



Oregon

Theodore R. Kulongoski, Governor

Department of Consumer and Business Services
Workers' Compensation Division
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Salem, OR 97309-0405
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www.wcd.oregon.gov

Sept. 15, 2009

Proposed Changes to Workers' Compensation Rules

The Department of Consumer and Business Services, Workers' Compensation Division proposes changes to OAR chapter 436.

Please review the attached documents for more information about proposed changes and possible fiscal impacts.

The department welcomes public comment on proposed changes and has scheduled a public hearing.

When is the hearing? Oct. 26, 2009, 9:00 a.m.

Where is the hearing? Labor & Industries Building
350 Winter Street NE, Room F (basement)
Salem, Oregon 97301

How can I make a comment? Come to the hearing and speak, send written comments, or do both. Send written comments to:
Fred Bruyns, rules coordinator
Workers' Compensation Division
350 Winter Street NE (for courier or in-person delivery)
PO Box 14480, Salem, OR 97309-0405
Email: fred.h.bruyns@state.or.us
Phone: 503-947-7717; Fax: 503-947-7514

The closing date for written comments is Oct. 29, 2009.

How can I get copies of the proposed rules?

On the Workers' Compensation Division's Web site –

<http://wcd.oregon.gov/policy/rules/rules.html#proprules>

Or call 503-947-7627 to get free paper copies.

Questions? Contact Fred Bruyns, 503-947-7717.

Secretary of State
NOTICE OF PROPOSED RULEMAKING HEARING

A Statement of Need and Fiscal Impact accompanies this form.

Department of Consumer & Business Services,
Workers' Compensation Division

OAR CHAPTER 436

Agency and Division	Address	Administrative Rules Chapter Number
Fred Bruyns	PO Box 14480, Salem, OR 97309-0405; 350 Winter Street NE, Rm 27, Salem, OR 97301-3879	503-947-7717 Fax 503-947-7514
Rules Coordinator	Address	Telephone

RULE CAPTION

Workers' compensation claims administration, medical services and billing, reemployment assistance, and attorney fees

Hearing date	Time	Location	Hearings Officer
10-26-2009	9:00 a.m.*	Room F (basement), Labor & Industries Building 350 Winter Street NE, Salem, Oregon	Fred Bruyns

*NOTE: The hearing will begin at 9:00 a.m. and end when all present who wish to testify have done so.
Written testimony will be accepted through Oct. 29, 2009.

**The site of the hearing is accessible for individuals with mobility impairments.
Auxiliary aids for persons with disabilities are available upon advance request.**

RULEMAKING ACTION

ADOPT: OAR 436-001-0420; 436-001-0430; 436-001-0440

AMEND: OAR 436-030; 436-060; 436-105; 436-110; 436-120; and
OAR 436-001-0003; 436-001-0019; 436-009-0010; 436-009-0070; 436-010-0008; 436-010-0240; 436-010-0265;
436-010-0280; 436-140-0005; 436-150-0005; 436-150-0010; 436-150-0030; 436-160-0310; 436-160-0340

REPEAL: OAR 436-075-0110

AMEND AND RENUMBER: From OAR 436-001-0265 to 436-001-0400; from 436-001-0265 to 436-001-0410

ORS 656.726(4)

Stat. Auth.

Other Authority

ORS chapter 656, as amended by Oregon Laws (OL) 2009: House Bill (HB) 2045 – OL 2009, ch. 32; HB 2195 – OL 2009, ch. 35; HB 2197 – OL 2009, ch. 36; HB 2705 – OL 2009, ch. 312; HB 2707 – OL 2009, ch. 313; HB 3345 – OL 2009, ch. 526; and ORS chapter 656, as amended by OL 2007, Senate Bill 559, ch. 241

Stats. Implemented

RULE SUMMARY

NOTE: "Insurer" in this summary includes self-insured employers. The agency proposes to amend OAR chapter 436 to improve organization, clarity and consistency, and to eliminate redundancy. More specifically:

The agency proposes to amend OAR chapter 436, division 001, "Procedural Rules Governing Rulemaking and Hearings." These proposed rules: Implement House Bill 3345 by raising the maximum attorney fee payable under ORS 656.385 from \$2,000 to \$3,000, and making corresponding changes to the attorney fee matrix. The proposed rules consolidate rules related to attorney fees into OAR 436-001 and remove them from OAR 436-010, 060, and 120.

The agency proposes to amend OAR chapter 436, division 009, "Oregon Medical Fee and Payment Rules." These proposed rules: Clarify the types of identification numbers providers must include on their medical bills; allow a medical service provider to submit bills for independent medical examinations in the form or format agreed to by the insurer and the medical service provider.

The agency proposes to amend OAR chapter 436, division 010, "Medical Services." These proposed rules: Implement HB 2045 by including chiropractors among those health care providers who may make findings of impairment (when serving as the worker's attending physician); implement HB 2197, which allows a medical service provider who is not qualified to be an attending physician to provide compensable medical service to an

injured worker for a period of 30 days or for 12 visits from the date of the first visit on the initial claim (rather than the date of injury), whichever first occurs, without the authorization of an attending physician; defer to OAR 436-001 for awarding attorney fees under ORS 656.385; require use of a release form (in addition to Form 801 or 827) for release of HIV-related information; clarify requirements for collection of the workers' Social Security number on Form 827; allow and describe use of Form 827 to make claims for new or omitted medical conditions; require the health care provider to give the worker a copy of Form 3283 when giving the worker a copy of Form 827. (The agency prints nearly all 827s used by workers and providers, and will print Form 3283 as an attachment to Form 827.)

