

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

In the Matter of the Amendment of)
Oregon Administrative Rules (OAR))
chapter 436, division 001,) **ORDER OF ADOPTION**
) No. 04-053
Procedural Rules Governing Rulemaking and)
Hearings)

The Director of the Department of Consumer and Business Services, pursuant to the general rulemaking authority under ORS 656.726(4), and in accordance with the procedure provided by ORS 183.335, amends OAR chapter 436, division 001, Procedural Rules Governing Rulemaking and Hearings.

On December 15, 2003, the Workers' Compensation Division filed the *Notice of Proposed Rulemaking/Hearing* with the Secretary of State to amend rules governing Procedural Rules Governing Rulemaking and Hearings. The *Statement of Need and Fiscal Impact* accompanied the *Notice*. Copies of the *Notice* and *Statement* were mailed to interested persons and legislators in accordance with ORS 183.335(1) and OAR 436-001-0000 and posted to the Workers' Compensation Division's web site. The notice was published in the January 2004 *Oregon Bulletin*.

On January 22, 2004 a public hearing was held as announced. In addition, the record was held open for written testimony through 5:00 p.m. January 27, 2004. A written summary of testimony received and agency responses, as well as principal documents relied upon, will be on file and available for public inspection upon request during regular business hours, 8:00 a.m. to 5:00 p.m., Monday through Friday, in the Administrator's Office, Workers' Compensation Division, Labor & Industries Building, 350 Winter Street NE, PO Box 14480, Salem, Oregon 97309-0405.

RULE SUMMARY:

These rules have been amended in part to replace temporary rules issued to implement changes in the law due to legislation passed by the 2003 Oregon Legislature. Senate Bill 620 modified ORS 656.385 to require payment of fees to workers' attorneys when a worker prevails in certain medical and vocational disputes. An attorney fee matrix has been added to the rules, and the maximums apply to all work the worker's attorney has done relative to the proceeding at all levels before the department, absent a showing of extraordinary circumstances.

In addition, these rules:

- Update the rulemaking notice rule.
- Update the contested case rules to establish consistency with the Attorney General's Model Rules of Procedure applicable to hearings before the Office of Administrative Hearings, OAR 137-003. Because the model rules control, duplicative or inconsistent rules are repealed. Remaining supplementary rules have been updated. Significant changes address the filing of hearing requests; delegation of authority to the ALJ; clarifications regarding scope of review; and a new process for alternative dispute resolution.

FINDINGS:

Having reviewed and considered the record and being fully informed, I make the following findings:

- (a) The applicable rulemaking procedures have been followed.
- (b) These rules are within the director's authority.
- (c) The rules being adopted are a reasonable administrative interpretation of the statutes and are required to carry out statutory responsibilities.

IT IS THEREFORE ORDERED THAT:

- B. Amendments to OAR chapter 436, division 001, as set forth in Exhibit "A", attached hereto and incorporated by reference herein, **are adopted on this 4th day of March 2004 to be effective April 1, 2004.**
- C. A certified copy of the amended rules adopted herein shall be filed with the Secretary of State.
- D. A copy of the amended rules with revision marks shall be filed with the Legislative Counsel pursuant to ORS 183.715 within ten (10) days after filing with the Secretary of State.

DATED this 4th day of March 2004.

DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES

/s/ John L. Shilts

John L. Shilts, Administrator
Workers' Compensation Division

Pursuant to the Americans with Disabilities Act guidelines, alternative format copies of the rules will be made available to qualified individuals upon request.

If you have questions about these rules or need them in an alternate format, contact the Workers' Compensation Division at (503) 947-7810.

Distribution: WCD-ID, S0, S1, S3, S4, S5, S6, S7, S8, NM

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 001**

PROCEDURAL RULES GOVERNING RULEMAKING AND HEARINGS

EFFECTIVE APRIL 1, 2004

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Revision bars are not present on this rule document because the entire rule division has been substantially revised.

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**EXHIBIT "A"
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 001**

436-001-0000 Notice of Agency Action Concerning Rules

(1) Except when adopting a temporary rule, the division will give prior notice of the adoption, amendment, or repeal of any rule(s), as provided in ORS 183.335 and this rule.

