



Oregon

Theodore R. Kulongoski, Governor

Department of Consumer and Business Services
Workers' Compensation Division
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August 20, 2007

Proposed Changes to Workers' Compensation Rules

The 2007 Oregon Legislature passed a number of bills affecting workers' compensation laws. The Department of Consumer and Business Services, Workers' Compensation Division proposes changes to OAR chapter 436 to make these rules consistent with the revised laws. In addition, the department proposes changes to make the rules easier to understand, to streamline regulations, and to expand return-to-work incentives for the Employer-at-Injury Program and Preferred Worker Program.

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?** September 24, 2007, 2:00 p.m.
- Where is the hearing?** Labor & Industries Building
350 Winter Street NE, Room 260 (2nd Floor),
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) 947-7581

The closing date for written comments is September 27, 2007.

How can I get copies of the proposed rules?

On the Workers' Compensation Division's Web site –

<http://www.cbs.state.or.us/external/wcd/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.

Dept of Consumer and Business Services (DCBS),
Workers' Compensation Division
Agency and Division

OAR CHAPTER 436
Administrative Rules Chapter Number

Fred Bruyns
Rules Coordinator

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RULE CAPTION

Proposed rules affecting workers' compensation insurance, claims processing, medical treatment, and return-to-work assistance.

Hearing date	Time	Location	Hearings Officer
September 24, 2007	2:00 p.m.*	Room 260 (2 nd Floor, Labor & Industries Building) 350 Winter Street NE, Salem, Oregon	Fred Bruyns

***NOTE: The hearing will begin at 2:00 p.m. and end when all present who wish to testify have done so. Written testimony will be accepted through September 27, 2007.**

**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 436-105-0511; 436-105-0512; 436-160-0400; 436-160-0410; 436-160-0420; 436-160-0430

AMEND: OAR 436-040; 436-105; 436-110; 436-120; and

436-009-0005	436-015-0005	436-030-0175	436-050-0100	436-060-0008	436-160-0004
436-009-0010	436-015-0030	436-030-0185	436-050-0175	436-060-0010	436-160-0005
436-009-0020	436-015-0040	436-035-0005	436-050-0200	436-060-0015	436-160-0006
436-009-0030	436-015-0120	436-035-0110	436-050-0400	436-060-0018	436-160-0010
436-009-0040	436-030-0007	436-035-0350	436-050-0410	436-060-0055	436-160-0020
436-010-0005	436-030-0020	436-035-0390	436-050-0420	436-060-0060	436-160-0030
436-010-0210	436-030-0035	436-035-0420	436-050-0440	436-060-0140	436-160-0040
436-010-0220	436-030-0115	436-035-0500	436-050-0450	436-060-0147	436-160-0050
436-010-0230	436-030-0135	436-045-0008	436-050-0455	436-060-0150	436-160-0060
436-010-0240	436-030-0145	436-045-0030	436-050-0460	436-160-0001	436-160-0070
436-010-0265	436-030-0155	436-050-0003	436-050-0470	436-160-0002	436-160-0080
436-010-0280	436-030-0165	436-050-0005	436-050-0480	436-160-0003	436-160-0090

REPEAL: 436-030-0440; 436-030-0450; 436-030-0460; 436-030-0550; 436-030-0570;
436-110-0326; 436-110-0327; 436-110-0380; 436-120-0730

ORS 656.726(4)
Stat. Auth.

Other Authority

ORS chapter 656, as amended by enrolled: Senate Bill (SB) 83 – Oregon Laws (OL) 2007, ch. 70; SB 147 - OL 2007, ch. 86; SB 253 - OL 2007, ch. 491; SB 504 - OL 2007, ch. 505; SB 563 - OL 2007, ch. 423; SB 762 - OL 2007, ch. 518; House Bill (HB) 2218 - OL 270; HB 2756 - OL 2007, ch. 252; HB 2783 - OL 2007, ch. 656; HB 2943 - OL 2007, ch. 300

Stats. Implemented

RULE SUMMARY

Amendments to implement changes in the Workers' Compensation Law, including:

- Replacing the term "Handicapped Workers" with "Workers with Disabilities" (SB 83);
- Updating name of Board of Medical Examiners for the State of Oregon to "Oregon Medical Board" (SB 147);

- Including “administrative law judge” as a person who may approve or disapprove a claims disposition agreement (SB 253);
- Describing restrictions affecting emergency room physicians’ rights to be attending physicians and authorize temporary disability benefits (SB 504);
- Deleting requirement that managed care organizations send to the director copies of all new or amended treatment standards, protocols, and guidelines for the director’s review and approval; deleting related definitions (SB 563);
- Explaining how DCBS will publish the maximum reimbursable amount for medical services for non-disabling claims (SB 762);
- Amending penalty provisions affecting managed care organizations; deleting procedures for temporary rule promulgation to address disability in individual claims (when medical conditions are not addressed by current standards), and addressing such conditions in the director’s order on reconsideration, and providing that penalties will not be assessed if an increase in compensation results from such an order; describing how insurers must process requests for a lump sum payments of permanent partial disability awards (HB 2218);
- Describing the authority and limitations for several types of providers - chiropractors, naturopaths, podiatrists, and physician assistants - when acting as attending physicians (HB 2756);
- Referring to ORS 656.427 regarding time frames for termination of guaranty contracts; defining “premium” (HB 2783);
- Adopting standards of professional conduct for health care providers who perform independent medical examinations, which apply if the provider’s professional regulatory board has not adopted standards for performing such examinations (HB 2943);

General amendments to OAR chapter 436, including:

- Using plain language to add clarity to a number of rules;
- Shortening some rules by removing unnecessary descriptions of DCBS procedures;

Amendments to OAR 436, 009, “Oregon Medical Fee and Payment Rules” and OAR 436-160, “Electronic Data Interchange” (EDI), to improve the quality of medical billing data for use by DCBS and its customers, including:

- Requiring hospitals and other health care providers to include sufficient data on their billings so insurers and DCBS can identify the providers;
- Requiring insurers to report medical billing data to DCBS using standards for electronic data interchange adopted by the International Association of Industrial Accident Boards and Commissions;
- Listing the data elements reportable to DCBS; testing procedures for EDI; phase-in dates for EDI and when insurers and self-insured employers are subject; procedures for requesting deferral of EDI reporting;

Amendment to OAR 436-010, “Medical Services,” to remove obsolete medical utilization guideline:

- Regarding frequency of treatment in OAR 436-010-0230;

Amendments to OAR 436-030, “Claim Closure and Reconsideration,” to eliminate conflicts between statute and rules, streamline processing, delete obsolete rules, and reduce litigation, including:

- Restricting reconsideration of claim closure to issues raised by the parties plus requirements under ORS 656.268(1);
- Requiring insurers to submit documents related to reconsideration of claim closure in chronological order;
- Removing the limitation on attorney fees from OAR 436-030-0175(4);
- Deleting obsolete rules OAR 436-030-0440, 0450; 0460, 0550, and 0570; the relevant subject matter from these rules has been addressed in other rules in OAR 436-030 and 436-035 (since approximately 1988), but the rules have remained in the Oregon Administrative Rules published by the Secretary of State;

Amendments to OAR 436-035, “Disability Rating Standards,” to clarify or correct certain provisions, and to provide for rating disability for a medical condition not currently addressed by the standards, including:

- Clarifying the definition of “direct medical sequela”;
- Correcting the description of impairment involving angulation or malalignment of the humerus;
- Clarifying how to rate impairment for surgery involving one or more discs or vertebrae;
- Eliminating provision that if a value of impairment is determined for damage to the brain, no additional value for speech or psychiatric impairment is allowed;
- Provide standards for rating impairment for vaginal prolapse;

Amendments to OAR 436-050, “Employer/Insurer Coverage Responsibility,” to clarify certain provisions and ensure appropriate oversight of worker leasing company licensing and practices, including:

- Clarifying time frames and process for cancellation of self-insurance;
- Revising regulations affecting worker leasing companies, including:
 - Relevant definitions;
 - The application and license renewal process;
 - Reporting and record-keeping;
 - Grounds for disqualification, suspension of license, and revocation of license by the director;
 - Appeal rights for persons refused approval or renewal of a worker leasing license;
 - Reapplication following disqualification for, or revocation of, license;
 - Continuation of a disqualification, suspension, or revocation of a worker leasing license applicable to any new worker leasing company created through the sale, transfer, or conveyance of ownership or of the worker leasing company’s assets to another person or controlling person;
 - Penalties under ORS 656.990;

Amendments to OAR 436-060, “Claims Administration,” to eliminate inconsistencies in DCBS rules and clarify or streamline certain provisions, including:

- Revising time frame for employers’ first aid record-keeping (to be consistent with Oregon OSHA requirements);
- Reducing the documentation a worker must submit when appealing an insurer’s refusal to reclassify a claim;
- Clarifying conditions under which the insurer must notify health care providers when a workers’ compensation claim is denied or partially denied;

Amendments to OAR 436-105, “Employer-at-Injury Program” (EAIP), to promote increased use of the EAIP and therefore earlier return to work of injured workers with their employers at injury, by streamlining program administration, setting an appropriate fee payable to insurers for administration of the program, and expanding some incentives, including:

