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ARCHIVES DIVISION  
MARY BETH HERKERT  
DIRECTOR  
  
800 SUMMER STREET NE  
SALEM, OR 97310  
503-373-0701

**NOTICE OF PROPOSED RULEMAKING**  
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 436  
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION

**FILED**  
01/24/2019 9:22 AM  
ARCHIVES DIVISION  
SECRETARY OF STATE

FILING CAPTION: Preparation of exhibits for hearings; distribution of a multilingual help page

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 02/25/2019 11:55 PM

*The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.*

CONTACT: Fred Bruyns  
503-947-7717  
fred.h.bruyns@oregon.gov

350 Winter Street NE  
PO Box 14480  
Salem, OR 97309

Filed By:  
FREDERICK BRUYNS  
Rules Coordinator

HEARING(S)

*Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.*

DATE: 02/19/2019

TIME: 10:00 AM

OFFICER: Fred Bruyns

ADDRESS: Labor and Industries

Building

350 Winter Street NE, Room F

(basement)

PO Box 14480

Salem, OR 97309

SPECIAL INSTRUCTIONS:

Teleconference dial-in number: 213-  
787-0529, access code, 9221262#

NEED FOR THE RULE(S):

The current process for preparing and providing exhibits for hearings within the director's jurisdiction under ORS 656.704(2) (primarily disputes regarding medical services, medical treatment, MCOs, and 656.262(11) penalties and fees) is inefficient and not consistent with the process in all other types of workers' compensation hearings. Currently, Workers' Compensation Division (WCD) staff members, on behalf of the director, prepare an index of all documents relied on in the underlying administrative review and send the index and documents to the parties and the administrative law judge at the Workers' Compensation Board's Hearings Division (WCB Hearings Division). In other types of cases before the WCB Hearings Division, the parties prepare and submit exhibits and indexes as specified in OAR 438-007-0018. Many attorneys, consistent with the process for WCB, also prepare exhibit indexes in director's hearings. This results in duplicative efforts and multiple, inconsistent exhibit indexes that the administrative law judge needs to sort through. Also, many of the cases WCD refers for hearing resolve before the hearing takes place, making the indexed exhibits unnecessary. This proposal is to make WCD's process more consistent with the WCB Hearings

Division process for all other types of workers' compensation hearings.

Workers with limited English proficiency may not be able to understand the content of important documents. Failure by a worker to exercise their appeal rights or to take other action may result in a loss of benefits. Form 5377, "Workers' Compensation Multilingual Help Page," will explain, in several languages, that the document the worker has received is important, that they may lose a right or benefit unless they take action by a deadline given, and that for language assistance regarding the document, they may call the State of Oregon, Ombudsman for Injured Workers.

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**DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:**

Rulemaking advisory committee records and written advice. These documents are available for public inspection upon request to the Workers' Compensation Division, 350 Winter Street NE, Salem, Oregon 97301-3879. Please contact Fred Bruyns, rules coordinator, 503-947-7717, fred.h.bruyns@oregon.gov.

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**FISCAL AND ECONOMIC IMPACT:**

Proposed changes affecting the preparation of exhibits, if adopted, should reduce the time spent on preparation by Workers' Compensation Division staff. Only about 60 hearing requests are filed annually, and the estimated time savings is approximately 30 hours per month. Although this time savings would not result in direct cost savings for the division, it would allow for reallocation of that time to more productive work.

The proposed rules do not specify that the agency will also send Form 5377, "Workers' Compensation Multilingual Help Page," with documents issued by the agency to the worker that are subject to appeal or otherwise describe actions required by a worker to preserve a right or benefit. However, the agency will establish procedures for issuance of Form 5377 to accompany such documents, consistent with the criteria in the proposed rule. The division issues no more than 11,000 documents per year that will be accompanied by Form 5377, and the estimated cost to print is \$440 or less. Additional postage may total \$165, for a total agency cost of \$605. Storage and handling can be absorbed using existing staff and resources.

See additional fiscal and economic impact estimates under "Statement of Cost of Compliance" below.

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**COST OF COMPLIANCE:**

*(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).*

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

a. The agency estimates that the proposed rule amendments will not increase costs to state agencies for compliance with these rules.

b. The agency estimates that proposed rule changes will not increase costs for units of local government for compliance with these rules, except for units of local government that are self-insured employers. See estimated impacts for self-insured employers in part c. below.

c. The agency estimates that proposed rule changes will have the following impacts to the public for compliance with these rules:

Insurers and self-insured employers will expend some additional resources to prepare exhibit indexes for hearings within the director's jurisdiction, if they do not already do so. The increase should be relatively small, as the number of hearing requests within the director's jurisdiction is small in proportion to the number of hearing requests in all workers' compensation cases, for which the insurer or self-insured employer already prepares the exhibit indexes.

