

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
PROPOSED OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 060**

CLAIMS ADMINISTRATION

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BEFORE THE DIRECTOR OF THE
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
OF THE STATE OF OREGON

In the Matter of the Amendment of Oregon Administrative Rules, chapter 436, division: 060, Claims Administration)
)
) **SUMMARY OF TESTIMONY**
) **AND AGENCY RESPONSES**
)

This document summarizes the significant data, views, and arguments contained in the hearing record. The purpose of this summary is to provide the Director with a record of the agency conclusions about the major issues raised.

The amendment to the rules was announced in the Secretary of State’s Oregon Bulletin dated September 1, 2004. On September 22, 2004 a public rulemaking hearing was held as announced at 10:00 a.m. in Room B of the Labor and Industries Building, 350 Winter Street NE, Salem, Oregon 97301-3879. Fred Bruyns, Rules Coordinator, acted as presiding officer. Business Support Services audio-recorded the hearing and created a written transcript. The record was held open for written comment through September 28, 2004.

Exhibit # Oral testimony received from:

- 11 Carol Helton, Workers’ Compensation Division
See “Transcript of Proceedings,” a record of the public hearing.

Exhibit # Written testimony received from:

- 1 David A. Vinson, Starr & Vinson, PC
- 2 Doris E. Bain, CompPro, Inc.
- 3 Carol Helton, Workers’ Compensation Division
- 4 Nicole Schneider, Liberty Northwest Insurance
- 5 Linda L. Jefferson, City of Portland
- 6 Linda L. Jefferson, Oregon Self-Insurers Association
- 7 Linda Barno, Schnitzer Steel Industries, Inc.
- 8 William “Chip” Bartel, Special Districts Association of Oregon & Public Risk Consultants
- 9 Christopher J. T. Davie, SAIF Corporation
- 10 Susan Lavier, Dan Holden, City County Insurance Services
- 11 Linda Barno, Schnitzer Steel Industries, Inc.

The following is a summary of the testimony received and the agency’s responses to that testimony. If oral and written testimony were submitted by the same party, summarized oral testimony is listed separately only if and to the extent it differs from written testimony.

Summary of testimony & agency responses
OAR 436-060

OAR 436-060-0010(20) (*Exhibit 2*)

Testimony: The rule currently requires an annual election for supplemental disability benefits processing, however ORS 656.210(5)(b) does not require an annual election. It serves no purpose to ask insurers to redetermine this on an annual basis. The rule could be rewritten to state that the insurer must make an election and that once made the election will be effective until the insurer changes their election.

Response: In the interest of reducing requirements, and in line with regulatory streamlining, the director agrees. The rule will be modified.

OAR 436-060-0015(8) (*Exhibits 4, 5, 6, 7, 8, 9 & 10*)

Testimony:

- a) The rule should clarify the notice is only required on disabling claims, not every claim.
- b) It makes sense that this letter be sent any time there is a change in the average weekly wage after the initial letter has been sent.
- c) The proposed language implies that work disability is applicable on all claims, when it will only be applicable to those claims that qualify.
- d) OAR 436-060-0025 and OAR Chapter 438 are not specific as far as appeal rights and time frames. There should be more specific language incorporated into this rule or into one of the referenced rules regarding appeal rights and time frames for the worker to appeal the wage calculation if s/he disagrees with the insurer's calculations.

Response:

- a) By the language "Prior to claim closure..." it is implied this is only applicable to disabling claims, since non-disabling claims are not "closed." However, to add clarity, language will be added to make it clearer that this only applies to disabling claims.
- b) Agreed, the language will be modified.
- c) Agreed, the language will be modified.
- d) There is no statutory authority to impose a time frame within which the worker must appeal the wage calculation. However, language can be added regarding how to appeal, similar to the language in OAR 436-060-0025(5).

OAR 436-060-0017(3) (*Exhibits 1, 4, 5, 6, 7, 8, & 10*)

Testimony: The rule needs to better identify what is discoverable in the claims examiner's generated file notes. A worker's attorney stated he has no objection to excluding any notes pertaining to the setting of reserves, claims management strategy or privileged communications. But claimants should be entitled to file notes that pertain to processing the claim such as any investigation done by the adjuster, and any information obtained via the telephone that pertains to the processing of the claim. Insurers are interpreting the current rule to mean that all claims examiner file notes are not discoverable.

It seems that the proposed rule itself is in conflict with 436-060-0017(1)(a) the definition of documents – "insurer generated records exclude a claim examiner's generated file notes, such as

Summary of testimony & agency responses
OAR 436-060

documentation or justification concerning setting or adjusting reserves, claims management strategy, or any privileged communication...”

The department should outline the insurer’s responsibility in cases where the request for records is not copied to the worker. Many parties who request records are not governed by workers’ compensation rules (e.g., motor vehicle accident insurance companies). Is it the insurer’s responsibility to notify the requesting party that their request is insufficient? If the release specifies by the worker signing the release they are consenting to not being notified when/if records are requested, what is the insurer’s responsibility? Several insurers strongly disagree with the proposed language and believe it is in direct conflict with the basic rules of impeachment evidence rules and procedures. This rule already provides that workers and their representatives be copied on the insurer’s claim records. Therefore, we do not see the need for the proposed change and ask that this not be included in the adopted rules.

Requesting records is part of a claims management strategy. Language suggested: “If the request is from someone other than the worker or the worker’s representative, the requestor must also copy the worker or the worker’s representative with the request except when such notice would reveal a claims management strategy.”

Response: The definition of documents needs greater clarity. However, more input is needed before changing the language. The director doesn’t have a good sense of how big a problem the discovery issue is. Upon further review there is concern about the jurisdiction over other parties outside the workers’ compensation system. The proposed new sentence will be removed and this issue will be flagged for the next rule revision.

OAR 436-060-0018(3) (*Exhibits 5, 6, 7, 8, 9 & 10*)

Testimony: This rule appears to conflict with ORS 656.277 and 656.273, which requires reclassifications to be treated as aggravations if the claim had been in a non-disabling status for one year or more.

Response: The intent of this rule is to instruct the insurer to issue a Modified Notice of Acceptance when a new or omitted condition is accepted and to change a non-disabling claim to disabling if the new or omitted condition qualifies under the disabling criteria. However, the latter part of the proposed rule is problematic and will be removed. For clarity the statutory cites for new or omitted conditions and modifying the notice of acceptance from time to time will be added.

OAR 436-060-0019(1) (*Exhibit 4*)

Testimony: The proposed language for the three-day wait pertaining to the job at which the injury occurred should be removed, as it is misleading. We understand the intent of the language change was to emphasize the three-day wait is not applicable on a secondary job. However, the proposed wording doesn’t account for job changes in the primary job, before the worker has ever lost time from work, but still during the initial claim. Since there is proposed language to OAR

Summary of testimony & agency responses
OAR 436-060

436-060-0035 that clarifies the three-day wait is not applicable to secondary jobs, any reference here can be removed.

Response: The testimony points out a problem not contemplated. Since the same information is contained in OAR 436-060-0035, it will be removed here.

OAR 436-060-0025(4) (*Exhibits 5, 6, 7, 8, & 10*)

Testimony: We recommend a specific timeline be given the worker to contest the wage information used to determine benefits. The rule should provide appeal language if the worker disagrees with the insurer's calculations.

Response: There is no statutory authority for limiting when a worker can raise a dispute with the insurer's wage calculation. The fact that a wage dispute may be referred to the division for resolution is contained in OAR 436-060-0025(4) and (5). However, the testimony caused us to realize the language could be consolidated.

OAR 436-060-0035(1)(f) (*Exhibit 9*)

Testimony: Retaining the language "check stubs or payroll records" would provide guidance that this is the type of evidence needed, while opening the door for other documentation of a similar nature.

Response: Several division managers and program experts reviewed what is verifiable documentation. The word "information" broadens what is acceptable documentation. The act of verifying is different than able to be verified. The language will remain as proposed.

OAR 436-060-0035(3) (*Exhibit 4*)

Testimony: The rule should be modified to include any type of notice of a secondary job triggers the insurer's five day timeframe for sending the supplemental disability benefit information to the worker. Language suggested: *Within five business days of receiving notice or knowledge of a secondary job on a claim on which the temporary disability rate for the primary job does not meet or exceed the maximum rate, the insurer must send the worker an initial notice informing the worker what type of information....*"

Response: The division acknowledges the notice of a job in addition to the one at which the injury occurred may be received later than the notice of the claim. "A secondary job" may be limiting because the worker may have more than two. The suggested language from the testimony will be blended with the proposed language.

Summary of testimony & agency responses
OAR 436-060

OAR 436-060-0035(4) (*Exhibits 4, 5, 6, 7, 8, 9, & 10*)

Testimony: We understand this rule change was based on case law, but we believe it removes any responsibility of the worker. The rule must include a time limit (60 days was recommended) for the worker to provide verifiable wage documentation. Otherwise workers could potentially request supplemental disability benefits and provide wage documentation years after the period they lost time/wages from a secondary job. Without a specific time limit, an insurer will be greatly hindered by having to keep reserves on files for information that *may* be received at a future date. If an insurer does not have verifiable documentation of a secondary job from a worker, they would not be prompted to obtain time loss authorization from the attending physician relating to the secondary employment. In the event the verifiable documentation were not received until months after an injury, it would be extremely difficult to track down time loss authorizations and have a physician verify if a worker was able or unable to perform the work at the secondary employment. Several insurers suggested precluding the worker's entitlement to supplemental disability if the documentation is not received within 60 days, unless the worker first requests and establishes at an expedited hearing under ORS 656.291 that the worker had good cause for the delay. The suggested language would also include, "In no circumstance will documentation received by the insurer after 180 days following the initial notice in subsection 3 be considered to determine the worker's eligibility for supplemental disability or recalculation of the temporary disability rate."

The proposed rule seems to set a dangerous precedent by implying a deadline and then requiring the insurer to ignore it. If workers see that this deadline was not real, why should they adhere to other deadlines, like a denial of the claim or a new condition? Until the statute is amended to include a time limit for submitting verifiable documentation or the Courts reverse the Board decision, the rule should not attempt to impose a deadline.

Response: The Board case pointed out the problem with this rule. Supplemental disability benefits paid to the worker are reimbursed to the insurer from the Worker Benefit Fund. As time goes by it will be harder for a worker to produce verifiable documentation and it is still the worker's responsibility to provide the information. The proposed rules will be modified to remove the 60-day timeframe and tie the initial calculation to the wages from the primary job only until and unless the worker provides the necessary information.

OAR 436-060-0035(10)

Testimony: The intent of this proposed rule is unclear. It seems to require supplemental disability be paid only for the days that were scheduled days off for the secondary job. The result in most cases could mean no disability would be paid. The preferred way to designate days off is to combine the days off for the two jobs. Exhibit 9

Response: Several division managers and program experts reviewed how to keep this as simple and uncomplicated as possible. What days off to use only becomes an issue on partial weeks. The proposed rule will remain.

OAR 436-060-0035(23), (24), & (25) (*Exhibits 5, 6, 7, 8, 9, & 10*)

Summary of testimony & agency responses
OAR 436-060

Testimony: A time limit should be given to the division or its assigned processing administrator to provide their lien amount, when a lien request is received by an insurer or self-insured employer. This will limit the possibility of holding-up settlement negotiations. Clearly outline the distribution of funds if there is insufficient funds to completely cover the SDB lien and the WC lien.

The division is proposing a procedure for third party recoveries that differs from the rules for any other reimbursable programs. We recognize the Worker Benefit Fund's right to share in the proceeds of a recovery and we will make every effort to advise the division of pending negotiations. However, we can find no section of ORS 656.593 that includes provisions governing notification to the division. We assume that failure to advise the division for any reason will not jeopardize reimbursements from the Worker Benefit Fund.

Response: If the insurer is paying supplemental disability, they will know the amount of the lien based on what they have paid out and received in reimbursement. Distribution of funds is outlined in ORS 656.593 and does not need to be repeated in these rules. The language was lifted from Division 075 language on third party recoveries. However, based on the testimony the language requiring the insurer to notify the division will be removed.