- Providing that a medical release remains in effect until another medical release is issued by the worker’s medical service provider;
- Providing that a worker is eligible for EAIP services while the claim is “deferred” (prior to acceptance or denial);
- Providing insurers greater discretion to determine appropriate EAIP worksite modifications and EAIP purchases;
- Providing insurers greater discretion to determine what is appropriate training; eliminating the requirement that EAIP purchases for training are limited to “accredited” or “licensed” training or courses;
- Increasing maximum reimbursable amount for EAIP purchases for tools and equipment;
- Allowing insurers to submit more than one reimbursement request per EAIP;
- Stating the administrative fee payable to the insurer for its administration of EAIP services (formerly not prescribed by rule);

Amendments to OAR 436-110, “Preferred Worker Program” (PWP) to promote increased use of the PWP and therefore facilitate the return to work of injured workers and improve return-to-work outcomes (wages, tenure, etc.), by streamlining program administration, creating new PWP incentives, and expanding some existing incentives, including:

- Redefining and simplifying “date of hire” and “reimbursable wages”;
- Shortening and simplifying the wording that must appear on notices to workers about potential PWP benefits;
- Issuing PWP identification cards with no expiration date - workers could offer the initial and any subsequent employers three full years of premium exemption and claim cost reimbursement;
- Eliminating the requirement that a modification of regular work be “substantial” in order for a worker to be eligible for PWP benefits other than Worksite Modification;
- Removing the restriction that Wage Subsidies may not be combined with subsidies from other sources, with the exception of subsidies under OAR 436-120;
- Revising the name of “Obtained Employment Purchases” to “Employment Purchases”;
- Allowing Employment Purchases while a worker is receiving vocational assistance under OAR 436-120;
- Allowing replacement of Employment Purchases;

- Increasing the maximum expenditure for an Employment Purchase for tools and equipment;
- Providing Employment Purchases needed to create a new worksite;
- Creating a miscellaneous category of Employment Purchase that may be used to help a worker find, accept, or retain employment;
- Allowing a second use of Wage Subsidy and a second use of each category of Employment Purchase for a different job with the same employer (formerly two wage subsidies could not be used with the same employer);
- Eliminating forms currently required for Worksite Modifications costing \$2,500 or less;
- Eliminating the general requirement for competitive bids for Worksite Modification;

Amendments to OAR 436-120, “Vocational Assistance to Injured Workers,” to improve sufficiency of certain notices, clarify time frames for submitting information to DCBS, streamline return-to-work plan development process, clarify or define certain provisions, and delete obsolete provisions, including:

- Describing how the Workers’ Compensation Division will determine the timeliness of any document that must be sent to the division in vocational matters;
- Requiring that notices of eligibility for vocational assistance, training, or direct employment services explain the rights of the worker to request a return-to-work plan conference;
- Requiring that notice must be *in writing* when an insurer notifies a worker that an eligibility determination is postponed while awaiting information about permanent restrictions;
- Requiring that if an insurer ends a worker’s eligibility because lack of suitable employment is not due to the limitations caused by the injury, the insurer must have obtained new information that did not exist or that the insurer could not have discovered with reasonable effort at the time the insurer determined eligibility;
- Including among the reasons a worker would be ineligible for vocational assistance or for which eligibility would end, that the worker is unavailable for vocational assistance due to short-term incarceration;
- Eliminating all time frames related to return-to-work plan development except that a plan must be approved within 45 days (direct employment) or 90 days (training) under OAR 436-120-0500(1) & (2);
- Updating the vocational fee schedule (consistent with changes in state average weekly wage and Bulletin 124);
- Eliminating the requirement that insurers request administrative approval for vocational services when the insurer is entitled to claims cost reimbursement under OAR 436-110;
- Repealing the rule: “Reimbursement of Vocational Assistance Costs for Pre-1986 Injuries”; and
- Defining “show-cause hearing” for the purposes of OAR 436-120-0915(3).

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 to:

Fred Bruyns, Rules Coordinator; phone 503-947-7717; fax 503-947-7581; 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 from WCD Publications, 503-947-7627 or fax 503-947-7630.

September 27, 2007
Last Day for Public Comment

John L. Shilts
Authorized Signer and Date

8-14-07

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

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

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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
Agency and Division

OAR CHAPTER 436
Administrative Rules Chapter Number

In the Matter of)
The Amendment of OAR:)
436-009, Oregon Medical Fee and Payment Rules)
436-010, Medical Services)
436-015, Managed Care Organizations)
436-030, Claim Closure and Reconsideration)
436-035, Disability Rating Standards)
436-040, Workers with Disabilities Program)
436-045, Reopened Claims Program)
436-050, Employer/Insurer Coverage Responsibility)
436-060, Claims Administration)
436-105, Employer-at-Injury Program)
436-110, Preferred Worker Program)
436-120, Vocational Assistance to Injured Workers)
436-160, Electronic Data Interchange)

Rule Caption:

Proposed rules affecting workers' compensation insurance, claims processing, medical treatment, and return-to-work assistance.

Statutory Authority: ORS 656.726(4)

Other Authority:

Statutes Implemented: ORS chapter 656, as amended by enrolled: Senate Bill (SB) 83 – Oregon Laws (OL) 2007, ch. 70; SB 147 - OL 2007, ch. 86; SB 253 - OL 2007, ch. 491; SB 504 - OL 2007, ch. 505; SB 563 - OL 2007, ch. 423; SB 762 - OL 2007, ch. 518; House Bill (HB) 2218 - OL 270; HB 2756 - OL 2007, ch. 252; HB 2783 - OL 2007, ch. 656; HB 2943 - OL 2007, ch. 300

Need for the Rule(s): Chapter 436 must be amended to be consistent with the Workers' Compensation Law, as amended by legislation passed by the 2007 Oregon Legislature. Some of that legislation required the director to make rules to implement revised laws. The department is proposing additional changes to make the rules easier to understand, to streamline regulations affecting stakeholders, and to expand return-to-work incentives for the Employer-at-Injury Program and Preferred Worker Program.

Documents Relied Upon, and where they are available: "Issues" documents as presented to advisory committees; advisory committee meeting minutes; written advice from advisory committee members.

These records are available for public inspection in the Administrator's Office, 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, including Statement of Cost of Compliance: The following is a list of significant estimated fiscal/economic impacts on persons and organizations affected by proposed rule amendments:

Amendments to implement changes in the Workers' Compensation Law

- Senate Bill 504 restricts emergency room physicians' rights to be attending physicians and authorize temporary disability benefits. Overall emergency-room treatment charges can be substantially higher than charges for visits to primary care physicians. In addition, early referral to primary care physicians should improve insurers' ability to keep track of authorization of temporary disability benefits and to promote return-to-work. The agency estimates that these changes should result in a small reduction in insurers' claims costs.
- Senate Bill 563 eliminates the requirement that managed care organizations (MCOs) send to the director copies of all new or amended treatment standards, protocols, and guidelines for the director's review and approval. In

the “Statement of Need and Fiscal Impact” filed with the Secretary of State on 8/14/06, DCBS estimated reporting costs for such reporting based on advice from MCOs. The low-high range of estimated reporting costs was then \$100 per year to \$50,000 per year per MCO, potentially \$400/year to \$200,000/year for the four active MCOs. The agency projects elimination of these reporting costs for MCOs.

- House Bill 2756 provides authority and limitations for several types of providers - chiropractors, naturopaths, podiatrists, and physician assistants - when acting as attending physicians. Because we cannot project how many injured workers will choose these providers as their attending physicians, we cannot now project the fiscal impacts. However, DCBS will monitor the effects of HB 2756 to identify impacts over time.
- House Bill 2783 requires insurers to notify the employer of termination of a guaranty contract 45 days in advance instead of the 30 days currently required. In addition, HB 2783 allows for a shorter notice requirement of only 10 days if the termination is based on nonpayment of premium. The agency projects some reductions in costs for insurers, because they can shorten their liability under the 10-day notice provision. The agency projects that these savings will be greater than any increased costs due to the 45-day notice provision, because insurers can adjust notice procedures in order to end liability, in most cases, by a date certain. The agency projects a small positive impact for employers subject to the 45-day notice, as it will give them more time to shop for cost-effective workers’ compensation insurance coverage.

In addition to changes to implement changes in the Workers’ Compensation Law:

Amendments to OAR 436, 009, “Oregon Medical Fee and Payment Rules” and OAR 436-160, “Electronic Data Interchange” (EDI)

- The agency projects that proposed rule changes will not have a significant fiscal impact on Oregon health care providers, as providers already send sufficient data to insurers on standard billing forms. The agency projects some fiscal impacts for insurers and self-insured employers, smaller for those companies already using EDI in other states and greater for Oregon-only reporters. The advisory committee did not express concerns about implementation costs. However, the agency projects significant costs for some insurers and self-insured employers in order to prepare for EDI, and also projects that these costs will eventually be exceeded by savings due to efficiencies inherent in electronic communication.

