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

Effective Jan. 1, 2016

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NOTE: New text is underlined. Deletions have a ~~strike-through~~ style.

Historical rules: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf

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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, 2016.~~Dec. 28, 2012.~~

(3) OAR 436-001-0400 through 436-001-0440 apply to attorney fees awarded by the director under ORS 656.262, 656.277, 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 orders issued and attorney fees incurred ~~attorney fees assessed by an order that is issued~~ on or after ~~Dec. 28, 2012~~Jan. 1, 2016, regardless of the date on which the claim was filed.

(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.

(5) OAR 436-001-0500 applies to any refund or credit processed by the director on or after Jan. 1, 2016, regardless of the date on which the payment was received.

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.704, ORS ch. 183
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12
Amended 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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.~~

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

(c~~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.~~

(d~~f~~) "Director" means the director of the Department of Consumer and Business Services

or the director's designee.

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

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

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

(h~~j~~) "Mailed" means addressed to the last known address, with sufficient postage and placed in the custody of the U.S. Postal Service.

(i~~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.

(j~~l~~) "Proposed and final order" means an order subject to revision by the director that 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.

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.704, ORS ch. 183
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12
Amended 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

Rulemaking

436-001-0005 Model Rules for Rulemaking

The Model Rules for Rulemaking, OAR 137-001-0005 through 137-001-0100, in effect on Jan. 1, 2008, adopted by the Oregon Department of Justice under ORS 183.341, are adopted as the rules of procedure for rulemaking actions of the Workers' Compensation Division.

{ED. NOTE: The full text of the Model Rules is available from the Department of Justice, the Workers' Compensation Division, or on the Oregon State Archives website: http://arcweb.sos.state.or.us/pages/rules/oars_100/oar_137/137_001.html.}

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 183.325 through 183.410
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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 before the effective date of the rule;

(b) Notifying interested people 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~~a~~ person or organization may elect to receive email or hard-copy notification of proposed rulemaking actions conducted by the division. ~~to its notification list if the person or organization:~~

(a) A person or organization may elect to ~~S~~subscribe~~s~~ to the division's e-mail notification service ~~through the division's website~~ at: https://service.govdelivery.com/accounts/ORDCBS/subscriber/new~~wcd.oregon.gov~~. ~~, or~~

(b) A person or organization may elect to receive hard-copy notification by sending a ~~R~~request~~s~~ in writing, ~~to receive hard-copy notification and~~ including~~es~~ the person or organization's full name and mailing address. ~~,~~ to the following address:

Rules Coordinator, Operations Section/Policy Team
Workers' Compensation Division
350 Winter Street NE, PO Box 14480
Salem OR 97309-0405

Statutory authority: ORS 656.726 (4)
Statutes implemented: ORS 183.335 and 84.022
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12
Amended 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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~~ division 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, to the following address: ~~.~~

Hearings Coordinator, Operations Section/Policy Team
Workers' Compensation Division
350 Winter Street NE, PO Box 14480
Salem OR 97309-0405

(b) By hand-delivery, to the following address:~~.~~

Hearings Coordinator, Operations Section/Policy Team
Workers' Compensation Division
350 Winter Street NE, 2nd floor
Salem OR 97301

(c) By fax, to 503-947-7514, 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@oregon.gov~~state.or.us~~. If the request for hearing is an attachment to the e-mail, it must be in a format that Microsoft Word 2010~~07~~® (.docx, .doc, .txt, .rtf) or Adobe Reader® (.pdf) can open. Image formats that can be viewed in Internet Explorer® (.tif, .jpg) are also acceptable.

(e) By using the online form, available on the division's website~~ at 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.

(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~~division. At the limited hearing, the administrative law judge may consider only whether:

(a) The denied request for hearing was filed timely; or

(b) 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 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12
Amended 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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(7).

(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.

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.704
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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 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.

(4) If an employer or insurer receives a written request for hearing or administrative review from a worker, and the request should have been filed with the division, the employer or insurer must promptly forward the request to the division.

