

Chapter 438 Department of Consumer and Business Services, Workers' Compensation Board

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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 rulemaking authority of ORS 656.726(5) to provide rules of practice and procedure for hearing and review proceedings under 656.001 to 656.990, for exercising its continuing authority under 656.278 and providing for the payment of attorney fees in cases under the Workers' Compensation Law pursuant to 656.388.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.726(5)

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 3-2005, f. 11-15-05, cert. ef. 1-1-06

438-005-0011

Effective Date; Applicability

These rules are effective January 1, 2006 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 Chapter 655.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.726(5)

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; WCB 1-2003, f. 2-21-03, cert. ef. 5-1-03; WCB 3-2005, f. 11-15-05, cert. ef. 1-1-06

438-005-0015

Adoption of Attorney General's Model Rules

The Board hereby adopts OAR 137-004-0010, as adopted by the Department of Justice effective January 27, 1986.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 183.341(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 1-2003, f. 2-21-03, cert. ef. 5-1-03

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 085.

Stat. Auth.: ORS 183 & 656
Stats. Implemented: ORS 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) "Board" means the Workers' Compensation Board.

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

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

(7) "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.

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

(9) "Insurer" means the State Accident Insurance Fund Corporation, an insurer authorized under ORS Chapter 731 to transact workers' compensation insurance in this state, or, except where the context requires otherwise, an assigned claims agent in cases under ORS 656.054.

(10) "Party" means a claimant, an employer, including a non-complying employer, an assigned claims agent in cases under ORS 656.054, and an insurer.

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

(12) "Workers' Compensation Division" means the Workers' Compensation Division of the Department of Consumer and Business Services.

Stat. Auth.: ORS 656.726(5)
Stats. Implemented: ORS 656.726(5) & 656.054
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; WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 1-2003, f. 2-21-03, cert. ef. 5-1-03; WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04

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) In addition to the procedures otherwise described in these rules, "filing" may also be accomplished in the manner prescribed in OAR 436, division 009 or 010 for filing a request for administrative review with the Director provided that the request involves a dispute that requires a determination of either the compensability of the medical condition for which medical services are proposed or whether a sufficient causal relationship exists between medical services and an accepted claim to establish compensability;

(c) 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;

(d) If a settlement stipulation, disputed claim settlement, or claim disposition agreement results from a mediation, "filing" also includes the physical delivery of the settlement stipulation, disputed claim settlement, or claim disposition agreement to the Administrative Law Judge who mediated the settlement or agreement, regardless of location.

(e) 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 may be accomplished by electronic mail (e-mail). To electronically file a request for hearing or Board review, a party shall:

(A) Send an e-mail to: request.wcb@state.or.us; and

(B) Attach an electronic copy of a completed Workers' Compensation Board "Request for Hearing Form," or a completed request for Board review. These attachments must be in a format of Microsoft Word 2000® (.doc, .txt, .rtf), Adobe Reader® (.pdf), or formats that can be viewed in Internet Explorer® (.tif, .jpg).

(C) For purposes of this rule, the date of an electronic filing is determined by the date the Board receives the appropriate completed electronic form which must be in a format of Microsoft Word 2000® (.doc, .txt, .rtf), Adobe Reader® (.pdf), or formats that can be viewed in Internet Explorer® (.tif, .jpg). An electronic filing under subsection (d) of this section received by the Board by 11:59 p.m. of a non-holiday, weekday is filed on that date.

(f) Except for the documents specified in subsection (c) or (e) 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;

(g) "Filing" includes the submission of any document (other than the exchange of exhibits and indexes under OAR 438-007-0018) to any permanently staffed office of the Board by means of a telephone facsimile communication device (FAX) provided that:

(A) The document transmitted indicates at the top that it has been delivered by FAX;

(B) The Board's facsimile transmission number is used; and

(C) The Board receives the complete FAX-transmitted document by 11:59 p.m. of a non-holiday, weekday.

(2) Service:

(a) A true copy of any thing delivered for filing under these rules shall be simultaneously served personally, by means of a facsimile transmission, by means of e-mail regarding requests for hearing or Board review filed under OAR 438-005-0046(1)(d), or by mailing by first-class mail, postage prepaid, through the United States Postal Service, to each other party, or to their attorneys. Service by mail is complete upon mailing, service by facsimile transmission is complete upon disconnection following an error-free transmission, and service by e-mail regarding requests for hearing or Board review filed under 438-005-0046(1)(d) is complete upon successful transmission, provided that the copy is sent in a format readable by the recipient;

(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, service by means of a facsimile transmission, service by means of e-mail regarding requests for hearing or Board review filed under OAR 438-005-0046(1)(d), or 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(5)

Stats. Implemented: ORS 656.726(5)

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; WCB 1-1999, f. 8-24-99, cert. ef. 11-1-99; WCB 2-1999(Temp), f. 9-24-99, cert. ef. 10-23-99 thru 4-14-00; WCB 1-2000, f. 3-29-00, cert. ef. 4-3-00; WCB 1-2007, f. 1-19-07, cert. ef. 3-1-07; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

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 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, 2601 25TH STREET SE, SUITE 150, SALEM, OREGON 97302-1280. 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 WORKERS' COMPENSATION DIVISION TOLL FREE AT 1-800-452-0288."

Stat. Auth: ORS 656.307, 656.388, 656.593 & 656.726(5)

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; WCB 1-1999, f. 8-24-99, cert. ef. 11-1-99; WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04; WCB 3-2005, f. 11-15-05, cert. ef. 1-1-06; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

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 period allowed under ORS 656.262 for processing the claim, so indicate in or as part of a denial otherwise meeting the requirements of 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; WCB 3-2005, f. 11-15-05, cert. ef. 1-1-06

438-005-0055

Notice of Claim Denial and Hearing Rights

(1) Except for a denial issued under ORS 656.262(14), in addition to the requirements of 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, 2601 25TH STREET SE, SUITE 150, SALEM OREGON 97302-1280. 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 MAKE A TIMELY REQUEST FOR HEARING ON A DENIAL OF COMPENSABILITY OF YOUR CLAIM AS REQUIRED BY ORS 656.319(1)(a) THAT IS BASED ON ONE OR MORE REPORTS OF EXAMINATIONS CONDUCTED AT THE REQUEST OF THE INSURER OR SELF-INSURED EMPLOYER UNDER ORS 656.325(1)(a) AND YOUR ATTENDING PHYSICIAN DOES NOT CONCUR WITH THE REPORT OR REPORTS, YOU MAY REQUEST AN EXAMINATION TO BE CONDUCTED BY A PHYSICIAN SELECTED BY THE DIRECTOR. THE COST OF THE EXAMINATION AND THE EXAMINATION REPORT SHALL BE PAID BY THE INSURER OR SELF-INSURED EMPLOYER. IF YOU HAVE QUESTIONS YOU MAY CALL THE WORKERS' COMPENSATION DIVISION TOLL FREE AT 1-800-452-0288."

(2) If an insurer or self-insured employer intends to deny a claim under ORS 656.262(14) because of a worker's failure to cooperate in the investigation of the claim, in addition to the requirements of 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, 2601 25TH STREET SE, SUITE 150, SALEM OREGON 97302-1280. YOUR LETTER MUST STATE THAT YOU WANT AN EXPEDITED HEARING, YOUR ADDRESS AND THE DATE OF YOUR ACCIDENT IF YOU KNOW THE DATE. YOU WILL 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 WORKERS' COMPENSATION DIVISION TOLL FREE AT 1-800-452-0288."

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.262(6), 656.262(15) & 656.325

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; WCB 1-1999, f. 8-24-99, cert. ef. 11-1-99; WCB 2-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04; WCB 3-2005, f. 11-15-05, cert. ef. 1-1-06; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

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, 656.593 & 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 2-1989, 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 656.313. In addition to the information required by 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 60 days after mailing of a notice of hearing date.

Stat. Auth.: ORS 656.726(5)
 Stats. Implemented: ORS 656.283(4)(5)(a)
 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; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

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 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. In such a situation, the Administrative Law Judge may continue the hearing upon motion of an adverse party pursuant to 438-006-0091.

Stat. Auth.: ORS 656.726(5)
 Stats. Implemented: ORS 656.307 & 656.726(5)
 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 1-2003, f. 2-21-03, cert. ef. 5-1-03

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. In such a situation, the Administrative Law Judge may continue the hearing upon motion of an adverse party pursuant to 438-006-0091.

Stat. Auth.: ORS 656.726(5)
 Stats. Implemented: ORS 656.307 & 656.726(5)
 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 1-2003, f. 2-21-03, cert. ef. 5-1-03

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

438-006-0045

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 656.262(13). 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(5).

(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(5)
Stats. Implemented: ORS 656.726(5) & 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; WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02

438-006-0064

Prehearing Matters Regarding Multiple Employer/Insurer Cases

(1) In cases where the initially scheduled hearing has been postponed because of the need to join one or more potentially responsible employers or insurers, the parties shall participate in any prehearing conferences that the assigned Administrative Law Judge determines are required to expedite the hearing.

(2) The assigned Administrative Law Judge is authorized to:

(a) Establish a prehearing schedule for investigation of the claim, including but not limited to the interviewing of the claimant;

(b) Make prehearing rulings necessary to promote full discovery and completion of the medical record required for determination of the issues arising from the claim; and

(c) Specify what is required of the claimant to meet the obligation to reasonably cooperate with the investigation of claims.

(3) The Administrative Law Judge shall reschedule the postponed hearing as expeditiously as possible after all potentially responsible employers and insurers have been joined in the proceeding and the medical record is fully developed.

(4) For purposes of this rule, "parties" includes the claimant, the employer(s) and insurer(s) already joined in the proceeding, and potentially responsible employers or insurers not yet joined. Participation in prehearing conferences under this rule may be through the parties' legal representatives.

Stat. Auth.: ORS 656.726(5), 656.283 & 656.388
Stats. Implemented: ORS 656, 656.262(11)(a) & (16), 656.283(4)(b) & 656.726(5)
Hist.: WCB 3-2003, f. 12-12-03 cert. ef. 1-1-04

438-006-0065

Consolidation/Joinder/Bifurcation

(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) Any request for hearing pertaining to the same claim or claimant as that of a pending hearing request should also recite whether the request for hearing should be consolidated with a pending hearing request or be separately scheduled for hearing.

(3) Except as provided in ORS 656.308(2)(a) and section (1) of this rule, a hearing request complying with section (2) of this rule shall be processed pursuant to the recitation contained in the hearing request.

(4) A hearing request not complying with section (2) of this rule shall be referred to the Administrative Law Judge assigned to any pending request for hearing pertaining to the same claim or claimant or to the Presiding Administrative Law Judge or his/her designee, who shall determine, in the interests of substantial justice to all parties, whether the request will be consolidated or separately scheduled for hearing.

(5) On his/her own motion or, in response to a party's written motion filed no less than seven (7) days prior to a scheduled hearing, the assigned Administrative Law Judge or the Presiding Administrative Law Judge or his/her designee may, in the interests of substantial justice to all parties, bifurcate consolidated requests for hearing or consolidate separately scheduled hearings.

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; WCB 1-1997, f. 3-20-97, cert. ef. 7-1-97

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)
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; 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) 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;

(3) 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. Within 10 days after the close of the record, 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(5) & 656.291(4)
Stats. Implemented: ORS 656.262(4), 656.291 & 656.726(5)
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; WCB 1-2003, f. 2-21-03, cert. ef. 5-1-03

**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 (of 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)
Stats. 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**

(1) 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:

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

(b) Unavailability of a party, lay witness or representative due to nonemergency 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;

(c) An attorney's, party's, representative's or witness' conflict with proceedings before another administrative body that are scheduled more than three days after mailing of the Hearings Division's notice of hearing;

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

(2) For purposes of this rule, "due diligence" shall include, but not be limited to, a party's inability to produce, because of unavailability, a medical or vocational expert witness for direct examination at hearing or for cross-examination at hearing or by deposition/interrogatories prior to a scheduled hearing, provided that the request for cross-examination was made no later than seven (7) days after the requesting party received from another party a copy of a report from the medical or vocational expert witness accompanied by written notice that the sending party is submitting the report as a proposed exhibit for admission into evidence at a scheduled hearing. A party need not subpoena a medical or vocational expert witness to establish due diligence under this section.

Stat. Auth.: ORS 656.283(4)
Stats. Implemented: ORS 656.307 & 656.726(5)
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; WCB 1-1997, f. 3-20-97, cert. ef. 7-1-97; WCB 1-2003, f. 2-21-03, cert. ef. 5-1-03

**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. If a continuance is granted, the Administrative Law Judge shall state the specific reason for the continuance. A continuance may be granted:

(1) If circumstances, including the time allocated for the scheduled hearing, prevent all parties from presenting their evidence and argument;

(2) Upon a showing of due diligence, as described in OAR 438-006-0081(2), if necessary to afford reasonable opportunity to cross-examine on documentary medical or vocational evidence;

(3) Upon a showing of due diligence, as described in OAR 438-006-0081(2), if necessary to afford reasonable opportunity for the party bearing the burden of proof to obtain and present final rebuttal evidence;

(4) Upon motion of an adverse party, if that party is surprised and prejudiced by a new issue raised during a hearing; or

(5) For any reason that would justify postponement of a scheduled hearing under OAR 438-006-0081.

