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**OREGON ADMINISTRATIVE RULES 1997 COMPILATION**

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**DIVISION 5**

**ADOPTION; DEFINITIONS;  
CONSTRUCTION; NOTICES REQUIRED**

**438-005-0005**

**Statutory Authority**

These rules are adopted under the Board's general rule-making authority of ORS 656.726(4) to provide rules of practice and procedure for hearing and review proceedings under ORS 656.001 to 656.990, for exercising its continuing authority under ORS 656.278 and providing for the payment of attorney fees in cases under the Workers' Compensation Law pursuant to ORS 656.388.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.726(4)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90

**438-005-0011**

**Effective Date; Applicability**

Except as otherwise provided below, these rules are effective January 1, 1996 and shall apply to all cases pending before the

Hearings Division and the Board under the provisions of ORS Chapter 656 on and after that date. These rules are also applicable to cases pending before the Hearings Division and the Board arising under ORS Chapter 655.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.726(4)

Hist.: WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 9-1990(Temp), f. 8-24-90, cert. ef. 8-27-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 1-1993, f. 5-19-93, cert. ef. 6-1-93; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

**438-005-0015**

**Adoption of Attorney General's Model Rules**

To the extent that the following rules are applicable to contested cases under the Workers' Compensation Law (Chapter 656), the Board hereby adopts by reference OAR 137-001-0005 through 137-001-0085, 137-003-0055 and 137-004-0010 (Attorney General's Model and uniform Rules).

Stat. Auth.: ORS 656.726(4) & 654.025(2)

Stats. Implemented: ORS 183.341(1)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88

**438-005-0016**

**Notice of Rulemaking**

(1) Prior to adoption, amendment or repeal of any administrative rule, other than a temporary rule adopted under ORS 183.355(5), the Board shall give notice of the intended action:

(a) In the Secretary of State's Bulletin referred to in ORS 183.360 at least 21 days before the effective date of the intended action;

(b) By mailing a copy of the notice to persons on the Board's mailing list established pursuant to ORS 183.335(7) at least 28 days before the effective date of the intended action; and

(c) By mailing or furnishing a copy of the notice to:

- (A) The Oregonian;
- (B) The Associated Press; and
- (C) The Capitol Press Room.

(2) The Board shall give notice of any administrative rulemaking hearing:

(a) In the Secretary of State's Bulletin referred to in ORS 183.360 at least 14 days before the hearing; and

(b) By mailing notice of the hearing to any person requesting the hearing and to the persons on the Board's mailing list established pursuant to ORS 183.335(7) at least 21 days before the hearing.

Stat. Auth.: ORS 656.726(4) & 654.025(2)

Stats. Implemented: ORS 183.341(4)

Hist.: WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95; WCB 1-1995, f. 3-20-95, cert. ef. 6-1-95

**438-005-0030**

**Safety Rules Reference**

Rules pertaining to the Oregon Safe Employment Act, ORS Chapter 654, may be found at OAR Chapter 438, Division 85.

Stat. Auth.: ORS 183 & 656

Stats. Implemented: ORS Ch. 183 & 656

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84

**438-005-0035**

**Board Policy**

It is the policy of the Board to expedite claim adjudication and amicably dispose of controversies. In accordance with ORS 656.012(3), these rules shall be interpreted in an impartial and balanced manner. The overriding principle is substantial justice. With respect to postponement or continuance of hearings, substantial justice requires consideration of the relative financial hardship of the parties. The unrepresented party shall not be held strictly accountable for failure to comply with these rules. Any individual who undertakes to represent a party in proceedings under these rules shall be required to comply with these rules.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.012(2)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### 438-005-0037

##### Penalty for Failure to Comply with Rules

If failure to comply with these rules by an insurer or self-insured employer results in delay in compensation ultimately ordered paid to a claimant by an Administrative Law Judge, an additional amount may be assessed on such compensation for unreasonable delay under the provisions of ORS 656.262(11).

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.262(10)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### 438-005-0040

##### General Definitions

(1) "Administrative Law Judge" means an individual appointed by the Board to perform the duties, functions and powers provided in ORS 654, 655 and 656, and such other duties, functions and powers as may be prescribed by the Board.

(2) "Aggravation" means an actual worsening of the compensable condition(s) after the last award or arrangement of compensation, which is established by medical evidence supported by objective findings, and otherwise satisfies the statutory requirements of ORS 656.273.

(3) "Aggravation rights" means the time periods specified in ORS 656.273 during which an injured worker is entitled to additional compensation for worsened conditions as a matter of right.

(4) "Benefits Section" means the Benefits Section of the Workers' Compensation Division of the Department of Consumer & Business Services.

(5) "Board" means the Workers' Compensation Board.

(6) "Claimant" means an injured worker or any other person entitled to initiate or continue a claim for compensation.

(7) "Director" means the Director of the Department of Consumer & Business Services or his/her designee.

(8) "Evaluation" means the Evaluation Unit of the Workers' Compensation Division of the Department of Consumer & Business Services.

(9) "Hearings Division" means the Hearings Division of the Workers' Compensation Board.

(10) "Insurer" means the State Accident Insurance Fund Corporation or an insurer authorized under ORS Chapter 731 to transact workers' compensation insurance in this state.

(11) "Party" means a claimant, an employer, including a noncomplying employer, the SAIF Corporation as processing agent in cases under ORS 656.054, and an insurer.

(12) "Self-insured employer" means an employer or group of employers certified under ORS 656.430 as meeting the qualifications set out in ORS 656.407.

Stat. Auth.: ORS 656.726(4) & 654.025(2)

Stats. Implemented: ORS 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### 438-005-0046

##### Filing and Service of Documents; Correspondence

(1) Filing:

(a) Except as otherwise provided in these rules, "filing" means the physical delivery of a thing to any permanently staffed office of the Board, or the date of mailing;

(b) If filing of a request for hearing or Board review of either an Administrative Law Judge's order or a Director's order finding no bona fide medical services dispute is accomplished by mailing, it shall be presumed that the request was mailed on the date shown on a receipt for registered or certified mail bearing the stamp of the United States Postal Service showing the date of mailing. If the request is not mailed by registered or certified mail and the request is actually received by the Board after the date for filing, it shall be presumed that the mailing was untimely unless the filing party establishes that the mailing was timely;

(c) Except for the documents specified in subsection (b) of this section, filing of any other thing required to be filed within a

prescribed time may be accomplished by mailing by first class mail, postage prepaid. An attorney's certificate that a thing was deposited in the mail on a stated date is proof of mailing on that date. If the thing is not received within the prescribed time and no certificate of mailing is furnished, it shall be presumed that the filing was untimely unless the filing party establishes that the filing was timely;

(d) "Filing" shall not include the submission of any thing to any permanently staffed office of the Board by means of a telephone facsimile communication device (FAX).

(2) Service:

(a) A true copy of any thing delivered for filing under these rules shall be simultaneously served personally or by mailing by first-class mail, postage prepaid, through the United State Postal Service, to each other party, or to their attorneys. Service by mail is complete upon mailing;

(b) Any thing delivered for filing under these rules shall include or have attached thereto either an acknowledgment of service by the person served or proof of service in the form of a certificate executed by the person who made service showing personal delivery deposit in the mails together with the names and addresses of the persons served.

(3) Correspondence. All correspondence to the Board shall be captioned with the name of the claimant, the WCB Case number and the insurer or self-insured employer claim number. Correspondence to the Hearings Division shall also be captioned with the date of the hearing and name of the assigned Administrative Law Judge, if any.

Stat. Auth.: ORS 656.726(4) & 656.388(4)

Stats. Implemented: ORS 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, cert. ef. 1-1-88; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 3-1991(Temp), f. 5-24-91, cert. ef. 5-28-91; WCB 8-1991, f. 11-6-91, cert. ef. 11-7-91

#### 438-005-0050

##### Notice of Claim Acceptance and Hearing Rights Under ORS 656.262(6)(d)

(1) Every notice of claim acceptance shall include all of the information prescribed by ORS 656.262(6)(b) and OAR Chapter 436.

(2) In the event that the insurer or self-insured employer disagrees with all or any portion of a worker's objections to a notice of claim acceptance under ORS 656.262(6)(d), the insurer's or self-insured employer's written response shall specify the reasons for the disagreement, and shall contain a notice, in prominent or bold-face type, as follows:

**"If you disagree with this decision, you may file a letter with the Workers' Compensation Board, 2250 McGilchrist Street, S.E., Salem, Oregon 97310. Your letter should state that you want a hearing, your address, the date of your injury, and your claim number."**

**"If your claim qualifies, you may receive an expedited hearing within 30 days. Your request cannot, by law, affect your employment. You may be represented by an attorney of your choice at no cost to you for attorney fees. If you have questions you may call the benefits section toll free in Oregon 1-800-452-0288 or in Salem or from outside Oregon at (503) 945-7585."**

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.262(6)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### 438-005-0053

##### Notice of Denial of Responsibility

(1) If a self-insured employer or insurer intends to deny responsibility for a claim on the basis of injury or exposure with another employer, the self-insured employer or insurer shall, within the 90 days allowed under ORS 656.262 for processing the claim, so indicate in or as part of a denial otherwise meeting the



requirements of ORS 656.262 and OAR 438-005-0055.

(2) The notice shall:

(a) Identify the condition(s) for which responsibility is being denied;

(b) State the factual and legal reasons for the denial; and

(c) Advise the claimant to file separate, timely claims against other potentially responsible insurers or self-insured employers, including other insurers for the same employer, in order to protect the claimant's rights to obtain benefits on the claim.

(3) The denial may:

(a) List the names and addresses of other insurers or self-insured employers who may be responsible for the claimant's condition; and

(b) State whether the self-insured employer or insurer has requested the appointment of a paying agent pursuant to ORS 656.307.

Stat. Auth.: ORS 656.726(4) & 654.025(2)

Stats. Implemented.: ORS 656.308(2) & 656.262(6)

Hist.: WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### **438-005-0055**

##### **Notice of Claim Denial and Hearing Rights**

In addition to the requirements of ORS 656.262, the notice of denial shall specify the factual and legal reasons for denial, and shall contain a notice, in prominent or bold-face type, as follows:

**"If you think this denial is not right, within 60 days after the mailing of this denial you must file a letter with the Workers' Compensation Board, 2250 McGilchrist Street, S.E., Salem Oregon 97310. Your letter must state that you want a hearing, your address and the date of your accident if you know the date. If your claim qualifies, you may receive an expedited hearing within 30 days. Your request cannot, by law, affect your employment. If you do not file a request within 60 days, you will lose any right you may have to compensation unless you can show good cause for delay beyond 60 days. After 180 days all your rights will be lost. You may be represented by an attorney of your choice at no cost to you for attorney fees. If you have questions you may call the benefits section toll free in Oregon 1-800-452-0288 or in Salem or from outside Oregon at (503) 945-7585."**

Stat. Auth.: ORS 656.726(4) & 654.025(2)

Stats. Implemented.: ORS 656.262(6)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### **438-005-0060**

##### **Notice of Partial Denial and Hearing Rights**

Every notice of partial denial shall set forth with particularity the injury, condition, benefit or service for which liability is denied and the factual and legal reasons therefor. The notice shall be in the form specified by OAR 438-005-0055.

Stat. Auth.: ORS 656.307, 656.388, 656.543 & 656.726(4)

Stats. Implemented.: ORS 656.262(6)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89

#### **438-005-0065**

##### **Manner of Giving Notice**

Notice of denial or other notice from which statutory time runs against a claimant shall be in writing and shall be delivered by registered or certified mail with return receipt requested or by personal service meeting the requirements for service of a summons.

Stat. Auth.: ORS 656.307, 656.388, 656.543 & 656.726(4)

Stats. Implemented.: ORS 656.262(6)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88

#### **438-005-0070**

##### **Request for Hearing**

Proceedings before the Hearings Division are begun by filing a request for hearing meeting the requirements of ORS 656.283. The request for hearing should be on a form prescribed by the Board. A request by an insurer or self-insured employer should also recite whether payment of compensation has been or will be stayed under ORS 656.313. In addition to the information required by ORS 656.283(3), the person requesting a hearing should include the person's full name, the name of the injured worker if different from that of the person requesting the hearing, the injured worker's social security account number, the date of the injury or exposure, the name of the employer and its insurer, if any, and the claim number. A copy of the request should be mailed to the insurer, self-insured employer, claimant, or if represented, claimant's counsel.

Stat. Auth.: ORS 656.726(4) & 654.025(2)

Stats. Implemented.: ORS 656.283(1)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95

#### **438-005-0072**

##### **Expedited Hearing/Compensation Stayed Under ORS 656.313**

For purposes of OAR 438 Divisions 005-006, compensation is deemed stayed under ORS 656.313 if the employer/insurer has filed a request for hearing on or after July 1, 1990 on a reconsideration order and compensation is due and unpaid under the order for temporary disability benefits, permanent total disability benefits, or death benefits payable to a surviving spouse prior to remarriage, to children or dependents that accrued before the date of the order, or permanent disability benefits.

Stat. Auth.: ORS 656.726(4) & 654.025(2)

Stats. Implemented.: ORS 656.313

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### **438-005-0075**

##### **Duty to Forward Misdirected Request**

If a claimant sends a request for hearing or Board review to the employer or insurer, the employer or insurer shall promptly forward the request to the Board.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented.: ORS 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89

### **DIVISION 6**

### **PROCEDURES PRIOR TO HEARING IN ORDINARY CASES**

#### **438-006-0020**

##### **Acknowledgment; Notice of Conference and Hearing in Ordinary Hearing Process**

The Hearings Division shall, by mail, acknowledge receipt of a request for hearing. Such acknowledgment may include notice of date for an informal prehearing conference pursuant to OAR 438-006-0062 or notice of hearing date. The hearing shall be scheduled for a date that is within 90 days of the request for hearing and not less than ten days after mailing of a notice of hearing date.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented.: ORS 656.283(4)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 6-1990(Temp), f. 4-24-90, cert. ef. 4-25-90; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90

#### **438-006-0031**

##### **Specification of Issues**

Not later than 15 days after the first disclosure of documents under OAR 438-007-0015, the party who requested the hearing shall, on a form prescribed by the Board, file with the Board and simultaneously mail copies to all other parties a specific listing of

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all issues to be raised at the hearing and all relief requested. Amendments shall be freely allowed up to the date of the hearing. If, during the hearing, the evidence supports an issue or issues not previously raised, the Administrative Law Judge may allow the issue(s) to be raised during the hearing. The Administrative Law Judge may continue the hearing upon motion of an adverse party if the party is surprised and prejudiced by the additional issue(s) and a continuance is necessary to allow the party an opportunity to cure the surprise and prejudice.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.307, 656.388, 656.593 & 656.726(4)

Hist.: WCB 3-1987(Temp), f. 8-27-87, ef. 9-15-87; WCB 5-1987, f. 12-18-87, ef. 1-1-88

#### 438-006-0036

##### Response

Not later than 15 days after receiving the listing of issues and other information required by OAR 438-006-0031, a party defending against a request for hearing shall, on a form prescribed by the Board, file and simultaneously mail copies to all other parties a response specifying the respondent's position on the issues raised and relief requested and any additional issues raised and relief requested by the respondent. Amendments shall be freely allowed up to the date of the hearing. If, during the hearing, the evidence supports an issue or issues not previously raised, the Administrative Law Judge may allow the issue(s) to be raised during the hearing. The Administrative Law Judge may continue the hearing upon motion of an adverse party if the party is surprised and prejudiced by the additional issue(s) and a continuance is necessary to allow the party an opportunity to cure the surprise and prejudice.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.307, 656.388, 656.593 & 656.726(4)

Hist.: WCB 3-1987(Temp), f. 8-27-87, ef. 9-15-87; WCB 5-1987, f. 12-18-87, ef. 1-1-88

#### 438-006-0037

##### Waiver of Notice

A party may waive objection to lack of notice, or a defect in the form of notice, of any issue raised at a hearing.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.307, 656.388, 656.593 & 656.726(4)

Hist.: WCB 3-1987(Temp), f. 8-27-87, ef. 9-15-87; WCB 5-1987, f. 12-18-87, ef. 1-1-88

#### 438-006-0038

##### Hearings on Worker Subjectivity

Notwithstanding OAR 438-006-0031, 438-006-0036 and 438-006-0037, when a hearing is granted in which a worker challenges a determination by the Compliance Section, Workers' Compensation Division, that the worker is not a subject worker, the only issue to be considered by the Administrative Law Judge shall be whether the worker was a subject worker of a subject employer on the date of the alleged injury.

Stat. Auth.: ORS 656.726(4) & 654.290

Stats. Implemented: ORS 656.726(4) & 654.290

Hist.: WCB 2-1992(Temp), f. 4-8-92, cert. ef. 4-15-92; WCB 6-1992, f. 10-9-92, cert. ef. 10-12-92

#### 438-006-0045

##### Motions, Arguments

Unless otherwise agreed among the parties and the Administrative Law Judge, pre or post hearing motions shall be filed in writing and copies shall be simultaneously served on all parties or their attorneys. Unless otherwise ordered by the Administrative Law Judge, ten days after filing shall be allowed for written response to a motion.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.307, 656.388, 656.593 & 656.726(4)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89

#### 438-006-0050

##### Preliminary Rulings

The Presiding Administrative Law Judge or his or her delegate shall rule on all preliminary matters.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.307, 656.388, 656.593 & 656.726(4)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89

#### 438-006-0055

##### Depositions

Depositions of medical or vocational experts are permitted by agreement of the parties, or by approval of an Administrative Law Judge, subject to the provisions of ORS 656.285. Depositions of claimants are permitted in the manner prescribed by ORS 656.262(14). Depositions of other lay witnesses are not permitted over objection unless the Presiding Administrative Law Judge or his or her delegate finds that extraordinary circumstances justify the deposition.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.307, 656.388, 656.593 & 656.726(4)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### 438-006-0062

##### Prehearing Conference

(1) An informal prehearing conference may be held by the Hearings Division as provided by, and for the purposes stated in ORS 656.726(4).

(2) The parties shall be given not less than ten days notice of the date of the conference.

(3) At the conference, any party may participate in the conference with or without an attorney.

(4) If a party is represented by counsel at the conference, a client representative with settlement authority (claimant, employer or claims examiner, as applicable) must attend the conference with counsel, or be available by telephone during that time.

(5) The Administrative Law Judge who conducts a prehearing conference on the merits shall not conduct the hearing on the matter over objection by any party.

Stat. Auth.: ORS 656.726(4) & 654.025(2)

Stats. Implemented: ORS 656.726(4) & 656.283(9)

Hist.: WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95

#### 438-006-0065

##### Consolidation and Joinder

(1) An Administrative Law Judge shall consolidate into one proceeding all cases in which a claimant has requested hearings involving denials of responsibility for a claim issued by insurers or self-insured employers under ORS 656.308(2)(a).

(2) The following kinds of cases (which do not involve responsibility denials issued under ORS 656.308(2)(a)) shall be consolidated for hearing at the same time and place if the Administrative Law Judge finds that consolidation is necessary or desirable for full determination of the issues:

(a) Cases in which a claimant has requested hearings involving more than one claim, regardless of date of injury, against the same employer, insurer, or self-insured employer; and

(b) Cases in which a claimant has requested a hearing or hearings involving matters concerning a claim or claims in which any party has also requested a hearing involving matters of compliance with the workers' compensation law where the primary issues relate to the same alleged injury or occupational disease.

(3) An Administrative Law Judge may consolidate cases for hearing at the same time and place if all parties and the Administrative Law Judge agree that consolidation of the cases is in the interest of substantial justice.

(4) Unless already a party to a case with the same claimant before the Hearings Division on a common issue, an insurer or self-insured employer shall not be joined by another insurer or self-insured employer in any proceeding unless it is established:

- (a) That the insurer or self-insured employer is a party to an Order Designating Paying Agent pursuant to ORS 656.307; or
- (b) That, in compliance with ORS 656.308(2)(a)(b), the worker has first filed a timely, written claim against that insurer or self-insured employer.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.307, 656.308 & 656.726(4)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### **438-006-0071**

##### **Failure of Party to Pursue or to Appear at Hearing**

(1) A request for hearing may be dismissed if an Administrative Law Judge finds that the party that requested the hearing has abandoned the request for hearing or has engaged in conduct that has resulted in an unjustified delay in the hearing of more than 60 days.

(2) Unjustified failure of a party or the party's representative to attend a scheduled hearing is a waiver of appearance. If the party that waives appearance is the party that requested the hearing, the Administrative Law Judge shall dismiss the request for hearing as having been abandoned unless extraordinary circumstances justify postponement or continuance of the hearing.

