

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

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

**Effective July 1, 2008**

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NOTE: Significant revisions are marked with vertical lines in the right margins.

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

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

In the Matter of the Amendment of Oregon Administrative Rules (OAR):  
436-001, Procedural Rules for Rulemaking and Hearings

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**ORDER OF  
ADOPTION  
No. 08-050**

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

On April 10, 2008, the Workers' Compensation Division filed with the Secretary of State a *Notice of Proposed Rulemaking Hearing* and *Statement of Need and Fiscal Impact*. The division mailed copies of the *Notice* and *Statement* to interested persons and legislators in accordance with ORS 183.335 and OAR 436-001-0009, and posted copies to its Web site. The Secretary of State included notice of the public hearing in its May 2008 *Oregon Bulletin*.

On May 19, 2008, a public hearing was held as announced. In addition, the record was held open for written testimony through May 22, 2008. The department received no testimony regarding these rules.

**RULE SUMMARY**

Revised rules:

- Clarify the applicability of the rules (436-001-0003)
- Carry out ORS 183.335 by requiring notice to legislators about proposed rulemaking (436-001-0009)
- Clarify the requirements for and methods of requesting a hearing (436-001-0019)
- Clarify that parties only need to provide supplemental exhibits to the director's representative if the director has filed an entry of appearance; clarify that all exhibits offered will be included in the hearing file whether or not they are admitted into the evidentiary record (436-001-0240)
- Clarify that written exceptions to a proposed and final order should include argument (436-001-0246)
- Provide that a party may request that director review be stayed if there is a pending matter concerning a claim that may make the matter within the director's jurisdiction moot (436-001-0252)
- Change the time frame for submitting a statement of services from seven days of the hearing date to any time before an order is issued (436-001-0265)
- Allow the ALJ to issue a proposed and final order dismissing the request for hearing if the parties resolve all issues within the director's jurisdiction via a settlement or agreement (436-001-0170 & 0296)

## 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

- 1) Amendments to OAR chapter 436, as set forth in Exhibit "A", are attached, incorporated by reference, and **adopted on this 12<sup>th</sup> day of June 2008, to be effective July 1, 2008.**
- 2) A certified copy of the adopted rules will be filed with the Secretary of State.
- 3) A copy of the amended rules with revision marks will be filed with the Legislative Counsel under ORS 183.715 within ten days after filing with the Secretary of State.

**DATED this 12<sup>th</sup> day of June 2008.**

DEPARTMENT OF CONSUMER  
AND BUSINESS SERVICES

*/s/ John L. Shilts*

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John L. Shilts, Administrator  
Workers' Compensation Division

**Under 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, S2, S3, S4, S5, S6, S7, S8, ML, ME

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

**General Provisions**

**436-001-0003 Applicability and Purpose of these Rules**

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

(2) Except as provided in section (4), these rules apply to hearings on matters within the director's jurisdiction that are held on or after July 1, 2008. Matters within the director's jurisdiction are matters other than those concerning a claim, as defined by ORS 656.704.

(3) In general, the rules of the Workers' Compensation Board, in OAR chapter 438, apply to the conduct of hearings, unless these rules provide otherwise.

(4) These rules do not apply to hearings requested under ORS 656.740.

(5) These rules apply to all division rulemaking on or after July 1, 2008.

(6) 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, ORS ch. 183

Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

**436-001-0004 Definitions**

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

(a) "Administrative law judge" means an administrative law judge appointed by the Workers' Compensation Board, as defined in OAR 438-005-0040.

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

(c) "Board" means the Workers' Compensation Board and includes its Hearings Division.

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

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

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

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

(h) "Filed" means mailed, faxed, e-mailed, delivered, or otherwise submitted to the division in a method allowable under these rules.

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

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

(k) "Party" may include, but is not limited to, a worker, an employer, an insurer, a self-insured employer, a managed care organization, a medical provider, or the division.

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

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

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 656.704, ORS ch. 183  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

### Rulemaking

#### **436-001-0005 Model Rules of Procedure For Rulemaking**

The Model Rules of Procedure, OAR 137-001-0005 through 137-001-0100, in effect on January 1, 2008, as promulgated by the Attorney General of the State of Oregon under the Administrative Procedures Act, are adopted as the rules of procedure for rulemaking actions of the Workers' Compensation Division.