(2) The division will publish notice of a proposed action in the Secretary of State's Oregon Bulletin at least 21 days prior to the effective date of the action.

(3) The division will notify interested persons and organizations on the division's notification lists of proposed rulemaking actions under ORS 183.335.

(4) A person or organization may be included on the division's notification list as follows:

(a) To receive electronic notification through the division's e-mail notification service, by subscribing through the division's web board at www.oregonwcd.org. The on-line subscription form requires a first name, last name, password, e-mail address, and phone number.

(b) To receive hard-copy notification, by submitting a written request, including the person or organization's full name and address.

(5) The division's notification list includes persons and organizations receiving electronic and hard-copy notification of proposed actions. The list complies with the requirements of the mailing list as required by ORS 183.335(8), and the Uniform Electronic Transactions Act, ORS 84.001 to 84.061.

Stat. Auth.: ORS 656.704(2), 656.726 (4)

Stats. Implemented: ORS 183.335 and 84.022

Hist: WCB 16-1975, f. & eff. 10-20-75
WCD 4-1977 (Admin) (Temp f. & eff. 11-7-77;
WCD 4-1978 (Admin) f. 7 eff. 3-6-78;
Renumbered from 436-90-505, 5-1-85;
WCD 3-1986 f. & eff. 5-15-86;
Amended 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0001 Authority

The director adopts these rules under the general rulemaking authority in ORS 656.726, and the director's specific authority and responsibility under ORS chapters 183 and 656.

Stat. Auth.: ORS 656.704(2), 656.726(4)

Stats. Implemented: ORS Chapter 183, ORS 656.245, 656.248, 656.260, 656.262, 656.268, 656.283, 656.327, 656.385, 656.388, 656.447

Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 02/12/96 as WCD Admin. Order 96-055 eff. 02/12/96
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0003 Applicability and Purpose

(1) This rule division establishes supplemental procedures governing rulemaking and contested case hearings, and carries out the provisions of ORS chapters 183 and 656.

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(2) These rules apply to all contested case hearings and rulemaking on or after the effective date.

(3) Unless otherwise obligated by statute, the director may waive any procedural rules as justice so requires.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.704(2) and 183.310 through 183.550

Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 02/12/96 as WCD Admin. Order 96-055 eff. 02/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0004 Definitions

The following definitions apply to these rules, unless the context requires otherwise.

(1) "Administrative Law Judge" or "ALJ" means an Administrative Law Judge assigned by the Office of Administrative Hearings.

(2) "Administrator" means the administrator of the Workers' Compensation Division or the administrator's designee.

(3) "Delivered" means physical delivery to the division's Salem office.

(4) "Department" means the Department of Consumer and Business Services.

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

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

(7) "Filed" means mailed, electronically transmitted by telephonic facsimile or e-mail, or delivered to the division.

(8) "Final order" means a final action by the director, expressed in writing.

(9) "Good cause" includes, but is not limited to, mistake, inadvertence, surprise, or excusable neglect.

(10) "Mailed" means correctly addressed, with sufficient postage and placed in the custody of the U. S. Postal Service.

(11) "Party" includes, but is not limited to, a worker, an employer, an insurer, a self-insured employer, a managed care organization, or a medical provider.

(12) "Proposed and final order" means an order subject to revision by the director which becomes final unless exceptions are timely filed, or the director issues a notice of intent to review the proposed and final order.

(13) Other words and phrases have the same meaning as given in ORS 183.310, where applicable.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.704(2), ORS 183.310 through 183.550

Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 02/12/96 as WCD Admin. Order 96-055 eff. 02/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

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436-001-0005 Model Rules of Procedure Governing Rulemaking

The director adopts the Attorney General's Model Rules for Rulemaking, OAR 137-001-0005 to 137-001-0085, by reference.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 183.325 through 183.410 and ORS 656.704 (2)

Hist: Filed 5/15/86 as WCD Admin. Order 3-1986, eff. 5/15/86
Amended 5/22/92 as WCD Admin. Order 9-1992, eff. 5-22-92
Amended 2/12/96 as WCD Admin Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0007 Designation of Proposed or Final Order

(1) Unless provided otherwise by statute or administrative rule, an order issued by an administrative law judge is a proposed and final order subject to revision by the director.