Other parties may submit copies of additional documents from the director's record that they will rely upon at hearing, and these documents would also have to be numbered and indexed. Because this proposal, if adopted, will align numbering and indexing for hearings in the director's jurisdiction with other hearings conducted by the Workers' Compensation Board's Hearings Division, the impact on the parties should be small; however, we request input from stakeholders regarding the nature and extent of any impacts.

Insurers, self-insured employers, service companies, and MCOs will assume costs to print and distribute Form 5377, "Workers' Compensation Multilingual Help Page." Most 5377s will be issued by insurers, self-insured employers, and service companies in numbers corresponding to their claim volume, but the volume estimates below include 5377s issued by MCOs.

One workers' compensation carrier estimated that for accepted, disabling claims, Form 5377 will be issued five to seven times per claim, and substantially more often if there are one or more disputes in the claim. The agency will base estimated costs on seven issuances of Form 5377 per accepted disabling claim, by insurers, self-insured employers, service companies, and MCOs. Approximately 20,000 accepted, disabling claims occur in Oregon each year. At seven issuances of Form 5377 per claim, the annual total will be about 140,000. For accepted, nondisabling claims, the agency projects that Form 5377 will be issued two times per claim on average, so for the approximately 42,000 accepted, nondisabling claims issued each year, Form 5377 will be issued about 84,000 times. For about 10,000 denied claims per year, Form 5377 will have to be issued at least once, so to reflect one or more appeals, the agency projects that Form 5377 will be issued two times per denied claim, or 20,000 times per year.

Some of the totals above include Forms 5377 issued by MCOs with certain dispute-related documents. The agency does not have data it can use to accurately project how many 5377s will be issued by MCOs, though the volume is estimated to be several thousand but not more than 10,000 per year. The agency invites testimony from the MCOs regarding anticipated costs.

Accepted/disabling	Accepted, nondisabling	Denied	Total	
Claims counts	20,000	42,000	10,000	72,000
Form 5377 – per claim	7	2	2	
Form 5377 totals	140,000	84,000	20,000	244,000

Costs to print Form 5377 will vary. Although the form may be printed on colored paper, generally at a greater cost, use of colored paper is not required by rule, so these cost estimates are for white paper. For claims processors and MCOs

with relatively few claims, copies may be made in-house on an ink jet printer, laser printer, or photocopier. Professionally printing larger quantities may reduce costs. Costs may range from about \$0.02 to \$0.08 per copy for laser printing. Inkjet printing is probably less commonly used, and it may be more expensive, up to \$0.20 per copy. If on average the cost of copies is \$0.05, the cost system-wide will be about \$12,200, mostly assumed by insurers, self-insured employers, and service companies, but up to \$500 of that amount may be borne by MCOs.

Claims processors and MCOs will assume some handling costs for storing, printing, and mailing Form 5377. There is no data available for the agency to estimate these costs. Although handling costs should be small, some companies may make some related changes to their data programs to automatically generate Form 5377, and therefore make a significant one-time investment.

Some mail pieces may be pushed over mailing weight thresholds by insertion of Form 5377, increasing the postage cost (effective 1/1/2019) from \$0.55 to \$0.70 if one ounce is exceeded, and from \$0.70 to \$0.85 if the mail piece exceeds two ounces. This should be infrequent, but if it is true for 10 percent of mail pieces (and assuming most documents are mailed through the United States Postal Service), the costs overall may be as much as \$3,660 (244,000 divided by 10, times the difference of \$0.15 per unit), mostly assumed by insurers, self-insured employers, and service companies, but up to \$150 may be borne by MCOs. Some additional postage will be required if insertion of Form 5377 necessitates use of a larger envelope (flat) when a standard number 10 envelope would have been sufficient. The agency invites testimony regarding impacts on postage costs.

The agency projects that to the extent affected workers can preserve their rights to benefits by taking certain actions within required time frames, those workers will benefit financially. Also, Form 5377 may indirectly reduce some costs associated with warning letters, suspensions of benefits, and litigation.

Proposed rule amendments unrelated to the preparation of exhibit indexes or the multilingual help page are projected to have no significant impacts on the cost of compliance for any person or organization.

## 2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:

One of the MCOs is a small business. At least one service company (claims processor) is a small business. We estimate that more than 200 attorneys represent the interests of injured workers, and many of these attorneys work for firms that are small businesses.

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:

The agency projects there will be some increased time required for preparation of exhibits for hearings in the director's jurisdiction as described above. The impact should be quite limited, because the proposed changes would align numbering and indexing for hearings in the director's jurisdiction with other hearings conducted by the Workers' Compensation Board's Hearings Division.