Amendments to OAR 436-035, “Disability Rating Standards”

- The agency projects that eliminating provision that if a value of impairment is determined for damage to the brain, no additional value for speech or psychiatric impairment is allowed, will have a positive economic impact on affected workers and an equal increased cost to affected insurers. However, this combination of medical conditions is very rare and the impact is not expected to be significant overall.

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

- The agency projects that proposed rules affecting worker leasing companies will add a small cost to submit additional information with the application for initial license or renewal of license.
- Conversely, the purpose of these rule changes is to create a level playing field for leasing companies by preventing or removing unfair competition by companies that cannot or will not comply with worker leasing laws and rules. Successfully preventing unfair competition would have a positive economic effect on leasing companies that do comply with the laws and rules. Relative to taking no action, the agency projects a small positive economic impact on worker leasing companies.

Amendments to OAR 436-105, “Employer-at-Injury Program” (EAIP) and OAR 436-110, “Preferred Worker Program” (PWP)

- The agency projects that expanded benefits and administrative fees for the EAIP will cost the Workers’ Benefit Fund (maximum/annual):
 - Reimbursement of EAIP costs before the claim is accepted or denied (if ultimately denied)..... \$700,000.00
 - Increased reimbursable amount for EAIP purchases for tools and equipment \$300,000.00
 - Proposed fee payable to insurers for administration of the EAIP \$480,000.00
 - Total \$1,480,000.00

- The agency projects that expanded benefits for the PWP will cost the Workers' Benefit Fund (maximum/annual):
 - Providing Employment Purchases needed to create a new worksite..... \$100,000.00
 - Creating a miscellaneous category of Employment Purchase that may be used to help a worker find, accept, or retain employment \$100,000.00
 - Total \$200,000.00
- The agency projects that issuing PWP identification cards with no expiration date will increase use of premium exemption and thus increase costs to the Workers' Benefit Fund. However, the impact would be very minor in the near term and increase gradually over time. The agency does not have a basis to project how many workers will use their cards for future employment, but will monitor this closely.
- Additional proposed changes that expand access to reemployment incentives will have lesser impacts on the Workers' Benefit Fund; however, the agency does not have a basis to project how extensively these incentives will be used.
- All moneys paid out of the Workers' Benefit Fund would have a positive economic impact on Oregon employers and insurers. In addition to the direct dollar transfer, by promoting early return to work, the proposed rules may reduce claims costs. In addition, the proposed changes should positively affect injured workers by promoting early return to work, which produces better long-term employment outcomes.
- The Workers' Benefit Fund has adequate reserves to cover any increased costs resulting from proposed rule changes.

Regarding: Additional proposed changes:

- The agency estimates that additional changes will not have any significant negative economic impacts on any persons or businesses, including small businesses. Because a number of the proposed rule changes streamline processes, the agency projects a small overall positive economic impact of proposed rule changes not otherwise described.

How were small businesses involved in the development of this rule?

Representatives from small businesses participated in the stakeholder advisory committees.

Cost of compliance effect on small businesses:

Estimated number of small businesses subject to the proposed rule:

One managed care organization. (Of the four managed care organizations certified and active in the Oregon workers' compensation system, one managed care organization meets the definition of a small business under ORS 183.310.)

Identify the types of businesses and industries with small businesses subject to the proposed rule:

The proposed rule amendments will affect managed care organizations.

Describe the projected reporting, record-keeping and other administrative activities required for compliance with the proposed rule, including costs of professional services:

Reporting: Proposed rule changes would require less reporting by managed care organizations, who will no longer have to send to the director copies of all new or amended treatment standards, protocols, and guidelines for the director's review and approval.

Record-keeping: Proposed rule changes may substantially reduce record keeping by a managed care organization only if organization keeps a running record of updated treatment standards, protocols, and guidelines for the purpose of reporting the updates to the director.

Other administrative activities and costs of professional services: For managed care organizations that contract with companies that specialize in provision of guidelines and protocols, there is the potential for reduced professional services costs.

Extent of economic impact: The agency projects a substantial reduction in reporting costs for MCOs.

Identify equipment, supplies, labor and increased administration required for compliance with the proposed rule:

Equipment: The proposed rule changes do not require the purchase of equipment to achieve compliance.

Supplies: The proposed rule changes do not require the purchase of supplies to achieve compliance.

Labor: The proposed rule changes do not require increased labor costs to achieve compliance.

Administration: The proposed rule changes do not require increased administrative costs to achieve compliance.

Extent of economic impact: No increased costs for these categories.

Administrative Rule Advisory Committee consulted:

Yes. Advisory committees met on 6/21/07, 7/10/07, 7/16/07, 7/17/07, 7/19/07, 7/20/07, 7/23/07, 7/26/07, 7/31/07

The agency asked the advisory committee for advice on the impact of the discussed changes on costs, including any significant adverse impacts on small businesses.

John L. Shilts

8-14-07

Signature and Date

John L. Shilts, Administrator, Workers' Compensation Division

Printed name

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION



Disability Rating Standards
Proposed Oregon Administrative Rules
Chapter 436, Division 035

Summer/Fall 2007

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

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EXHIBIT "A"
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 035

436-035-0005 Definitions

As used in OAR 436-035-0001 through 436-035-0500, unless the context requires otherwise:

(1) "Activities of Daily Living (ADL)" include, but are not limited to, the following personal activities required by an individual for continued well-being: eating/nutrition; self-care and personal hygiene; communication and cognitive functions; and physical activity, e.g., standing, walking, kneeling, hand functions, etc.

(2) "Ankylosis" means a bony fusion, fibrous union or arthrodesis of a joint. Ankylosis does not include pseudarthrosis or articular arthropathies.

(3) "Combined condition" means a preexisting condition and a compensable condition contribute to the worker's overall disability or need for treatment.

(4) "Date of Issuance", for purposes of these rules, means the mailing date of a Notice of Closure, Determination Order or Order on Reconsideration under ORS 656.268 and ORS 656.283(7).

(5) "*Dictionary of Occupational Titles*" or (DOT) means the publication of the same name by the U.S. Department of Labor, Fourth Edition Revised 1991.

(6) "Direct medical sequela" means a condition which originates or stems from ~~the compensable injury~~ **an accepted condition** or disease that is clearly established medically. Disability from direct medical sequelae is rated under these rules and ORS 656.268(14). For example: The accepted condition is low back strain with herniated disc at L4-5. The worker develops permanent weakness in the leg and foot due to radiculopathy. The weakness is considered a "direct medical sequela" of the herniated disc.

(7) "Earning Capacity" means impairment as modified by age, education and adaptability.

(8) "Impairment" means a compensable, permanent loss of use or function of a body part/system related to the compensable condition, determined under these rules, OAR 436-010-0280 and ORS 656.726(4)(f).

(9) "Irreversible findings" for the purposes of these rules are:

ARM

Arm angulation
Radial head resection
Shortening

EYE

Enucleation
Lens implant
Lensectomy

GONADAL

Loss of gonads resulting in absence of, or an abnormally high, hormone level

HAND

Carpal bone fusion
Carpal bone removal

KIDNEY

Nephrectomy

LEG

Knee angulation
Length discrepancy
Meniscectomy
Patellectomy

LUNG

Lobectomy

SHOULDER

Acromioclavicular joint resection
Clavicle resection

SPINE

Compression fractures
Discectomy
Laminectomy

SPLEEN

Splenectomy

URINARY TRACT DIVERSION

Cutaneous ureterostomy without intubation
Nephrostomy or intubated ureterostomy
Uretero-Intestinal

OTHER

Amputations/resections
Ankylosed/fused joints
Displaced pelvic fracture ("healed" with displacement)
Loss of opposition
Organ transplants (heart, lung, liver, kidney)
Prosthetic joint replacements

(10) "Medical arbiter" means a physician(s) under ORS 656.005(12)(b)(A) appointed by the Director under OAR 436-010-0330.

(11) "Offset" means to reduce a current permanent partial disability award, or portions thereof, by a prior Oregon workers' compensation permanent partial disability award from a different claim.

(12) "Physician's release" means written notification, provided by the attending physician to the worker and the worker's employer or insurer, releasing the worker to work and describing any limitations the worker has.

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(13) "Preponderance of medical evidence" or "opinion" does not necessarily mean the opinion supported by the greater number of documents or greater number of concurrences; rather it means the more probative and more reliable medical opinion based upon factors including, but not limited to, one or more of the following:

- (a) The most accurate history,
- (b) The most objective findings,
- (c) Sound medical principles or
- (d) Clear and concise reasoning.

(14) "Redetermination" means a reevaluation of disability under ORS 656.267, 656.268(9), 656.273 and 656.325.

(15) "Regular work" means the job the worker held at the time of injury.

(16) "Scheduled disability" means a compensable permanent loss of use or function which results from injuries to those body parts listed in ORS 656.214(3)(a) through (5).

(17) "Social-vocational factors" means age, education and adaptability factors under ORS 656.726(4)(f).

(18) "Superimposed condition" means a condition that arises after the compensable injury or disease which contributes to the worker's overall disability or need for treatment but is not the result of the original injury or disease. Disability from a superimposed condition is not rated. For example: The accepted condition is a low back strain. Two months after the injury, the worker becomes pregnant (non-work related). The pregnancy is considered a "superimposed condition."