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.704
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08
Amended 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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. An agency representative may represent the director in the following categories of hearings:

(a) Hearings held before the a~~A~~dministrative l~~L~~aw j~~J~~udges of the Workers' Compensation Board to determine the correctness of:

(A) An order under ORS 656.052 declaring a person, as defined in ORS 656.005(23), to be a noncomplying employer ("NCE Orders");

(B) A nonsubjectivity determination under ORS 656.052 declaring either that a person, as defined in OR5 656.005(23), is not a subject employer or is not a subject worker ("NSD Orders");

(C) An order assessing a civil penalty under ORS 656.735, 656.740, 656.745(2), or 656.750;

(D) An order under ORS 656.745(1) assessing a civil penalty against an employer or insurer with prior written consent of the Attorney-in-Charge of the Business Activities Section of the Department of Justice; and

(E) An order under ORS 656.254(2) imposing sanctions to enforce medical reporting requirements.

(b) In cases assigned to lay representatives in accordance with subsection (a), above:

(A) Lay representatives are authorized to handle all settlement negotiations related to proposed NCE Orders, NSD Orders, and civil penalty or forfeiture orders. All settlement documents will be reviewed for legal sufficiency by the Department of Justice~~DOJ~~ unless they conform to a form settlement document approved by the Attorney-in-Charge of the Business Activities Section. All settlement documents submitted to the Department of Justice~~DOJ~~ will be accompanied by the original proposed order and any subsequent orders issued by the division~~WCD~~.

(B) If the division~~WCD~~ issues a worker nonsubjectivity denial ~~(WNSD)~~ instead of referring the claim to the assigned claims agent, ~~WCD's~~ the division's lay representative(s) may handle settlement negotiations resulting from that worker nonsubjectivity denial~~WNSD~~. Once a request for hearing has been filed contesting that worker nonsubjectivity denial~~WNSD~~, the lay representative(s) have seven calendar days within which to finalize any pending settlement negotiations and must coordinate settlement discussions with the assigned assistant attorney general or special assistant attorney general, who will assume representation on the case. The assistant attorney general or special assistant attorney general assigned to the case may extend the seven-day time period by authorizing the lay representative(s) to continue settlement negotiations. All settlement documents will be reviewed for legal sufficiency by the attorney assigned to the case before submission to an a~~A~~dministrative l~~L~~aw j~~J~~udge.

(c) Notwithstanding subsections (a) or (b) above, and under ORS 656.704, the Department of Justice~~DOJ~~ will represent ~~WCD~~ the division in all matters pertaining to a claim.

(3) The administrative law judge ~~shall~~ must not allow an agency representative appearing under section (2) of this rule to present legal argument as defined by this rule.

(a) "Legal a~~A~~rgument" includes arguments on:

(A) The jurisdiction of the agency to hear the contested case;

(B) The constitutionality of a statute or rule or the application of a constitutional requirement to an agency; and

(C) The application of court precedent to the facts of the particular contested case proceeding.

(b) "Legal a~~A~~rgument" does not include presentation of motions, evidence, examination and cross-examination of witnesses, or presentation of factual arguments or arguments on:

(A) The application of the statutes or rules to the facts in the contested case;

(B) Comparison of prior actions of the agency in handling similar situations;

(C) The literal meaning of the statutes or rules directly applicable to the issues in the contested case;

(D) The admissibility of evidence; and

(E) The correctness of procedures being followed in the contested case hearing.

(4) If the administrative law judge determines that statements or objections made by an agency representative appearing under section (2) involve legal argument as defined in this rule, the administrative law judge must~~shall~~ provide reasonable opportunity for the agency representative to consult the Attorney General and permit the Attorney General to present argument at the hearing or to file written legal argument within a reasonable time after conclusion of the hearing.

(5) An agency representative appearing under section (2) must read and be familiar with the Code of Conduct for Non-Attorney Representatives at Administrative Hearings dated June 1, 2011, as amended October 1, 2011, which is maintained by the Oregon Department of Justice and available on its website at: http://www.doj.state.or.us/help/pdf/code_of_conduct_oah_contested.pdf~~http://www.doj.state.or.us~~.

Statutory authority: ORS 183.452, 656.704, 656.726(4)
Statutes implemented: ORS 180.220(2), 180.235, 183.452, and 656.704
Hist: Amended 3/10/14 as WCD Admin. Order 14-051, eff. 3/28/14
Amended 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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 and except as stated in section (3) of this 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) When~~re~~ appropriate, the administrative law judge may issue an interim order. An interim order is not subject to review by the director under OAR 436-001-0246.

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

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

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

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

(8) Consolidation of matters under section (6) of this rule or under ORS 656.704(3)(c) is only for the purpose of hearing. The administrative law judge must issue a separate order for matters other than those concerning a claim.