Stat. Auth.: ORS 656.726(4)

Stat. Auth.: ORS 656.307, 656.388 656.593 & 656.726(4)

Hist.: WCB 3-1987(Temp), f. 8-27-87, ef. 9-15-87; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89

#### **438-006-0075**

##### **Expedited Remedy for Failure to Pay Temporary Disability**

(1) If it is alleged that the self-insured employer or insurer has terminated temporary disability compensation without: the attending physician advising the worker and documenting in writing that the worker is released to return to regular employment; or the injured worker's actual return to regular or modified employment; or the attending physician advising the worker and documenting in writing that the worker is released to return to modified employment, when such employment has been offered in writing to the worker and the worker fails to begin such employment; or any other event that causes temporary disability benefits to be lawfully suspended, withheld or terminated under ORS 656.262(4) or other provisions under chapter 656; or the issuance of a determination order or notice of closure; or authorization of the Board or the Director, the claimant may file with the Hearings Division with copies to the insurer, a motion supported by affidavit asserting the failure to receive such compensation.

(2)(a) If the Hearings Division determines that the amount in controversy is less than \$1,000, the case shall be referred to the Expedited Claims Service under the provisions of Division 013 of these rules;

(b) If the matter cannot be resolved by referral to the Expedited Claims Service, the Hearings Division shall immediately upon receipt of the motion and affidavit issue an Order requiring the self-insured employer or insurer to show cause within 15 days why said compensation has not been provided to the claimant. The show cause order shall contain notice of the date, time and place of the show cause hearing.

(3) Immediately upon the conclusion of the hearing or expiration of the 15 days, the Administrative Law Judge shall enter an Order denying or granting temporary disability compensation and awarding penalties and attorney fees when appropriate.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.262(4), 656.2273(4) & 656.726(4)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### **438-006-0078**

##### **Request for Expedited Hearing**

(1) If it is alleged that the claimant is suffering a financial hardship or medical hardship, the claimant may file with the Presiding Administrative Law Judge with copies to the insurer, a written motion asserting the hardship and requesting an expedited hearing:

(a) For purposes of this rule, "financial hardship" means that the claimant is receiving neither compensation nor regular wages nor other income in lieu of wages which is comparable in amount to compensation;

(b) For purposes of this rule, "medical hardship" means that the claimant's condition will permanently and irreversibly deteriorate if the hearing is scheduled in the ordinary course of business and that such deterioration may be avoided by scheduling the hearing at an earlier date.

(2) A motion for expedited hearing shall be accompanied with supporting evidence:

(a) If the motion is based on financial hardship, supporting evidence shall include an affidavit from claimant or family member establishing such hardship;

(b) If the motion is based on medical hardship, supporting evidence shall include a medical report from the attending physician establishing medical hardship.

(3) A motion for expedited hearing shall state whether opposing counsel (or the party if the party is not represented by counsel), objects to, concurs in or has no comment regarding the motion.

(4) If opposing counsel (or the party if the party is not represented by counsel) concurs with the motion, the motion shall be accompanied by three mutually suitable dates for an expedited hearing.

(5) If opposing counsel (or the party if the party is not represented by counsel) either objects to the motion or has no comment, counsel for the moving party shall arrange and place a conference telephone call with the Presiding Administrative Law Judge or his or her designee and counsel for the parties.

(6) Within a reasonable time after receipt of the motion for expedited hearing and completion of the telephone call, if required, the Presiding Administrative Law Judge or his or her designee shall notify the parties in writing of the Administrative Law Judge's ruling:

(a) If the motion is granted, the Presiding Administrative Law Judge or his or her designee shall also notify the parties of the date for the expedited hearing;

(b) If the motion is denied, hearing shall be held on a date scheduled in the ordinary course of business.

Stat. Auth.: ORS 656.726(4)

Stat. Implemented: ORS 656.283(1) & 656.726(4)

Hist.: WCB 5-1991, f. 8-22-91, cert. ef. 9-2-91

#### **438-006-0081**

##### **Postponement of Hearings**

A scheduled hearing shall not be postponed except by order of an Administrative Law Judge upon a finding of extraordinary circumstances beyond the control of the party or parties requesting the postponement. "Extraordinary circumstances" shall not include:

(1) Failure of the insurer or self-insured employer to refer or delay in referring the case or any pertinent information to its representative;

(2) Unavailability of a party, witness or representative due to nonemergency medical or dental appointment, occupational, personal or professional business or appointments, or unwillingness to appear, provided that a postponement may be granted if the unavailable person is a worker who is temporarily working out of state and is reasonably expected to return to the state within a time certain or is a person who has been duly subpoenaed and has failed to comply with the subpoena;

(3) An attorney's party's, representative's or witness' conflict with administrative proceedings scheduled more than three days after mailing of the notice of hearing;

(4) Incomplete case preparation, unless the Administrative Law Judge finds that completion of the record could not be accomplished with due diligence.



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Stat. Auth.: ORS 656.283(4)

Stat. Implemented: ORS 656.307, 656.388, 656.593 & 656.726(4)

Hist.: WCB 3-1987(Temp), f. 8-27-87, ef. 9-15-87; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, cert. ef. 4-1-89

#### 438-006-0091

##### Continuances

The parties shall be prepared to present all of their evidence at the scheduled hearing. Continuances are disfavored. The Administrative Law Judge may continue a hearing for further proceedings. The Administrative Law Judge shall state the specific reason for the continuance:

(1) If the time allocated for the scheduled hearing is insufficient to allow all parties to present their evidence and argument;

(2) Upon a showing of due diligence if necessary to afford reasonable opportunity to cross-examine on documentary medical or vocational evidence;

(3) Upon a showing of due diligence if necessary to afford reasonable opportunity for the party bearing the burden of proof to obtain and present final rebuttal evidence or for any party to respond to an issue raised for the first time at a hearing; or

(4) For any reason that would justify postponement of a scheduled hearing under OAR 438-06-081.

Stat. Auth.: ORS 656.283(4) & 656.726(4)

Stat. Implemented: ORS 656.307, 656.388, 656.593 & 656.726(4)

Hist.: WCB 3-1987(Temp), f. 8-27-87, cert. ef. 9-15-87; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89

#### 438-006-0095

##### Change of Administrative Law Judge

(1) An Administrative Law Judge may withdraw from a case whenever he or she considered himself or herself disqualified.

(2) Any party may request that the Administrative Law Judge be removed from a case, on grounds of personal bias or conflict of interest, by filing with the Presiding Administrative Law Judge, promptly upon discovery of the alleged facts, an affidavit which sets forth in detail the matters believed to constitute the grounds for disqualification.

(3) If, in the opinion of the Presiding Administrative Law Judge, the request for disqualification is filed with the diligence and the supporting affidavit is sufficient on its face, the Presiding Administrative Law Judge shall either disqualify the Administrative Law Judge and assign another Administrative Law Judge to the case or order a hearing on the allegations in the affidavit.

(4) If the Presiding Administrative Law Judge does not disqualify the Administrative Law Judge, the Presiding Administrative Law Judge shall so rule on the record, stating the grounds for his ruling, and the case shall proceed with the Administrative Law Judge.

Stat. Auth.: ORS 656.726(4)

Stat. Implemented: ORS 656.307, 656.388, 656.593, 656.726(4)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88

#### 438-006-0100

##### Representation by Counsel

(1) Except as permitted by ORS 656.291 and this rule, corporations and state agencies must be represented by members of the Oregon State Bar. The Board encourages injured workers also to be represented in formal hearings.

(2) Notwithstanding section (1) of this rule, a state agency officer or employee may represent the Director as permitted by rule of the Director.

(3)(a) A law student authorized to appear before courts and administrative tribunals of this state in accordance with Rule 9.05 through 9.30 of the Supreme Court Rules for Admission of Attorneys (Law Student Appearance Rules) has the consent of the Board to appear on behalf of a client at a hearing if:

(A) All of the following documents have been filed with the Presiding Administrative Law Judge prior to the hearing:

(i) A true copy of the student's certification to appear under the Law Student Appearance Rules showing approval by the Supreme Court and filing with the State Court Administrator;

(ii) The client's written consent to representation under the Law Student Appearance Rules, which shall be made a part of the official record of each case; and

(iii) The student's supervising attorney has introduced the student to the Presiding Administrative Law Judge in a letter of introduction signed by the supervising attorney; and

(B) The Presiding Administrative Law Judge has approved the law student's appearance prior to the hearing.

(b) The supervising attorney is encouraged, though not required, to personally introduce the law student to the assigned Administrative Law Judge in each case.

Stat. Auth.: ORS 656.726(4)

Stat. Implemented: ORS 656.726(4) & 9.320

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 1-1990, f. 1-24-90, cert. ef. 2-28-90; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90

#### 438-006-0105

##### Deferred Hearings

A hearing may be deferred until a time specified in the order of deferral if:

(1) The primary issue is unscheduled permanent disability and the claimant is entitled to temporary disability compensation under an Authorized Training Program, except where there is an interruption of compensation or upon a showing of good cause;

(2) Consolidation with a pending hearing under OAR 438-005-0065(1) cannot be accomplished prior to the time scheduled for the pending hearing; or

(3) The claimant has made a claim that the Administrative Law Judge finds should be resolved with the pending hearing and the insurer or self-insured employer will not be allowed the full time for processing of the new claim under the provisions of ORS 656.262 prior to the time scheduled for the pending hearing.

Stat. Auth.: ORS 656.726(4)

Stat. Implemented: ORS 656.726(4) & 656.268(8)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90

#### 438-006-0110

##### Hearing Security

Any party or attorney having knowledge or reasonable belief that any party or witness to the hearing may potentially present a danger or may be a threat to anyone involved in the claim or hearing shall immediately notify the hearing Administrative Law Judge and the opposing attorney(s) of the potentially dangerous situation. All decisions involving security at the hearing shall be within the discretion of the Presiding Administrative Law Judge or his/her designee.

Stat. Auth.: ORS 656.726(4)

Stat. Implemented: ORS 656.726(4)

Hist.: WCB 1-1993, f. 5-19-93, cert. ef. 6-1-93; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90

#### 438-006-0115

##### Motion to Dismiss a Party Under ORS 656.308(2)(c)

(1) If an insurer or self-insured employer is alleging that the record does not contain substantial evidence to support a finding of responsibility against it, the insurer or self-insured employer may file a "written notice" pursuant to ORS 656.308(2)(c) requesting its dismissal as a party to the proceeding.

(2) The written notice described in section (1) of this rule shall be considered by the Administrative Law Judge if:

(a) The written notice is labeled "308 Dismissal Motion";

(b) The written notice (including any supporting documentation) is filed not more than 28 days or less than 14 days before the hearing; and

(c) A copy of the written notice (including any supporting documentation) is simultaneously served on the other parties, or if represented, on their attorneys in the manner provided in OAR 438-005-0046(2)(a), and proof of such service is provided in accordance with OAR 438-005-0046(2)(b).

(3) Written responses to the written notice described in



sections (1) and (2) of this rule shall be considered if:

(a) The written response is labeled "308 Dismissal Response";

(b) The written response (including supporting documentation) is filed within seven days after the written notice is filed; and

(c) A copy of the written response (including supporting documentation) is simultaneously served on the other parties or, if represented, on their attorneys in the manner provided in OAR 438-005-0046(2)(a) and proof of such service is provided in accordance with OAR 438-005-0046(2)(b).

(4) For purposes of ORS 656.308(2)(c) and this rule, the record shall include any document filed with the Hearings Division which was considered by the Administrative Law Judge prior to the issuance of his / her decision.

(5) Not less than seven days before the hearing, the Administrative Law Judge shall inform the parties either that:

(a) The party filing the written notice shall be dismissed as a party to the hearing; or

(b) The party filing the written notice shall not be dismissed as a party to the hearing; or

(c) The hearing shall be postponed.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.308(2)(c)

Hist.: WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

## DIVISION 7

### EVIDENCE — HEARINGS

#### 438-007-0005

##### **Medical and Vocational and Other Documentary Evidence**

(1) Statutory references: medical reports as evidence, ORS 656.310(2); vocational reports, ORS 656.287.

(2) To avoid unnecessary delay and expense medical evidence should be presented in the form of written reports and should include:

(a) History of the injury or disease;

(b) Pertinent medical history;

(c) Present complaints;

(d) All sources of history and complaints;

(e) Date of examination;

(f) Findings on examination;

(g) Impairment of physical or mental function including loss of reserve capacity;

(h) Restrictions of activities, such as lifting, bending, twisting, sitting, standing and repetitive use;

(i) Cause of the impairment and opinion whether the impairment is all or in part work related;

(j) Medical treatment indicated;

(k) Likelihood of permanent impairment and opinion whether the condition is likely to change; and

(l) The reason for the opinion.

(3) The insurer may subpoena the claimant's attending or consulting physician(s) or vocational expert for cross-examination. Medical, surgical, hospital and vocational reports offered by the insurer will also be accepted as prima facie evidence provided the insurer agrees to produce the medical or vocational expert for cross-examination upon request of the claimant. The reports of any medical or vocational expert who has refused to make herself or himself available for cross-examination shall be excluded from the record unless good cause is shown why such evidence should be received. The cost of cross-examination of any medical or vocational expert under this section shall be paid by the insurer.

(4) To avoid unnecessary cost and delay, the Board encourages the use of written interrogatories or depositions to secure medical or vocational expert testimony.

(5) The Administrative Law Judge may appoint a medical or vocational expert to examine the claimant and to file a report with the Administrative Law Judge. The parties may also agree in advance to be bound by such expert's findings. The cost of

examination and reports under this rule shall be paid by the insurer.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.287 & 656.310(2)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 1-1987, f. 3-4-87, ef. 4-15-87; WCD 2-1987(Temp), f. 4-13-87, ef. 4-15-87; WCB 4-1987, f. 11-6-87, ef. 11-16-87; WCB 5-1987, f. 12-18-87, ef. 1-1-88

#### 438-007-0010

##### **Competency of Vocational Experts**

Vocational reports and testimony are admissible as expert opinion evidence if the Administrative Law Judge finds the author or witness to be qualified as an expert or if the parties stipulate to the author's or witness' qualifications as an expert in vocational assistance matters.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.287

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88

#### 438-007-0015

##### **Entitlement to Claims Information-Full Disclosure Required**

(1) References to the insurer and the claimant include their representatives.

(2) Documents pertaining to claims are obtained by mailing a copy of the Request for Hearing, or a written demand accompanied by an attorney retention agreement or medical information release, to the insurer or self-insured employer. Within 15 days of said mailing, the insurer or self-insured employer shall furnish the claimant and other insurers, without cost, originals or legible copies of all medical and vocational reports, records of compensation paid, and all other documents pertaining to the claim(s). Upon specific demand by the claimant, payroll records shall be obtained by the insurer from the employer and provided in the same manner as other documents.

(3) Upon written demand by the insurer(s) or self-insured employer(s), the claimant shall within 15 days of the mailing of said demand, furnish to the insurer(s), without cost, copies of all medical and vocational reports and other documents pertaining to the claim which the claimant did not receive from the insurer or self-insured employer making the demand.

(4) Documents acquired after the initial exchanges shall be provided to the other parties within seven days after the disclosing party's receipt of the documents.

(5) It is the express policy of the Board to promote the full and complete disclosure of all facts and opinion pertaining to the claim being litigated before the Hearings Division. Failure to comply with this rule shall, if found unreasonable, be considered delay or refusal under ORS 656.262(11). Failure to comply with this rule may also be considered grounds for continuance of a hearing or exclusion of evidence under OAR 438-007-0018(4).

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats Implemented: ORS 656.726(4)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; Suspended by WCB 3-1987(Temp), f. 8-27-87, ef. 9-15-87; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### 438-007-0016

##### **Disclosure of Expert Witness Required**

Within the times provided for the initial exchanges of exhibits and indexes under OAR 438-007-0018 each party shall disclose to all other parties the identity of each expert witness the party will call to testify at the hearing. A statement by a party that the party "reserves the right," or similar language, to call as a witness any expert whose opinion has been included in the documents filed in the case is not compliance with this rule. At the hearing the Administrative Law Judge may, in his or her discretion, allow the testimony of expert witnesses not disclosed as required by this rule. In the exercise of this discretion, the Administrative Law Judge shall determine whether material prejudice has resulted from the timing of the disclosure and, if so, whether there is good cause for the failure to timely disclose that outweighs the prejudice to the other party or parties.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.726(4)

Hist.: WCB 3-1987(Temp), f. 8-27-87, ef. 9-15-87; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89

**438-007-0017**

**Impeachment Evidence**

(1) Impeachment evidence shall not include any material disclosed to, or reviewed by, a medical or vocational expert.

(2) Unless withheld as impeachment evidence, the following material shall be disclosed under OAR 438-007-0015:

(a) All medical or vocational material, whether created or existing before, on, or after the date of injury or exposure; and

(b) All audio tapes, video tapes, transcriptions, summaries, and notes of recorded or unrecorded statements given by a claimant to an insurer, self-insured employer, claims administration agency, or employer.

(3) Impeachment evidence consisting of medical or vocational reports not used during the course of the hearing must be provided to any opposing party at the conclusion of the presentation of evidence and before closing arguments are presented. Any other withheld impeachment evidence is not subject to disclosure.

(4) Impeachment evidence shall not be considered by the Administrative Law Judge as substantive evidence, unless any opposing party offers any withheld medical or vocational reports as substantive evidence.

Stat. Auth.: ORS 656.726(4) & 654.025(2)

Stats. Implemented: ORS 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

**438-007-0018**

**Exchange and Admission of Exhibits at Hearing**

(1) Not later than 28 days before the hearing, the insurer or self-insured employer shall provide the claimant and other insurer or self-insured employer legible copies of all documents that are relevant and material to the matters in dispute in the hearing, together with an index. The index shall include the document numbers, description of each document, author, number of pages and date of the document. The documents shall be arranged in chronological order and numbered, in Arabic numerals, in the lower right corner of each page, beginning with the document of earliest date. The numbers shall be preceded by the designation "Ex," and pagination of multiple-page documents shall be designated by a hyphen followed by the page number. For example, page two of document two shall be designated "Ex 2-2." A physician's chart notes constitute a multi-page document to the extent that the date of each individual chart note is subsequent to the date of the preceding exhibit and is earlier than the date of the next exhibit. However, for deposition transcripts, only the cover page of the deposition need be numbered; i.e., "Ex. 3."

(2) Not less than 14 days before the hearing, or within seven days of receipt of the insurer document index and documents, whichever is later, the claimant shall provide the insurer(s) or self-insured employer(s) legible copies of any additional documents that are relevant and material to the matters in dispute in the hearing. The additional documents shall be marked and accompanied by a supplemental document index, prepared in the same manner as the insurer documents and index and numbered to coincide in chronological order with the insurer's documents. Letter subdesignations shall be used to ensure chronological numbering. For example, a document which is chronologically between documents six and seven of the insurer documents shall be designated "Ex 6A."

(3) Before the hearing, the parties shall delete from their indexes and packets of documents those documents which are cumulative, or which no party can in good faith represent to be relevant and material to the issues, and the revised indexes and packets of documents shall be submitted to the Administrative Law Judge. For compliance with this rule, it is sufficient for the parties to mark neatly through the index description of the documents not being offered in evidence with ink, and to remove the corresponding documents from the packets submitted to the

Administrative Law Judge.

(4) Subject to ORS 656.287(1), at the hearing the Administrative Law Judge may in his or her discretion allow admission of additional medical reports or other documentary evidence not disclosed as required by OAR 438-007-0015. In the exercise of this discretion, the Administrative Law Judge shall determine whether material prejudice has resulted from the timing of the disclosure and, if so, whether there is good cause for the failure to timely disclose that outweighs any prejudice to the other party or parties. Following a finding of material prejudice, the Administrative Law Judge may exclude a document or continue the hearing for such action as is appropriate to cure the material prejudice caused by the late disclosure of the document.

(5) Within the time provided for the initial exchanges of exhibits and indexes under Section (1), if a party intends to present any portion of the "reconsideration record" obtained from the Director for admission under ORS 656.283(7) at the hearing, that party shall notify the other parties.

(6) The notifying party's copy of the Director's reconsideration record is subject to the "disclosure" requirements of OAR 438-007-0015. However, presentation of the Director's reconsideration record is not subject to the "exchange and admission" requirements of this rule.

(7) At the hearing, rather than presenting the Director's reconsideration record for admission, the parties shall present their oral or written stipulation identifying the exhibits in the hearing record which were also included in the Director's reconsideration record under ORS 656.283(7). If the parties cannot reach an agreement, any disputed portions of the Director's reconsideration record may be presented for admission.

Stat. Auth.: ORS 656.726(4) & 654.025(2)

Stats. Implemented: ORS 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

**438-007-0019**

**Testimony at Hearings**

All testimony at the hearing shall be upon oath or affirmation administered by the Administrative Law Judge.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.726(2)(b)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88

**438-007-0020**

**Witness Fees**

Witness fees and mileage in workers' compensation cases are payable as in civil actions.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.283(8) & 656.726(2)(c)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88

**438-007-0022**

**Manner of Taking Testimony of Lay Witnesses**

(1) Testimony of lay witnesses shall be taken by personal appearance of the witness before the Administrative Law Judge at the hearing.