Stat. Auth.: ORS 656.283(4) & 656.726(5)
Stats. Implemented: ORS 656.307 & 656.726(5)
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; WCB 1-2003, f. 2-21-03, cert. ef. 5-1-03

**438-006-0095
Change of Administrative Law Judge**

(1) Except as provided in section (4) of this rule, an Administrative Law Judge shall disqualify himself or herself from a proceeding in which the Administrative Law Judge's impartiality reasonably may be questioned, including, but not limited to, instances when:

(a) The Administrative Law Judge has a bias or prejudice concerning a party, a representative, or any other participant in the proceeding before the Administrative Law Judge, or has knowledge, obtained from sources outside the proceeding, of disputed evidentiary facts concerning the proceeding;

(b) The Administrative Law Judge served as a lawyer in the matter in controversy, or a lawyer with whom the Administrative Law Judge previously was associated served during the period of association as a lawyer in the matter, or the Administrative Law Judge or the lawyer has been a material witness in the matter;

(c) The Administrative Law Judge knows that the Administrative Law Judge, individually or as a fiduciary, or the Administrative Law Judge's spouse, parent or child, wherever residing, or any other person residing in the Administrative Law Judge's household has a financial interest in the subject matter in controversy, is a party to the proceeding or has any other interest that could be substantially affected by the outcome of the proceeding;

(d) The Administrative Law Judge, the Administrative Law Judge's spouse, parent or child, wherever residing, or any other person residing in the Administrative Law Judge's household:

(A) Is a party to the proceeding, or an officer, director, partner or trustee of a party;

(B) Is acting as a lawyer in the proceeding; or

(C) Is, to the Administrative Law Judge's knowledge, likely to be a material witness in the proceeding.

(2) When an Administrative Law Judge disqualifies himself or herself from a proceeding under this rule, the Administrative Law Judge is not required to disclose the reason or reasons for the disqualification except as required by law.

(3) For purposes of this rule:

(a) "Fiduciary" includes relationships such as personal representative, trustee, conservator and guardian;

(b) "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor or other active participant in the affairs of a party, except that:

(A) Ownership in a mutual or common investment fund that owns securities is not a "financial interest" unless the Administrative Law Judge participates in the management of the fund;

(B) Holding an office in an educational, religious, charitable, fraternal or civic organization is not a "financial interest" in property of the organization;

(C) The proprietary interest of a policy holder in a mutual insurance company, a depositor in mutual savings association, or a similar proprietary interest is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest; and

(D) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(4) An Administrative Law Judge who would be disqualified under this rule may, rather than disqualify himself or herself from the proceeding, disclose to the parties the basis of the disqualification. If, after such disclosure, any party wishes the Administrative Law Judge to disqualify himself or herself from the proceeding, the Administrative Law Judge shall do so. If, after such disclosure, the parties all agree in writing or on the record that the Administrative Law Judge's impartiality is not in question because of the information disclosed to the parties, the Administrative Law Judge may participate in the proceeding. Any writing signed by or on behalf of all parties shall be incorporated into the record of the proceeding, or, in the case of a mediation, made part of the Administrative Law Judge's mediation file.

(5) Immediately upon discovering the asserted basis, any party may request that an Administrative Law Judge disqualify himself or herself from a proceeding on any basis set forth in section (1) of this rule. If the Administrative Law Judge does not then disqualify himself or herself, any party may promptly file a request for disqualification of the Administrative Law Judge with the Presiding Administrative Law Judge. Such a request shall include an affidavit setting out, in detail, the basis for the requested disqualification.

(6) Following review of the request for disqualification and accompanying affidavit, the Presiding Administrative Law Judge will determine, in his/her discretion, whether a hearing on the allegations in the affidavit shall be held. Following such a hearing or following the Presiding Administrative Law Judge's determination that a hearing will not be held, the Presiding Administrative Law Judge shall issue a written decision concerning the disqualification request. If the Presiding Administrative Law Judge determines that the Administrative Law Judge should be disqualified, the Presiding Administrative Law Judge shall so state and explain the basis for his/her decision, and shall assign another Administrative Law Judge to the case. If the Presiding Administrative Law Judge determines that the Administrative Law Judge should not be disqualified, the Presiding Administrative Law Judge shall so state and explain the basis for his/her decision, and the case shall proceed with the Administrative Law Judge.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.726(5)

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 1-2003, f. 2-21-03, cert. ef. 5-1-03; WCB 2-2005, f. & cert. ef. 11-3-05

438-006-0099

Ex Parte Communications

(1) An ex parte communication is an oral, written or electronic communication between an assigned Administrative Law Judge and a party, a party's representative or someone with a substantial interest in the outcome of the proceeding about the merits of a proceeding to which the Administrative Law Judge is assigned and which is not made to all parties to the proceeding.

(2) Ex parte communications are prohibited.

(3) Notwithstanding section (2) of this rule, an assigned Administrative Law Judge may communicate with a party, when necessary for administrative or scheduling purposes, so long as the communication does not involve the merits of a proceeding and the Administrative Law Judge believes that no party's legal rights or duties will be affected.

(4) An Administrative Law Judge shall promptly disclose to all parties the substance of any communication prohibited by this rule. All parties shall be allowed a reasonable opportunity to respond to a prohibited communication.

(5) This rule does not apply to communications made to, or by, an Administrative Law Judge acting as a mediator.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.726(5)

Hist.: WCB 1-2003, f. 2-21-03, cert. ef. 5-1-03

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 13.05 through 13.30 of the Supreme Court Rules for Admission of Attorneys (Law Student Appearance Program) 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 Program 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 Program, 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(5)
 Stats. Implemented: ORS 656.726(5) & 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; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

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)
 Stats. 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 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 438-005-0046(2)(a) and proof of such service is provided in accordance with 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, 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 or self-insured employer may subpoena the claimant's attending or consulting physician(s) and vocational expert(s) for cross-examination. Medical, surgical, hospital and vocational reports offered by the insurer or self-insured employer will also be accepted as prima facie evidence provided the insurer or self-insured employer agrees to produce the medical and vocational expert(s) 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(s) under this section shall be paid by the insurer or self-insured employer.

(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; WCB 1-1997, f. 3-20-97, cert. ef. 7-1-97

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 — Disclosure Requirements

(1) With respect to a claim for workers' compensation benefits and as used in this section, references to the insurer and the claimant include persons acting on their behalf, and references to the insurer include the self-insured employer, claims processing agents and assigned claims processing agents for non-complying employers.

(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. Within 15 days of said mailing, the insurer shall furnish the claimant and other insurers, without cost, originals or legible copies of all medical and vocational reports and other documents pertaining to the claim(s) as specified below.

(3) Upon written demand by the insurer, the claimant shall within 15 days of the mailing of the demand, furnish to the insurer, without cost, originals or legible copies of all medical and vocational reports and other documents pertaining to the claim(s) as specified below, which the claimant did not receive from the insurer (or self-insured employer) making the demand. In cases involving multiple insurers, an insurer shall seek discovery in accordance with section (9) of this rule.

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

(5) For the purpose of this rule, "documents pertaining to the claim(s)" or any variation thereof means documents and recordings, whether written or electronic or in any other form, which consist of the following items applicable to the workers' compensation claim:

(a) Medical and vocational reports, including any correspondence to and from the medical and vocational experts who provide the reports or who agree to testify on behalf of the party sending correspondence;

(b) Official forms and notices required by ORS Chapter 656, the Workers' Compensation Division or the Workers' Compensation Board, as they relate to the claim(s);

(c) Investigative statements, including a party's statement, and investigative summaries;

(d) Correspondence to and from the Workers' Compensation Division and the Workers' Compensation Board; and

(e) Upon specific request, records of all compensation paid, payroll records, records or statements of wages earned by the claimant, and copies of bills from medical and vocational service providers rendering treatment or services to the claimant.

(6) After the disclosure required by this rule, either the claimant or the insurer may request further specific discovery of other factual documents relevant and material to an issue raised by the Request for Hearing or the Response thereto, or any other issue which thereafter arises and is subject to the jurisdiction of the Workers' Compensation Board.

(7) Notwithstanding any other provision of this section, the following documents pertaining to the claim(s) are not discoverable:

(a) Material protected under the attorney/client privilege as defined in Oregon Rules of Evidence ORS 40.225 Rule 503;

(b) Material which is the work product of any attorney, except that correspondence and any inclusions sent to a medical or vocational expert who writes a report that is otherwise subject to disclosure under these rules or who agrees to testify at the request of the corresponding party shall be discoverable under subsection (5)(a) of this rule;

(c) Material reflecting the mental impressions, case value or merit, plans or thought processes of the claimant or insurer;

(d) Material protected by ORS 656.260; and

(e) Material protected from disclosure under OAR 438-007-0017 (impeachment).

(8) It is the express policy of the Board to promote the full and complete discovery of all relevant facts and expert opinion bearing on a claim being litigated before the Hearings Division, consistent with the right of each party to due process of law. Failure to comply with this rule, if found to be unreasonable or unjustified, may result in the imposition of penalties and attorney fees, exclusion of evidence, continuance of a hearing (subject to OAR 438-006-0091), and/or dismissal of a request for hearing.

(9) When a new party is joined into existing litigation, the disclosure of discoverable documents and the exhibit list shall be made available to the new party by the insurer with the lowest WCB case number. This disclosure shall be made as soon as reasonable but no later than 15 days from the insurer's receipt of notice of the joinder of the new party.

(10) Any dispute under this rule regarding whether something is discoverable, in whole or in part, will be resolved by the assigned Administrative Law Judge or the designee of the Presiding Administrative Law Judge.

Stat. Auth.: ORS 656.726(5)
 Stats. Implemented: ORS 656.307 & 656.726(5)
 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; WCB 2-1997, f. 12-12-97, cert. ef. 3-1-98; WCB 1-2003, f. 2-21-03, cert. ef. 5-1-03

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 is material which:

(a) Attacks the capacity of the witness to perceive, recall or recount;

(b) Tends to establish that the witness has a character for untruthfulness;

(c) Establishes prior convictions for felonies or crimes involving false statement or dishonesty;

(d) Tends to establish bias;

(e) Reveals a prior material inconsistent statement;

(f) Reveals material contradictions in statements made by the witness;

(g) Attacks the expertise of a witness through learned treatises.

(2) 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.

(3) Impeachment evidence shall not be considered by the Administrative Law Judge as substantive evidence, unless the opposing party offers any withheld evidence 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; WCB 2-1997, f. 12-12-97, cert. ef. 3-1-98

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 or at 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.

Stat. Auth.: ORS 656.726(5)
 Stats. Implemented: ORS 656.726(5)
 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; WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 1-2003, f. 2-21-03, cert. ef. 5-1-03

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

Subpoenas; Witness Fees

(1) Whenever a party has requested a hearing, a subpoena may be issued to compel:

- (a) Attendance and testimony at a hearing; or
- (b) The production of documentary or physical evidence under a witness' control at or before a hearing.

(2) Subpoenas may be issued by an Administrative Law Judge or the attorney of record of a party. Upon request, the Hearings Division shall provide blank subpoenas.

(3) Subpoenas issued on behalf of a party may be served by the party or the party's representative. Service may be made in person or by certified mail or other mail that provides for a receipt signed by the recipient.

(4) Subpoenas shall be served far enough in advance of an appearance to allow the witness or party a reasonable time to comply with the subpoena or to file an objection.

(5) Witness fees and mileage shall be provided at the time the subpoena is served, in the amount provided for in civil actions.

(6) "Individually identifiable health information," as defined in ORCP 55(H)(1)(a), may be obtained through a subpoena under the following procedures:

(a) At the time a subpoena for individually identifiable health information is issued, the party issuing the subpoena must serve a copy of the subpoena to the party or the attorney for the party whose individually identifiable health information is being subpoenaed. Such service shall be as provided in section (3) above.

(b) The subpoena shall provide notice to the person or the person's attorney, if represented, whose individually identifiable health information is being subpoenaed of the extent of the information being sought, and shall describe the procedure for submitting a timely objection to the disclosure of such information. The subpoena shall include the following in prominent or boldface type:

"IF YOU OPPOSE THE DISCLOSURE OF THE INFORMATION INCLUDED IN THIS SUBPOENA, YOU MUST FILE A WRITTEN OBJECTION, WITH THE WORKERS' COMPENSATION BOARD, 2601 25TH STREET SE, SUITE 150, SALEM OREGON 97302-1280. YOUR OBJECTION MUST BE FILED WITHIN SEVEN (7) CALENDAR DAYS OF THE MAILING DATE OF THIS NOTICE, AND MUST STATE THAT YOU OBJECT TO THE RELEASE OF THE INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION, THE BASIS FOR YOUR OBJECTION, YOUR ADDRESS, AND THE DATE OF YOUR INJURY IF YOU KNOW THE DATE. A COPY OF YOUR LETTER MUST ALSO BE PROVIDED SIMULTANEOUSLY TO THE RECIPIENT OF THE SUBPOENA, AS WELL AS TO THE PARTY ISSUING THE SUBPOENA. IF YOU HAVE QUESTIONS YOU MAY CALL THE WORKERS' COMPENSATION BOARD TOLL FREE IN OREGON 1-877-311-8061 OR, IN SALEM OR FROM OUTSIDE OREGON, AT (503) 378-3308, OR THE OMBUDSMAN'S OFFICE AT (503) 378-3351, OR TOLL-FREE, (800) 927-1271."