OAR 436-060-0040(4) (*Exhibit 4*)

Testimony: We request the rule be modified to clarify that at the end of training, if no award of permanent impairment remains due, then temporary disability benefits are paid "procedurally" pending claim closure. Language needs to be added to clarify that any period of temporary disability that is paid beyond the end of training can be later taken as an overpayment if it is not statutorily due.

Response: It is not appropriate to introduce the term "procedurally" into the rules. ORS 656.268(13)(a) gives the insurer the authority to recover overpaid benefits. Therefore, it is unnecessary to add it to the rules.

OAR 436-060-0095(2) (*Exhibits 5, 6, 7, & 8*)

Testimony: Several insurers submitted testimony to modify this rule. They provided no explanation of why the change is needed. The suggested language reads, "The Division will consider requests to authorize suspension of benefits on accepted claims *and deferred claims. Requests to dismiss a Request for Hearing on a denied claim* in which the worker has appealed the insurer's denial *shall be considered by the Worker's Compensation Board Hearings Division.*" New language is bold italicized.

Response: On October 12, 2004, Wendy Stone spoke with Linda Jefferson of the City of Portland for clarification of this issue. Linda stated she was under the impression the Workers' Compensation Board would have jurisdiction for suspension of benefits when a claim has been denied. However, under ORS 656.325 the director has jurisdiction for suspension of benefits. The rule will remain as proposed.

Summary of testimony & agency responses
OAR 436-060

OAR 436-060-0095(14) new section (*Exhibits 5, 6, 7, 8, & 10*)

Testimony: Several insurers submitted testimony to add this section to the rule. They provided no explanation of why they believe this change is needed. The suggested language reads, *“Insurer’s and self-insured employer’s shall be entitled to offset costs associated with medical examinations under ORS 656.325 and medical arbiter exams under ORS 656.267 that the worker refused to attend or otherwise obstructed. Offsets shall be made against compensation payable to the worker on any claim with the same insurer or self-insured employer. “Costs associated with a medical examination” include, but are not limited to, cancellation fees charged by the examiner, prepaid travel expenses and prepaid lodging.”*

Response: This issue was not included in the issues document and was not discussed in the internal or external advisory committee meetings. An issue must go through the entire process to allow the various parties to comment. This issue will be flagged for consideration during the next rule revision.

OAR 436-060-0140 (*Exhibit 3*)

Testimony: To streamline, consolidate and improve consistency, all information about preparing and processing Updated Notices of Acceptance belongs with the other types of notices of acceptance and the other aspects of claims processing. Updated Notices of Acceptance are not specifically addressed with other types of acceptance notices. Division staff have seen instances of incorrect actions taken to issue, change, and correct initial Updated Notices of Acceptance after they are issued in conjunction with the Notice of Closure. Discussions, review, and comparison of rules in Divisions 030 and 060 lead the division to believe the absence of direction for processing these notices in OAR 436-060 may be contributing to the errors. The Division recommends a reference be added in this rule to processes related to Updated Notices of Acceptance.

Response: There is specific information about issuing an Updated Notice of Acceptance at Closure in OAR 436-030-0015. It makes sense, however, to include a reference to that rule in OAR 436-060-0140(7). The rule will be modified.

OAR 436-060-0140(10)(c) (*Exhibit 9*)

Testimony: The proposed wording is misleading. Rather than saying “an appeal” may occur sooner, the notice should tell the worker that “a hearing may occur sooner if the worker requests an expedited hearing.”

Response: The testimony provides clarity to the proposed rule. The rule will be modified.

OAR 436-060-0147(6) (*Exhibit 1*)

Testimony: I object to this proposed change. Injured workers have no input or opportunity to object to any of the selected physicians an insurer chooses for insurer medical exams. So,

Summary of testimony & agency responses
OAR 436-060

insurers should not have any input into the selection of the worker requested medical exam doctor, much less the right to veto one of the doctors selected by the director. The rule should allow the worker to select the worker requested medical exam doctor from a list provided by the director.

Response: This program was patterned after the Medical Arbiter Program where each side is provided the opportunity to have input to the selection of the doctor. However, this program was designed to provide the worker with an impartial examination and the report can be used as evidence to establish compensability. The language will be modified to remove the insurer's opportunity to have input to the process.

OAR 436-060-0147(7) (*Exhibits 5, 6, 7, 8, & 9*)

Testimony: Expedite the delivery of a list of physicians by faxing the list or sending it by overnight mail in order for the parties to comply with the time limits. Five business days is not enough time to respond, litigation of a denied claim is not conducted on an expedited basis, so there is no compelling reason for an arbitrarily short processing time. The rule should allow ten business days.

Response: Litigation of a denied claim is not conducted on an expedited basis and there is no compelling reason for an arbitrarily short processing time. It seems reasonable to allow ten business days. The rule will be modified.

OAR 436-060-0150(9) (*Exhibits 4, 5, 6, 7, 8, 9, & 10*)

Testimony: The rule is not specific about the notification of how a temporary disability payment is calculated. We assume this does not include the method by which the rate of compensation is calculated. This information is already included in other mandatory notices to the worker and does not need to be repeated with every payment, unless there has been a change. Compliance with this requirement would significantly increase paperwork. The paperwork associated with this rule would be extremely burdensome and excessive for the insurer or self-insured employer.

Response: In the interest of regulatory streamlining and since OAR 436-060-0015(8) clarifies that an initial notification is required on this subject with an additional notification if there is a change, the proposed language will be removed.

OAR 436-060-0155(3) (*Exhibit 1*)

Testimony: As the current rule is structured, the insurer can delay discovery to the injured worker's representative until the 180 days has passed. The rule also takes away a right expressly granted to the worker in ORS 656.319(6), which provides two years in which to seek a remedy. That remedy must be filed within two years of the action or inaction. The current rule takes away rights granted the worker by ORS 656.262 and 656.319. The director does not have authority granted by statute to reduce any statutory right granted to the injured worker.

Summary of testimony & agency responses
OAR 436-060

Response: This language has existed in these rules for many years. In *Kathryn R. Cook v. Liberty Northwest Insurance Corporation*, 150 Or App 597 (1997), the Court of Appeals held this rule is reasonably required for the director to carry out the performance of the director's duties. The case also considered the issue the testimony presented concerning ORS 656.319(6). A worker still has the right to appeal an action or inaction to the Workers' Compensation Board under ORS 656.319(6). The current language will remain.

OAR 436-060-0155(8) (*Exhibits 5, 6, 7, 8, 9, and 10*)

Testimony: The proposed language does not provide the insurer the opportunity to consider further appeal of the order. Often a decision on further appeal is made at the last minute. Several insurers recommend a reasonable time period of at least 14, but no greater than 30, days after the date of the order upholding the penalty becomes final.

Response: Paying the penalty within fourteen days of the order upholding the penalty becoming final is a reasonable time. The rule will be modified.

Having reviewed and considered all data, views and arguments presented, I hereby submit this report as a summary of statements given and exhibits received. I recommend the adoption of the amendments to the rules consistent with the above responses.

Dated this 10th day of November, 2004.

WORKERS' COMPENSATION DIVISION

/s/ Fred Bruyns

Fred Bruyns, Rules Coordinator
Policy Section
Workers' Compensation Division

Secretary of State
NOTICE OF PROPOSED RULEMAKING HEARING

A Statement of Need and Fiscal Impact accompanies this form.

Dept of Consumer and Business Services, Workers' Compensation Division		OAR CHAPTER 436	
Agency and Division		Administrative Rules Chapter Number	
Fred Bruyns		(503) 947- 7717 Fax (503) 947-7581	
Rules Coordinator		Telephone	
PO Box 14480, Salem, OR 97309-0405; 350 Winter Street NE, Rm 27, Salem, OR 97301-3879			
Address			
September 22, 2004		Room B (basement), Labor & Industries Building	
10:00 a.m.		350 Winter Street NE, Salem, Oregon	
Hearing date		Fred Bruyns	
Time		Hearings Officer	
Location			

NOTE: The hearing will convene at 10:00 a.m. and end when all present who have indicated their intention to testify have been called to present testimony. Written testimony will be accepted through September 28, 2004.

**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

AMEND: OAR chapter 436, division 060

ORS 656.726(4), 656.704

Stat. Auth.

ORS 183.335; OAR 137-001; OAR 436-001

Other Authority

ORS chapter 656; ch. 657, OL 2003 (Senate Bill 757)

Stats. Implemented

RULE SUMMARY

The agency proposes to amend these rules in part to implement changes in the law due to legislation passed by the 2003 Oregon Legislature. Senate Bill 757 changed the disability rating standards for claims with dates of injury on or after January 1, 2005. In accordance with the changes, these proposed rules (for dates of injury on or after 1/1/2005):

- Eliminate the distinction between scheduled and unscheduled permanent partial disability; and
- Require insurers to withhold payment of "work disability" if a worker becomes enrolled and actively engaged in training under ORS 656.340 and OAR 436-120.

In addition, these proposed rules:

- 436-060-0009(7) Require that requests to inspect or obtain copies of workers' compensation claim records include the reason for requesting the records;
- 436-060-0015(8) Require that prior to claim closure, the insurer send the worker a letter documenting the wage upon which benefits were based and work disability will be determined when the claim is closed. The letter must also explain how the worker can appeal the insurer's wage calculation under OAR 436-060-0025 or OAR chapter 438, if the worker disagrees with the wage;
- 436-060-0017(3) Require that for requests for an insurer's claim records, if the requestor is someone other than the worker or the worker's representative, the requestor must also copy the worker or the worker's representative with the request;
- 436-060-0017(10) Provide that if the Workers' Compensation Division is investigating rule violation complaints about release of requested claim documents, and an insurer provides an inadequate response to the

**Oregon Administrative Rules, Chapter 436
Notice of Proposed Rulemaking Hearing**

division's request (e.g. failing to answer specific questions or provide requested documents), a civil penalty may be assessed against the insurer; this section formerly addressed only the timeliness of the response;

- 436-060-0018 Clarify procedures for the director's review of disabling/non-disabling status decisions and related appeal rights;
- 436-060-0035(4) Provide that the worker has 60 days to send to the insurer verifiable documentation of wages from another employer; otherwise, the insurer is to calculate time loss due based on the information on hand. If the worker sends the information after the 60 days, the insurer must recalculate what is due and pay it. However, the insurer is not then subject to penalties for late payment of supplemental disability;
- 436-060-0035(9) Provide that there is no three-day waiting period applicable to supplemental disability benefits;
- 436-060-0035(10) Provide that the worker's scheduled days off for the job at which the injury occurred are used to calculate and pay supplemental disability;
- 436-060-0035(23)-(25) Provide that in third party recoveries, supplemental disability paid from the Workers' Benefit Fund is considered part of the department's lien;
- 436-060-0135(6) Specify certain types of information that must be submitted by an insurer requesting suspension of benefits for failure to attend an insurer medical examination;
- 436-060-0140(10) Provide that if the attending physician did not agree with an insurer medical examination report, a related denial notice must include the division's Web site address and toll free Infoline for the worker's use in obtaining a brochure about Worker Requested Medical Examinations;
- 436-060-0147(6)-(7) Provide that the director may give the parties a list of appropriate physicians (for a Worker Requested Medical Examination); the parties may agree to one physician from the list or each party may eliminate one physician from the list;
- 436-060-0150(9) Provide that each temporary disability payment must be accompanied by an explanation of how the payment was calculated; and
- 436-060-0155(8) Provide that if the penalty order is appealed and later upheld, the penalty under this rule will be due on the date on which the order upholding the penalty becomes final.

Request for public comment:

The agency 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://www.cbs.state.or.us/external/wcd/policy/rules/rules.html#proprules> or from WCD Publications at 503-947-7627 or fax 503-947-7630.

September 28, 2004
Last Day for Public
Comment

/s/ John L. Shilts
Authorized Signer and Date

8/5/2004

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.

