



Oregon

Kate Brown, Governor

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Workers' Compensation Division
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Jan. 19, 2018

Proposed Changes to Workers' Compensation Rules Caption: Procedural rules governing workers' compensation rulemaking, contested case hearings, and attorney fees

The Workers' Compensation Division proposes changes to OAR 436-001, "Procedural Rules, Rulemaking, Hearings, and Attorney Fees," and has scheduled a public hearing.

- When is the hearing?** Feb. 21, 2018, 10 a.m.
- Where is the hearing?** Labor & Industries Building
350 Winter Street NE, Room F (basement)
Salem, Oregon 97301
- How can I make a comment?** Come to the hearing and speak, send written comments, or do both. Send written comments to:
Email – fred.h.bruyns@oregon.gov
Fred Bruyns, rules coordinator
Workers' Compensation Division
350 Winter Street NE (for courier or in-person delivery)
PO Box 14480, Salem, OR 97309-0405
Fax – 503-947-7514
- The public may also listen to the hearing or testify by telephone: Dial-in number is 1-213-787-0529; Access code is 9221262#.

The closing date for written comments is Feb. 26, 2018.

How can I get copies of the proposed rules and view testimony?

On the Workers' Compensation Division's website –
<http://wcd.oregon.gov/laws/Pages/proposed-rules.aspx>.
Or call 503-947-7717 to get free paper copies

Questions?

Contact Fred Bruyns, 503-947-7717.

Summary of proposed changes:

- Amended rule 0003 eliminates specific effective dates for the rules in division 001; each rule has its own effective date listed after its substantive text.
- Amended rule 0004 incorporates into its definitions the definitions in ORS chapter 656 and ORS 183.310, unless a term is specifically defined elsewhere in division 001 or the context requires otherwise.
- Amended rule 0005 deletes unnecessary punctuation.
- Amended rule 0009 has an updated address for sending mail to the Workers' Compensation Division's rules coordinator and deletes unnecessary punctuation.
- Amended rule 0019 clarifies methods for requesting hearings; it has updated mailing, delivery, and website addresses and fax number. The rule also clarifies the director's authority to withdraw a matter referred for hearing.
- Rule 0023 has not been revised but is published for public review and comment.
- Amended rule 0027 has a minor typographical correction.
- Amended rule 0030 has some minor, clarifying wording changes, plus an updated website address.
- Amended rule 0170 deletes unnecessary punctuation and eliminates a statement that an administrative law judge (ALJ) may conduct a hearing by telephone if all parties agree; an ALJ has this discretion notwithstanding this provision, making the provision unnecessary.
- Amended rule 0225 clarifies that when an ALJ reviews matters within the director's jurisdiction de novo, new evidence may be admitted and considered.
- Amended rule 0240 –
 - Changes certain time frames, consistent with time frames in OAR 438-007-0018 –
 - Extends the time allowed for the Workers' Compensation Division to provide documents relied on in the underlying action or order to the parties and the ALJ, from within 21 days after referral for hearing to the Workers' Compensation Board to not less than 28 days before the hearing;
 - Changes the time limit for the petitioner to provide additional exhibits that will be offered at hearing from 28 days to 14 days before the hearing; and
 - Changes the time limit for the respondent and cross-petitioner to provide additional exhibits that will be offered at hearing from 14 days to seven days before the hearing; and
 - Clarifies that time frames for provision of additional exhibits that will be offered at hearing are contingent on new evidence being allowed under OAR 436-001-0225; and
 - Eliminates a provision allowing an ALJ to accept a photograph or description of an object or real evidence; an ALJ has this discretion notwithstanding rule 0240, and this provision is unnecessary.
- Amended rule 0246 –
 - Has amended address information for filing exceptions, responses, and replies; and
 - Clarifies that the time period for filing exceptions may not be extended.
- Amended rule 0252 streamlines provisions for stay of director review, administrative review, or referral of a matter; the director may stay the review or referral if there is another pending matter concerning a claim that may affect the outcome of the matter within the director's jurisdiction.
- Rule 0259 has not been revised but is published for public review and comment.
- Amended rule 0296 simplifies language.
- Amended rule 0400 clarifies and adds some general provisions and requirements for attorney fees awarded by the director, including that:

Notice of proposed rulemaking hearing

- The director may request the attorney to submit additional information to support or clarify the statement of hours;
 - The director will presume the attorney spent 1-2 hours on the case if the attorney does not submit a statement of hours or other information requested by the director before an order is issued; and
 - The factors the director may consider in assessing a reasonable attorney fee have been made consistent with the rules of the Workers' Compensation Board, at OAR 438-015-0010(4).
- Amended rule 0410 includes website addresses for division bulletins relevant to attorney fees and deletes unnecessary punctuation.
 - Rule 0420 has not been revised but is published for public review and comment.
 - Amended rule 0430 deletes unnecessary punctuation.
 - Amended rule 0435 increases the minimum hourly rate for fees awarded under ORS 656.277(1) from \$150 to \$275 per hour and simplifies language.
 - Amended rule 0440 reduces the time allowed for payment of assessed attorney fees from within 30 days to within 14 days of the date the order awarding the fees becomes final, consistent with OAR 438-015-0082.
 - Rule 0500 has not been revised but is published for public review and comment.

