

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

In the Matter of the Amendment of Oregon Administrative Rules (OAR) Chapter 436,	ORDERS OF ADOPTION
Division 045, Reopened Claims Program.....	No. 03-072
Division 055, Certification of Claims Examiners.....	No. 03-073
Division 060, Claims Administration	No. 03-074
Division 070, Workers' Benefit Fund.....	No. 03-075
Division 075, Retroactive Program.....	No. 03-076
Division 085, Premium Assessments: Assessments/Contributions	No. 03-077
Division 150, Workers' Benefit Fund Claims Program.....	No. 03-078

The Director of the Department of Consumer and Business Services, pursuant to the general rulemaking authority under ORS 656.726(4), and in accordance with the procedure provided by ORS 183.335, amends OAR chapter 436, Divisions 045, 055, 060, 070, 075, 085, and 150.

On September 12, 2003, the Workers' Compensation Division filed the *Notice of Proposed Rulemaking/Hearing* with the Secretary of State to amend these rules. A Notice of Periodic Review of Rules was contained in the *Notice*. The *Statement of Need and Fiscal Impact* accompanied the *Notice*. Copies of the *Notice* and *Statement* were mailed to interested persons and legislators in accordance with ORS 183.335(1) and OAR 436-001-0000 and posted to the Workers' Compensation Division's web site. The notice was published in the October, 2003 *Oregon Bulletin*.

On October 22, 2003, a public hearing was held as announced. In addition, the record was held open for written testimony through 5:00 p.m. October 27, 2003. A written summary of testimony received and agency responses thereto, as well as principal documents relied upon, will be on file and available for public inspection upon request during regular business hours, 8:00 a.m. to 5:00 p.m., Monday through Friday, in the Administrator's Office, Workers' Compensation Division, Labor & Industries Building, 350 Winter Street NE, Salem, Oregon 97301-3879.

RULE SUMMARY:

These rules have been amended to reflect Senate Bill 233's changes to ORS chapter 656.740. The time frame for appeal of a proposed order or proposed assessment of civil penalty will no longer be 60 days following the party's receipt of notice, but instead 60 days from the date the order is mailed by the department. In addition, a number of "housekeeping" amendments have been made.

FINDINGS:

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

- a) The applicable rulemaking procedures have been followed.
- b) These rules are within the Director's authority.

- c) The rules being adopted are a reasonable administrative interpretation of the statutes and are required to carry out statutory responsibilities.

IT IS THEREFORE ORDERED THAT:

- (1) Amendments to OAR Chapter 436, as set forth in Exhibit "A", attached hereto and incorporated by reference herein, **are adopted on this 3rd day of December 2003 to be effective January 1, 2004.**
- (2) A certified copy of the amended rules adopted herein shall be filed with the Secretary of State.
- (3) A copy of the amended rules with revision marks shall be filed with the Legislative Counsel pursuant to ORS 183.715 within ten (10) days after filing with the Secretary of State.

DATED this 3rd day of December, 2003.

DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES

/s/ John L. Shilts

John L. Shilts, Administrator
Workers' Compensation Division

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

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

Attachments

Distribution: WCD-ID, S0, S1, S2, S3, NM

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 045**

REOPENED CLAIMS PROGRAM

EFFECTIVE JANUARY 1, 2004

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**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
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REOPENED CLAIMS PROGRAM**

**EXHIBIT "A"
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 045**

436-045-0001 Authority for Rules

These rules are promulgated under the director's authority contained in ORS 656.625 and ORS 656.726

Stat. Auth.: ORS 656.625 and ORS 656.726

Stats. Implemented: ORS 656.625

Hist: Filed 12-18-87 as WCD Admin. Order 8-1987, eff. 1-1-88.

436-045-0002 Purpose

The purpose of these rules is to establish guidelines for administering disbursements made from the Reopened Claims Program established to reimburse compensation paid as a result of awards made by the Board or voluntary claim reopenings pursuant to ORS 656.278.

