

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION



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

**Effective Jan. 1, 2010**

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**NOTE:** Significant revisions are marked with vertical lines in the right margins.

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

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

In the Matter of the Amendment of Oregon Administrative	)	<b>ORDER OF</b>
Rules (OAR):	)	<b>ADOPTION</b>
436-001, Procedural Rules, Rulemaking, Hearings,	)	<b>No. 09-053</b>
and Attorney Fees	)	

The Director of the Department of Consumer and Business Services, under the general rulemaking authority in ORS 656.726(4), and in accordance with the procedures in ORS 183.335, amends OAR chapter 436, division 001.

On Sept. 15, 2009, the Workers' Compensation Division filed with the Secretary of State a *Notice of Proposed Rulemaking Hearing and Statement of Need and Fiscal Impact*. The division mailed copies of the *Notice* and *Statement* to interested persons and legislators in accordance with ORS 183.335 and OAR 436-001-0009, and posted copies to its Web site. The Secretary of State included notice of the public hearing in its October 2009 *Oregon Bulletin*. On October 26, 2009, the division held a public hearing as announced. The record remained open for written testimony through October 29, 2009.

**SUMMARY OF RULE AMENDMENTS**

These rules:

- Are updated and reorganized to improve clarity.
- Implement House Bill 3345 by raising the maximum attorney fee payable under ORS 656.385 from \$2,000 to \$3,000, and by making corresponding changes to the attorney fee matrix.
- Consolidate rules related to attorney fees from OAR 436-010, 060, and 120.

**FINDINGS**

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

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

**IT IS THEREFORE ORDERED THAT**

- 1) Amendments to OAR chapter 436, division 001 are adopted as administrative order No. 09-053 on this **1<sup>st</sup> day of Dec. 2009, to be effective Jan. 1, 2010.**
- 2) A certified copy of the adopted rules will be filed with the Secretary of State.
- 3) A copy of the adopted rules with revision marks will be filed with the Legislative Counsel under ORS 183.715 within ten days after filing with the Secretary of State.

**Order of Adoption**  
**OAR chapter 436, division 001**

**DATED this 1<sup>st</sup> day of December 2009.**

*/s/ John L. Shilts*

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John L. Shilts, Administrator  
Workers' Compensation Division

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

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

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

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

**436-001-0003      Applicability and Purpose of these Rules**

(1) OAR 436-001-0005 through 436-001-0009 establish supplemental procedures for rulemaking under ORS chapter 183 and apply to all division rulemaking on or after Jan. 1, 2010.

(2) OAR 436-001-0019 through 436-001-0300 establish supplemental procedures for hearings on matters within the director's jurisdiction, which are matters other than those concerning a claim as defined in ORS 656.704.

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

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

(c) These rules apply to hearings held on or after Jan. 1, 2010.

(3) OAR 436-001-0400 through 436-001-0440 apply to attorney fees awarded by the director under ORS 656.262 and 656.386, and to attorney fees awarded by the director or administrative law judge under ORS 656.385(1).

(a) These rules apply to attorney fees assessed by an order that is issued on or after Jan. 1, 2010.

(b) For attorney fees that are ordered to be paid in reconsideration proceedings under ORS 656.268(6), OAR 436-030-0175 applies.

(4) The director may waive procedural rules as justice requires, unless otherwise obligated by statute.

Statutory authority: ORS 656.726(4)

Statutes implemented: ORS 656.704, ORS ch. 183

Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08  
Amended 12-1-2009 as WCD Admin. Order 09-053, eff. 1-1-2010

**436-001-0004      Definitions**

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

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

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

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

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

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

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

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

(h) "Filed" means mailed, faxed, e-mailed, delivered, or otherwise submitted to the division in a method allowable under these rules.

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

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

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

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

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

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 656.704, ORS ch. 183  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

### Rulemaking

#### **436-001-0005 Model Rules of Procedure For Rulemaking**

The Model Rules of Procedure, OAR 137-001-0005 through 137-001-0100, in effect on January 1, 2008, as promulgated by the Attorney General of the State of Oregon under the Administrative Procedures Act, are adopted as the rules of procedure for rulemaking actions of the Workers' Compensation Division.

