filed by mail, **facsimile transmission** or deliver[ed]y to the division.

(2) [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 presiding officer, 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.] **A telephonic facsimile copy of a document will be accepted for filing provided the document transmitted indicates at the top that it has been delivered by FAX, the division facsimile transmission number is used, and the original signed document is simultaneously mailed, addressed to the Division. The complete facsimile copy must be received by the Division by 5 p.m. on the filing deadline. When reception of a document begins after 5 p.m., the date of filing of that document, for purposes of these rules, shall be the date of the next regular workday. Persons filing documents by facsimile copy accept all responsibility for timely filings. Delays in transmission shall not extend filing deadlines.**

[(3) The date of service of a filing by facsimile transmission is the date of transmission].

(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 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0160 Extension of Time for Filing

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

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. 5/25/92
 Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0170 Duties and Powers of the Presiding Officer

The presiding officer shall conduct a fair and impartial hearing[, and avoid delay]. The presiding officer has authority to:

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- (1) [Issue subpoenas;
- (2) Authorize 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) **(2)** Regulate the course of the hearing and exclude persons from the hearing;
- (8) **(3)** Require a party to state their position on any issue and the [legal] basis for that position;
- (9) **(4)** Order a party to produce a witness or other evidence;
- [10] **(5)** Call and examine any party or witness;
- [11] **(6)** Close and reopen the hearing record as [the needs of] justice **so** requires; [and]
- (7) Remand to the administrative unit; and**
- [12] **(8)** Take any other action necessary, in the presiding officer's reasonable judgment, for a full and fair 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. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
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436-001-0171 Hearings Security

(1) Any party or representative, having knowledge or reasonable belief that any person participating in the hearing may present a danger or may be a threat to anyone involved in the hearing, shall immediately notify the assigned presiding officer and the opposing parties or representatives of the potentially dangerous situation.

(2) All decisions involving security at the hearing shall be within the discretion of the presiding officer.

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: **Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98**

436-001-0175 Conducting a Contested Case Hearing

(1) The contested case hearing shall be conducted by and under the control of the presiding officer, so as to include the following:

(a) The statement and evidence of the petitioner in support of its action;

(b) The statement and evidence of respondent, interested agencies, and other parties, except that subject areas of the limited parties shall be confined to the area of participation granted by the presiding officer;

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(c) Any rebuttal evidence; and

(d) Any closing arguments.

(2) Presiding officers, interested agencies and parties shall have the right to question witnesses. However, questions of witnesses by limited parties shall be confined to the area of participation granted by the presiding officer.

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0185 [Telephone] Hearings

(1) **At the discretion of the presiding officer, [H] hearings [shall be] may be conducted either by telephone [, unless the presiding officer determines that the circumstances warrant otherwise. The presiding officer will notify the parties what factors will be considered in determining if an in-person hearing is warranted] or in-person.**

(2) [Not withstanding subsection (1), nothing in this rule precludes the presiding officer from allowing some parties or witnesses to attend by telephone while others attend in person.] **A party desiring an in-person hearing shall make a written request. In-person contested case hearings are held in Salem, Oregon except when the presiding officer authorizes a hearing outside of Salem.**

(3) Upon prior arrangement and approval of the presiding officer, a party or witness for an in-person hearing may appear by telephone.

[(3)] **(4)** The presiding officer shall make an audio recordinging of any [telephone] hearing.

[(4)] **(5)** Prior to commencement of a[n evidentiary] hearing [that is held by telephone], each party and the division shall provide to all other parties, presiding officer and to the division, copies of documentary evidence that it will seek to introduce into the record.

[(5)] **(6)** Nothing in this rule precludes any party or the division from seeking to introduce documentary evidence in addition to evidence described in subsection [(4)] **(5)** during the [telephone] hearing. [and] **The presiding officer [shall] may receive such evidence, subject to the applicable rules of evidence, if inclusion of the evidence in the record is necessary to conduct a full and fair hearing. When new evidence is introduced, the other parties may request an opportunity to submit rebuttal evidence. The presiding officer may allow the admission of rebuttal evidence.** If any evidence introduced during the hearing has not previously been provided to the presiding officer, **to** 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 for sound reproduction or transmission over a distance.]