The agency proposes to amend OAR chapter 436, division 030, "Claim Closure and Reconsideration." These proposed rules: Require that a Notice of Closure include information about a worker's right to be represented by an attorney (now stated in ORS 656.270, to be repealed effective 1/1/2010 – HB 2197) and right to request a vocational eligibility evaluation (related to limits to requirements for vocational eligibility evaluations in HB 2705); clarify procedures for administrative claim closure; provide that requests for reconsideration of claim closures may be made by telephone; explain that the 14-day time frames for parties to submit certain records relevant to the reconsideration process begin with the director's notice of the start date of the reconsideration; require that evidence stored by the parties on audio media may be submitted to the director (for the purpose of reconsideration) only in transcribed form.

The agency proposes to amend OAR chapter 436, division 060, "Claims Administration." These proposed rules: Specify when and how to issue claim-related notices after a worker is deceased, regardless of the cause of death; clarify requirements for the worker's employer to give the worker a copy of Form 3283, "A guide for workers recently hurt on the job," when the worker files a claim; lengthen the time period that an ongoing request by the claimant's attorney for future claim-related documents remains in effect; specify that time limits for sending most information to the director begin with the mailing date of the agency's letter or order; implement HB 2707 by prescribing notice requirements when the insurer learns that the worker was employed in more than one job at the time of injury; exclude secondary employment by Oregon subject volunteers from the calculation of supplemental disability; require notice to the worker, as part of the notice of claim acceptance, about criteria for reimbursement of claim-related expenses; describe timeliness criteria, notice requirements, and consent requirements related to the electronic payment of benefits to workers and beneficiaries; implement HB 3345 by setting conditions for the payment of penalty assessments to workers and fees to attorneys related to late payment of disputed claim settlement amounts.

The agency proposes to amend OAR 436-075, "Retroactive Program," OAR 436-140, "Construction Carve-Out Programs," and OAR 436-150, "Workers' Benefit Fund Claims Program." These proposed rules: Eliminate references to "guaranty contract," because Senate Bill 559 (2007 Session) replaced the guaranty contract with policy-based proof of coverage and reporting.

The agency proposes to amend OAR 436-105, "Employer-at-Injury Program (EAIP)." These proposed rules: Define "consumables," as purchases required to support the functioning of newly purchased tools or equipment, and allow purchase of consumables under the EAIP; clarify that a worksite modification must be related to limitations that resulted in the worker's EAIP eligibility or prevent the worsening of an accepted condition; clarify minimum reimbursement thresholds and when administrative costs are reimbursable.

The agency proposes to amend OAR 436-110, "Preferred Worker Program (PWP)." These proposed rules: Clarify the definition of "date of hire"; revise definitions of "premium" and "reimbursable wages" to be consistent with the definitions in OAR 436-105; implement HB 2197 by clarifying procedures for use of premium exemption under ORS 656.622; provide a more specific time limit for requesting claims cost reimbursement; create a new employment purchase type – placement assistance provided by a certified vocational counselor or any public or private agency that provides placement services, reimbursable if the assistance results in employment that the preferred worker retains for at least 90 days; provides that placement assistance may not be combined with vocational assistance under OAR 436-120.

The agency proposes to amend OAR 436-120, "Vocational Assistance to Injured Workers." These proposed rules: Define several terms used in division 120 – "delivered," "director," "filed," "likely eligible," and "mailed"; defer to OAR 436-001 for awarding attorney fees under ORS 656.385; provide that modified or new employment that results from an employer-at-injury-activated use of the PWP is considered "suitable" 12 months after the department determines a worksite modification is complete; implement HB 2705 by eliminating the requirement to complete a vocational eligibility evaluation if the worker is released to regular or other suitable work with the employer at injury or aggravation; specify that the insurer is not required to do an eligibility evaluation if the worker is deceased or has a permanent total disability award; implement HB 2195 by allowing an insurer, without approval

by the director, to extend time loss up to 21 months; allow further training to a worker who has completed one training plan if there is a reasonable cause to do so; publish vocational fee schedule maximums as percentages of Oregon's state average weekly wage rather than fixed dollar amounts; to implement HB 2195, provide for "registration" rather than "authorization" of vocational assistance providers; require certified counselors who are subject to continuing education requirements under these rules to take at least eight hours (currently 7 ½ hours) of training in ethical practices and at least six hours of training on the vocational assistance and reemployment assistance rules during the five years before certification renewal.

The agency proposes to amend OAR 436-160, "Electronic Data Interchange." These proposed rules: Specify whether certain proof-of-coverage data elements should be mandatory or optional.

Request for public comment: The Workers' Compensation Division requests public comment on whether other options should be considered for achieving the rules' substantive goals while reducing the negative economic impact of the rules on business.

Address questions or written testimony to: Fred Bruyns, rules coordinator; phone 503-947-7717; fax 503-947-7514; e-mail fred.h.bruyns@state.or.us. Proposed rules are available on the Workers' Compensation Division's Web site: <http://wcd.oregon.gov/policy/rules/rules.html#proprules> or at no charge from WCD Publications, 503-947-7627.

Oct. 29, 2009
(Last day to submit written comments
to the rules coordinator)

/s/ Jerry R. Managhan, for 9/15/2009
Authorized Signer and Date
John L. Shilts, Administrator, Workers' Compensation Division
Printed name

*Hearing Notices published in the Oregon Bulletin must be submitted by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a weekend or legal holiday, upon which the deadline is 5:00 pm the preceding workday.