(c) The subpoena must also contain the following certification: "I certify that I mailed a copy of this subpoena to [the person or the person's attorney, if represented] at [address] on [date] by certified mail return receipt requested."

(d) "File," as used in this section, has the same meaning as OAR 438-005-0046.

(e) If the person whose individually identifiable health information is being subpoenaed does not timely object or waives any objection, the recipient of the subpoena shall comply with the subpoena.

(f) If the recipient of the subpoena receives a timely objection from the party whose individually identifiable health information is being subpoenaed, the recipient shall comply with the subpoena by mailing the information sought to the Workers' Compensation Board, at 2601 25TH STREET SE, SUITE 150, SALEM OREGON 97302-1280.

(g) If the person whose individually identifiable health information is being subpoenaed timely objects, an expedited pre-hearing conference will be conducted under the provisions of ORS 656.283.

(h) A party who receives information under this section is required to disclose that information under OAR 438-007-0015.

Stat. Auth.: ORS 656.726(5)
 Stats. Implemented: ORS 656.283(8), 656.724(4) & 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; WCB 1-2003, f. 2-21-03, cert. ef. 5-1-03; WCB 1-2005, f. 6-29-05, cert. ef. 9-1-05

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

438-007-0024

Offers of Proof

Whenever the Administrative Law Judge excludes a document or the testimony of a witness, the party adversely affected may make an offer of proof for the record in a form determined by the Administrative Law Judge.

Stat. Auth.: ORS 656.726(5)
Stats. Implemented: ORS 656.726(5)
Hist.: WCB 1-2003, f. 2-21-03, cert. ef. 5-1-03

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

438-007-0027

Hearing for Purpose of Own Motion Recommendation

(1) Where the Administrative Law Judge determines that an issue(s) raised by a party is within the Board's Own Motion jurisdiction, the Administrative Law Judge may proceed with a fact-finding hearing or other proceeding that the Administrative Law Judge deems achieves substantial justice (without notifying or requesting permission from the Board prior to going forward with such a fact-finding hearing or other proceeding) for the purpose of providing an unappealable recommendation to the Board regarding the issue(s) within the Board's Own Motion jurisdiction.

(2) If the Administrative Law Judge chooses to proceed with a fact-finding hearing or other proceeding as described in section (1), the Administrative Law Judge shall:

- (a) Make findings of fact and conclusions of law regarding the Own Motion issue(s) within the time required to issue any appeal-

able order in the related case issued regarding matters within the Administrative Law Judge's jurisdiction; and

(b) Forward to the Board a separate, unappealable recommendation with respect to the Own Motion issue(s) and a copy of any appealable order in the related case issued regarding matters within the Administrative Law Judge's jurisdiction.

Stat. Auth.: ORS 656.726(5)
Stats. Implemented: ORS 656.726(5)
Hist.: WCB 1-2003, f. 2-21-03, cert. ef. 5-1-03

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

438-007-0040

Electronic Documents

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

(2) If a party introduces into evidence a reproduction described in subsection (1), the exhibit index described in OAR 438-007-0018 will include the following certification: "The attached exhibits contain reproductions as described in 438-007-0040. I hereby certify that the reproductions were created in the regular course of a party's business or activity."

Stat. Auth.: ORS 656.726(5)
Stats. Implemented: ORS 656.726(5) & 656.283(7)
Hist.: WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02

DIVISION 9

COMPROMISE AND SETTLEMENT

438-009-0001

Special Definitions

As used in this division:

(1) "Claim Disposition Agreement" means a written agreement pursuant to ORS 656.236(1), 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 656.001 to 656.794 except for medical services, in an accepted claim.

(2) "Disputed Claim Settlement" means a written agreement pursuant to ORS 656.289(4), executed by all parties in which the parties agree to make a reasonable disposition of all or part 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 an 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(5)
Stats. Implemented: ORS 656.236, 656.289(4) & 656.726(5)
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 3-2001, f. 11-14-01, cert. ef. 1-1-02

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 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), an 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.

Stat. Auth.: ORS 656.726(5)
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; WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

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 all or part of the claim exists and that the parties have agreed to compromise and settle all or part of 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 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 the following matters:

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

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

(c) Except with the consent of the worker, reimbursement made to medical service providers from the proceeds of a disputed claim settlement shall not exceed 40 percent of the total present value of the settlement amount; and

(d) Reimbursement from the proceeds of a disputed claim settlement made to medical service providers shall not prevent a medical service provider or health insurance provider from recovering the balance of amounts owing for such services directly from the worker.

(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 approved 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:

(a) Recite whether a claim disposition agreement in the claim has been filed; and

(b) Be in a separate document from a claim disposition agreement.

Stat. Auth.: ORS 656.726(5)
Stats. Implemented: ORS 656.236, 656.289(4) & 656.313(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; WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

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) Notwithstanding OAR 438-005-0046(1)(d), in all cases settled by disputed claim settlement or written stipulation of the parties, the original and one legible copy of the settlement document shall be mailed or delivered to the Administrative Law Judge or the Board for approval. If the disputed claim settlement or 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 that is pending before the Board. If the disputed claim settlement or written stipulation is mailed or delivered to the Hearings Division for approval and the agreement either formally or effectively modifies a dispute which is pending before the Board, the disputed claim settlement or stipulation shall be submitted in a format to provide for both Hearings Division and Board approval.

(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 656.726(5)
 Stats. Implemented: ORS 656.236, 656.289(4) & 656.726(5)
 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; WCB 1-1999, f. 8-24-99, cert. ef. 11-1-99; WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04

438-009-0020

Claim Disposition Agreements; Form

Any document filed with the Board for approval by the Administrative Law Judge who mediated the agreement or the Board Members 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 Administrative Law Judge who mediated the agreement or the Board may:

(a) Mail a letter notifying the parties that the deficiency must be corrected and that an addendum signed by one or more of the parties or their representatives must be filed in the manner described in the letter 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(5)
 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; WCB 1-1999, f. 8-24-99, cert. ef. 11-1-99; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

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 name of the insurer/self-insured employer;
- (g) Specific identification of all benefits, rights and insurer/self-insured employer obligations under Workers' Compensation Law which are released by the agreement;

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

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

(j) 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 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 OR THE ADMINISTRATIVE LAW JUDGE WHO MEDIATED THE AGREEMENT TELLING YOU THE DATE THIS AGREEMENT WAS RECEIVED BY THEM FOR APPROVAL. YOU HAVE

30 DAYS FROM THE DATE THE BOARD OR THE ADMINISTRATIVE LAW JUDGE WHO MEDIATED THE AGREEMENT RECEIVES THE AGREEMENT TO REJECT THE AGREEMENT, BY TELLING THE BOARD OR THE ADMINISTRATIVE LAW JUDGE WHO MEDIATED THE AGREEMENT 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, 2601 25TH STREET SE, SUITE 150, SALEM, OREGON 97302-1280, TELEPHONE: (503) 378-3308, TOLL-FREE AT 1-877-311-8061, 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, 350 WINTER STREET NE, SALEM, OR 97310, TELEPHONE: (503) 378-3351, TOLL-FREE AT 1-800-927-1271, 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(5)

Stats Implemented: ORS 656.236

Hist.: WCB 2-1995, f. 11-13-96, cert. ef. 1-1-96; WCB 1-1999, f. 8-24-99, cert. ef. 11-1-99; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

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 with the Board for approval by the Administrative Law Judge who mediated the agreement or the Board Members. Any claim disposition agreement may be filed in accordance with OAR 438-005-0046(1)(a) and (1)(d). 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 Administrative Law Judge who mediated the agreement or the Board. All times to be calculated shall be calculated from the date of receipt of the agreement by the Administrative Law Judge who mediated the agreement or the Board.

(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 656.726(5)

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; WCB 1-1999, f. 8-24-99, cert. ef. 11-1-99; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

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 Administrative Law Judge who mediated the agreement or the Board to all parties and their attorneys if the claim disposition agreement is approved. The Administrative Law Judge who mediated the agreement may also physically deliver the postcards to all parties and their attorneys as provided in OAR 438-009-0030(6).

(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 Administrative Law Judge who mediated the agreement or 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 Administrative Law Judge who mediated the agreement or the Board may follow the procedures described in OAR 438-009-0020(4).

Stat. Auth.: ORS 656.726(5)

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; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

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 receipt of a claim disposition agreement by the Administrative Law Judge who mediated the agreement or the Board 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 disapproval, the Administrative Law Judge who mediated the agreement or the Board shall notify the parties and the Director of the receipt of a claim disposition agreement.

(3) In all cases, the Administrative Law Judge who mediated the agreement or the Board shall notify the Director of the 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 Administrative Law Judge who mediated the agreement or the Board shall notify the State Court Administrator of the receipt of the agreement.

(5) In the event that the Administrative Law Judge who mediated the agreement or the Board Members issue[s] a separate written decision, copies of that 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 (5) of this rule, the signature of the Administrative Law who mediated the agreement or 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 either:

(a) By the Administrative Law Judge who mediated the agreement or the Board mailing the postcards filed pursuant to OAR 438-009-0028 to the parties and their attorneys; or

(b) By physical delivery of the postcards filed pursuant to OAR 438-009-0028 to the parties and their attorneys by the Administrative Law Judge who mediated the agreement.

(7) Payment of the disposition shall be made no later than the 14th day after notice of its approval has been mailed or delivered under Section (5) or (6) of this rule to the parties, unless otherwise stated in the agreement.

Stat. Auth.: ORS 656.726(5)
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; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

438-009-0035

Reconsideration of Claim Disposition Agreements

(1) A motion for reconsideration of final orders issued under ORS 656.236 and these rules shall be filed within 10 days of the date of mailing of the order.

(2) The Administrative Law Judge who mediated the agreement or 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 under ORS 656.236 and these rules shall be limited to the record before the Administrative Law Judge who mediated the agreement or the Board at the time the final order was mailed or delivered under OAR 438-009-0030(5) or (6) and no additional information will be considered, unless the Administrative Law Judge who mediated the agreement or the Board finds good cause for allowing the additional submission.

Stat. Auth.: ORS 656.726(5)
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; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

DIVISION 10

APPLICABILITY OF THE PERMANENT DISABILITY RATING STANDARDS

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. & ef. 2-1-89; 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, 656.576 to 656.595. These rules do not apply to proceedings before the Board on its own motion pursuant to 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.

Stat. Auth.: ORS 656.726(5)
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; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

438-011-0022

Expedited Review

(1) For purposes of OAR 438 division 011, 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:

- (a) The parties;
- (b) The issues;
- (c) The reviewing members;
- (d) The Board's decision and
- (e) 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(5)
 Stats. Implemented: ORS 656.295(5) & 656.718
 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; WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02

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 Board" and "Board" mean the Workers' Compensation Board acting under its authority pursuant to ORS 656.278 and these rules.

(2) "Own Motion Claim" means:

(a) A written request by or on behalf of a claimant for temporary disability compensation or claim reopening regarding a worsened condition that has been determined to be compensable and that was initiated after the rights under ORS 656.273 expired (i.e., a "post-aggravation rights" "worsened condition" claim);

(b) A new medical condition or an omitted medical condition that is related to an initially accepted claim that has been determined

to be compensable and that was initiated after the rights under ORS 656.273 expired (i.e., a "post-aggravation rights" new medical condition or omitted medical condition claim); or

(c) A written request by or on behalf of a claimant for 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.

(3) For a "post-aggravation rights" "worsened condition" claim, "determined to be compensable" means:

(a) The insurer does not dispute compensability of or responsibility for the claim or condition; i.e., the insurer has not issued a denial within the time period prescribed under ORS 656.262 or 656.308(2); or

(b) An order from an Administrative Law Judge, the Board, or the court has found the claim or condition compensable and the responsibility of the insurer.

(4) For a "post-aggravation rights" new medical condition or omitted medical condition claim, "determined to be compensable" means:

(a) The insurer has issued a notice of acceptance under ORS 656.262(7)(a); or

(b) The insurer's denial under ORS 656.262(7) or 656.308(2) or de facto denial has been set aside by an order from an Administrative Law Judge, the Board, or the court.

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

(6) "Own Motion Order" means an order of the Own Motion Board.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.267(1)(3), 656.278(1) & 656.726(5)

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; WCB 2-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 2-2003, f. 7-10-03, cert. ef. 9-1-03; WCB 3-2005, f. 11-15-05, cert. ef. 1-1-06

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

438-012-0017

Written Argument and Other Documents

(1) Timely compliance with Board requests for written argument and/or timely responses to inquiries from the Board is necessary to the Board's decision making process.