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

Need for the Rule(s): These proposed rule amendments are needed to eliminate obsolete provisions, to align the rules with current practice, to enhance or clarify provisions affecting hearings, and to provide appropriate fees for attorneys' services.

Documents Relied Upon, and where they are available: Rulemaking advisory committee records. 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.

Fiscal and Economic Impact: The agency projects that proposed rule changes will not produce a significant fiscal or economic impact for the agency. Possible effects on other state agencies, units of local government, and the public are described below.

Statement of Cost of Compliance:

- 1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):**
 - a. The agency estimates that proposed rule changes will present no significant costs to state agencies for compliance with these rules.
 - b. The agency estimates that proposed rule changes will present no significant costs to units of local government for compliance with these rules, with the exception of units of government that are self-insured employers or members of self-insured employer groups. See the impacts on self-insured employers and groups under the "public" below.
 - c. The agency estimates that proposed rule changes will increase fees awarded to attorneys for obtaining an order from the director that reclassifies a claim from nondisabling to disabling. The range for the hourly rate is currently \$150 to \$400 per hour, and the proposed rules increase the

range to \$275 to \$400 per hour. We estimate this will increase attorney fee awards under ORS 656.277(1) by \$125 to \$250. Most awards have been for one to two hours at \$150 per hour. The agency ordered 26 such awards in 2017, so the total estimated annual fiscal impact is \$3250 to \$6500. This represents an economic benefit for attorneys at a corresponding cost to insurers, self-insured employers, and self-insured employer groups.

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:

The small businesses primarily affected by proposed rule changes are attorneys. Approximately 200 attorneys represent the interests of workers, and most of these attorneys work for firms that are small businesses.

Additional businesses affected by proposed rule changes are workers' compensation insurers and self-insured employers, and these companies are typically large businesses. However, individual members of self-insured employer groups that join together for the purpose of self-insuring are small businesses as defined by ORS 183.310(10). Oregon has one private self-insured employer group that has for-profit member businesses – 39 members are in the group. Oregon employers may be affected indirectly if any increased insurer costs influence the cost of workers' compensation premiums; Oregon has approximately 115,000 employers, and at least 90 percent 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 no increased costs for reporting, recordkeeping, professional services, or other administrative activities required for compliance by small businesses.

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

The agency projects there will be no increased costs for equipment, supplies, labor, or increased administration required for compliance by small businesses.

How were small businesses involved in the development of this rule? The agency sent its request for advisory committee members and issues to more than 3,500 people, including representatives of small businesses. One attorney from a firm that is a small business attended the rulemaking advisory committee meeting.

Administrative Rule Advisory Committee consulted?: Yes.

Mailing distribution:

US Mail, WCD - S, U, AT, CE, EG, NM, CI, EC, MR, PW, RE, VR, DC, DO, GR, MD, OT, PY | agency email lists

Full text of proposed rules with marked revisions is available on the Workers' Compensation Division's website: <http://wcd.oregon.gov/laws/Pages/proposed-rules.aspx>, or request a copy (at no cost to you) from Fred Bruyns, 503-947-7717.



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

Proposed

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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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**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION**

***Proposed* PROCEDURAL RULES, RULEMAKING, HEARINGS, AND ATTORNEY FEES**

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 Jan. 1, 2010](#).

(2) OAR 436-001-0019 through 436-001-0300 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) 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 Jan. 1, 2016](#).

(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~~ on or after [the date the rules are effective 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 [the date the rule is effective 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. Order 15-065, eff. 1/1/16

[Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx](#)

See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf

436-001-0004 Definitions

(1) [Unless a term is specifically defined elsewhere 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) [The following definitions apply to](#) ~~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.

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- (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.
- (f) "Filed" means mailed, faxed, e-mailed, 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" 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.

~~(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. Order 15-065, eff. 1/1/16
 Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx
 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 [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 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
 Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx
 See also the *Index to Rule History*: http://www.cbs.state.or.us/wcd/policy/rules/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:

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- (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 the division.

(a) A person or organization may elect to subscribe to the division's e-mail 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, ~~Operations Section/Policy Team~~
Workers' Compensation Division
~~350 Winter Street NE, P.O.~~ 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. Order 15-065, eff. 1/1/16

Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx

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 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, [available on the division's website at http://wcd.oregon.gov/forms/Pages/forms.aspx](http://wcd.oregon.gov/forms/Pages/forms.aspx). 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;

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- (h) The division's 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:
- ~~WCD Hearings~~~~Hearings Coordinator, Operations Section/Policy Team~~
Workers' Compensation Division
~~350 Winter Street NE, P.O.~~ Box 14480
Salem, OR 97309-0405
- (b) By hand-delivery, to the following address:
- ~~WCD Hearings~~~~Hearings Coordinator, Operations Section/Policy Team~~
~~Workers' Compensation Division~~
350 Winter Street NE, 2nd floor
Salem, OR 97301
- (c) By fax, to 503-947-7511⁴, 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 request for hearing is an attachment to the e-mail, it 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.
- (e) By using the online form, available on the division's website [at http://wcd.oregon.gov/forms/Pages/request-a-hearing.aspx](http://wcd.oregon.gov/forms/Pages/request-a-hearing.aspx).
- (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 ~~requesting~~ 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 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

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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

Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx

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)

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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

Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx

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) ~~An agency representative may represent the director in H~~hearings held before the administrative law judges of the ~~Workers' Compensation B~~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 ORS 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 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 will be accompanied by the original proposed order and any subsequent orders issued by the division.

