### Agenda

**Rulemaking Advisory Committee**

**Workers’ Compensation Division Rules**  
OAR chapter 436, division 001  
Procedural Rules, Rulemaking, Hearings, and Attorney Fees

<table>
<thead>
<tr>
<th>Type of meeting:</th>
<th>Rulemaking advisory committee</th>
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| Date, time, & place: | Nov. 27, 2017, 1:30 to 4:30 p.m.  
Room F (basement), Labor and Industries Building  
350 Winter Street NE, Salem, Oregon  
Teleconference: 213-787-0529 | Access code, 9221262# |
| Facilitators: | Fred Bruyns, Cathy Ostrand-Ponsioen, Workers’ Compensation Division |
| 1:30 to 1:45 | Welcome and introductions; meeting objectives |
| 1:45 to 3:00 | Discussion of issues — see attachment. |
| 3:00 to 3:15 | Break |
| 3:15 to 4:15 | Discussion of issues on agenda continued, and request for new issues |
| 4:15 to 4:30 | Summing up – next steps – thank you! |

**Attached:**  
Issues document  
Draft rules  
**Bulletin 285** and **Form 2839** | Bulletin 356
ISSUE #1
Rule: 001-0019(6)
001-0252(1)

Issue and background:
The term “moot” is used in two places in the rules, but it is a legal concept that applies to courts, not administrative agencies. See the excerpt below from a recent Court of Appeals case, *JRP Construction Enterprises, Inc. v. DCBS*, 269 Or App 372, 375 (2015):

“The order on review does not disclose what the director meant by the term ‘moot.’ If the director dismissed insurer’s request for review under the jurisdictional doctrine of mootness that governs the courts, the director erred. “‘[M]ootness’ is a term of art concerning the authority of the courts to exercise the judicial power conferred by Article VII (Amended) of the Oregon Constitution and ***, as an aspect of justiciability, it applies only to the courts and not to local governments or administrative agencies.” *Thunderbird Hotels, LLC v. City of Portland*, 218 Or App 548, 556, 180 P3d 87 (2008) (emphasis added); *see also Wallace v. State ex rel PERS*, 249 Or App 214, 220, 275 P3d 997, rev den, 352 Or 342 (2012) (noting agency’s concession “that the concept of mootness does not apply to administrative agencies”).”

Alternatives:

- Come up with alternative wording that expresses the same meaning. For example:
  - “There is no longer an actual and substantial controversy between the parties”
  - “The action will not have a practical effect on the rights of the parties”
- Keep the wording of the rule general, such as: “The director may withdraw a matter that has been referred if the director determines the matter is not appropriate for hearing at that time.”
- Leave the language as-is

Fiscal Impacts, including cost of compliance for small business:
Recommendation:

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ISSUE #2
Rule: 001-0170(11)

Issue and background:
In many of the cases that the division refers to the Hearings Division there is no “hearing,” either in-person or by telephone; rather, they are decided on the written record.

Alternatives:
• Amend the rule to allow for a matter to be reviewed on the written record, without a hearing
• Remove section (11) from the rule, so the ALJs follow the same practice for all hearings
• No change

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

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ISSUE #3
Rule: 001-0225(1)
001-0240(2) & (3)

Issue and background:
It has not been clear to some parties and ALJs that in a de novo review, new evidence may be offered and admitted at hearing. Amending 001-0225(1) to specify that new evidence may be admitted and considered may help clarify.
Similarly, 001-0240(2) and (3), which allow parties to submit additional exhibits, have been interpreted to conflict with the limitation on new evidence in a substantial evidence review.

**Alternatives:**

- Amend 001-0225 to clarify that new evidence may be admitted and considered in a de novo review
- Amend 001-0240 to clarify that additional exhibits may be offered only if new evidence is admissible
- No change

**Fiscal Impacts, including cost of compliance for small business:**

**Recommendation:**

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**ISSUE #4**
**Rule:** 001-0240(1)

**Issue and background:**
Twenty-one days after referral of the request for hearing to the board has not been enough time for the division to prepare and send the exhibits to the parties and ALJ. The division’s understanding is that the parties and ALJs do not need the exhibits so early in the process, but we would like to hear from the stakeholders on this issue.