Distribution: WCD-ID, S, T, U, AT, CE, EG, IA, LU, NM, CI, S0, S1

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

In the Matter of)	Statutory Authority,
)	Statutes Implemented,
The Amendment of:)	Statement of Need,
OAR 436-060, Claims Administration)	Principal Documents Relied Upon,
)	Statement of Fiscal Impact

Statutory Authority: ORS 656.704, 656.726(4)

Other Authority: ORS 183.335; OAR 137-001; OAR 436-001

Statutes Implemented: ORS chapter 656; ch. 657, OL 2003 (Senate Bill 757)

Need for the Rule(s): These amendments are proposed in part to implement changes in the law due to legislation passed by the 2003 Oregon Legislature. Senate Bill 757 changed the disability rating standards for claims with dates of injury on or after January 1, 2005. Additional changes have been proposed at the request of stakeholders and customers and for the purposes of regulatory streamlining.

Documents Relied Upon: Enrolled Senate Bill 757; fiscal impact statement and bill analysis forms for SB 757; rule advisory committee meeting records; issues documents. These documents will be available for public inspection in the Administrator's Office, Workers' Compensation Division, 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) 947-7810.

Fiscal and Economic Impact:

The proposed rules require that notice be provided to injured workers documenting the wage used to determine their benefits and explaining how time-loss payments were calculated. This requirement will slightly increase costs for some insurers and self-insured employers. However, the rules do not prescribe the form or format for the notices, and therefore provide flexibility to determine the most cost-effective notification methods. In addition, enhanced notice is proposed as an alternative to some of the monitoring and enforcement measures used by the Workers' Compensation Division, such as early review of reporting forms for possible wage/time-loss discrepancies. Overall, we estimate that this change should be cost neutral or produce net savings to the workers' compensation system.

Proposed changes to supplemental disability benefit processing may slightly increase payments for this type of benefit (e.g., elimination of the three-day wait for additional jobs). This benefit is ultimately paid from the Workers' Benefit Fund, but the impact on the Fund is not expected to be significant.

Statement of Need and Fiscal Impact

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The proposed Worker Requested Medical Examination physician selection process will involve some increased workload for Workers' Compensation Division staff. However, given the small volume of examination requests, the workload can be absorbed by existing staff.

Additional proposed changes are projected to have no significant fiscal impact on any party. These rules should not impose any significant burdens on small businesses.

Administrative Rule Advisory Committee consulted: Yes, June 4, 2004

/s/ John L. Shilts

8/5/2004

Signature and Date

John L. Shilts, Administrator, Workers' Compensation Division

Printed name

Administrative Rules Unit, Archives Division, Secretary of State, 800 Summer Street NE, Salem, Oregon 97310.

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**EXHIBIT 'A'
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 060**

436-060-0001 Authority for Rules

These rules are promulgated under the director's authority contained in ORS 656.210(2), 656.262(11), 656.264, 656.265(6), 656.325, 656.331, and 656.726(4).

Stat. Auth: ORS 656.210(2), 656.262(11), 656.264, 656.265(6), 656.325, 656.331, 656.704, and 656.726(4)
Stat. Impltd: ORS 656.210(2), 656.262(11), 656.264, 656.265(6), 656.325, 656.331, 656.704, and 656.726(4)
Hist: Filed 12/19/75 as WCB Admin. Order 18-1975, eff. 1/1/76
 Amended 4/27/78 as WCD Admin. Order 6-1978, eff. 4/27/78
 Amended 1/11/80 as WCD Admin. Order 1-1980, eff. 1/11/80
 Amended 12/29/83 as WCD Admin. Order 8-1983, eff. 1/1/84
 Renumbered from 436-54-001, May 1, 1985
 Amended 12/12/85 as WCD Admin. Order 8-1985, eff. 1/1/86
 Amended 6/18/90 as WCD Admin. Order 8-1990, eff. 7/1/90 (Temp)
 Amended 11/30/90 as WCD Admin. Order 26-1990, eff. 12/26/90
 Amended 2/2/96 as WCD Admin. Order 96-053, eff. 2/12/96
 Amended 11/30/01 as WCD Admin. Order 01-061, eff. 1/1/02

436-060-0002 Purpose

The purpose of these rules is to prescribe uniform standards by which insurers shall process workers' compensation claims pursuant to ORS 656.726(4). The director has charged the Workers' Compensation Division with the administration and enforcement of the applicable statutes, these rules, and all bulletins pertaining to claims processing. Failure to process claims in accordance with these rules will subject insurers to civil penalty under ORS 656.745; to penalties payable to the claimant pursuant to ORS 656.262(11); and, to sanctions pursuant to ORS 656.447.

Stat. Auth: ORS 656.262(11), 656.447, 656.704, 656.726(4), and 656.745
Stat. Impltd: ORS 656.262(11), 656.447, 656.704, 656.726(4), and ORS 656.745
Hist: Filed 4/27/78 as WCD Admin. Order 6-1978, eff. 4/27/78
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 Amended 11/30/90 as WCD Admin. Order 26-1990, eff. 12/26/90
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 Amended 2/2/96 as WCD Admin. Order 96-053, eff. 2/12/96
 Amended 11/30/01 as WCD Admin. Order 01-061, eff. 1/1/02

436-060-0003 Applicability of Rules

- (1) These rules govern claims processing and carry out the provisions of:
- (a) ORS 656.210. Temporary total disability;
 - (b) ORS 656.212. Temporary partial disability;
 - (c) ORS 656.230. Lump sum payments;
 - (d) ORS 656.262. Responsibility for processing and payment of compensation, sight drafts, claimant's duty to cooperate with an investigation, acceptance and denial and reporting of claims, and penalties for payment delays;

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- (e) ORS 656.264. Required reporting of information to the director;
- (f) ORS 656.265. Notices of accidents from workers;
- (g) ORS 656.268. Insurer claim closures, insurer recovery of overpayments;

(h) ORS 656.273 Aggravation for worsened conditions, procedures, limitations, additional compensation;

(i) ORS 656.277 Request for reclassification of nondisabling claim, nondisabling claim procedure;

- (j)** ORS 656.307. Determination of responsibility for compensation payments;

[(i)] **(k)** ORS 656.325. Required medical examinations, suspension of compensation, injurious practices, claimant's duty to reduce disability, and reduction of benefits for failure to participate in rehabilitation;

- [(j)] **(l)** ORS 656.331. Notice to worker's attorney; and,

- [(k)] **(m)** ORS 656.726(4). The director's powers and duties generally.

(2) The applicability of these rules is subject to ORS 656.202.

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

Stat. Auth: ORS 656.210, 656.212, 656.230, 656.262, 656.264, 656.265, 656.268, 656.273, 656.277, 656.307, 656.325, 656.331, 656.704, and 656.726(4)

Stat. Impltd: ORS 656.704 and 656.726(4)

Hist: Filed 4/27/78 as WCD Admin. Order 6-1978, eff. 4/27/78
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Amended 12/23/81 as WCD Admin. Order 6-1981, eff. 1/1/82
Amended 12/29/83 as WCD Admin. Order 8-1983, eff. 1/1/84
Amended 4/4/84 as WCD Admin. Order 3-1984, eff. 4/4/84
Renumbered from 436-54-003, May 1, 1985
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Amended 12/18/87 as WCD Admin. Order 4-1987, eff. 1/1/88
Amended 12/22/89 as WCD Admin. Order 7-1989, eff. 1/1/90
Amended 6/18/90 as WCD Admin. Order 8-1990, eff. 7/1/90 (Temp)
Amended 11/30/90 as WCD Admin. Order 26-1990, eff. 12/26/90
Amended 1/3/92 as WCD Admin. Order 1-1992, eff. 2/1/92
Amended 2/28/94 as WCD Admin. Order 94-050, eff. 3/1/94 (Temp)
Amended 8/11/94 as WCD Admin. Order 94-055, eff. 8/28/94
Amended 8/18/95 as WCD Admin. Order 95-058, eff. 8/18/95 (Temp)
Amended 2/2/96 as WCD Admin. Order 96-053, eff. 2/12/96
Amended 5/31/96 as WCD Admin. Order 96-062, eff. 5/31/96 (Temp)
Amended 8/5/96 as WCD Admin. Order 96-066, eff. 8/12/96 (Temp)
Amended 10/18/96 as WCD Admin. Order 96-070, eff. 11/27/96
Amended 11/30/01 as WCD Admin. Order 01-061, eff. 1/1/02
Amended 10/2/02 as WCD Admin. Order 02-059, eff. 11/01/02

436-060-0005 Definitions

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

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

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(2) "Authorized nurse practitioner" means a nurse practitioner authorized to provide compensable medical services under ORS 656.245 [(§ 3, ch 811, OL 2003)] and OAR 436-010.

(3) "Designated Paying Agent" means the insurer temporarily ordered responsible to pay compensation for a compensable injury [pursuant to] **under** ORS 656.307.

(4) "Director" or "director" means the Director of the Department of Consumer and Business Services or the director's designee for the matter, unless the context requires otherwise.

(5) "Disposition" or "claim disposition" means the written agreement as provided in ORS 656.236 in which a claimant agrees to release rights, or agrees to release an insurer or self-insured employer from obligations, under ORS 656.001 to 656.794, except for medical services, in an accepted claim. The term "compromise and release" has the same meaning.

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

(7) "Employer" means a subject employer as defined in ORS 656.023.

(8) "Employment on call" means sporadic, unscheduled employment at the call of an employer without recourse if the worker is unavailable.

(9) "Health insurance," as defined under ORS 731.162, means all insurance against bodily injury, illness or disability, and the resultant expenses, except for workers' compensation coverage.

(10) "Inpatient" means an injured worker who is admitted to a hospital prior to and extending past midnight for treatment and lodging.

(11) "Insurer" means the State Accident Insurance Fund Corporation; an insurer authorized under ORS Chapter 731 to transact workers' compensation insurance in Oregon; or, an employer or employer group which has been certified under ORS 656.430 that it meets the qualifications of a self-insured employer under ORS 656.407.

(12) "Lump sum" means the payment of all or any part of a permanent partial disability award in one payment.

(13) "Physical rehabilitation program" means any services[,] provided to an injured worker to prevent the injury from causing continuing disability.

(14) "Suspension of compensation" means:

(a) No temporary disability, permanent total disability or medical and related service benefits shall accrue or be payable during the period of suspension; and

(b) Vocational assistance and payment of permanent partial disability benefits shall be stayed during the period of suspension.

(15) "Third party administrator" is the contracted agent for an insurer, as defined by these rules, authorized to process claims and make payment of compensation on behalf of the insurer.

(16) "Written" and its variations mean that which is expressed in writing, including electronic transmission.

Stat. Auth: ORS 656.704 and 656.726(4)

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Stat. Impltd: ORS 656.704 and 656.726(4)
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 Amended 12/22/89 as WCD Admin. Order 7-1989, eff. 1/1/90
 Amended 6/18/90 as WCD Admin. Order 8-1990, eff. 7/1/90 (Temp)
 Amended 11/30/90 as WCD Admin. Order 26-1990, eff. 12/26/90
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 Amended 10/2/02 as WCD Admin. Order 02-059, eff 11/1/02
 Amended 12/12/03 as WCD Admin. Order 03-071, eff. 1/1/04 (Temp.)
 Amended 2/17/04 as WCD Admin. Order 04-051, eff. 2/29/04

436-060-0006 Administration of Rules

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

Stat. Auth: ORS 656.704 and 656.726(4)
Stat. Impltd: ORS 656.704 and 656.726(4)
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436-060-0008 Administrative Review and Contested Cases

(1) Any party as defined by ORS 656.005, including an assigned claims agent as a designated processing agent pursuant to ORS 656.054, aggrieved by an action taken pursuant to these rules in which a worker's right to compensation or the amount thereof is directly in issue, may request a hearing by the Hearings Division of the Workers' Compensation Board in accordance with ORS chapter 656 and the Board's Rules of Practice and Procedure for Contested Cases under the Workers' Compensation Law except where otherwise provided in ORS chapter 656.

(2) Contested case hearings of Sanctions and Civil Penalties: Any party as described in section (1) aggrieved by a proposed order or proposed assessment of civil penalty of the director [or division] issued [pursuant to] under ORS 656.254, 656.735, 656.745 or 656.750 may request a hearing by the Hearings Division of the Workers' Compensation Board in accordance with ORS 656.740 [(section 9, chapter 170, Oregon Laws 2003)].