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- (B) If the division issues a worker nonsubjectivity denial instead of referring the claim to the assigned claims agent, the division's lay representative(s) may handle settlement negotiations resulting from that worker nonsubjectivity denial. Once a request for hearing has been filed contesting that worker nonsubjectivity denial, 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 administrative law judge.
- (c) Notwithstanding subsections (a) or (b) above, and under ORS 656.704, the Department of Justice will represent the division in all matters pertaining to a claim.
- (3) The administrative law judge must not allow an agency representative appearing under section (2) of this rule to present legal argument as defined by this rule.
- (a) "Legal argument" 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 argument" 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 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,

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2011, as amended October 1, 2011, which is maintained by the Oregon Department of Justice and available on its website at: https://www.doj.state.or.us/wp-content/uploads/2017/06/code_of_conduct_oah_contested.pdf ~~http://www.doj.state.or.us/help/pdf/code_of_conduct_oah_contested.pdf~~.

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. Order 15-065, eff. 1/1/16
~~Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx~~
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 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 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

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Amended 12/10/15 as WCD Admin. Order 15-065, eff. 1/1/16

[Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx](#)

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) ~~of this rule and, the administrative law judge reviews all matters within the director's jurisdiction de novo~~, unless otherwise provided by statute or administrative rule:-

(a) The administrative law judge reviews all matters within the director's jurisdiction de novo; and

(b) New evidence may be admitted and considered.

(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

[Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx](#)

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 a~~After referral of ~~the~~ 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 copies of all documents ~~that were~~ relied ~~up~~ upon in the underlying action or order, with an index.

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

(a) Not less than ~~1428~~ 1428 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.

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For example, an exhibit that is chronologically between the division's exhibits 5 and 6 would be marked as "~~Exhibit 5a~~" or "Ex. 5a."

~~(b3)~~ Not less than ~~seven~~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 subsection (2)(a).

~~(34)~~ 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. Order 15-065, eff. 1/1/16

Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx

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 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:

~~WCD Hearings~~ ~~Hearings Coordinator, Operations Section/Policy Team~~

Workers' Compensation Division

~~350 Winter Street NE, P.O. Box 14480~~

Salem, OR 97309-0405

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

~~WCD Hearings~~ ~~Hearings Coordinator, Operations Section/Policy Team~~

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350 Winter Street NE, 2nd floor
Salem, OR 97301

(C) By fax, to 503-947-7511⁴, 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 [for a party to file a response, reply, or argument in section \(2\)](#) upon [the](#) party's written request that explains the need for the delay, or on the director's own motion. [The time period for filing exceptions may not be extended.](#)

(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 time frames.

(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. Order 15-065, eff. 1/1/16

[Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx](#)

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

[The director may stay director review, administrative review, or referral of a matter if there is another pending matter concerning a claim that may affect the outcome of the matter within the director's jurisdiction.](#)

~~(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.~~

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~~(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

Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx

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 director 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. Order 15-065, 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 ~~before~~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.

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(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

Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx

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

In addition to the specific provisions in OAR 436-001-0410 through 436-001-0435, the following provisions apply when the director awards an attorney fee:

(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:

(a) 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.~~

(b) The director may request the attorney to submit additional information to support or clarify the statement of hours.

(c) If the attorney does not submit a statement of hours or other information requested by the director before an order is issued, 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 for legal services.

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

(c) The value of the interest involved.

(d) The skill of the attorneys and the quality of representation.

(e) The nature of the proceedings.

(f) The benefit secured for the represented party/worker.

(g) The risk in a particular case that an attorney's efforts may go uncompensated and the contingent nature of the practice.

(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

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Hist: Amended and renumbered 12/1/09 from OAR 436-001-0265 as WCD Admin. Order 09-053, eff. 1/1/10
Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx
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 at http://wcd.oregon.gov/Bulletins/bul_356.pdf), 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.”*~~[Deleted quotation marks; italicized text.]~~ In addition, the following may be considered in determining the value of the results achieved or the benefit to the worker:

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- (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 ([as published in Bulletin 124, available on the division's website at http://wcd.oregon.gov/Bulletins/bul_124.pdf](http://wcd.oregon.gov/Bulletins/bul_124.pdf)) 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. Order 15-065, eff. 1/1/16
 Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx
 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. Order 15-065, 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 "C" ([OAR 436-060-0400](http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf)).

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
 Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx
 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 ~~awarded~~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 ~~\$275~~\$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. Order 15-065, eff. 1/1/16
 Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx

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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 1430 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
[Amended xx/xx/xx as WCD Admin. Order 18-xxx, eff. xx/xx/xx](#)

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