**Alternatives:**

- Allow WCD 28 days before the hearing to provide exhibits; allow the petitioner and respondent 14 and 7 days before the hearing, respectively, to submit additional documents. These timeframes are consistent with OAR 438-007-0018 (Exchange and Admission of Exhibits at Hearing).
- Another time frame
Issues document
OAR 436-001
11/15/17

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

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ISSUE #5
Rule: 001-0240(5)

Issue and background:
This section allows an accurate description or photograph of an object or real evidence to be substituted for the object or real evidence. There does not appear to be a corresponding rule in chapter 438. Is this language needed in the director’s rules, or should the ALJs follow their usual process?

Alternatives:

• Remove section (5); ALJs follow same process for all hearings

• No change

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

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ISSUE #6
Rule: 001-0246(3)

Issue and background:
The division has received requests to extend the time periods for submitting exceptions, responses, and replies after the time has already expired. If an extension is granted, it should be granted before the time period runs.

Alternatives:

- Insert “before they expire” in section (3)
- No change

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

ISSUE #7
Rule: 001-0252(2) and (3)

Issue and background:
These provisions regarding stay of director and administrative review were added to the rule in 2005, when ORS 656.704 was amended to move WCD’s hearings from the Office of Administrative Hearings to the Hearings Division. These provisions are not used very often, if at all. Should they be made more general (see 1st alternative below)?

Alternatives:

- Replace (2) and (3) with something like: “A matter may be stayed if other pending matters will affect the outcome, or on request of the parties.”
- No change

Fiscal Impacts, including cost of compliance for small business:

Recommendation:
ISSUE #8
Rule: 001-0400(2)

Issue and background:
The current rule suggests, but does not require, that an attorney submit a statement of the number of hours spent on a case; itemization is not required. In some cases, the reviewers have found that further information would be helpful in determining a reasonable fee.

Alternatives:

- Amend the rule to require the attorney to provide further information upon request of the WCD reviewer
- No change

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

ISSUE #9
Rule: 001-0400(3)

Issue and background:
The wording of the list of factors for the director to consider in assessing a reasonable fee is slightly different than the wording of the list of factors in the corresponding rule in chapter 438. Should the 436 rule, subsections (a)-(h), be amended to match the 438 rule, subsections (a)-(h)?

OAR 438-015-0010(4) provides:

In any case where an Administrative Law Judge or the Board is required to determine a reasonable attorney fee, the following factors shall be considered:
(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;
(e) The nature of the proceedings;
(f) The benefit secured for the represented party;
(g) The risk in a particular case that an attorney’s efforts may go uncompensated and the contingent nature of the practice; and
(h) The assertion of frivolous issues or defenses.

Alternatives:

- Make the wording consistent with the 438 rule
- No change

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

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ISSUE #10
Rule: 001-0435(2)

Issue and background:
WCD has received feedback that the minimum hourly rate of $150 for an attorney fee at reclassification is too low.

Alternatives:
• Increase the minimum hourly rate to $275, which is the hourly rate for an attorney’s actual time spent during an interview or deposition under ORS 656.262(14)(a), under OAR 438-015-0033(1)

• Instead of a range, set a flat rate

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

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ISSUE #11
Rule: 001-0440

Issue and background:
The board recently changed its rule to require assessed attorney fees to be paid within 14 days, rather than 30 days, of the date the order becomes final. See OAR 438-015-0082(2). Should WCD change its rule to be consistent?

Alternatives:

• Amend the rule to require assessed fees to be paid within 14 days of the date the order becomes final, consistent with the requirement in chapter 438

• No change

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

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ISSUE #12
Rule: Division 001 in general

Issue and background: Are there other issues or topics that are not included in the 001 rules but should be, or that are included in the 001 rules but are inconsistent with the rules in chapter 438?