(2) When a lay witness is unable to attend the hearing due to extraordinary circumstances beyond the control of the party offering the testimony and the testimony of the witness cannot be taken by deposition, the Administrative Law Judge may allow testimony to be taken in any manner that will afford substantial justice and insure a complete and accurate record of all examination and testimony.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.726(2)(d)

Hist.: WCB 6-1987(Temp), f. & ef. 12-18-87; WCB 1-1988, f. & ef. 6-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

**438-007-0023**

**Order of Presentation of Evidence and Argument at Hearing**

The party bearing the burden of proof on an issue in a hearing has the right of first and last presentation of evidence and

argument on the issue.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.726(2)(d)

Hist.: WCB 2-1989, f. 3-3-89, ef. 4-1-89

#### **438-007-0025**

##### **Reconsideration**

(1) The Administrative Law Judge may reopen the record and reconsider his or her decision before a request for review is filed or, if none is filed, before the time for requesting review expires. Reconsideration may be upon the Administrative Law Judge's own motion or upon a motion by a party showing error, omission, misconstruction of an applicable statute or the discovery of new material evidence.

(2) A motion to reconsider shall be served on the opposite parties by the movant and, if based on newly discovered evidence, shall state;

(a) The nature of the new evidence; and

(b) An explanation why the evidence could not reasonably have been discovered and produced at the hearing.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.283(7) & 656.726(4)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88

#### **438-007-0030**

##### **Unofficial Recording of Hearing Prohibited**

An Administrative Law Judge shall prohibit broadcasting, televising, sound or video recording and the taking of photographs within the hearing room and of events in the hearing room from outside the hearing room while the hearing is in session and during recesses between sessions, except sound recording of a hearing by the Administrative Law Judge or an official hearing reporter for the purpose of making a record of the hearing. To the extent the Administrative Law Judge deems necessary, the same prohibitions may be applied to areas immediately adjacent to the hearing room where the activities may interrupt or interfere with entry to or exit from the hearing room, distract or disturb proceedings within the hearing room or otherwise interfere with the conduct of the hearing.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.283(7) & 656.726(4)

Hist.: WCB 1-1988, f. & ef. 6-1-88

#### **438-007-0035**

##### **Interpreters**

(1) "Interpreter" means a person qualified to interpret oral and written proceedings from a language other than English to English and English to the other language, or the operator of appropriate assistive communication devices necessary to allow a disabled person to fully participate in proceedings.

(2) The Workers' Compensation Board (Board) will pay for the services of an interpreter if:

(a) The party seeking to offer evidence that requires interpretation, or who requires interpretation to fully participate in the proceeding, has engaged the services of an interpreter;

(b) The interpreter is under a current personal services contract with the Board at the time interpretation services are performed; and

(c) A proceeding, whether or not recorded, is conducted in the presence of an Administrative Law Judge or pursuant to a Administrative Law Judge's order.

(3) The party who engages the services of an interpreter is responsible for notifying the interpreter of the dates, times and places of proceedings and of any changes in those factors, including cancellations of hearings.

(4) Payment shall be at the rate(s) prescribed in the personal services contract, except that:

(a) Interpretation services will be paid only for proceedings, whether or not recorded, conducted in the presence of a Administrative Law Judge or pursuant to a Administrative Law Judge's order;

(b) The Board will reimburse the interpreter for travel costs only if travel of more than 40 miles round trip is required to

perform interpretation services and the travel is approved in advance by the Board's Administrator; and

(c) If a scheduled hearing has been cancelled, any appearance charges billed by the interpreter shall be the responsibility of the party who engaged the interpreter.

(5) A list of interpreters under contract with the Board may be obtained by contacting the Hearings Division, 2250 McGilchrist Street, S.E., Salem, OR 97310.

(6) This rule does not prohibit the parties from engaging the services of interpreters not under Board contract, either as volunteers or at the expense of one or more of the parties, if the parties and the Administrative Law Judge so agree.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 656.726(2)(d)

Hist.: WCB 4-1992(Temp), f. 6-16-92, cert. ef. 6-17-92; WCB 7-1992, f. 12-10-92, cert. ef. 12-14-92; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95

## **DIVISION 9**

## **COMPROMISE AND SETTLEMENT**

#### **438-009-0001**

##### **Special Definitions**

As used in this Division:

(1) "Claim Disposition Agreement" means a written agreement executed by all parties in which a claimant agrees to release rights, or agrees to release an insurer or self-insured employer from obligations, under ORS 656.001 to 656.794 except for medical services, in an accepted claim.

(2) "Disputed Claim Settlement" means a written agreement executed by all parties in which the parties agree to make a reasonable disposition of a claim in which there is a bona fide dispute over the compensability of the claim.

(3) "Settlement Stipulation" means a written agreement, or an oral agreement if made on the oral record of a hearing and approved in writing by a Administrative Law Judge, in which any matter contested between the parties, other than matters resolvable in a claim disposition agreement or disputed claim settlement, are resolved by agreement of the parties.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.236, 656.289(4) & 656.726(4)

Hist.: WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90

#### **438-009-0005**

##### **Settlement Stipulations**

(1) Contested matters arising out of a claim closure may be resolved by the parties at any time after the conclusion of the reconsideration proceeding by Evaluation under ORS 656.268, whether or not a hearing has been requested by a party.

(2) Any contested matters not arising out of a claim closure may be resolved by the parties at any time, whether or not a hearing has been requested by a party.

(3) All settlement stipulations that provide for an award of compensation for permanent partial disability shall recite the body part(s) for which the award(s) is (are) made and shall recite all awards in both degrees and percent of loss. In the event there is any inconsistency between the stated degrees and percent of loss awarded in a settlement stipulation, the stated percent of loss shall be controlling.

(4) For purposes of ORS 656.289(1)-(3), a Administrative Law Judge's order approving a settlement stipulation is a determination of all matters included within the terms of the settlement stipulation.

(5) All settlement stipulations shall recite whether a claim disposition agreement in the claim has been filed for approval by the Board.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.268 & 656.289(1-3)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90



**438-009-0010****Disputed Claim Settlements**

(1) Any document submitted for approval by the Board or the Hearings Division as a settlement of a denied or disputed claim shall be in the form specified by this rule.

(2) A disputed claim settlement shall recite, at a minimum:

(a) The date and nature of the claim;

(b) That the claim has been denied and the date of the denial;

(c) That a bona fide dispute as to the compensability of the claim exists and that the parties have agreed to compromise and settle the denied and disputed claim under the provisions of ORS 656.289(4);

(d) The factual allegations and legal positions in support of the claim;

(e) The factual allegations and legal positions in support of the denial of the claim;

(f) That each of the parties has substantial evidence to support the factual allegations of that party;

(g) A list of medical service providers who shall receive reimbursement in accordance with ORS 656.313(4), including the specific amount each provider shall be reimbursed, and the parties' acknowledgment that this reimbursement allocation complies with the reimbursement formula prescribed in ORS 656.313(4)(d); and

(h) The terms of the settlement, including the specific date on which those terms were agreed.

(3) If an accepted claim is later denied entirely at any time based on fraud, misrepresentation or other illegal activity by the worker, the disputed claim settlement shall further recite the specific factual allegations and legal positions of the parties concerning the fraud, misrepresentation or other illegal activity.

(4) If a claim was previously accepted in good faith but later denied, in whole or in part, based on later obtained evidence that the claim is not compensable or evidence that the paying agent is not responsible for the claim, the disputed claim settlement shall further recite:

(a) If the accepted claim is later denied entirely at any time up to two years from the date of claim acceptance, an allegation that the self-insured employer or insurer has obtained later evidence that the claim is not compensable or that the paying agent is not responsible for the claim; or

(b) If the denial is a denial of aggravation, current need for medical services or a partial denial of a medical condition on the ground that the condition is not related to the accepted injury, that the claimant retains all rights that may later arise under ORS 656.245, 656.273, 656.278 and 656.340, insofar as these rights may be related to the original accepted claim.

(5) If the claimant is unrepresented, the denial of the claim which is being settled by any document described in section (1) of this rule shall not be contained within that document, but rather shall be issued separately. In addition, any document described in section (1) of this rule shall recite that the unrepresented claimant has been orally advised of:

(a) The right to an attorney of the claimant's choice at no cost to the claimant for attorney fees; and

(b) The existence of the office of the Ombudsman pursuant to ORS 656.709.

(6) Any document described in section (1) of this rule shall also recite that the claimant has been orally advised that:

(a) The claimant has the right to request a hearing concerning the claim, after which an Administrative Law Judge will determine whether the claimant will receive workers' compensation benefits;

(b) If, following the hearing, the claim is finally determined compensable, the claimant would be entitled to workers' compensation benefits, which could include temporary disability, permanent disability, medical treatment, and vocational rehabilitation;

(c) If, following the hearing, the claim is finally determined not compensable, the claimant would not be entitled to workers' compensation benefits;

(d) As a result of this agreement, the claimant's rights to seek

workers' compensation benefits concerning this claim would be extinguished;

(e) Both parties agree that the terms of the agreement are reasonable; and

(f) The agreement shall not be binding upon the parties unless and until the agreement is signed by an Administrative Law Judge or the Board, depending upon which forum is considering the dispute.

(7) No document described in section (1) of this rule shall be approved unless the document submitted by the parties establishes that a bona fide dispute as to compensability exists and the proposed disposition of the dispute is reasonable. If an Administrative Law Judge or the Board is not satisfied that a bona fide dispute exists or that disposition of the dispute is reasonable, the Administrative Law Judge or Board may reject the agreement or specify the manner in which objection(s) can be cured.

(8) All disputed claim settlements shall recite whether a claim disposition agreement in the claim has been filed for approval by the Board. All disputed claim settlements shall be in a separate document from a claim disposition agreement.

Stat. Auth.: ORS 656.313(4)

Stats. Implemented: ORS 656.236, 656.289(4) & 656.726(4)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 5-1990, f. 4-19-90, cert. ef. 5-21-90; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 3-1993, f. 10-27-93, cert. ef. 11-4-93; WCB 2-1995, f. 11-13-96, cert. ef. 1-1-96

**438-009-0015****Notice of Settlement; Submission of Documents**

(1) The party that requested the hearing shall promptly notify the Presiding Administrative Law Judge, or his or her delegate, when a case is settled in whole or in part.

(2) The party that requested Board review shall promptly notify the Board's Closing and Appeals Division in writing when a case is settled in whole or in part.

(3) The Presiding Administrative Law Judge, or his or her delegate, may require written notice of settlement as a condition of cancellation of a scheduled hearing.

(4) With the consent of the assigned Administrative Law Judge, the parties may enter a settlement on the oral record at the time and place scheduled for the hearing. With the exception of a disputed claim settlement, the Administrative Law Judge may enter an order reciting and approving the settlement in such cases, without the submission of documents by the parties. With the consent of the parties, the official oral record, including the Administrative Law Judge's approval, which is subject to transcription if necessary, is sufficient authority for the payment of settlement amounts in advance of the formal written order.

(5) In all cases settled by written stipulation of the parties, the original and six legible copies of the settlement document shall be submitted to the Administrative Law Judge or the Board for approval. If the written stipulation pertains to the resolution of disputes pending before both the Hearings Division and the Board, the settlement document shall recite the issues resolved by the Opinion and Order which is pending before the Board. If the written stipulation is submitted to the Hearings Division for approval and the agreement either formally or effectively modifies a dispute which is pending before the Board, the stipulation shall be submitted in a format to provide for both Hearings Division and Board approval. The original document shall be retained in the Board's file and necessary copies shall be conformed and distributed to the parties and Compliance.

(6) Unless a party has filed prior written notice with the Hearings Division or the Board that the party wants an exhibit returned to them, all exhibits (with the exception of exhibit lists) may be discarded from the record following:

(a) Administrative Law Judge or Board approval of a settlement stipulation or disputed claim settlement;

(b) An Administrative Law Judge order dismissing a party's hearing request in response to that party's withdrawal of the request; or

(c) A Board order dismissing a party's request for Board review in response to that party's withdrawal of the request for

Board review.

Stat. Auth.: ORS 654.025(2) & 656.726(4)  
Stats. Implemented: ORS 656.236, 656.289(4) & 656.726(4)  
Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 1-1990, f. 1-24-90, cert. ef. 2-28-90; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95

**438-009-0020**

**Claim Disposition Agreements; Form**

Any document filed for approval by the Board as a claim disposition agreement shall:

- (1) Contain the terms, conditions, and information as prescribed by the Board pursuant to OAR 438-009-0022;
- (2) Be in a separate document from a disputed claim settlement; and
- (3) Include, in prominent or bold-face type, the following paragraph, which shall be located at the conclusion of the document after the signature lines for the parties:

**"THIS AGREEMENT IS IN ACCORDANCE WITH THE TERMS AND CONDITIONS PRESCRIBED BY THE BOARD. SEE ORS 656.236(1). ACCORDINGLY, THIS CLAIM DISPOSITION AGREEMENT IS APPROVED. AN ATTORNEY FEE PAYABLE TO CLAIMANT'S ATTORNEY ACCORDING TO THE TERMS OF THIS AGREEMENT IS ALSO APPROVED.**

**IT IS SO ORDERED.**

DATED THIS \_\_\_\_ DAY OF \_\_\_\_\_ 19\_\_.

Board Member

Board Member

**NOTICE TO ALL PARTIES: THIS ORDER IS FINAL AND IS NOT SUBJECT TO REVIEW. ORS 656.236(2)."**

(4) If the document filed for approval lacks any of the information required by section (1) of this rule, the Board may:

(a) Mail a letter notifying the parties that the deficiency must be corrected and that an addendum signed by the parties or their representatives must be filed with the Board within 21 days from the date of the letter; and

(b) In the event that the deficiency is not corrected in the manner and within the time described in subsection (a) of this section, disapprove the proposed agreement as unreasonable as a matter of law under ORS 656.236(1)(a).

Stat. Auth.: ORS 656.726(4)  
Stats. Implemented: ORS 656.236  
Hist.: WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 1-1991(Temp), f. & cert. ef. 3-8-91; WCB 5-1991, f. 8-22-91, cert. ef. 9-2-91; WCB 2-1995, f. 11-13-96, cert. ef. 1-1-96

**438-009-0022**

**Required Information in a CDA**

(1) If a claim disposition agreement involves more than one claim, the disposition shall contain all of the information required by this rule for each claim including a separate first page of the claim disposition agreement as set forth in section (3) of this rule.

(2) The insurer/self-insured employer shall provide the claimant information explaining claim dispositions in a separate enclosure accompanying the proposed claim disposition agreement. The Board shall prescribe by a bulletin the specific form and format for the enclosure. If the claimant does not read or comprehend English, or is otherwise unable to understand written language, the insurer/self-insured employer shall provide this information in a language or other manner which ensures the worker understands the meaning of the disposition.

(3) The first page of the claim disposition agreement shall include, but not be limited to, the following information:

- (a) The worker's name;
- (b) The case number assigned to the claim by the Board, if any;
- (c) The insurer's/self-insured employer's claim number;
- (d) The date of the compensable injury or disease;
- (e) The file number assigned to the claim by the Workers'

Compensation Division, if known;

- (f) The worker's social security number;
- (g) The name of the insurer/self-insured employer;
- (h) Specific identification of all benefits, rights and insurer/self-insured employer obligations under Workers' Compensation Law which are released by the agreement;

(i) The total attorney fee, if any, to be paid to claimant's attorney;

(j) The total amount (excluding attorney fee) to be paid to the claimant; and

(k) A statement indicating whether or not the parties are waiving the "30-day" approval period of ORS 656.236(1)(a)(C) as permitted by ORS 656.236(1)(b).

(4) The claim disposition agreement shall also contain, but not be limited to, the following:

(a) Identification of the accepted conditions that are the subject of the disposition;

(b) The date of the first claim closure, if any;

(c) The amount of any permanent disability award(s), if any;

(d) Whether the worker has ever been able to return to the work force following the industrial injury or occupational disease;

(e) The worker's age, highest education level, and the extent of vocational training (or in the event that the worker is deceased, the age, highest education level, and the extent of vocational training of the worker's beneficiaries);

(f) A list of occupations that the worker has performed (or in the event that the worker is deceased, a list of occupations that each of the deceased worker's beneficiaries has performed);

(g) That the worker has been provided the informational enclosure prescribed by bulletin pursuant to section (2) of this rule (attachment of the informational enclosure to the parties' claim disposition agreement is not required, unless the enclosure is expressly incorporated into the agreement); and

(h) The following notice in prominent or bold face type, which shall either be included in the claim disposition agreement or incorporated by reference into the agreement:

**"NOTICE TO CLAIMANT: UNLESS YOU ARE REPRESENTED BY AN ATTORNEY AND YOUR CLAIM DISPOSITION AGREEMENT INCLUDES A PROVISION WHICH WAIVES THE 30-DAY "COOLING OFF" PERIOD, YOU WILL RECEIVE A NOTICE FROM THE WORKERS' COMPENSATION BOARD TELLING YOU THE DATE THIS AGREEMENT WAS RECEIVED BY THEM FOR APPROVAL. YOU HAVE 30 DAYS FROM THE DATE THE BOARD RECEIVES THE AGREEMENT TO REJECT THE AGREEMENT, BY TELLING THE BOARD IN WRITING. DURING THE 30 DAYS ALL OTHER PROCEEDINGS AND PAYMENT OBLIGATIONS OF THE INSURER/ SELF-INSURED EMPLOYER, EXCEPT FOR MEDICAL SERVICES, ARE STAYED ON YOUR CLAIM. IF YOU DO NOT HAVE AN ATTORNEY, YOU MAY DISCUSS THIS AGREEMENT WITH THE BOARD IN PERSON WITHOUT FEE OR CHARGE. TO CONTACT THE BOARD, WRITE OR CALL: WORKERS' COMPENSATION BOARD, 2250 MCGILCHRIST STREET SE, SALEM, OREGON 97310, TELEPHONE: (503) 378-3308, 8:00 TO 5:00, MONDAY THROUGH FRIDAY.**

**"YOU MAY ALSO DISCUSS THIS AGREEMENT WITH THE WORKERS' COMPENSATION OMBUDSMAN, WITHOUT FEE OR CHARGE. TO CONTACT THE OMBUDSMAN, WRITE OR CALL: WORKERS' COMPENSATION OMBUDSMAN, LABOR & INDUSTRIES BUILDING, SALEM, OR 97310, TELEPHONE: (503) 378-3351, 8:00 TO 5:00, MONDAY THROUGH FRIDAY."**

**"YOU MAY ALSO CALL THE WORKERS' COMPENSATION DIVISION'S INJURED WORKER HOTLINE, TOLL-FREE IN OREGON, AT 1-800-452-0288."**

Stat. Auth: ORS 656.726(4)  
Stats Implemented: ORS 656.236  
Hist.: WCB 2-1995, f. 11-13-96, cert. ef. 1-1-96

**438-009-0023**

**Notice to Claimant Required**

Each claimant shall, at the time of execution of a Claim Disposition Agreement, be given a written notice, separate from

the agreement, in the form prescribed by the Board pursuant to OAR 438-009-0022.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.236

Hist.: WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 2-1995, f. 11-13-96, cert. ef. 1-1-96

#### **438-009-0025**

##### **Claim Disposition Agreements; Processing**

(1) The parties shall file an original and one legible copy of the claim disposition agreement for the Board's approval. Any claim disposition agreement filed for approval by the Board shall be mailed or delivered to the Board at 2250 McGilchrist Street, SE, Salem, Oregon 97310. The original claim disposition agreement shall be retained in the Board's file and a copy shall be conformed and distributed to the Director.

(2) Any claim disposition agreement filed under section (1) of this rule, shall be deemed to have been submitted as of the date the agreement is received by the Board. All times to be calculated shall be calculated from the date of the Board's receipt of the agreement.

(3) A request by an unrepresented claimant to meet with the Board must be made to the Board not more than 30 days after the Board's receipt of a claim disposition agreement, but need not be in any particular form; verbal requests will be accepted.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 656.236

Hist.: WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 2-1993, f. 9-9-93, cert. ef. 12-1-93; WDB 1-1994, f. 11-1-94, cert. ef. 1-1-95

#### **438-009-0028**

##### **Postcard Announcing CDA Approval Order**

(1) The parties shall also file self-addressed "Announcement of CDA Approval Order" postcards which shall be mailed by the Board to all parties and their attorneys if the claim disposition agreement is approved.

(2) The postcard, which shall be in a form prescribed by the Board, shall provide the following information:

- (a) The claimant's name;
- (b) The claim number; and
- (c) Blank spaces for the Board to insert:
  - (A) The CDA case number; and
  - (B) The date when the claim disposition agreement was approved.

(3) If an insufficient number of postcards is filed by the parties or if any postcard lacks the information set forth in section (2) of this rule, the Board may follow the procedures described in OAR 438-009-0020(4).

Stat. Auth.: ORS 654.025(2), 656.726(4)

Stats. Implemented: ORS 656.236

Hist.: WCB 2-1993, f. 9-9-93, cert. ef. 12-1-93; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-96, cert. ef. 1-1-96

#### **438-009-0030**

##### **Claim Disposition Agreements; Stay of Other Proceedings; Payment of Proceeds**

(1) Notwithstanding OAR 438-006-0081, 438-006-0091, 438-011-0020 and 438-011-0025, the Board's receipt of a claim disposition agreement shall suspend all other proceedings before the Board and the Hearings Division until completion of action upon the agreement, except that the Board shall accept and file requests for hearing and Board review for purposes of establishing jurisdiction.