{ED. NOTE: The full text of the Attorney General's Model Rules of Procedures is available from the Office of the Attorney General or the Workers' Compensation Division.}

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 183.325 through 183.410  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

#### **436-001-0009 Notice of Division Rulemaking**

(1) Except when adopting a temporary rule, the division will give prior public notice of the proposed adoption, amendment, or repeal of any rule by:

(a) Publishing notice of the proposed rulemaking action in the Secretary of State's Oregon Bulletin at least 21 days prior to the effective date of the rule;

(b) Notifying interested persons and organizations on the division's notification lists of proposed rulemaking actions under ORS 183.335; and

(c) Providing notice to legislators as required by ORS 183.335(15).

(2) The division will add a person or organization to its notification list if the person or organization:

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

(b) Requests in writing to receive hard-copy notification, and includes the person or organization's full name and mailing address.

Stat. Auth.: ORS 656.726 (4)  
Stats. Implemented: ORS 183.335 and 84.022

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Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

## Hearings

### 436-001-0019 Requests for Hearing

(1) A request for hearing on a matter within the director's jurisdiction must be filed with the administrator no later than the filing deadline. Filing deadlines will not be extended except as provided in section (7) of this rule.

(2) A request for hearing must be in writing. A party may use the division's Form 2839. A request for hearing must include the following information, as applicable:

- (a) The name, address, and phone number of the party making the request;
- (b) Whether the party making the request is the worker, insurer, medical provider, employer, any other party, or an attorney on behalf of a party;
- (c) The number of the administrative order being appealed;
- (d) The worker's name, address, and phone number;
- (e) The name, address, and phone number of the worker's attorney, if any;
- (f) The date of injury;
- (g) The insurer's or self-insured employer's claim number;
- (h) The division's (WCD) file number; and
- (i) The reason for requesting a hearing.

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

- (a) By mail.
- (b) By hand-delivery.
- (c) By fax, if the document transmitted indicates that it has been delivered by fax, is sent to the correct fax number, and indicates the date the document was sent.
- (d) By e-mail to [wcd.hearings@state.or.us](mailto:wcd.hearings@state.or.us). If the request for hearing is an attachment to the e-mail, it must be in a format that Microsoft Word 2000® (.doc, .txt, .rtf) or Adobe Reader® (.pdf) can open. Image formats that can be viewed in Internet Explorer® (.tif, .jpg) are also acceptable.

- (e) By using the on-line form available on the division's Web site at [wcd.oregon.gov](http://wcd.oregon.gov).

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

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

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

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(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 administrator. At the limited hearing, the administrative law judge may only consider whether:

(a) The denied request for hearing was filed timely; or

(b) If good cause existed that prevented the party from timely requesting a hearing on the merits. For the purpose of this rule, "good cause" includes, but is not limited to, mistake, inadvertence, surprise, or excusable neglect.

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

Stats. Implemented: ORS 656.704

Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

#### **436-001-0023 Other Filings and Submissions**

(1) Except as provided in section (3) of this rule, any filing, motion, request, document, or correspondence filed or submitted in a matter within the director's jurisdiction must be filed or submitted:

(a) To the division before the dispute is referred to the board;

(b) To the administrative law judge after the dispute is referred to the board but before the administrative law judge issues a proposed and final order; and

(c) To the division after the administrative law judge issues a proposed and final order, unless it is a request for correction of errors in the proposed and final order under OAR 436-001-0246(6).

(2) A copy of any filing, motion, request, document, or correspondence must be sent to the other parties, or their legal representatives, at the same time it is filed or submitted to the division or administrative law judge.

(3) A party must notify the division and the other parties of any changes in the party's mailing address or legal representation.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.704

Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

#### **436-001-0027 Timeliness; Calculation of Time**

(1) Timeliness of any document required by these rules to be filed or submitted to the division is determined as follows:

(a) If a document is mailed, it will be considered filed on the date it is postmarked.