Alternatives:

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Fiscal Impacts, including cost of compliance for small business:

Recommendation:

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ISSUE #13
Bulletin 285 (attached) / Form 2839 (attached) / online request for hearing form

Issue and background: The information in the bulletin and forms will need to be reviewed for needed updates based on rule changes and recent organizational changes that have been made within the division.

Alternatives:

- Update position title (there is no longer a “Hearings Coordinator”); update the mailing address; update the fax number; update the phone number
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Fiscal Impacts, including cost of compliance for small business:

Recommendation:

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ISSUE #14 Bulletin 356 (attached)

Issue and background:
This issue is a placeholder in case any changes to the rules impact any information in the bulletin.

Alternatives:

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Fiscal Impacts, including cost of compliance for small business:

Recommendation:

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ISSUE #15 Appeal rights

Issue and background:
Templates used by WCD and the Hearings Division may need to be updated as a result of changes to the rules.

Alternatives:

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Fiscal Impacts, including cost of compliance for small business:

Recommendation:

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Housekeeping

001-0003 Replace specific effective dates in the rule text with the generic “effective date”

001-0004 Revise the introductory language to be consistent with other rule divisions in chapter 436

001-0019(3) Update position title, mailing address, and fax number
Add URL for online form

001-0030(2)(a) Change references to “Workers’ Compensation Board” to “board,” which is defined in 001-0005

001-0030(5) The URL for the Code of Conduct for Non-Attorney Representatives has changed

001-0170(1) Remove commas

001-0246(2)(d) Update position title, mailing address, and fax number

001-0400(2) “which the director” should be “that the director” Add

001-0410(1)(c) URL for Bulletin 356, “Attorney Fees”

001-0410(3)(b) Add reference to the Addendum to Bulletin 124, where the dollar amounts for the vocational assistance fee schedule are listed

Throughout Reformat paragraphs (numbering and indenting) to be consistent with other rule divisions in chapter 436
Blank page for two-sided printing
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 their effective date 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 their effective date 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 their effective date 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 its effective date Jan. 1, 2016, regardless of the date on which the payment was received.

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

436-001-0004  Definitions

(1) Unless a term is specifically defined elsewhere in these rules or the context otherwise requires, the definitions of ORS chapter 656 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.
(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.

(32) 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
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

Rulemaking

436-001-0005 Model Rules for Rulemaking

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

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

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 183.325 through 183.410
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12
See also the Index to Rule History: http://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:
(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, PO Box 14480
Salem OR 97309-0405

Statutory authority: ORS 656.726 (4)
Statutes implemented: ORS 183.335 and 84.022
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12
Amended 12/10/15 as WCD Admin. 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

Hearings

436-001-0019 Requests for Hearing

(1) A request for a 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. 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 file number; and

(i) The reason for requesting a hearing.

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

(a) By mail, to the following address:
   Hearings Coordinator, Operations Section/Policy Team
   Workers’ Compensation Division
   350 Winter Street NE, PO Box 14480
   Salem OR 97309-0405

(b) By hand-delivery, to the following address:
   Hearings Coordinator, Operations Section/Policy Team
   Workers’ Compensation Division
   350 Winter Street NE, 2nd floor
   Salem OR 97301

(c) By fax, to 503-947-7514, if the document transmitted indicates that it has been delivered by fax, is sent to the correct fax number, and indicates the date the document was sent.

(d) By e-mail, to wcd.hearings@oregon.gov. 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.

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

436-001-0027  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)
436-001-0030  Role of the Workers' Compensation Division

(1) In any hearing, the director may request to:
   (a) Receive notice of all matters;
   (b) Receive copies of all documents; and
   (c) Present evidence, testimony, and argument.