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Secretary of State
STATEMENT OF NEED AND FISCAL IMPACT

A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

Department of Consumer and Business Services,
Workers' Compensation Division

OAR CHAPTER 436

Agency and Division

Administrative Rules Chapter Number

Workers' compensation claims administration, medical services and billing, reemployment assistance, and attorney fees

Rule Caption

In the Matter of: The Amendment of:

- 436-001, Procedural Rules for Rulemaking and Hearings
- 436-009, Oregon Medical Fee and Payment Rules
- 436-010, Medical Services
- 436-030, Claim Closure and Reconsideration
- 436-060, Claims Administration
- 436-075, Retroactive Program
- 436-105, Employer-at-Injury Program
- 436-110, Preferred Worker Program
- 436-120, Vocational Assistance to Injured Workers
- 436-140, Construction Carve-Out Programs
- 436-150, Workers' Benefit Fund Claims Program
- 436-160, Electronic Data Interchange

Statutory Authority: ORS 656.726(4)

Other Authority:

Stats. Implemented: ORS chapter 656, as amended by Oregon Laws (OL) 2009: House Bill (HB) 2045 – OL 2009, ch. 32; HB 2195 – OL 2009, ch. 35; HB 2197 – OL 2009, ch. 36; HB 2705 – OL 2009, ch. 312; HB 2707 – OL 2009, ch. 313; HB 3345 – OL 2009, ch. 526; & ORS chapter 656, as amended by OL 2007, Senate Bill 559, ch. 241

Need for the Rules: To implement legislation passed by the 2007 and 2009 Legislatures; to improve the effectiveness of claims administration, regulatory and dispute resolution functions of the agency, vocational assistance, and reemployment assistance programs under ORS 656.622.

Documents Relied Upon, and where they are available: Enrolled House Bills 2045, 2195, 2197, 2705, 2707 and 3345; Enrolled Senate Bill 559 (2007); fiscal impact data; "Issues" document presented to stakeholder advisory committees; other advisory committee meeting records; and written advice. These records are available for public inspection in the Workers' Compensation Division of the Department of Consumer and Business Services, 350 Winter Street NE, Salem, Oregon 97301-3879, upon request and between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday. Please call 503-947-7717 to request copies.

Fiscal and Economic Impact: The agency projects fiscal/economic impacts as follows:

NOTE: "Insurer" in this document includes self-insured employers.

The proposed rules will implement HB 3345, which provides for new or increased attorney fees payable by insurers to workers' attorneys and new or increased penalties payable to workers by insurers.

ORS 656.262(12) will require payment of penalty assessments to workers and fees to attorneys related to late payment of disputed claim settlement (DCS) amounts. Assessments and fees are only triggered if payment of the DCS is late and the insurer fails to pay the DCS within five days of notice by the worker or the worker's attorney. Therefore, the agency estimates that the overall fiscal impact will be minor.

In 2008, the agency ordered payment of approximately \$189,000 by insurers to worker's attorneys who prevailed in medical and vocational disputes. HB 3345 raised the maximum payable under ORS 656.385 in these cases from \$2000 to \$3000, and the proposed attorney fee matrix increases all amounts payable by 50% - for equivalent results achieved and time devoted by the attorney. The agency projects the maximum fiscal impact of this change is 50% above current costs or less than \$100,000 per year, payable by insurers to workers' attorneys.

Proposed rules explain that the matrix may be used as a guide for awarding attorney fees for prevailing in disputes under ORS 656.262(11), which would add slightly to insurers' costs.

The agency estimates that the overall fiscal and economic impact of proposed rule changes related to attorney fees will be substantially under \$150,000 per year, representing increased costs to insurers and increased payments to workers' attorneys.

The proposed rules will implement HB 2045 by including chiropractors among those health care providers who may make findings of impairment (when serving as the worker's attending physician). The agency estimates that this change will have a small positive fiscal impact on chiropractors and also a positive impact on insurers, because chiropractors will not have to refer workers to other physicians to perform closing medical examinations, which can increase medical costs and delay claim closure.

The proposed rules require that evidence stored by the parties on audio media may be submitted to the director (for the purpose of reconsideration of claim closure) only in transcribed form. Insurers have advised the agency that this will increase their costs substantially. The agency agrees that transcription will entail significant costs, though most insurers do not submit audio files as evidence, so costs will vary according to insurers' business practices.

The proposed rules lengthen the time period that an ongoing request by the claimant's attorney for future claim-related documents remains in effect. At the rulemaking advisory committee meeting, insurer representatives present explained that it has been common practice to continue providing documents longer than the 90 days currently required. The agency projects that this change may slightly increase insurers' costs. However, attorneys and insurers should save some time and money by not having to make and process multiple requests for records.

The proposed rules facilitate the electronic payment of benefits to workers and beneficiaries. For those workers/beneficiaries and insurers that choose to participate, the agency projects that electronic payment will result in faster payment of benefits, as well as cost savings for insurers.

The proposed rules allow purchase of "consumables" under the Employer-at-Injury Program (EAIP). The agency estimates that this will slightly increase costs to the Workers' Benefit Fund, with a corresponding benefit to employers and workers who participate in the EAIP.

The proposed rules create a new employment purchase type for job-placement assistance and will increase costs to the Workers' Benefit Fund. The agency cannot project how much placement assistance will be provided, but does project a significant cost to the Workers' Benefit Fund, with a corresponding positive impact on vocational rehabilitation providers and to the workers who are successfully returned to work.

The proposed rules will implement HB 2705, which eliminates the requirement to complete a vocational eligibility evaluation if the worker is released to regular or other suitable work with the employer at injury or aggravation, thus reducing the number of evaluations required. The agency estimates that this change will have a small positive fiscal impact on Oregon insurers, and a small negative impact on vocational rehabilitation organizations that have conducted the evaluations.