(2) An order suspending or revoking the insurer's authority to issue guaranty contracts under ORS 656.447 is a proposed and final order subject to revision by the director.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.704(2) and 656.447

Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 2/12/96 as WCD Admin Order 96-055 eff. 2/12/96
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0008 Model Rules of Procedure in Contested Cases

These rules supplement the Attorney General's Model Rules of Procedure for Contested Cases, OAR 137-003-0501 to 137-003-0700, which govern the procedures for a contested-case hearing before the Office of Administrative Hearings. If there is a conflict between these rules and the model rules, the provisions of the model rules will control.

Stat. Auth: ORS 656.726(4)

Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2) (and §7, ch. 75, OL 2003)

Hist: Filed 12/2/91 as WCD Admin. Order 9-1991, eff. 12/2/91 (Temporary)
Filed 11/2/95 as WCD Admin. Order 95-066 eff. 11/1/95 (Temporary)
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0025 Contested Case Notice

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

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

(1) In any contested-case proceeding, 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 by providing the administrative law judge and parties with an entry of appearance in the contested-case hearing. The director may be represented by a contested-case representative, assistant attorney general, or special assistant attorney general as

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authorized by the Department of Justice. If the director enters an appearance, all notices and documents in the dispute must be provided to the director's representative.

(3) In every contested-case proceeding the administrative law judge must copy the director with all:

- (a) Notices and reset notices of hearing;
- (b) Substitution of Counsel notices;
- (c) Addition of a party notices; and
- (d) All orders.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 180.220(2), 180.235, and 656.704(2)

Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0045 Rights of Parties in Contested Cases

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0055 Request by a Person to Participate as a Party or Limited Party

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0065 Request by Agency to Participate as a Party or an Interested Agency

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0090 Postponement and Continuances

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)

Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0105 Pre-hearing Conference

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0110 Consolidation or Separation

(1) The administrative law judge may consolidate cases in which there are common parties or common issues of law and fact.

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(2) The administrative law judge may separate cases which will promote efficient disposition of the matters.

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 183.310 through 183.508 and 656.704(2)
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
 Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
 Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0120 Motions

Stat. Auth.: ORS 656.726(3)
Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
 Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
 Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
 Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0135 Discovery

Stat. Auth.: ORS 656.726(3)
Stats. Implemented: ORS 183.415 and 656.704(2)
Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
 Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0140 Subpoenas

Stat. Auth.: ORS 656.726(3)
Stats. Implemented: ORS 183.310 through 183.550 and 656.704
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
 Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
 Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
 Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0150 Change of Administrative Law Judge

The director adopts OAR 471-060-0005, by reference.

Stat. Auth.: ORS 656.726(3)
Stats. Implemented: ORS 183.310 through 183.550, 656.704(2)
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
 Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
 Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
 Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0155 Manner of Filing a Contested-Case Hearing Request

(1) A request for hearing must be mailed to the division no later than the filing deadline. The date and time of receipt for electronic filings is determined under ORS 84.043. Parties are responsible for submitting a request timely, which will not be extended except as provided in section (6) of this rule. The request should be copied to all known parties and their legal representatives, if any.

(2) A contested case hearing request must be in writing. A party may use the division's Form 2839. If filing by electronic mail and attaching a word processing document, the document must be in Microsoft Word 97 format. A request for hearing must include:

- (a) The identity, name, address, and phone number of the party making the request;
- (b) The division's administrative order number;
- (c) The worker's name, address, and phone number;
- (d) The name, address, and phone number of the worker's attorney, if any;

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- (e) The date of injury;
 - (f) The insurer or self-insured employer claim number;
 - (g) The division's file number;
 - (h) The reason for requesting review; and
 - (i) If applicable, the justification for holding an in-person hearing.
- (3) A request for hearing may be mailed or delivered to the division.

(4) A request for hearing may be electronically transmitted to "wcd.hearings@state.or.us", the division's contested-case hearing electronic mail address. The division will acknowledge receipt of the transmission by electronic response. A party submitting a request for hearing under this section consents and agrees to conduct the transaction electronically. The party's electronic mailing address qualifies as its electronic signature.

(5) A telephonic facsimile request for hearing will be accepted provided the document transmitted indicates that it has been delivered by FAX, uses the division's facsimile transmission number, and the original signed document is simultaneously mailed to the division. The complete facsimile copy must be received by the filing deadline. When reception of a document begins after 5 p.m., the receipt date will be the date of the next regular workday.