(2) The director may appear in a matter by filing an entry of appearance. The director may be represented by an agency representative, assistant attorney general, or special assistant attorney general as authorized by the Department of Justice. If the director enters an appearance, all notices and documents in the hearing must be provided to the director’s representative. An agency representative may represent the director in the following categories of hearings:
   (a) Hearings held before the administrative law judges of the Workers’ Compensation Board to determine the correctness of:
      (A) An order under ORS 656.052 declaring a person, as defined in ORS 656.005(23), to be a noncomplying employer (“NCE Orders”);
      (B) A nonsubjectivity determination under ORS 656.052 declaring either that a person, as defined in 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.
(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, 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. Statutory authority: ORS 183.452, 656.704, 656.726(4).

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.
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
See also the Index to Rule History: [link to Index]

436-001-0240 Exhibits and Evidence

(1) 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 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 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.”

(b) Not less than seven 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).

(3) 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 12/15/15 as WCD Admin. Order15-065, eff. 1/1/16
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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

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

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

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

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

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

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

(A) By mail, to the following address:

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

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

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

Comment [CN06]: Update title.
Comment [CN07]: Update title.
ORDER NO. 18-XXX
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS’ COMPENSATION DIVISION

11/8/17 DRAFT Proposed PROCEDURAL RULES, RULEMAKING, HEARINGS, AND ATTORNEY FEES

350 Winter Street NE, 2nd floor
Salem OR 97301

(C) By fax, to 503-947-7514, if the document transmitted indicates that it has been delivered by fax, is sent to the correct fax number, and indicates the date the document was sent.

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

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

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

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

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

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

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

(9) Any requests for review or requests for reconsideration of a proposed and final order filed with the board or administrative law judge within 30 days of the mailing date of the order will be forwarded to the director and treated as timely exceptions under this rule.

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

436-001-0252 Stay of Director and Administrative Review

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

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

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

436-001-0259 Ex Parte Communication
An ex parte communication is an oral or written communication to the 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. Order15-065, eff. 1/1/16
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf

436-001-0296 Settlements and Dismissals
(1) If, after a request for hearing is filed but before a proposed and final order is issued, an agreement under ORS 656.236 or 656.289(4) is approved that resolves all issues in the matter within the director’s jurisdiction, the administrative law judge may issue a proposed and final order dismissing the request for hearing.

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

(3) If the matter within the director’s jurisdiction is consolidated with matters concerning a claim and the parties reach agreement on all issues in the matter within the director’s jurisdiction prior to issuance of a proposed and final order, the administrative law judge may issue a proposed and final order approving the agreement and dismissing the request for hearing.
(4) Notwithstanding OAR 436-001-0170(2), the administrative law judge may issue a final order of dismissal when the requesting party withdraws the request for hearing and no cross-request for hearing has been filed.

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

Attorney Fees

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

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

(2) In cases in which time devoted is a factor in determining the amount of the fee, the attorney should submit a statement of the number of hours spent on the case. The director may request the attorney to submit additional information. 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 or other information upon request, the director may 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 attorney 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
Hist: Amended and renumbered 12/1/09 from OAR 436-001-0265 as WCD Admin. Order 09-053, eff. 1/1/10
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf

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

(1) In cases in which the director or administrative law judge awards a fee under ORS 656.385(1):
(a) The fee must fall within the ranges of the matrix in subsection (1)(d), unless extraordinary circumstances are shown or the parties otherwise agree.

(b) Extraordinary circumstances are not established merely by exceeding eight hours or a benefit of $6,000.

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

(d) The fee must fall within the ranges of the matrix in subsection (1)(d), unless extraordinary circumstances are shown or the parties otherwise agree.

Extraordinary circumstances are not established merely by exceeding eight hours or a benefit of $6,000.