(19) "Unscheduled disability" means a compensable condition that results in a permanent loss of earning capacity as described in these rules and arising from those losses under OAR 436-035-0330 through 436-035-0450.

(20) "Work Disability", for the purposes of determining permanent disability, means the separate factoring of impairment as modified by age, education, and adaptability to perform the job at which the worker was injured.

Stat. Auth.: ORS 656.726

Stats. Impltd.: ORS 656.005, 656.214, 656.268, 656.726

Hist: Amended 12/5/05 as WCD Admin. Order 05-074, eff. 1/1/06

436-035-0110 Other Upper Extremity Findings

(1) Loss of palmar sensation in the hand, finger(s), or thumb is rated according to the location and quality of the loss, and is measured by the two point discrimination method, as noted by the *AMA Guides, 3rd Ed. Rev., 1990*.

(a) If enough sensitivity remains to distinguish two pin pricks applied at the same time (two point), the following apply:

FINDING

6 millimeters apart or less:

7-10 millimeters:

11-15 millimeters:

GRADE OF SENSATION

normal

less than normal

protective sensation

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Greater than 15 millimeters:

total loss

(b) In determining sensation findings for a digit which has been resected or amputated, the value is established by comparing the remaining overall length of the digit to the table in subsection (1)(c) of this rule and rating the length equivalency.

For Example: Amputation of 1/2 the middle phalanx of the index finger with total sensory loss extending from the level of amputation to the metacarpophalangeal joint, results in a value for 1/2 the digit or 33%.

(c) Loss of sensation in the finger(s) or thumb is rated as follows:

Level of Loss and Percentage of Impairment

	Whole digit MP Joint	1/2 Proximal Phalanx	PIP Joint	1/2 Digit or IP Joint of the Thumb	DIP Joint	1/2 Distal Phalanx
THUMB						
Less than normal:	25	19	NA	12	NA	8
Radial side only:	10	8	NA	5	NA	3
Ulnar side only:	17	12	NA	7	NA	5
Protective sensation:	38	28	NA	17	NA	12
Radial side only:	17	12	NA	7	NA	5
Ulnar side only:	25	18	NA	11	NA	7
Total loss of sensation:	50	37	NA	23	NA	15
Radial side only:	23	16	NA	9	NA	6
Ulnar side only:	35	25	NA	15	NA	10
INDEX Finger						
Less than normal:	25	23	20	17	13	8
Radial side only:	17	15	13	11	8	5
Ulnar side only:	10	9	8	7	5	3
Protective sensation:	38	35	30	25	19	12
Radial side only:	25	23	20	17	12	7
Ulnar side only:	17	15	13	10	8	5
Total loss of sensation:	50	45	39	33	24	15
Radial side only:	35	31	27	22	16	10
Ulnar side only:	23	20	17	14	10	6
MIDDLE Finger						
Less than normal:	25	23	20	17	13	8
Radial side only:	17	15	13	11	8	5
Ulnar side only:	10	9	8	7	5	3

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Protective sensation:	38	35	30	25	19	12
Radial side only:	25	23	20	17	12	7
Ulnar side only:	17	15	13	10	8	5
Total loss of sensation:	50	45	39	33	24	15
Radial side only:	35	31	27	22	16	10
Ulnar side only:	23	20	17	14	10	6

Level of Loss and Percentage of Impairment

	Whole digit MP Joint	1/2 Proximal Phalanx	PIP Joint	1/2 Digit or IP Joint of the Thumb	DIP Joint	1/2 Distal Phalanx
RING Finger						
Less than normal:	25	23	20	17	13	8
Radial side only:	17	15	13	11	8	5
Ulnar side only:	10	9	8	7	5	3
Protective sensation:	38	35	30	25	19	12
Radial side only:	25	23	20	17	12	7
Ulnar side only:	17	15	13	10	8	5
Total loss of sensation:	50	45	39	33	24	15
Radial side only:	35	31	27	22	16	10
Ulnar side only:	23	20	17	14	10	6
LITTLE Finger						
Less than normal:	25	23	20	17	13	8
Radial side only:	10	9	8	7	5	3
Ulnar side only:	17	15	13	11	8	5
Protective sensation:	38	35	30	25	19	12
Radial side only:	17	15	13	10	8	5
Ulnar side only:	25	23	20	17	12	7
Total loss of sensation:	50	45	39	33	24	15
Radial side only:	23	20	17	14	10	6
Ulnar side only:	35	31	27	22	16	10

(NA = Not Applicable)

(d) If the level of the loss is less than 1/2 the distal phalanx or falls between the levels in subsection (c) of this section, rate at the next highest (or more proximal) level.

(e) In determining sensation impairment in a digit in which the sensation loss does not extend to the distal end of the digit, the value is established by determining the value for loss from the distal end of the digit to the proximal location of the loss, and subtracting the value for loss from the distal end of the digit to the distal location of the loss.

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Example: Grade 2 sensation in the index finger between the PIP joint and the MP joint:

Loss from distal end of the finger to the MP joint (proximal location of loss)	25%
Minus loss from distal end of the finger to the PIP joint (distal location of loss)	20%
Equals loss between MP and PIP	5%

(f) Any portion of palmar sensation loss is rated as follows:

	Total Loss of Sensation	Protective Sensation
Palmar Median Nerve	15% hand	11% hand
Palmar Ulnar Nerve	7% hand	5% hand

(g) Loss of sensation on the dorsal side of the hand, fingers or thumb is not considered a loss of function, so no value is allowed.

(h) Sensory loss in the forearm or arm is not considered a loss of function, therefore no value is allowed.

(i) When there are multiple losses of palmar sensation in a single body part (e.g. hand, finger(s), or thumb), the impairment values are first combined for an overall loss of sensation value for the individual digit or hand. This value is then combined with other impairment values for that digit or hand prior to conversion.

(j) Hypersensitivity resulting in a loss of use in the digits or palm, is valued utilizing the above loss of sensation tables. Mild hypersensitivity is valued at the equivalent impairment level as less than normal sensation, moderate hypersensitivity the equivalent of protective sensation loss, and severe hypersensitivity the equivalent of a total loss of sensation.

(2) When surgery or an injury results in arm length discrepancies involving the injured arm, the following values are given on the affected arm for the length discrepancy:

Discrepancy in Inches	Arm Impairment
Less than 1 inch	0%
1 inch or more, but less than 2 inches	5%
2 inches or more but less than 3 inches	10%
3 inches or more but less than 4 inches	15%
4 inches or more	20%

(3) Joint instability in the finger(s), thumb, or hand is rated according to the body part affected:

	Finger			Thumb		Hand
	MP	PIP	DIP	MP	IP	CMC
Mild: Less than 10°	20%	16%	9%	2%	3%	15%
Moderate: 10° to 20°	40%	32%	18%	4%	6%	30%
Severe: Greater than 20°	60%	48%	27%	6%	9%	45%

(4) Lateral deviation or malalignment of the upper extremity is valued as follows:

(a) Increased lateral deviation at the elbow is determined as follows:

Severity of Deviation	Arm Impairment
Mild: less than 20°	7%
Moderate: 20° - 30°	14%
Severe: Greater than 30°	21%

(b) Fracture resulting in angulation or malalignment, other than at the elbow, is determined as follows:

Deformity	Forearm-Impairment
Radius or ulna	10% <u>forearm</u>
Humerus	25% <u>arm</u>

(5) Surgery on the upper extremity is valued as follows:

(a) Finger/Thumb Surgery	Finger Impairment
Prosthetic joint replacement	1/2 the lowest ankylosis value for the involved joint
(b) Forearm/Hand Surgery	Forearm/Hand Impairment
Carpometacarpal arthroplasty	1/2 the lowest ankylosis value for the involved joint
Carpal bone fusion	5% each (Add values up to 30% maximum)
Prosthetic carpal bone replacement	5%
Carpal bone removal, (any portion)	
without replacement	5% maximum for each carpal bone
Prosthetic distal ulnar replacement	5%

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Distal ulnar resection, without replacement	10%
(c) Arm Surgery	Arm Impairment
Prosthetic radial head replacement	10%
Radial head resection, without replacement	15%
Prosthetic elbow joint replacement	35%
Humeral head replacement	15%

(6) Dermatological conditions, including burns, which are limited to the arm, forearm, hand, fingers, or thumb are rated according to the body part affected. The percentages indicated in the classes below are applied to the affected body part(s), e.g. a Class 1 dermatological condition of the thumb is 3% of the thumb, or a Class 1 dermatological condition of the hand is 3% of the hand, or a Class 1 dermatological condition of the arm is 3% of the arm. Contact dermatitis of an upper extremity is rated in this section unless it is an allergic systemic reaction, which is also rated under OAR 436-035-0450. Contact dermatitis for a body part other than the upper or lower extremities is rated under OAR 436-035-0440. Impairments may or may not show signs or symptoms of skin disorder upon examination but are rated according to the following classes:

(a) **Class 1:** 3% for the affected body part if treatment results in no more than minimal limitation in the performance of activities of daily living, although exposure to physical or chemical agents may temporarily increase limitations.