Stat. Auth.: ORS 656.625 and ORS 656.726

Stats. Implemented: ORS 656.625 and ORS 656.726

Hist: Filed 12-18-87 as WCD Admin. Order 8-1987, eff. 1-1-88.
Amended 12/4/97 as WCD Admin. Order 97-061, eff. 1/1/98
Amended 12/6/01 as WCD Admin. Order 01-062, eff. 1/1/02

436-045-0003 Applicability of Rules

(1) These rules are effective January 1, 2002, and shall apply to all requests for reimbursement from the Reopened Claims Program.

(2) These rules apply to all awards ordered on claims opened by the Board pursuant to ORS 656.278 on or after January 1, 1988 and all voluntary claim reopenings on or after January 1, 2002.

(3) These rules carry out the provisions of ORS 656.625.

(4) Applicable to this chapter, the director may, unless otherwise obligated by statute, in the director's discretion waive any procedural rules as justice so requires.

Stat. Auth.: ORS 656.625

Stats. Implemented: ORS 656.236, ORS 656.289 and ORS 656.625

Hist: Filed 12-18-87 as WCD Admin. Order 8-1987, eff. 1-1-88
Amended 6-18-90 as WCD Admin. Order 10-1990, eff. 7-1-90 Temp
Amended 11-30-90 as WCD Admin. Order 22-1990, eff. 12-26-90
Amended 12-13-91 as WCD Admin. Order 14-1991, eff. 1-1-92
Amended 12/4/97 as WCD Admin. Order 97-061, eff. 1/1/98
Amended 12/6/01 as WCD Admin. Order 01-062, eff. 1/1/02

436-045-0005 Definitions

As used in OAR 436-045-0001 through 436-045-0030 unless the context requires otherwise:

(1) "Board" means the Workers' Compensation Board of the Department of Consumer and Business Services.

(2) "Compensation" includes all benefits payable as a result of any order or award made by the Board or voluntary claim reopening pursuant to ORS 656.278.

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

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

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

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

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

(8) "Paying Agency" means the insurer, self-insured employer, self-insured employer group or designated representative of the self-insured employer/group, responsible for paying compensation for a compensable injury.

(9) "Reopened Claims Program" and "Program" means the program established pursuant to ORS 656.625.

(10) "Voluntary Claim Reopening" means any claim reopened by the insurer or self-insured employer to provide benefits or to grant additional medical or hospital care to the claimant pursuant to ORS 656.278.

Stat. Auth.: ORS 656.726

Stats. Implemented: ORS 656.726

Hist: Filed 12-18-87 as WCD Admin. Order 8-1987, eff. 1-1-88
Amended 6-18-90 as WCD Admin. Order 10-1990, eff. 7-1-90 Temp
Amended 11-30-90 as WCD Admin. Order 22-1990, eff. 12-26-90
Amended 12/4/97 as WCD Admin. Order 97-061, eff. 1/1/98
Amended 12/6/01 as WCD Admin. Order 01-062, eff. 1/1/02

436-045-0006 Administration of Rules

Any orders issued by the divisions in carrying out the director's authority to enforce ORS Chapter 656 and these rules are considered orders of the director.

Stat. Auth.: ORS 656.704 and ORS 656.726

Stats. Implemented: ORS 656.704 and ORS 656.726

Hist: Filed 12-18-87 as WCD Admin. Order 8-1987, eff. 1-1-88
Amended 12/4/97 as WCD Admin. Order 97-061, eff. 1/1/98

436-045-0008 Administrative Review

(1) Any party as defined by ORS 656.005 aggrieved by a proposed order or proposed assessment of civil penalty of the director or division issued pursuant to ORS 656.745 or 656.750 may request a hearing by the Hearings Division of the Workers' Compensation Board in accordance with ORS 656.740 (section 9, chapter 170, Oregon Laws 2003).

(a) The request for hearing must be sent in writing to the Administrator of the Workers' Compensation Division. No hearing shall be granted unless the request specifies the grounds upon which the person requesting the hearing contests the proposed order or assessment.