The agency projects there will be increased costs for printing and mailing Form 5377, "Workers' Compensation Multilingual Help Page," as described above. The business could print Form 5377 on its own printers or send it to a professional printer.

c. Equipment, supplies, labor and increased administration required for compliance:

The agency projects there will be some increased labor required for preparation of exhibits for hearings in the director's jurisdiction as described above.

The agency projects there will be increased costs for supplies, specifically for printing Form 5377, "Workers' Compensation Multilingual Help Page." Businesses may also have some additional costs for printing, storing, and distributing Form 5377, and for administration, primarily the development of procedures to ensure proper distribution of Form 5377.

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DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

The agency requested volunteers for the rulemaking advisory committees by notice to more than 4,000 stakeholders, including representatives of small businesses. Representatives of small businesses affected by the proposed rules attended the rulemaking advisory committee meetings.

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WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

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RULES PROPOSED:

436-001-0003, 436-001-0004, 436-001-0005, 436-001-0009, 436-001-0027, 436-001-0240, 436-001-0600, 436-001-0610

AMEND: 436-001-0003

RULE SUMMARY: Amended rule 0003 includes:

- Exception of rule 0030 from the statement that "these rules do not apply to hearings requested under ORS 656.740";
- A new section describing when two new rules are effective; and
- Minor wording changes and reorganization to enhance clarity.

CHANGES TO RULE:

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 the date the rules are effective.¶¶

(2) OAR 436-001-0019 through 436-001-0300~~296~~ establish supplemental procedures for hearings on matters within the director's jurisdiction.¶¶

(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) ¶Except for OAR 436-001-0030, these rules do not apply to hearings requested under ORS 656.740.¶¶

(c) These rules apply to hearings held on or after the date the rules are effective.¶¶

(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 on or after the date the rules are effective, 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 the date the rule is effective, regardless of the date ~~on which~~ the payment was received.¶~~

(5) OAR 436-001-0600 and 436-001-0610 apply on and after the date the rules are effective.¶

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

Statutory/Other Authority: ORS 656.726(4)

Statutes/Other Implemented: ORS 656.704, ORS 183

AMEND: 436-001-0004

RULE SUMMARY: Amended rule 0004 has minor wording changes to enhance clarity.

CHANGES TO RULE:

436-001-0004

Definitions ¶¶

(1) Unless a term is ~~specifically defined elsewhere~~ defined in these rules or the context otherwise requires, the definitions of ORS chapter 656 and ORS 183.310 are ~~hereby~~ incorporated by reference and made a part of these rules.¶¶

(2) For the purpose of 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) "Board" means the Workers' Compensation Board and includes its Hearings Division.¶¶

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

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

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

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

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

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

(i) "Party" refers to a party to the hearing and 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) "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.

Statutory/Other Authority: ORS 656.726(4)

Statutes/Other Implemented: ORS 656.704, ORS 183

AMEND: 436-001-0005

RULE SUMMARY: Amended rule 0005 refers to the "division" instead of "Workers' Compensation Division," because "division" is defined in rule 0004.

CHANGES TO RULE:

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 at [http://arcweb.sos.state.or.us/pages/rules/oars\\_100/oar\\_137/137\\_001.html](http://arcweb.sos.state.or.us/pages/rules/oars_100/oar_137/137_001.html).}

Statutory/Other Authority: ORS 656.726(4)

Statutes/Other Implemented: ORS 183.325 - 183.410

AMEND: 436-001-0009

RULE SUMMARY: Amended rule 0009 has minor wording changes to enhance clarity.

CHANGES TO RULE:

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) A person or organization may elect to receive email or hard-copy notification of proposed rulemaking actions ~~conducted by~~ of the division.¶¶

(a) A person or organization may elect to subscribe to the division's email notification service at <https://service.govdelivery.com/accounts/ORDCBS/subscriber/new>.¶¶

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

Rules Coordinator¶¶

Workers' Compensation Division¶¶

P.O. Box 14480¶¶

Salem, OR 97309-0405

Statutory/Other Authority: ORS 656.726(4)

Statutes/Other Implemented: ORS 183.335, 84.022

AMEND: 436-001-0027

RULE SUMMARY: Amended rule 0027 had included a requirement that 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; this provision will be relocated to rule 0610.