(7) The presiding officer may recess the hearing to discuss any of the matters listed in OAR 436-001-0105(2).

Stat. Auth.: ORS 656.726(3)

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

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436-001-0191 Evidence

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

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

(3) Subject to the presiding officer's discretion to exclude irrelevant, immaterial or unduly repetitious matter, all offered evidence, not objected to, will be received.

(4) Evidence objected to may be received by the presiding officer. 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.

(5) The presiding officer shall accept an offer of proof made for excluded evidence. The offer of proof shall contain sufficient detail to allow the reviewing agency or court to determine whether the evidence was properly excluded. The presiding officer has discretion to decide whether the offer of proof is to be oral or written and at what stage in the proceeding it will be made. The presiding officer may place reasonable limits on the offer of proof, including the time to be devoted to an oral offer or the number of pages in a written offer.

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0195 Medical Evidence

The following [medical evidence, as defined in OAR 436-010-0008(14)(c),] does not constitute "new medical evidence" and, if relevant, [shall] **may** be [admitted] **admissible** in a contested case[.];

(1) Supplemental cross-examination of medical professionals whose reports or work products are included in the medical evidence gathered by the [director's] **Medical Review Unit's** staff, provided the scope of the cross-examination deals with events occurring on or before the date the [director's] **Medical Review Unit's** record was closed.

(2) Supplemental reports, corrections and clarifications by medical professionals whose reports or work products are in the medical evidence gathered by the [director's] **Medical Review Unit's** staff provided the scope of the additional items deals with events occurring on or before the date the [director's] **Medical Review Unit's** record was closed.

(3) Supplemental cross-examination of those providing data under subsection (2)[(a)], provided the scope of the cross-examination is limited to what is [provided] under subsection (2)[(a)].

(4) Relevant testimony [by the injured worker].

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 656.260, 656.327, and 656.704(2)

Hist: Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
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436-001-0201 Failure to Appear

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

(2) If the respondent does not appear, the presiding officer has the discretion to proceed with the hearing.

Stat. Auth.: ORS 656.726(3)
Stats. Implemented: ORS 183.415 and 656.704(2)
Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0205 Withdrawal of Attorney from Contested Case

If an attorney is withdrawing from representing a party, the attorney shall provide written notice of the withdrawal to all parties and the presiding officer.

Stat. Auth.: ORS 656.726(3)
Stats. Implemented: ORS 183.415 and 656.704(2)
Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0210 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 presiding officer.

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

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

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

Stat. Auth.: ORS 656.726(3)
Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)
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436-001-0225 Scope of Review/Limitations on the Record

The scope of review shall be [de novo unless otherwise prescribed by statute or administrative rule.] **as follows:**

(1) Medical services disputes arising under ORS 656.245 shall be reviewed de novo.

(2) Medical fee disputes arising under ORS 656.248 shall be reviewed de novo.

[2] **(3) Medical treatment disputes arising under ORS 656.327 shall be reviewed pursuant to the substantial evidence standard. In such disputes no new medical evidence or medical issues, as defined by OAR 436-001-0195, shall be admitted at the contested hearing.**

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[3] **(4)** Medical treatment disputes arising within a managed care organization certified under ORS 656.260 shall be reviewed pursuant to the substantial evidence standard. In such disputes, no new medical evidence or medical issues, as defined by OAR 436-001-0195, shall be admitted at the contested case hearing.

[4] **(5)** Vocational assistance disputes arising under ORS 656.340 shall be reviewed pursuant to the limited scope of review in ORS 656.283[.], **as follows:** [In such disputes, only evidence presented at the administrative review or evidence offered at hearing which is probative as to the four bases for modification of the director's administrative order in ORS 656.283 shall be admitted.]

(a) Violates a statute or rule;

(b) Exceeds the statutory authority of the agency;

(c) Was made upon unlawful procedure; or

(d) Was characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(A) At the hearing, the presiding officer may admit new evidence to determine if any of the above occurred.