(2) In those cases where the claimant is unrepresented or the claim disposition agreement does not include a provision in which the parties waive their "30-day" rights to seek Board disapproval, the Board shall notify the parties and the Director of its receipt of a claim disposition agreement.

(3) In all cases, the Board shall notify the Director of its receipt of a claim disposition agreement.

(4) In cases in which a party has requested judicial review of an order of the Board and such judicial review is pending on the

date the Board receives the claim disposition agreement, the Board shall notify the State Court Administrator of its receipt of the agreement.

(5) In the event that the Board issues a separate written decision, copies of the Board's decision approving or disapproving a claim disposition agreement shall be mailed to parties, their attorneys, and the Director.

(6) Except as otherwise provided in section (4) of this rule, the signature of two Board members on a claim disposition agreement shall constitute a final order approving the disposition under ORS 656.236(1). Notice of this approval shall be accomplished by the Board mailing the postcards filed pursuant to OAR 438-009-0028 to the parties and their attorneys.

(7) Payment of the disposition shall be made no later than the 14th day after the Board mails notice of its approval of the agreement to the parties, unless otherwise stated in the agreement.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.236

Hist.: WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 2-1993, f. 9-9-93, cert. ef. 12-1-93; WCB 2-1995, f. 11-13-96, cert. ef. 1-1-96

#### **438-009-0035**

##### **Reconsideration of Claim Disposition Agreements**

(1) A motion for reconsideration of final orders issued by the Board under ORS 656.236 and these rules shall be filed within ten days of the date of mailing of the order.

(2) The Board may reconsider final orders under ORS 656.236, provided that the motion for reconsideration:

- (a) Is filed in accordance with section (1) of this rule; and
- (b) States specifically the reason(s) reconsideration is requested.

(3) Reconsideration of a final order issued by the Board under ORS 656.236 and these rules shall be limited to the record before the Board at the time its final order was mailed and no additional information will be considered, unless the Board finds good cause for allowing the additional submission.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.236

Hist.: WCB 1-1991(Temp), f. & cert. ef. 3-8-91; WCB 5-1991, f. 8-22-91, cert. ef. 9-2-91

## **DIVISION 10**

### **APPLICABILITY OF THE PERMANENT DISABILITY RATING STANDARDS**

#### **438-010-0000**

##### **Applicability of the Permanent Disability Rating Standards for Rating Extent of Disability**

The disability rating standards adopted by the Director, OAR Chapter 436, Division 35, pursuant to Oregon Laws 1987, Chapter 884, Section 2, for rating permanent disability shall apply to hearings conducted on and after July 1, 1988 and shall apply only to claims closed and evaluated by the Evaluation Section, Unit Compensation Division, Department of Consumer and Business Services, insurers and self-insured employers on and after July 1, 1988, where the claimant last became medically stationary on an after January 1, 1988.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.283(7) & 656.295(5)

Hist.: WCB 2-1988(Temp), f. 6-30-88, ef. 7-1-88; WCB 5-1988, f. 12-22-88, ef. 12-28-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89

#### **438-010-0010**

##### **Effective Date for Applying Disability Standards**

In applying the disability rating standards at hearing and on review, the Administrative Law Judge and the Board shall apply the disability rating standards as required by OAR 436-035-0003.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.283(7) & 656.295(5)



Hist.: WCB 1-1989(Temp), f. 6-1-89; WCB 4-1989, f. 6-15-89, ef. 7-1-89; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 4-1991(Temp), f. 6-14-91, cert. ef. 6-17-91; WCB 8-1991, f. 11-6-91, cert. ef. 11-7-91; WCB 5-1992(Temp), f. 6-26-92, cert. ef. 6-29-92; WCB 7-1992, f. 12-10-92, ef., 12-14-92

## DIVISION 11

### BOARD REVIEW; THIRD PARTY ORDERS

#### **438-011-0005**

##### **Request for Board Review**

(1) The time for and manner of filing a request for Board review of a Administrative Law Judge's order are set forth in ORS 656.289 and 656.295.

(2) Copies of a request for Board review of a Administrative Law Judge's order shall be simultaneously mailed to all parties who appeared at the hearing and to their attorneys, if represented by an attorney.

(3) The request should recite the name of the claimant, the WCB case number, the identity of the party requesting review and should contain a brief statement of the reason review is requested.

(4) The request should also recite whether payment of compensation will be stayed under ORS 656.313.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.289(3) & 656.295(1)(2)

Hist.: WCB 4-1986, f. 10-8-86, ef. 11-1-86; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1991(Temp), f. 3-28-91, cert. ef. 4-8-91; WCB 5-1991, f. 8-22-91, cert. ef. 9-2-91

#### **438-011-0010**

##### **Applicability**

These rules apply to all cases in which a party or parties request Board review of an order of an Administrative Law Judge pursuant to ORS 656.289, 656.291, 656.295 and 656.307 and to cases in which a party requests a decision of the Board under the third party law, ORS 656.576 to 656.595. These rules do not apply to proceedings before the Board on its own motion pursuant to ORS 656.278 and proceedings before the Board after remand from an appellate court.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.295, 656.307, 656.587 & 656.594

Hist.: WCB 4-1986, f. 10-8-86, ef. 11-1-86; WCB 5-1987, f. 12-18-87, ef. 1-1-88

#### **438-011-0015**

##### **Scope of Board Review**

(1) Review by the Board is de novo upon the entire record. The Board may remand a matter to the Hearings Division to take additional evidence, report findings to the Board or to enter an Opinion and Order on remand.

(2) The Board will not ordinarily entertain oral argument. All issues and arguments should be reduced to writing and filed pursuant to OAR 438-011-0020. The case will be reviewed in the ordinary course of business without prior notice to the parties of the date or time of review.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.295(5)

Hist.: WCB 4-1986, f. 10-8-86, ef. 11-1-86; WCB 5-1986(Temp), f. 10-30-86, ef. 11-1-86; WCB 1-1987, f. 3-4-87, ef. 4-15-87; WCB 2-1987(Temp), f. 4-13-87, ef. 4-15-87; WCB 4-1987, f. 11-6-87, ef. 11-16-87; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### **438-011-0020**

##### **Briefs and Other Documents**

(1) Filing of briefs is not jurisdictional; however, the Board views briefs as a significant aid to the review process. Briefs submitted for consideration by the Board shall comply with this section.

(2) The party requesting Board review shall file its appellant's brief to the Board within 21 days after the date of mailing of the transcript of record to the parties. Respondent(s) shall file its

(their) brief(s) within 21 days after the date of mailing of the appellant's brief. Any party who has filed a cross-request for review shall include its cross-appellant's opening brief as a part of its respondent's brief. An appellant may file a reply and/or cross-respondent's brief within 14 days after the date of mailing of the respondent's and/or cross-appellant's brief. Any party who has not filed a request for review may file a cross-respondent's brief within 14 days after the date of mailing of the cross-appellant's brief. A cross-appellant may file a cross-reply brief within 14 days of the mailing date of a cross-respondent's brief. Unless otherwise authorized by the Board, no other briefs will be considered.

(3) Extensions of time for filing of briefs will be allowed only on written request filed no later than the date the brief is due. A statement whether opposing counsel (or a party if the party is not represented by counsel) objects to, concurs in or has no comment regarding the extension of time requested shall be furnished in all cases. Briefing extensions will not be allowed unless the Board finds that extraordinary circumstances beyond the control of the party requesting the extension justify the extension. For purposes of this section, "extraordinary circumstances beyond the control of the party requesting the extension" shall not include the press of business.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.295(5) & 656.726(4)

Hist.: WCB 4-1986, f. 10-8-86, ef. 11-1-86; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 4-1990(Temp), f. 4-13-90, cert. ef. 4-30-90; WCB 10-1990(Temp), f. 10-25-90, cert. ef. 10-27-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 1-1993, f. 5-19-93, cert. ef. 6-1-93

#### **438-011-0022**

##### **Expedited Review**

(1) For purposes of OAR Chapter 438 Division 11, compensation is deemed stayed under ORS 656.313 if the employer/insurer has filed a request for Board review on or after July 1, 1990 of an Administrative Law Judge's order and compensation is due and unpaid under the order for medical services, temporary disability benefits, permanent total disability benefits, or to a surviving spouse prior to remarriage, to children or dependents that accrued before the date of the order, or permanent disability benefits.

(2) Board review of Administrative Law Judge orders in cases described in section (1) of this rule will be expedited.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented.: ORS 656.313(1)(6) & 656.726(4)

Hist.: WCB 2-1991(Temp), f. 3-28-91, cert. ef. 4-8-91; WCB 5-1991, f. 8-22-91, cert. ef. 9-2-91; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### **438-011-0023**

##### **Request for Recusal of Board Member**

A request by a party that a Board member not participate in the review of a case shall be made in writing and filed with the Board not later than the due date of the party's first brief. The request shall state specifically why the Board member should not participate in review of the case. A Board member may decline to participate in the review if the Board member finds that he or she has a personal conflict of interest involving a matter or matters directly in issue in the case.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.726(4)

Hist.: WCB 2-1989, f. 3-3-89, ef. 4-1-89

#### **438-011-0025**

##### **Motions That Toll Time**

Unless otherwise ordered by the Board, the filing of a motion to dismiss a request or cross-request for review or to remand a case to the Hearings Division tolls the time for the next event in the review process.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.295(5) & 656.726(4)

Hist.: WCB 4-1986, f. 10-8-86, ef. 11-1-86; WCB 5-1987, f. 12-18-87, ef. 1-1-88

#### **438-011-0030**

### **Motion for Waiver of Rules**

Except as otherwise prohibited by law, the Board may waive any provision of OAR 438-011 upon motion of a party. A motion for waiver of rules shall include a statement of the facts and circumstances relied upon and shall be simultaneously served upon all other parties or their attorneys. The motion may be allowed if the Board finds that extraordinary circumstances beyond the control of the party requesting waiver of a rule or rules justify such an action.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.295(5) & 656.726(4)

Hist.: WCB 4-1986, f. 10-8-86, ef. 11-1-86; WCB 5-1987, f. 12-18-87, ef. 1-1-88

### **438-011-0031**

#### **Request for Oral Argument**

(1) At any time before expiration of the briefing schedule, a party may request that the Board entertain oral argument.

(2) The Board may grant a request under section (1) of this rule or, on its own motion, at any time prior to issuance of its order schedule oral argument if the Board finds that:

(a) The case presents an issue of first impression; and

(b) The issue for resolution may have a significant impact on the workers' compensation system.

(3) Whether or not oral argument is permitted is a decision within the sole discretion of the Board.

Stat. Auth.: ORS 656.025(2) & 656.726(4)

Stats. Implemented: ORS 656.295(5)

Hist.: WCB 1-1994, f. 1-11-94, cert. ef. 1-1-95

### **438-011-0032**

#### **Procedure at Oral Argument**

(1) In those cases where the Board has granted oral argument under OAR 438-011-0031, each party shall have 30 minutes to present its argument, unless the Board member who is presiding at the argument designates a longer or shorter period.

(2) The appellant shall argue first and may reserve not more than 10 minutes of the time allowed for argument in which to reply.

(3) Unless the Board member who is presiding at the argument orders otherwise, a party's argument must be presented by only one individual.

Stat. Auth.: ORS 656.025(2) & 656.726(4)

Stats. Implemented: ORS 656.295(5)

Hist.: WCB 1-1994, f. 1-11-94, cert. ef. 1-1-95

### **438-011-0035**

#### **Review; Board Order; Reconsideration**

(1) The Board order on review shall set forth the parties, the issues, the Board's decision and shall advise all parties of appeal rights.

(2) A request for reconsideration of a Board order shall include a concise statement of the reason(s) reconsideration is requested. An order on reconsideration shall state whether or not the original order is withdrawn for reconsideration.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.295(5)

Hist.: WCB 5-1986(Temp), f. 10-30-86, ef. 11-1-86; WCB 1-1987, f. 3-4-87, ef. 4-15-87; WCB 2-1987(Temp), f. 4-13-87, ef. 4-15-87; WCB 4-1987, f. 11-6-87, ef. 11-16-87; WCB 5-1987, f. 12-18-87, ef. 1-1-88

### **438-011-0045**

#### **Third Party Orders**

(1) Any party requesting the Board's resolution of a controversy arising under the third party law, ORS 656.576 to 656.595, shall petition the Board for relief. The party requesting relief is the petitioner and all other parties are respondents.

(2) The petition shall clearly identify the party seeking relief, shall clearly state the relevant facts and the nature of the dispute and shall specify the relief sought. All relevant evidence shall be attached to the petition. Testimonial evidence shall be by deposition, affidavit or written interrogatories. True copies of the petition and all attachments shall be served on all other parties to

the dispute.

(3) The Board shall acknowledge receipt of the petition to all named parties. The respondent(s) shall be allowed 21 days to file evidence and argument in response to the petition. The petitioner shall be allowed 14 days to file a reply argument. The time for filing may be extended by the Board upon motion of a party. The Board will issue its order within a reasonable time after all argument and evidence has been filed.

(4) Settlement documents in civil actions under ORS 656.576 to 656.595 shall not be submitted to the Board unless there is a dispute requiring resolution by the Board.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.587 & 656.593

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89

## **DIVISION 12**

## **BOARD'S OWN MOTION JURISDICTION**

### **438-012-0001**

#### **Definitions**

(1) "Own Motion Claim" means a written request by or on behalf of a claimant for:

(a) Temporary disability compensation, where claimant's aggravation rights have expired; and/or

(b) Medical benefits for a compensable injury that occurred before January 1, 1966, unless the injury occurred from August 5, 1959 through December 31, 1965 and resulted in an award of permanent total disability.

(2) "Own Motion Insurer," "Insurer" and "Paying Agent" mean a guaranty contract insurer or self-insured employer which is or may be responsible for payment of compensation under the provisions of ORS 656.278.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 656.278(1) & 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

### **438-012-0016**

#### **Communication with Board and Parties in Own Motion Cases**

A copy of any document in an own motion proceeding, including correspondence, directed to the Board or to a party in the claim shall be simultaneously mailed to all other parties involved in the claim or, if a party is currently represented by an attorney, to the party's attorney.

Stat. Auth.: ORS 656.278(1) & 656.726(4)

Stats. Implemented: ORS 656.278(1) & 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

### **438-012-0018**

#### **Applicability of Rules**

These rules apply to claims in which a request for compensation under the Board's own motion jurisdiction is in existence or arose on or after the effective date of these rules.

Stat. Auth.: ORS 654.025(2), 656.726(4)

Stats. Implemented: ORS 656.278(1) & 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 8-1990(Temp), f. 8-23-90, cert. ef. 9-15-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

### **438-012-0020**

#### **Insurer to Process Own Motion Claim: Notice and Contents of Claim**

(1) All own motion claims shall first be directed to and processed by the insurer. An own motion claim shall be legibly date-stamped on the date it is received by the insurer.

(2) An own motion claim shall contain sufficient information to identify the claimant and the claim.

(3) An insurer is deemed to have notice of an own motion

claim for temporary disability compensation when one of the following documents is submitted to the insurer by or on behalf of the claimant after the expiration of aggravation rights:

(a) A written request for temporary disability compensation or a claim reopening; or

(b) Any document that reasonably notifies the insurer that the claimant's compensable injury requires surgery or hospitalization.

(4) Except as provided in section (5) of this rule, an insurer is deemed to have notice of an own motion claim for medical benefits and/or temporary disability compensation relating to a compensable injury that occurred before January 1, 1966, when one of the following documents is submitted to the insurer by or on behalf of the claimant:

(a) A written request for medical benefits relating to the compensable injury;

(b) Any document that reasonably notifies the insurer that the claimant is seeking medical benefits for the compensable injury;

(c) A written request for temporary disability compensation or claim reopening; or

(d) Any document that reasonably notifies the insurer that claimant's compensable injury requires surgery or hospitalization.

(5) An own motion claim for medical benefits does not include a claim for medical benefits relating to a compensable injury that occurred from August 5, 1959 through December 31, 1965 and resulted in an award of permanent total disability. Such claims shall be processed as a claim for medical services under ORS 656.245.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented.: ORS 656.278(1) & 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### **438-012-0030**

##### **Insurer Recommendation of Reopening or Denial of Claim Voluntarily Reopening**

(1) Except as provided in section (2) of this rule, the own motion insurer shall, within 90 days after receiving an own motion claim, submit to the Board a written recommendation as to whether the claim should be reopened or denied, on a form prescribed by the Board, accompanied by the required evidence supporting the recommendation. The own motion insurer shall supply all information and evidence required by the form. Copies of the recommendation form and any supporting evidence shall be mailed to the claimant and the claimant's attorney, if any.

(2) In extraordinary circumstances, the Board may grant the insurer an extension for submission of its recommendation.

(3) Nothing in these rules shall prevent the insurer from voluntarily reopening any claim to provide benefits or grant additional medical or hospital care to the claimant; however, subsequent authorization of such benefits will not be granted by the Board unless the claim qualifies for own motion relief under ORS 656.278 and these rules.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 656.278(1) & 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### **438-012-0031**

##### **Notification of Pending Proceedings**

Parties to an own motion proceeding shall notify the Board of any pending proceeding involving a contested case under ORS 656.283 to 656.295, ORS 656.307 or ORS 656.308, an arbitration or mediation proceeding under ORS 656.307, or a Director's medical review under ORS 656.245, 656.260 or 656.327. The parties shall also specify the issues raised in that proceeding.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 656.278(1) & 656.726(4)

Hist.: WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### **438-012-0032**

##### **Consent to Designation of Paying Agent**

(1) Except as provided in section (2) of this rule, when the Benefits Section notifies the Board that it is prepared to issue an order designating a paying agent under ORS 656.307 and OAR 436-060-0180 if the Board consents to the order where one or more insurers involved in the proceeding is subject to ORS 656.278, the Board shall notify the Benefits Section within ten days whether it consents to the order.

(2) If the Board is unable to determine from the available evidence whether the claimant would be entitled to own motion relief if the own motion insurer was determined to be the responsible insurer, the Board may require the parties to state their positions in writing and submit any supporting evidence to the Board within ten days. The time for the Board's response to the Benefits Section is suspended during this process.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 656.278(1) & 656.307

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### **438-012-0035**

##### **Temporary Disability Compensation**

(1) The Board shall order the payment of temporary disability compensation from the date the claimant is actually hospitalized or undergoes outpatient surgery in those cases where:

(a) The own motion claim for temporary disability compensation is filed after the aggravation rights have expired;

(b) There is a worsening of a compensable injury requiring either inpatient or outpatient surgery or other treatment requiring hospitalization; and

(c) The claimant was in the work force at the time of the worsening of the compensable injury.

(2) The claimant is deemed to be in the work force if:

(a) The claimant is engaged in regular employment;

(b) The claimant, although not employed, is willing to work and is making reasonable efforts to obtain employment; or

(c) The claimant is willing to work, but the claimant is not employed, and the claimant is not making reasonable efforts to obtain employment because such efforts would be futile as a result of the effects of the compensable injury.

(3) The insurer shall make the first payment of temporary disability compensation within 14 days from the date of an order of the Board reopening the claim.

(4) Temporary disability compensation shall be paid until one of the following events occurs:

(a) The claim is closed pursuant to OAR 438-012-0055;

(b) A claim disposition agreement is submitted to the Board pursuant to ORS 656.236(1), unless the claim disposition agreement provides for the continued payment of temporary disability compensation; or

(c) Termination of such benefits is authorized by the terms of ORS 656.268.

(5) If the own motion insurer believes that temporary disability compensation should be suspended for any reason, the insurer may make a written request for such suspension. Copies of the request shall be mailed to the claimant and the claimant's attorney, if any, by certified or registered mail. Unless an extension is granted by the Board, claimant or claimant's attorney shall have 14 days to respond to the Board in writing to the request. Unless an extension is granted by the Board, the insurer shall have 14 days to reply in writing to claimant's response. The insurer shall not suspend compensation under this section without prior written authorization by the Board.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 656.278(1) & 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 8-1990(Temp), f. 8-23-90, cert. ef. 9-15-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### **438-012-0037**

##### **Payment of Medical Benefits**

Except as otherwise provided in OAR 438-012-0020(5), for



every condition resulting from a compensable injury occurring before January 1, 1966, the Board shall order the own motion insurer to pay for reasonable and necessary medical services when:

- (1) Undertaken for curative purposes;
- (2) Provided to a claimant who has been determined to have permanent total disability;
- (3) Provided in the form of prescription medications;
- (4) Necessary to administer prescription medication or to monitor administration of prescription medication;
- (5) Provided in the form of prosthetic devices, braces and supports;
- (6) Necessary to maintain and monitor the status, replacement or repair of a prosthetic device, brace or support;
- (7) Necessary to diagnose the claimant's condition;
- (8) Necessary to enable the claimant to continue current employment;
- (9) Provided in the form of life-preserving modalities similar to insulin therapy, dialysis and transfusions; or
- (10) The Board determines that special circumstances justify the provision of further medical services.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 656.278(1)(b) & 656.726(4)

Hist.: WCB 8-1990(Temp), f. 8-23-90, cert. ef. 9-15-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### **438-012-0040**

##### **Action by Board After Insurer Recommendation**

Except as provided in OAR 438-012-0050, within a reasonable time after receipt of the insurer's recommendation and supporting evidence and any additional evidence and argument from the claimant the Board may:

- (1) Issue its order based upon the evidence and argument submitted by the parties;
- (2) Request additional evidence from one or more of the parties; or
- (3) Refer the matter to the Hearings Division for an evidentiary hearing and recommended findings of fact and conclusions.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 656.278(1) & 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### **438-012-0050**

##### **Board Will Act Unless Claimant Has Not Exhausted Other Available Remedies**

- (1) The Board will act promptly upon a request for relief under the provisions of ORS 656.278 and these rules unless:
  - (a) The claimant has available administrative remedies under the provisions of ORS 656.273;
  - (b) The claimant's condition is the subject of a contested case under ORS 656.283 to 656.298, ORS 656.307 or ORS 656.308, or an arbitration or mediation proceeding under ORS 656.307; or
  - (c) The claimant's request for payment of temporary disability compensation is based on surgery or hospitalization that is the subject of a Director's medical review under ORS 656.245, 656.260 or 656.327.