The proposed rules will implement HB 2195 by allowing an insurer, without approval by the director, to extend time loss to 21 months – for a worker engaged in training. The agency estimates this change will streamline the extension process and slightly reduce costs to insurers and the agency.

The proposed rules allow further training to a worker who has completed one training plan if there is a reasonable cause to do so. Although the agency expects this to occur infrequently, this change may slightly increase insurers' costs for vocational assistance, and increase payments to vocational assistance providers and training facilities. Affected worker would benefit from increased wage earning capacity.

Additional proposed rule changes should either have no significant fiscal impact on any party or be slightly positive in effect to the extent the agency achieves its objectives of improved clarity of its rules and general streamlining of requirements affecting claims administration. However, the agency welcomes public input on potential fiscal impacts of any of the proposed rule changes.

Statement of Cost of Compliance:

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

Proposed rule changes will increase demand on the Workers' Benefit Fund. The agency projects that the fund has sufficient reserves to meet the demand. Otherwise, proposed changes should not have any significant effect on other state agencies or local governments, and should not affect the general public at all except as described under "Fiscal and Economic Impact" above.

2. Cost of compliance effect on small business (ORS 183.336):

- a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:** Primarily, 1) workers' compensation attorneys retained by injured workers; and 2) vocational rehabilitation organizations (registered under OAR 436-120). 190 attorneys from 147 firms represented injured workers in cases before the Workers' Compensation Board during the past year. Bulletin

151 lists 106 vocational rehabilitation providers that have been registered by the Department of Consumer and Business Services. Not all of these providers are small businesses as defined in ORS 183.310, but approximately 100 vocational assistance providers are small businesses.

- b. Projected reporting, record-keeping and other administrative activities required for compliance, including costs of professional services:** None. The agency projects overall positive economic effects of the proposed rule changes on both attorneys and vocational assistance providers.
- c. Equipment, supplies, labor, and increased administration required for compliance:** None. The agency projects overall positive economic effects of the proposed rule changes on both attorneys and vocational assistance providers.

How were small businesses involved in the development of this rule? Attorneys who represent injured workers and vocational rehabilitation professionals participated on rulemaking advisory committees and submitted written advice to the agency.

Administrative Rule Advisory Committee consulted? Yes, the agency consulted with rulemaking advisory committees on August 7, 10, 11, 25, and 27, 2009.

<i>/s/ Jerry R. Managhan, for</i>	John L. Shilts, Administrator	9/15/2009
Signature	Workers' Compensation Division Printed name	Date

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION



**Employer-at-Injury Program
Oregon Administrative Rules
Chapter 436, Division 105**

Proposed Rules

TABLE OF CONTENTS

Rule		Page
436-105-0001	Authority for Rules	1
436-105-0002	Purpose of Rules	1
436-105-0003	Applicability of Rules	1
436-105-0005	Definitions.....	2
436-105-0006	Administration of Rules.....	3
436-105-0008	Reconsideration/Appeal to the Director.....	3
436-105-0500	Insurer Participation in the Employer-At-Injury Program.....	4
436-105-0510	Employer Eligibility.....	6
436-105-0511	Worker Eligibility	7
436-105-0512	End of Eligibility.....	7
436-105-0520	Assistance Available from the Employer-at-Injury Program	7
436-105-0530	Employer-at-Injury Program Procedures for Concurrent Injuries	9
436-105-0540	Employer-at-Injury Program Reimbursement Procedures.....	9
436-105-0550	Audits.....	10
436-105-0560	Sanctions	11

NOTE: Revisions are marked as follows:

Deleted text has a strike-through style, as in ~~Deleted~~

Added text is bold and underlined, as in **Added**

HISTORY LINES: These rules include only the most recent "History" lines. A rule's history line shows when the rule was last revised and its effective date. To obtain a "Chapter 436 revision history index," please call the Workers' Compensation Division, (503) 947-7627, or visit the division's Web site:

<http://www.wcd.oregon.gov/policy/rules/history.html>

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
Proposed Rules **EMPLOYER-AT-INJURY PROGRAM**

EXHIBIT "A"
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 105

436-105-0001 Authority for Rules

The director has adopted OAR Chapter 436, Division 105 under the authority of ORS 656.622 and 656.726.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Adopted 8/14/01 as WCD Admin. Order 01-057, eff. 10/1/01

436-105-0002 Purpose of Rules

(1) The Employer-at-Injury Program encourages the early return to work of injured workers by providing incentives to employers.

(2) The Employer-at-Injury Program is activated by the employer and administered by the insurer .

(3) The program consists of Wage Subsidy, Worksite Modification, and Employer-at-Injury Program Purchases.

(4) These rules explain:

(a) The assistance and reimbursements available from the Employer-at-Injury Program;

(b) Who is qualified for the assistance and reimbursement; and

(c) How to receive assistance and reimbursements.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Amended 11/1/07 as WCD Admin. Order 07-065, eff. 12/1/07

436-105-0003 Applicability of Rules

(1) These rules apply to:

(a) All individual Employer-at-Injury Programs begun on or after ~~December 1, 2007~~**January 1, 2010**; and

(b) All reimbursement requests made to the division in accordance with OAR 436-105-0540(4) on or after ~~December 1, 2007~~**January 1, 2010** regardless of the date an Employer-at-Injury Program began, unless the insurer requests that reimbursement be based on the rules in effect on the date an individual Employer-at-Injury Program began.

(2) The director may, unless otherwise obligated by statute, in the director's discretion waive any procedural rules as justice so requires.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Amended 11/1/07 as WCD Admin. Order 07-065, eff. 12/1/07

Amended xx-xx-xx as WCD Admin. Order xx-xxx, eff. xx-xx-xx

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
Proposed Rules EMPLOYER-AT-INJURY PROGRAM

436-105-0005 Definitions

For the purpose of these rules, unless the context requires otherwise:

(1) "Administrator" means the Administrator of the Workers' Compensation Division, or the administrator's delegate for the matter.