(B) Review of any new evidence is *de novo*.

(6) All other disputes shall be reviewed *de novo* unless otherwise prescribed by statute or administrative rule.

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 656.260, 656.283, 656.327, 656.704(2)

Hist: Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96

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436-001-0226 Notice of Expert Testimony

At least 14 days before the hearing, a party shall provide to the presiding officer and other parties, in writing, the identity of each expert witness the party will call to testify at hearing.

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0231 Official Notice

(1) The presiding officers may take official notice of a fact, if it is a fact not subject to reasonable dispute because it is generally known or can be accurately and readily determined by resort to sources whose accuracy cannot reasonably be questioned.

(2) The presiding officers may also take official notice of general, technical or scientific facts within their specialized knowledge.

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

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436-001-0240 Exhibits and Exchange of Exhibits

(1) [In cases where the director is required by statute to create a record sufficient for review, including ORS 656.260, 656.327 and 656.283, t] **The division [will] shall provide the parties and the presiding officer legible copies of all documents that were relied upon in the underlying administrative review, together with an index. The index shall include a description of each document, author, number of pages and date of the document. The documents shall be arranged in chronological order and designated by [capital letters] numbers in the lower right corner of each page, beginning with the document of earliest date. Pagination of multiple-page documents shall be designated by the [capital letter] document number, followed by the page number. For example, page two of document [two] five [shall] may be [designated] marked as ["WCD/DRS Exhibit # A, page 2 of 4."] "Exhibit 5, page 2" or "Ex. 5-2," etc.**

(a) Not less than [ten] **fourteen** days before the hearing, or within [five] **seven** days of receipt of the division's document index and documents, whichever is later, the petitioner(s) shall provide the other parties and the presiding officer legible copies of any additional documents that they will offer at hearing. The additional documents shall be marked and accompanied by a supplemental document index, **numbered to coincide** in chronological order [and] **with the division's documents.** [preceded by a "p" and a number.] For example, [the second page of the petitioner's first exhibit chronologically should be marked as "p1-2"] **a document which is chronologically between documents five and six of the division's documents may be marked as "Exhibit 5a," "Ex. 5a," etc.**

(b) Not less than [five] **seven** days before the hearing, the respondent(s)/cross-petitioner(s) shall provide to the other parties and the presiding officer legible copies of any additional documents that they will offer at hearing in the same manner as provided by the petitioner(s)[, except the additional documents by the respondent (s) shall be preceded by a "r" and a number. For example, the second page of the respondent's first exhibit chronologically shall be marked as "r1-2."].

(2) [In all other cases where the director is not required to provide a record sufficient for review, including but not limited to ORS 656.262(11) and ORS 656.245(2), the petitioner shall provide to the other parties, the division and the presiding officer, not later than 15 days before the hearing legible copies of all documents that are relevant and material to the matters in dispute at hearing, together with an index. The index shall include the document numbers, description of each document, author, number of pages and date of the document. The documents shall be arranged chronologically and numbered, in Arabic numerals, in the lower right hand corner of each page, beginning with the earliest document. The numbers shall be preceded by the designation of "Ex.," and pagination of multiple-page documents shall be designated by a hyphen followed by the page number. For example, page two of document two shall be designated "Ex 2-2."]

(a) Not less than 10 days before the hearing, or within 5 days of receipt of the petitioner's document index and documents, whichever is later, the respondent shall provide to the parties, the division and the presiding officer legible copies of any additional documents that are relevant and material to the matters in dispute. The additional documents shall be marked and accompanied by a supplemental document index, prepared in the same manner as the petitioner's documents and index and numbered to coincide in chronological order with the petitioner's documents. Letter subdesignations shall be used to ensure chronological numbering. For example, a document which is chronologically between documents six and seven of the petitioner's documents shall be designated shall be designated "Ex. 6A."