(6) The director will deny requests for hearing if the request is submitted or received after the filing deadline. The party may request a show-cause hearing within 30 days after the date of the denial notice. The administrative law judge may only consider whether:

- (a) The request for contested case hearing was filed timely; or
- (b) If good cause existed that prevented the party from timely requesting a hearing on the merits.

Stat. Auth.: ORS 656.726(4) and ORS 84.013

Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)

Hist: Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0160 Extension of Time for Filing

Requests for extension of time for filing documents other than a request for hearing must be received by the director, or the administrative law judge if the contested case has been referred to the Office of Administrative Hearings, on or before the document's filing deadline.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)

Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0170 Duties and Powers of the Administrative Law Judge

(1) The administrative law judge may remand a dispute to the director for further administrative action.

- (2) Unless otherwise provided in writing, the director delegates to an administrative law

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judge conducting a contested case hearing on the director's behalf the authority to:

- (a) Rule on a petition to participate as a party or as a limited party under OAR 137-003-0535;
 - (b) Issue subpoenas in support of a discovery order, and manage discovery motions, under OAR 137-003-0572(10) when a motion for an order requiring discovery has been filed with the administrative law judge under OAR 137-003-0520(2);
 - (c) Issue a written order granting or denying a deposition, or issue a subpoena to compel a deposition, of persons other than department employees under OAR 137-003-0572;
 - (d) Determine whether a party is unable to pay for a qualified interpreter under OAR 137-003-0590;
 - (e) Execute and issue final orders of dismissal when the requesting party has withdrawn the request, and no cross-request for hearing was filed; and
 - (f) Execute and issue final orders by default under OAR 137-003-0670.
- (3) If necessary, the administrative law judge shall continue a hearing to allow the presentation of oral or written legal argument by the Department of Justice.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)

Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0171 Hearings Security

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0175 Conducting a Contested Case Hearing

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0185 Hearings

(1) At the discretion of the administrative law judge, hearings may be conducted either by telephone or in-person.

(2) In-person contested case hearings are held in Salem, Oregon except when the administrative law judge authorizes a hearing outside of Salem.

(3) Upon prior arrangement and approval of the administrative law judge, a party or witness for an in-person hearing may appear by telephone.

(4) The administrative law judge shall make an audio recording of all hearings.

(5) Prior to the hearing, each party and the division must provide copies of documentary evidence that it will seek to introduce into the record to all other parties, the director's representative under OAR 436-001-0030(2), and the administrative law judge.

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(6) Nothing in this rule precludes any party or the division from seeking to introduce documentary evidence in addition to evidence described in section (5) during the hearing. The administrative law judge may receive such evidence, subject to the applicable rules of evidence, if inclusion of the evidence in the record is necessary to conduct a full and fair hearing. When new evidence is introduced, the other parties may request an opportunity to submit rebuttal evidence. The administrative law judge may allow the admission of rebuttal evidence. If any evidence introduced during the hearing has not previously been provided to the administrative law judge, the director's representative, and to the other parties, the hearing may be continued for sufficient time to allow the party or the division to obtain and review the evidence.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)

Hist: Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0191 Evidence

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0195 Medical Evidence

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.260, 656.327, and 656.704(2)

Hist: Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0201 Failure to Appear

(1) If the petitioner fails to appear at the hearing, the administrative law judge may issue an order of dismissal or an order to show cause. An order to show cause shall allow the petitioner ten days to present argument establishing good cause reason for the failure to appear.

(2) If the respondent does not appear, the administrative law judge has the discretion to proceed with the hearing.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0205 Withdrawal of Attorney from Contested Case

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0210 Record and Transcript of Hearing

(1) A verbatim record shall be made of all hearings, including all motions, rulings and testimony. The record shall be made by audio tape or reporter, at the discretion of the administrative law judge.

(2) At any time before the decision becomes final, the administrative law judge or director may order a full or partial transcript of the record.

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(3) At any time before the reporter's notes or recordings of the hearing are destroyed, any party may order a transcript at that party's expense.