(2) The Board may postpone its review of the merits of the claimant's request for relief if the available remedies set forth in section (1) of this rule could affect the Board's authority to award compensation under the provisions of ORS 656.278.

Stat. Auth.: ORS 656.025(2) & 656.726(4)

Stats. Implemented: ORS 656.278(1) & 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### **438-012-0055**

##### **Closure of Claims Reopened Under ORS 656.278**

(1) Except as provided in section (2) of this rule, when a claim has been voluntarily reopened or ordered reopened by the Board but not simultaneously closed by the Board and the medical

reports indicate to the insurer that the claimant's condition has become medically stationary, the claim shall be closed by the insurer without the issuance of a Board order. In all such cases the insurer shall issue a Notice of Closure (Form 2066) to the claimant with copies to the claimant's attorney, if any, and Benefits Section. The notice shall be on the form prescribed by the Director and shall inform the claimant of the amount and duration of temporary disability compensation and the medically stationary date, and shall include the following notice in prominent or bold face type:

**"IF YOU THINK THIS CLAIM CLOSURE IS WRONG, YOU MAY ASK THE WORKERS' COMPENSATION BOARD TO REVIEW IT AND DECIDE WHETHER YOU ARE ENTITLED TO MORE COMPENSATION. IF YOU DO NOT ASK FOR REVIEW WITHIN 60 DAYS OF THE DATE OF THIS NOTICE YOU WILL LOSE ANY RIGHT YOU MAY HAVE TO CONTEST THIS NOTICE UNLESS YOU CAN SHOW GOOD CAUSE FOR DELAY BEYOND 60 DAYS. AFTER 180 DAYS ALL RIGHTS WILL BE LOST. YOU MAY ASK FOR A REVIEW BY WRITING TO THE BOARD AT 2250 MCGILCHRIST STREET, S.E., SALEM, OREGON 97310. YOU MAY HAVE AN ATTORNEY OF YOUR CHOICE, WHOSE FEE WILL BE LIMITED TO A PERCENTAGE OF ANY MORE COMPENSATION YOU MAY BE AWARDED."**

(2) When an own motion claim has been reopened for the payment of temporary disability compensation, and the Board approves a claim disposition agreement under ORS 656.236 by which the claimant releases his right to further payment of temporary disability compensation, the claim shall be closed administratively by the Board.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 656.236, 656.278(1) & 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 3-1988(Temp), f. 10-20-88, ef. 11-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 8-1990(Temp), f. 8-23-90, cert. ef. 9-15-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### **438-012-0060**

##### **Board Review of Insurer Closure**

(1) The request for Board review of the insurer's claim closure pursuant to OAR 438-012-0055(1) shall be in writing, signed by the claimant or the claimant's attorney, and shall include the claimant's name and mailing address, a statement that Board review is requested, the name of the insurer and a copy of the Notice of Closure (Form 2066). To be considered, the request must be filed with the Board within 60 days after the mailing date of the notice of closure, or within 180 days after the mailing date if the claimant establishes good cause for the failure to file the request within 60 days after the mailing date. The Board shall notify all parties that review has been requested.

(2) Within 15 days after notification from the Board that a review has been requested, the insurer shall submit to the Board and to the claimant and the claimant's attorney, if any, legible copies of all evidence considered by the insurer in closing the claim, except any evidence already submitted to the Board with the insurer's recommendation pursuant to OAR 438-012-0030(1). The insurer may also submit written arguments at this time.

(3) The claimant may submit additional evidence and written argument to the Board. To be considered, such evidence and argument must be submitted within 15 days from the date the insurer mails the evidence pursuant to section (2) of this rule.

(4) No additional written argument may be submitted unless authorized by the Board.

(5) The Board may, prior to issuing its order, refer a matter to the Hearings Division for an evidentiary hearing and recommended findings of fact and conclusions.

(6) The Board shall issue its order within a reasonable time after receipt of all evidence and argument from the parties and any recommendations from the Hearings Division.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 656.278(1) & 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-

89; WCB 2-1990, f. 1-24-90, cert. ef. 2-28-90; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

**438-012-0062**

**Referral of Request for Enforcement of Board's Own Motion Order to Hearings Division**

(1) The Board may refer a request to enforce an own motion order to the Hearings Division for an evidentiary hearing and recommended findings of fact and conclusions.

(2) The Board shall issue its order within a reasonable time after receipt of all evidence and argument from the parties and any recommendations from the Hearings Division.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 656.278(1) & 656.726(4)

Hist.: WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

**438-012-0065**

**Reconsideration of Own Motion Orders**

(1) All final orders issued by the Board under the provisions of ORS 656.278 shall set forth the parties, the request for relief, the Board's decision and shall advise all parties of appeal rights.

(2) A motion for reconsideration of a final order issued by the Board under the provisions of ORS 656.278 shall be filed within 30 days after the date of mailing of the order, or within 60 days after the mailing date if the party requesting reconsideration establishes good cause for the failure to file the request within 30 days after the mailing date.

(3) Notwithstanding section (2) of this rule, in extraordinary circumstances the Board may, on its own motion, reconsider any prior Board order.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 656.278(1), (3) & 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 2-1990, f. 1-24-90, cert. ef. 2-28-90; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95, cert. ef. 1-1-95; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

**DIVISION 13**

**EXPEDITED CLAIMS SERVICE**

**438-013-0005**

**Expedited Claims Service Established**

Pursuant to the mandate of 1987 Oregon Laws, Chapter 884, Section 18, there is established within the Hearings Division the Expedited Claims Service. The purpose of the Expedited Claims Service is to provide for prompt, informal dispute resolution and to insure fair and just treatment of workers in all proceedings.

Stat. Auth.: ORS 656.291

Stats. Implemented: ORS 656.291

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88

**438-013-0010**

**Referral of Request for Hearing to Expedited Claim Service**

(1) A request for hearing shall be referred to the Expedited Claims Service if:

(a) The request does not involve the compensability of or responsibility for a claim, and the total amount in controversy, exclusive of penalties and/or related attorney fees, is \$1,000 or less;

(b) The only issue in the case is entitlement to penalties and/or related attorney fees; or

(c) The request involves a denial under ORS 656.262(15) for a worker's failure to cooperate in a claim investigation.

(2) If an Administrative Law Judge finds at the hearing or at any time prior to the hearing that the case should not have been referred to the Expedited Claims Service, the Administrative Law Judge shall refer the case for decision under the ordinary hearing process. With the consent of the Administrative Law Judge, the parties may agree on the oral record to proceed with the hearing as referred to the ordinary hearing process without further delay. Such an agreement to proceed is a waiver of any claim of defect

as to notice of hearing or issues.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.291(2)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

**438-013-0015**

**Determination of Amount in Controversy**

For the purpose of referral to the Expedited Claims Service, the total amount in controversy shall be presumed to be \$1,000 or less if the party requesting the hearing so states on a form prescribed by the Board or in the request for hearing.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.291(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89

**438-013-0020**

**Representation of Parties in Expedited Claims**

(1) A claimant need not be represented by any other person in proceedings before the Expedited Claims Service.

(2) A claimant may be represented by an attorney or by an individual who is not an attorney in proceedings before the Expedited Claims Service.

(3) Notwithstanding OAR 438-006-0100, an insurer, self-insured employer or claim processing agent for an insurer or self-insured employer may be represented by an authorized claims representative at any proceeding under the Expedited Claims Service.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.291(5)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89

**438-013-0025**

**Notice of Hearing Date**

The Hearings Division shall mail a notice of hearing date to all parties and to all other individuals who represent the parties. The hearing shall be scheduled for a date that is not less than 15 days from the mailing of the notice of hearing nor more than 30 days from the date of receipt of the request for hearing by the Hearings Division.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.291

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88

**438-013-0030**

**Hearings in Expedited Claims; Informal Dispute Resolution**

(1) OAR 438-007-0018 does not apply to the Expedited Claim Service. The insurer's representative shall bring all medical and vocational reports, records of compensation paid, and all other documents pertaining to the claim to the hearing. The Administrative Law Judge shall, before convening the hearing, determine whether the case may be resolved informally or decided on agreed facts.

(2) If the case can be decided on agreed facts, the agreement of the facts shall be stated on the oral record. No testimony shall be taken and the record shall be closed upon oral argument, if any, on behalf of the parties.

(3) If the case cannot be decided on agreed facts, the Administrative Law Judge shall so state on the oral record of the hearing or in the order. The Administrative Law Judge shall admit into evidence those documents furnished by the insurer that are relevant to a determination of the dispute, along with any other relevant documents offered by the claimant.

(4) It is the intent of the Board in adopting these rules that all cases under the Expedited Claim Service be heard and decided quickly and fairly. Administrative Law Judges shall take an active role in the hearing.

(5) Unless more time is allowed in advance after a showing of good cause, no hearing under the expedited Claims Service shall be scheduled to exceed one hour in duration.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.291(4)(6)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 3-1990(Temp), f. & cert. ef.

3-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90

**438-013-0035**

**Postponements and Continuances**

(1) A hearing under the Expedited Claims Service shall not be postponed except upon a showing of extraordinary circumstances beyond the control of the party requesting the postponement. "Extraordinary circumstances" shall be as defined in OAR 438-006-0081 except that unavailability of an individual who represents an insurer shall not be a reason to postpone a hearing under any circumstances and unavailability of an individual who represents a claimant shall not be a reason to postpone a hearing under the Expedited Claims Service unless the Administrative Law Judge finds that the claimant is physically or mentally incapable of representing himself or herself at the hearing.

(2) A hearing under the Expedited Claims Service may be continued for further proceedings only if the Administrative Law Judge finds and states on the oral record that a continuance is required to achieve substantial justice.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.291(3)(b) & (4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88

**438-013-0040**

**Order of Administrative Law Judge; Review**

(1) The Administrative Law Judge shall issue an order deciding the case not later than ten days after the closing of the record. The order may adopt by reference findings and conclusions stated on the oral record.

(2) The Administrative Law Judge's order shall include a notice of rights of review by the Workers' Compensation Board under the provisions of ORS 656.295.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.291(3)(b) & (4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88

**DIVISION 15**

**ATTORNEY FEES**

**438-015-0003**

**Authority for Adoption**

These rules are adopted pursuant to ORS 656.236, 656.388 and 656.593, under the general rulemaking authority of the Board pursuant to ORS 656.726(4).

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.236(4), 656.388(3), 656.593(1)(a) & 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; Suspended by WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90

**438-015-0005**

**Definitions**

In addition to the definitions set forth in OAR 438-005-0040:

(1) "Approved fee" means an attorney fee paid out of a claimant's compensation.

(2) "Assessed fee" means an attorney fee paid to a claimant's attorney by an insurer or self-insured employer in addition to compensation paid to a claimant.

(3) "Attorney" means a member of the Oregon State Bar.

(4) "Attorney fee" means payment for legal services performed by an attorney on behalf and at the request of a claimant under ORS Chapter 656.

(5) "Compensation" means all benefits, including medical services, provided for a compensable injury to a subject worker or the beneficiaries of a subject worker pursuant to ORS Chapter 656.

(6) "Costs" means money expended by an attorney for things and services reasonably necessary to pursue a matter on behalf of a party, but do not include fees paid to any attorney. Examples of costs referred to include, but are not limited to, costs of independent medical examinations, depositions, expert witness opinions,

witness fees and mileage paid to execute a subpoena and costs associated with travel.

(7) "Denied claim" means a claim for compensation which an insurer or self-insured employer refuses to pay on the express ground that the injury or condition for which compensation is claimed is not compensable or otherwise does not give rise to an entitlement to any compensation.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.388(3) & 656.726(4)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

**438-015-0010**

**General Principles**

(1) Attorney fees for an attorney representing a claimant shall be authorized only if an executed attorney retainer agreement has been filed with the Administrative Law Judge or Board.

(2) Attorney fees for an attorney representing a claimant shall be paid out of the claimant's compensation award except as provided by ORS 656.307, 656.382 and 656.386.

(3) An approved fee awarded or allowed to an attorney representing a claimant shall be a lien upon the claimant's compensation.

(4) 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;
- (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
- (h) The assertion of frivolous issues or defenses.

(5) Percentage limitations on fees established by these rules apply to the amount of compensation paid the claimant exclusive of medical, hospital or other expenses of treatment.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.388(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90

**438-015-0015**

**Charge for Legal Services Must be Authorized**

No charge for legal services for representation of claimants in connection with any claim under ORS Chapter 656 is valid unless the charge has been authorized in accordance with ORS 656.307, 656.382 - 656.390 or 656.593 or these rules.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.388(1)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 4-1988(Temp), f. & ef. 11-15-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90

**438-015-0025**

**Maximum Attorney Fees Out of Compensation**

Except in situations where a claimant's attorney fee is an assessed fee, in settlement of disputed claims or claim disposition agreements and in cases under the third-party law, unless there is a finding in a particular case by an Administrative Law Judge or the Board that extraordinary circumstances justify a higher fee, the established fees for attorneys representing claimants are as set forth in OAR 438-015-0040, 438-015-0045, 438-015-0055(1) and 438-015-0080.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.236(4), 656.289(4), 656.386(2), 656.388(3) & 656.593(1)(a)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90



#### 438-015-0029

##### Request at Board Review Level for Assessed Fees

(1) On Board review of an Administrative Law Judge's order, to assist the Board in determining the amount of a reasonable assessed fee for services at the hearing level and/or for services on Board review, a claimant's attorney may file a request for a specific fee, which the attorney believes to be reasonable.

(2) The request shall be considered by the Board if:

(a) The request is filed within 14 days from the date of filing of the last appellate brief under OAR 438-011-0020;

(b) The request describes in detail the manner in which the factors set forth in OAR 438-015-0010(4) specifically apply to the case, as well as any other information deemed relevant; and

(c) A copy of the request is simultaneously served upon the other parties and their attorneys who appeared at hearing and on Board review in the manner provided in OAR 438-005-0046(2)(a) and proof of such service is provided in accordance with OAR 438-005-0046(2)(b).

(3) A written response raising objection to the request shall be considered by the Board if:

(a) The response is filed within 14 days from the date of filing of claimant's attorney's request for a specific fee under subsection (2)(a) of this rule; and

(b) A copy of the request is simultaneously served upon the other parties and their attorneys who appeared at hearing and on Board review in the manner provided in OAR 438-005-0046(2)(a) and proof of such service is provided in accordance with OAR 438-005-0046(2)(b).

(4) A request or response that does not comply with this rule shall not be considered by the Board in determining the amount of a reasonable assessed fee.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 656.382(2), 656.386(1) & 656.388(3)

Hist.: WCB 1-1992, f. 3-5-92, cert. ef. 4-6-92; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95

#### 438-015-0030

##### Attorney Fees When There is No Hearing

If an attorney is instrumental in obtaining compensation for a claimant without a hearing before an Administrative Law Judge, a reasonable attorney fee may be approved or assessed. The amount of the fee shall be determined by an Administrative Law Judge or by agreement of the parties.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 656.386(1)(2)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95

#### 438-015-0035

##### Attorney Fees When a Claimant Requests a Hearing on a Denied Claim

If the Administrative Law Judge orders the acceptance of a previously denied claim, the Administrative Law Judge shall award a reasonable assessed fee. This rule applies to denials of original claims for accidental injury and occupational disease, denials of aggravation and partial denials.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.386(1) & 656.388(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89

#### 438-015-0038

##### Attorney Fees When a Claimant Requests a Hearing on a Responsibility Denial

If the claimant appears in any proceeding regarding a responsibility denial issued under ORS 656.308(2), and actively and meaningfully participates through an attorney, and finally prevails against that responsibility denial, the Administrative Law Judge shall award a reasonable assessed fee to be paid by the insurer or self-insured employer who issued the responsibility denial. Absent a showing of extraordinary circumstances, the assessed attorney fee shall not exceed \$1,000.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.386(1) & 656.388(3)

Hist.: WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

#### 438-015-0040

##### Attorney Fees When a Claimant Requests a Hearing on Extent of Permanent Disability

(1) If the Administrative Law Judge awards additional compensation for permanent partial disability the Administrative Law Judge shall approve a fee of 25 percent of the increased compensation, but not more than \$2,800, to be paid out of the increased compensation.

(2) If the Administrative Law Judge awards compensation for permanent total disability the Administrative Law Judge shall approve a fee of 25 percent of the increased compensation, but not more than \$4,600, to be paid out of the award for permanent total disability.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.386(2) & 656.388(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90

#### 438-015-0045

##### Attorney Fees When a Claimant Requests a Hearing on Extent of Temporary Disability

If the Administrative Law Judge awards additional compensation for temporary disability the Administrative Law Judge shall approve a fee of 25 percent of the increased compensation, but not more than \$1,050, to be paid out of the increased compensation.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.386(2) & 656.388(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89

#### 438-015-0050

##### Attorney Fees in Connection With Disputed Claim Settlements

(1) When a denied and disputed claim is settled under the Administrative Law Judge provisions of ORS 656.289(4) and OAR 438-009-0010, an attorney fee may be approved by the Administrative Law Judge or the Board in an amount up to 25 percent of the first \$12,500 of the settlement proceeds plus ten percent of any amount of the settlement proceeds in excess of \$12,500. Under extraordinary circumstances, a fee may be authorized in excess of this calculation.

(2) When the settlement proceeds are to be paid in more than one payment payable within a period of more than one year from the date of approval, for purposes of approving an attorney fee under section (1) of this rule, settlement proceeds shall be calculated based on the "present value" of the total settlement proceeds. "Present value" may be represented by the actual present value of the total settlement proceeds or the purchase price of any annuity designed to fund payment of the total settlement proceeds. The parties shall provide the Board with a written statement of the "present value" of the total settlement proceeds.

Stat. Auth.: ORS 656.388(4) & 656.726(4)

Stats. Implemented: ORS 656.289(4) & 656.388(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 6-1991(Temp), f. 8-29-91, cert. ef. 9-2-91; WCB 8-1991, f. 11-6-91, cert. ef. 11-7-91

#### 438-015-0052

##### Attorney Fees in Connection With Claim Disposition Agreements

(1) When a claim disposition agreement is approved under the provisions of ORS 656.236 and OAR 438-009-0020, an attorney fee may be approved by the Board in an amount up to 25 percent of the first \$12,500 of the agreement proceeds plus ten percent of any amount of the proceeds in excess of \$12,500. Under extraordinary circumstances, a fee may be authorized in excess of this calculation.

(2) When the agreement proceeds are to be paid in more than

one payment payable within a period of more than one year from the date of approval, for purposes of approving an attorney fee under section (1) of this rule, agreement proceeds shall be calculated based on the "present value" of the total proceeds. "Present value" may be represented by the actual present value of the total agreement proceeds or the purchase price of any annuity designed to fund payment of the total agreement proceeds. The parties shall provide the Board with a written statement of the "present value" of the total agreement proceeds.

Stat. Auth.: ORS 656.388(4) & 656.726(4)

Stats. Implemented: ORS 656.236(4) & 656.388(3)

Hist.: WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 6-1991(Temp), f. 8-29-91, cert. ef. 9-2-91; WCB 8-1991, f. 11-6-91, cert. ef. 11-7-91

**438-015-0055****Attorney Fees When a Claimant Requests Review by the Board**

(1) If a claimant requests review of an Administrative Law Judge's order on the issue of compensation for temporary or permanent disability and the Board awards additional compensation, the Board shall approve a fee of 25 percent of the increased compensation, provided that the total of fees approved by the Administrative Law Judge and the Board shall not exceed \$3,800, except in cases where the Board awards compensation for permanent total disability, in which cases the total of fees awarded by the Administrative Law Judge and the Board shall not exceed \$6,000.