(2) "Client" means a person to whom workers are provided under contract and for a fee on a temporary or leased basis.

(3) "Consumable" means purchases required to support the functioning of newly-purchased tools or equipment.

~~(3)~~ **(4)** "Director" means the Director of the Department of Consumer and Business Services, or the director's delegate for the matter.

~~(4)~~ **(5)** "Division" means the Workers' Compensation Division of the Department of Consumer and Business Services.

~~(5)~~ **(6)** "Employer-at-Injury" means the organization that employed the worker when the worker:

- (a) Sustained the injury or occupational disease;
- (b) Made the claim for aggravation; or
- (c) Requested an Own Motion opening under ORS 656.278.

~~(6)~~ **(7)** "Fund" means the Workers' Benefit Fund.

~~(7)~~ **(8)** "Insurer" means the insurance company or self-insured employer responsible for the workers' compensation claim.

~~(8)~~ **(9)** "Premium" means the monies paid to an insurer for the purpose of purchasing workers' compensation insurance.

~~(9)~~ **(10)** "Regular employment" means the employment the worker held at the time of:

- (a) Injury;
- (b) The claim for aggravation; or
- (c) Own Motion opening under ORS 656.278.

~~(10)~~ **(11)** "Reimbursable wages" means the worker's gross wages for the Wage Subsidy period.

~~(11)~~ **(12)** "Skills building" means a class or course of instruction taken by the worker for the purpose of enhancing an existing skill or developing a new skill. When skills building is the transitional work, the worker must agree in writing to take the class or course of instruction.

~~(12)~~ **(13)** "Transitional Work" means temporary work with the employer-at-injury which is not the worker's full duty regular work and is assigned because the worker cannot perform full duty regular work. Transitional work must be within the worker's injury-caused limitations and may be created through modification of the worker's regular work, job restructuring, assistive devices, worksite modification(s), reduced hours, or reassignment to another job. Transitional

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
Proposed Rules EMPLOYER-AT-INJURY PROGRAM

work must be within the employer's course and scope of trade or profession, unless the work is "skills building."

~~(13)~~ **(14)** "Worker Leasing Company" means the person which provides workers, by contract and for a fee, as prescribed in ORS 656.850.

~~(14)~~ **(15)** "Work site" means a primary work area available for a worker to use to perform the required job duties. The work site may be the employer's, client's, or worker's premises, property, and equipment used to conduct business under the employer's or client's direction and control. A work site may include a worker's personal property or vehicle if required to perform the job.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Amended 11/1/07 as WCD Admin. Order 07-065, eff. 12/1/07

Amended xx-xx-xx as WCD Admin. Order xx-xxx, eff. xx-xx-xx

436-105-0006 Administration of Rules

(1) Orders issued by the division to enforce ORS 656.622 or these rules are orders of the director.

(2) The department maintains the financial integrity of the fund and all reimbursement is subject to the availability of funds. If the funds are too low for all reimbursements, the director has the final authority to determine how the funds will be disbursed.

(3) The director may use monies from the fund for activities to provide information about and encourage the reemployment of injured workers. A maximum of \$250,000 may be used in a fiscal year, July 1 to June 30. The director must approve all expenditures. Activities include, but are not limited to:

(a) Advertisements and promotion of reemployment assistance programs and associated production costs; and

(b) Public reemployment assistance program conferences and workshops.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Adopted 8/14/01 as WCD Admin. Order 01-057, eff. 10/1/01

436-105-0008 Reconsideration/Appeal to the Director

(1) The division will deny any reimbursement for Employer-at-Injury Program assistance it finds in violation of these rules. The division has the discretion to deny any reimbursement of Employer-at-Injury Program assistance it determines is not reasonable, practical, or feasible, or considers an abuse of the program.

(2) Parties directly affected by a division Employer-at-Injury Program decision may request a reconsideration by sending a written request for reconsideration to the administrator no later than 60 days after the date the decision is issued. Facsimiles that are legible and complete are acceptable and will be processed the same as originals. Reconsideration must precede a director's review.

ORDER NO. 09-XXX

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
Proposed Rules EMPLOYER-AT-INJURY PROGRAM**

(3) The request for reconsideration must specify the reasons why the decision is appealed and may include additional documentation. No reconsideration will be granted unless the request meets the requirements of this rule.

(4) The division will reconsider the decision and notify all directly affected parties of its decision in writing. The affected parties may request a director's review by sending a written request no later than 60 days after the date the reconsideration was issued. The request must specify the reasons why the decision is appealed and may include additional documentation.

(5) The director may require any affected party to provide information or to participate in the director's review. If the party requesting the director's review fails to participate without reasonable cause as determined by the director, the director may dismiss the review.

(6) The director's review decision will be issued in writing and all directly affected parties will be notified. The director's review decision is final and not subject to further review by any court or other administrative body.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Amended 11/1/07 as WCD Admin. Order 07-065, eff. 12/1/07

436-105-0500 Insurer Participation in the Employer-At-Injury Program

(1) An insurer must be an active participant in providing reemployment assistance with the employer's consent. Participation includes issuing notices of the available assistance and administering the Employer-at-Injury Program as specified in these rules.

(2) The insurer will notify the worker and employer-at-injury in writing of the assistance available from the Employer-at-Injury Program. A notice must be issued:

(a) Upon acceptance or reopening of a claim; and

(b) Within five days of a worker's first release for work after claim opening unless the release is for regular work.