(b) **Class 2:** 15% for the affected body part if intermittent treatments and prescribed examinations are required, and the worker has some limitations in the performance of activities of daily living.

(c) **Class 3:** 38% for the affected body part if regularly prescribed examinations and continuous treatments are required, and the worker has many limitations in the performance of activities of daily living.

(d) **Class 4:** 68% for the affected body part if continuous prescribed treatments are required. The treatment may include periodically having the worker stay home or admitting the worker to a care facility, and the worker has many limitations in the performance of activities of daily living.

(e) **Class 5:** 90% for the affected body part if continuous prescribed treatment is required. The treatment necessitates having the worker stay home or being permanently admitted to a care facility, and the worker has severe limitations in the performance of activities of daily living.

(7) Vascular dysfunction of the upper extremity is valued according to the affected body part, using the following classification table:

(a) **Class 1:** 3% for the affected body part if the worker experiences only transient edema; and on physical examination, the findings are limited to the following: loss of pulses, minimal loss of subcutaneous tissue of fingertips, calcification of arteries as detected by radiographic examination, asymptomatic dilation of arteries or veins (not requiring surgery and not resulting in curtailment of activity), or cold intolerance (e.g. Raynaud's phenomenon) which results in a loss of use or function that occurs with exposure to temperatures below freezing (0° Centigrade).

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(b) **Class 2:** 15% for the affected body part if the worker experiences intermittent pain with repetitive exertional activity; or there is persistent moderate edema incompletely controlled by elastic supports; or there are signs of vascular damage such as a healed stump of an amputated digit, with evidence of persistent vascular disease, or a healed ulcer; or cold intolerance (e.g. Raynaud's phenomenon) which results in a loss of use or function that occurs on exposure to temperatures below 4° Centigrade.

(c) **Class 3:** 35% for the affected body part if the worker experiences intermittent pain with moderate upper extremity usage; or there is marked edema incompletely controlled by elastic supports; or there are signs of vascular damage such as a healed amputation of two or more digits, with evidence of persistent vascular disease, or superficial ulceration; or cold intolerance (e.g. Raynaud's phenomenon) which results in a loss of use or function that occurs on exposure to temperatures below 10° Centigrade.

(d) **Class 4:** 63% for the affected body part if the worker experiences intermittent pain upon mild upper extremity usage; or there is marked edema that cannot be controlled by elastic supports; or there are signs of vascular damage such as an amputation at or above the wrist, with evidence of persistent vascular disease, or persistent widespread or deep ulceration involving one extremity; or cold intolerance (e.g. Raynaud's phenomenon) which results in a loss of use or function that occurs on exposure to temperatures below 15° Centigrade.

(e) **Class 5:** 88% for the affected body part if the worker experiences constant and severe pain at rest; or there are signs of vascular damage involving more than one extremity such as amputation at or above the wrist, or amputation of all digits involving more than one extremity with evidence of persistent vascular disease, or persistent widespread deep ulceration involving more than one extremity; or cold intolerance such as Raynaud's phenomenon which results in a loss of use or function that occurs on exposure to temperatures below 20° Centigrade.

(f) If partial amputation of the affected body part occurs as a result of vascular disease, the impairment values are rated separately.

(8) Injuries to unilateral spinal nerve roots or brachial plexus with resultant loss of strength in the arm, forearm or hand are determined according to the specific nerve root which supplies (innervates) the weakened muscle(s), as described in the following table and modified under OAR 436-035-0011(7):

(a) **SPINAL NERVE ROOT Arm Impairment**

C-5	30%
C-6	35%
C-7	35%
C-8	45%
T-1	20%

(b) For loss of strength in bilateral extremities, each extremity is rated separately.

(9) When a spinal nerve root or brachial plexus are not injured, valid loss of strength in the arm, forearm or hand, substantiated by clinical findings, is valued based on the peripheral nerve supplying (innervating) the muscle(s) demonstrating the decreased strength, as described in the following table and as modified under OAR 436-035-0011(7).

Peripheral Nerve	Forearm Impairment
Median (above mid-forearm below elbow)	69%
Median (below mid-forearm)	44%
Radial (Musculospiral) (forearm with sparing of triceps)	50%
Ulnar (above mid-forearm)	44%
Ulnar (below mid-forearm)	31%
	Arm Impairment
Radial (upper arm with loss of triceps)	55%
Radial (triceps only)	25%
Musculocutaneous	25%

Example 1: A worker suffers a rupture of the biceps tendon. Upon recovery, the attending physician reports 4/5 strength of the biceps. The biceps is innervated by the musculocutaneous nerve which has a 25% impairment value. 4/5 strength, under OAR 436-035-0011(7), is 20%. Final impairment is determined by multiplying 25% by 20% for a final value of 5% impairment of the arm.

Example 2: A worker suffers a laceration of the median nerve below the mid-forearm. Upon recovery, the attending physician reports 3/5 strength in the forearm. The median nerve below the mid-forearm has a 44% impairment value. 3/5 strength, under OAR 436-035-0011(7), is 50%. Final impairment is determined by multiplying 44% by 50% for a final value of 22% impairment of the forearm.

- (a) Loss of strength due to an injury in a single finger or thumb receives a value of zero.
- (b) Decreased strength due to an amputation receives no rating for weakness in addition to that given for the amputation.
- (c) Decreased strength due to a loss in range of motion receives no rating for weakness in addition to that given for the loss of range of motion.
- (d) When loss of strength is present in the shoulder, refer to OAR 436-035-0330 for determination of the impairment.

(10) For motor loss in any part of an arm which is due to brain or spinal cord damage, impairment is valued as follows:

(a) Severity of Motor Loss	Arm Impairment
Can use the involved extremity for self care, grasping, and holding but has difficulty with digital dexterity.	14%

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Can use the involved extremity for self care, can grasp and hold objects with difficulty, but has no digital dexterity. 34%

Can use the involved extremity but has difficulty with self care activities. 55%

Cannot use the involved extremity for self care. 100%

(b) When a value is granted under subsection (a) of this section, additional impairment values are not allowed for weakness, chronic condition, or reduced range of motion in the same extremity.

(c) For bilateral extremity loss, each extremity is rated separately.

(11) Neurological dysfunction resulting in cold intolerance in the upper extremity is valued according to the affected body part utilizing the same classifications for cold intolerance due to vascular dysfunction in section (7) of this rule.

Stat. Auth.: ORS 656.726

Stats. Impltd.: ORS 656.005, 656.214, 656.268, 656.726

Hist: Amended 12/5/05 as WCD Admin. Order 05-074, eff. 1/1/06

436-035-0350 General Spinal Findings

(1) The following ratings are for fractured vertebrae:

(a) For a compression fracture of a single vertebral body:

% of Compression	% Impairment		
	Cervical	Thoracic	Lumbosacral
1% - 25%	4	2	5
26% - 50%	6	3	7
>50%	10	5	12

(b) A fracture of one or more of the posterior elements of a vertebra (spinous process, pedicles, laminae, articular processes, or transverse processes) is valued per vertebra as follows:

% Impairment		
Cervical	Thoracic	Lumbosacral
4	2	5

(2) For the purposes of this section, the cervical, thoracic, and lumbosacral regions are considered separate body parts. Values determined within one body part are first added, then the total impairment value is obtained by combining the different body part values. The following values are for surgical procedures performed on the spine.

	% Impairment		
	Cervical	Thoracic	Lumbosacral
1st Surgical Procedure			
Involving one 1 disc or up to 1 or 2 vertebrae, or any combination	8%	4%	9%
Additional disc(s) or vertebra treated within the same region/body part	Add 1% for each additional disc or vertebra.		
Subsequent Surgical Procedures	Add 1% for each disc or vertebrae treated.		

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(3) For injuries that result in loss of strength in the back, refer to OAR 436-035-0330(17) and (18).

Stat. Auth.: ORS 656.726

Stats. Impltd.: ORS 656.005, 656.214, 656.268, 656.726

Hist: Amended 12/5/05 as WCD Admin. Order 05-074, eff. 1/1/06

436-035-0390 Cranial Nerves/Brain

(1) Impairment of the First Cranial Nerve (Olfactory) resulting in either complete inability to detect odors or alteration of the sense of smell is 3% impairment.

(2) Ratings given for impairment of the Second Cranial Nerve (Optic) are figured according to their effects on vision under OAR 436-035-0260.

(3) Ratings given for impairment in the Third Cranial Nerve (Oculomotor), Fourth Cranial Nerve (Trochlear), and Sixth Cranial Nerve (Abducens) are determined according to their effects on ocular motility under OAR 436-035-0260.

(4) Ratings given for impairment of the Fifth Cranial Nerve (Trigeminal) are as follows:

(a) For loss or alteration of sensation in the Trigeminal distribution on one side: 10%; on both sides: 35%

(b) The rating given for loss of motor function in one Trigeminal Nerve is 5%.

(c) The rating given for loss of motor function of both Trigeminal Nerves is determined under OAR 436-035-0385 and 436-035-0420.