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(b) The request for hearing must be filed with the Administrator of the Workers' Compensation Division by the aggrieved person within 60 days after the mailing of the proposed order or assessment. No hearing shall be granted unless the request is mailed or delivered to the administrator within 60 days after the mailing of the proposed order or assessment.

(2) Any party as defined by ORS 656.005 aggrieved by an action or order of the director or division pursuant to these rules, other than as described in section (1), where such action or order qualifies for review by hearing before the director as a contested case, may request review pursuant to ORS 183.310 through 183.550 as modified by these rules pursuant to ORS 183.315(1). When the matter qualifies for review as a contested case, the process for review will be as follows:

(a) The request for hearing must be sent in writing to the Administrator of the Workers' Compensation Division. No hearing will be granted unless the request specifies the grounds upon which the action or order is contested and is mailed or delivered to the administrator within 30 days of the action or from the date of mailing or other service of an order.

(b) The hearing will be conducted by an Administrative Law Judge of the Office of Administrative Hearings.

(c) Any proposed order issued by the administrative law judge is subject to revision by the director. The director may allow objections to the proposed order to be filed for the director's consideration within 30 days of issuance of the proposed order.

Stat. Auth.: ORS 656.704, ORS 656.726(4) and ORS 656.745

Stats. Implemented: ORS 656.236, ORS 656.289, ORS 656.625, ORS 656.704, ORS 656.726(8), section 9, chapter 170, Oregon Laws 2003, and ORS 656.745

Hist: Filed 12-18-87 as WCD Admin. Order 8-1987, eff. 1-1-88
Amended 6-18-90 as WCD Admin. Order 10-1990, eff. 7-1-90 Temp
Amended 11-30-90 as WCD Admin. Order 22-1990, eff. 12-26-90
Amended 12/4/97 as WCD Admin. Order 97-061, eff. 1/1/98
Amended 12/3/03 as WCD Admin. Order 03-072, eff. 1/1/04

436-045-0010 Criteria for Eligibility

(1) In order to qualify for reimbursement from the Reopened Claims Program there must be:

(a) An order or award issued by the Board upon its own motion pursuant to ORS 656.278 and as provided by OAR Chapter 438, Division 12 or a voluntary claim reopening; and

(b) Verifiable compensation paid in accordance with the order or award issued by the Board or voluntary claim reopening, including permanent disability awarded as a result of a reopening due to a new or omitted medical condition pursuant to ORS 656.278(1)(b).

(2) Notwithstanding paragraph (1)(b) of this rule, reimbursement may be made from the Program for reasonable overpayments of temporary disability. Reasonable overpayments are those made from the date a worker becomes medically stationary, returns to work or is released to work until the insurer is notified or should have known of the status change.

(3) Costs for claims to subject workers of an employer who is in a noncomplying status as defined in ORS 656.052 are not eligible for reimbursement from the Program but remains a cost recoverable from the employer as provided by ORS 656.054(3).

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Stat. Auth.: ORS 656.625
Stats. Implemented: ORS 656.236, ORS 656.289 and ORS 656.625
Hist: Filed 12-18-87 as WCD Admin. Order 8-1987, eff. 1-1-88
 Amended 12/4/97 as WCD Admin. Order 97-061, eff. 1/1/98
 Amended 12/6/01 as WCD Admin. Order 01-062, eff. 1/1/02

436-045-0020 Limitation of Program

(1) Reimbursement shall be limited to the monies available in the Workers' Benefit Fund.

(2) In the event of insufficient funds in the Workers' Benefit Fund, the director shall have final authority to determine an equitable distribution which will proportionately distribute the available funds among the claims having qualified for reimbursement under the Program.

Stat. Auth.: ORS 656.625
Stats. Implemented: ORS 656.625
Hist: Filed 12-18-87 as WCD Admin. Order 8-1987, eff. 1-1-88
 Amended 12/4/97 as WCD Admin. Order 97-061, eff. 1/1/98

436-045-0025 Dispositions

(1) In order for a disposition of a claim by the parties to be considered for reimbursement eligibility under the Reopened Claims Program, it must be submitted to the director during the period of time in which the claim remains open under the Board's Own Motion or voluntary claim reopening.