(9) 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.

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

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

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.704
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12
Amended 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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 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 656.340(16), 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.

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.245, 656.247, 656.260, 656.327, 656.340, 656.704
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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. 5a."

(3) Not less than 14 days before the hearing, the respondent(s) and ~~/~~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.

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.704
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08
Amended 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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~~ division 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 was filed.

(d) Exceptions, responses, and replies may be filed in any of the following ways:

(A) By mail, to the following address:

Hearings Coordinator, Operations Section/Policy Team
Workers' Compensation Division
350 Winter Street NE, PO Box 14480
Salem OR 97309-0405

(B) By hand-delivery, to the following address:

Hearings Coordinator, Operations Section/Policy Team
Workers' Compensation Division
350 Winter Street NE, 2nd floor
Salem OR 97301

(C) By fax, to 503-947-7514, 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@oregon.gov. If the exception, response, or reply is in an attachment to the e-mail, the attachment must be in a format that Microsoft Word 2010® (.docx, .doc, .txt, .rtf) or Adobe Reader® (.pdf) can open. Image formats that can be viewed in Internet Explorer® (.tif, .jpg) are also acceptable.

(3) The director may extend the time periods in section (2) upon a party's written request that explains the need for the delay, or on the director's own motion.

(4) 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.

(5) 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.

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

(7) 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.

(8) 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.

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

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.704
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12
Amended 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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.

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.704
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-001-0259 Ex Parte Communication

An ex parte communication is an oral or written communication to the ~~administrator~~ director ~~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.

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.704, OL 2005 ch 26
Hist: Adopted 10/19/05 as WCD Admin. Order 05-061 eff. 1/2/06
Amended 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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 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.

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.704
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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 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 12/1/09 from OAR 436-001-0265 as WCD Admin. Order 09-053, eff. 1/1/10
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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 maximum fee under ORS 656.385(1), as adjusted annually by the same percentage increase, if any, to the average weekly wage defined in ORS 656.211. Before July 1 of each year the director will publish, in Bulletin 356 (available on the division's website), the matrix showing the maximum fee and fee ranges as dollar amounts after the annual adjustment to the statutory maximum fee. Dollar amounts will be rounded to the nearest whole dollar. If the average weekly wage does not change or decreases, the maximum attorney fee awarded under ORS 656.385(1) will not be adjusted for that year.

(d)

Estimated Benefit Achieved	**Professional Hours Devoted (Fees as percentage of adjusted maximum attorney fee under ORS 656.385(1))**		
	1-4 hours	**4.1-8 hours**	**over 8 hours**
$1-$2,000	5.0% - 35.0%	15.0% - 50.0%	40.0% - 62.5%
$2,001-$4,000	10.0% - 40.0%	30.0% - 65.0%	52.5% - 75.0%
$4,001-$6,000	15.0% - 50.0%	40.0% - 72.5%	65.0% - 87.5%
Over $6000	20.0% - 65.0%	52.5% - 90.0%	77.5% - 100.0%

(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; 2015 Or Laws, ch. 521, section 6
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12
Amended 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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 must consider the proportionate benefit to the worker when determining the amount of the fee.

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.262; 2015 Or Laws, ch. 521, section 2
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12
Amended 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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) is in OAR 436-060, Appendix "D" (436-060-0400).

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.262
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-001-0435 Attorney fees awarded under ORS 656.277(1)

(1) Attorney fees assessed under ORS 656.277(1) will be based on a reasonable hourly rate multiplied by the time devoted by the attorney to obtaining the reclassification order.

(2) The director will determine a reasonable hourly rate of no less than $150 per hour and no more than $400 per hour.

(3) When determining the time devoted by the attorney to obtaining the reclassification order, the director may consider time devoted by the attorney to requesting reclassification from the insurer or self-insured employer and investigating issues related to the classification of the worker's claim.

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.277(1); 2015 Or Laws, ch. 521, section 3
Hist: Adopted 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16

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 12/1/09 as WCD Admin. Order 09-053, eff. 1/1/10

Overpayments

436-001-0500 Refund of overpayments

When the director receives a payment in excess of the amount legally due and payable to the director, the director will refund or credit the excess amount. However, when the excess amount is less than $20 and the payment was for an assessment or civil penalty issued under OAR chapter 436 or ORS chapter 656, the director will refund or credit the excess amount only if a written request for refund or credit is received within two years of the date that the excess amount was received by the director.