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

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 183.325 through 183.410  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

#### **436-001-0009 Notice of Division Rulemaking**

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

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

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

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

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

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

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

Stat. Auth.: ORS 656.726 (4)  
Stats. Implemented: ORS 183.335 and 84.022  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

## Hearings

### 436-001-0019      Requests for Hearing

(1) A request for hearing on a matter within the director's jurisdiction must be filed with the administrator no later than the filing deadline. Filing deadlines will not be extended except as provided in section (7) of this rule.

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

- (a) The name, address, and phone number of the party making the request;
- (b) Whether the party making the request is the worker, insurer, medical provider, employer, any other party, or an attorney on behalf of a party;
- (c) The number of the administrative order being appealed;
- (d) The worker's name, address, and phone number;
- (e) The name, address, and phone number of the worker's attorney, if any;
- (f) The date of injury;
- (g) The insurer's or self-insured employer's claim number;
- (h) The division's (WCD) file number; and
- (i) The reason for requesting a hearing.

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

- (a) By mail.
- (b) By hand-delivery.
- (c) By fax, if the document transmitted indicates that it has been delivered by fax, is sent to the correct fax number, and indicates the date the document was sent.
- (d) By e-mail to [wcd.hearings@state.or.us](mailto:wcd.hearings@state.or.us). If the request for hearing is an attachment to the e-mail, it must be in a format that Microsoft Word 2007<sup>®</sup> (.docx, .doc, .txt, .rtf) or Adobe Reader<sup>®</sup> (.pdf) can open. Image formats that can be viewed in Internet Explorer<sup>®</sup> (.tif, .jpg) are also acceptable.

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

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

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

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

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

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

**Statutory authority:** ORS 656.726(4) and ORS 84.013

**Statutes implemented:** ORS 656.704

**Hist:** Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08  
Amended 12-1-2009 as WCD Admin. Order 09-053, eff. 1-1-2010

**436-001-0023 Other Filings and Submissions**

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

- (a) To the division before the dispute is referred to the board;
- (b) To the administrative law judge after the dispute is referred to the board but before the administrative law judge issues a proposed and final order; and
- (c) To the division after the administrative law judge issues a proposed and final order, unless it is a request for correction of errors in the proposed and final order under OAR 436-001-0246(6).

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

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

**Stat. Auth.:** ORS 656.726(4)

**Stats. Implemented:** ORS 656.704

**Hist:** Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

**436-001-0027 Timeliness; Calculation of Time**

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

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

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

(3) Time periods allowed for a filing or submission to the division are calculated in

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calendar days. The first day is not included. The last day is included unless it is a Saturday, Sunday, or legal holiday. In that case, the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday. Legal holidays are those listed in ORS 187.010 and 187.020.

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 656.704  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

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

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

- (a) Receive notice of all matters;
- (b) Receive copies of all documents; and
- (c) Present evidence, testimony, and argument.

(2) The director may appear in a matter by filing an entry of appearance. The director may be represented by an agency representative, assistant attorney general, or special assistant attorney general as authorized by the Department of Justice. If the director enters an appearance, all notices and documents in the hearing must be provided to the director's representative.

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 180.220(2), 180.235, and 656.704  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

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

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

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

(3) The administrative law judge may dismiss requests for hearing as provided in OAR 436-001-0296.

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

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

(6) The administrative law judge may separate matters to promote efficient disposition of the matters.

(7) Consolidation of matters under section (5) of this rule or under ORS 656.704(3)(c) is only for the purpose of hearing. The administrative law judge must issue a separate order for matters other than those concerning a claim.

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

(9) The administrative law judge may send the division a written question regarding

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

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

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 656.704  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

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

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

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

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

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

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 656.245, 656.247, 656.260, 656.283, 656.327, 656.704  
Hist: Amended 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

**436-001-0240 Exhibits and Evidence**

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

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

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5a.”

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

(4) Unless withdrawn, all exhibits offered will be included in the hearing file, whether or not they are admitted into the evidentiary record.