CHANGES TO RULE:

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 emailed, 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/Other Authority: ORS 656.726(4)

Statutes/Other Implemented: ORS 656.704

AMEND: 436-001-0240

RULE SUMMARY: Amended rule 0240 revises the process for preparation of documents for hearings within the director's jurisdiction to be consistent with Workers' Compensation Board rule, OAR 438-007-0018:

- The Workers' Compensation Division will provide the parties and the administrative law judge with copies of all documents in the director's record, but the division will no longer number and index the documents;
- The insurer or self-insured employer must provide the other parties legible copies of all documents, from the director's record, that the insurer or self-insured employer will rely on at hearing; the documents must be numbered and indexed as provided in OAR 438-007-0018(1); and
- Other parties must provide legible copies of any additional documents, from the director's record, that they will rely on at hearing; the documents must be numbered and indexed as provided in OAR 438-007-0018(2).

CHANGES TO RULE:

436-001-0240

~~Exhibits and Evidence~~The Record ¶

~~(1) A~~Not more than 30 days after referral ofing a request for hearing to the board,~~but not less than 28 days before the hearing,~~ the division will provide the parties and the administrative law judge with copies of all documents ~~relied on in the underlying action or order, with an index.~~¶

~~(2) If new evidence is allowed under OAR 436-001-0225:~~¶

~~(a) in the director's record.~~¶

~~(2) Not less than 14~~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~~rector's record, ~~whichever is later, the insurer or self-insured employer must provide the other parties legible copies of all documents, from the director's representative, if the director has filed an entr~~cord, that the insurer or self-insured employer will ~~rely on~~ a ~~pppearance. The exhibit hearing. The documents must be mark~~numbered and include a supplemental index, ~~numbe~~ded as provided in OAR 438-007-0018(1).¶

~~(3) Not less than 14 days before to coincide in chronological order with the division's exhibits and exhibit list. For example, an exhibit that is chronologically between the division's exhibit~~he hearing, or within seven days of receipt of the insurer's or self-insured employer's documents ~~5 and 6 would be marked as "Ex. 5a."~~¶

~~(b) Not less than seven days before the hearing, the respondent(s) and cross-petitioner(s)~~index, ~~whichever is later, the other parties must provide legible copies of any additional exhibits~~documents, from the director's record, that they will ~~offer~~rely on at hearing ~~to the ot~~. The documents must be numbered and indexed as provided in OAR 438-007-0018(2).¶

~~(4) Ther parties, the administrative law judge, and~~ may include with their documents and indexes documents that are not included in the director's representative, ~~if the director has filed an entry~~cord only if new evidence is allowed under OAR 436-001-0225.¶

~~(5) Before of~~r appearance. ~~The exhibits must be marked~~t the hearing, the parties must submit their documents and indexed ~~ins~~to the same manner as provided in subsection (2)(a)~~administrative law judge as provided in OAR 438-007-0018 or as otherwise required by the administrative law judge.~~¶

~~(36) Unless withdrawn, all exhibit~~documents offered ~~by a party will be included in the hearing file, whether or not they are admitted into the evidentiary record~~ by the administrative law judge.

Statutory/Other Authority: ORS 656.726(4)

Statutes/Other Implemented: ORS 656.704

ADOPT: 436-001-0600

RULE SUMMARY: New rule 0600 requires insurers, self-insured employers, service companies, and managed care organizations (MCOs) to send Form 5377, "Workers' Compensation Multilingual Help Page," along with any document required to be sent to a worker by OAR chapter 436, if the document includes:

- Appeal rights;
- A deadline for action required to obtain or preserve a right or benefit, including dates of required medical examinations or vocational evaluations; or
- Notice of action required to prevent or reverse a suspension or reduction of benefits.

CHANGES TO RULE:

436-001-0600

Multilingual Help Page

(1) An insurer, self-insured employer, service company, or managed care organization (MCO) that sends a document to a worker that is required by OAR chapter 436 must simultaneously send Form 5377, "Workers' Compensation Multilingual Help Page," if the document includes:¶

(a) Appeal rights:¶

(b) A deadline for action required to obtain or preserve a right or benefit, including dates of required medical examinations or vocational evaluations; or¶

(c) Notice of action required to prevent or reverse a suspension or reduction of benefits.¶

(2) Form 5377 is published under Bulletin 379.¶

(3) Bulletin 379 lists the notices described by subsections (1)(a) through (c).¶

(4) Failure to send Form 5377 with a document as required by this rule does not affect the validity of the document, but may subject the insurer, self-insured employer, service company, or MCO to civil penalties under ORS 656.745.

Statutory/Other Authority: ORS 656.726(4), ORS 656.260

Statutes/Other Implemented: ORS 656.726(4), ORS 656.260

ADOPT: 436-001-0610

RULE SUMMARY: New rule 0610 contains the provision, formerly in rule 0027, that 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.

CHANGES TO RULE:

436-001-0610

Duty to Forward Misdirected Request

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/Other Authority: ORS 656.726(4)

Statutes/Other Implemented: ORS 656.704