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.506, 656.612, 656.614, 656.735, 656.745, 656.750, 656.780, and 293.445
Hist: Adopted 12/10/15 as WCD Admin. Order 15-065, eff. 1/1/16

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

In the Matter of the Amendment of Oregon Administrative Rules (OAR): 436-001, Procedural Rules, Rulemaking, Hearings, and Attorney Fees	))))	**ORDER OF ADOPTION No. 15-065**

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 Oct. 15, 2015, 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 website. The Secretary of State included notice of the public hearing in its November 2015 *Oregon Bulletin*. On Nov. 24, 2015, a public hearing was held as announced. The record remained open for written testimony through Nov. 30, 2015.

SUMMARY OF RULE AMENDMENTS

These amended rules:

- Remove definitions of terms that are no longer used in OAR 436-001;
- Require that if a worker sends a written request for hearing or administrative review to an employer or insurer, and the request should have been sent to the division, the employer or insurer must promptly forward the request to the division;
- Provide that, when moneys are received in excess of the amounts due and payable to the director, or when moneys have been received to which the director has no legal interest, the director will refund or credit the excess amount; but for amounts less than $20, when moneys are received for an assessment or a civil penalty, the director will refund the excess amount only upon receipt of a written request from the party entitled to the refund or credit;
- Implement House Bill 2764 (2015) by:
  - Explaining that the director must consider the proportionate benefit to the worker when determining the amount of an attorney fee awarded under ORS 656.262(11); and
  - Establishing criteria for determining a reasonable attorney fee under ORS 656.277(1).

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. 15-065 on this 10th day of December, 2015, to be effective Jan. 1, 2016.**

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.

DATED this 10th day of December, 2015.

/s/ John L. Shilts
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: Workers' Compensation Division e-mail distribution lists, including advisory committee members and testifiers

Secretary of State
Certificate and Order for Filing

PERMANENT ADMINISTRATIVE RULES

FILED
12-10-15 11:40 AM
ARCHIVES DIVISION
SECRETARY OF STATE

I certify that the attached copies are true, full and correct copies of the PERMANENT Rule(s) adopted on Upon filing. by the

Department of Consumer and Business Services, Workers' Compensation Division — 436
Agency and Division — Administrative Rules Chapter Number

Fred Bruyns — (503) 947-7717
Rules Coordinator — Telephone

PO Box 14480, Salem, OR 97309-0405
Address

To become effective 01/01/2016 Rulemaking Notice was published in the November 2015 Oregon Bulletin.

RULE CAPTION

Procedures on refunds and hearing requests; attorney fees; implementation of House Bill 2764 (2015)

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

RULEMAKING ACTION

Secure approval of new rule numbers with the Administrative Rules Unit prior to filing.

ADOPT:
436-001-0435, 436-001-0500

AMEND:
436-001-0003, 436-001-0004, 436-001-0009, 436-001-0019, 436-001-0027, 436-001-0030, 436-001-0170, 436-001-0240, 436-001-0246, 436-001-0259, 436-001-0410, 436-001-0420

REPEAL:

RENUMBER:

AMEND AND RENUMBER:

Statutory Authority:
ORS 656.726(4)

Other Authority:

Statutes Implemented:
ORS chapter 656, as amended by HB 2764 (2015 Or Laws, ch. 521); ORS 293.445

RULE SUMMARY

The agency has amended OAR 436-001, "Procedural Rules, Rulemaking, Hearings, and Attorney Fees," to:
- Remove definitions of terms that are no longer used in OAR 436-001;
- Require that if a worker sends a written request for hearing or administrative review to an employer or insurer, and the request should have been sent to the division, the employer or insurer must promptly forward the request to the division;
- Provide that, when moneys are received in excess of the amounts due and payable to the director, or when moneys have been received to which the director has no legal interest, the director will refund or credit the excess amount; but for amounts less than $20, when moneys are received for an assessment or a civil penalty, the director will refund the excess amount only upon receipt of a written request from the party entitled to the refund or credit;
- Implement House Bill 2764 (2015) by:
  Explaining that the director must consider the proportionate benefit to the worker when determining the amount of an attorney fee awarded under ORS 656.262(11); and
  Establishing criteria for determining a reasonable attorney fee under ORS 656.277(1).

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