(2) Unless otherwise allowed by the Board, extensions of time for the filing of written arguments/responses will be allowed only on written request filed no later than the date the argument/response 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 should be furnished with the extension request.

Stat. Auth.: ORS 656.278 & 656.726(5)

Stats. Implemented: ORS 656.278(1) & 656.726(5)

Hist.: WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04

438-012-0018

Applicability of Rules; Effective Date

(1) 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.

(2) These rules in division 012 are effective January 1, 2006.

Stat. Auth.: ORS 656.278 & 656.726(5)

Stats. Implemented: ORS 656.278(1) & 656.726(5)

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; WCB 2-2003, f. 7-10-03, cert. ef. 9-1-03; WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04; WCB 3-2005, f. 11-15-05, cert. ef. 1-1-06

438-012-0020

Insurer to Process Own Motion Claim: Notice and Contents of Claim; Worsened Condition Claim; "Post-aggravation Rights" New Medical Condition or Omitted Medical Condition Claim; Pre-1966 Injury Claim

(1) All Own Motion claims, including "post-aggravation rights" new medical condition or omitted medical condition 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 a "post-aggravation rights" worsened condition when one of the following documents is submitted to the insurer by or on behalf of the claimant:

(a) A written request for temporary disability compensation or claim reopening regarding a worsened condition that has been determined to be compensable as defined under OAR 438-012-0001(3) and that was initiated after the rights under ORS 656.273 expired; or

(b) Any document submitted to the insurer after the expiration of aggravation rights regarding a worsened condition that has been determined to be compensable as defined under OAR 438-012-0001(3) that reasonably notifies the insurer that the compensable injury results in the claimant's inability to work and requires hospitalization or inpatient or outpatient surgery, or other curative treatment prescribed in lieu of hospitalization that is necessary to enable the claimant to return to work.

(4) An insurer is deemed to have notice of a "post-aggravation rights" new medical condition or omitted medical condition claim when the insurer receives from the claimant any document that clearly requests formal written acceptance of a new medical condition or an omitted medical condition initiated after expiration of aggravation rights under ORS 656.273 as required by 656.267 and that claim has been determined to be compensable as defined under OAR 438-012-0001(4).

(5) Except as provided in section (7) 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 regarding a worsening of an injury occurring before January 1, 1966 that has been determined to be compensable as defined under OAR 438-012-0001(3); or

(d) Any document regarding a worsening of an injury occurring before January 1, 1966 that has been determined to be compensable as defined under OAR 438-012-0001(3) that reasonably notifies the insurer that the compensable injury results in the inability of the claimant to work and requires surgery or hospitalization or other curative treatment prescribed in lieu of hospitalization that is necessary to enable the claimant to return to work.

(6) An insurer is deemed to have notice of a "post-aggravation rights" new medical condition or omitted medical condition claim related to a compensable injury that occurred before January 1, 1966, when the insurer receives from the claimant any document that clearly requests formal written acceptance of a new medical condition or an omitted medical condition initiated after expiration of aggravation rights under ORS 656.273 as required by 656.267 and that claim has

been determined to be compensable as defined under OAR 438-012-0001(4).

(7) 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 656.726(5)

Stats. Implemented.: ORS 656.278(2) & 656.726(5)

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; WCB 2-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 2-2003, f. 7-10-03, cert. ef. 9-1-03; WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04; WCB 3-2005, f. 11-15-05, cert. ef. 1-1-06

438-012-0030

Insurer Recommendation of Reopening or Denial of Claim Voluntarily Reopening

(1) Except as provided in section (3) of this rule, for "worsened condition" claims that have been determined to be compensable as defined under OAR 438-012-0001(3) and "post-aggravation rights" new medical condition or omitted medical condition claims that have been determined to be compensable as defined under 438-012-0001(4), the Own Motion insurer shall, within 30 days after the claimed condition has been determined to be compensable as defined under 438-012-0001(3) or 438-012-0001(4), either:

(a) Voluntarily reopen the Own Motion claim, including any "post-aggravation rights" new medical condition or omitted medical condition claim, under ORS 656.278(5) to provide benefits allowable under 656.278; or

(b) Submit to the Board a written recommendation as to whether the Own Motion claim, including any "post-aggravation rights" new medical condition or omitted medical condition claim, should be reopened or not reopened, 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, which should be marked as exhibits, arranged in chronological order, and accompanied by an exhibit list. Copies of the recommendation form and any supporting evidence shall be mailed to the claimant and the claimant's attorney, if any.

(2) Except as provided in section (3) of this rule, for medical benefit claims under OAR 438-012-0001(2)(c), the Own Motion insurer shall, within 60 days after receiving the Own Motion claim, either:

(a) Voluntarily reopen the Own Motion claim under ORS 656.278(5) to provide benefits allowable under 656.278 or to grant additional medical or hospital care to the claimant; or

(b) Submit to the Board a written recommendation as to whether the Own Motion claim should be reopened or not reopened, 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, which should be marked as exhibits, arranged in chronological order, and accompanied by an exhibit list. Copies of the recommendation form and any supporting evidence shall be mailed to the claimant and the claimant's attorney, if any.

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

(4) In all cases when the Own Motion insurer voluntarily reopens the claim under ORS 656.278(5), the insurer shall issue a 3501 Form to the claimant with copies to the claimant's attorney, if any, and the Workers' Compensation Division. The form shall be as prescribed by the Director.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.278(1), 656.278(5) & 656.726(5)

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; WCB 2-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 2-2003, f. 7-10-03, cert. ef. 9-1-03; WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04; WCB 3-2005, f. 11-15-05, cert. ef. 1-1-06

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, 656.307, or 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 Workers' Compensation Division 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 Workers' Compensation Division 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; WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04

438-012-0035

Temporary Disability Compensation

(1) The insurer may pay temporary disability compensation in accordance with the provisions of ORS 656.210, 656.212(2) and 656.262(4) from the time the attending physician authorizes temporary disability compensation for the hospitalization, surgery, or other curative treatment until the claimant's condition becomes medically stationary in those cases where:

(a) The Own Motion claim for temporary disability compensation is filed after the aggravation rights under ORS 656.273 expired;

(b) There is a worsened condition that has been determined to be compensable as defined under OAR 438-012-0001(3) and that results in the inability of the worker to work and requires hospitalization or inpatient or outpatient surgery, or other curative treatment prescribed in lieu of hospitalization that is necessary to enable the claimant to return to work; and

(c) The claimant qualifies as a "worker" pursuant to ORS 656.005(30). "Worker" does not include a person who has withdrawn from the work force during the period for which such benefits are sought.

(2) The insurer may pay temporary disability compensation in accordance with the provisions of ORS 656.210, 656.212(2) and 656.262(4) from the time the attending physician authorizes temporary disability compensation for the hospitalization, surgery, or other curative treatment until the claimant's condition becomes medically stationary in those cases where:

(a) A new medical condition or an omitted medical condition claim has been determined to be compensable as defined under OAR 438-012-0001(4) and was initiated after the aggravation rights under ORS 656.273 expired; and

(b) The claimant qualifies as a "worker" pursuant to ORS 656.005(30). "Worker" does not include a person who has withdrawn from the work force during the period for which such benefits are sought.

(3) 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.

(4) The insurer shall make the first payment of temporary disability compensation in accordance with ORS 656.210, 656.212(2) and 656.262(4) within 14 days from:

- (a) The date of an order of the Board reopening the claim; or
- (b) The date the insurer voluntarily reopened the claim.

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

(a) The claimant is medically stationary pursuant to ORS 656.005(17);

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

(c) 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

(d) Termination of such benefits is authorized by the terms of ORS 656.268(4)(a) through (d).

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.005(30), 656.262(4), 656.268(4), 656.278(1) & (2) & 656.726(5)

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; WCB 1-1997, f. 3-20-97, cert. ef. 7-1-97; WCB 2-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 2-2003, f. 7-10-03, cert. ef. 9-1-03; WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04; WCB 3-2005, f. 11-15-05, cert. ef. 1-1-06; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

438-012-0036

Permanent Disability Compensation

(1) Where a new medical condition or an omitted medical condition claim has been determined to be compensable as defined under OAR 438-012-0001(4) and the claim was initiated after the aggravation rights under ORS 656.273 expired, the insurer may provide any permanent disability benefits to which the claimant is entitled under application of the Standards adopted by the Director under 656.726 when the insurer closes the claim pursuant to OAR 438-012-0055.

(2) Pursuant to ORS 656.278(2)(d), an insurer may include permanent disability benefits for additional impairment to an injured body part that has previously been the basis of a permanent partial disability award, but only to the extent that the permanent partial disability rating exceeds the permanent partial disability rated by the prior award or awards.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.278(1), 656.278(2) & 656.726(5)

Hist.: WCB 2-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 3-2005, f. 11-15-05, cert. ef. 1-1-06

438-012-0037

Payment of Medical Benefits

Except as otherwise provided in OAR 438-012-0020(7), for every condition resulting from a compensable injury occurring before January 1, 1966, the Own Motion insurer may 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 656.726(5)

Stats. Implemented: ORS 656.278(1)(c), 656.278(2)(c) & 656.726(5)

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; WCB 2-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 3-2005, f. 11-15-05, cert. ef. 1-1-06

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, 656.307 or 656.308, or an arbitration or mediation proceeding under 656.307; or

(c) The claimant's request for payment of temporary disability compensation is based on surgery or hospitalization or other curative treatment prescribed in lieu of hospitalization that is necessary to enable the claimant to return to work that is the subject of either a managed care dispute resolution review process or 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 656.726(5)

Stats. Implemented: ORS 656.278(1) & 656.726(5)

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; WCB 2-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 2-2003, f. 7-10-03, cert. ef. 9-1-03; WCB 3-2005, f. 11-15-05, cert. ef. 1-1-06

438-012-0055

Closure of Claims Reopened Under ORS 656.278

When a claim has been voluntarily reopened or ordered reopened 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 the Workers' Compensation Division. 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, the amount of any permanent disability award determined under ORS 656.278(1)(b) and (2)(d), 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 2601 25TH STREET SE, SUITE 150, SALEM, OREGON 97302-1280. YOU MAY HAVE AN ATTORNEY OF YOUR CHOICE, WHOSE FEE WILL BE LIMITED TO A PERCENTAGE OF ANY MORE COMPENSATION YOU MAY BE AWARDED."

Stat. Auth.: ORS 656.726(5)
Stats. Implemented: ORS 656.278(1), (2) & (6) & 656.726(5)
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; WCB 1-1999, f. 8-24-99, cert. ef. 11-1-99; WCB 2-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04; WCB 3-2005, f. 11-15-05, cert. ef. 1-1-06

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 shall be in writing, signed by the claimant or the claimant's attorney, and shall include, but is not limited to, the following information:

- (a) The claimant's name and mailing address;
- (b) A statement that Board review is requested, and the reason(s) for the request for review; reasons for requesting review may include, but are not limited to:
 - (A) Disagreement with the medically stationary determination;
 - (B) Disagreement with the temporary disability compensation awarded, including rate of payment and/or dates awarded; and/or
 - (C) Disagreement with permanent disability compensation awarded, if the claim was reopened for a "post-aggravation rights" new medical condition claim and/or omitted medical condition claim. If the claimant disagrees with the impairment used in rating of the claimant's permanent disability for such a claim, the claimant may request appointment of a medical arbiter;
- (c) The name of the insurer; and
- (d) A copy of the Notice of Closure (Form 2066).

(2) 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.

(3) Within 14 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 that pertains to the claimant's compensable condition at the time of closure, including any evidence relating to permanent disability. Such evidence should be marked as exhibits, arranged in chronological order, and accompanied by an exhibit list. The insurer may also submit written arguments at this time, with copies to the claimant or the claimant's attorney, if any.

(4) The claimant may submit additional evidence and written argument to the Board, with copies to the insurer or its attorney, if any. To be considered, such evidence and argument must be submitted within 21 days from the date the insurer mails the evidence pursuant to section (3) of this rule.

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

(6) The Board may refer a matter to the Hearings Division for an evidentiary hearing and recommended findings of fact and conclusions.

(7) The Board may refer a disagreement regarding the rating of the claimant's permanent disability for a "post-aggravation rights" new or omitted medical condition to the Workers' Compensation Division for an evaluation and recommendation based on the record presented to the Board.

(8) 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 or the Workers' Compensation Division.

Stat. Auth.: ORS 656.726(5)
Stats. Implemented: ORS 656.278(1) & (6) & 656.726(5)
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; WCB 1-1997, f. 3-20-97, cert. ef. 7-1-97; WCB 2-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 2-2003, f. 7-10-03, cert. ef. 9-1-03; WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04; WCB 3-2005, f. 11-15-05, cert. ef. 1-1-06

438-012-0061

Board Review of Voluntary Reopening of an Own Motion Claim

(1) If a dispute arises out of a voluntary reopening of a claim under ORS 656.278(5), a party may file a written request for Board review, with copies to the other party.