(2) Dispositions submitted in accordance with (1) are not eligible to receive reimbursement from the Reopened Claims Program unless made with the prior written approval of the director.

(3) Requests for written approval of proposed dispositions shall include:

(a) A copy of the proposed disposition which specifies the amount of the proposed contribution to be made from the Reopened Claims Program;

(b) A statement from the insurer indicating how the amount of the contribution was calculated;

(c) Any other information as required by the director.

(4) The director will not approve the disposition for reimbursement if the proposed contribution from the Program exceeds a reasonable projection of that claim's future liability to the Program under that Board's Own Motion reopening or voluntary claim reopening.

Stat. Auth.: ORS 656.236, ORS 656.289 and ORS 656.625
Stats. Implemented: ORS 656.236, ORS 656.289 and ORS 656.625
Hist: Filed 6-18-90 as WCD Admin. Order 10-1990, eff. 7-1-90 Temp
 Amended 11-30-90 as WCD Admin. Order 22-1990, eff. 12-26-90
 Amended 12-13-91 as WCD Admin. Order 14-1991, eff. 1-1-92
 Amended 12/4/97 as WCD Admin. Order 97-061, eff. 1/1/98
 Amended 12/6/01 as WCD Admin. Order 01-062, eff. 1/1/02

436-045-0030 Reimbursement

(1) Reimbursement shall be made by Compliance quarterly after receipt and approval of documentation of compensation paid by the paying agent.

(2) The director, by bulletin, shall prescribe the form and format for requesting

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reimbursement from the Program. Documentation to support the reimbursement request shall include but not be limited to:

(a) Net temporary disability compensation paid, net permanent disability paid, and net medical compensation paid for dates of injury prior to January 1, 1966. For purposes of this section, "net" compensation paid means the total compensation paid less any recoveries, including but not limited to, third party recovery, Retroactive Program reimbursement, and Handicapped Workers' Program reimbursement.

(b) Payment certification statement.

(c) Any other information deemed necessary by the director.

(3) Periodically Compliance shall audit the physical file of the paying agent to validate the amount reimbursed and to verify that the closing report is correct. Reimbursement shall not be approved if, upon such audit, it is found:

(a) Payments were not authorized in the Board's Own Motion order or voluntary claim reopening; or

(b) Payments of temporary disability compensation were made for periods of time during which the worker did not qualify as a "worker" pursuant to ORS 656.005(30); or

(c) Compensation has been paid as a result of untimely, inaccurate, or improper claims processing; or

(d) The separate payments of compensation have not been documented, as required under generally accepted accounting procedures; or

(e) Medical payments for claims with injury dates prior to January 1, 1966 are in excess of what should have been paid if paid in accordance with OAR 436-009-0030 and properly audited as required by OAR 436-009-0020; or

(f) Permanent disability payments were made in claims reopened for other than a new medical or omitted condition.

Stat. Auth.: ORS 656.625

Stats. Implemented: ORS 656.625

Hist: Filed 12-18-87 as WCD Admin. Order 8-1987, eff. 1-1-88.
Amended 6-18-90 as WCD Admin. Order 10-1990, eff. 7-1-90 Temp
Amended 11-30-90 as WCD Admin. Order 22-1990, eff. 12-26-90
Amended 12/4/97 as WCD Admin. Order 97-061, eff. 1/1/98
Amended 12/6/01 as WCD Admin. Order 01-062, eff. 1/1/02

Secretary of State
Certificate and Order for Filing
 PERMANENT ADMINISTRATIVE RULES

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

December 3, 2003 by the
 Date prior to or same as filing date

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

OAR chapter 436
 Administrative Rules Chapter No.