(3) The notices of Employer-at-Injury Program assistance must contain the following language:

(a) The notice to the worker must appear in bold type as follows:

The Reemployment Assistance Program provides Oregon's qualified injured workers help with staying on the job or getting back to work. Because of your injury, your employer may be eligible for assistance to return you to transitional work through the Employer-at-Injury Program while your claim is open. Your employer may contact [insurer name and phone number].

(b) The notice to the employer-at-injury must appear in bold type as follows:

Because of your worker's injury, you may be eligible for assistance through the Employer-at-Injury Program to return the worker to transitional work while the worker's claim is open. To learn more about the assistance available from the program, please call [insurer name and phone number].

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
***Proposed Rules* EMPLOYER-AT-INJURY PROGRAM**

(4) The insurer will administer the Employer-at-Injury Program according to these rules. The insurer will assist an employer to:

- (a) Obtain a qualifying medical release, pursuant to section (5) of this rule, from the medical service provider;
 - (b) Identify a transitional work position;
 - (c) Process employer Wage Subsidy requests as specified in OAR 436-105-0520(1);
 - (d) Make Worksite Modification purchases as specified in OAR 436-105-0520(2);
 - (e) Make Employer-at-Injury Program Purchases as specified in OAR 436-105-0520(3);
- and

(f) Request Employer-at-Injury Program reimbursement from the division as specified in OAR 436-105-0540.

(5) For purposes of the Employer-at-Injury Program, medical releases must meet the following criteria:

(a) All medical releases must be dated and related to the accepted or deferred conditions of the claim. The date the medical release is issued by the worker's medical service provider is considered the effective date if an effective date is not otherwise specified;

(b) Two types of medical release qualify under these rules:

(A) A medical release that states the worker's specific restrictions; or

(B) A statement by the medical service provider that indicates the worker is not released to regular employment accompanied by an approval of a job description which includes the job duties and physical demands required for the transitional work.

(c) A medical release must cover any period of time for which benefits are requested.

(6) For the purposes of the Employer-at-Injury Program, a medical release, and any restrictions it contains, remains in effect until another medical release is issued by the worker's medical service provider. An employer or insurer may get clarification about a medical release from the medical service provider who issued the release any time prior to submitting the reimbursement request.

(7) The insurer must maintain all records of the Employer-at-Injury Program for a period of three years from the date of the last *Employer-at-Injury Program Reimbursement Request*. The insurer will maintain the following information at the authorized claim processing location(s):

(a) The worker's claim file;

(b) Documentation from the worker's medical service provider that the worker is unable to perform regular employment due to the injury and dated copies of all work releases from the worker's medical service provider;

(c) A legible copy of the worker's payroll records for the Wage Subsidy period as follows:

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
Proposed Rules **EMPLOYER-AT-INJURY PROGRAM**

(A) Payroll records must state the payroll period, wage rate(s), and the worker's gross wages for the Wage Subsidy period. The payroll record must also include the dates and hours worked each day if the worker has hourly restrictions;

(B) Insurers and employers may supplement payroll records with documentation of how the worker's earnings were calculated for the Wage Subsidy. Supplemental documentation may be used to determine a worker's work schedule, wages earned on a particular day, dates of paid leave, or to clarify any other necessary information not fully explained by the payroll record;

(C) If neither the payroll record(s) nor supplemental documentation show the amount of wages earned by the worker for reimbursable partial payroll periods, the allowable reimbursement amount may be calculated as follows:

(i) Divide the gross wages by the number of days in the payroll period for the daily rate; and

(ii) Multiply the daily rate by the number of eligible days; and

(D) If a partial day's reimbursement is requested after a worker is released for transitional work, or prior to returning from a medical appointment with a regular work release, documentation of the time of the medical appointment and hours and wages of transitional work must be provided for those days.

(d) A legible copy **of proof of purchase providing proof the item was ordered during the EAIP period** ~~of invoices, and proof of payment, and proof of the delivery date~~ of the item(s) for Worksite Modification purchases and Employer-at-Injury Program Purchases;

(e) Written documentation of the insurer's decision to approve Worksite Modifications;

(f) Documentation of the transitional work, which must include the start date, wage and hours, and a description of the job duties;

(g) Documentation that payments for a home care worker were made to the Oregon ~~Department of Human Services~~ **Health Authority**, if applicable;

(h) The written acceptance by the worker when skills building is the transitional work; and

(i) Documentation, including course title and curriculum for a class or course of instruction when Employer-at Injury Program Purchases are requested.

Stat. Auth.: ORS 656.340, 656.622, 656.726(4)

Stats. Implemented: ORS 656.340, 656.622

Hist: Amended 11/1/07 as WCD Admin. Order 07-065, eff. 12/1/07

Amended xx-xx-xx as WCD Admin. Order xx-xxx, eff. xx-xx-xx

436-105-0510 Employer Eligibility

(1) The employer must maintain Oregon workers' compensation insurance coverage.
(2) The employer must be the employer at injury as defined in OAR 436-105-0005.
(3) The employer must be re-employing an eligible worker while the worker's claim is open.

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
Proposed Rules **EMPLOYER-AT-INJURY PROGRAM**

[ED. NOTE: The remainder of this rule has been moved to OAR 436-105-0511 and 0512.]

Stat. Auth.: ORS 656.622, 656.726(4)
Stats. Implemented: ORS 656.622
Hist: Amended 5/24/05 as WCD Admin. Order 05-057, eff. 7/1/05
 Amended 11/1/07 as WCD Admin. Order 07-065, eff. 12/1/07

436-105-0511 Worker Eligibility

(1) The worker must have an accepted or deferred Oregon workers' compensation injury or occupational disease claim at the time of the Employer-at-Injury Program.