(2) Within 14 days after notification from the Board that a review has been requested, the insurer shall submit to the Board and to the claimant or the claimant's attorney, if any, legible copies of all evidence which pertains to the claimant's compensable condition at the time of the voluntary reopening. The insurer may also submit written arguments at this time, with copies to the claimant or the claimant's attorney, if any.

(3) The claimant may submit additional evidence and written argument to the Board, with copies to the insurer or its attorney, if any. To be considered, such evidence and argument must be submitted within 21 days from the date the insurer mails the evidence and argument pursuant to section (2) of this rule.

(4) The Board may refer a matter to the Hearings Division for an evidentiary hearing and recommended findings of fact and conclusions.

(5) 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 656.726(5)
Stats. Implemented: ORS 656.278(1), 656.278(5) & 656.726(5)
Hist.: WCB 2-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 2-2003, f. 7-10-03, cert. ef. 9-1-03

438-012-0062

Referral of Request for Enforcement of Board's Own Motion Order and Request for Suspension of Temporary Disability Compensation 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 may refer a request for suspension of temporary disability compensation under OAR 438-012-0035(6) to the Hearings Division for an evidentiary hearing and recommended findings of fact and conclusions.

(3) 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(5)
Stats. Implemented: ORS 656.278(1) & 656.726(5)
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; WCB 2-2003, f. 7-10-03, cert. ef. 9-1-03

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), 656.278(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

438-012-0110

Penalty for Unreasonable Failure to Comply or Untimely Compliance with Board Own Motion Rules

(1) Failure to comply with the Board's Own Motion rules by the insurer, if found unreasonable or unjustified, may result in the

imposition of penalties and attorney fees pursuant to ORS 656.262(11) and OAR 438-015-0110, exclusion of evidence, and/or referral for a fact-finding hearing.

(2) Failure to comply with the Board's Own Motion rules by the claimant, if found unreasonable or unjustified, may result in the exclusion of evidence, referral for a fact-finding hearing, and/or dismissal of the request for benefits.

Stat. Auth.: ORS 656.726(5)
Stats. Implemented.: ORS 656.267(1)(3), 656.278(1)(b) & 656.726(5)
Hist.: WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04

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 is for an expedited hearing to appeal 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 656.726(5)
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; WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02

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) & 656.291(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) & 656.291(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) "Cost bill" means an itemized statement from the claimant of the amount of expenses and costs for records, expert opinions, and witness fees incurred as a result of the litigation involving a claim denial under ORS 656.386(1).

(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.

(8) "Expenses and costs" reimbursable under ORS 656.386(2) mean reasonable expenses and costs incurred by the claimant for things and services reasonably necessary to pursue a matter, but do not include attorney fees. Examples of expenses and costs referred to include, but are not limited to, costs of records, expert witness opinions, witness fees and mileage paid to execute a subpoena and costs associated with travel.

Stat. Auth.: ORS 656.726(5)
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; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

438-015-0010

General Principles

(1) Attorney fees for an attorney representing a claimant before the Board or its Hearings Division 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(5)
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; WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02

438-015-0011

Attorney Retainer Agreement

(1) Except as provided in subsection (2), every executed attorney retainer agreement filed with the Administrative Law Judge or Board shall be in English.

(2) Any English language attorney retainer agreement filed with the Administrative Law Judge or Board may be accompanied by a translation into a foreign language that is certified by the translator to be an accurate and true translation of the English writing. Either the English or the foreign language writing must be signed.

Stat. Auth.: ORS 656.726(5)
Stats. Implemented: ORS 656.388(3)
Hist.: WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04

438-015-0015

Charge for Legal Services Must Be Authorized

No charge for legal services for representation of claimants in connection with any matter concerning a claim before the Board or its Hearings Division under ORS Chapter 656 is valid unless the charge has been authorized in accordance with 656.307, 656.382 to 656.390 or 656.593 or these rules.

Stat. Auth.: ORS 656.726(5)
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; WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02

438-015-0019

Cost Bill Procedures

(1) If a claimant finally prevails against a denial under ORS 656.386(1), the Administrative Law Judge or the Board may order payment of the claimant's reasonable expenses and costs for records, expert opinions, and witness fees incurred in the litigation of the denied claim(s).

(2) In ordering payment under section (1), an Administrative Law Judge or the Board may award reasonable expenses and costs that the claimant incurred as a result of the litigation of the denied claim(s) under ORS 656.386(1). If the parties stipulate to the specific amount of the reasonable expenses and costs, the Administrative Law Judge's or the Board's award of expenses and costs shall be included in the order finding that the claimant finally prevails against a denied claim(s) under 656.386(1). In the absence of the parties' stipulation, the Administrative Law Judge or the Board may award reasonable expenses and costs as described in section (1), which the claimant may claim by submitting a cost bill under section (3) to the insurer or the self-insured employer, not to exceed \$1,500, unless the claimant demonstrates extraordinary circumstances justifying payment of a greater amount.

(3) If an order under section (2) does not specify the amount of a reasonable award for expenses and costs, the claimant shall submit, within 30 days after the order under section (2) becomes final, a cost bill to the insurer or self-insured employer. The cost bill, which may be submitted on a form prescribed by the Board, shall contain, but is not limited to, the following information:

(a) An itemization of the incurred expenses and costs for records, expert opinions, and witness fees that are due to the denied claim(s); and

(b) The claimant's signature confirming that the claimed expenses and costs were incurred in the litigation of the denied claim(s).

(4) If the parties disagree whether a claimed fee, expense, or cost is reasonable, a party may request a hearing seeking resolution of that dispute. The resolution of disputes under this section shall be made by a final, appealable order.

(5) Payments for witness fees, expenses, and costs shall be made by the insurer or self-insured employer within 30 days of its receipt of the cost bill submitted in accordance with section (3) and are in addition to compensation payable to the claimant and in addition to attorney fees.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.386(2), 656.726(5)

Hist.: WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

438-015-0022

Attorney Fee Lien Procedures

(1) If a former attorney of a claimant alleges that the former attorney has been instrumental in obtaining additional compensation or in settling a claim, the former attorney may provide a notice of potential attorney fee lien to the insurer or the self-insured employer. Copies of such a notice shall also be simultaneously provided to the claimant and to the appropriate litigation forum, if there is a pending case before the Hearings Division or the Board.

(2) The notice of potential attorney fee lien shall include, but is not limited to, the following information:

(a) A description of the former attorney's services that support the allegation that the attorney was instrumental in obtaining additional compensation or in settling the claimant's claim;

(b) The amount of the potential claim;

(c) The amount of the potential attorney fee lien; and

(d) A copy of an executed retainer agreement between the claimant and the former attorney.

(3) If the insurer or self-insured employer has received a notice of a potential attorney fee lien, any proposed disputed claim settlement, settlement stipulation, or claim disposition agreement shall include a provision resolving the potential attorney fee lien. Any approval of a settlement agreement that does not comply with this provision shall be void.

(4) If the notice of potential attorney fee lien is disputed, the former attorney, the claimant, the insurer, or the self-insured employer may file a petition for resolution of the lien dispute with the forum where litigation involving the claim is pending or, if there is no pending litigation, with the Hearings Division. The petition shall include copies of the notice of potential attorney fee lien and the accompanying materials that were submitted to the claimant and the insurer or the self-insured employer, as well as any other relevant documents.

(5) If a petition for resolution of a potential attorney fee lien dispute is filed, the respondent(s) shall be provided not less than seven days to respond to the petition. The former attorney shall also be provided not less than seven days to reply to the responses.

(6) The resolution of a potential attorney fee lien dispute shall be made by a final, appealable order.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.388(3), 656.726(5)

Hist.: WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

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 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 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 \$4,600, 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 \$12,500, 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; WCB 1-1998, f. 11-20-98, cert. ef. 2-1-99

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 \$1,500, 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; WCB 1-1998, f. 11-20-98, cert. ef. 2-1-99

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 \$17,500 of the settlement proceeds plus ten percent of any amount of the settlement proceeds in excess of \$17,500. 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; WCB 1-1998, f. 11-20-98, cert. ef. 2-1-99

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 \$17,500 of the agreement proceeds plus ten percent of any amount of the proceeds in excess of \$17,500. 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; WCB 1-1998, f. 11-20-98, cert. ef. 2-1-99

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 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 \$5,000.

(2) If a claimant requests review of an Administrative Law Judge's order on the issue of compensation for 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 \$6,000.

(3) If a claimant requests review of an Administrative Law Judge's order on the issue of compensation for permanent total 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 \$16,300.

(4) If a claimant requests review of an 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 656.386(1), 656.386(2) & 656.388(3)
Stats. Implemented: ORS 656.386(1), 656.386(2) & 656.388(3)
Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 1-1998, f. 11-20-98, cert. ef. 2-1-99

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

(1) If an attorney is instrumental in obtaining increased temporary disability compensation, the Board shall approve a fee of 25 percent of the increased compensation, but not more than \$1,500, to be paid out of the increased compensation.

(2) If an attorney is instrumental in obtaining a voluntary reopening of an Own Motion claim that results in increased temporary disability compensation, the Board shall approve a fee of 25 percent of the increased compensation, but not more than \$1,500, to be paid out of the increased temporary disability compensation resulting from the voluntary reopening.

(3) If the Board awards additional compensation for permanent disability, the Board shall approve a reasonable attorney fee in the amounts prescribed in OAR 438-015-0040, payable out of the increased compensation.

(4) The Board may allow a fee in excess of the amounts prescribed in sections (1) through (3) of this rule upon a finding that extraordinary services have been rendered.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.267(3), 656.278(1), 656.386(1)(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; WCB 1-1998, f. 11-20-98, cert. ef. 2-1-99; WCB 2-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 2-2003, f. 7-10-03, cert. ef. 9-1-03; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

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

438-015-0110

Attorney Fees in Cases Involving ORS 656.262(11)(a)

If the Director, an Administrative Law Judge, the Board, or the Court find that the insurer or self-insured employer unreasonably delayed or unreasonably refused to pay compensation, or unreasonably delayed acceptance or denial of a claim, an assessed attorney fee shall be awarded in a reasonable amount that:

(1) Is proportionate to the benefit to the claimant;

(2) Takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and to the time devoted to the case; and

(3) Does not exceed \$2,000, absent a showing of extraordinary circumstances.

Stat. Auth.: ORS 656.726(5), 656.283 & 656.388

Stats. Implemented: ORS 656, 656.262(11)(a) & (16), 656.283(4)(b) & 656.726(5)

Hist.: WCB 3-2003, f. 12-12-03 cert. ef. 1-1-04

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)

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

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

438-016-0020

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) 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), 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)
 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

DIVISION 19

MEDIATION

438-019-0000

Special Definitions

(1) Mediation. Mediation is a voluntary process for resolving disputes by which an independent neutral third person, in the role of mediator, assists two or more parties to a controversy in reaching a mutually acceptable resolution. For purposes of OAR division 019, mediation does not pertain to dispute resolution governed by ORS 656.307(6).

(2) Mediator. A mediator is an independent neutral third person whose role is to assist the parties in resolving their dispute by mutual agreement. The mediator has no authority to decide the outcome of the controversy or to force settlement upon the parties. The mediator, for purposes of these rules, is an employee of the Workers' Compensation Board, with the authority of an Administrative Law Judge, who satisfies the qualifications prescribed in OAR 438-019-0010(1) and (2).

(3) Party. For purposes of OAR 438 division 019, party means any person identified in OAR 438-005-0040(11) and any other person identified by the mediator as necessary to the mediation.

Stat. Auth.: ORS 656.726(5)
 Stats. Implemented: ORS 656.012(2)(b), 656.283(1), 656.283(9) & 656.289(4)
 Hist.: WCB 1-1997, f. 3-20-97, cert. ef. 7-1-97; WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02

438-019-0010

Mediator Qualifications

(1) A mediator shall have completed at least 30 hours of basic mediation training and hold a certificate demonstrating such training.

(2) Such training described in section (1) of this rule shall address the following areas as outlined in OAR 718-040-0040(3):

- (a) Active listening, empathy and validation;
- (b) Sensitivity to and awareness of cross-cultural issues;
- (c) Maintaining neutrality;

- (d) Identifying and reframing interests and issues;
- (e) Establishing trust and respect;
- (f) Using techniques to achieve agreement and settlement, including creating a climate conducive to resolution, identifying options, working toward agreement, and reaching consensus;
- (g) Shaping and writing agreements; and
- (h) Ethical standards for mediator conduct adopted by state and national organizations.

Stat. Auth.: ORS 656.726(4)
 Stats. Implemented: ORS 656.012(2)(b), 656.283(1) & (9) & 656.289(4)
 Hist.: WCB 1-1997, f. 3-20-97, cert. ef. 7-1-97

438-019-0020

Standards of Mediator Conduct

(1) Mediators have duties to the parties, to their profession, and to themselves. They should be honest and unbiased, act in good faith, be diligent, and never seek to advance their own interests at the expense of the parties.