(2) If a claimant requests review of a Administrative Law Judge's order that upheld a denial of a claim and the Board orders the claim accepted, the Board shall assess a reasonable attorney fee to be paid by the insurer or self-insured employer to the claimant's attorney.

Stat. Auth.: ORS

Stats. Implemented: ORS 656.386(1)(2) & 656.388(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88

**438-015-0065****Attorney Fees When Insurer or Self-Insured Employer Requests a Hearing**

If an insurer or self-insured employer requests a hearing or otherwise seeks a reduction in compensation and the Administrative Law Judge does not reduce the compensation, the Administrative Law Judge shall award a reasonable assessed fee.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.382(2) & 656.388(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88

**438-015-0070****Attorney Fees When Insurer or Self-Insured Employer Requests or Cross-Requests Review by the Board**

If an insurer or self-insured employer requests or cross-requests review of the Administrative Law Judge's order and the Board does not disallow or reduce the claimant's compensation, the Board shall award a reasonable assessed fee.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.382(2) & 656.388(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88

**438-015-0080****Attorney Fees in Own Motion Cases**

If an attorney is instrumental in obtaining increased disability compensation, the Board shall approve a reasonable attorney fee, not to exceed \$1,050, payable out of the increased compensation. The Board may allow a fee in excess of \$1,050 upon a finding that extraordinary services have been rendered.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.278(1), 656.386(2) & 656.388(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 2-1990, f. 1-24-90, cert. ef. 2-28-90; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90

**438-015-0082****Timely Payment of Attorney Fees**

(1) An approved attorney fee shall be paid within the time required for payment of the compensation out of which the approved fee is to be paid.

(2) An assessed attorney fee shall be paid within 30 days of the date the order authorizing the fee becomes final.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.382(1), 656.386(1)(2) & 656.388(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90

**438-015-0085****Payment of Attorney Fees Out of Compensation; Fee Not Subject to Offset**

(1) If the claimant consents in the attorney retainer agreement, the Administrative Law Judge or the Board may order the payment of approved attorney fees directly to the claimant's attorney in a lump sum when the fee is to be paid out an award of compensation for permanent disability. The lump sum shall not be due until the award of compensation becomes final.

(2) An attorney fee which has been authorized under these rules to be paid out of increased compensation awarded by a Administrative Law Judge, the Board or a court shall not be subject to any offset based upon prior overpayment of compensation to the claimant.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.386(2) & 656.388(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88

**438-015-0090****Attorney Fees in Proceeding Under ORS 656.307**

If the claimant appears in any proceeding under ORS 656.307 and actively and meaningfully participates through an attorney, the Administrative Law Judge may require the payment of a reasonable assessed fee to be paid by the insurer or self-insured employer determined by the Administrative Law Judge to be the party responsible for paying compensation.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.307(5) & 656.388(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96

**438-015-0095****Attorney Fees in Third-Party Cases**

Unless otherwise ordered by the Board after a finding of extraordinary circumstances, an attorney fee not to exceed 33-1/3 percent of the gross recovery obtained by the plaintiff in an action maintained under the provisions of ORS 656.576 - 656.595 is authorized.

Stat. Auth.: ORS 656.307, 656.388, 656.593 & 656.726(4)

Stats. Implemented: ORS 656.593(1)(a) & 656.388(3)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89

**DIVISION 16****BOARD REVIEW OF DIRECTOR'S ORDER FINDING NO BONA FIDE MEDICAL SERVICES DISPUTE****438-016-0005****Request for Board Review**

(1) A request for Board review of a Director's order finding no bona fide medical services dispute shall be filed in accordance with OAR 438-005-0046(1)(a) or (b).

(2) Copies of a request for Board review of the Director's order should be simultaneously mailed to the Director, all parties to the Director's order, and to their attorneys, if represented by an attorney. The request should recite the name of the claimant, the identity of the party requesting review and contain a brief statement of the reason review is requested. However, the failure to comply with this section shall not be cause for dismissal of the request for review.

Stat. Auth.: ORS 656.726(4)

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Stats. Implemented: ORS 656.327(1)(b) & 656.726(4)  
Hist.: WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90

Hist.: WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90

#### 438-016-0010

##### Acknowledgment of Request for Review; Record

(1) The Board shall notify the parties and the Director of its receipt of the request for review. This acknowledgment shall also notify the parties of the implementation of a briefing schedule which will become effective upon the Director's mailing of the record.

(2) Not later than 30 days after mailing of the Board's acknowledgment, the Director shall file with the Board a certified copy of the entire record, including an index of all items contained in the record. The Director shall simultaneously mail to the parties, or where a party is represented by an attorney, the party's attorney, a certified copy of the record.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 656.327(1)(b) & 656.726(4)

Hist.: WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95

#### 438-016-0015

##### Scope of Review

(1) Review by the Board shall be for substantial evidence in the record in accordance with ORS 656.327(1)(b). The Board shall set aside or remand the order only if it finds that the order is not supported by substantial evidence in the record.

(2) The Board will not ordinarily entertain oral argument. All issues and arguments should be reduced to writing and filed pursuant to OAR 438-016-0020. The case will be reviewed in the ordinary course of business without prior notice to the Director or the parties of the date or time of review.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.327(1)(b)

Hist.: WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90

#### 438-016-0015

##### Briefs and Other Documents

**438-016-0020** (1) Filing of briefs is not jurisdictional; however the Board views briefs as a significant aid to the review process. Briefs submitted for consideration by the Board shall comply with this section.

(2) Briefs shall be filed in accordance with OAR 438-011-0020(2), except that the briefing schedule shall begin upon the date of mailing of the Director's certified copy of the record to the Board.

(3) Requests for extensions of time for filing of briefs will be processed in accordance with OAR 438-011-0020(3).

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.327(1)(b) & 656.726(4)

ORS 656.327(1)(b) & 656.726(4)

Hist.: WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90

#### 438-016-0025

##### Board Decision; Reconsideration; No Further Review

(1) The Board's decision shall be mailed to the Director, all parties, and their attorneys.

(2) Upon its own motion or the request of any interested party, within 30 days after a final decision of the Board, the Board may withdraw its decision for reconsideration. On reconsideration, the Board may affirm its previous decision, issue a new order or make such other disposition of the case as it deems justified pursuant to ORS 656.327(1)(b).

(3) An order on reconsideration shall contain the following notice:

**"NOTICE TO ALL PARTIES: This order is final and is not subject to further reconsideration or review by any other court or administrative agency."**

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 656.327(1)(b)

#### DIVISION 82

### PRACTICE AND PROCEDURE FOR APPEALS UNDER THE COMPENSATION ACT FOR VICTIMS OF CRIME

#### 438-082-0000

##### Statutory Authority; Adoption Procedures

(1) The statutory authority for the adoption of these rules is ORS 656.726(4) and ORS 147.155.

(2) These rules are adopted in accordance with ORS Chapter 183 and the Attorney General's Model Rules of Procedure applicable to rulemaking sanctions.

Stat. Auth.: ORS 183.310 – 183.410, 147.155(5) & 656.726(4)

Stats. Implemented: ORS 147.155 & 656.726(4)

Hist.: WCB 5-1978, f. 4-14-78, ef. 5-1-78; WCB 3-1986, f. 8-28-86, ef. 9-1-86

#### 438-082-0005

##### Applicability; Effective Date; Repeal of Prior Rules

(1) These rules apply to victims or dependents of deceased victims who apply for compensation under the Compensation Act for Victims of Crime (ORS Chapter 147 and OAR 137-076-0005, et seq.)

(2) These rules are effective September 1, 1986, and apply to all appeals pending at that time, regardless of the the date of injury.

(3) OAR 438-082-0000 through 438-082-0055, effective May 1, 1978 are hereby repealed.

Stat. Auth.: ORS 183.310 – 183.410, 147.155(5) & 656.726(4)

Stats. Implemented: ORS 147.155 & 656.726(4)

Hist.: WCB 5-1978, f. 4-14-78, ef. 5-1-78; WCB 3-1986, f. 8-28-86, ef. 9-1-86

#### 438-082-0010

##### Definitions

(1) "Applicant" means any person who applies to the Department for Compensation under the Compensation Act for victims of Crime (ORS Chapter 147 and OAR 137-076-0005 et seq.).

(2) "Board" means the Workers' Compensation Board.

(3) "Department" means the Department of Justice.

(4) "Interested person" means an applicant, the Department and any other persons named and admitted as a full participant in an appeal.

Stat. Auth.: ORS 183.310 – 183.410, 147.155(5) & 656.726(4)

Stats. Implemented: ORS 147.155 & 656.726(4)

Hist.: WCB 5-1978, f. 4-14-78, ef. 5-1-78; WCB 3-1986, f. 8-28-86, ef. 9-1-86

#### 438-082-0015

##### Request for Review by Board

The request for Board review of a decision of the Department shall be in writing, signed by the applicant and mailed to the Board at 2250 McGilchrist Street, S.E. Salem, Oregon 97310, and shall contain the applicant's mailing address and telephone number, if the applicant has a telephone.

(2) The request for Board review should contain a brief statement of the reasons the applicant disagrees with the decision of the Department; however, the failure of an applicant to comply with this section shall not be cause for dismissal of the request for review.

Stat. Auth.: ORS 183.310 – 183.410, 147.155(5) & 656.726(4)

Stats. Implemented: ORS 147.155 & 656.726(4)

Hist.: WCB 5-1978, f. 4-14-78, ef. 5-1-78; WCB 3-1986, f. 8-28-86, ef. 9-1-86

#### 438-082-0020

##### Notification of Department; Premature Request for Review

(1) The Board shall forthwith notify the Department in writing of the request for review and shall mail a copy of the request for review to the Department. If the Department has not yet reconsidered its initial order under the provisions of ORS 147.145, the request for review shall be deemed to be a request for



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reconsideration by the Department. Upon receipt from Board of such a premature request for review, the Department shall forthwith notify the Board and the applicant and shall proceed to reconsider the order pursuant to ORS 147.145.

(2) The Department may file a response to the request for review.

Stat. Auth.: ORS 183.310 – 183.410, 147.155(5) & 656.726(4)

Stats. Implemented: ORS 147.155 & 656.726(4)

Hist.: WCB 5-1978, f. 4-14-78, ef. 5-1-78; WCB 3-1986, f. 8-28-86, ef. 9-1-86

#### 438-082-0025

##### Acknowledgement of Request for Review; Record

(1) The Board shall forthwith notify the applicant of its receipt of the request for review. The notice shall direct the applicant to inform the Board not later than 15 days after the mailing of the record by the Department whether the applicant requests a fact finding hearing and, if a hearing is requested, what findings of fact, conclusions or portions of the Department's order are contested.

(2) Not later than 15 days after mailing of notification of the request for review to the Department, the Department shall file with the Board a certified copy of the entire Department record, including an index of all items contained in the record. The Department shall simultaneously mail to the applicant a certified copy of the record, except that any material deemed confidential by the Department may be excluded from the copy of the record mailed to the applicant. If confidential material is excluded from the copy of the record mailed to the applicant, the applicant shall be informed that material has been excluded from the applicant's copy of the record on the basis of its confidentiality.

(3) Upon receipt and review of the record, the Board may release additional material to the applicant or may declare additional material confidential

Stat. Auth.: ORS 183.310 – 183.410, 147.155(5) & 656.726(4)

Stats. Implemented: ORS 147.155 & 656.726(4)

Hist.: WCB 5-1978, f. 4-14-78, ef. 5-1-78; WCB 3-1986, f. 8-28-86, ef. 9-1-86

#### 438-082-0030

##### Standard of Review; Review Without Hearing

(1) The standard of review by the Board shall be de novo upon the entire record.

(2) If the applicant does not request a fact finding hearing within 15 days of the mailing of the record, the review shall be confined to the record filed by the Department and any written argument filed by the interested parties. The applicant's written argument, if any, must be filed with the Board not later than 30 days after the mailing of the record to be considered. The Department shall be allowed 15 days from the filing of the applicant's written argument to file its response, or, of the applicant files no written argument, the Department's written argument, if any, shall be filed not later than 45 days after the mailing of the record.

Stat. Auth.: ORS 183.310 – 183.410, 147.155(5) & 656.726(4)

Stats. Implemented: ORS 147.155 & 656.726(4)

Hist.: WCB 5-1978, f. 4-14-78, ef. 5-1-78; WCB 3-1986, f. 8-28-86, ef. 9-1-86

#### 438-082-0035

##### Fact Finding Hearing

(1) If the applicant requests a fact finding hearing, the Board may appoint a special hearings officer to preside over the hearing.

(2) Any person considered necessary by the Board or its special hearings officer for a full determination of all issues shall be joined as a party to the hearing.

(3) The Board or its special hearings officer shall give not less than ten (10) days written notice of the hearing to all interested parties.

(4) Postponement of a scheduled hearing shall be requested as soon as possible and may be allowed by the Board or its special hearings officer upon reasonable justification. A special hearings officer may postpone a hearing at the convenience of the Board. Postponed hearings shall be rescheduled upon not less than ten (10) days written notice to all interested parties.

(5) The hearing shall be held at Salem, Oregon, unless in the

judgment of the Board the holding of the hearing at some other place would avoid undue hardship to an interested party.

(6) A prehearing conference may be conducted by the Board or its special hearings officer for the purpose of simplifying and clarifying the issues or expediting the proceeding. A prehearing conference may be conducted by telephone conference call.

Stat. Auth.: ORS 183.310 – 183.410, 147.155(5) & 656.726(4)

Stats. Implemented: ORS 147.155 & 656.726(4)

Hist.: WCB 5-1978, f. 4-14-78, ef. 5-1-78; WCB 3-1986, f. 8-28-86, ef. 9-1-86

#### 438-082-0040

##### Conduct of Hearing; Evidence; Proposed Order; Notice to Parties

(1) A record of all proceedings shall be made, except that no record need be made of prehearing conferences. The record shall be transcribed only by order of the Board.

(2) Subject to sections (3) and (7) of this rule, the hearing may be conducted in any manner reasonably calculated to achieve substantial justice.

(3) The entire record filed by the Department with the Board shall be received into evidence. No other documentary evidence shall be received. Only those persons whose statements were considered by the Department in reaching its decision shall be permitted to give testimony. Subject only to these limitations, there are no formal or technical rules of evidence; however, evidence may be excluded if it is irrelevant or unduly repetitious.

(4) If the applicant fails to appear at the requested hearing, the special hearings officer shall forthwith issue an order requiring the applicant to show cause in writing within ten days why the applicant's request for Board review of Department's decision should not be dismissed as having been abandoned. If no or an insufficient response is received to the order to show cause, the Board may dismiss the applicant's request for review of Department's decision or may take such other action as it deems appropriate.

(5) Not more than 30 days after the conclusion of the hearing, the special hearings officer shall file with the Board all documentary evidence received together with written findings of fact, conclusions and a proposed order. Copies of the written findings of fact, conclusions and proposed order shall be simultaneously mailed to all interested parties.

(6) The proposed order shall contain the following notice: **“NOTICE TO ALL PARTIES: This order will be reviewed automatically by the Workers' Compensation Board within 30 days and will become a final order of the Workers' Compensation Board 30 days from the mailing date of this order unless this order is sooner withdrawn or modified by the Board. Objections to this proposed order must be in writing and filed with Workers' Compensation Board, 2250 McGilchrist Street, S.E., Salem, OR 97310 within 20 days from the date of this order to be considered.”**

(7) Hearings under these rules shall be open to the public except:

(a) The Board or a special hearings officer shall close the hearing to the public upon the motion or request of an applicant or, if the applicant is minor, a parent or guardian of the applicant, for any of the reasons set forth in ORS 147.115(1); and

(b) The Board or a special hearings officer may close the hearing to the public upon the motion or request of an interested party other than the applicant or upon its or his or her own motion for any of the reasons set forth in ORS 147.115(1).

Stat. Auth.: ORS 183.310 – 183.410, 147.155(5) & 656.726(4)

Stats. Implemented: ORS 147.155 & 656.726(4)

Hist.: WCB 5-1978, f. 4-14-78, ef. 5-1-78; WCB 3-1986, f. 8-28-86, ef. 9-1-86

#### 438-082-0045

##### Board Decision

(1) In cases in which the Board's decision is made upon a review of the record and written argument only, the Board will issue its decision in writing within a reasonable time. The decision shall be mailed to all interested parties.

(2) In cases in which a hearing is held, the Board shall within

30 days of receipt of the record from the special hearings officer review the record together with the findings of fact, conclusions and proposed order. Unless sooner withdrawn or modified by the Board, the findings of fact, conclusions and proposed order of the Board's special hearings officer shall be a final order of the Board 30 days after the filing of the proposed order with the Board and mailing to interested parties pursuant to OAR 438-082-0040(5).

Stat. Auth.: ORS 183.310 – 183.410, 147.155(5) & 656.726(4)

Hist.: WCB 5-1978, f. 4-14-78, ef. 5-1-78; WCB 3-1986, f. 8-28-86, ef. 9-1-86

#### **438-082-0050**

##### **Reconsideration; No Further Review**

(1) Upon its own motion or the request of any interested party, within 30 days after a final decision of the Board the Board may withdraw its decision for reconsideration. On reconsideration, the Board may affirm its previous decision, issue a new order or make such other disposition of the case as it deems justified.

(2) An order on reconsideration shall contain the following notice:

**“NOTICE TO ALL PARTIES: This order is final and is not subject to further reconsideration or administrative or judicial review.”**

Stat. Auth.: ORS 183.310 – 183.410, 147.155(5) & 656.726(4)

Stats. Implemented: ORS 147.155 & 656.726(4)

Hist.: WCB 5-1978, f. 4-14-78, ef. 5-1-78; WCB 3-1986, f. 8-28-86, ef. 9-1-86

#### **438-082-0055**

##### **Representation by Counsel; Charging of Fee Prohibited**

(1) The Department shall be represented in all proceedings under these rules by the Department of Justice.

(2) Any other interested party may be represented by an attorney who is member of the Oregon State Bar.

(3) No applicant shall be charged any fee for any purpose, including legal representation, in any proceeding under these rules. (ORS 147.315.)

Stat. Auth.: ORS 183.310 – 183.410, 147.155(5) & 656.726(4)

Stats. Implemented: ORS 147.155 & 656.726(4)

Hist.: WCB 5-1978, f. 4-14-78, ef. 5-1-78; WCB 3-1986, f. 8-28-86, ef. 9-1-86

### **DIVISION 85**

#### **RULES OF PRACTICE AND PROCEDURE FOR CONTESTED CASES UNDER THE OREGON SAFE EMPLOYMENT ACT**

##### **Scope; Policy; Definitions**

#### **438-085-0006**

##### **Scope; Authority**

(1) These rules (OAR 438-085-0006 to 438-085-0870) govern practice and procedure for all contested cases under the Act.

(2) These rules are authorized by the Act and by ORS Chapter 183.

(3) The model rules of procedure adopted by the Attorney General pursuant to ORS 183.341 shall not apply to contested cases under the Act.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025(2)

Hist.: Adopted temporarily as Rule 436-85-005 and as part of 436-85-011 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-005 and as a part of 436-85-011 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form as Rule 436-85-006 by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77

#### **438-085-0010**

##### **Effective Date; Applicability**

These rules are effective December 1, 1994 and shall apply to all appeals filed on or after that date.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 654.025(2)

Hist.: WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95

#### **438-085-0017**

##### **Board Policy; Liberal Construction**

(1) It is the policy of the Board to provide for the prompt and fair disposition of contested cases, encourage informal settlements consistent with the purposes of the Act, and provide an impartial forum for hearings on cases that cannot be resolved between the parties.

(2) These rules shall be liberally construed to carry out the policy of the Board and the purposes of the Act.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025(2) & 654.003

Hist.: Adopted temporarily as Rule 436-85-025 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-025 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78

#### **438-085-0021**

##### **Number**

For the purpose of these rules, the singular includes the plural and the plural includes the singular.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025(2)

Hist.: Adopted temporarily as Rule 436-85-030 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-030 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted 5-4-77 by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended 6-16-82 by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

#### **438-085-0026**

##### **Definitions**

For the purpose of these rules, unless the context otherwise requires, the following definitions apply:

(1) “Act”: The Oregon Safe Employment Act (ORS 654.001 to 654.295 and 654.991).

(2) “Affected Employee”: An employee who, in the course and scope of the employee's employment, may be or may have been exposed to a condition of practice described in a Citation, Correction Order or Variance. The term also includes a labor union authorized to bargain collectively for affected employees.

(3) “OR-OSHA”: The Oregon Occupational Safety and Health Division of the Department of Consumer and Business Services.

(4) “Appeal”: A written request for a hearing to contest a citation, notice or order issued by OR-OSHA. Unless the context otherwise requires, any writing which clearly contests, objects to, or seeks relief from an OR-OSHA citation, notice or order shall be construed as an appeal.

(5) “Board”: The Workers' Compensation Board created by ORS 656.712.

(6) “Citation”: A document issued by OR-OSHA pursuant to ORS 654.071 to allege a violation. A citation may include a notice of penalty and a correction order.

(7) “Contested Case”: A dispute in which an appeal has been filed.