(5) Ratings given for impairment of the Sixth Cranial Nerve (Abducens) are described in section (3) of this rule.

(6) Ratings given for impairment of the Seventh Cranial Nerve (Facial) are as follows:

(a) No rating is given for loss of sensation from impairment of one or both Facial Nerves.

(b) If impairment of one or both Facial Nerves results in loss or alteration of the sense of taste, the rating is 3%.

(c) Motor loss on one side of the face due to impairment of the Facial Nerve is rated at 15% for a complete loss, or 5% for a partial loss.

(d) Motor loss on both sides of the face due to impairment of the Facial Nerve is rated at 45% for a complete loss, or 20% for a partial loss.

(7) Ratings given for impairment of the Eighth Cranial Nerve (Auditory) are determined according to their effects on hearing under OAR 436-035-0250. Other ratings for loss of function most commonly associated with this nerve include the following:

(a) For permanent disturbances resulting in disequilibrium which limits activities the impairment is rated according to the following:

(A) 8% when signs of disequilibrium are present with supporting objective findings and the usual activities of daily living are performed without assistance.

(B) 23% when signs of disequilibrium are present with supporting objective findings and the usual activities of daily living can be performed without assistance, and the worker is unable

to operate a motor vehicle.

(C) 48% when signs of disequilibrium are present with supporting objective findings and the usual activities of daily living cannot be performed without assistance.

(D) 80% when signs of disequilibrium are present with supporting objective findings and the usual activities of daily living cannot be performed without assistance, and confinement to the home or other facility is necessary.

(b) Tinnitus which by a preponderance of medical opinion requires job modification is valued at 5%. No additional impairment value is allowed for "bilateral" tinnitus.

(8) Ratings given for impairment of the Ninth Cranial Nerve (Glossopharyngeal), Tenth Cranial Nerve (Vagus), and Eleventh Cranial Nerve (Cranial Accessory) are as follows:

(a) Impairment of swallowing due to damage to the Ninth, Tenth, or Eleventh Cranial Nerves is determined under OAR 436-035-0420.

(b) Speech impairment due to damage to the Ninth, Tenth, or Eleventh Cranial Nerves is rated according to the classifications in OAR 436-035-0385(8).

(9) Ratings given for impairment of the Twelfth Cranial Nerve (Hypoglossal) are as follows:

(a) No rating is allowed for loss on one side.

(b) Bilateral loss is rated as in section (8) of this rule.

(10) Impairment for injuries that have resulted in damage to the brain is determined based upon a preponderance of medical opinion which applies or describes the following criteria.

(a) The existence and severity of the claimed residuals and impairments must be objectively determined by observation or examination or a preponderance of evidence, and must be within the range reasonably considered to be possible, given the nature of the original injury, based upon a preponderance of medical opinion.

(b) The residuals must be a direct result of organic injury to the brain. For example, emotional or behavioral disturbances must result directly from injury to the brain. Emotional disturbances which are reactive to other residuals, but which are not directly organically based, such as frustration or depressed mood about memory deficits or work limitations, are not included under these criteria and must be addressed separately.

(c) The distinctions between Classes are intended to reflect, at their most fundamental level, the impact of the residuals on two domains: impairment of activities of daily living, and impairment of employment capacity.

(d) Where the residuals from the accepted condition and any direct medical sequelae place the worker between one or more classes, the worker is entitled to be placed in the highest class that describes the worker's impairment. There is no averaging of impairment values when a worker falls between classes.

(e) As used in these rules, Episodic Neurologic Disorder refers to and includes any of the following:

(A) Any type of seizure disorder;

- (B) Vestibular disorder, including disturbances of balance or sensorimotor integration;
- (C) Neuro-ophthalmologic or oculomotor visual disorder, such as diplopia;
- (D) Headaches.

CLASS I

10% Impairment

Cognition: The worker functions at the equivalent of Rancho Los Amigos Scale-Revised level of 9 or 10; (e.g. the worker is alert and oriented; behavior is appropriate and the worker is able to recall and integrate past and recent events). The worker is independent in activities of daily living. If there are cognitive or memory deficits, they are no more than minimal or “nuisance” level, and do not materially impair activities of daily living, or the type of work the worker may perform.

Language: If there is a language deficit, it is no more than minimal (e.g. language comprehension or production might be less than normal, but it is adequate for daily living).

Emotions/Behavior: If there are emotional disturbances or personality changes, they are minimal and occur only transiently during stressful situations and events.

Sleep/Alertness: If there are episodic sleep disturbances, fatigue, or lethargy, they are minimal (e.g. any sleeping irregularity, fatigue, or lethargy does not interfere with daily living).

Episodic Neurologic Disorder: If there is an episodic neurologic disorder, it is completely controlled and does not interfere with daily living.

The fundamental intent of this Class is as follows: (1) ADL’s: The worker has “nuisance” level residual effects of head injury, which may slightly impact the manner in which ADL’s are performed, or the subjective ease of performance, but the worker remains fully independent in all activities of daily living; (2) Work Capacity: The “nuisance” level residuals may impact the manner in which the worker performs work tasks, or the subjective ease of performance, but the worker is not materially limited in the types of work which can be performed, as compared with pre-injury abilities.

CLASS II

30% impairment

Cognition: The worker functions at the equivalent Rancho Los Amigos Scale-Revised level of 8 (e.g. the worker is alert and oriented; behavior is appropriate and the worker is able to recall and integrate past and recent events). The worker can perform all activities of daily living independently, but due to mild cognitive or memory deficits, may need to use compensatory strategies or devices such as multiple written reminders, alarms, or digital devices; or may sometimes require more time than normal to complete activities of daily living; or may use occasional reminders, prompts, or minor assistance by others as a compensatory strategy, but is not dependent on others. For example, a spouse may be asked to double-check financial transactions for errors, but the worker can manage all transactions independently if necessary, and is not fundamentally dependent on the spouse for this activity. The cognitive or memory deficits limit the worker’s ability to perform some types of jobs, for example, mild attention deficits may preclude work in a busy, multi-taking environment, but the worker is still employable..

Language: Language deficit is mild (e.g. language comprehension or production might

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occasionally interfere with daily living or limit the worker's ability to perform some types of jobs, but the worker is still employable).

Emotion/Behavior: Emotional or behavioral disturbances or personality changes are mild. While they may be disproportionate to the stress or situation, they do not significantly impair the worker's ability to relate to others, or to live with others. They may limit the worker's ability to perform some types of jobs, for example, irritability may preclude jobs with high public contact; but the worker is still employable.

Sleep/Alertness: Episodic sleep disturbances, fatigue, or lethargy are mild (e.g. any sleeping irregularity, fatigue, or lethargy only occasionally interferes with daily living). Sleep disturbance, or mild or episodic fatigue or lethargy, may limit the worker's ability to perform some types of jobs, for example, shift work or commercial driving; but the worker is still employable.

Episodic Neurologic Disorder: Any episodic neurologic disorder is not completely controlled, and results in limits in ADL performance or types of work that may be performed, but the worker is still independent in ADL's and is employable. For example, headaches may intermittently interfere with daily living; diplopia which worsens with fatigue may cause the worker to have driving restrictions; vestibular symptoms may limit the worker's ability to operate industrial machinery or cause the worker to avoid heights.

The fundamental intent of this Class is as follows: (1) ADL's: The worker is independent in all activities of daily living, but may require significant adaptations or modifications in normal patterns or means of activities of daily living in order to achieve ADL-independence; (2) Work Capacity: The residuals result in some type of limitation on the worker's employment capacity, restricting the range of employment options that were previously available to the worker, but the worker remains employable in most jobs for which s/he was qualified prior to injury.

CLASS III
50% impairment

Cognition: The worker functions at the equivalent of Rancho Los Amigos Scale-Revised level of 7 (e.g. the worker is alert and oriented, behavior is appropriate but the worker has mild to moderate impaired judgment or mild to moderate, functionally significant cognitive or memory deficits). The judgment, cognitive, or memory deficits result in impairment sufficient that the worker regularly requires assistance or supervision in order to perform some activities of daily living. The deficits restrict the worker to a limited range of jobs, at a level significantly below the worker's pre-injury employment capacity.

Language: Language deficit is mild to moderate (e.g. language comprehension or production deficits frequently interfere with activities of daily living or restrict the worker to a limited range of jobs, at a level significantly below the worker's pre-injury employment capacity).

Emotions/Behavior: Emotional or behavioral disturbances or personality changes are moderate, disproportionate to the stress or situation, are present at all times and significantly impair the worker's ability to relate to others or to live with others. The disturbances restrict the worker to a limited range of jobs, at a level significantly below the worker's pre-injury employment capacity.

Sleep/Alertness: Episodic sleep disturbances, fatigue, or lethargy are moderate. They

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frequently interfere with daily living, or restrict the worker to a limited range of jobs, at a level significantly below the worker's pre-injury employment capacity.

Episodic Neurologic Disorder: If there is an episodic neurologic disorder, it is not completely controlled. It markedly interferes with daily living. The worker cannot operate industrial machinery, and is restricted to a limited range of jobs, at a level significantly below the worker's pre-injury employment capacity.