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

(b) The aggrieved person must file a hearing request with the Administrator of the Workers' Compensation Division within 60 days after the mailing of the proposed order or

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assessment. No hearing will be granted unless the request for hearing is mailed or delivered to the administrator within 60 days of the mailing date of the proposed order or assessment.

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

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

(b) The hearing will be conducted by an [A]administrative [L]law [J]judge of the Office of Administrative Hearings.

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

(4) Administrative review by the director or designee: Any party aggrieved by an action taken pursuant to these rules by another person except as described in sections (1) through (3) above may request administrative review by the division on behalf of the director. The process for administrative review of such matters will be as follows:

(a) The request for administrative review [shall] **must** be made in writing to the Administrator of the Workers' Compensation Division within 90 days of the action. No administrative review will be granted unless the request specifies the grounds upon which the action is contested and is mailed or delivered to the administrator within 90 days of the contested action unless the director or the director's designee determines that there was good cause for delay or that substantial injustice may otherwise result.

(b) In the course of the review, the division may request or allow such input or information from the parties deemed to be helpful.

(c) The division's determination will specify whether it is a final order or whether an aggrieved party may request a contested case hearing before the Office of Administrative Hearings pursuant to ORS 183.310.

(d) The hearing request must comply with the procedures provided in section (3) above.

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

Stat. Impltd: ORS 656.245, 656.260, 656.704, 656.726(4), and 656.740(1) (section 9, chapter 170, Oregon Laws 2003)

Hist: File 4/27/78 as WCD Admin. Order 6-1978, eff. 4/27/78
Amended 1/11/80 as WCD Admin. Order 1-1980, eff. 1/11/80
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Amended 2/2/96 as WCD Admin. Order 96-053, eff. 2/12/96
Amended 11/30/01 as WCD Admin. Order 01-061, eff. 1/1/02
Amended 10/2/02 as WCD Admin. Order 02-059, eff. 11/1/02
Amended 12/3/03 as WCD Admin. Order 03-074, eff. 1/1/04
Amended 2/17/04 as WCD Admin. Order 04-051, eff. 2/29/04

436-060-0009 Access to Department of Consumer and Business Services Workers' Compensation Claim File Records

(1) Pursuant to ORS 192.430 and OAR 440-005-0015(1) the director, as custodian of public records, promulgates this rule to protect the integrity of claim file records and prevent interference with the regular discharge of the department's duties.

(2) The department rules on Access of Public Records, Fees for Record Search and Copies of Public Records are found in OAR 440-005. Payment of fees for access to records [shall] **must** be made in advance unless the director determines otherwise. Workers and insurers of record, their legal representatives and third-party administrators shall receive a first copy of any document free. Additional copies shall be provided at the rates set forth in OAR 440-005.

(3) Any person has a right to inspect nonexempt public records. The statutory right to "inspect" encompasses a right to examine original records. It does not include a right to request blind searches for records not known to exist. The director will retain or destroy records according to retention schedules published by the Secretary of State, Archives Division.

(4) Pursuant to ORS 192.502(19) workers' compensation claims records are exempt from public disclosure. Access to workers' compensation claims records will be granted at the sole discretion of the director in accordance with this rule, under the following circumstances:

(a) When necessary for insurers, self-insured employers and third-party claims administrators and their legal representatives for the sole purpose of processing workers' compensation claims. A request by telephone or facsimile transmission will be accepted, but requires provision of the claimant's social security number and insurer claim number in addition to the information required in section (7).

(b) When necessary for the director, other governmental agencies of this state or the United States to carry out their duties, functions or powers.

(c) When the disclosure is made in such a manner that the disclosed information cannot be used to identify any worker who is the subject of a claim. Such circumstances include when workers' compensation claims file information is required by a public or private research organization in order to contact injured workers in order to conduct its research. The director may enter into such agreements with such institutions or persons as are necessary to secure the confidentiality of the disclosed records.

(d) When a worker or the worker's representative requests review of the workers' claim record.

(5) The director may release workers' compensation claims records to persons other than those described in section (4) when the director determines such release is in the public interest.

(a) For the purpose of these rules, a "public interest" exists when the conditions set forth in ORS 192.502(19) and subsections (4)(a) through (d) of this rule have been met. The

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determination whether the request to release workers' compensation claims records meets those conditions shall be at the sole discretion of the director.

(b) The director may enter into written agreements as necessary to ensure that the recipient of workers' compensation claims records under this section uses or provides the information to others only in accordance with these rules and the agreement with the director. The director may terminate such agreements at any time the director determines that one or more of the conditions of the agreement have been violated.

(6) The director may deny or revoke access to workers' compensation claims records at any time the director determines such access is no longer in the public interest or is being used in a manner which violates these rules or any law of the State of Oregon or the United States.

(7) Requests to inspect or obtain copies of workers' compensation claim records [shall] **must** be made in writing or in person and [shall] **must** include:

(a) The name, address and telephone number of the requester;

(b) **The reason for requesting the records;**

(c) A specific identification of the public record(s) required and the format in which they are required;

[(c)] (d) The number of copies required;

[(d)] (e) The account number of the requester, when applicable.

(8) Except as prescribed in subsections (4)(a) through (d), a person must submit to the division an attorney retainer agreement or release signed by the claimant in order to inspect or obtain copies of workers' compensation claims records. The director may refuse to honor any release which the director determines is likely to result in disclosed records being used in a manner contrary to these rules. Upon request, the director will review proposed release forms to determine whether the proposed release is consistent with the law and this rule.

Stat. Auth: ORS 192.502, 656.704 and 656.726(4)

Stat. Impltd: ORS 656.704 and 656.726(4)

Hist: Filed 12/22/89 as WCD Admin. Order 7-1989, eff. 1/1/90
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Amended 11/30/01 as WCD Admin. Order 01-061, eff. 1/1/02
Amended 2/17/04 as WCD Admin. Order 04-051, eff. 2/29/04

436-060-0010 Reporting Requirements

(1) A subject employer [shall] **must** accept notice of a claim for workers' compensation benefits from an injured worker or the worker's representative. The employer [shall] **must** provide a copy of the "[Worker's and Employer's] Report of [Occupational] **Job Injury** or [Disease] **Illness.**" Form 440-801 (Form 801)[or, an optional short form, the "Worker's Notice of Claim for Occupational Injury or Disease," Form 440-801W (Form 801W),] to the worker immediately upon request; the form must be readily available for workers to report their injuries. Proper use of this form satisfies ORS 656.265.

(2) A "First Medical Report," Form 440-827 (Form 827), signed by the worker, is written notice of an accident which may involve a compensable injury under ORS 656.265. The signed Form 827 shall start the claim process, but shall not relieve the worker or employer of the

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responsibility of filing a Form 801[or Form 801W]. If a worker reports a claim electronically, the insurer may require the worker to sign a medical release form, so the insurer can obtain medical records, pursuant to OAR 436-010-0240, necessary to process the claim.

(3) Employers, except self-insured employers, [shall] **must** report the claim to their insurers no later than five days after notice or knowledge of any claim or accident which may result in a compensable injury. The employer's knowledge date is the earliest of the date the employer (any supervisor or manager) first knew of a claim, or of when the employer has enough facts to reasonably conclude that workers' compensation liability is a possibility. The report [shall] **must** provide the information requested on the Form 801, and shall include, but not be limited to, the worker's name, address, and social security number, the employer's legal name and address, and the data specified by ORS 656.262 and 656.265.

(4) For the purpose of this section, "first aid" means any treatment provided by a person who does not require a license in order to provide the service. If an injured worker requires only first aid, no notice need be given the insurer, unless the worker chooses to file a claim. If a worker signs a Form 801[or Form 801W], the claim must be reported to the insurer. If the person must be licensed to legally provide the treatment or if a bill for the service will result, notice must be given to the insurer. When the worker requires only first aid and chooses not to file a claim, the employer [shall] **must** maintain records showing the name of the worker, the date, nature of the injury and first aid provided for one year. These records shall be open to inspection by the director, or any party or its representative. If an employer subsequently learns that such an injury has resulted in medical services, disability or death, the date of that knowledge will be considered as the date on which the employer received notice or knowledge of the claim for the purposes of processing pursuant to ORS 656.262.

(5) The director may assess a civil penalty against an employer delinquent in reporting claims to its insurer in excess of ten percent of the employer's total claims during any quarter.

(6) An employer intentionally or repeatedly paying compensation in lieu of reporting to its insurer claims or accidents which may result in a compensable injury claim may be assessed a civil penalty by the director.

(7) The insurer [shall] **must** process and file claims and reports required by the director in compliance with ORS chapter 656, WCD Administrative Rules, and WCD Bulletins. Such filings shall not be made by computer-printed forms, facsimile transmission (FAX), electronic data interchange (EDI), or other electronic means, unless specifically authorized by the director.

(8) When a claim is received and the insurer does not provide insurance coverage for the worker's employer on the date of injury, the insurer may check for other coverage or forward it to the director. The insurer [shall] **must** do one or the other within three days of determining they did not provide coverage on the date of injury. If the insurer checks for coverage and coverage exists, the insurer [shall] **must** send the claim to the correct insurer within the same three day period. If the insurer checks for coverage and coverage cannot be found, the insurer [shall] **must** forward the claim to the director within the same three day period.

(9) The insurer or self-insured employer and third party administrator, if any, [shall] **must** be identified on all insurer generated workers' compensation forms, including insurer name, third

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party administrator name (if applicable), address, and phone number of the location responsible for processing the claim.

(10) The insurer [shall] **must** file all disabling claims with the director within 14 days of the insurer's initial decision either to accept or deny the claim. To meet this filing requirement, the Insurer's Report, Form 440-1502 (Form 1502) accompanied by the Form 801, or its electronic equivalent, is to be submitted to the director. However, when the Form 801 is not available within a time frame that would allow a timely filing, a Form 1502, accompanied by a signed Form 827 when available, will satisfy the initial reporting requirement. If the Form 801 is not submitted at the time of the initial filing of the claim, the Form 801 must be submitted within 30 days from the filing of the Form 1502. A Form 801 prepared by the insurer in place of obtaining the form from the employer/worker does not satisfy the filing requirement of the Form 801, unless the employer/worker cannot be located, or the form cannot be obtained from the employer/worker due to lack of cooperation, or the form is computer-printed based upon information obtained from the employer and worker. The insurer [shall] **must** submit copies of all acceptance or denial notices not previously submitted to the director with the Form 1502. Form 1502 is used to report claim status and activity to the director.

(11) When submitting an initial compensability decision Form 1502, the insurer [shall] **must** report:

- (a) The status of the claim;
- (b) Reason for filing;
- (c) Whether first payment of compensation was timely, if applicable;
- (d) Whether the claim was accepted or denied timely; and
- (e) Any Managed Care Organization (MCO) enrollment, and the date of enrollment, if applicable.

(12) The insurer [shall] **must** file an additional Form 1502 with the director within 14 days of:

- (a) The date of any reopening of the claim;
- (b) Changes in the acceptance or disability status;
- (c) Any litigation order or insurer's decision that causes reopening of the claim or changes the acceptance or disability status;
- (d) MCO enrollment that occurs after the initial Form 1502 has been filed;
- (e) The insurer's knowledge that a previous Form 1502 contained erroneous information;

or

- (f) The date of any denial.

(13) A nondisabling claim [shall] **must** only be reported to the director if it is denied, in part or whole. It must be reported to the director within 14 days of the date of denial. A nondisabling claim which becomes disabling must be reported to the director within 14 days of the date of the status change.

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(14) If the insurer voluntarily reopens a qualified claim pursuant to ORS 656.278, it [shall] **must** file a Form 3501 with the director within 14 days of the date the insurer reopens the claim.

(15) The insurer [shall] **must** report a new medical condition reopening on the Form 1502 if the claim cannot be closed within 14 days of the first to occur: acceptance of the new condition, or the insurer's knowledge that interim temporary disability compensation is due and payable.