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

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.704

Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

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

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

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

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

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

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

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

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

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

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

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

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

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

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 656.704  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

**436-001-0252 Stay of Director and Administrative Review**

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

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

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

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 656.704  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

**436-001-0259 Ex Parte Communication**

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

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

**436-001-0265 Attorney Fees (*Renumbered to 436-001-0400 and 0410*)**

**Statutory authority:** ORS 656.385(1), 656.726(4)  
**Statutes implemented:** ORS 656.262, 656.385, 656.388, and 656.704  
**Hist:** Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08  
Amended and renumbered 12-1-2009 to 436-001-0400 and 0410 as WCD Admin. Order 09-053, eff. 1-1-2010

**436-001-0296 Settlements and Dismissals**

(1) If, after a request for hearing is filed but before a proposed and final order is issued, an agreement under ORS 656.236 or 656.289(4) is approved that resolves all issues in the matter within the director's jurisdiction, the administrative law judge may issue a proposed and final

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order dismissing the request for hearing.

(2) If, after a request for hearing is filed but before a proposed and final order is issued, the parties reach agreement on all issues in the matter within the director's jurisdiction, the administrative law judge may issue a proposed and final order approving the agreement and dismissing the request for hearing.

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

(4) Notwithstanding OAR 436-001-0170(2), the administrative law judge may issue a final order of dismissal when the requesting party withdraws the request for hearing and no cross-request for hearing has been filed.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.704

Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

**436-001-0300 Alternative Dispute Resolution**

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

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

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

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

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 183.502, 656.704

Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

**Attorney Fees**

**436-001-0400 General provisions and requirements for attorney fees awarded by the director**

(1) In order to be awarded an attorney fee, the attorney must file with the director a signed attorney retainer agreement.

(2) In cases in which time devoted is a factor in determining the amount of the fee, the attorney should submit a statement of the number of hours spent on the case. If the attorney has submitted a statement of hours and then spends more time on the case, the attorney may submit an updated statement, which the director will consider if an order has not already been issued. If

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the attorney does not submit a statement of hours, the director will presume the attorney spent one to two hours on the case.

(3) In cases in which a reasonable fee is to be assessed, the director may consider the following factors:

- (a) The time devoted to the case.
- (b) The complexity of the issues involved.
- (c) The value of the interest involved.
- (d) The skill of the attorney and the quality of representation.
- (e) The nature of the proceedings.
- (f) The benefit secured for the worker.
- (g) The risk in a particular case that an attorney's efforts may go uncompensated.
- (h) The assertion of frivolous issues or defenses.

Statutory authority: ORS 656.385(1), 656.726(4)  
Statutes implemented: ORS 656.262, 656.385, 656.388, and 656.704  
Hist: Amended and renumbered 12-1-2009 from OAR 436-001-0265 as WCD Admin. Order 09-053, eff. 1-1-2010

**436-001-0410 Attorney fees awarded under ORS 656.385(1)**

(1) In cases in which the director or administrative law judge awards a fee under ORS 656.385(1):

- (a) The fee must fall within the ranges of the matrix in subsection (1)(d), unless extraordinary circumstances are shown or the parties otherwise agree.
- (b) Extraordinary circumstances are not established merely by exceeding eight hours or a benefit of \$6,000.
- (c) The matrix in subsection (1)(d) shows the maximum fee and fee ranges as percentages of the average weekly wage defined in ORS 656.211. Before July 1 of each year the director, by bulletin, will publish the matrix showing the maximum fee and fee ranges as dollar amounts, after adjusting the fees by the same percentage increase, if any, to the average weekly wage. Dollar amounts will be rounded to the nearest whole dollar.
- (d)

Estimated Benefit Achieved	Professional Hours Devoted (Fees as percentage of average weekly wage defined in ORS 656.211. See Bulletin 111 for current average weekly wage amount.)		
	1-4 hours	4.1-8 hours	over 8 hours
<b>\$1-\$2,000</b>	18.74% - 131.15%	56.21% - 187.36%	149.89% - 234.20%
<b>\$2,001-\$4,000</b>	37.47% - 149.89%	112.42% - 243.57%	196.73% - 281.04%
<b>\$4,001-\$6,000</b>	56.21% - 187.36%	149.89% - 271.67%	243.57% - 327.88%
<b>Over \$6000</b>	74.94% - 243.57%	196.73% - 337.25%	290.41% - 374.72%

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(2) For purposes of applying the matrix in medical disputes under ORS 656.245, 656.247, 656.260, and 656.327, the following may be considered in determining the value of the results achieved or the benefit to the worker:

(a) The fee allowed by the medical fee schedule in OAR 436-009 for the medical service at issue.

(b) The overall cost of the medical service at issue.