The fundamental intent of this Class is as follows: (1) ADL's: The worker is not completely independent in all ADL's, and requires some type of supervision, assistance, or guidance from another person at some times for some aspects of ADL's; (2) Work Capacity: The residuals result in major limitations on the worker's employment capacity with major restrictions or limitations on the worker's range of employment options.

CLASS IV
75% impairment

Cognition: The worker functions at the equivalent of Rancho Los Amigos Scale-Revised level of 6 (e.g. the worker has impaired judgment or significant memory deficit, such that the worker needs assistance and supervision to perform most activities of daily living and can work only in a sheltered setting).

Language: Language deficit is moderate (e.g. language comprehension is often impaired or language production is often inappropriate or unintelligible).

Emotions/Behavior: Emotional or behavioral disturbances or personality changes are moderate to severe, disproportionate to the stress or situation, are present at all times, require the worker to be supervised, or seriously limit the worker's ability to live with others. The worker can work, if at all, only in a sheltered setting.

Sleep/Alertness: Episodic sleep disturbances, fatigue, or lethargy are moderate-severe (e.g. they require supervision for daily living). The worker can work, if at all, only in a sheltered setting.

Episodic Neurologic Disorder: If there is episodic neurologic disorder, it is of such severity and constancy that activities have to be limited and supervised. The worker needs to live in a supervised setting such as a foster home, care facility, or supervised semi-independent residence..

The fundamental intent of this Class is as follows: (1) ADL's: The worker is basically dependent on others for most aspects of ADL's, although the worker may not need direct supervision at all times. (2) Work Capacity: The worker is incapable of competitive employment and can work, if at all, only in a sheltered setting.

CLASS V
85% impairment

The worker functions at the equivalent of Rancho Los Amigos Scale-Revised level of 4-5 (e.g. the worker's behavior is inappropriate, the worker is confused, not reliably oriented to time and place; the worker may be agitated and has a severe memory deficit) and the worker requires assistance and supervision to perform all activities of daily living. Total supervision is required. The worker is incapable of any employment.

CLASS VI

95% impairment

The worker functions at the equivalent of Rancho Los Amigos Scale-Revised level of 1-3. The worker is comatose or the worker's responses to stimuli are localized, inconsistent or delayed.

(11) For the purpose of section (10) of this rule, the Rancho Los Amigos-Revised levels are based upon the **Eight States Levels of Cognitive Recovery developed at the Rancho Los Amigos Hospital and co-authored by Chris Hagen, PhD, Danese Malkumus, M.A., and Patricia Durham, M.S., in 1972. These levels were revised by Danese Malkumus, M.A., and Kathryn Standenip, O.T.R., in 1974,** revised by Chris Hagen, PhD, in 1999 to include ten levels, referred to as Rancho-R.

~~(12) If a value of impairment is determined under section (10) of this rule, no additional value for speech or psychiatric impairment is allowed.~~

(13) For brain damage that has resulted in the loss of use or function of any upper or lower extremities, a value may be allowed for the affected body part(s). Refer to the appropriate section of these standards for that determination.

Stat. Auth.: ORS 656.726

Stats. Impltd.: ORS 656.005, 656.214, 656.268, 656.726

Hist: Amended 12/5/05 as WCD Admin. Order 05-074, eff. 1/1/06

436-035-0420 Gastrointestinal and Genitourinary Systems

(1) Impairments in mastication (chewing) and deglutition (swallowing) are determined based on the following criteria:

- (a) Diet limited to semi-solid or soft foods8%
- (b) Diet limited to liquid foods25%
- (c) Eating requires tube feeding or gastrostomy50%

(2) Impairment of the upper digestive tract (esophagus, stomach and duodenum, small intestine, pancreas) is valued according to the following classes:

Class 1

(3% Impairment)

Symptoms or signs of upper digestive tract disease are present or there is anatomic loss or alteration; and

Continuous treatment is not required; and

Weight can be maintained at the desirable level; or

There are no sequelae after surgical procedures.

Class 2

(15% Impairment)

Symptoms and signs of organic upper digestive tract disease are present or there is anatomic loss or alteration; and

Appropriate dietary restrictions and drugs are required for control of symptoms, signs or nutritional deficiency; and

Loss of weight below the "desirable weight"* does not exceed 10%.

**Class 3
(35% Impairment)**

Symptoms and signs of organic upper digestive tract disease are present or there is anatomic loss or alteration; and

Appropriate dietary restrictions and drugs do not completely control symptoms, signs, or nutritional state; or

There is 10-20% loss of weight below the "desirable weight"* which is ascribable to a disorder of the upper digestive tract.

**Class 4
(63% Impairment)**

Symptoms and signs of organic upper digestive tract disease are present or there is anatomic loss or alteration; and

Symptoms are not controlled by treatment; or

There is greater than a 20% loss of weight below the "desirable weight"* which is ascribable to a disorder of the upper digestive tract.

*Desirable weight Table:

DESIRABLE WEIGHTS BY SEX, HEIGHT AND BODY BUILD

THE WEIGHT CHARTS INCLUDE

(5LB CLOTHING FOR MEN, 3LB FOR WOMEN, SHOES WITH 1 IN HEELS)

MEN

HEIGHT (inches)	WEIGHT (pounds)		WEIGHT (pounds)
	SMALL FRAME	MEDIUM FRAME	LARGE FRAME
62	128-134	131-141	138-150
63	130-136	133-143	140-153
64	132-138	135-145	142-156
65	134-140	137-148	144-160
66	136-142	139-151	146-164
67	138-145	142-154	149-168
68	140-148	145-157	152-172
69	142-151	148-160	155-176
70	144-154	151-163	158-180
71	146-157	154-166	161-184
72	149-160	157-170	164-188
73	152-164	160-174	168-192
74	155-168	164-178	172-197

75	158-172	167-182	176-202
76	162-176	171-187	181-207

WOMEN

HEIGHT (inches)	WEIGHT (pounds) SMALL FRAME	WEIGHT (pounds) MEDIUM FRAME	WEIGHT (pounds) LARGE FRAME
58	102-111	109-121	118-131
59	103-113	111-123	120-134
60	104-115	113-126	122-137
61	106-118	115-129	125-140
62	108-121	118-132	128-143
63	111-124	121-135	131-147
64	114-127	124-138	134-151
65	117-130	127-141	137-155
66	120-133	130-144	140-159
67	123-136	133-147	143-163
68	126-139	136-150	146-167
69	129-142	139-153	149-170
70	132-145	142-156	152-173
71	135-148	145-159	155-176
72	138-151	148-162	158-179

(3) Colonic and rectal impairment is rated according to the following classes:

Class 1

(3% Impairment)

Signs and symptoms of colonic or rectal disease are infrequent and of brief duration; and

Limitation of activities, special diet or medication is not required; and

No systemic manifestations are present and weight and nutritional state can be maintained at a desirable level; or

There are no sequelae after surgical procedures.

Class 2

(15% Impairment)

There is objective evidence of colonic or rectal disease or anatomic loss or alteration; and

There are mild gastrointestinal symptoms with occasional disturbances of bowel function, accompanied by moderate pain; and

Minimal restriction of diet or mild symptomatic therapy may be necessary; and
No impairment of nutrition results.

Class 3
(30% Impairment)

There is objective evidence of colonic or rectal disease or anatomic loss or alteration; and
There are moderate to severe exacerbations with disturbance of bowel habit, accompanied by periodic or continual pain; and

Restriction of activity, special diet and drugs are required during attacks; and

There are constitutional manifestations (fever, anemia, or weight loss).

Class 4
(50% Impairment)

There is objective evidence of colonic and rectal disease or anatomic loss or alteration;
and

There are persistent disturbances of bowel function present at rest with severe persistent pain; and

Complete limitation of activity, continued restriction of diet, and medication do not entirely control the symptoms; and

There are constitutional manifestations (fever, weight loss, or anemia) present.

(4) Anal impairment is rated according to the following classes:

Class 1
(3% Impairment)

Signs of organic anal disease are present or there is anatomic loss or alteration; or

There is mild incontinence involving gas or liquid stool; or

Anal symptoms are mild, intermittent, and controlled by treatment.

Class 2
(13% Impairment)

Signs of organic anal disease are present or there is anatomic loss or alteration; and

Moderate but partial fecal incontinence is present requiring continual treatment; or

Continual anal symptoms are present and incompletely controlled by treatment.

Class 3
(23% Impairment)

Signs of organic anal disease are present and there is anatomic loss or alteration; and

Complete fecal incontinence is present; or

Signs of organic anal disease are present and severe anal symptoms unresponsive or not amenable to therapy are present.

(5) Liver impairment is determined according to the following classes:

Class 1

(5% Impairment)

There is objective evidence of persistent liver disease even though no symptoms of liver disease are present; and no history of ascites, jaundice, or bleeding esophageal varices within three years; and

Nutrition and strength are good;

Biochemical studies indicate minimal disturbance in liver function; or

Primary disorders of bilirubin metabolism are present.