(16) New condition claims that are ready to be closed within 14 days [shall] **must** be reported on the "Insurer Notice of Closure Summary," Form 440-1503 (Form 1503) at the time the insurer closes the claim. The Form 1503 [shall] **must** be accompanied by the "Modified Notice of Acceptance" and "Updated Notice of Acceptance at Closure" letter.

(17) If, after receiving a claim from a worker or from someone other than the worker on the worker's behalf, the insurer receives written communication from the worker stating the worker never intended to file a claim and wants the claim "withdrawn," the insurer [shall] **must** submit a Form 1502 with a copy of the worker's communication to the director, if the claim had previously been reported.

(18) The director may issue a civil penalty against any insurer delinquent in reporting or in submitting Forms 801, 1502, 1503 or 1644 with a late or error ratio in excess of ten percent during any quarter. For the purposes of this section, a claim or form shall be deemed to have been reported or submitted timely according to the provisions of ORS 656.726(4).

(19) Insurers [shall] **must** make an annual report to the director reporting attorney fees, attorney salaries, and all other costs of legal services paid pursuant to ORS chapter 656. The report [shall] **must** be submitted on forms furnished by the director for that purpose. Reports for each calendar year [shall] **must** be filed not later than March 1 of the following year.

(20) If an insurer elects to process and pay supplemental disability benefits, pursuant to ORS 656.210(5)(a), the insurer does not need to inform the director of their election. The insurer [shall] **must** request reimbursement, pursuant to OAR 436-060-0500, by filing Form 3504 "Supplemental Disability Benefits Quarterly Reimbursement Request" with the director for any quarter during which they processed and paid supplemental disability benefits. If an insurer elects not to process and pay supplemental disability benefits, the insurer [shall] **must** submit Form 3530, "Supplemental Disability Election Notification," to the director by February 1 of each year. The election remains in effect for all supplemental disability claims the insurer receives during that calendar year. The election is made by the insurer and applies to all third party administrators an insurer may use for processing claims.

(21) An insurer may change its election made under section (20):

(a) Annually and

(b) Once after the division completes its first audit of supplemental disability payments made by the insurer.

Stat. Auth: ORS 656.262, 656.264, 656.265(6), 656.704, 656.726(4) and 656.745

Stat. Impltd: ORS 656.210, 656.262, 656.264, 656.265, 656.704, 656.726(4), and section 3 (5)(a), chapter 865, Oregon Laws 2001

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436-060-0015 Required Notice And Information

(1) When an injured worker's attorney has given written notice of representation, prior or simultaneous written notice [shall] **must** be given to the worker's attorney pursuant to ORS 656.331:

- (a) When the director or insurer requests the worker to submit to a medical examination;
- (b) When the insurer contacts the worker regarding any matter which may result in denial, reduction or termination of the worker's benefits; or
- (c) When the insurer contacts the worker regarding any matter relating to disposition of a claim pursuant to ORS 656.236.

(2) The director shall assess a civil penalty against an insurer who intentionally or repeatedly fails to give notice as required under section (1) of this rule.

(3) The insurer or the third party administrator [shall] **must** provide the pamphlet, "What Happens if I'm Hurt on the Job?," Form 440-1138 (Form 1138), to every injured worker who has a disabling claim with the first time-loss check or earliest written correspondence. For nondisabling claims, the information page, "Understanding workers' compensation claims," Form 440-3283 (Form 3283) may be provided in lieu of Form 1138, unless the worker specifically requests Form 1138.

(4) The insurer [shall] **must** provide Form 3283 to their insured employers for distribution to workers at the time a worker completes a Form 801 [or Form 801W], for all claims filed.

(5) The insurer [shall] **must** provide the "Notice to Worker," Form 440-3058 (Form 3058) or its equivalent to the worker with the initial notice of acceptance on the claim pursuant to OAR 436-060-0140(6). For the purpose of this rule, an equivalent to the Form 3058 [shall] **must** include all of the statutory and rule requirements.

(6) Additional notices the insurer [shall] **must** send to a worker are contained in OAR 436-060-0018, 436-060-0030, 436-060-0035, 436-060-0095, 436-060-0105, 436-060-0135, 436-060-0140, and 436-060-0180.

(7) When an insurer changes claims processing locations, [service companies] **third party administrators**, or self-administration, the insurer must provide at least 10 days prior notice to workers with open or active claims, their attorneys, and attending physicians. The notice must

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provide the name of a contact person, telephone number, and mailing address of the new claim processor.

(8) Prior to claim closure, the insurer must send the worker a letter documenting the wage upon which benefits were based and work disability will be determined when the claim is closed. The letter must also explain how the worker can appeal the insurer's wage calculation under OAR 436-060-0025 or OAR chapter 438 if the worker disagrees with the wage.

Stat. Auth: ORS 656.331, 656.704, 656.726(4), and 656.745

Stat. Impltd: ORS 656.331, 656.704, and 656.726(4)

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Amended 2/17/04 as WCD Admin. Order 04-051, eff. 2/29/04

436-060-0017 Release of Claim Documents

(1) For the purpose of this rule:

(a) "Documents" include, but are not limited to, medical records, vocational records, written and automated payment ledgers for both time loss and medical services, payroll records, recorded statements, insurer generated records (insurer generated records exclude a claim examiner's generated file notes, such as documentation or justification concerning setting or adjusting reserves, claims management strategy, or any privileged communications), all forms required to be filed with the director, notices of closure, electronic transmissions, and correspondence between the insurer, service providers, claimant, the division and/or the Workers' Compensation Board.

(b) "Possession" means documents making up, or relating to, the insurer's claim record on the date of mailing the documents to the claimant, claimant's attorney or claimant's beneficiary. Any documents that have been received by the insurer five or more working days prior to the date of mailing shall be considered as part of the insurer's claim record even though the documents may not have yet reached the insurer's claim file.

(2) The insurer [shall] **must** date stamp each document upon receipt with the date it is received. The date stamp [shall] **must** include the month, day, year of receipt, and name of the company, unless the document already contains the date information and name of recipient company, as in faxes, e-mail and other electronically transmitted communications.

(3) A request for copies of claim documents [shall] **must** be submitted to the insurer, self-insured employer, or their respective third party administrator, and copied simultaneously to defense counsel, if known. **If the requestor is someone other than the worker or the worker's representative, the requestor must also copy the worker or the worker's representative with the request.**

(4) The insurer [shall] **must** furnish, without cost, legible copies of documents in its possession relating to a claim, upon request of the claimant, claimant's attorney or claimant's

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beneficiary, at times other than those provided for under ORS 656.268 and OAR chapter 438, as provided in this rule. Except as provided in OAR 436-060-0180, an initial request by anyone other than the claimant or claimant's beneficiary [shall] **must** be accompanied by a worker signed attorney retention agreement or a medical release signed by the worker. The signed medical release [shall] **must** be in a form or format as the director may provide by bulletin. Information not otherwise available through this release, but relevant to the claim, may only be obtained in compliance with applicable state or federal laws. Upon the request of the claimant's attorney, a request for documents shall be considered an ongoing request for future documents received and generated by the insurer for 90 days after the initial mailing date under section (7) or until a hearing is requested before the Workers' Compensation Board. The insurer [shall] **must** provide such new documents to claimant's attorney every 30 days, unless specific documents are requested sooner by the attorney. Such documents [shall] **must** be provided within the time frame of section (7).

(5) Once a hearing is requested before the Workers' Compensation Board, the release of documents is controlled by OAR chapter 438. This rule applies subsequently if the hearing request is withdrawn or when the hearing record is closed, provided a request for documents is renewed.

(6) Upon request, the entire health information record in the possession of the insurer will be provided to the worker or the worker's representative. This includes records from all healthcare providers, except that the following may be withheld:

(a) Information which was obtained from someone other than a healthcare provider under a promise of confidentiality and access to the information would likely reveal the source of the information,

(b) Psychotherapy notes,

(c) Information compiled for use in a civil, criminal, or administration action or proceeding; and

(d) Other reasons specified by federal regulation.

(7) The insurer [shall] **must** furnish copies of documents within the following time frames:

(a) The documents of open and closed files, and/or microfilmed files [shall] **must** be mailed within 14 days of receipt of a request, and copies of documents of archived files within 30 days of receipt of a request.

(b) If a claim is lost or has been destroyed, the insurer [shall] **must** so notify the requester in writing within 14 days of receiving the request for claim documents. The insurer [shall] **must** reconstruct and mail the file within 30 days from the date of the lost or destroyed file notice.

(c) If no documents are in the insurer's possession at the time the request is received, the 14 days within which to provide copies of documents starts when the insurer does receive some documentation on the claim if that occurs within 90 days of receipt of the request.

(d) Documents are deemed mailed when addressed to the last known address of the claimant, claimant's beneficiary or claimant's attorney and deposited in the U.S. Mail.

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(8) The documents [shall] **must** be mailed directly to the claimant's or beneficiary's attorney, when the claimant or beneficiary is represented. If the documents have been requested by the claimant or beneficiary, the insurer [shall] **must** inform the claimant or beneficiary of the mailing of the documents to the attorney. The insurer is not required to furnish copies to both the claimant or beneficiary and the attorney. However, if a claimant or beneficiary changes attorneys, the insurer [shall] **must** furnish the new attorney copies upon request.

(9) The director may assess a civil penalty against an insurer who fails to furnish documents as required under this rule. The matrix attached to these rules in Appendix "A" will be used in assessing penalties.

(10) Rule violation complaints about release of requested claims documents must be in writing, mailed or delivered to the division within 180 days of the request for documents, and must include a copy of the request submitted under section (3). When notified by the director that a complaint has been filed, the insurer [shall] **must** respond in writing to the division. The response must be mailed or delivered to the director within 21 days of the date of the division's inquiry letter. A copy of the response including any attachments, must be sent simultaneously to the requester of claim documents. If the division does not receive a timely response **or the insurer provides an inadequate response (e.g. failing to answer specific questions or provide requested documents)**, a civil penalty may be assessed pursuant to OAR 436-060-0200 against the insurer. Assessment of a penalty does not relieve the insurer of the obligation to provide a response.

Stat. Auth: ORS 656.360, 656.362, 656.704, 656.726(4), and 656.745

Stat. Impltd: ORS 656.704 and 656.726(4)

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436-060-0018 Nondisabling/Disabling Reclassification

(1) When the insurer changes the classification of an accepted claim, the insurer [shall] **must** submit an "Insurer's Report," Form 440-1502 to the director, indicating a change in status within 14 days from the date of the new classification. A notice of change of classification [shall] **must** be communicated by issuing a Modified Notice of Acceptance. This notice [shall] **must** include an explanation of the change in status and [shall] **must** be sent to the director, the worker, and the worker's attorney if the worker is represented. If the claim qualifies for closure, the insurer [shall] **must** close the claim under ORS 656.268(5).

(2) The insurer [shall] **must** reclassify a non[-]disabling claim to disabling within 14 days of receiving information that any condition already accepted meets the disabling criteria in this rule. A claim is disabling if any of the following criteria apply:

(a) Temporary disability is due and payable; or

(b) The worker is medically stationary within one year of the date of injury and the worker will be entitled to an award of permanent disability; or

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(c) The worker is not medically stationary, but there is a reasonable expectation that the worker will be entitled to an award of permanent disability when the worker does become medically stationary.

(3) The insurer [shall] **must issue a Modified Notice of Acceptance and** reclassify a non[-] disabling claim to disabling upon acceptance of a new or omitted condition that meets the disabling criteria in this rule, **regardless of the worker's statutory timeline for requesting reclassification of a nondisabling claim.**

(4) If a claim has been classified as nondisabling for less than one year after the date of acceptance and the worker believes the claim was or has become disabling, the worker may request reclassification by submitting a written request for review of the classification status to the insurer under ORS 656.277.