(8) “Correction Order”: A written OR-OSHA order which directs a person to stop an alleged violation within a given period of time. The term also includes a Red Warning Notice posted pursuant to ORS 654.082.

(9) “Division”: The Workers' Compensation Division of the Department of Consumer and Business Services created by ORS 656.708.

(10) “Director”: The Director of the Department of Consumer and Business Services.

(11) “Document: Any notice, form, letter or other writing relating to a contested case.

(12) “Employee”: Any individual, including a minor whether lawfully or unlawfully employed, who engages to furnish services

for a remuneration, financial or otherwise, subject to the direction and control of an employer, and includes salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations, or any individual who is provided with workers' compensation coverage as a subject worker pursuant to ORS Chapter 656, whether by operation of law or by election. See ORS 654.005(5).

(13) "Employer": Any person who has one or more employees, or any sole proprietor or member of a partnership who elects workers' compensation coverage as a subject worker pursuant to ORS 656.128. See ORS 654.005(6).

(14) "Filed": The receipt of a document by the Hearings Division, except that an appeal will be considered filed upon receipt at any office of the Board or OR-OSHA.

(15) "Hearing": A formal, reported proceeding before an Administrative Law Judge of the Hearings Division where the parties to a contested case may present their evidence and arguments on the issues.

(16) "Hearings Division": The Hearings Division of the Board.

(17) "Party": A person named or admitted as a full participant in a contested case. The term includes OR-OSHA, a necessary party to all contested cases under the Act.

(18) "Penalty": The dollar amount proposed in a written notice by OR-OSHA as the Director's assessment against a person for an alleged violation.

(19) "Person": One or more individuals, legal representatives, partnerships, joint ventures, association, corporations (whether or not organized for profit), business trusts, or any organized group of persons, including the state, state agencies, counties, municipal corporation, school districts and other public corporations or subdivisions. See ORS 654.005(8).

(20) "Presiding Administrative Law Judge": The Administrative Law Judge who presides over and administers the Hearings Division, as provided in ORS 656.724.

(21) "Administrative Law Judge": The Administrative Law Judge of the Hearings Division, or other qualified member of the Oregon State Bar, who is assigned by the Presiding Administrative Law Judge to a contested case. The term also means the Presiding Administrative Law Judge if an Administrative Law Judge has not been assigned to the case or the assigned Administrative Law Judge is unavailable.

(22) "Representative": Any individual authorized by a party or intervenor to represent the party in a contested case. Any reference to "OR-OSHA," "defendant," "employee," "employer," "intervenor," "labor union," "party," "petitioner," "plaintiff," or "respondent" includes that person's representative.

(23) "Settlement": A written agreement which, when approved by all parties and affirmed by the Administrative Law Judge, will amend the contested OR-OSHA citation, notice or order and dispose of all issues in the case.

(24) "Variance": The written authority given by OR-OSHA to an employer to permit the employer to use a specific alternative means or method to comply with the intent of an occupational safety or health law or rule.

(25) "Violation": The breach of a person's duty to comply with an Oregon occupational safety or health law, rule or order.

(26) "Withdrawal": A party's complete and unconditional abandonment of its allegations, contentions and participation in a contested case. An OR-OSHA withdrawal is an abandonment of the entire citation, notice or order that contains the matters appealed from.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025(2) & 654.005

Hist.: Adopted temporarily as Rule 436-85-020 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated in amended form as permanent Rule 436-85-020 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82; WCB 7-1987, f. 12-23-87, ef. 1-1-88; WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95

## Filing Appeals

### 438-085-0106

#### Who May Appeal What

(1) A person to whom a citation, notice of penalty or correction order is issued may file an appeal to deny the alleged violation, contest the amount of the penalty, or contest the reasonableness of the correction order.

(2) A person who does not contest the reasonableness of the time as originally set by a correction order, but appeals to OR-OSHA for an extension of that time, may file an appeal to contest OR-OSHA's denial of the time extension.

(3) An affected employee may file an appeal to contest the reasonableness of the time allowed by a correction order or to contest a subsequent OR-OSHA order which modifies that time.

(4) An adversely-affected person, including an affected employee, may file an appeal to contest OR-OSHA's proposed grant, denial, modification or revocation of a variance.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025(2) & 654.078

Hist.: Adopted temporarily as parts of Rules 436-85-105, 436-85-110, 436-85-115, 436-85-125 and 436-85-130 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated in amended form as parts of permanent Rules 436-85-105, 436-85-110, 436-85-115, 436-85-125 and 436-85-130 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78

### 438-085-0111

#### Form and Content of Appeal

(1) An appeal does not have to be in any special form, but it must:

(a) Be in writing;

(b) Identify the particular citation, notice or order that is appealed from, and the person to whom it was issued;

(c) Specify each alleged violation, penalty, correction order, or other OR-OSHA action that is contested;

(d) State the grounds upon which the appeal is based; and

(e) Clearly indicate whether the appealing party wants to attempt to settle informally.

(2) An appeal should include the name, address and telephone number of the appealing party and of the party's representative, if any.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025(2) & 654.078(1)(2)

Hist.: Adopted temporarily as parts of Rules 436-85-105, 436-85-110, 436-85-115, 436-85-125 and 436-85-130 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated in amended form as parts of permanent Rules 436-85-105, 436-85-110, 436-85-115, 436-85-125 and 436-85-130 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89

### 438-085-0116

#### Where to Appeal

(1) All appeals should be filed with the Oregon Occupational Safety and Health Division at Room 21, Labor and Industries Building, Salem, Oregon 97310.

(2) An appeal may be delivered to any office of the Board or OR-OSHA, for forwarding to the Accident Prevention Division, to meet a filing deadline.

(3) When OR-OSHA receives an appeal, the Division shall promptly attempt to settle the case or refer the case to the Hearings Division if no settlement is desired or feasible.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025(2) & 654.078(1)

Hist.: Adopted temporarily as Rule 436-85-310 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-310 by WCB Admin. Order



10-1974, f. 3-19-74, ef. 4-15-74; Adopted 5-4-77 by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; WCB 7-1987, f. 12-23-87, ef. 1-1-88; WCB 3-1989, f. 3-31-89, ef. 5-1-89

#### **438-085-0121**

##### **When to Appeal**

(1) An appeal to contest an alleged violation or a proposed penalty shall be filed within 20 days after the contested OR-OSHA citation or notice is received by the person to whom it was issued.

(2) An appeal relating to a correction order or a variance shall, except for good cause, be filed within 20 days after the contested order or notice is received by the person to whom it was issued

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025(2) & 654.078(1)(2)

Hist.: Adopted temporarily as Rule 436-85-135 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated in amended form as permanent Rule 436-85-135 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78

#### **438-085-0131**

##### **Computing Time Periods**

Time periods required or allowed by these rules shall be computed in calendar days. The first full day after the time begins to run is counted as the first day. If the last day is a Saturday, Sunday, or State holiday, the period runs until the end of the next business day.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025(2)

Hist.: Adopted temporarily as Rule 436-85-305 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-305 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

##### **Jurisdiction Over Appeals: Untimely Appeals**

#### **438-085-0211**

##### **Jurisdiction of Hearings Division**

The jurisdiction of the Hearings Division commences 60 days after the employer's appeal was filed with any office of the Board or OR-OSHA unless the employer certifies that it does not want to participate in an informal conference, provided that the case has not been closed. It also commences after a party seeks reopening of a case under OAR 438-085-0636, or when an employee objects to a closed case under OAR 438-085-0641, or when a motion is filed under OAR 438-085-0305.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 654.025

Hist.: Adopted temporarily as part of Rule 436-85-035 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated in amended form as part of permanent Rule 436-85-035 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; WCB 7-1987, f. 12-23-87, ef. 1-1-88; WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB 3-1992(Temp), f. 5-15-92, cert. ef. 5-18-92; WCB 6-1992, f. 10-9-92, cert. ef. 10-12-92; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95; WCB 1-1995, f. 3-20-95, cert. ef. 6-1-95

#### **438-085-0216**

##### **Untimely Appeals**

(1) If OR-OSHA alleges that an appeal was not timely filed, the case shall be referred to the Hearings Division to give the parties an opportunity for a hearing on that issue, upon the request of one or more parties.

(2) If an Administrative Law Judge finds that an appeal was not timely filed, and that the Hearings Division lacks jurisdiction

to grant a hearing on the merits of the case, the referee shall issue an order dismissing the appeal.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 654.025 & 654.078(1-3)

Hist.: Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95

##### **Procedures in Response to Appeals**

#### **438-085-0305**

##### **Referral of Appeal to the Hearings Division**

(1) If a contested case is not closed within 60 days of the filing of an appeal, or if there is a request for third party status, intervenor party status, stay of correction date on a serious violation, extension of time for correction of a serious violation or any other motion or matter requiring an Administrative Law Judge decision, OR-OSHA shall immediately refer the case to the Hearings Division.

(2) If a party seeks reopening of a contested case under OAR 438-085-0636 or an employee objects to a closed case under OAR 438-085-0641, and the case has not been referred to the Hearings Division, OR-OSHA shall immediately refer the case to the Hearings Division.

(3) A referral shall transmit to the Hearings Division:

- (a) A notice of referral specifying the reason for the referral;
- (b) A list of the documents transmitted with the referral;
- (c) The original of the appeal document;
- (d) A certified true copy of the contested citation, notice or order;

(e) Where applicable, the original of the application for a variance, request for extended time on a correction order, or other petition that initiated the case;

(f) Where applicable, the original of any election to become a third party filed pursuant to OAR 438-085-0411 or person to intervene filed pursuant to OAR 438-085-0426;

(g) Where applicable, the original of any application to reopen filed pursuant to OAR 438-085-0636 or objection to a closed case filed pursuant to OAR 438-085-0641; and

(h) Where applicable, a copy of any written request for information submitted by an effected employee pursuant to OAR 438-085-0421.

(4) OR-OSHA shall mail a copy of the notice of referral and list of documents transmitted to the Hearing Division to the appealing party.

(5) Once a case is referred to the Hearings Division it shall remain there unless otherwise ordered by an Administrative Law Judge.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 654.025

Hist.: WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95

#### **438-085-0306**

##### **Hearings Division Response to Appeal**

(1) When the Hearings Division receives a referral, it shall caption and assign a docket number to the case, schedule the case for formal hearing within 90 days of the referral, and mail an acknowledgment to OR-OSHA and the appealing party.

(2) The acknowledgment shall include notice of the hearing and request that the party designate a representative.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025

Hist.: Adopted temporarily as part of Rule 436-85-420 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated in amended form 3-18-74 as part of permanent Rule 436-85-420 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; WCB 3-1989, f. 3-31-89, ef. 5-1-89

#### **438-085-0321**

##### **Expedited Proceedings**

## Chapter 438 Department of Consumer and Business Services, Workers' Compensation Board

### OREGON ADMINISTRATIVE RULES 1997 COMPILATION

(1) An expedited proceeding may be ordered by the Administrative Law Judge, for good cause, upon the motion of any party.

(2) An expedited proceeding shall be ordered by the Administrative Law Judge upon the motion of any party in a case in which a correction order relating to a serious violation is being contested.

(3) An expedited proceeding shall be given priority over other proceedings; the Administrative Law Judge shall make necessary rulings with respect to the time for filing documents and all other matters, without reference to times set forth in these rules, in order to complete the proceeding in the minimum time consistent with fairness and the needs of the case.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025

Hist.: Adopted temporarily as Rule 436-85-515 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-515 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77

#### 438-085-0326

##### Stay of Correction Order

When an appeal denies a violation or contests the unreasonableness of a correction order, in good faith and not solely for delay or the avoidance of penalties:

(1) If the contest involves an alleged general violation, the time allowed for correction of the violation shall not run between the day the appeal is filed and the day the correction order becomes final by operation of law or by order of a court.

(2) If the contest involves an alleged serious violation, the Administrative Law Judge may, upon motion of a party, for good cause, order a stay of the correction order pending disposition of the case.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77

##### Parties and Representatives; Employee Third-Party Rights and Notice; Access to Documents

#### 438-085-0406

##### Necessary Parties; Adding Parties

(1) OR-OSHA is a necessary party to all contested cases under the Act.

(2) Any person considered necessary by the Administrative Law Judge for a full and final determination of the issues in a case may be added as a party.

(3) If the appeal was filed by an employee or labor union, the employer who was issued the contested citation, notice or order shall be considered, and added as, a necessary party.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as part of Rule 436-85-205 and 436-85-435 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as part of permanent Rules 436-85-205 and 436-85-435 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77

#### 438-085-0411

##### Employee Third-Party Rights

(1) Affected employees may elect to participate as third parties in a contested case by submitting a request to OR-OSHA, which shall immediately be referred to the Hearings Division.

(2) An employee election to become a third party in a case must be filed at least five days before the hearing, if any, on the merits of the case. The Administrative Law Judge may allow a later employee appearance only upon a showing of good cause.

(3) The written election to become a third party must show that the person is an affected employee and must state the issues to be raised.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as part of Rule 436-85-205 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as part of permanent Rule 436-85-205 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; WCB 3-1989, f. 3-31-89, ef. 5-1-89

#### 438-085-0416

##### Notice of Rights to Affected Employees

(1) The employer of affected employees shall:

(a) Post copies of the Notice to Employees, together with copies of the contested OR-OSHA citation, notice or order, in a conspicuous manner in a sufficient number of places convenient for affected employees, until the case is closed; and

(b) Deliver or mail a copy of the Notice to Employees to each labor union, if any, authorized to bargain collectively for affected employees.

(2) An employer may satisfy the posting requirement of this rule by personally delivering or by mailing a copy of the Notice to Employees and the contested OR-OSHA citation, notice or order to each of the employer's employees.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rules 436-85-320, 436-85-325 and 436-85-430 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rules 436-85-320, 436-85-325 and 436-85-430 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; Amended 6-16-82 by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89

#### 438-085-0421

##### Response to Employee Requests

Upon written request from any affected employee to OR-OSHA or the Hearings Division, the employee shall be given:

(1) A copy of any settlement which closes a case without referral to the Hearings Division;

(2) Reasonable notice of any hearing or other scheduled proceeding in the case;

(3) A copy of any withdrawal or settlement that is filed, with the Hearings Division; and

(4) A copy of any Opinion and Order entered by an Administrative Law Judge in deciding the case.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89

#### 438-085-0426

##### Intervention

(1) A petition to intervene in a contested case may be filed by a person at any time before the case is closed without a hearing, or before any scheduled hearing starts.

(2) The petition must state the petitioner's interest in the case, show that participation will assist in the determination of the issues, and explain why intervention will not unnecessarily delay the proceedings.

(3) The Administrative Law Judge may grant a petition for intervention to such extent and upon such terms as considered appropriate.

(4) When a petition for intervention is granted, the intervenor becomes a party to the case.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-210 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-210 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89

#### 438-085-0431

##### Representatives of Parties

(1) Any party may act through a representative and may appear in a hearing by representative.

(2) A representative is not required to be an attorney at law or have any other special qualification.

(3) Unless a party is represented by an attorney at law, a designation of the party's representative must be in writing, contain the name, address and telephone number of the representative and be signed by the party. If the party is a corporation, the designation must be signed by an officer; if a partnership, by one of the partners; and if a public body, labor union, or other organization, by an official with the authority to designate a representative.

(4) A representative shall be considered to fully control the interests of the party in the case.

(5) A representative may terminate its status as a representative by filing a written notice thereof and serving a copy on all other parties.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-215 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated in amended form as permanent Rule 436-85-215 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89

#### 438-085-0436

##### Access to Documents

(1) The employer must maintain, until the case is closed, copies of all documents filed in the case at a location convenient for affected employees to inspect and copy them at reasonable times.

(2) Any person may inspect and copy the documents filed in a contested case which has been referred to the Hearings Division at the offices of the Hearings Division. Copies of documents may be ordered by mail. The cost of copies shall be at the rates set by the Board for the reproduction of its public records, but a nominal number of copies may be provided without charge.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-910 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-910 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; WCB 3-1989, f. 3-31-89, ef. 5-1-89

##### Captions; Form of Documents; Pleadings; Amendments; Service

#### 438-085-0506

##### Captions of Cases

Contested cases shall be captioned by the Hearings Division and referred to by the following titles:

(1) A case initiated by a contested OR-OSHA citation, notice of penalty or correction order shall be titled, "Oregon Occupational Safety and Health Division, Plaintiff v. (name of appealing party), Defendant".

(2) A contested case that originated with an application for modification of a correction order or with an application relating to a variance shall be titled, "(name of appealing party), Petitioner v. Oregon Occupational Safety and Health Division, Respondent".

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-405 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated in amended form 3-18-74 as permanent Rule 436-85-405 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in

amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

#### 438-085-0511

##### Form of Documents

(1) All documents, other than exhibits, filed after the Hearings Division acknowledges referral of a contested case shall:

(a) Contain the case title and docket number assigned by the Hearings Division;

(b) Contain the name, address and telephone number of the party or representative submitting the document; and

(c) Be signed by the party or representative submitting the document.

(2) The Administrative Law Judge may refuse to accept any document that does not comply with this rule.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-415 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-415 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78

#### 438-085-0516

##### Pleadings

Formal pleadings are not required. The pleadings in contested cases are as follows:

(1) In a case of the type described in section (1) of OAR 438-085-0506, OR-OSHA's contested citation, notice of penalty or correction order is considered to be the "complaint" and the appeal is considered to be the "answer".

(2) In a case of the type described in section (2) of OAR 438-085-0506:

(a) If the appealing party was the original applicant, the application is considered to be the "petition", OR-OSHA's contested notice or order the "response", and the appeal the "reply"; or

(b) If the appealing party was not the original applicant, the appeal is considered to be the "petition", and OR-OSHA shall be presumed to have denied the appeal.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-410 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated in amended form 3-18-74 as permanent Rule 436-85-410 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended 6-16-82 by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89

#### 438-085-0526

##### Amendments As of Right

(1) At any time before a Notice of Hearing is issued, a party may, as a matter of right, once amend that party's pleadings to clarify the issues in the case and the grounds for the party's position.

(2) An amendment made by OR-OSHA under this rule may not allege a new violation or increase a penalty.

(3) Amendments made in accordance with this rule are effected upon filing.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as a part of Rule 436-85-440 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated in amended form as permanent Rule 436-85-440 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89



#### **438-085-0531**

##### **Correction of Defective Appeal**

If an appeal fails to specify the matters contested and the grounds for the appeal, or otherwise fails to substantially comply with the requirements of OAR 438-085-0111, the Administrative Law Judge may, on the Administrative Law Judge's own motion or upon motion of a party, order the appealing party to correct the defects by filing an amended appeal, or a supplement to the appeal, within such time as the Administrative Law Judge considers reasonable. If within the time permitted the appealing party fails to amend or supplement the appeal to conform with OAR 438-085-0111, the appeal may be dismissed by the Administrative Law Judge.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

#### **438-085-0536**

##### **Amendments Upon Motion**

At any time, upon motion of a party made in accordance with OAR 438-085-0735, the Administrative Law Judge may allow a pleading to be amended for good cause shown and upon such terms as the Administrative Law Judge considers proper to protect the interests of the parties and affected employees.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as a part of Rule 436-85-440 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated in amended form as permanent Rule 436-85-440 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78

#### **438-085-0541**

##### **Service of Documents on Other Parties**

(1) At the time a party files any document with the Hearings Division, the party shall serve a copy of that document on every other party to the case.

(2) Service shall be made upon a party by first class mail or by personal delivery, and is effected at the time of mailing or personal delivery.

(3) Service upon a party who is acting through a representative shall be made upon that representative.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-315 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-315 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

#### **438-085-0545**

##### **Proof of Service**

(1) A party who files a document with the Hearings Division shall include with the document a proof of service which states the date and manner of compliance with OAR 438-085-0541, including the address at which the other party was served.

(2) Proof of service may be made by:

(a) Affidavit of service;

(b) Written statement made upon the document filed, and signed by the party or representative making the statement; or

(c) Letter of transmittal.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-315 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-315 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

#### **438-085-0550**

##### **Ex Parte Communications**

(1) There shall be no ex parte communication, concerning the merits of any pending case, between any employee of the Board and any of the parties, their representatives or their employees.

(2) In the event an ex parte communication occurs, the Presiding Administrative Law Judge or the Administrative Law Judge presiding at the hearing shall place on the record a statement of the substance of any written or oral ex parte communication on a fact in issue made to the Administrative Law Judge during the pendency of the proceedings and notify the parties of the communication and of their right to rebut such communication and may enter such orders or take such action as fairness requires. The Board will take appropriate disciplinary action against any employee of the Board who knowingly solicits or makes a prohibited ex parte communication.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-905 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-905 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

##### **Closing Cases by Withdrawal or Settlement**

#### **438-085-0606**

##### **Withdrawal of Appeal**

(1) The appealing party may file a written withdrawal of his appeal at any time before the Administrative Law Judge issues an Opinion and Order.

(2) When an appeal is withdrawn before referral of a case to the Hearings Division, OR-OSHA shall affirm the contested citation and close the case.