Class 2

(20% Impairment)

There is objective evidence of chronic liver disease even though no symptoms of liver disease are present; and no history of ascites, jaundice, or bleeding esophageal varices within three years; and

Nutrition and strength are good; and

Biochemical studies indicate more severe liver damage than Class 1.

Class 3

(40% Impairment)

There is objective evidence of progressive chronic liver disease, or history of jaundice, ascites, or bleeding esophageal or gastric varices within the past year; and

Nutrition and strength may be affected; or

There is intermittent hepatic encephalopathy.

Class 4

(75% Impairment)

There is objective evidence of progressive chronic liver disease, or persistent ascites or persistent jaundice or bleeding esophageal or gastric varices, with central nervous system manifestations of hepatic insufficiency; and

Nutritional state is poor.

NOTE: For successful liver transplants a basic impairment value of 50% of the digestive system is given. This is combined with any other impairments of the digestive system.

(6) Biliary tract impairment is determined according to the following classes:

Class 1

(5% impairment)

There is an occasional episode of biliary tract dysfunction.

Class 2

(20% impairment)

There is recurrent biliary tract impairment irrespective of treatment.

Class 3

(40% impairment)

There is irreparable obstruction of the bile tract with recurrent cholangitis.

Class 4

(75% impairment)

There is persistent jaundice and progressive liver disease due to obstruction of the common bile duct.

(7) Impairment of the Upper Urinary Tract is determined according to the following classes:

Class 1**(5% Impairment)**

Diminution of upper urinary tract function is present as evidenced by creatinine clearance of 75 to 90 liters/ 24 hr (52 to 62.5 ml/min), or PSP excretion of 15% to 20% in 15 minutes; or

Intermittent symptoms and signs of upper urinary tract dysfunction are present that do not require continuous treatment or surveillance.

Class 2**(23% Impairment)**

Diminution of upper urinary tract function is present as evidenced by creatinine clearance of 60 to 75 liters/24 hr (42 to 52 ml/min), or PSP excretion of 10% to 15% in 15 minutes; or

Although creatinine clearance is greater than 75 liters/24 hr (52 ml/min), or PSP excretion is more than 15% in 15 minutes, symptoms and signs of upper urinary tract disease or dysfunction necessitate continuous surveillance and frequent treatment.

Class 3**(48% Impairment)**

Diminution of upper urinary tract function is present as evidenced by creatinine clearance of 40 to 60 liters/24 hr (28 to 42 ml/min), or PSP excretion of 5% to 10% in 15 minutes; or

Although creatinine clearance is 60 to 75 liters/24 hr (42 to 52 ml/min), or PSP excretion is 10% to 15% in 15 minutes, symptoms and signs of upper urinary tract disease or dysfunction are incompletely controlled by surgical or continuous medical treatment.

Class 4**(78% Impairment)**

Diminution of upper urinary tract function is present as evidenced by creatinine clearance below 40 liters/24 hr (28 ml/min), or PSP excretion below 5% in 15 minutes; or

Although creatinine clearance is 40 to 60 liters/24 hr (28 to 42 ml/min), or PSP excretion is 5% to 10% in 15 minutes, symptoms and signs of upper urinary tract disease or dysfunction persist despite surgical or continuous medical treatment.

*NOTE: The individual with a nephrectomy, as a result of an occupational injury or disease, should be rated as having 10% impairment. This value is to be combined with any other permanent impairment (including any impairment in the remaining kidney) pertinent to the case under consideration. The normal ranges of creatinine clearance are: Males: 130 to 200 liters/24 hr (90 to 139 ml/min). Females: 115 to 180 liters/24 hr (80 to 125 ml/min). The normal PSP excretion is 25% or more in urine in 15 minutes.

Permanent, surgically-created forms of urinary diversion usually are provided to compensate for anatomic loss and to allow for egress of urine. They are evaluated as a part of, and in conjunction with, the assessment of the involved portion of the urinary tract.

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Irrespective of how well these diversions function in the preservation of renal integrity and the disposition of urine, the following values for the diversions should be combined with those determined under the criteria previously given for the portion of the urinary tract involved:

Type of Diversion	% Impairment
Uretero-Intestinal.....	10
Cutaneous Ureterostomy Without Intubation.	10
Nephrostomy or Intubated Ureterostomy.....	15

(8) Impairment of the Bladder: When evaluating permanent impairment of the bladder, the status of the upper urinary tract must also be considered. The appropriate impairment values for both are combined under OAR 436-035-0011(5). Impairment of the bladder is determined according to the following classes:

Class 1**(5% Impairment)**

A patient belongs in Class 1 when the patient has symptoms and signs of bladder disorder requiring intermittent treatment with normal function between episodes of malfunction.

Class 2**(18% Impairment)**

A patient belongs in Class 2 when (a) there are symptoms or signs of bladder disorder requiring continuous treatment; OR (b) there is good bladder reflex activity, but no voluntary control.

Class 3**(30% Impairment)**

A patient belongs in Class 3 when the bladder has poor reflex activity, that is, there is intermittent dribbling, and no voluntary control.

Class 4**(50% Impairment)**

A patient belongs in Class 4 when there is no reflex or voluntary control of the bladder, that is, there is continuous dribbling.

(9) Urethra: When evaluating permanent impairment of the urethra, one must also consider the status of the upper urinary tract and bladder. The values for all parts of the urinary system are combined under OAR 436-035-0011(5). Impairment of the urethra is determined according to the following classes:

Class 1**(3% Impairment)**

A patient belongs in Class 1 when symptoms and signs of urethral disorder are present that require intermittent therapy for control.

Class 2**(15% Impairment)**

A patient belongs in Class 2 when there are symptoms and signs of a urethral disorder that cannot be effectively controlled by treatment.

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(10) Penile Sexual Dysfunction: When evaluating permanent impairment due to sexual dysfunction of the penis, one must also consider the status of the urethra upper urinary tract and bladder. The values for all parts of the system are combined under OAR 436-035-0011(6). Loss or alteration of the gonads is valued under OAR 436-035-0430. Impairment due to sexual dysfunction of the penis is determined according to the following classes for men 40 to 65 years of age.

Class 1

(Under 40 years old = 12% 40-65 years old = 8% Over 65 years old = 4%)

Sexual function is possible, but with varying degrees of difficulty of erection, ejaculation or sensation.

Class 2

(Under 40 years old = 21% 40-65 years old = 14% Over 65 years old = 7%)

Sexual function is possible with sufficient erection, but with impaired ejaculation and sensation.

Class 3

(Under 40 years old = 30% 40-65 years old = 20% Over 65 years old = 10%)

No sexual function is possible.

(11) Cervix/Uterus/Vagina: When evaluating permanent impairment of the cervix/uterus/vagina, one must also consider the status of the urethra, upper urinary tract and bladder. The values for all parts of the system are combined under OAR 436-035-0011(5). Loss or alteration of the gonads is valued under OAR 436-035-0430. Impairment of the cervix/uterus/vagina is determined according to the following classes:

Class 1

(8% Impairment)

Symptoms and signs of disease or deformity of the cervix,~~and/or~~ uterus, or vagina are present that do not require continuous treatment; or

Cervical stenosis, if present, requires no treatment; or

There is anatomic loss of the cervix,~~or~~ uterus, or vagina in the postmenopausal years.

Class 2

(20% Impairment)

Symptoms and signs of disease or deformity of the cervix,~~or~~ uterus, or vagina are present that require continuous treatment; or

Cervical stenosis, if present, requires periodic treatment.

Class 3

(32% Impairment)

Symptoms and signs of disease or deformity of the cervix,~~or~~ uterus, or vagina are present that are not controlled by treatment; or

Cervical stenosis is complete; or

Anatomic or complete functional loss of the cervix,~~or~~ uterus, or vagina in premenopausal years.

Stat. Auth.: ORS 656.726

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Stats. Impltd.: ORS 656.005, 656.214, 656.268, 656.726

Hist: Amended 12/5/05 as WCD Admin. Order 05-074, eff. 1/1/06

436-035-0500 Temporary Rule ~~Promulgation~~ Standard for Individual Claims

(1) This rule applies to the rating of permanent disability under Chapter 656 in individual cases under ORS 656.726(4)(f) which requires the director to ~~stay the reconsideration proceeding and adopt temporary rules~~ **determine the rating standard** in cases where the director finds that the worker's impairment is not addressed in the disability standards.

(2) ~~Temporary rules promulgated~~ **Rating standards determined** under ORS 656.726(4)(f) will be ~~incorporated by reference to the Workers' Compensation Division claim file number~~ **written into the director's order on reconsideration** and will be ~~apply~~ **applied** solely to the rating of that claim. ~~The temporary rule will be effective upon filing with the Secretary of State and elapse 180 days thereafter under ORS 183.335(6)(a).~~

~~(3) Notice of adoption of temporary rules will be given by mailing a copy of the temporary rule to the affected parties and to others as provided in OAR 436-001-0000(3).~~

Stat Auth: ORS 656.726(4)

Stats. Impltd.: ORS 656.005, 656.214, 656.268, 656.726

Hist: Amended 7/17/06 as WCD Admin. Order 06-058, eff. 7/17/06 (Temp) (AAP-4748) (H99-0974)