(5) Within 14 days of the worker's request, the insurer [shall] **must** review the claim and,

(a) If the classification is changed to disabling, provide notice under this rule; or

(b) If the insurer believes evidence supports denying the worker's request to reclassify the claim, the insurer [shall] **must** send a Notice of Refusal to Reclassify to the worker and the worker's attorney, if the worker is represented. The notice must include the following statement, in bold print:

“If you disagree with this Notice of Refusal to Reclassify, you must appeal by contacting the Workers' Compensation Division within sixty (60) days of the mailing of this notice or you will lose your right to appeal. The address and telephone number of the Workers' Compensation Division are: [INSURER: Insert current address and telephone number of the Workers' Compensation Division, Appellate Review Unit, here.]”

(6) A worker dissatisfied with the decision in the Notice of Refusal to Reclassify may appeal to the director. Such appeal must be made no later than the 60th day after the Notice is mailed. The appeal must be accompanied by:

(a) **A copy of all Notices of Acceptance in the claim,**

(b) A copy of the request for reclassification the worker sent to the insurer, and

[(b)] **(c)** A copy of the insurer's Notice of Refusal to Reclassify that the worker received in response.

(7) For claims that are reclassified from nondisabling to disabling within one year from the date of acceptance, the aggravation rights begin with the first valid closure of the claim.

(8) For claims that are not reclassified from nondisabling to disabling within one year from the date of acceptance, the aggravation rights continue to run from the date of injury.

(9) When a claim has been classified as nondisabling for at least one year after the date of acceptance, a worker who believes the claim was or has become disabling may submit a claim for aggravation according to the provisions of ORS 656.273.

(10) Failure of the insurer or self-insured employer to respond timely to a request for reclassification may result in penalties under OAR 436-060-0200.

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(11) Notwithstanding (12), once a claim has been accepted and classified as disabling for more than one year from date of acceptance, all aspects of the claim are classified as disabling and remain disabling. Any additional conditions or aggravations subsequently accepted [shall] **must** be processed according to provisions governing disabling claims, including closure under ORS 656.268.

(12) If a claim has been classified as disabling and the insurer determines the criteria for a disabling claim were never satisfied, the insurer may reclassify the claim to non[-]disabling. The insurer must notify the worker and the worker's representative, if applicable, by issuing a Modified Notice of Acceptance.

(a) The Modified Notice of Acceptance must advise the worker that he or she has 60 days from the date of the notice to appeal the decision.

(b) Appeals of such reclassification decisions are made to the Appellate Review Unit for issuance of a Director's Review order.

(13) The worker's appeal under (6) or (12) must be copied to the insurer.

(14) The worker's appeal must be in writing. The worker may use the form specified by the director for requesting review of the insurer's claim classification decision.

(15) A worker need not be represented by an attorney to appeal the insurer's classification decision.

(16) Upon receipt of an appeal, the director will acknowledge receipt of the request in writing to the injured worker, the worker's attorney, if any, and the insurer and initiate the review.

(17) Within 14 days of the director's acknowledgement, the insurer must provide the director and all other parties with the complete medical record and all official actions and notices on the claim. The insurer may be subject to penalties under OAR 436-060-0200 for failure to provide claim documents in a timely manner.

(18) Within the same 14 days, the worker may submit any additional evidence for the director to consider. Copies must be provided to all other parties at the same time.

(19) After receiving and reviewing the required documents, the director will issue a Director's Review order.

(20) The worker and the insurer have 30 days from the mailing date of the Director's Review order to appeal the director's decision to the Hearings Division of the Workers' Compensation Board.

(21) The director may reconsider, abate, or withdraw any Director's Review order before the order becomes final by operation of law.

Stat. Auth.: ORS 656.268, ORS 656.726, 1995 OR Laws Chapter 332, and 1999 OR Laws Chapter 313

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Stats. Implemented: ORS 656.210, ORS 656.212, ORS 656.214, ORS 656.262, ORS 656.268, ORS 656.273, ORS 656.277, ORS 656.745, ORS 656.726, 1995 OR Laws Chapter 332, 1999 OR Laws Chapter 313, and chapter 350, Oregon Laws 2001

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436-060-0019 Determining and Paying the Three Day Waiting Period

(1) Pursuant to ORS 656.210 and 656.212, the three day waiting period is three consecutive calendar days beginning with the first day the worker loses time or wages from [work] **the job at which the injury occurred** as a result of the compensable injury, subject to the following:

(a) If the worker leaves work but returns and completes the work shift without loss of wages, that day shall not be considered the first day of the three day waiting period.

(b) If the worker leaves work but returns and completes the work shift and receives reduced wages, that day shall be considered the first day of the three day waiting period.

(c) If the worker does not complete the work shift, that day shall be considered the first day of the three day waiting period even if there is no loss of wages. For the purpose of this rule, an attending physician's or authorized nurse practitioner's authorization of temporary disability is not required to begin the waiting period; however, the waiting period would not be due and payable unless authorized.

(2) Pursuant to ORS 656.210(3), no disability payment is due the worker for temporary total disability suffered during the first three calendar days after the worker leaves work as a result of a compensable injury, unless the worker is totally disabled after the injury and the total disability continues for a period of 14 consecutive days or unless the worker is admitted as an inpatient to a hospital within 14 days of the first onset of total disability. For the purpose of this rule, admittance as an inpatient to a hospital can be any time following the date of the injury, but must be within 14 days of the first onset of total disability to waive the three day waiting period.

(3) If compensation is due and payable for the three day waiting period, the worker [shall] **must** be paid for one-half day for the initial work day lost if the worker leaves the job during the first half of the shift and does not return to complete the shift. No compensation is due for the initial day of the waiting period if the worker leaves the job during the second half of the shift.

(4) If a worker is employed with varying days off or cyclic work schedules, the three day waiting period shall be determined using the work schedule of the week the worker begins losing time or wages as a result of the injury. If the worker is no longer employed with the employer at injury or does not have an established schedule when the worker begins losing time/wages, the three day waiting period and scheduled days off shall be based on the work schedule of the week the worker was injured.

Stat. Auth: ORS 656.210, 656.212, 656.704, and 656.726(4)

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Stat. Impltd: ORS 656.210, 656.212

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436-060-0020 Payment of Temporary Total Disability Compensation

(1) An employer may pay compensation under ORS 656.262(4) with the approval of the insurer pursuant to ORS 656.262(12). Making such payments does not constitute a waiver or transfer of the insurer's duty to determine the worker's entitlement to benefits, or responsibility for the claim to ensure timely benefit payments. The employer [shall] **must** provide adequate payment documentation as the insurer may require to meet its responsibilities.

(2) Pursuant to ORS 656.005(30), no temporary disability is due and payable for any period of time in which the person has withdrawn from the workforce. For the purpose of this rule, a person who has withdrawn from the workforce, includes, but is not limited to:

(a) A person who, prior to reopening under ORS 656.267, 656.273 or 656.278, was not working and had not made reasonable efforts to obtain employment, unless such efforts would be futile as a result of the compensable injury.

(b) A person who was a full time student for at least six months in the 52 weeks prior to injury elects to return to school full time, unless the person can establish a prior customary pattern of working while attending school. For purposes of this subsection, "full time" is defined as twelve or more quarter hours or the equivalent.

(3) No temporary disability is due and payable for any period of time where the insurer has requested from the worker's attending physician or authorized nurse practitioner verification of the worker's inability to work and the physician or authorized nurse practitioner cannot verify it pursuant to ORS 656.262(4)(d), unless the worker has been unable to receive treatment for reasons beyond the worker's control. Before withholding temporary disability under this section, the insurer [shall] **must** inquire of the worker whether a reason beyond the worker's control prevented the worker from receiving treatment. If no valid reason is found or the worker refuses to respond or cannot be located, the insurer [shall] **must** document its file regarding those findings. The insurer [shall] **must** provide the division a copy of the documentation within 20 days, if requested. If the attending physician or authorized nurse practitioner is unable to verify the worker's inability to work, the insurer may stop temporary disability payments and, in place of the scheduled payment, [shall] **must** send the worker an explanation for stopping the temporary disability payments. When verification of temporary disability is received from the attending physician or authorized nurse practitioner, the insurer [shall] **must** pay temporary disability within 14 days of receiving the verification of any authorized period of time loss, unless otherwise denied.

(4) Authorization from the attending physician or authorized nurse practitioner may be oral or written. The insurer at claim closure, or the division at reconsideration of the claim closure, may infer authorization from such medical records as a surgery report or hospitalization record that reasonably reflects an inability to work because of the compensable claim, or from a medical report or chart note generated at the time of, and indicating, the worker's inability to work. No compensation is due and payable after the worker's attending physician or authorized

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nurse practitioner ceases to authorize temporary disability or for any period of time not authorized by the attending physician or authorized nurse practitioner pursuant to ORS 656.262(4)(g).

(5) An insurer may suspend temporary disability benefits without authorization from the division pursuant to ORS 656.262(4)(e) when all of the following circumstances apply:

(a) The worker has missed a regularly scheduled appointment with the attending physician or authorized nurse practitioner;

(b) The insurer has sent a certified letter to the worker and a letter to the worker's attorney, at least ten days in advance of a rescheduled appointment, stating that the appointment has been rescheduled with the worker's attending physician or authorized nurse practitioner; stating the time and date of the appointment; and giving the following notice, in prominent or bold face type:

“You must attend this appointment. If there is any reason you cannot attend, you must tell us before the date of the appointment. If you do not attend, your temporary disability benefits will be suspended without further notice, as provided by ORS 656.262(4)(e).”

(c) The insurer verifies that the worker has missed the rescheduled appointment;

(d) The insurer sends a letter to the worker, the worker's attorney and the division giving the date of the regularly scheduled appointment that was missed, the date of the rescheduled appointment that was missed, the date of the letter being the day benefits are suspended, and the following notice, in prominent or bold face type:

“Since you missed a regular appointment with your doctor, we arranged a rescheduled appointment. We notified you of the rescheduled appointment by certified mail and warned you that your benefits would be suspended if you failed to attend. Since you failed to attend the rescheduled appointment, your temporary disability benefits have been suspended. In order to resume your benefits, you must attend a rescheduled appointment with your doctor who must verify your continued inability to work.”

(6) If temporary disability benefits end because the insurer or employer:

(a) Speaks by telephone with the attending physician or authorized nurse practitioner, or the attending physician's or authorized nurse practitioner's office, and negotiates a verbal release of the worker to return to any type of work as a result, when no return to work was previously authorized; and

(b) The worker has not already been informed of the release by the attending physician or authorized nurse practitioner or returned to work; then

(c) The insurer [shall] **must**:

(A) Document the facts;

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(B) Communicate the release to the worker by mail within 7 days; the communication to the worker of the negotiated return to work release may be contained in an offer of modified employment; and

(C) Advise the worker of their reinstatement rights under ORS chapter 659A.

(7) When concurrent temporary disability is due the worker as a result of two or more accepted claims, the insurers may petition the division to make a pro rata distribution of compensation due under ORS 656.210 and 656.212. The insurer [shall] **must** provide a copy of the request to the worker, and the worker's attorney if represented. The division's pro rata order shall not apply to any periods of interim compensation payable pursuant to ORS 656.262 and also does not apply to benefits pursuant to ORS 656.214 and 656.245. Claims subject to the pro rata order approved by the division [shall] **must** be closed pursuant to OAR 436-030 and ORS 656.268, when appropriate. The insurers shall not unilaterally prorate temporary disability without the approval of the division, except as provided in section (8) of this rule. The division may order one of the insurers to pay the entire amount of temporary disability due or make a pro rata distribution between two or more of the insurers. The pro rata distribution ordered by the division shall be effective only for benefits due as of the date all claims involved are in an accepted status. The order pro rating compensation will not apply to periods where any claim involved is in a deferred status.

(8) When concurrent temporary disability is due the worker as a result of two or more accepted claims involving the same worker, the same employer and the same insurer, the insurer may make a pro rata distribution of compensation due under ORS 656.210 and 656.212 without an order by the division. The worker [shall] **must** receive compensation at the highest temporary disability rate of the claims involved.

(9) If a closure pursuant to ORS 656.268 has been found to be premature and there was an open ended authorization of temporary disability at the time of closure, the insurer [shall] **must** begin payments pursuant to ORS 656.262, including retroactive periods, and pay temporary disability for as long as authorization exists or until there are other lawful bases to terminate temporary disability.