(2) The mediator must maintain impartiality toward all parties. Impartiality means a commitment to serve all mediation parties as opposed to a single party. The mediator should disclose to the parties any affiliations which the mediator may have with any participant and obtain all parties' consent to proceed as mediator.

(3) The mediator has an obligation to assure that all parties understand the nature of the mediation process, the procedures to be utilized, and the particular role of the mediator. Each party's consent to proceed with mediation should be obtained early, prior to the beginning of substantive negotiations.

(4) The mediator shall inform the parties of their rights to withdraw from mediation at any time and for any reason. If the mediator believes that the parties are unable or unwilling to participate effectively in the mediation process, the mediator should suspend or terminate the mediation. If the parties reach a final impasse, the mediator should not prolong unproductive discussions.

Stat. Auth.: ORS 656.726(4)
 Stats. Implemented: ORS 656.012(2)(b), 656.283(1), 656.283(9) & 656.289(4)
 Hist.: WCB 1-1997, f. 3-20-97, cert. ef. 7-1-97

438-019-0030

Confidentiality

(1) Unless there is a written agreement otherwise, any communication made in mediation which relates to the controversy being mediated is confidential.

(2) The mediator shall create and maintain a separate mediation file. All memoranda, work product, and other materials contained in the mediation file are confidential.

(3) The names and case numbers of cases for which mediation has been requested and the outcomes of those mediations are not confidential.

(4) Any mediation agreement that requires approval by the Administrative Law Judge who mediated the agreement or the Board pursuant to ORS Chapter 656 and OAR chapter 438 shall not be confidential.

(5) Statements, memoranda, materials, and other tangible evidence that are subject to discovery under the Board's Rules of Practice and Procedure are not confidential unless they were prepared specifically for use in mediation.

Stat. Auth.: ORS 656.726(5)
 Stats. Implemented: ORS 656.012(2)(b), 656.283(1), 656.283(9) & 656.289(4)
 Hist.: WCB 1-1997, f. 3-20-97, cert. ef. 7-1-97; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

438-019-0040

Standards of Conduct for Attorneys and Parties

(1) Attorneys representing parties in mediation shall know the facts, the applicable law and the issues involved in their case, and understand the interests and needs of their clients which may affect the mediation process.

(2) Attorneys representing parties in mediation shall come to the mediation with authority to settle the issues or bring with them that person or those persons who have such authority.

(3) By consenting to mediation, all parties agree to bargain in good faith.

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 656.012(2)(b), 656.283(1), 656.283(9) & 656.289(4)
Hist.: WCB 1-1997, f. 3-20-97, cert. ef. 7-1-97

438-019-0050

Requests for Mediation

(1) The parties shall notify the Presiding Administrative Law Judge or designee of their desire to mediate their controversy. The parties may select a mediator from an approved list maintained by the Hearings Division. If the parties do not indicate a choice of mediator or cannot agree, a mediator may be selected by the Presiding Administrative Law Judge or designee.

(2) Persons who are not parties to a mediation may be included in mediation discussions with the consent of the mediator and the parties.

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 656.012(2)(b), 656.283(1), 656.283(9) & 656.289(4)
Hist.: WCB 1-1997, f. 3-20-97, cert. ef. 7-1-97

438-019-0060

Settlement Agreements

(1) Any resolution involving matters arising under ORS Chapter 656 that is reached by the parties shall be reduced to writing and shall comply with the requirements set forth in OAR 438.

(2) The parties may, by agreement, resolve issues that arise outside the scope of ORS Chapter 656 and reduce those agreements to writing. Such agreements, however, shall be separate from any agreement resolving the workers' compensation issues and shall not be enforceable by the Workers' Compensation Board.

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 656.012(2)(b), 656.283(1), 656.283(9) & 656.289(4)
Hist.: WCB 1-1997, f. 3-20-97, cert. ef. 7-1-97

DIVISION 20

INTERPRETERS

438-020-0001

Special Definitions

As used in this division:

(1) "Certified interpreter" means an interpreter who has been certified under ORS 45.291;

(2) "Disabled person" means a person who cannot readily understand the proceedings because of deafness or a physical hearing impairment, or cannot communicate in the proceedings because of a physical speaking impairment;

(3) "Interpreter Services Coordinator" (ISC) means a Board employee who is responsible for coordinating procedures regarding the identification, appointment, notification, and removal of interpreters, and who, when designated by an Administrative Law Judge, is responsible for appointing an interpreter.

(4) "Non-English speaking person" means a person who, by reason of place of birth or culture, speaks a language other than English and does not speak English with adequate ability to communicate effectively in the proceedings;

(5) "Qualified interpreter" means a person who is readily able to communicate with the non-English speaking person and who can orally transfer the meaning of statements to and from English and the language spoken by the non-English speaking person. A qualified interpreter must be able to interpret in a manner that conserves the meaning, tone, level, style and register of the original statement, without additions or omissions. "Qualified interpreter" does not include any person who is unable to interpret the dialect, slang or specialized vocabulary used by the party or witness. In proceedings involving a "disabled person," a "qualified interpreter" means a person who is readily able to communicate with the disabled person, interpret the proceedings and accurately repeat and interpret the statements of the disabled person to the ALJ.

Stat. Auth.: ORS 656.726(5) & 183.310 - 183.400
Stats. Implemented: ORS 656.726(5), 45.273, 45.275, 45.285 & 45.288
Hist.: WCB 1-2001, f. 4-12-01, cert. ef. 7-1-01

438-020-0005

ALJ Designation

Pursuant to ORS 45.275(1), an Administrative Law Judge (ALJ) is empowered to appoint qualified interpreters in hearings over which he/she presides. The ALJ may designate the Hearings Division's Interpreter Services Coordinator (ISC) or another designee to appoint the interpreter.

Stat. Auth.: ORS 656.726(5) & 183.310 - 183.400
Stats. Implemented: ORS 656.726(5), 45.273, 45.275, 45.285 & 45.288
Hist.: WCB 1-2001, f. 4-12-01, cert. ef. 7-1-01

438-020-0010

Notice of Need for and Appointment of Interpreter

(1) When a party or a party's attorney determines that an interpreter is needed, the attorney, or an unrepresented claimant, shall immediately notify the Hearings Division's ISC. Postal notification or FAX is preferred, although telephonic notification will be accepted. Notification shall contain:

- (a) The claimant's name;
- (b) The WCB case number;
- (c) The insurer claim number;
- (d) The date, time and location of the hearing;
- (e) The assigned ALJ; and
- (f) The specific interpretation needs, such as the language and dialect, the need for multiple interpreters and the anticipated length of the proceeding if it is reasonably expected to last more than two hours;

(2) The ISC, another designee of the assigned ALJ, or the assigned ALJ will appoint a certified or qualified interpreter and promptly notify the parties, or their representatives, of the name of the appointed interpreter.

(3) If there is an objection to the appointed interpreter, the objecting party shall communicate the objection to the assigned ALJ within a reasonable time.

(4) If, after the appointment of an interpreter, a proceeding is postponed or continued for reasons other than, and not including, an objection to or dissatisfaction with an appointed interpreter, it shall be presumed that the parties have no objection to the use of an interpreter previously appointed for the case and to whom no objection was made within a reasonable time after such appointment.

Stat. Auth.: ORS 656.726(5) & 183.310 - 183.400
Stats. Implemented: ORS 656.726(5), 45.273, 45.275, 45.285 & 45.288
Hist.: WCB 1-2001, f. 4-12-01, cert. ef. 7-1-01

438-020-0015

Removal of Interpreter

After the appointment of an interpreter, the ALJ shall remove the interpreter and another interpreter shall be appointed if, at any time prior to or during the hearing, the ALJ determines that:

- (1) The appointed interpreter has a conflict of interest with the ALJ, any party, attorney or witness;
- (2) The appointed interpreter is unable to adequately interpret and/or is unable to understand or be understood by the ALJ, a party, an attorney or a witness;
- (3) The appointed interpreter is unable or unwilling to cooperate with the ALJ, a party, an attorney or a witness; or
- (4) Other good cause exists, in the discretion of the ALJ, to remove the appointed interpreter.

Stat. Auth.: ORS 656.726(5) & 183.310 - 183.400
Stats. Implemented: ORS 656.726(5), 45.273, 45.275, 45.285 & 45.288
Hist.: WCB 1-2001, f. 4-12-01, cert. ef. 7-1-01

438-020-0020

Cancellation

When a party or a party's attorney becomes aware that interpreter services are no longer needed, the attorney for the party, or the unrepresented party, shall immediately notify the assigned ALJ.

Stat. Auth.: ORS 656.726(5) & 183.310 - 183.400
Stats. Implemented: ORS 656.726(5), 45.273, 45.275, 45.285 & 45.288
Hist.: WCB 1-2001, f. 4-12-01, cert. ef. 7-1-01

DIVISION 21

BOARD MEETINGS

438-021-0005

Purpose

The purpose of these rules is to establish a standard procedure for regular open meetings of the Workers' Compensation Board. With the exception of its review of contested cases and any other confidential or privileged matter, it is the specific intent of the Board to make the public aware of its deliberations, decisions, and the information upon which such decisions are made.

Stat. Auth.: ORS 656.726(5)
Stats. Implemented: ORS 656.726(5)
Hist.: WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02

438-021-0010

Regularly Scheduled Meetings

(1) In consultation with the Board and in accordance with ORS 192.610 to 192.690, the Chairperson shall establish the time, date, and place for the Board or Committees of the Board to meet. In any event, the Chairperson shall call a meeting of the Board:

- (a) Within 30 days of adoption of this rule;
(b) Within 30 days of a reconstitution of the Board;
(c) Within 30 days of written notice from a majority of Board Members that a Board meeting must be held; and

(d) At least once within every quarter of the calendar year.
(2) Nothing in this rule will prevent the Chairperson from calling more frequent meetings of the Board.

Stat. Auth.: ORS 656.726(5)
Stats. Implemented: ORS 656.726(5)
Hist.: WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02

438-021-0015

Duties of the Chairperson

(1) The Chairperson, or the Board Members calling the meeting, shall prepare the agenda for each meeting.

(2) The order of business for Board meetings shall be as follows:

- (a) Call to order;
(b) Approval of the agenda and order of business;
(c) Approval of minutes of the previous meetings;
(d) Reports of the administrative staff;
(e) Any unfinished business;
(f) New business;
(g) Public comment;
(h) Announcements; and
(i) Adjournment.

Stat. Auth.: ORS 656.726(5)
Stats. Implemented: ORS 656.726(5)
Hist.: WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02

438-021-0020

Consultation of the Board

(1) The Chairperson shall consult with the Board on all matters requiring such consultation under ORS 656.001 to 656.990 during meetings as set forth in these rules.

(2) These consultations shall be made prior to any decision by the Chairperson.

Stat. Auth.: ORS 656.726(5)
Stats. Implemented: ORS 656.726(5)
Hist.: WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02

DIVISION 22

RULEMAKING PROCEDURES

438-022-0005

Adoption of Attorney General's Model Rules

To the extent that the following rules are applicable to the Workers' Compensation Law (Chapter 656), the Board hereby adopts by reference OAR 137-001-0005 through 137-001-0100 (Attorney General's Model Rules for Rulemaking), as adopted by the Department of Justice effective January 1, 2006.

Stat. Auth.: ORS 656.726(5) & 654.025(2)
Stats. Implemented: ORS 183.341(4)
Hist.: WCB 1-2003, f. 2-21-03, cert. ef. 5-1-03; WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04; WCB 1-2007, f. 1-19-07, cert. ef. 3-1-07

438-022-0010

Notice of Rulemaking

(1) Prior to adoption, amendment or repeal of any administrative rule, other than a temporary rule adopted under ORS 183.335(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(8) at least 28 days before the effective date of the intended action;

(c) By mailing a copy of the notice to the legislators specified in ORS 183.335(15) at least 49 days before the effective date of the intended action; and

(d) 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(8) at least 21 days before the hearing.

Stat. Auth.: ORS 656.726(5) & 654.025(2)
Stats. Implemented: ORS 183.341(4)
Hist.: WCB 1-2003, f. 2-21-03, cert. ef. 5-1-03; WCB 1-2004, f. 6-23-04 cert. ef. 9-1-04

DIVISION 82

RULES OF 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 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

(1) 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 2601 25th Street SE, Suite 150, Salem, Oregon 97302-1282, and shall contain the applicant's mailing address and telephone number, if 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 subsection 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; WCB 1-1999, f. 8-24-99, cert. ef. 11-1-99

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 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 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, if 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, 2601 25th Street SE, Suite 150, Salem, OR 97302-1282 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 a 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; WCB 1-1999, f. 8-24-99, cert. ef. 11-1-99

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 Chapters 656 and 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.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0010

Effective Date; Applicability

These rules are effective March 1, 1998 and shall apply to all requests for hearing pending 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; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

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 settlements, formal and informal, 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.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

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.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 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, 654.750 to 654.780, and 654.991).

(2) "Administrative Law Judge": An Administrative Law Judge of the Hearings Division who is a member of the Oregon State Bar.