(b) If a document is faxed or e-mailed, it must be received by the division by 11:59 p.m. Pacific time to be considered filed on that date.

(c) If a document is delivered, it must be delivered during regular business hours to be considered filed on that date.

(2) The date and time of receipt for electronic filings is determined under ORS 84.043.

(3) Time periods allowed for a filing or submission to the division are calculated in

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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.

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 656.704  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

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

(1) In any hearing, the director may request to:

- (a) Receive notice of all matters;
- (b) Receive copies of all documents; and
- (c) Present evidence, testimony, and argument.

(2) The director may appear in a matter by filing an entry of appearance. The director may be represented by an agency representative, assistant attorney general, or special assistant attorney general as authorized by the Department of Justice. If the director enters an appearance, all notices and documents in the hearing must be provided to the director's representative.

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 180.220(2), 180.235, and 656.704  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

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

(1) The administrative law judge may conduct the hearing in any manner, consistent with these rules, that will achieve substantial justice.

(2) Unless provided otherwise by statute or rule, any order issued by an administrative law judge regarding a matter within the director's jurisdiction is a proposed and final order subject to review by the director under OAR 436-001-0246.

(3) The administrative law judge may dismiss requests for hearing as provided in OAR 436-001-0296.

(4) Where appropriate, the administrative law judge may remand a dispute to the director for further administrative action.

(5) The administrative law judge may consolidate matters in which there are common parties or common issues of law or fact.

(6) The administrative law judge may separate matters to promote efficient disposition of the matters.

(7) Consolidation of matters under section (5) of this rule or under ORS 656.704(3)(c) is only for the purpose of hearing. The administrative law judge must issue a separate order for matters other than those concerning a claim.

(8) On the motion of a party, the division, or the administrative law judge, the administrative law judge may continue a hearing to allow the presentation of oral or written legal argument by the Department of Justice.

(9) The administrative law judge may send the division a written question regarding

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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.

(10) The administrative law judge may conduct a hearing by telephone if all parties agree.

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 656.704  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

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

(1) Except for the matters listed in sections (2) and (3), the administrative law judge reviews all matters within the director's jurisdiction de novo, unless otherwise provided by statute or administrative rule.

(2) In medical service and medical treatment disputes under ORS 656.245, 656.247(3)(a), and 656.327, and managed care disputes under ORS 656.260(16), the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law. New medical evidence or issues may not be admitted or considered.

(3) In vocational assistance disputes under ORS 656.340, new evidence may be admitted and considered. Under ORS 656.283(2), the administrative law judge may modify the director's order only if it:

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

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 656.245, 656.247, 656.260, 656.283, 656.327, 656.704  
Hist: Amended 10/19/05 as WCD Admin. Order 05-061, eff. 1/2/06

#### **436-001-0240 Exhibits and Evidence**

(1) Within 21 days after referral of the request for hearing to the board, the division will provide the parties and the administrative law judge copies of all documents that were relied upon in the underlying action or order, with an index.

(2) Not less than 28 days before the hearing, or within seven days of receipt of the division's document index and documents, whichever is later, the petitioner(s) must provide copies of any additional exhibits they will offer at hearing to the other parties, the administrative law judge, and the director's representative, if the director has filed an entry of appearance. The exhibits must be marked and include a supplemental index, numbered to coincide in chronological order with the division's exhibits and exhibit list. For example, an exhibit that is chronologically between the division's exhibits 5 and 6 would be marked as "Exhibit 5a" or "Ex.

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5a.”

(3) Not less than 14 days before the hearing, the respondent(s)/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 section (2).

(4) Unless withdrawn, all exhibits offered will be included in the hearing file, whether or not they are admitted into the evidentiary record.

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

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.704

Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

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

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

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

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

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

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

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

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

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

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

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

(8) Any requests for review or requests for reconsideration of a proposed and final order

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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.

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 656.704  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

**436-001-0252 Stay of Director and Administrative Review**

(1) A party may request that director review be stayed if exceptions are timely filed and there is a pending matter concerning a claim that may make the matter within the director's jurisdiction moot.