(10) If a denied claim has been determined to be compensable, the insurer [shall] **must** begin temporary disability payments pursuant to ORS 656.262, including retroactive periods, if the time loss authorization was open ended at the time of denial, and there are no other lawful bases to terminate temporary disability.

Stat. Auth: ORS 656.210(2), 656.245, 656.262, 656.307(1)(c), 656.704, and 656.726(4)

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436-060-0025 Rate Of Temporary Disability Compensation

(1) The rate of compensation shall be based on the wage of the worker at the time of injury, except in the case of an occupational disease, for which the rate of compensation will be based on the wage as outlined in ORS 656.210(2)(d)(B). Employers shall not continue to pay wages in lieu of statutory temporary total disability payments due. However, pursuant to ORS 656.018(6) the employer is not precluded from supplementing the amount of temporary total disability paid the worker. Employers [shall] **must** separately identify workers' compensation benefits from other payments and shall not have payroll deductions withheld from such benefits.

(2) Notwithstanding section (1), pursuant to ORS 656.262(4)(b), a self-insured employer may continue the same wage with normal deductions withheld (e.g. taxes, medical, and other voluntary deductions) at the same pay interval that the worker received at the time of injury. If the pay interval or amount of wage changes (excluding wage increases), the worker [shall] **must** be paid temporary disability as otherwise prescribed by the workers' compensation law. The claim shall be classified as disabling. The rate of temporary total disability that would have otherwise been paid had continued wages not occurred and the period of disability will be reported to the division.

(3) The rate of compensation for regularly employed workers shall be computed as outlined in ORS 656.210 and this rule. "Regularly employed" means actual employment or availability for such employment.

(a) Monthly wages shall be divided by 4.35 to determine weekly wages. Seasonal workers paid monthly [shall] **must** have their weekly wages determined pursuant to OAR 436-060-0025(5).

(b) For workers employed through union hall call board insurers [shall] **must** compute the rate of compensation on the basis of a five-day work week at 40 hours a week, regardless of the number of days actually worked per week.

(4) When the worker disagrees with the wage amount used, the insurer [shall] **must** contact the employer to confirm the correct wage, or if a self-insured employer, the employer [shall] **must** verify whether the correct wage amount was used. The insurer [shall] **must** provide the worker an explanation of any wage change different from that [reported on the claim Form 801] **initially reported in writing to the insurer.**

(5) The rate of compensation for workers regularly employed, but paid on other than a daily or weekly basis, or employed with unscheduled, irregular or no earnings shall be computed on the wages determined by this rule. The insurer shall resolve disputes regarding wage calculations by contacting the employer and worker to determine a reasonable wage. If an agreement cannot be reached, the dispute may be referred to the division for resolution.

(a) For workers employed seasonally, on call, paid hourly, paid by piece work or with varying hours, shifts or wages:

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(A) Insurers [shall] **must** use the worker's average weekly earnings with the employer at injury for the 52 weeks prior to the date of injury. For workers with multiple employers at the time of injury who qualify pursuant to ORS 656.210(2)(b) and OAR 436-060-0035, insurers shall average all earnings for the 52 weeks prior to the date of injury. For workers employed less than 52 weeks or where extended gaps exist, insurers [shall] **must** use the actual weeks of employment (excluding any extended gaps) with the employer at injury or all earnings, if the worker qualifies pursuant to ORS 656.210(2)(b) and OAR 436-060-0035, up to the previous 52 weeks. For the purpose of this rule, gaps shall not be added together and [shall] **must** be considered on a claim-by-claim basis; the determination of whether a gap is extended must be made in light of its length and of the circumstances of the individual employment relationship itself, including whether the parties contemplated that such gaps would occur when they formed the relationship. For workers employed less than four weeks, insurers shall use the intent of the wage earning agreement as confirmed by the employer and the worker. For the purpose of this section, the wage earning agreement may be either oral or in writing.

(B)(i) Where there has been a change in the wage earning agreement due only to a pay increase or decrease during the 52 weeks prior to the date of injury, insurers [shall] **must** use the worker's average weekly hours worked for the 52 week period, or lesser period as required in (5)(a)(A) of this section, multiplied by the wage at injury to determine the worker's current average weekly earnings.

(ii) Where there has been a change in the wage earning agreement due to a change of hours worked, change of job duties, or for other reasons either with or without a pay increase or decrease, during the 52 weeks prior to the date of injury, insurers [shall] **must** average earnings for the weeks worked under the most recent wage earning agreement, calculated by the method described in (5)(a)(A).

(iii) For workers employed less than four weeks under a changed wage earning agreement as described in this subsection, insurers [shall] **must** use the intent of the most recent wage earning agreement as confirmed by the employer and the worker.

(iv) For determining benefits under this rule for occupational disease claims, insurers [shall] **must** use the wage at the date of disability, if the worker was working at the time of medical verification of the inability to work, or the wage at the date of last regular employment, if the worker was not working due to the injury at the time of medical verification of the inability to work in place of "the date of injury."

(b) Workers employed through a temporary service provider on a "temporary basis," or a worker-leasing company as defined in OAR 436-050, [shall] **must** have their weekly wage determined by the method provided in subsection (a) of this section. However, each job assignment shall not be considered a new wage earning agreement.

(c) For workers paid salary plus considerations (e.g. rent, utilities, food, etc.) insurers [shall] **must** compute the rate on salary only if the considerations continue during the period the worker is disabled due to the injury. If the considerations do not continue, the insurer [shall] **must** use salary plus a reasonable value of those considerations. Expenses incurred due to the job and reimbursed by the employer (e.g. meals, lodging, per diem, equipment rental) are not considered part of the wage.

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(d) Earnings from a second job will be considered for calculating temporary partial disability only to the extent that the post-injury income from the second job exceeds the pre-injury income from the second job (i.e., increased hours or increased wage).

(e) For workers employed where tips are a part of the worker's earnings insurers [shall] **must** use the wages actually paid, plus the amount of tips required to be reported by the employer pursuant to section 6053 of the Internal Revenue Code of 1954, as amended, or the amount of actual tips reported by the worker, whichever amount is greater.

(f) Insurers shall consider overtime hours only when the worker worked overtime on a regular basis. Overtime earnings [shall] **must** be included in the computation at the overtime rate. For example, if the worker worked one day of overtime per month, use 40 hours at regular wage and two hours at the overtime wage to compute the weekly rate. If overtime varies in hours worked per day or week, use the averaging method described in subsection (a). One-half day or more will be considered a full day when determining the number of days worked per week.

(g) Bonus pay shall be considered only when provided as part of the written or verbal employment contract as a means to increase the worker's wages. End-of-the-year and other one time bonuses paid at the employer's discretion shall not be included in the calculation of compensation.

(h) Incentive pay shall be considered only when regularly earned. If incentive pay earnings vary, use the averaging method described in subsection (a).

(i) Covered workers with no wage earnings such as volunteers, jail inmates, etc., [shall] **must** have their benefits computed on the same assumed wage as that upon which the employer's premium is based.

(j) For workers paid by commission only or commission plus wages insurers [shall] **must** use the worker's average commission earnings for previous 52 weeks, if available. For workers without 52 weeks of earnings, insurers [shall] **must** use the assumed wage on which premium is based. Any regular wage in addition to commission [shall] **must** be included in the wage from which compensation is computed.

(k) For workers who are sole proprietors, partners, officers of corporations, or limited liability company members including managers, insurers [shall] **must** use the assumed wage on which the employer's premium is based.

(l) For school teachers or workers paid in a like manner, insurers [shall] **must** use the worker's annual salary divided by 52 weeks to arrive at weekly wage. Temporary disability benefits shall extend over the calendar year.

(m) For workers with cyclic schedules, insurers [shall] **must** average the hours of the entire cycle to determine the weekly wage. For purposes of temporary disability payments, the cycle shall be considered to have no scheduled days off. For example: A worker who works ten hours for seven days, has seven scheduled days off, then repeats the cycle, is considered to have a 14 day cycle. The weekly wage and payment schedule would be based on 35 hours a week with no scheduled days off.

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(6) When a working shift extends into another calendar day, the date of injury shall be the date used for payroll purposes by the employer.

Stat. Auth: ORS 656.210(2), 656.704, and 656.726(4)

Stat. Impltd: ORS 656.210, 656.704, 656.726(4), and section 3 (2)(a) through (c), chapter 865, Oregon Laws 2001

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436-060-0030 Payment of Temporary Partial Disability Compensation

(1) The amount of temporary partial disability compensation due a worker shall be determined by:

- (a) Subtracting post-injury wage earnings by the worker from any kind of work from
- (b) The wage used to compute the rate of compensation at the time of injury; then
- (c) Dividing the difference by the wage earnings used in subsection (b) to arrive at the percentage of loss of wages; then
- (d) Multiplying the current temporary total disability compensation rate by the percentage of loss of wages in subsection (c).

(2) Notwithstanding section (1), for workers whose rate of compensation is based on an assumed wage, "post-injury wage earnings" will be that proportion of the assumed wage which the hours worked during the period of temporary partial disability represent as a percentage of the hours worked prior to the injury.

(3) An insurer shall cease paying temporary total disability compensation and start paying temporary partial disability compensation under section (1) from the date an injured worker begins wage earning employment, prior to claim closure, unless the worker refuses modified work pursuant to ORS 656.268(4)(c)(A) through (F). If the worker is with a new employer and upon request of the insurer to provide wage information, it shall be the worker's responsibility to provide documented evidence of the amount of any wages being earned. Failure to do so shall be cause for the insurer to assume that post-injury wages are the same as or higher than the worker's wages at time of injury.

(4) For the purpose of section (5) of this rule:

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(a) "Commute" means the lesser of the distance traveled from the worker's residence at the time of injury to the work site or the worker's residence at the time of the modified work offer to the work site;

(b) "Where the worker was injured" means the location where the worker customarily reported or worked at the time of injury; and

(c) "Temporary employees" has the same meaning as defined in OAR 436-050-0420.

(5) Pursuant to ORS 656.325(5)(a), an insurer shall cease paying temporary total disability compensation and start paying temporary partial disability compensation under section (1) as if the worker had begun the employment when an injured worker fails to begin wage earning employment, under the following conditions:

(a) The employer or insurer:

(A) notifies the attending physician or authorized nurse practitioner of the physical tasks to be performed by the injured worker;

(B) notifies the attending physician or authorized nurse practitioner of the location of the modified work offer; and

(C) asks the attending physician or authorized nurse practitioner if the worker can, as a result of the compensable injury, physically commute to and perform the job.

(b) The attending physician or authorized nurse practitioner agrees the employment appears to be within the worker's capabilities and the commute is within the physical capacity of the worker; and

(c) The employer or insurer has confirmed the offer of employment in writing to the worker stating:

(A) the beginning time, date and place;

(B) the duration of the job, if known;

(C) the wages;

(D) an accurate description of the physical requirements of the job;

(E) that the attending physician or authorized nurse practitioner has found the job to be within the worker's capabilities and the commute within the worker's physical capacity;

(F) the worker's right to refuse the offer of employment without termination of temporary total disability if any of the following conditions apply:

(i) The offer is at a site more than 50 miles from where the worker was injured, unless the work site is less than 50 miles from the worker's residence, or the intent of the employer and worker at the time of hire or as established by the employment pattern prior to the injury was that the job involved multiple or mobile work sites and the worker could be assigned to any such site. Examples of such sites include, but are not limited to logging, trucking, construction workers, and temporary employees;

(ii) The offer is not with the employer at injury;

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(iii) The offer is not at a work site of the employer at injury;

(iv) The offer is not consistent with existing written shift change policy or common practice of the employer at injury or aggravation; or

(v) The offer is not consistent with an existing shift change provision of an applicable union contract; and

(G) The following notice, in prominent or bold face type:

“If you refuse this offer of work for any of the reasons listed in this notice, you should write to the insurer or employer and tell them your reason(s) for refusing the job. If the insurer reduces or stops your temporary total disability and you disagree with that action, you have the right to request a hearing. To request a hearing you must send a letter objecting to the insurer’s action(s) to the Worker’s Compensation Board, 2601 25th Street SE, Suite 150, Salem, Oregon 97302-1282.”