(3) For purposes of applying the matrix in vocational disputes under ORS 656.340, the value of vocational assistance or a training plan, unless determined to be otherwise, falls within the highest range of the matrix for "benefit achieved." In addition, the following may be considered in determining the value of the results achieved or the benefit to the worker:

(a) The actual or projected cost of the service at issue.

(b) The maximum spending limit in the fee schedule for vocational assistance costs in OAR 436-120-0720 for the service at issue.

Statutory authority: ORS 656.385(1), 656.726(4)

Statutes implemented: ORS 656.262, 656.385, 656.388, and 656.704

Hist: Amended and renumbered 12-1-2009 from OAR 436-001-0265 as WCD Admin. Order 09-053, eff. 1-1-2010

**436-001-0420 Attorney fees awarded under ORS 656.262(11)**

In cases in which the director awards a fee under ORS 656.262(11):

(1) OAR 438-015-0110 applies.

(2) The director may use the matrix in OAR 436-001-0410 as a guide in determining the amount of the fee.

(3) The director will publish by bulletin, before July 1 of each year, the percentage increase, if any, in the maximum attorney fee.

Statutory authority: ORS 656.726(4)

Statutes implemented: ORS 656.262

Hist: Adopted 12-1-2009 as WCD Admin. Order 09-053, eff. 1-1-2010

**436-001-0430 Attorney fees awarded under ORS 656.262(12)**

The matrix for determining the amount of the attorney fee assessed under ORS 656.262(12) (2009 Oregon Laws, chapter 526, section 1) is in OAR 436-060, Appendix "D" (436-060-0400).

Statutory authority: ORS 656.726(4)

Statutes implemented: ORS 656.262

Hist: Adopted 12-1-2009 as WCD Admin. Order 09-053, eff. 1-1-2010

**436-001-0440 Time within which attorney fees must be paid**

Attorney fees assessed under OAR 436-001-0400 to 436-001-0440 must be paid within 30 days of the date the order awarding the fees becomes final.

Statutory authority: ORS 656.385(1), 656.726(4)

Statutes implemented: ORS 656.262, 656.385, 656.388, and 656.704

Hist: Adopted 12-1-2009 as WCD Admin. Order 09-053, eff. 1-1-2010

**Secretary of State  
Certificate and Order for Filing  
PERMANENT ADMINISTRATIVE RULES**

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

Dec. 1, 2009 by the  
Date prior to or same as filing date

Department of Consumer and Business Services  
Workers' Compensation Division

OAR chapter 436  
Administrative Rules Chapter Number

Agency and Division

Fred Bruyns<sup>FB</sup> 350 Winter Street NE; Salem OR 97301-3879,  
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Rules Coordinator Address

503-947-7717  
Telephone

to become effective Jan. 1, 2010 Rulemaking Notice was published in the October 2009 *Oregon Bulletin*.\*\*  
Date upon filing or later Month and Year

**Workers' compensation claims administration, medical services and billing, reemployment assistance, and attorney fees**

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

**RULEMAKING ACTION**

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

**ADOPT:** OAR 436-001-0420; 436-001-0430; 436-001-0440; 436-060-0012; 436-060-0400

<b>AMEND:</b> OAR	436-030-0020	436-060-0017	436-060-0195	436-110-0336	436-120-0720
436-001-0003	436-030-0034	436-060-0018	436-060-0200	436-110-0337	436-120-0800
436-001-0019	436-030-0065	436-060-0020	436-060-0500	436-110-0345	436-120-0810
436-009-0010	436-030-0115	436-060-0025	436-060-0510	436-110-0347	436-120-0820
436-009-0070	436-030-0135	436-060-0035	436-105-0003	436-110-0350	436-120-0830
436-010-0008	436-030-0145	436-060-0095	436-105-0005	436-110-0900	436-120-0840
436-010-0240	436-030-0155	436-060-0105	436-105-0500	436-120-0004	436-120-0900
436-010-0265	436-030-0165	436-060-0135	436-105-0520	436-120-0005	436-120-0915
436-010-0280	436-030-0185	436-060-0137	436-105-0540	436-120-0007	436-150-0005
436-030-0002	436-030-0580	436-060-0140	436-105-0550	436-120-0008	436-150-0010
436-030-0003	436-060-0003	436-060-0147	436-110-0005	436-120-0340	436-150-0030
436-030-0005	436-060-0008	436-060-0150	436-110-0310	436-120-0410	436-160-0310
436-030-0007	436-060-0009	436-060-0153	436-110-0325	436-120-0440	436-160-0340
436-030-0015	436-060-0010	436-060-0155	436-110-0330	436-120-0500	
436-030-0017	436-060-0015	436-060-0180	436-110-0335	436-120-0510	