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

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<td>15.0% - 50.0%</td>
</tr>
<tr>
<td>Over $6000</td>
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</tr>
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</table>

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

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

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

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

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

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

Statutory authority: ORS 656.385(1), 656.726(4)
Statutes implemented: ORS 656.262, 656.385, 656.388, and 656.704; 2015 Or Laws, ch. 521, section 6
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12
Amended 12/10/15 as WCD Admin. Order15-065, eff. 1/1/16
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf
436-001-0420 Attorney fees awarded under ORS 656.262(11)
In cases in which the director awards a fee under ORS 656.262(11):

(1) OAR 438-015-0110 applies.

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

(3) The director must consider the proportionate benefit to the worker when determining the amount of the fee.

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.262; 2015 Or Laws, ch. 521, section 2
Hist: Amended 11/16/12 as WCD Admin. Order 12-060, eff. 12/28/12
Amended 12/10/15 as WCD Admin. 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” (436-060-0400).

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

436-001-0435 Attorney fees awarded under ORS 656.277(1)
(1) Attorney fees assessed under ORS 656.277(1) will be based on a reasonable hourly rate multiplied by the time devoted by the attorney to obtaining the reclassification order.

(2) The director will determine a reasonable hourly rate of no less than $275 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

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 14 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

Comment [CNO11]: OAR 438-015-0082(2) has been revised to 14 days.
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
BULLETIN NO. 285 (Revised)  
Nov. 21, 2012

TO:  All interested parties

SUBJECT:  Workers’ Compensation Division Request for Hearing, Form 440-2839

This bulletin provides the form to use to request a hearing on a matter within the director’s jurisdiction. The Workers’ Compensation Division made a few minor updates to the bulletin and form, but the requirements for requesting a hearing have not changed. This bulletin replaces Bulletin 285 dated Dec. 4, 2009.

The requirements for requesting a hearing are in OAR 436-001-0019. Use of Form 2839 is optional, but completion of the form ensures your request is complete.

You can print or re-create Form 2839. The automated Word® version of the form is available online: http://wcd.oregon.gov/forms/Pages/forms.aspx.

There is also a Web form available: http://wcd.oregon.gov/BulletinExtra/hearing_request.html.

You must file your request for hearing with the division no later than the filing deadline. You can submit your request by mail, hand delivery, fax, e-mail, or by using the online form. See OAR 436-001-0027 to determine how to submit your request timely.

Mail to:  
Hearings Coordinator  
Operations Section  
Workers' Compensation Division  
P.O. Box 14480  
Salem, OR 97309-0405

Hand deliver to:  
Labor and Industries Building  
Workers' Compensation Division  
Second Floor Reception  
350 Winter St. NE  
Salem, OR 97301

E-mail to:  
wcd.hearings@oregon.gov
See OAR 436-001-0019(3) for additional requirements for e-mail.
Fax to: Hearings Coordinator
Operations Section
503-947-7514

See OAR 436-001-0019(3) for additional requirements for fax.

You can find the rules that apply to requests for hearing at
www.wcd.oregon.gov/laws/Pages/Rule.aspx?r=001. Click on “001” (Procedural Rules,
Rulemaking, Hearings, and Attorney Fees). Relevant rules are also re-printed on the second page of
Form 2839.

If you have questions about hearings within the director’s jurisdiction, contact the Hearings
Coordinator at 503-947-7841.

/s/ John L. Shilts
John L. Shilts, Administrator
Workers’ Compensation Division

Attachment: Form 440-2839, “Workers’ Compensation Division Request for Hearing” (Rev. 11/12)

Distribution: WCD-LY, E-mail lists
Workers’ Compensation Division

Request for Hearing

Please type or print. Not all information will apply to every case. Complete all areas that apply.