(2) The worker must not be covered by the Injured Inmate Law.

Stat. Auth.: ORS 656.622, 656.726(4)
Stats. Implemented: ORS 656.622
Hist: Amended and renumbered from OAR 436-105-0510 11/1/07 as WCD Admin. Order 07-065, eff. 12/1/07

436-105-0512 End of Eligibility

The Employer-at-Injury Program will end when:

(1) The worker or employer no longer meets the eligibility provisions stated in OAR 436-105-0510 and OAR 436-105-0511;

(2) The worker's claim is closed;

(3) Sanctions under OAR 436-105-0560 preclude eligibility; or

(4) The insurer ends the Employer-at-Injury Program at any time while the worker's claim is open.

Stat. Auth.: ORS 656.622, 656.726(4)
Stats. Implemented: ORS 656.622
Hist: Amended and renumbered from OAR 436-105-0510 11/1/07 as WCD Admin. Order 07-065, eff. 12/1/07

436-105-0520 Assistance Available from the Employer-at-Injury Program

The Employer-at-Injury Program may be used only once per worker per claim opening, for a non-disabling claim or a disabling claim. If a non-disabling claim becomes a disabling claim after one year from the date of acceptance, the disabling claim is considered a new opening and the Employer-at-Injury Program may be used again. Assistance available includes:

(1) Wage Subsidy, **which** provides 50 percent reimbursement of the worker's gross wages for the Wage Subsidy period. Wage Subsidy benefits are subject to the following conditions:

(a) A Wage Subsidy may not exceed 66 work days and must be completed within a 24 consecutive month period;

(b) A Wage Subsidy may not start or end with paid leave;

(c) If the worker has hourly restrictions, reimbursable paid leave must be limited up to the maximum number of hours of the worker's hourly restrictions. Paid leave exceeding the worker's hourly restrictions is not subject to reimbursement;

ORDER NO. 09-XXX

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
Proposed Rules EMPLOYER-AT-INJURY PROGRAM

(d) Any day during which the worker exceeds his or her injury-caused limitations will not be reimbursed. If, however, an employer uses a time clock, a reasonable time not to exceed 30 minutes per day will be allowed for the worker to get to and from the time clock and the worksite without exceeding the worker's hourly restrictions.

(2) Worksite Modification means altering a work site by renting, purchasing, modifying, or supplementing equipment to enable a worker to perform the transitional work within the worker's limitations **that resulted in the worker's EAIP eligibility, or to prevent a worsening of the worker's accepted condition.** Maximum reimbursement is \$2,500. Worksite Modification assistance is subject to the following conditions:

- (a) The insurer determines the appropriate Worksite Modification(s) for the worker;
- (b) The insurer documents its reason(s) for approving the modification(s);
- (c) The Worksite Modification(s) must be ordered during the Employer-at-Injury Program;
- (d) Modifications purchased by the employer in good faith are reimbursable if the worker refuses to return to work;
- (e) Worksite Modification items become the employer's property upon the end of the Employer-at-Injury Program.

(3) Employer-at-Injury Program Purchases are limited to:

(a) Tuition, books, fees, and materials required for a class or course of instruction to enhance an existing skill or develop a new skill when skills building is used as transitional work or when required to meet the requirements of the transitional work position. Maximum expenditure is \$1,000. Tuition, books, fees, and required materials will be provided under the following conditions:

(A) The insurer determines the instruction will help the worker enhance an existing skill or develop a new skill, and documents its decision;

(B) Costs for tuition, books, fees, and required materials may be fully reimbursed if the worker began participation in the class or course while eligible for the Employer-at-Injury Program; or

(C) The employer in good faith paid for the costs of the class or course after the worker agreed to take part in the training and then the worker refused to attend.

(b) Tools and equipment required for the worker to perform transitional work, **including consumables.** Maximum expenditure is \$2,500, and these purchases will be the employer's property.

(c) Clothing required for the job, except clothing the employer normally provides. Clothing becomes the worker's property. Maximum expenditure is \$400.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Amended 11/1/07 as WCD Admin. Order 07-065, eff. 12/1/07

Amended xx-xx-xx as WCD Admin. Order xx-xxx, eff. xx-xx-xx

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
Proposed Rules EMPLOYER-AT-INJURY PROGRAM

436-105-0530 Employer-at-Injury Program Procedures for Concurrent Injuries

- (1) A worker is eligible for only one Employer-At-Injury Program at a time.
- (2) When a worker in an Employer-at-Injury Program incurs a new compensable injury, transitional work for the first Employer-At-Injury is considered regular work for the second Employer-at-Injury Program.
- (3) If the new injury makes the first Employer-at-Injury Program unsuitable, the worker may be eligible for a second Employer-at-Injury Program under the new injury.
- (4) When the worker is no longer eligible for the second Employer-At-Injury Program, the first Employer-At-Injury Program may be resumed if the employer and worker still meet eligibility criteria under that claim.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Amended 5/16/03 as WCD Admin. Order 03-057 eff. 6/8/03

436-105-0540 Employer-at-Injury Program Reimbursement Procedures

- (1) Reimbursements may include Wage Subsidy, Employer-at-Injury Program Purchases, and Worksite Modification.
- (2) The insurer is entitled to a program administrative cost of \$120.00 for the first reimbursement request of an Employer-at-Injury Program. A subsequent request for reimbursement for the same Employer-at-Injury Program is not entitled to an additional program administrative cost.
- (3) The insurer must receive all required documentation for reimbursement within one year from the end of the Employer-at-Injury Program in order to qualify for reimbursement. The insurer must date stamp each reimbursement request document with the receipt date.
- (4) The insurer must submit the request for reimbursement (Form 2360) to the division within one year and 30 days from the end of the Employer-at-Injury Program.
- (5) ~~The An~~ Employer-at-Injury Reimbursement Request must be a minimum of \$100. The associated administrative costs will also be eligible for reimbursement, not including the administrative cost, to be subject to reimbursement.