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

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

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 656.704  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

**436-001-0259 Ex Parte Communication**

An ex parte communication is an oral or written communication to the administrator or administrator's designee during director review of the matter not made in the presence of all parties to the dispute, concerning a fact in issue, but does not include communication from division staff or the Department of Justice about legal issues or facts in the record. Ex parte communications received during director review will be promptly disclosed to all parties, and the parties will be allowed a reasonable opportunity to respond.

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 656.704, OL 2005 ch 26  
Hist: Adopted 10/19/05 as WCD Admin. Order 05-061 eff. 1/2/06

**436-001-0265 Attorney Fees**

(1) In cases where the director or administrative law judge is required to assess an attorney fee under ORS 656.385(1):

(a) The fee must be based on the factors listed in ORS 656.385(1).

(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:

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Estimated Benefit Achieved	Professional Hours Devoted				
	1-2 hours	2.1-4 hours	4.1-6 hours	6.1-8 hours	Over 8 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
Over \$6000	\$400-900	\$800-1300	\$1050-1600	\$1350-1800	\$1550-2000

(c) Extraordinary circumstances are not established by merely exceeding eight hours or exceeding a benefit of \$6000.

(d) In cases under ORS 656.245, 656.247, 656.260, or 656.327, the factors listed in OAR 436-010-0008(12) may also be considered.

(e) 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:

- (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 before an order is issued; and
- (h) Any other relevant consideration deemed appropriate by the administrative law judge or director.

(3) In cases under ORS 656.262(11) 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 436-001-0246.

Stat. Auth.: ORS 656.385(1), 656.726(4)  
Stats. Implemented: ORS 656.262, 656.385, 656.388, and 656.704  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

#### **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,

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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.

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 656.704  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

### **436-001-0300 Alternative Dispute Resolution**

(1) The director may offer the parties to a matter within the director's jurisdiction alternative dispute resolution as a way to resolve the matter prior to a hearing.

(2) If the parties agree to attempt alternative dispute resolution before the director after referral of the matter to the board for hearing, the director will notify the administrative law judge that the parties have agreed to attempt resolution, and that the hearing should be deferred until the process is complete. If the parties do not settle, the director will notify the administrative law judge to proceed with the hearing.

(3) If the parties settle the matter within the director's jurisdiction through alternative dispute resolution before the director, the director will issue an order dismissing the request for hearing.

(4) Nothing in this rule prevents the parties from participating in the board's mediation program for those matters within the director's jurisdiction.

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 183.502, 656.704  
Hist: Amended 6/12/08 as WCD Admin. Order 08-050, eff. 7/1/08

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

June 12, 2008 by the  
Date prior to or same as filing date

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

OAR chapter 436  
Administrative Rules Chapter No.

Fred Bruyns 503-947-7717  
Rules Coordinator Telephone

350 Winter Street NE; Salem OR 97301-3879, PO Box 14480, Salem OR 97309-0405  
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to become effective July 1, 2008 Rulemaking Notice was published in the May 2008 *Oregon Bulletin*.\*\*  
Date upon filing or later Month and Year

**Rules affecting workers' compensation insurance, claims processing, medical billing, and return-to-work assistance.**

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

**RULEMAKING ACTION**

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

**ADOPT:** OAR 436-050-0025

**AMEND:** OAR:

436-001-0003	436-001-0252	436-009-0070	436-045-0003	436-050-0175	436-160-0330
436-001-0004	436-001-0265	436-009-0090	436-050-0002	436-050-0190	436-160-0340
436-001-0005	436-001-0296	436-015-0005	436-050-0003	436-050-0200	436-160-0350
436-001-0009	436-001-0300	436-015-0009	436-050-0005	436-050-0210	436-160-0360
436-001-0019	436-009-0004	436-015-0010	436-050-0008	436-050-0220	436-160-0410
436-001-0023	436-009-0008	436-015-0020	436-050-0045	436-110-0240	436-160-0430
436-001-0027	436-009-0010	436-015-0030	436-050-0050	436-110-0320	
436-001-0030	436-009-0015	436-015-0040	436-050-0100	436-110-0330	
436-001-0170	436-009-0020	436-015-0110	436-050-0110	436-160-0020	
436-001-0240	436-009-0030	436-030-0003	436-050-0120	436-160-0070	
436-001-0246	436-009-0040	436-040-0003	436-050-0170	436-160-0090	

