

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION



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

Effective July. 1, 2012

TABLE OF CONTENTS

Rule		Page
ORDER OF ADOPTION OF TEMPORARY RULES		iii
436-001-0003	Applicability and Purpose of these Rules (<i>Temporary Rule</i>)	1
436-001-0004	Definitions.....	1
Rulemaking	2
436-001-0005	Model Rules of Procedure For Rulemaking	2
436-001-0009	Notice of Division Rulemaking	2
Hearings	3
436-001-0019	Requests for Hearing.....	3
436-001-0023	Other Filings and Submissions	4
436-001-0027	Timeliness; Calculation of Time.....	4
436-001-0030	Role of the Workers' Compensation Division.....	5
436-001-0170	Duties and Powers of the Administrative Law Judge.....	5
436-001-0225	Scope of Review/Limitations on the Record	6
436-001-0240	Exhibits and Evidence.....	6
436-001-0246	Proposed and Final Orders - Exceptions, Correction, Director Review	7
436-001-0252	Stay of Director and Administrative Review	8
436-001-0259	Ex Parte Communication	8
436-001-0296	Settlements and Dismissals.....	8
436-001-0300	Alternative Dispute Resolution.....	9
Attorney Fees	9
436-001-0400	General provisions and requirements for attorney fees awarded by the director	9
436-001-0410	Attorney fees awarded under ORS 656.385(1) (<i>Temporary Rule</i>)	10
436-001-0420	Attorney fees awarded under ORS 656.262(11).....	11
436-001-0430	Attorney fees awarded under ORS 656.262(12).....	11
436-001-0440	Time within which attorney fees must be paid	11
Certificate and Order for Filing TEMPORARY ADMINISTRATIVE RULES		12
STATEMENT OF NEED AND JUSTIFICATION		13

NOTE: Revisions are marked as follows:

Deleted text has a "strike-through" style, as in

~~Deleted~~

Added text is bold and underlined, as in

Added

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

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
OF THE STATE OF OREGON**

In the Matter of the Amendment of)	ORDER OF ADOPTION
OAR chapter 436, division 001:)	OF TEMPORARY RULES
Procedural Rules, Rulemaking, Hearings, and)	No. 12-054
Attorney Fees		

The Director of the Department of Consumer and Business Services, under rulemaking authority in ORS 656.726(4), and in accordance with the procedure in ORS 183.335(5), temporarily amends OAR chapter 436, division 001.

EXPLANATION

These temporary rules amend the attorney fee matrix in OAR 436-001-0410 to show the maximum fee and fee ranges as percentages of the adjusted maximum fee payable under ORS 656.385(1). The permanent rule had shown the maximum fee and fee ranges as percentages of the state average weekly wage (SAWW). These formulas were accurate for any year in which the SAWW increased or remained the same. However, effective July 1, 2012, the state average weekly wage has gone down, and the percentages in rule 0410 were no longer accurate because attorney fees may only be adjusted based on an increase, if any, in the SAWW. The revised formulas will remain accurate whether the SAWW goes up, goes down, or stays the same in future years. The net effect of the temporary rule is that the maximum attorney fee and fee ranges will remain the same as those in effect from 7/1/2011 through 6/30/2012.

FINDINGS

Failure to act promptly will result in serious prejudice to the public interest.

IT IS THEREFORE ORDERED:

- (1) Temporary amendments to OAR Chapter 436, Division 001, Procedural Rules, Rulemaking, Hearings, and Attorney Fees, are **adopted on this 13th day of June, 2012, to be effective July 1, 2012.**
- (2) The attached Statement of Need and Justification is incorporated by reference.
- (3) The amended rules, the Certificate and Order for Filing, and the Statement of Need and Justification will be filed with the Secretary of State.

Order of Adoption
OAR chapter 436, division 001

- (4) The amended rules, with marked revisions, will be filed with Legislative Counsel in accordance with ORS 183.715 within ten days after filing with the Secretary of State.

Dated this 13th day of June, 2012.

DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES

/s/ John L. Shilts

John L. Shilts, Administrator
Workers' Compensation Division

Under ADA Guidelines, alternate 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 a different format, contact the Workers' Compensation Division at 503-947-7810.

Distribution: WCD: S0, S, U, AT, CE, EG, LU, NM, CI, EC, MR, PW, RE, TT, VR, DC, DO, GR, MD, ND, OT, PY, M2, E-mail lists; and legislators under ORS 183.335(15)

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
PROCEDURAL RULES, RULEMAKING, HEARINGS, AND ATTORNEY FEES**

**OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 001**

436-001-0003 Applicability and Purpose of these Rules (*Temporary Rule*)

(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~~ **July 1, 2012**.

(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 12-1-2009 as WCD Admin. Order 09-053, eff. 1-1-2010

Amended 6-13-2012 as WCD Admin. Order 12-054, eff. 7-1-2012

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.

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

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
PROCEDURAL RULES, RULEMAKING, HEARINGS, AND ATTORNEY FEES**

(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:

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

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
PROCEDURAL RULES, RULEMAKING, HEARINGS, AND ATTORNEY FEES**

(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. If the request for hearing is an attachment to the e-mail, it must be in a format that Microsoft Word 2007[®] (.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 on-line form available on the division's Web site 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

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
PROCEDURAL RULES, RULEMAKING, HEARINGS, AND ATTORNEY FEES**

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 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

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
PROCEDURAL RULES, RULEMAKING, HEARINGS, AND ATTORNEY FEES**

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 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

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
PROCEDURAL RULES, RULEMAKING, HEARINGS, AND ATTORNEY FEES**

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 656.340(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.

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 656.245, 656.247, 656.260, 656.327, 656.340, 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. 5a."

(3) Not less than 14 days before the hearing, the respondent(s)/cross-petitioner(s) must

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
PROCEDURAL RULES, RULEMAKING, HEARINGS, AND ATTORNEY FEES**

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 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.

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
PROCEDURAL RULES, RULEMAKING, HEARINGS, AND ATTORNEY FEES**

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

436-001-0296 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

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
PROCEDURAL RULES, RULEMAKING, HEARINGS, AND ATTORNEY FEES**

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 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.

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
PROCEDURAL RULES, RULEMAKING, HEARINGS, AND ATTORNEY FEES**

- (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) (Temporary Rule)

(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, by bulletin, will publish the matrix showing the maximum fee and fee ranges as dollar amounts; after **the annual adjustment to the statutory maximum fee**ing the fees by the same percentage increase, if any, to the average weekly wage. Dollar amounts will be rounded to the nearest whole dollar. **If the average weekly wage does not change or goes down, the maximum attorney fee awarded under ORS 656.385(1) will remain the same.**

(d)

Estimated Benefit Achieved	Professional Hours Devoted (Fees as percentage of adjusted maximum attorney fee under ORS 656.385(1) 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	
\$1-\$2,000	18.74 <u>5.0%</u>	131.15 <u>35.0%</u>	56.21 <u>15.0%</u>	187.36 <u>50.0%</u>	149.89 <u>40.0%</u>	234.20 <u>62.5%</u>
\$2,001-\$4,000	37.47 <u>10.0%</u>	149.89 <u>40.0%</u>	112.42 <u>30.0%</u>	243.57 <u>65.0%</u>	196.73 <u>52.5%</u>	281.04 <u>75.0%</u>
\$4,001-\$6,000	56.21 <u>15.0%</u>	187.36 <u>50.0%</u>	149.89 <u>40.0%</u>	271.67 <u>72.5%</u>	243.57 <u>65.0%</u>	327.88 <u>87.5%</u>
Over \$6000	74.94 <u>20.0%</u>	243.57 <u>65.0%</u>	196.73 <u>52.5%</u>	337.25 <u>90.0%</u>	290.41 <u>77.5%</u>	374.72 <u>100.0%</u>

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
PROCEDURAL RULES, RULEMAKING, HEARINGS, AND ATTORNEY FEES**

(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

Amended 6-13-2012 as WCD Admin. Order 12-054, eff. 7-1-2012

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
TEMPORARY ADMINISTRATIVE RULES
A Statement of Need and Justification accompanies this form.