(4) Audio tapes, reporters' notes or records of a hearing may be destroyed six months after final disposition of the case.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)

Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0225 Scope of Review/Limitations on the Record

(1) Review of medical service (ORS 656.245 and 656.247(3)(a)) and treatment (ORS 656.327 and 656.260) disputes is for substantial evidence or error of law. New medical evidence or issues may not be considered at the contested-case hearing.

(2) In vocational assistance (ORS 656.340) disputes, new evidence may be admitted. The standard of review is to determine whether the director's order:

- (a) Violates a statute or rule;
- (b) Exceeds the statutory authority of the agency;
- (c) Was made upon unlawful procedure; or
- (d) Was characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(3) The scope of review for medical fee (ORS 656.248 and 656.247(3)(b)) disputes is *de novo*.

(4) The scope of review in all other contested-case hearing disputes is *de novo*, unless otherwise prescribed by statute or administrative rule.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.260, 656.283, 656.327, 656.704(2)

Hist: Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0226 Notice of Expert Testimony

At least 14 days before the hearing, a party shall provide written notice to the administrative law judge, all other parties, and the director's representative identifying each expert witness the party will call to testify at hearing. If a party fails to provide 14 days notice, the contested-case hearing will be continued to allow sufficient time for the parties to prepare.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0231 Official Notice

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

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436-001-0240 Exhibits and Exchange of Exhibits

(1) The division will provide the parties and the administrative law judge legible copies of all documents that were relied upon in the underlying administrative review, together with an index. The index will include a description of each document, author, number of pages, and date of the document. The documents will be arranged in chronological order and designated by numbers in the lower right corner of each page, beginning with the document of earliest date. Pagination of multiple-page documents will be designated by the document number, followed by the page number. For example, page two of document five may be marked as "Exhibit 5, page 2" or "Ex. 5-2," etc.

(2) Not less than 14 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 the other parties, the director's representative, and the administrative law judge legible copies of any additional documents to be relied upon at hearing. The additional documents must be marked and accompanied by a supplemental document index, numbered to coincide in chronological order with the division's exhibits and exhibit list. For example, a document which is chronologically between documents 5 and 6 of the division's exhibit list may be marked as "Exhibit 5a," "Ex. 5a," etc.

(3) Not less than seven days before the hearing, the respondent(s)/cross-petitioner(s) must provide to the other parties, the director's representative, and the administrative law judge legible copies of any additional documents that they will offer at hearing in the same manner as provided by the petitioner(s).

(4) Any party using photographs as exhibits must provide each party, the director's representative, and the administrative law judge with a set of the photographs.

(5) All exhibits offered, whether or not admitted into evidence, unless withdrawn, will be part of the record in the case.

(6) At the discretion of the administrative law judge, an accurate description or photograph of an object or real evidence may be substituted for such object or real evidence. The party offering such evidence shall be responsible for providing the description or photograph, and for retaining custody of the object until the case is closed.

(7) If any party, in the regular course of the party's business or activity, had kept or recorded any memorandum, writing, entry, print, reproduction, or a combination thereof, of any act, transaction, occurrence, or event, and in the regular course of the party's business or activity has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, optical imaging, or other process that accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself whether the original is in existence or not at the time a party introduces into evidence such reproduction. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 183.310 through 183.550, 656.260, 656.327, 656.283 and 656.704(2)

Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96

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Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0255 Ex Parte Communication

Stat. Auth.: ORS 656.726(3)
Stats. Implemented: ORS 183.415 and 656.704(2)
Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0260 Unacceptable Conduct

(1) Contested case hearings are not public meetings and are not open to the public, except with the consent of the parties and as authorized by the administrative law judge.

(2) The administrative law judge may expel a person from a contested case hearing if that person disrupts the proceeding.

(3) The administrative law judge may prohibit broadcasting, television, sound or video recording, and the taking of photographs of proceedings in the hearing room. These prohibitions, in the administrative law judge's discretion, may be applied to areas immediately adjacent to the hearing room where the activities may interrupt or interfere with entry or exit from the hearing room and distract or disturb the proceedings or interfere with the conduct of the hearing.

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)
Hist: Filed 5/22/92 as WCD Admin. Order 9-1992, eff. 5/25/92
Amended 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0265 Attorney Fees

(1) In cases where the director is required to assess an attorney fee under ORS 656.385(1) (§2, ch. 756, OL 2003):

(a) The fee must be based on the factors listed in ORS 656.385(1) (§2, ch. 756, OL 2003).