Fred Bruyns (503) 947-7717
 Rules Coordinator Telephone

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to become effective January 1, 2004 Rulemaking Notice was published in the October 2003 *Oregon Bulletin*.**
 Date upon filing or later Month and Year

RULEMAKING ACTION

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

ADOPT: OAR 436-050-0165, 436-050-0480

AMEND: OAR

436-045-0008	436-050-0080	436-050-0180	436-050-0290	436-080-0003	436-080-0070
436-050-0003	436-050-0090	436-050-0185	436-050-0400	436-080-0005	436-080-0080
436-050-0005	436-050-0100	436-050-0190	436-050-0440	436-080-0006	436-085-0008
436-050-0006	436-050-0110	436-050-0195	436-055-0008	436-080-0010	436-150-0008
436-050-0008	436-050-0120	436-050-0200	436-060-0008	436-080-0020	436-160-0003
436-050-0040	436-050-0150	436-050-0210	436-070-0008	436-080-0030	436-160-0310
436-050-0050	436-050-0160	436-050-0220	436-075-0008	436-080-0040	436-160-0320
436-050-0055	436-050-0170	436-050-0260	436-080-0001	436-080-0060	436-160-0340
436-050-0060	436-050-0175	436-050-0270	436-080-0002	436-080-0065	436-160-0350
		436-050-0280			436-160-0360

REPEAL: OAR 436-050-0020, 436-050-0150T, 436-050-0160T 436-050-0165T, OAR 436-080-0050

ORS 656.704, 656.726(4)

Statutory Authority

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

Other Authority

ORS chapter 656

Statutes being Implemented

RULE SUMMARY

These rules have been amended in part to reflect Senate Bill 233's changes to ORS 656. The time frame for appeal of a proposed order or proposed assessment of civil penalty will no longer be 60 days following the party's receipt of notice, but instead 60 days from the date the order is mailed by the department. SB 233 also eliminated claim closure penalties for non-complying employers and changed the notification requirements for termination of guaranty contracts. In addition, these rules include a number of "housekeeping" amendments and supersede temporary OAR 436-050 rules indicated above after "REPEAL."

These rules:

- Repeal specific requirements affecting service of orders by the director.
- Reduce data reporting requirements for industry codes.
- Eliminate certain requirements to report coverage elections and cancellation of elections.
- Explain the notice and reporting requirements regarding the insurer's termination of guaranty contracts.
- State that active self-insurance certification remains in effect if a guaranty contract has been filed.
- Require notification of workers and other parties at least 10 days prior to changing claims processing locations.
- Require insurers and self-insured employers to keep documentation of dates payments are mailed.
- Require submission of audited financial statements by self-insured employers under certain conditions.
- Provide that an irrevocable standby letter of credit may be accepted by the director as an alternative to a surety bond as a security deposit. This provision has been in effect under authority of temporary rules effective 7/18/03.
- Provide that government securities, certificates of deposit, or time deposit accounts will not be accepted as new or replacement security deposits by self-insured employers effective January 1, 2004; require self-insured employers with existing securities of this type to complete a "Security Agreement and Notice to Intermediary," Form 440-4023, granting the department a security interest in and control over those financial assets.
- Provide that excess insurance coverage must be specific on a per occurrence basis, and that such coverage may include aggregate excess insurance.
- Incorporate annual reporting requirements for self-insured employers formerly published only in Bulletin 209.
- Require that future claim liability estimates or annual incurred losses include losses incurred but not reported.
- Require that a new self-insured employer's deposit is not less than the amount of the approved self-insured employer retention level for the employer's excess workers' compensation insurance.
- Require that each entity included under a self-insurance certification enter into an agreement making the entity jointly and severally liable for payment of compensation and moneys due.
- Require that self-insured employer groups maintain coverage records relating to each member.
- Prohibit a worker leasing company from providing workers' compensation coverage to another leasing company.
- Provide for assessment of civil penalties against worker leasing companies or prospective leasing companies that fail to meet the requirements of relevant rules. Provide penalty matrixes for worker leasing companies that violate these rules and for companies that operate as worker leasing companies without a license

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

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

/s/ John L. Shilts
Authorized Signer

December 3, 2003
Date

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

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

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