(3) "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 or practice described in a Citation, Correction Order or Variance.

(4) "Authorized Representative" means "authorized representative" as used in ORS 654.290(2)(d) or "representative of such employees" as used in ORS 654.078(2), and includes a bargaining unit representative, or an individual selected by employees who serves as their spokesperson.

(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 request for hearing 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, photograph, audiotape, videotape, or other tangible item 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 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 654.005(6).

(14) "Filed": A request for hearing will be considered filed when it is either actually received at any permanently staffed office of the Department of Consumer and Business Services, or when it is mailed if mailing is established by receipt of registered or certified mail bearing the stamp of the United States Postal Service showing the date of mailing. All other documents will be considered filed when mailed to or received by the Hearings Division, whichever occurs first.

(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) "OR-OSHA": The Oregon Occupational Safety and Health Division of the Department of Consumer and Business Services."

(18) "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.

(19) "Penalty": The dollar amount proposed in a written notice by OR-OSHA as the Director's assessment against a person for an alleged violation.

(20) "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 corporations, school districts and other public corporations or subdivisions. See ORS 654.005(7).

(21) "Presiding Administrative Law Judge": The Administrative Law Judge who presides over and administers the Hearings Division, as provided in ORS 656.724.

(22) "Representative": Any individual authorized by a party to represent the party in a contested case.

(23) "Request for Hearing": A written request for a hearing to contest a citation, notice or order issued by OR-OSHA.

(24) "Settlement": A written agreement which, when approved by all parties, will amend the contested OR-OSHA citation, notice or order and dispose of some or all issues in the case.

(25) "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 Oregon occupational safety or health law or rule.

(26) "Violation": The breach of a person's duty to comply with an Oregon occupational safety or health law, rule or order.

(27) "Withdrawal": A party's complete and unconditional abandonment of some or all of its allegations and contentions in a contested case.

Stat. Auth.: ORS 654.025(2)
 Stats. Implemented: ORS 654.025(2) & 654.005
 Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78; WCB 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; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

Filing Appeals

438-085-0111

Form and Content of Request for Hearing

(1) A request for hearing does not have to be in any special form, but it must:

(a) Identify the particular citation, notice or order that is appealed from, and the person to whom it was issued;

(b) Specify each alleged violation, penalty, correction order, or other OR-OSHA action that is contested;

(c) State the grounds upon which the request for hearing is based; and

(d) Clearly indicate whether the requesting party wants to participate in OR-OSHA's informal settlement process.

(e) Clearly indicate whether the period of time fixed for correction of a serious violation is being contested.

(2) A request for hearing should include the name, address and telephone number of the requesting 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.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0116

Where to File a Request for Hearing

All requests for hearing shall be filed with the Department of Consumer and Business Services, and should be directed to the Oregon Occupational Safety and Health Division at 350 Winter St. NE, Room 430, Salem, Oregon 97310, or with any permanently staffed office of the Workers' Compensation Board or OR-OSHA.

Stat. Auth.: ORS 654.025(2)
 Stats. Implemented: ORS 654.025(2) & 654.078(1)
 Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 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 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0131

Computing Time Periods

Time periods required or allowed by the Act or 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.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0141

Untimely Requests for Hearing

(1) If OR-OSHA alleges that a request for hearing was not filed timely, the case shall promptly be transmitted to the Hearings Division for a determination of that issue.

(2) If an Administrative Law Judge finds that a request for hearing was not filed timely, and that the Hearings Division lacks jurisdiction to grant a hearing on the merits of the case, the Administrative Law Judge shall issue an order dismissing the request for hearing.

Stat. Auth.: ORS 654.025(2) & 656.726(4)
 Stats. Implemented: ORS 654.025 & 654.078(1)-(3)
 Hist.: WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 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; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98, Renumbered from 438-085-0216

Jurisdiction Over Appeals: Untimely Appeals

438-085-0200

Special Definitions

For the purpose of mediations conducted by the Board, unless the context otherwise requires, the following definitions apply:

(1) Mediation. A voluntary process for resolving disputes by which a mediator assists two or more parties to a controversy in reaching a mutually acceptable resolution.

(2) Mediator. An Administrative Law Judge whose role is to assist the parties in resolving their dispute by mutual agreement. The mediator has no authority to decide the outcome of the controversy or to force settlement upon the parties.

(3) Party. For purposes of OAR 438-085-0200 through 438-085-0260, "party" means any person identified in 438-085-0026(18) and any other person identified by the mediator as necessary to the mediation.

Stat. Auth.: ORS 654.025(2) & 654.078

Stats. Implemented: ORS 183.502

Hist.: WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0210

Mediator Qualifications

(1) A mediator shall have completed at least 30 hours of basic mediation training and hold a certificate demonstrating such training.

(2) Such training shall address the following areas as outlined in OAR 718-040-0040(3):

- (a) Active listening, empathy and validation;
- (b) Sensitivity to and awareness of cross-cultural issues;
- (c) Maintaining neutrality;
- (d) Identifying and reframing interests and issues;
- (e) Establishing trust and respect;

(f) Using techniques to achieve agreement and settlement, including creating a climate conducive to resolution, identifying options, working toward agreement, and reaching consensus;

(g) Shaping and writing agreements; and

(h) Ethical standards for mediator conduct adopted by state and national organizations.

Stat. Auth.: ORS 654.025(2) & 654.078

Stats. Implemented: ORS 183.502

Hist.: WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

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.: WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 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

438-085-0220

Standards of Mediator Conduct

(1) Mediators have duties to the parties, to their profession, and to themselves. They shall be honest and unbiased, act in good faith, be diligent, and never seek to advance their own interests at the expense of the parties.

(2) The mediator must maintain impartiality toward all parties. Impartiality means a commitment to serve all mediation parties as opposed to a single party. The mediator shall disclose to the parties any affiliations which the mediator may have with any participant and obtain all parties' consent to proceed as mediator.

(3) The mediator has an obligation to assure that all parties understand the nature of the mediation process, the procedures to be utilized, and the particular role of the mediator. Each party's consent to proceed with mediation should be obtained early, prior to the beginning of substantive negotiations.

(4) The mediator shall inform the parties of their rights to withdraw from mediation at any time and for any reason. If the mediator believes that the parties are unable or unwilling to participate effectively in the mediation process, the mediator should suspend or

terminate the mediation. If the parties reach a final impasse, the mediator should not prolong unproductive discussions.

Stat. Auth.: ORS 654.025(2) & 654.078

Stats. Implemented: ORS 183.502

Hist.: WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0240

Standards of Conduct for Representatives and Parties

(1) A party may attend a mediation personally or through a representative.

(2) A party or its representative shall come to the mediation with authority to settle the issues, or bring with them or otherwise make available that person or those persons who have such authority.

(3) By consenting to mediation, all parties and their representatives agree to bargain in good faith.

Stat. Auth.: ORS 654.025(2) & 654.078

Stats. Implemented: ORS 183.502

Hist.: WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0250

Requests for Mediation

(1) The parties shall notify the assigned Administrative Law Judge of their desire to mediate their controversy. The parties may select a mediator from an approved list provided by the Hearings Division. If the parties do not indicate a choice of mediator or cannot agree, a mediator may be selected by the assigned Administrative Law Judge.

(2) Persons who are not parties to a mediation may be included in mediation discussions with the consent of the mediator and the parties.

Stat. Auth.: ORS 654.025(2) & 654.078

Stats. Implemented: ORS 183.502

Hist.: WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0260

Mediation Agreements

(1) Any resolution involving matters arising under the Act shall be reduced to writing.

(2) The parties may, by agreement, resolve issues that arise outside the scope of the Act and reduce those agreements to writing. Such agreements, however, shall be separate from any agreement resolving issues under the Act and shall not be enforceable by the Workers' Compensation Board.

(3) The parties shall advise the mediator in writing when a request for hearing has been resolved by an executed mediation agreement.

Stat. Auth.: ORS 654.025(2) & 654.078

Stats. Implemented: ORS 183.502

Hist.: WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

Procedures in Response to Appeals

438-085-0305

Transmittal of Documents to Hearings Division

(1) The Board will defer action on a Request for Hearing for 90 days unless:

(a) There is a withdrawal of the citation or Request for Hearing;

(b) A settlement is reached;

(c) There is an express waiver of participation in the OR-OSHA informal settlement conference process;

(d) An expedited hearing is required by ORS 654.078(6); or

(e) There is a motion or matter requiring action by an Administrative Law Judge.

(2) If, during the deferral period, the case is settled or the citation or request for hearing is withdrawn, or there is any other reason the case requires action by an Administrative Law Judge, OR-OSHA shall immediately transmit to the Hearings Division those documents necessary to allow the Administrative Law Judge to dismiss the request for hearing and close the case, or take whatever other action is required.

(3) At the expiration of 90 days or in all other cases described in section (1) of this rule, OR-OSHA shall transmit to the Hearings Division the following documents:

- (a) A statement of the reason for the transmittal;
- (b) A list of the documents transmitted;
- (c) The original request for hearing;
- (d) A copy of the contested citation, notice or order;
- (e) Any other document pertinent to the reason for the transmittal.

(4) OR-OSHA shall mail a copy of the notice of transmittal and list of transmitted documents to all parties.

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; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0306

Hearings Division Response to Request For Hearing

(1) When the Hearings Division receives a transmittal pursuant to OAR 438-085-0305, it shall caption and assign a docket number to the case. The case shall then be assigned to an Administrative Law Judge, who will thereafter be responsible for all case management, including all pre-hearing matters and the hearing itself.

(2) After a case has been received by the Hearings Division and assigned to an Administrative Law Judge, the Hearings Division shall mail the parties an acknowledgment and notice of case assignment.

(3) If the parties request Alternative Dispute Resolution assistance, the assigned Administrative Law Judge shall refer the case to the mediator requested by the parties, or selected by the assigned Administrative Law Judge if the parties so request.

Stat. Auth.: ORS 654.025(2)
Stats. Implemented: ORS 654.025
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78; WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

Parties and Representatives; Employee Third-Party Rights and Notice; Access to Documents

438-085-0406

Necessary Parties; Adding Parties

(1) OR-OSHA and the employer are necessary parties in all contested cases under the Act.

(2) If an affected employee or authorized representative requests a hearing pursuant to ORS 654.078(2) or 654.056(5), or requests to become a party pursuant to ORS 654.290(2)(d) and OAR 438-085-0411, such affected employee or authorized representative shall be a necessary party.

(3) Any person considered necessary by the Administrative Law Judge for a full and final determination of the issues in a case may be added upon petition pursuant to OAR 438-085-0426.

Stat. Auth.: ORS 183.335, 654.056(5) & 656.726(5)
Stats. Implemented: ORS 654.025, 654.078 & 654.290(2)(d)
Hist.: WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0411

Employee Rights

(1) Affected employees or authorized representatives may elect to participate as parties in a contested case in which they have not requested a hearing by submitting a request to the Hearings Division.

(2) An affected employee's or authorized representative's request to become a party in a case must be filed at least five days before the hearing, if any, on the merits of the case. The assigned Administrative Law Judge may otherwise allow an affected employee or authorized representative to participate as a party only upon a showing of good cause.

(3) The written request to become a party must show that the person is an affected employee or an authorized representative.

Stat. Auth.: ORS 654.025(2)
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

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.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 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 a 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) & 654.293
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

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.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 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 party requesting a hearing), Defendant."

(2) A contested case that originated with an application relating to a variance shall be titled, "(name of party requesting a

hearing), *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.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0511

Form of Documents

(1) All documents, other than exhibits submitted pursuant to OAR 438-085-0855, filed after the Hearings Division acknowledges transmittal of a contested case shall:

- (a) Contain the case title and docket number assigned by the Hearings Division and the name of the assigned Administrative Law Judge;
- (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 for filing or consideration any document that does not comply with this rule.

Stat. Auth.: ORS 654.025(2)
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0526

Amendments as of Right

(1) Unless otherwise provided by the Administrative Law Judge, amendments to the citation and to the request for hearing, including affirmative defenses, shall be allowed up to the date and time set for hearing.

(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 effective upon filing.

(4) If a party is prejudiced by the timing of the amendment, a postponement or continuance may be allowed.

Stat. Auth.: ORS 654.025(2)
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0531

Correction of Defective Request for Hearing

If a request for hearing fails to specify the matters contested and the grounds for the request for hearing, or otherwise fails to substantially comply with the requirements of ORS 654.078 and 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 requesting party to correct the defects by filing an amended request for hearing, or a supplement to the request for hearing, within such time as the Administrative Law Judge considers reasonable. If within the time permitted the requesting party fails to amend or supplement the request for hearing to conform with ORS 654.078 and OAR 438-085-0111, it may be dismissed by the Administrative Law Judge.

Stat. Auth.: ORS 183.335 & 656.726(5)
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

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 effective 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.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

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.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 2-1982, f. 6-22-82, ef. 8-2-82

438-085-0550

Ex Parte Communications

(1) Except for communications made in the context of a mediation or other settlement proceeding, there shall be no ex parte communication, concerning the merits of any pending case, with the assigned Administrative Law Judge.