(b) Not less than 5 days before the hearing, or immediately following receipt of the petitioner's and respondent's document index and documents, whichever is later, the division shall provide to the parties, and the presiding officer legible copies of any additional documents that are relevant and material to the matters in dispute. The additional documents shall be marked and accompanied by a supplemental document index, prepared in the same manner as the petitioner's documents and index and numbered to coincide in chronological order with the petitioner's documents. Letter subdesignations shall be used to ensure chronological numbering. For example, a document which is chronologically between documents six and seven of the petitioner's documents shall be designated shall be designated "Ex. 6A."

(3) Before the hearing, the parties shall delete from their indexes and packets of documents those documents which are cumulative, or which no party can in good faith represent to be relevant and material to the issues, and the revised indexes and packets of documents shall be submitted to the presiding officer. For compliance with this rule, it is sufficient for the parties to mark neatly through the index description of the documents not being offered in evidence with ink, and to remove the corresponding documents from the packets submitted to the presiding officer.] **If photographs are used as exhibits, each party and the presiding officer shall be provided with a set of the photos.**

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[4] **(3)** All exhibits **offered**, whether or not admitted into evidence, **unless withdrawn**, shall be part of the record in the case.

[5] **(4)** At the discretion of the presiding officer, 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.

[6] **(5)** [At hearing, t] **The presiding officer** [may, at his or her discretion, allow admission of evidence not declared] **has discretion to admit evidence as otherwise provided under these rules.** [In the exercise of discretion, the presiding officer shall determine whether the party that failed to provide discovery offers a satisfactory reason for having failed to do so or whether excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10). If the presiding officer admits evidence which was not disclosed, the presiding officer may grant a continuance to allow an opportunity to respond.]

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.310 through 183.550, 656.260, 656.327, 656.283 and 656.704(2)

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436-001-0255 Ex Parte Communication

(1) An ex parte communication is an oral or written communication to the presiding officer or administrator not made in the presence of all parties to the hearing, concerning a fact in issue in the proceeding, but does not include communication from agency staff or counsel about facts in the record.

(2) If the presiding officer or administrator receives an ex parte communication during the pendency of the proceeding, the individual 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 for the limited purpose of receiving evidence relating to the ex parte communication, or in writing.

(3) The division's record of a contested case proceeding shall include:

(a) The ex parte communication, if in writing;

(b) A statement of the substance of the ex parte communication, if oral;

(c) The presiding officer's or administrator's notice to the parties of the ex parte communication; and

(d) Rebuttal evidence.

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

436-001-0260 Unacceptable Conduct

(1) Contested case hearings before the director are not public meetings and are not open

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to the public, except with the consent of the parties [or] **and** as authorized by the presiding officer.

(2) The presiding officer may **have** [expel] a person **removed** from a contested case hearing if that person disrupts the proceeding.

(3) The presiding officer may prohibit broadcasting, television, sound or video recording and the taking of photographs of proceedings in the hearing room. These prohibitions, in the presiding officer'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)

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436-001-0265 Attorney Fees

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

(a) The time devoted to the case;

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

(c) The quality of the legal representation;

[c] **(d)** The value of the interest involved;

[d] **(e)** The nature of the proceedings;

[e] **(f)** The benefit secured for the claimant;

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

[g] **(h)** The assertion of frivolous issues or defenses; [and]

(i) A statement of services, if submitted within seven days of the hearing date, unless the presiding officer instructs otherwise; and

[h] **(j)** Any other relevant consideration deemed appropriate by the [administrative law judge] **presiding officer.**

(2) 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 presiding officer or director may, where authorized by law, approve an assessed fee agreed to by the parties or may assess a fee considering the factors set forth in subsection (1).

(3) Attorney fees [shall] **may only** be authorized [only for services] if an executed attorney retainer agreement [and statement of services] has been filed.

(4) Once the attorney fee has been assessed, the opposing parties may file written exceptions to the fee pursuant to OAR 436-001-0275.

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[(5) Pursuant to ORS 656.388, attorney fees for services rendered before a managed care organization and before the director's administrative review, including services before the managed care organization and director's administrative review on remand from a contested case hearing request, are not allowed.]