**REPEAL:** OAR 436-030-0009; 436-075-0110

**AMEND AND RENUMBER:**

- From OAR 436-001-0265 to 436-001-0400;
- From OAR 436-001-0265 to 436-001-0410;
- From OAR 436-120-0320 to 436-120-0115;
- From OAR 436-120-0320 to 436-120-0125;
- From OAR 436-120-0320 to 436-120-0135;
- From OAR 436-120-0320 & 436-120-0350 to 436-120-0145;
- From OAR 436-120-0320 to 436-120-0155;
- From OAR 436-120-0350 to 436-120-0165;
- From OAR 436-120-0360 to 436-120-0175;
- From OAR 436-120-0320 to 436-120-0185

ORS 656.210(6) – OL 2009, ch. 313; 656.252(1); 656.262(12) – OL 2009, ch. 526;  
656.340(9) – OL 2009, ch. 312 & OL 2009, ch. 35; 656.385(1) – OL 2009, ch. 526;  
656.622 – OL 2009, ch. 36; and 656.726(4)

Statutory Authority

Other Authority

ORS chapter 656, as amended by Oregon Laws (OL) 2009: House Bill (HB) 2045 – OL 2009, ch. 32; HB 2195 – OL 2009, ch. 35; HB 2197 – OL 2009, ch. 36; HB 2705 – OL 2009, ch. 312; HB 2707 – OL 2009, ch. 313; HB 3345 – OL 2009, ch. 526; and ORS chapter 656, as amended by OL 2007, Senate Bill 559, ch. 241

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Statutes being Implemented

**RULE SUMMARY**

**OAR chapter 436, division 001, “Procedural Rules, Rulemaking, Hearings, and Attorney Fees”**

**These rules:** Are updated and reorganized to improve clarity; implement House Bill 3345 by raising the maximum attorney fee payable under ORS 656.385 from \$2,000 to \$3,000, and making corresponding changes to the attorney fee matrix; consolidate rules related to attorney fees from OAR 436-010, 060, and 120.

**OAR chapter 436, division 009, “Oregon Medical Fee and Payment Rules”**

**These rules:** Clarify the types of identification numbers providers must include on their medical bills; allow a medical service provider to submit bills for independent medical examinations in the form or format agreed to by the insurer and the medical service provider.

**OAR chapter 436, division 010, “Medical Services”**

**These rules:** Implement HB 2045 by including chiropractors among those health care providers who may make findings of impairment (when serving as the worker’s attending physician); implement HB 2197, which allows a medical service provider who is not qualified to be an attending physician to provide compensable medical service to an injured worker for a period of 30 days or for 12 visits from the date of the first visit on the initial claim (rather than the date of injury), whichever first occurs, without the authorization of an attending physician; defer to OAR 436-001 for awarding attorney fees under ORS 656.385; require use of a release form (in addition to Form 801 or 827) for release of HIV-related information; clarify requirements for collection of the workers’ Social Security number on Form 827; allow and describe use of Form 827 to make claims for new or omitted medical conditions; require the health care provider to give the worker a copy of Form 3283 when giving the worker a copy of Form 827. (The agency prints nearly all 827s used by workers and providers, and will print Form 3283 as an attachment to Form 827.)

**OAR chapter 436, division 030, “Claim Closure and Reconsideration”**

**These rules:** Require that a Notice of Closure include information about a worker’s right to be represented by an attorney and to request a vocational eligibility evaluation; clarify procedures for administrative claim closure; provide that requests for reconsideration of claim closures may be made by telephone; explain that the 14-day time frames for parties to submit certain records relevant to the reconsideration process begin with the director’s notice of the start date of the reconsideration; require that evidence stored by the parties on audio media may be submitted to the director (for the purpose of reconsideration) only in transcribed form.