I certify that the attached copies* are true, full and correct copies of the TEMPORARY Rule(s) adopted on **June 13, 2012** by the
Date prior to or same as filing date

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

Fred Bruyns 350 Winter St NE, PO Box 14480, Salem OR 97309 503-947-7717
Rules Coordinator Address Telephone

to become effective **July 1, 2012** through **Dec. 27, 2012.**
Date upon filing or later A maximum of 180 days including the effective date.

RULE CAPTION

Attorney fees awarded under ORS 656.385(1) of the Workers' Compensation Law

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.

Secure approval of new rule numbers (Adopted rules) with the Administrative Rules Unit prior to filing

AMEND: OAR 436-001-0003, 436-001-0410

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

Other Auth.:

Stats. Implemented: ORS 656.385

RULE SUMMARY

These temporary rules amend the attorney fee matrix in OAR 436-001-0410 to show the maximum fee and fee ranges as percentages of the adjusted maximum fee payable under ORS 656.385(1). The permanent rule had shown the maximum fee and fee ranges as percentages of the state average weekly wage (SAWW). These formulas were accurate for any year in which the SAWW increased or remained the same. However, effective July 1, 2012, the state average weekly wage has gone down, and the percentages in rule 0410 were no longer accurate because attorney fees may only be adjusted based on an increase, if any, in the SAWW. The revised formulas will remain accurate whether the SAWW goes up, goes down, or stays the same in future years. The net effect of the temporary rule is that the maximum attorney fee and fee ranges will remain the same as those in effect from 7/1/2011 through 6/30/2012.

/s/ John L. Shilts
Authorized Signer

John L. Shilts
Printed name

June 13, 2012
Date

*With this original and Statement of Need, file one photocopy of certificate, one paper copy of rules listed in Rulemaking Actions, and electronic copy of rules. ARC 940-2005

STATEMENT OF NEED AND JUSTIFICATION

A Certificate and Order for Filing Temporary Administrative Rules accompanies this form.

Department of Consumer and Business Services, Workers' Compensation Division
Agency and Division

436

Administrative Rules Chapter Number

In the Matter of: Amendment of OAR 436-001, Procedural Rules, Rulemaking, Hearings, and Attorney Fees

Rule Caption: Attorney fees awarded under ORS 656.385(1) of the Workers' Compensation Law

Statutory Authority: ORS 656.726(4), 656.385

Other Authority:

Stats. Implemented: ORS 656.385

Need for the Temporary Rule: These temporary rule amendments will prevent a conflict between OAR 436-001-0410 and ORS 656.385(1). For attorney fees assessed on or after July 1, 2012, the formulas stated in rule 0410 would be inaccurate and could result in attorney fee awards that are not consistent with the statutory maximum.

Documents Relied Upon, and where they are available: Request for stakeholders' comments on draft temporary rules and resulting written advice; Department of Consumer and Business Services memorandum dated May 8, 2012, documenting the state average weekly wage, as determined by the Oregon Employment Department. These documents are available for public inspection in the Administrator's Office, Workers' Compensation Division, 350 Winter Street NE, Salem, Oregon 97301-3879, upon request and between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday.

Justification of Temporary Rule: Failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned.

The administrative rules governing the calculation of attorney fees should remain consistent with amounts payable under ORS 656.385(1). With the May 15, 2012, announcement that the state average weekly wage has decreased, the rule for calculating attorney fees will be inaccurate effective July 1, 2012. There is not enough time to correct the rule before July 1, 2012, so this temporary rule is necessary to ensure accurate attorney fee awards and avoid potential disputes until a permanent rule can be adopted.

The agency's objectives are to provide clear rules with formulas for determining attorney fees. The formulas should remain consistent with statutory requirements, regardless of fluctuations in the state average weekly wage.

/s/ John L. Shilts

John L. Shilts

June 13, 2012

Authorized Signer

Printed name

Date

Administrative Rules Unit, Archives Division, Secretary of State, 800 Summer Street NE, Salem, Oregon 97310. ARC 945-2005