**REPEAL:** OAR 436-040-0100

ORS 656.726(4)

Statutory Authority

Other Authority

ORS chapter 656

Statutes being Implemented

**RULE SUMMARY**

**Amendments to OAR 436-001, "Procedural Rules for Rulemaking and Hearings":**

- Clarify the applicability of the rules (436-001-0003)
- Carry out ORS 183.335 by requiring notice to legislators about proposed rulemaking (436-001-0009)
- Clarify the requirements for and methods of requesting a hearing (436-001-0019)

## **Certificate and Order for Filing Permanent Administrative Rules**

- Clarify that parties only need to provide supplemental exhibits to the director's representative if the director has filed an entry of appearance; clarify that all exhibits offered will be included in the hearing file whether or not they are admitted into the evidentiary record (436-001-0240)
- Clarify that written exceptions to a proposed and final order should include argument (436-001-0246)
- Provide that a party may request that director review be stayed if there is a pending matter concerning a claim that may make the matter within the director's jurisdiction moot (436-001-0252)
- Change the time frame for submitting a statement of services from seven days of the hearing date to any time before an order is issued (436-001-0265)
- Allow the ALJ to issue a proposed and final order dismissing the request for hearing if the parties resolve all issues within the director's jurisdiction via a settlement or agreement (436-001-0170 & 0296)

### **Amendments to OAR 436-009, "Oregon Medical Fee and Payment Rules":**

- Adopt by reference updated medical fee schedules and resources for the payment of health care providers, except as otherwise provided in these rules (436-009-0004)
- Extend the time for an insurer to request that a health care provider refund an overpayment for a compensable medical service from 90 to 180 days from the payment date; if the provider fails to respond or disagrees that an overpayment occurred, the insurer may request review by the director within 90 days of requesting the refund (436-009-0008)
- Exclude lumbar artificial disc replacement from compensability except under specified conditions (436-009-0015)
- Remove electronic data interchange medical reporting requirements in Appendix B, because OAR 436-160 includes the "Medical Bill Data Element Requirement Table" (436-009-0030)
- Raise the evaluation/management conversion factor from \$59.79 to \$64.79; lower the surgery conversion factor from \$93.66 to \$86.44 (436-009-0040)
- Reduce the maximum allowable fee for medications from 88% of the average wholesale price (AWP) to 83.5% of AWP and reduce the dispensing fee from \$8.70 to \$2.00 (436-009-0090)

### **Amendments to OAR 436-015, "Managed Care Organizations":**

- Clarify MCO certification requirements by defining the terms "group" (of medical service providers) and "non-qualifying employer." (436-015-0005 & 0009)
- Require that if an MCO has not obtained contracts with more than one insurer within one year from the effective date of its first contract, the MCO must provide the director with a report documenting its efforts to obtain additional contracts (436-015-0009)
- Eliminate the requirement that a prospective MCO submit certain documentation within 120 days of the filing of the "Notice of Intent to Form" (436-015-0010 & 0030)
- Reduce the number of copies of MCO applications or plans that must be submitted to the director from four copies to one copy (436-015-0020 & 0030)
- Eliminate the requirement that a prospective MCO submit a certification of incorporation and a copy of the MCO by-laws with its application (436-015-0030)
- For the purpose of quarterly data reporting, require that MCOs submit National Provider Identification (NPI) numbers rather than Oregon license numbers for their member providers (436-015-0040)
- Update the wording of appeal rights notices that MCOs must provide to a worker and all other parties that may appeal an MCO's decision, to include updated department contact information, and that appeal time frames begin with the mailing date of the notice, not from the date notice is received by the party; simplify the process for making complaints about rule violations (436-015-0110)

### **Amendments to OAR 436-030, "Claim Closure and Reconsideration," 436-040, "Workers with Disabilities Program," and 436-045, "Reopened Claims Program":**