(b) Absent a showing of extraordinary circumstances or unless otherwise agreed by the parties, the fee may not exceed \$2,000 nor fall outside the ranges provided in the following matrix:

Estimated Results Achieved	Attorney Time Devoted				
	1-2 hours	2.1-4 hours	4.1-6 hours	6.1-8 hours	8.1-12 hours
\$1-\$2000	\$100-400	\$200-700	\$300-750	\$600-1000	\$800-1250
\$2001-\$4000	\$200-500	\$400-800	\$600-900	\$800-1300	\$1050-1500
\$4001-\$6000	\$300-700	\$600-1000	\$800-1250	\$1000-1450	\$1300-1750
\$6001-\$10000	\$400-900	\$800-1300	\$1050-1600	\$1350-1800	\$1550-2000

(c) In cases under ORS 656.245, 656.260, or 656.327, the factors listed in OAR 436-010-0008(13) may also be considered.

(d) In cases under ORS 656.340, the factors listed in OAR 436-120-0008(2) may also be considered.

(2) Except as provided in section (3), in cases where the administrative law judge or director assesses an attorney fee, the following factors may also be considered:

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- (a) The complexity of the issue(s) involved;
- (b) The quality of the legal representation;
- (c) The value of the interest involved;
- (d) The nature of the proceedings;
- (e) The risk in a particular case that an attorney's efforts may go uncompensated;
- (f) The assertion of frivolous issues or defenses;
- (g) A statement of services, if submitted within seven days of the hearing date, unless the administrative law judge instructs otherwise; and
- (h) Any other relevant consideration deemed appropriate by the administrative law judge or director.

(3) In cases under ORS 656.262(11) (§1, ch. 756, OL 2003) where the issue is solely the assessment and payment of a penalty and attorney fee, OAR 438-015-0110 applies.

(4) If an attorney fee has been assessed by an administrative law judge in a proposed order, the opposing parties may file written exceptions to the fee under OAR 436-001-0275.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.262, 656.385, 656.388 and 656.704(2) (and ch. 756, OL 2003)

Hist: Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 12/12/03 as WCD Admin. Order 03-067, eff. 1/1/04 (Temporary)
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0275 Proposed and Final Orders, Filing Exceptions

(1) When the administrative law judge serves a proposed and final order on the parties, the Office of Administrative Hearings shall notify the parties that written exceptions must be filed within 30 days of the date of service of the proposed and final order.

(2) Written responses to exceptions must be filed within 20 days of service of the exceptions and a reply, if any, must be filed within 10 days of service of the responses.

(3) If no exceptions are filed, the proposed and final order becomes final 30 days after the date of service of the order.

(4) Notwithstanding section (3) of this rule, the administrator may revise the proposed and final order under OAR 137-003-0501 to 137-003-0700, or these rules.

(5) "Date of service" means the date mailed or delivered.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 183.310 through 183.550 and 656.704(2)

Hist: Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0285 Final Orders

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

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**436-001-0295 Immediate Suspension or Refusal to Renew a License,
Notice of Opportunity for Hearing, Service**

Stat. Auth.: ORS 656.726(3)

Stats. Implemented: ORS 183.415 and 656.704(2)

Hist: Filed 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98
Repealed 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

436-001-0300 Alternative Dispute Resolution

(1) The director may contact the parties to a contested case dispute for the purposes of offering a resolution alternative to a contested-case hearing.

(2) If consent to attempt alternative dispute resolution is received prior to referral of the dispute to the Office of Administrative Hearings, the director will stay the referral. Once the dispute is settled, or it becomes clear that no resolution can be reached, the director will refer it.

(3) If consent to attempt alternative dispute resolution is received after referral of the dispute to the Office of Administrative Hearings, the director will notify the administrative law judge that the parties have agreed to use an alternative dispute resolution process, and that the hearing should be suspended until the process is complete. Once the dispute is settled, or it becomes clear that no resolution can be reached, the director will notify the administrative law judge to resume the hearing.

(4) If the parties resolve only the issues under the director's jurisdiction related to the contested case notice, then the director will incorporate the agreement into a final order under OAR 137-003-0665.