(3) When an appeal is withdrawn after referral of a case to the Hearings Division, provided that a third party has not entered an appearance, the Administrative Law Judge shall issue an order dismissing the appeal, affirming the contested OR-OSHA citation, notice or order, and closing the case. The Administrative Law Judge's order shall advise the appealing party of the effect of any stay of a correction order that has occurred or been granted pursuant to OAR 438-85-326.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as part of Rule 436-85-505 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated in amended form as part of permanent Rule 436-85-505 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; WCB 3-1989, f. 3-31-89, ef. 5-1-89

#### **438-085-0611**

##### **Withdrawal by Third Party**

(1) A third party in a contested case may file a written withdrawal at any time before the Administrative Law Judge issues an Opinion and Order.

(2) A withdrawal by a third party shall be effective at the time of the filing.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77

#### **438-085-0616**

##### **Withdrawal by OR-OSHA**

(1) OR-OSHA may withdraw its contested citation, notice or order at any time provided that no third party has entered an appearance in the case.

(2) OR-OSHA may move to withdraw its contested citation, notice or order at any time before the Administrative Law Judge issues an Opinion and Order. After referral the Administrative

Law Judge shall grant an OR-OSHA motion to withdraw and shall issue an order vacating the contested OR-OSHA citation, notice or order and closing the case, without further proceedings, provided that no third party has entered an appearance in the case.

(3) The OR-OSHA citation, notice or order shall be vacated with prejudice if the motion to withdraw it is filed more than 20 days after OR-OSHA is notified of the appeal.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as a part of Rule 436-85-505 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated in amended form as part of permanent Rule 436-85-505 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; WCB 3-1989, f. 3-31-89, ef. 5-1-89

#### **438-085-0621**

##### **Settlement**

(1) A settlement entered into within 60 days of the filing of an appeal, unless a contested case has been referred to the Hearings Division, is effective by signed agreement between the parties. A settlement by the agreeing parties shall automatically close the case.

(2) A settlement entered into more than 60 days after the filing of an appeal or after referral of a contested case to the Hearings Division is not effective until it is approved by an order of the Administrative Law Judge approving the settlement and closing the case, without further proceedings.

(3) The parties may file a settlement at any time before the Administrative Law Judge issues an Opinion and Order.

(4) In all cases settled by written agreement of the parties, the original, listing the parties, and four legible copies of the settlement document shall be submitted to the Administrative Law Judge for approval. The original document shall be retained in the Board file, and necessary copies shall be conformed and distributed to the parties.

Stat. Auth.: ORS 654.290 & 656.726(4)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-510 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-510 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB 3-1992(Temp), f. 5-15-92, cert. ef. 5-18-92; WCB 6-1992, f. 10-9-92, cert. ef. 10-12-92

#### **438-085-0631**

##### **Failure to File Document**

If a party fails to file any document when due, the Administrative Law Judge may, in the Administrative Law Judge's discretion:

(1) Treat the failure as a waiver of the party's right to file the document, and presume that the document, if filed, would be adverse to the party's position on any issue related to it;

(2) For good cause, treat the failure as an abandonment of the case and enter an appropriate dismissal order.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-455 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-455 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89

#### **438-085-0636**

##### **Reopening of Closed Case by Parties**

(1) A case that has been closed as the result of a settlement or withdrawal shall be reopened by the Hearings Division upon the filing of:

(a) A written application joined in by all parties to the case and filed within 20 days after the case was closed; or

(b) Any party's written application, supported by an affidavit showing that the withdrawal or settlement resulted from material misrepresentations made knowingly by another party, filed within 20 days after the party first received knowledge of the facts on which the application is based.

(2) In a case reopened under this rule, the Hearings Division shall, at the request of a party, schedule a hearing before an Administrative Law Judge to determine whether or not the settlement or withdrawal should be vacated.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

#### **438-085-0641**

##### **Employee Objection to Closed Case**

(1) A case that has been closed as the result of a settlement or an OR-OSHA withdrawal shall be reopened if an affected employee files a timely objection to the settlement or withdrawal on the ground that:

(a) Notice of the contested case was not provided to affected employees and to any labor union authorized to bargain collectively for them as required by OAR 438-085-0416; or

(b) OR-OSHA's settlement or withdrawal was unlawful, capricious or an abuse of discretion; or

(c) OR-OSHA's settlement or withdrawal was the result of material misrepresentations made knowingly by the appealing party.

(2) An employee objection to a settlement or withdrawal is timely if it is filed within 20 days after the employee first received knowledge of the facts upon which the objection is based.

(3) In a case reopened under this rule, the Hearings Division shall, at the request of a party or the objecting employee, schedule a hearing before an Administrative Law Judge to determine whether or not the settlement or withdrawal should be vacated.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89

### **Pre-Hearing Procedures**

#### **438-085-0705**

##### **Decision by Administrative Law Judge Without Hearing**

(1) To reduce the cost to the public, to the parties and to their witnesses, the Board encourages the parties to submit their cause to the Administrative Law Judge, wherever possible, without hearing.

(2) A case may be decided by the Administrative Law Judge without a hearing upon the joint agreement of all parties, and upon the parties' written submission of the following:

(a) A joint statement of all issues to be decided;

(b) Stipulations as to all relevant and necessary facts about which there is no dispute;

(c) Affidavits, depositions, interrogatories or exhibits to establish facts which are in dispute; and

(d) Written arguments on each party's contentions.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77

#### **438-085-0710**

##### **Setting and Notice of Hearing**

(1) Notice of scheduled hearing shall be given to all parties by the Hearings Division at least 20 days before the hearing date, unless the parties agree to a shorter period of notice.

(2) The notice of hearing shall include the date, time and place of hearing.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-425 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-425 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89

#### **438-085-0715**

##### **Place of Hearing**

The hearing shall be held in Oregon at a place that is reasonably convenient for the appealing party and affected employees, or at such other place as may be selected by the Administrative Law Judge.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-610 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-610 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77

#### **438-085-0720**

##### **Postponement or Continuance of Hearing**

A scheduled hearing shall not be postponed except by order of an Administrative Law Judge upon a finding of extraordinary circumstances beyond the control of the party or parties requesting the postponement. "Extraordinary circumstances" shall not include:

(1) Failure of a party to refer or delay in referring the case or any pertinent information to its representative;

(2) Unavailability of a party, witness or representative due to nonemergency medical or dental appointment, occupational, personal or professional business or appointments, or unwillingness to appear, provided that a postponement may be granted if the unavailable person is a worker/ employer who is temporarily working out of state and is reasonably expected to return to the state within a time certain or is a person who has been duly subpoenaed and has failed to comply with the subpoena;

(3) An attorney's, party's, representative's or witness' conflict with administrative proceedings scheduled more than three days after mailing of the notice of hearing;

(4) Incomplete case preparation, unless the Administrative Law Judge finds that completion of the record could not be accomplished with due diligence.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-605 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-605 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89

#### **438-085-0725**

##### **Joint Statement of Issues; Pre-Hearing Conference**

At any time before hearing the Administrative Law Judge may order the parties to:

(1) Jointly prepare and submit a written statement setting forth the relevant facts about which there is no dispute, each party's contentions of fact, and the issues of fact and law to be decided by the Administrative Law Judge.

(2) Exchange information or attended a pre-hearing conference with the Administrative Law Judge for the purpose of simplifying and clarifying the issues or expediting the proceeding.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-520 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-520 by WCB Admin. Order

10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77

#### **438-085-0730**

##### **Consolidation or Separation**

If no substantial right of any party will be prejudiced, the Administrative Law Judge may, for good cause:

(1) Consolidate cases in which there are common parties and common questions of law or fact; or

(2) Divide the issues of a case into separate cases.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-220 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-220 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77

#### **438-085-0735**

##### **Motions**

(1) All motions that can be made before hearing shall be filed with the Administrative Law Judge no later than 15 days before the hearing date except for good cause shown.

(2) Pre-hearing motions shall be in writing and contain a clear and plain statement of the relief sought and the grounds for relief.

(3) Any party on whom a pre-hearing motion is served shall have ten days, or such greater time as the Administrative Law Judge may allow, to file response to the motion.

(4) Arguments on pre-hearing motions shall be in writing, except in the discretion of the Administrative Law Judge.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-445 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-445 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77

#### **438-085-0740**

##### **Discovery Methods**

(1) On petition of any party to a contested case, depositions, depositions upon oral examination (ORCP 39) or written questions (ORCP 40), and production of documents or things (ORCP 43), may be taken and used in the same manner and to the same extent as provided by law in civil actions, except as herein stated.

(2) The Administrative Law Judge shall make determinations and issue orders in the manner required by the court by ORCP 36C, except that attorney fees shall not be allowed.

(3) The petition shall set forth:

(a) The name and address of the witness whose testimony is desired;

(b) A showing of the materiality of the testimony;

(c) A request for an order that the testimony of the witness be taken before an officer named in the petition for that purpose. The formality of the petition may be waived between the parties.

(4) A reporter's fee for a deposition shall be taken by the party at whose instance the deposition is taken, unless otherwise agreed by the parties or directed by the Administrative Law Judge.

(5) If any person fails to comply with a subpoena, or any party or witness refuses to testify on any matters on which the party or witness may be lawfully questioned, proceedings to compel obedience may be instituted in accordance with ORS 654.130 or 183.440.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-525 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-525 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82



#### 438-085-0745

##### Subpoenas

(1) The attendance and testimony of witnesses at the hearing, or the production of documentary or physical evidence under the witnesses' control or possession, may be compelled by subpoena.

(2) Subpoenas may be issued by the Presiding Administrative Law Judge, the Administrative Law Judge, or the representative of record of the party in whose behalf the witnesses are required to appear. The Hearings Division shall provide subpoenas in blank, upon request, to a party or the party's representative of record.

(3) Any person present at the hearing may be required to testify to the same extent as if the person had been subpoenaed.

(4) If any person fails to comply with a subpoena, or any party or witness refuses to testify on any matters on which such party or witness may be lawfully questioned, proceedings to compel obedience may be instituted in accordance with ORS 654.130 or 183.440.

(5) Witnesses appearing by subpoena shall be paid, by the party who subpoenas them, the same fees and mileage are required by law for witnesses in civil actions. Parties and employees of OR-OSHA shall not receive such witness fees or mileage.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-540 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-745 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted 5-4-77 by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

#### 438-085-0750

##### Change of Administrative Law Judge

(1) An Administrative Law Judge may withdraw from a case whenever he or she considers himself or herself disqualified.

(2) Any party may request that the Administrative Law Judge be removed from a case, on the grounds of personal bias or conflict of interest, by filing with the Presiding Administrative Law Judge, promptly upon discovery of the alleged facts, an affidavit which sets forth in detail the matters believed to constitute the grounds for disqualification.

(3) If, in the opinion of the Presiding Administrative Law Judge, the request for disqualification is filed with due diligence and the supporting affidavit is sufficient on its face, the Presiding Administrative Law Judge shall either disqualify the Administrative Law Judge and assign another Administrative Law Judge to the case or order a hearing on the allegation in the affidavit.

(4) If the Presiding Administrative Law Judge does not disqualify the Administrative Law Judge, the Presiding Administrative Law Judge shall so rule on the record, stating the grounds for the ruling, and the case shall proceed with the Administrative Law Judge.

Stat. Auth.: ORS 656.726(4)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-630 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-630 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted 5-4-77 by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82; WCB 7-1987, f. 12-23-87, ef. 1-1-88

#### 438-085-0755

##### Extensions of Time

Requests for extensions of time for filing of any documents should be received in advance of the day on which the document is due to be filed.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

### Hearings

#### 438-085-0800

##### Special Circumstances; Waiver of Rules

In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the Administrative Law Judge may, upon application by any party or intervenor, or on the Administrative Law Judge's own motion, after ten days notice to all parties and intervenors, waive any rule or make such order as justice or the administration of the Act requires. This rule shall not apply to OAR 438-085-0121(1).

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

#### 438-085-0805

##### Duties and Powers of Administrative Law Judge

It is the duty of the Administrative Law Judge to conduct a fair and impartial hearing and avoid delay. The Administrative Law Judge has the authority to:

- (1) Issue subpoenas;
- (2) Order depositions to be taken;
- (3) Hold conferences for settlement of the case or simplification of the issues;
- (4) Dispose of procedural requests, motions or similar matters;
- (5) Administer oaths and affirmations;
- (6) Rule upon offers of evidence;
- (7) Regulate the course of the hearing and, if necessary, exclude persons from the hearing;
- (8) Require a party to state the party's position on any issue in the case and the legal basis for that position;
- (9) Order a party to produce a witness or other evidence;
- (10) Call and examine any party or witness;
- (11) Close the hearing record, or reopen it, as the needs of justice and the hearing require;
- (12) Take any other action necessary for a full and fair disposition of the case.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-625 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-625 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

#### 438-085-0810

##### Failure to Appear

(1) Except as provided in section (2) of this rule, failure of a party to appear at the hearing shall be considered a default and a waiver of all rights except the right to be served with a copy of the Administrative Law Judge's decision and the right to request judicial review in accordance with ORS 183.480 to 183.500.

(2) Upon a showing of good cause, the Administrative Law Judge shall excuse a party's failure to appear and reconvene the hearing.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-615 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-615 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; WCB 3-1989, f. 3-31-89, ef. 5-1-89

#### 438-085-0815

##### Record and Transcript of Hearing

(1) A verbatim record shall be made of the hearing, including all motions, rulings and testimony. Reporters' hearing and transcript fees shall be paid by the Board, except as provided in section (3) of this rule.

(2) At any time before the Administrative Law Judge's decision becomes final, the Administrative Law Judge may order a full or partial transcript of the hearing record.

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

(4) When the record of a case is forwarded to the Court of Appeals for judicial review pursuant to ORS 183.482(4), each party shall be served with a copy of the record, excepting exhibits.

(5) Reporters' notes or records of a hearing may be destroyed six months after final disposition of the case by the Administrative Law Judge or court.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-620 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated in amended form as permanent Rule 436-85-620 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

#### 438-085-0820

##### Burden of Proof

(1) OR-OSHA has the burden of proving:

- (a) A denied violation;
- (b) The reasonableness of a contested penalty;
- (c) The reasonableness of a contested correction order.

(2) The party who contests OR-OSHA's grant or denial of a requested modification of the time for correction of a violation has the burden of proving that OR-OSHA's decision is unreasonable.

(3) The party who contests a proposed, OR-OSHA order that will grant, deny, modify or revoke a variance has the burden of proving that the proposed order is unreasonable.

(4) The party having the burden of proving a fact must establish it by a preponderance of the evidence.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-635 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-625 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77

#### 438-085-0825

##### Conduct of Hearing

(1) Testimony shall be taken only on oath or affirmation.

(2) Each party shall have these rights:

- (a) To call and examine parties and witnesses;
- (b) To introduce exhibits;

(c) To question the witnesses of other parties on any matter relevant to the issues even though that matter was not covered in the direct examination;

(d) To impeach any witness regardless of which party first called the witness to testify; and

(e) To rebut the evidence against the party.

(3) The taking of evidence in the hearing shall be controlled by the Administrative Law Judge in the manner best suited to ascertain the facts and safeguard the rights of the parties.

(4) The hearing shall be conducted in the English language. Upon reasonable advance request, a qualified interpreter shall be provided in accordance with ORS 183.418.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-640 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-640 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

#### 438-085-0830

##### Affidavits

An affidavit may be admitted in lieu of oral testimony if the matters contained in the affidavit are otherwise admissible and no other party objects to the admission of the affidavit.

Stat. Auth.: ORS 183.335 & 656.726(5)

Hist.: Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77

#### 438-085-0835

##### Exclusion of Witness From Hearing Room

At the request of a party, the Administrative Law Judge may exclude from the hearing room an adverse party's witness not at the time under examination, so that the excluded witness will not hear the testimony of other witnesses, but a party or his representative shall not be excluded.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-650 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-650 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77

#### 438-085-0840

##### Rules of Evidence

(1) Evidence that reasonably prudent persons commonly rely upon in the conduct of their serious affairs shall be admissible.

(2) Irrelevant, immaterial or unduly repetitious evidence shall be excluded.

(3) The rules of privilege recognized by law shall be followed.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-645 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-645 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77

#### 438-085-0845

##### Official Notice

(1) The Administrative Law Judge may take notice of judicially cognizable facts and the Administrative Law Judge may take official notice of general, technical or scientific facts within the Administrative Law Judge's specialized knowledge.

(2) The Administrative Law Judge shall advise the parties of, and give them an opportunity to contest, any facts or other matters of which official notice is being taken.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 4-1978, f. 3-31-78, ef. 4-1-78; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95

#### 438-085-0850

##### Objections

(1) Any objections to the introduction of evidence or to the conduct of the hearing shall be accompanied by a brief statement of the grounds for the objection.

(2) It is not necessary for a party to take an "exception" to an adverse ruling on an objection in order to preserve the question for judicial review.

(3) Whenever the Administrative Law Judge excludes the testimony of a witness, the party adversely affected may make an offer of proof on the record for the purpose of judicial review.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-660 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-660 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

#### 438-085-0855

##### Exhibits

(1) Exhibits, where practicable, shall be on one side only of paper 8-1/2" x 11" in size or folded in multiples thereof, except

that copies of the Oregon Occupational Safety and Health Code which are offered as exhibits may be photocopied on two sides.

(2) The party offering an exhibit shall provide a copy of it to each of the other parties, unless the Administrative Law Judge finds it impractical. Wherever possible, unless the exhibit is to be used solely for impeachment, such copies shall be provided to the other parties before the hearing commences.

(3) All offered exhibits, whether or not admitted into evidence, shall be part of the record in the case.

(4) Unless the Administrative Law Judge determines that exceptional circumstances require that an object or real evidence accompany the record, an accurate description or photograph of the object shall be substituted for it. 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.

(5) OR-OSHA shall offer as exhibits, prior to the hearing, copies of those portions of each Division of the Oregon Occupational Safety and Health Code upon which OR-OSHA intends to rely or which are otherwise relevant, and shall provide copies of the same to employer. In addition, OR-OSHA shall provide employer (or its designated representative or attorney) with a complete copy of each Division of the Oregon Occupational Safety and Health Code which contains the above rules. The exhibit and complete Division of rules so provided shall include a certification by the Director or the Director's designee, or by the Secretary of State, that the applicable rules offered and provided are true copies of the Oregon Administrative Rules adopted by the Director, filed with the Secretary of State, and in effect on the dates relevant to the issues in the case. At employer's request, OR-OSHA shall provide employer with certified copies of other potentially relevant rules.

Stat. Auth.: ORS 654.025(2) & 656.726(4)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-665 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-665 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95

#### **438-085-0860**

##### **View of Premises**

On motion of any party or on the Administrative Law Judge's own motion, the Administrative Law Judge may, prior to the hearing or during a recess of the hearing for that purpose, view the premises, equipment or processes related to an issue in the case, in order to obtain a better understanding of the testimony. All parties shall be given reasonable notice of, and an opportunity to be present during, a viewing. The Administrative Law Judge shall not consider as evidence in the case the impressions he obtains from a viewing.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-655 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-655 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted 5-4-77 by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

#### **438-085-0865**

##### **Opinion and Order of Administrative Law Judge**

(1) The decision of the Administrative Law Judge in a contested case shall be rendered in a written Opinion and Order, which shall also contain findings of fact and conclusions of law.

(2) Except for matters stipulated to by the parties or officially noticed by the referee, no factual information or evidence that is not made part of the record shall be considered by the referee in making determinations.

(3) A default order may be issued only upon a prima facie case made in the evidentiary record.

(4) The Opinion and Order of the Administrative Law Judge

shall be deemed to be a final order of the Board.

(5) Each party or, if applicable, a party's representative shall be mailed or delivered a copy of the Administrative Law Judge's Opinion and Order, with notice of the party's right to judicial review by the Court of Appeals as provided in ORS 183.480 to 183.500.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted temporarily as Rule 436-85-670 by WCB Admin. Order 5-1973, f. & ef. 12-20-73; Repealed by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Reinstated as permanent Rule 436-85-670 by WCB Admin. Order 10-1974, f. 3-19-74, ef. 4-15-74; Adopted in amended form by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82

#### **438-085-0870**

##### **Reconsideration**

(1) The Administrative Law Judge may withdraw an Opinion and Order for the purpose of reconsideration at any time prior to:

(a) The expiration of the period allowed for filing a petition for judicial review, if one has not been filed; or

(b) The date set for oral argument before the Court of Appeals on a petition for judicial review, as permitted by subsection (6) of ORS 183.482.

(2) Reconsideration may be upon the Administrative Law Judge's own motion, or upon motion of a party showing error, omission, or misconstruction of statute or rule.

(3) Written notice of reconsideration shall be given by the Administrative Law Judge to all parties.

(4) The Administrative Law Judge may affirm, modify or reverse an Opinion and Order that has been withdrawn.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: Adopted by WCB Admin. Order, Safety 6-1977, f. 5-5-77, ef. 6-1-77; Amended by WCB Admin. Order 2-1982, f. 6-22-82, ef. 8-2-82