(6) Subsequent requests less than \$100 will be eligible for reimbursement. However, the requests will not be eligible for reimbursement of a subsequent administrative cost.

(7) If the original request was less than \$100, but the amended request is at least \$100, the request and the associated administrative costs will be eligible for reimbursement.

~~(6)~~**(8)** When the division finds the insurer has submitted an Employer-at-Injury Program Reimbursement Request which is incomplete or contains an error, the division may return the form to the insurer for correction. The insurer has 60 days from the date the insurer receives the reimbursement request, or one year and 30 days from the end of Employer-at-Injury Program eligibility, whichever is greater, to make the corrections and return the corrected form to the division.

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
Proposed Rules **EMPLOYER-AT-INJURY PROGRAM**

~~(7)~~**(9)** The insurer may send an *Employer-at-Injury Program Reimbursement Request* to the division when a claim was initially denied and was subsequently accepted after the Employer-at-Injury Program eligibility ended and more than one year and 30 days have passed. In that case, the insurer must send a completed *Employer-at-Injury Program Reimbursement Request* to the division within 60 days of the first Order or Stipulation and Order accepting the claim. A copy of the Order accepting the claim, or Stipulation and Order accepting the claim must be attached.

~~(8)~~**(10)** The insurer may request reimbursement for a qualifying Employer-at-Injury Program that took place while the claim was in accepted or deferred status even if the claim is denied at the time the reimbursement request is sent to the division.

~~(9)~~**(11)** Amended reimbursement requests must be sent to the division within one year and 30 days from the end of the Employer-at-Injury Program eligibility except as provided in section (6) of this rule. The insurer may not request additional administrative cost reimbursement for filing an amended reimbursement request.

~~(10)~~**(12)** Amendments are to be made on a completed *Employer-at-Injury Program Reimbursement Request*, Form 2360. The amended reimbursement request must cite the corrected information with the statement "Amendment" written across the top of the form. The corrected information should be highlighted.

~~(11)~~**(13)** The insurer will not use Employer-at-Injury Program costs subject to reimbursement for rate making, individual employer rating, dividend calculations, or in any manner that would affect the employer's insurance premiums or premium assessments with the present or a future insurer. The insurer must be able to document that Employer-at-Injury Program costs do not affect the employer's rates or dividend.

~~(12)~~**(14)** If a Preferred Worker employed by an eligible employer with active Premium Exemption incurs a new injury, the claim is subject to Claim Cost Reimbursement under OAR 436-110. If the worker subsequently enters an Employer-at-Injury Program, program costs are to be separated from claim costs and will not be reimbursed as claim costs.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Amended 11/1/07 as WCD Admin. Order 07-065, eff. 12/1/07

Amended ~~xx-xx-xx~~ as WCD Admin. Order ~~xx-xxx~~, eff. ~~xx-xx-xx~~

436-105-0550 Audits

(1) Insurers and employers are subject to periodic program and fiscal audits by the division. All reimbursements are subject to subsequent audits, and may be disallowed on any of the grounds set forth in these rules. Disallowed reimbursements must be repaid to the department.

(2) The audit may include but not be limited to a review of the records required in OAR ~~436-105-0500(6)~~ **436-105-0500(7)**.

(3) When conflicting documentation exists, the division will utilize a preponderance of evidence standard to decide eligibility for reimbursement and if there is no clear preponderance, reimbursement will be allowed.

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
Proposed Rules **EMPLOYER-AT-INJURY PROGRAM**

(4) The division reserves the right to visit the work site to determine compliance with these rules.

Stat. Auth.: ORS 656.455, 656.622, 656.726(4), 731.475

Stats. Implemented: ORS 656.455, 656.622, 731.475

Hist: Amended 11/1/07 as WCD Admin. Order 07-065, eff. 12/1/07

Amended xx-xx-xx as WCD Admin. Order xx-xxx, eff. xx-xx-xx

436-105-0560 Sanctions

(1) Any person who knowingly makes a false statement or misrepresentation to the director or an employee of the director for the purpose of obtaining any benefits or reimbursement from the Employer-at-Injury Program or who knowingly misrepresents the amount of a payroll, or knowingly submits a false payroll report, is subject to penalties under ORS 656.990.

(2) Reasons for the director to sanction an insurer, self-insured employer, employer or their representative include, but are not limited to:

(a) Misrepresenting information in order to receive Employer-at-Injury Program assistance;

(b) Making a serious error or omission which resulted in the division approving reimbursement in error;

(c) Failing to respond to employer requests for assistance or failing to administer Employer-at-Injury Program assistance; or

(d) Failure to comply with any condition of these rules.

(3) Sanctions by the director may include one or more of the following:

(a) Ordering the person to take corrective action within a specific period of time;

(b) Ordering the person being sanctioned to repay the department all, or part, of the monies reimbursed, with or without interest at a rate set by the department. The order may include the department's legal costs;

(c) Ending the employer's eligibility to use the Employer-at-Injury Program for a specific period of time; and

(d) Pursuing civil penalties under ORS 656.745 or criminal action against the party.

Stat. Auth.: ORS 656.622, 656.726(4)

Stat. Implemented: ORS 656.622, 656.745, 656.990

Hist: Adopted 8/14/01 as WCD Admin. Order 01-057, eff. 10/1/01