- Correct the applicability provisions in rules 030-0003, 040-0003, and 045-0003

## **Certificate and Order for Filing Permanent Administrative Rules**

- Repeal OAR 436-040-0100, “Suspension and Revocation of Authorization to Issue Guaranty Contracts,” because this rule duplicates OAR 436-050-0015

### **Amendments to OAR 436-050, “Employer/Insurer Coverage Responsibility”:**

- Abbreviate the definition of “complete records” and adequately describe the term in the context of several rules in division 050 (436-050-0005, 0110, & 0210)
- Clarify rights of parties to appeal department orders by deleting an unnecessary and potentially misleading provision, which implies that if an order is final it cannot be appealed (436-050-0008(5)(d))
- Adopt a rule to explain how the Workers’ Compensation Division will serve penalty orders (436-050-0025)
- To implement House Bill 2007, expand the definition of “owner of the private home” to include any person related by an Oregon registered domestic partnership (436-050-0045)
- Eliminate the provision that an employer’s cancellation of coverage with an insurer does not terminate a guaranty contract; relocate a provision regarding overlapping self-insurance certification and guaranty contract coverage to rule 0200 (436-050-0100 & 0200)
- Supplement and clarify the description of record-keeping requirements (436-050-0110)
- Eliminate the requirement to include workers’ social security numbers on lists of claims provided to the director when an insurer or self-insured employer transfers claims to a new processor/location (436-050-0110 & 0210)
- Require insurers and self-insured employers to keep written records as to whether supplemental disability benefits were approved or denied (436-050-0120 & 0220)
- Provide that excess insurance coverage may include a deductible endorsement acceptable to the director (436-050-0170)
- Increase the time for a self-insured municipality to provide its annual report to the director (436-050-0175)
- Require that self insured employers notify the director within 30 days when the employer changes its operation in any manner that affects its workers’ compensation claims liability (436-050-0190)
- Require that self-insured employers conduct certain claim processing activities and record-keeping, and accommodate periodic audits, at in-state locations (436-050-0210)
- Require that self-insured employers provide contact information to the director for the location where records are or will be kept and where claims are or will be processed in Oregon; require that self-insured employers provide the director contact information for a designated person or position within the company who will assure payment of penalties and resolution of collections issues resulting from orders issued by the director (436-050-0220)

### **Amendments to OAR 436-110, “Preferred Worker Program”:**

- Allow issuance of a Preferred Worker card to a worker determined eligible before claim closure, even if the worker does not have available, immediate employment (436-110-0320)
- Provide additional time for insurers to request claim cost reimbursement (from the Workers’ Benefit Fund) if an employer informs an insurer about an injury to a preferred worker after the existing reimbursement deadlines have passed (436-110-0330)

### **Amendments to OAR 436-160, “Electronic Data Interchange”:**

- Provide the director discretion to require a trading partner agreement for medical data reporting, but eliminate the mandate for trading partner agreements for all EDI (436-160-0020)
- Clarify and simplify address reporting requirements (436-160-0090)
- Eliminate the requirement to submit paper reports to add or delete coverage for non-subject workers; the insurer must file the appropriate “include” or “exclude” endorsement transaction to the associated policy filing (436-160-0340 & 0350)
- Require insurers to notify the director of guaranty contract terminations within ten days (not within seven days) consistent with requirements in OAR 436-050 (436-160-0360)

**Certificate and Order for Filing Permanent Administrative Rules**

- Eliminate the requirement that the insurer submit a cancellation of a medical bill before resubmitting (436-160-0430)
- Revise electronic data interchange medical reporting requirements in Appendix B (436-160-0410)

Direct questions to: Fred Bruyns, Rules Coordinator; phone 503-947-7717; fax 503-947-7581; or e-mail [fred.h.bruyns@state.or.us](mailto:fred.h.bruyns@state.or.us). Rules are available on the Internet: <http://www.wcd.oregon.gov/policy/rules/rules.html>

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

/s/ John L. Shilts

Authorized Signer

6/12/08

Date

John L. Shilts, Administrator, Workers' Compensation Division

Printed name

\*With this original, file one photocopy of certificate, one paper copy of rules listed in Rulemaking Actions, and electronic copy of rules.

\*\*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 pm 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 pm on the preceding workday. ARC 930-2005