**OAR chapter 436, division 060, “Claims Administration”**

**These rules:** Specify when and how to issue claim-related notices after a worker is deceased, regardless of the cause of death; clarify requirements for the worker’s employer to give the worker a copy of Form 3283, “A guide for workers recently hurt on the job,” when the worker files a claim; lengthen the time period that an ongoing request by the claimant’s attorney for future claim-related documents remains in effect; specify that time limits for sending most information to the director begin with the mailing date of the agency’s letter or order; implement HB 2707 by prescribing notice requirements when the insurer learns that the worker was employed in more than one job at the time of injury; exclude secondary employment by Oregon subject volunteers from the calculation of supplemental disability; require notice to the worker, as part of the notice of claim acceptance, about criteria for reimbursement of claim-related expenses; describe timeliness criteria, notice requirements, and consent requirements related to the electronic payment of benefits to workers and beneficiaries; implement HB 3345 by setting conditions for the payment of penalty assessments to workers and fees to attorneys related to late payment of disputed claim settlement amounts.

**OAR 436-075, “Retroactive Program,” and OAR 436-150, “Workers’ Benefit Fund Claims Program”**

**These rules:** Eliminate references to “guaranty contract,” because Senate Bill 559 (2007 Session) replaced the guaranty contract with policy-based proof of coverage and reporting.

**OAR 436-105, “Employer-at-Injury Program (EAIP)”**

**These rules:** Define “consumables,” as purchases required to support the functioning of tools or equipment utilized during transitional work, and allow purchase of consumables under the EAIP; clarify that a worksite modification must be related to limitations that resulted in the worker’s EAIP eligibility or prevent the worsening of an accepted condition; clarify minimum reimbursement thresholds and when administrative costs are reimbursable.

**OAR 436-110, “Preferred Worker Program”**

**These rules:** Clarify the definition of “date of hire”; revise definitions of “premium” and “reimbursable wages” to

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be consistent with the definitions in OAR 436-105; implement HB 2197 by clarifying procedures for use of premium exemption under ORS 656.622; provide a more specific time limit for requesting claims cost reimbursement; create a new employment purchase type – placement assistance provided by a certified vocational counselor or any public or private agency that provides placement services, reimbursable if the assistance results in employment that the preferred worker retains for at least 90 days; provide that placement assistance may not be combined with vocational assistance under OAR 436-120.

**OAR 436-120, “Vocational Assistance to Injured Workers”**

**These rules:** Are reorganized to improve clarity; define several terms used in division 120 – “delivered,” “director,” “filed,” “likely eligible,” and “mailed”; defer to OAR 436-001 for awarding attorney fees under ORS 656.385; provide that modified or new employment that results from an employer-at-injury-activated use of the PWP is considered “suitable” 12 months after the department determines a worksite modification is complete; implement HB 2705 by eliminating the requirement to complete a vocational eligibility evaluation if the worker is released to regular ~~or other suitable~~ <sup>FB 12-22-09</sup> work with the employer at injury or aggravation; specify that the insurer is not required to do an eligibility evaluation if the worker is deceased or has a permanent total disability award; implement HB 2195 by allowing an insurer, without approval by the director, to extend time loss up to 21 months; allow further training to a worker who has completed one training plan if there is a reasonable cause to do so; publish vocational fee schedule maximums as percentages of Oregon’s state average weekly wage rather than fixed dollar amounts; to implement HB 2195, provide for “registration” rather than “authorization” of vocational assistance providers; require certified counselors who are subject to continuing education requirements under these rules to take at least eight hours (currently 7 ½ hours) of training in ethical practices and at least six hours of training on the vocational assistance and reemployment assistance rules during the five years before certification renewal.

**OAR 436-160, “Electronic Data Interchange”**

**These rules:** Specify whether certain proof-of-coverage data elements should be mandatory or optional.

Direct questions to: Fred Bruyns, Rules Coordinator; phone 503-947-7717; fax 503-947-7514; or e-mail [fred.h.bruyns@state.or.us](mailto:fred.h.bruyns@state.or.us). Rules are available on the Internet: <http://www.wcd.oregon.gov/policy/rules/rules.html>  
For a copy of the rules, contact Publications at 503-947-7627, Fax 503-947-7630.

/s/ John L. Shilts

Authorized Signer

12/1/2009

Date

John L. Shilts, Administrator, Workers’ Compensation Division

Printed name

\*With this original, file one photocopy of certificate, one paper copy of rules listed in Rulemaking Actions, and electronic copy of rules.

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

ARC 930-2005