Requester name and address:                             Worker name and address:

Phone:                                           Phone:
Fax:                                            Fax:

Employer’s name and address (for WBF assessment cases):   Worker’s attorney (if any) name and address:

Phone:                                           Phone:
Fax:                                            Fax:

Requester’s identity:

☐ Worker                                      ☐ Worker’s attorney
☐ Insurer                                      ☐ Medical service provider
☐ Employer                                    ☐ Employer’s attorney
☐ Managed care organization                   ☐ Other:

Date of injury:

Insurer claim number:

WCD file number:

Order number being appealed:

I request a hearing concerning (check below all that apply):

☐ Medical fee – ORS 656.248
☐ Medical services – ORS 656.245
☐ Medical treatment – ORS 656.327
☐ Managed care organization (MCO) medical dispute – ORS 656.260
☐ MCO non-medical dispute – ORS 656.260 (identify):

☐ Vocational assistance – ORS 656.340
☐ Penalty (sole issue) – ORS 656.262(11)
☐ Workers’ Benefit Fund assessment – ORS 656.506
☐ Attorney fees – ORS 656.385
☐ Other (identify and cite applicable statute):

Signature of requester                             Date

Mail or hand deliver to:

Hearings Coordinator
Operations Section
Workers’ Compensation Division
350 Winter St. NE, 2nd floor
P.O. Box 14480
Salem, OR 97309-0405

Or e-mail to:

WCD.hearings@oregon.gov

Or fax to:

Hearings Coordinator
Operations Section
503-947-7514

If you have questions, call: 503-947-7841

An automated MS Word form is available at:

http://wcd.oregon.gov/forms/Pages/forms.aspx

440-2839 (11/12/DCBS/WCD/WEB)
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. 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 file number; and
(i) The reason for requesting a hearing.

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

(a) By mail, to the following address:
   Hearings Coordinator, Operations Section/Policy Team
   Workers’ Compensation Division
   350 Winter Street NE, PO Box 14480
   Salem OR 97309-0405

(b) By hand-delivery, to the following address:
   Hearings Coordinator, Operations Section/Policy Team
   Workers’ Compensation Division
   350 Winter Street NE, 2nd floor
   Salem OR 97301

(c) By fax, to 503-947-7514, if the document transmitted indicates that it has been delivered by fax, is sent to the correct fax number, and indicates the date the document was sent.

(d) By e-mail, to wcd.hearings@oregon.gov. 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.

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

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

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

(7) The director will deny requests for hearing that are filed after the filing deadline. The party may request a limited hearing on the denial of the request for hearing within 30 days after the mailing date of the denial. The request must be filed with the 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.

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.
BULLETIN NO. 356 (Revised)
May 25, 2017

TO: All interested parties

SUBJECT: Attorney fees

EFFECTIVE: July 1, 2017

This bulletin publishes the attorney fee matrix under Oregon Administrative Rule (OAR) 436-001-0410(1)(d) for attorney fees awarded under Oregon Revised Statute (ORS) 656.385(1). This bulletin replaces Bulletin No. 356 issued May 20, 2016.

ORS 656.385(1) provides that the maximum attorney fee awarded under this subsection will be adjusted annually on July 1 by the same percentage increase, if any, as made to the average weekly wage defined in ORS 656.211. OAR 436-001-0410(1)(d) provides a matrix for determining the amount of the fee, showing the maximum fee and fee ranges as percentages of the adjusted statutory maximum. The matrix below translates those percentages into dollar amounts, rounded to the nearest whole dollar.

Effective July 1, 2017, the average weekly wage is $963.01, a decrease of 1.149 percent over the previous year’s average weekly wage. See Bulletin 111 for more information about the average weekly wage. Because there has not been an increase in the average weekly wage, the maximum fee and fee ranges will remain the same for fees awarded through June 30, 2018. The maximum attorney fee that may be awarded under ORS 656.385(1), absent a showing of extraordinary circumstances, is $4,225.

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</tbody>
</table>
You can find the statutes and rules referenced in this bulletin by going to the Workers’ Compensation Division’s website at www.wcd.oregon.gov and clicking on “Laws and rules.”

If you have questions about this bulletin, contact the division’s legal issues coordinator at 503-947-7723.

/s/ Louis Savage  
Louis Savage, Administrator  
Workers’ Compensation Division  

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