(2) In the event a prohibited ex parte communication occurs, the assigned Administrative Law Judge shall place on the record a statement of the substance of the prohibited communication and shall notify the parties of the communication and of their right to rebut such communication.

Stat. Auth.: ORS 183.335 & 656.726(5)
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

Closing Cases by Withdrawal or Settlement

438-085-0606

Withdrawal of Request for Hearing

(1) The requesting party may file a written withdrawal of the request for hearing at any time before the Administrative Law Judge issues a final order.

(2) When a request for hearing is withdrawn, the Administrative Law Judge shall issue an order dismissing the request for hearing.

Stat. Auth.: ORS 654.025(2)
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78; WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0611

Withdrawal by Affected Employee, Authorized Representative, or Intervenor

(1) An affected employee, an authorized representative, or an intervenor in a contested case may withdraw as a party at any time before the Administrative Law Judge issues a final order.

(2) Such a withdrawal shall be effective upon filing.

Stat. Auth.: ORS 183.335 & 656.726(5)
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0616

Withdrawal by OR-OSHA

OR-OSHA may withdraw its contested citation, notice or order at any time before an order issued by an Administrative Law Judge becomes final. Upon such withdrawal, the Administrative Law Judge shall issue an order vacating the citation, notice or order and dismissing the request for hearing.

Stat. Auth.: ORS 654.025(2)

Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78; WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

**438-085-0621
Settlement**

- (1) The parties may enter into a settlement agreement at any time.
- (2) A signed copy of any settlement entered into after the filing of a request for hearing shall be submitted to the Hearings Division, and the Administrative Law Judge shall issue an order dismissing the request for hearing, or take other appropriate action.

Stat. Auth.: ORS 654.290 & 656.726(4)
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78; WCB 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; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

**438-085-0631
Sanctions for Failure to File Documents**

If a party fails to file any document when due, the Administrative Law Judge may, in his or her 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; or
- (2) Enter an order dismissing the request for hearing or vacating the citation.

Stat. Auth.: ORS 654.025(2)
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

Pre-Hearing Procedures

**438-085-0710
Setting and Notice of Hearing**

- (1) Except as required by ORS 654.078(6), notice of a scheduled hearing shall be given to all parties by the Hearings Division at least 50 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.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

**438-085-0715
Place of Hearing**

The hearing shall be held in Oregon at a place that is reasonably convenient for the party requesting the hearing 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.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

**438-085-0718
Hearing Security**

Any party or representative having knowledge or reasonable belief that any party or witness may present a danger or may be a threat to anyone involved in the hearing shall immediately notify the assigned Administrative Law Judge and the opposing parties or representatives 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 656.725(4)
Stats. Implemented: ORS 656.726(4)
Hist.: WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

**438-085-0720
Postponement or Continuance of Hearing**

- (1) A scheduled hearing shall not be postponed except by order of an Administrative Law Judge upon a finding of good cause.
- (2) Continuance and/or bifurcation of a contested case shall be allowed at the discretion of the Administrative Law Judge upon consideration of the facts and circumstances providing the basis for the Motion for continuance and/or bifurcation.

Stat. Auth.: ORS 654.025(2)
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

**438-085-0725
Statement of Issues; Pre-Hearing Conference**

At any time before hearing the Administrative Law Judge may order the parties to:

- (1) 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 attend a pre-hearing conference with the Administrative Law Judge for the purpose of simplifying or clarifying the issues or expediting the proceeding.

Stat. Auth.: ORS 183.335 & 656.726(5)
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

**438-085-0730
Consolidation or Separation**

If no substantial right of any party will be prejudiced, the Administrative Law Judge may:

- (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.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

**438-085-0735
Motions**

- (1) All motions shall be filed with the Administrative Law Judge as soon as practicable.
- (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 14 days from the date of receipt of such motion, or such time as the Administrative Law Judge may allow, to file a written response to the motion. A written reply may be filed within seven (7) days of receipt of the last response.
- (4) No additional arguments may be submitted without the prior approval of the Administrative Law Judge.

Stat. Auth.: ORS 183.335 & 656.726(5)
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

**438-085-0740
Discovery**

- (1) Unless otherwise provided by the assigned Administrative Law Judge, within 14 days after the mailing of the notice of case assignment pursuant to OAR 438-085-0306 OR-OSHA shall provide to the other parties or their representatives copies of all documents in its possession pertaining to the contested matter, including relevant rules, unless previously provided.
- (2) Unless otherwise provided by the assigned Administrative Law Judge, within 14 days of OR-OSHA's mailing, the other parties or their representatives shall furnish to OR-OSHA copies of documents in their possession pertaining to the matter which they did not receive from OR-OSHA, unless previously provided.

(3) Copies of documents acquired after the initial exchanges shall be provided to the other parties immediately after the disclosing party's receipt of the documents.

(4) Subject to limitations imposed pursuant to OAR 438-085-0805(2), depositions and interrogatories are allowed by agreement of the parties or upon motion of a party and an order of the Administrative Law Judge.

(5) A reporter's fee for a deposition shall be paid by the party who requested the deposition unless otherwise agreed by the parties or directed by the assigned Administrative Law Judge.

(6) Notwithstanding sections (1) through (3), the assigned Administrative Law Judge may, after discussion with the parties, set timelines for completion of discovery.

(7) Where a "document" cannot be photocopied but it is discoverable, the possessing party shall so advise the other party or parties and shall cooperate in arranging for its inspection.

(8) Notwithstanding sections (1) through (3), privileged and work product documents shall not be subject to disclosure.

(9) Failure of a party to comply with this rule or with any requirements set by the assigned Administrative Law Judge may result in continuance of the hearing, exclusion of the documents from the evidentiary record, vacation of the citation, dismissal of the request for hearing, or such other sanctions as the assigned Administrative Law Judge may deem appropriate.

Stat. Auth.: ORS 183.335, 183.425(2) & 656.726(5)
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

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 required by law for witnesses in civil actions. Parties and employees of OR-OSHA shall not be paid such witness fees or mileage.

Stat. Auth.: ORS 183.335 & 656.726(5)
Stats. Implemented: ORS 183.440, 654.025, 654.078 & 654.130
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0750

Change of Administrative Law Judge

(1) The assigned Administrative Law Judge may withdraw from a case whenever he or she considers it appropriate.

(2) Any party may request that the assigned Administrative Law Judge remove himself or herself from a case on the grounds of personal bias or conflict of interest. If the assigned Administrative Law Judge declines the request, the party may file with the Presiding Administrative Law Judge a motion for removal and supporting affidavit.

(3) If, in the opinion of the Presiding Administrative Law Judge, the motion for removal is filed with due diligence and the supporting affidavit is sufficient on its face, the Presiding Administrative Law Judge may, in his or her discretion, hold a hearing, and shall either grant or deny the motion.

Stat. Auth.: ORS 655.726(4)
Stats. Implemented: ORS 654.025 & 654.078

Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 7-1987, f. 12-23-87, ef. 1-1-88; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0755

Extensions of Time

Requests for extensions of time for filing of any documents shall be received in the office of the assigned Administrative Law Judge 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.: WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

Hearings

438-085-0800

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, whenever possible, without a hearing.

(2) A case may be decided by the Administrative Law Judge without a hearing upon the joint agreement of all parties and the assigned Administrative Law Judge.

Stat. Auth.: ORS 183.335 & 656.726(5)
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

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 to avoid delay. The Administrative Law Judge has the authority to:

- (1) Issue subpoenas;
- (2) Order depositions to be taken or make limitations on discovery;
- (3) Hold conferences for settlement of the case, clarification of the issues, or such other purpose which furthers the goal of full, prompt, and fair resolution of the case;
- (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) Prohibit photographing, televising, or sound or video recording of the hearing from within or outside the hearing room.
- (13) Take any other action necessary for a full and fair disposition of the case.

Stat. Auth.: ORS 183.335, 656.726(5) & 654.025
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

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 order and the right to request judicial review in accordance with ORS 183.480 to 183.500. A default order may be issued only upon a prima facie case made in the evidentiary record.

(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 183.415(6), 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74;
WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 3-1989, f. 3-31-89, ef. 5-1-89; WCB
3-1997, f. 12-12-97, cert. ef. 3-1-98

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 subsection (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.

(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, except that prior to closure of the evidentiary record, in a case where witnesses have been excluded, no party may obtain, and the reporter or reporting firm shall not provide, any transcript of witness testimony or portion thereof without prior authorization by the Administrative Law Judge.

(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.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74;
WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB
3-1997, f. 12-12-97, cert. ef. 3-1-98

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 a proposed OR-OSHA order that will grant, deny, modify or revoke a variance has the burden of proving that the proposed order is incorrect.
- (3) 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.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74;
WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

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 offer documents as evidence;
 - (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 offer evidence to impeach any witness regardless of which party first called the witness to testify; and
 - (e) To offer rebuttal evidence.
- (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.
- (5) For purposes of ORS 654.078(6) and notwithstanding OAR 438-085-0026(15) and sections (1) through (4) of this rule, the issue of the time fixed for correction of a serious violation may be determined based upon a hearing record consisting of affidavits, stipulations, and such other documentary evidence as permitted by the ALJ.

Stat. Auth.: ORS 183.335 & 656.726(5)
Stats. Implemented: ORS 654.025 & 654.078

Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74;
WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB
3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0835

Exclusion of Witness from Hearing Room

Upon motion of a party, the Administrative Law Judge may exclude an opposing party's witness from the hearing room if the basis of the motion is to prevent the witness from hearing testimony. A party or its representative shall not be excluded on the grounds that the party or its representative will be a witness.

Stat. Auth.: ORS 183.335 & 656.726(5)
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74;
WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0840

Rules of Evidence

The rules of privilege and evidence in proceedings under this chapter are governed by ORS 183.450(1) through (4).

Stat. Auth.: ORS 183.335, 656.726(5) & 654.290(2)
Stats. Implemented: ORS 183.450(1) - 183.450(4), 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74;
WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0845

Official Notice

(1) The Administrative Law Judge may take official 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 183.450(4), 654.025 & 654.078
Hist.: WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 4-1978, f. 3-31-78, ef. 4-1-78;
WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95;
WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0850

Offers of Proof

Whenever the Administrative Law Judge excludes a document or the testimony of a witness, the party adversely affected may make an offer of proof for the record in a form determined by the Administrative Law Judge.

Stat. Auth.: ORS 183.335 & 656.726(5)
Stats. Implemented: ORS 654.025 & 654.078
Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74;
WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB
3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0855

Exhibits

(1) Unless otherwise required by the Administrative Law Judge, and not later than 21 days before the hearing, OR-OSHA shall provide to the assigned Administrative Law Judge legible copies of all proposed exhibits, numbered chronologically, earliest first, and indexed. Dated proposed exhibits shall precede those which are undated. Exhibit numbers shall be placed at the lower right corner of each page, except that depositions shall be numbered on the cover page only. OR-OSHA shall also provide to the other parties or their representatives an index of all proposed exhibits and copies of any proposed exhibits not previously provided pursuant to OAR 438-085-0740. Not less than 14 days before the hearing, or within seven days of receipt of the OR-OSHA index, whichever is later, the other parties or their representatives shall provide to OR-OSHA and to the Administrative Law Judge legible copies of any additional proposed exhibits, numbered chronologically and indexed to coincide with OR-OSHA's exhibits. For example, a proposed exhibit falling chronologically between those OR-OSHA has numbered "6" and "7" shall be designated Exhibit 6A.

(2) 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 the object or real

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evidence shall be responsible for providing the description or photograph, and for retaining custody of the object until all rights to review have expired.

(3) The parties shall offer as exhibits copies of only those portions of each Division of the Oregon Occupational Safety and Health Code upon which they intend to rely or which are otherwise relevant, and which were in effect and/or applicable on the dates pertaining to the issues in the case. In the event the relevant OR-OSHA rule adopts a Federal rule but does not contain the text thereof, a copy of the applicable Federal rule shall also be provided.

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

Stats. Implemented: ORS 654.025 & 654.078

Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 1-1994, f. 11-1-94, cert. ef. 1-1-95; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

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 obtained from a viewing.

Stat. Auth.: ORS 183.335 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

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 Administrative Law Judge, no factual information or evidence that is not made part of the record shall be considered by the Administrative Law Judge in making determinations.

(3) The Opinion and Order of the Administrative Law Judge shall be deemed to be a final order of the Board.

(4) 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.: WCB 5-1973, f. & ef. 12-20-73; WCB 10-1974, f. 3-19-74, ef. 4-15-74; WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98

438-085-0870

Reconsideration

(1) The Administrative Law Judge may withdraw any 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 a 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 any order that has been withdrawn.

Stat. Auth.: ORS 183.355 & 656.726(5)

Stats. Implemented: ORS 654.025 & 654.078

Hist.: WCB 6-1977, f. 5-5-77, ef. 6-1-77; WCB 2-1982, f. 6-22-82, ef. 8-2-82; WCB 3-1997, f. 12-12-97, cert. ef. 3-1-98