(5) If the parties resolve any or all matters regarding the claim under ORS 656.236, or issues resolving disputes over compensability of a claim under ORS 656.289(4), the disposition must be submitted to the Workers' Compensation Board for approval.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 183.415, 183.502 (§16, ch. 75, OL 2003)

Hist: Adopted 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04

Secretary of State
Certificate and Order for Filing
PERMANENT ADMINISTRATIVE RULES

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

March 4, 2004 by the
Date prior to or same as filing date

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

OAD chapter 436
Administrative Rules Chapter No.

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to become effective April 1, 2004 Rulemaking Notice was published in the January 2004 *Oregon Bulletin*.**
Date upon filing or later Month and Year

RULEMAKING ACTION

List each rule number separately, 000-000-0000.

ADOPT: OAR 436-001-0300

AMEND: OAR

436-001-0000	436-001-0160	436-009-0003	436-009-0050	436-010-0240	436-120-0340
436-001-0001	436-001-0170	436-009-0004	436-009-0060	436-010-0250	436-120-0350
436-001-0003	436-001-0185	436-009-0005	436-009-0070	436-010-0265	436-120-0360
436-001-0004	436-001-0201	436-009-0008	436-009-0080	436-010-0270	436-120-0410
436-001-0005	436-001-0210	436-009-0010	436-009-0090	436-010-0275	436-120-0500
436-001-0007	436-001-0225	436-009-0015	436-010-0003	436-010-0280	436-120-0710
436-001-0008	436-001-0226	436-009-0020	436-010-0005	436-010-0340	436-120-0720
436-001-0030	436-001-0240	436-009-0022	436-010-0008	436-120-0003	436-120-0830
436-001-0110	436-001-0260	436-009-0025	436-010-0210	436-120-0004	436-120-0840
436-001-0150	436-001-0265	436-009-0030	436-010-0220	436-120-0008	
436-001-0155	436-001-0275	436-009-0040	436-010-0230	436-120-0320	

REPEAL: OAR

436-001-0025	436-001-0090	436-001-0140	436-001-0195	436-001-0285
436-001-0045	436-001-0105	436-001-0171	436-001-0205	436-001-0295
436-001-0055	436-001-0120	436-001-0175	436-001-0231	436-010-0350
436-001-0065	436-001-0135	436-001-0191	436-001-0255	436-120-0920

ORS 656.704, 656.726(4)

Statutory Authority

ORS 183.335; OAR 137-001; OAR 436-001-0000 and 436-001-0005

Other Authority

ORS chapter 656

Statutes being Implemented

RULE SUMMARY

These rules have been amended to replace temporary rules issued to implement changes in the law due to legislation passed by the 2003 Oregon Legislature:

- Senate Bill 233 changed the time frame for appeal of a proposed order or proposed assessment of civil penalty from 60 days following the party's receipt of notice to 60 days from the date the order is mailed by the department. OAR 436-010 and 436-120 have been amended accordingly.

Certificate and Order for Filing Permanent Administrative Rules

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- Senate Bill 620 modified ORS 656.385 to require payment of fees to workers' attorneys when a worker prevails in certain medical and vocational disputes. An attorney fee matrix has been added to OAR 436-001, 010, and 120, and the maximums apply to all work the worker's attorney has done relative to the proceeding at all levels before the department, absent a showing of extraordinary circumstances.
- House Bill 2305 addresses how medical records may be released, consistent with the federal Health Insurance Portability and Accountability Act, and related changes have been made to OAR 436-010.
- House Bill 3669 gave additional authority to nurse practitioners to treat injured workers and authorize temporary disability payments. This bill was a result of legislative action after development of the legislative concepts by nurse practitioners and the Management Labor Advisory Committee. OAR 436-009, 436-010, and 436-120 have been amended accordingly.

In addition, these rules:

436-001

- Update the rulemaking notice rule.
- Update the contested case rules to establish consistency with the Attorney General's Model Rules of Procedure applicable to hearings before the Office of Administrative Hearings, OAR 137-003. Because the model rules control, duplicative or inconsistent rules are repealed. Remaining supplementary rules have been updated. Significant changes address the filing of hearing requests; delegation of authority to the ALJ; clarifications regarding scope of review; and a new process for alternative dispute resolution.