Stat. Auth.: ORS 656.726(3)

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

Hist: Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96

Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

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

(1) When the division serves a proposed and final order on the parties, the division shall [at the same time or at a later date] notify the parties:

(a) That, **in order to be considered by the division**, written exceptions [must] **shall** be filed within 30 days of the date of service of the proposed and final order [in order to be considered by the division]; and

(b) When and in what form argument may be made to the administrator who will render the final order.

(c) That written responses by other parties [must] **shall** be filed within 20 days of service of the exceptions and a reply, if any, [must] **shall** be filed within 10 days of service of the responses.

(2) If no exceptions are filed, the proposed and final order becomes final 30 days after the date of service of the order, subject to subsection (4).

(3) If exceptions are filed, the administrator may adopt the proposed order or prepare a new order.

(4) Nothing in this rule prohibits the staff of a non-party agency from commenting on the proposed order or the administrator from revising the proposed and final order, even if no exceptions are filed by the parties.

(5) "Date of service" means the date of mailing or delivery.

Stat. Auth.: ORS 656.726(3)

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

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436-001-0285 Final Orders

(1) Final orders in contested cases shall comply with all of the requirements prescribed in ORS 183.470.

(2) The date of service of the order to the parties shall be specified in writing and be part of or be attached to the order.

(3) Review of final orders shall be pursuant to ORS 183.480 et. seq.

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98

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436-001-0295 Immediate Suspension or Refusal to Renew a License, Notice of Opportunity for Hearing, Service

(1) Upon finding there is a serious danger to the public health or safety, the director may immediately suspend or refuse to renew a license. For purposes of this rule, such a decision is referred to as an emergency suspension order. An emergency suspension order shall be in writing and may be issued without prior notice to the licensee or an opportunity for a hearing as required for contested cases under ORS chapter 183.

(2)(a) Except when the danger to the public health or safety is so imminent that opportunity for the licensee to object under subsection (3) of this rule is not practicable as determined by the director, the director shall provide the licensee with notice and opportunity to object prior to issuing the emergency suspension order. For purposes of this rule, this notice is referred to as a pre-suspension notice.

(b) The pre-suspension notice shall:

(A) Describe generally the acts of the licensee and the circumstances that would be grounds for revocation, suspension or refusal to renew the license under the director's usual procedures;

(B) Describe generally the reasons why the acts of the licensee and the circumstances seriously and immediately endanger the public's health or safety; and

(C) Identify a person who the licensee may contact and who is authorized to issue the emergency suspension order or to make recommendations regarding the issuance of the emergency suspension order.

(c) The director may provide the pre-suspension notice to the licensee in writing, orally or by any other means available.

(3) Following the pre-suspension notice, the director shall provide the licensee an immediate opportunity to respond to the pre-suspension notice before a person authorized to issue the emergency suspension order or to make recommendations regarding the issuance of the emergency suspension order. An emergency suspension order may be issued anytime thereafter.

(4)(a) When the director issues an emergency suspension order, the director shall serve the order on the licensee either personally or by registered or certified mail.

(b) The order shall include the following statements:

(A) Those required under ORS 183.415(2) and (3);

(B) That the licensee has the right to demand a hearing to be held as soon as practicable to contest the emergency suspension order;

(C) That if the demand for hearing is not received by the division within 90 days of the date of notice of the emergency suspension order the licensee shall have waived its right to a hearing under ORS chapter 183;

(D) The effective date of the emergency suspension order;

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(E) Findings of the specific acts or omissions of the licensee that are grounds for revocation, suspension or refusal to renew the license, and the reasons these acts or omissions seriously and immediately endanger the public's health or safety; and

(F) That the director may combine the hearing on the emergency suspension order with any other proceedings before the director affecting the license. The procedures for a combined proceeding shall be those applicable to the other proceeding affecting the license.

(5)(a) If timely requested by the licensee, the director shall hold a hearing on the emergency suspension order as soon as practicable.

(b) At the hearing, the division 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 confirmation, alteration or revocation of the order.

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

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