436-009

- Adopt updated medical resources.
- Incorporate data reporting requirements currently published in Bulletin 220.
- Add group nine to the fee schedule for ambulatory surgical centers.
- Require insurers and self-insured employers to keep track of dates of receipt of medical bills.
- Provide that if a provider's usual and customary fee is unreasonable, the director may determine a different fee based on criteria.
- Increase the dollar amount of each conversion factor by 2.33%, based on the annual increase in the physicians' component of the consumer price index.
- Require electronic billings to include a "zz" modifier for services that use an Oregon Specific Code.
- Modify the definitions of first and second level physical capacity evaluations and of work capacity evaluation.
- Provide that pharmacy fees shall be paid at 88% of the Average Wholesale Price (AWP) – a reduction from 95% in the current rules -- with an \$8.70 dispensing fee – an increase from \$6.70 in the current rules.
- Provide that a brand name drug that has a generic equivalent will be paid at the lesser of 88% of the AWP for the brand name or 88% of the average AWP for the class of generic drug, plus dispensing fee, unless the prescribing medical provider writes "Do not substitute" or similar phrase on the prescription.
- Provide that payment for Oxycontin, Vioxx, Celebrex and Bextra is limited to an initial 5-day supply unless the prescriber writes a clinical justification for the drug.
- Define "clinical justification" and provide that insurers and self-insured employers cannot challenge the adequacy of the justification.
-

436-010

- Provide that a dispute may be resolved by agreement between the parties, and that the director may then issue a letter of agreement in lieu of an administrative order.
- Require that ancillary medical service providers send a copy of the treatment plan to the referring medical service provider and the insurer within seven days of starting treatment; the responsibility to sign and send a copy of the treatment plan to the insurer rests with the referring medical service provider; failure of the referring provider to do so may subject the provider to sanctions.
- Provide that, except in an emergency, drugs and medicine for oral consumption supplied by a physician's office are compensable for a maximum supply of 10 days.
- Require insurers to forward requested medical information to new attending physicians or authorized nurse practitioners within 14 days of a request.

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Page 3

- Require that the insurer forward a copy of the insurer medical examination report to the attending physician or authorized nurse practitioner within 72 hours of the insurer's receipt of the report.
- Require that the insurer notify the attending physician or authorized nurse practitioner, if known, and the MCO, if any, when it denies or partially denies a previously accepted claim.

436-120

- Require the insurer to notify the worker in writing, within 14 days of a request for vocational assistance when the insurer is not required to determine eligibility.
- Refer vocational professionals to the Oregon Wage Information (OWI) publication in lieu of the Oregon Automated Reporting System (OARS) Job Order Wage Report, both published by the Oregon Employment Department. The OARS publication will no longer provide job/wage data effective 4/1/04. When using the OWI wage information data, the presumed standard shall be the 10th percentile unless there is sufficient evidence that a higher or lower wage is more appropriate.
- Eliminate the requirement that vocational counselors sign statements that their eligibility determinations were based on substantial handicap assessments.
- Specify the conditions under which training may be terminated for failure to attend.
- State additional circumstances that require vocational eligibility to be redetermined.
- Provide that for workers found to have an exceptional disability or exceptional loss of earning capacity, certain fee schedule spending limits are increased by 30%.
- Increase the direct worker purchase training category fee schedule maximum by 10% due to state-wide tuition increases.
- Provide that to conduct only labor market research and/or job development does not require certification when conducted under the supervision of a certified vocational rehabilitation counselor.

Direct questions to: Fred Bruyns, Rules Coordinator; phone 503-947-7717; fax 503-947-7581; or e-mail fred.h.bruyns@state.or.us. Rules are available on the internet: <http://www.oregonwcd.org/policy/rules/rules.html#permrules>

For a copy of the rules, contact Publications at 503-947-7627, Fax 503-947-7630.

/s/ John L. Shilts
Authorized Signer

March 4, 2004
Date

John L. Shilts, Administrator, Workers' Compensation Division
Printed name

*Copies include a photocopy of this certificate with paper and electronic copies of each rule listed in the Rulemaking Action.

**The *Oregon Bulletin* is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 p.m. on the 15th day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 p.m. the preceding workday.