(6) Pursuant to ORS 656.325(5)(b), the insurer shall cease paying temporary total disability compensation and start paying temporary partial disability compensation under section (1) as if the worker had begun the employment when the attending physician or authorized nurse practitioner approves employment in a modified job that would have been offered to the worker if the worker had not been terminated from employment for violation of work rules or other disciplinary reasons, under the following conditions:

(a) The employer has a written policy of offering modified work to injured workers;

(b) The insurer has written documentation of the hours available to work and the wages that would have been paid if the worker had returned to work in order to determine the amount of temporary partial disability compensation under section (1);

(c) The attending physician or authorized nurse practitioner has been notified by the employer or insurer of the physical tasks to be performed by the injured worker; and

(d) The attending physician or authorized nurse practitioner agrees the employment appears to be within the worker’s capabilities.

(7) Pursuant to ORS 656.325(5)(c), the insurer shall cease paying temporary total disability compensation and start paying temporary partial disability compensation under section (1) as if the worker had begun the employment when the attending physician or authorized nurse practitioner approves employment in a modified job whether or not such a job is available if the worker is a person present in the United States in violation of federal immigration laws, under the following conditions:

(a) The insurer has written documentation of the hours available to work and the wages that would have been paid if the worker had returned to work in order to determine the amount of temporary partial disability compensation under section (1);

(b) The attending physician or authorized nurse practitioner has been notified by the employer or insurer of the physical tasks that would have been performed by the injured worker; and

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(c) The attending physician or authorized nurse practitioner agrees the employment appears to be within the worker's capabilities.

(8) Temporary partial disability [shall] **must** be paid at the full temporary total disability rate as of the date a modified job no longer exists or the job offer is withdrawn by the employer. This includes, but is not limited to, termination of temporary employment, layoff or plant closure. A worker who has been released to and doing modified work at the same wage as at the time of injury from the onset of the claim shall be included in this section. For the purpose of this rule, when a worker who has been doing modified work quits the job or the employer terminates the worker for violation of work rules or other disciplinary reasons it is not a withdrawal of a job offer by the employer, but shall be considered the same as the worker refusing wage earning employment pursuant to ORS 656.325(5)(a). This section does not apply to those situations described in sections (5), (6), and (7) of this rule.

(9) When the worker's disability is partial only and temporary in character, temporary partial disability compensation pursuant to ORS 656.212 shall continue until:

(a) The attending physician or authorized nurse practitioner verifies that the worker can no longer perform the modified job and is again temporarily totally disabled;

(b) The compensation is terminated by order of the division or by claim closure by the insurer pursuant to ORS 656.268; or

(c) The compensation is lawfully suspended, withheld or terminated for any other reason.

(10) In determining failure on the part of the worker in section (5) and for purposes of subsection (1)(a), "post-injury wages" are the wages the worker could have earned by accepting a job offer, or actual wages earned, whichever is greater, and any unemployment, sick or vacation leave payments received.

(11) If temporary disability benefits end because the insurer or employer:

(a) Speaks by telephone with the attending physician or authorized nurse practitioner, or the attending physician's or authorized nurse practitioner's office, and negotiates a verbal release of the worker to return to any type of work as a result, when no return to work was previously authorized; and

(b) The worker has not already been informed of the release by the attending physician or authorized nurse practitioner or returned to work; then

(c) The insurer [shall] **must**:

(A) Document the facts;

(B) Communicate the release to the worker by mail within 7 days; the communication to the worker of the negotiated return to work release may be contained in an offer of modified employment; and

(C) Advise the worker of their reinstatement rights under ORS chapter 659A.

(12) The insurer [shall] **must** provide the injured worker and the worker's attorney a written notice of the reasons for changes in the compensation rate, and the method of computation, whenever a change is made.

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Stat. Auth: ORS 656.212, 656.704, and 656.726(4)

Stat. Implt: ORS 656.212, 656.325(5), 656.704, 656.726(4), and section 12 (4)(c), chapter 865, Oregon Laws 2001

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436-060-0035 Supplemental Disability for Workers with Multiple Jobs at the Time of Injury

(1) For the purpose of this rule:

(a) “Assigned processing [agent] **administrator**” is the company or business whom the director has selected and authorized to process and pay supplemental disability benefits on behalf of the director, when the insurer has elected not to process and pay these benefits.

(b) “Primary job” means the job at which the injury occurred.

(c) “Secondary job” means any other job(s) held by the worker in Oregon subject employment at the time of injury.

(d) “Temporary disability” means wage loss replacement for the primary job.

(e) “Supplemental disability” means wage loss replacement for the secondary job(s) that exceeds the temporary disability, up to, but not exceeding, the maximum established by ORS 656.210.

(f) “Verifiable documentation” means [check stubs or payroll records] **information** which [include] **provides:**

(A) Identification of the Oregon subject employer(s) and the time period [of the date of injury to] **that** establishes the worker held the secondary job, in addition to the primary job, at the time of injury; and

(B) Adequate information to calculate the average weekly wage in accordance with OAR 436-060-0025.

(g) “Insurer” includes third party administrator.

(2) The insurer shall establish the temporary disability rate by multiplying the weekly wage, determined pursuant to OAR 436-060-0025, from the primary employer by 66 2/3% (.6667). If the result meets or exceeds the maximum temporary disability rate, the worker is not eligible for supplemental disability benefits.

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(3) Within five business days of receiving a claim on which the temporary disability rate **for the primary job** does not meet or exceed the maximum rate, the insurer [shall] **must** send a worker who identifies employment in addition to the primary job [on the Form 801] **an initial** notice informing the worker [of the date the insurer received the claim and the final date by which] **what type of information** the insurer or the assigned processing [agent] **administrator** must receive [verifiable documentation] to determine the worker's eligibility for supplemental disability. If the insurer has elected not to process and pay these benefits, the insurer [shall] **must** copy the assigned processing [agent] **administrator** with the notice to the worker. The notice [shall] **must** contain the name, address, and telephone number of the assigned processing [agent] **administrator**, and [shall] **must** also clearly advise the worker that the verifiable documentation must be sent to the assigned processing [agent] **administrator**.

(4) **The initial notice in (3) must also inform the worker that if the verifiable documentation is not received within 60 days of the notice, the insurer will determine the worker's temporary disability rate based only on the job at which the injury occurred. If the insurer receives the documentation after the 60 days has expired, the insurer must determine the worker's eligibility for supplemental disability benefits and, if the worker is found eligible, re-calculate the temporary disability rate. Additional benefits due, but not yet paid because of the worker's prior failure to provide documentation, must be paid retrospectively. Any delay in the payment of a higher disability rate because of the worker's failure to provide verifiable documentation under this paragraph will not result in a penalty under ORS 656.262(11).**

(5) Within 14 days of receiving the worker's verifiable documentation, the insurer or the assigned processing [agent] **administrator** [shall] **must** determine the worker's eligibility for supplemental disability and [shall] **must** communicate the decision to the worker and the worker's representative, if any, in writing. The [written communication shall] **letter must also** advise the worker why he/she is not eligible when that is the decision and how to appeal the decision, if the worker disagrees with the decision.

[5] **(6)** A worker is eligible if:

(a) The worker was employed at the secondary job by an Oregon subject employer at the time of the injury,

(b) The worker provides notification of a secondary job to the insurer within 30 days of the insurer's receipt of the initial claim, **and**

(c) [The worker provides verifiable documentation to the insurer or the assigned processing agent within 60 days of the date the insurer received the notification, and

(d) The worker's temporary disability rate from wages at the primary job does not meet or exceed the maximum rate under section (2) of this rule.

[6] **(7)** The insurer or the assigned processing [agent] **administrator** [shall] **must** calculate supplemental disability for an eligible worker by adding all earnings the worker received from all subject employment, pursuant to ORS 656.210(2)(a)(B). In no case shall an eligible worker receive less compensation than would be paid if based solely on wages from the primary employer.

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[(7)] **(8)** If the temporary disability rate from the primary employer does not meet or exceed the maximum rate, the insurer or the assigned processing [agent] **administrator** [shall] **must** combine the weekly wages, determined pursuant to OAR 436-060-0025, for each employer and multiply by 66 2/3% (.6667) to establish the combined disability rate up to the maximum rate. This is the base amount on which the worker's combined benefits will be calculated.

[(8)] **(9) No three day waiting period applies to supplemental disability benefits.**

(10) The worker's scheduled days off for the job at which the injury occurred shall be used to calculate and pay supplemental disability.

(11) To establish the combined partial disability benefits when the worker has post injury wages from either job, the insurer or the assigned processing [agent] **administrator** [shall] **must** use all post injury wages from both primary and all secondary employers. The insurer or the assigned processing agent [shall] **must** calculate the amount due the worker based on the combined wages at injury and combined post injury wages using the temporary partial disability calculation in OAR 436-060-0030. The insurer or the assigned processing [agent] **administrator** [shall] **must** then calculate the amount due from the primary job based only on the primary wages at injury and the primary post injury wages. That amount shall be subtracted from the amount due the worker; the remainder is the supplemental disability amount.

[(9)] **(12)** If the worker receives post injury wages from the secondary job equal to or greater than the secondary wages at the time of injury, no supplemental disability is due.

[(10)] **(13)** If the worker returns to a job not held at the time of the injury, the insurer or the assigned processing [agent] **administrator** [shall] **must** process supplemental disability under the same terms, conditions and limitations as OAR 436-060-0030.

[(11)] **(14)** Except as otherwise provided in sections (2), (7), (8), and (9) of this rule, supplemental disability shall be due, paid, and processed under the same provisions, conditions, and limitations as would be applicable to temporary disability for the job at injury.]
Supplemental disability may be due on a non[-]disabling claim even if temporary disability is not due from the primary job. The non[-]disabling claim will not change to disabling status due to payment of supplemental disability. When supplemental disability payments cease on a non[-]disabling claim, the insurer or the assigned processing [agent] **administrator** [shall] **must** send the worker written notice advising the worker that their supplemental disability payments have stopped and of the worker's right to appeal that action to the Workers' Compensation Board within 60 days of the notice, if the worker disagrees.

[(12)] **(15)** If the insurer has elected to process and pay supplemental disability pursuant to ORS 656.210(5)(a), the insurer [shall] **must** determine the worker's on-going entitlement to supplemental disability and [shall] **must** pay the worker supplemental disability simultaneously with any temporary disability due. Reimbursement for supplemental disability paid will be made pursuant to OAR 436-060-0500.

[(13)] **(16)** If the insurer has elected not to process and pay supplemental disability, the assigned processing [agent] **administrator** [shall] **must** determine the worker's on-going entitlement to supplemental disability and [shall] **must** pay the worker supplemental disability due once each 14 days.

[(14)] **(17)** A worker who is eligible for supplemental disability under section (5) of this rule has an on-going responsibility to provide information and documentation to the insurer or the

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assigned processing [agent] **administrator**, even if temporary disability is not due from the primary job.

[(15)] **(18)** If the insurer has elected not to process and pay supplemental disability, the insurer [and] **must cooperate and communicate with** the assigned processing [agent] **administrator** [shall communicate] and **both must** retain documentation of shared information, as necessary, to coordinate benefits due.

[(16)] **(19)** Supplemental disability applies to occupational disease claims the same as injury claims. Supplemental disability benefits for an occupational disease shall be based on the worker's combined primary and secondary wages at the time there is medical verification the worker is unable to work because of the disability.

[(17)] **(20)** When an insurer elects to pay supplemental disability pursuant to ORS 656.210(5)(a) and OAR 436-060-0010(20) and receive reimbursement pursuant to OAR 436-060-0500, the insurer [shall] **must** maintain a record of supplemental disability paid to the worker, separate from temporary disability paid as a result of the job at injury.

[(18)] **(21)** If a worker disagrees with the insurer's or the assigned processing [agent's] **administrator's** decision about the worker's eligibility for supplemental disability or the rate of supplemental disability, the worker may request a hearing before the Hearings Division of the Workers' Compensation Board. If the worker chooses to request a hearing on the insurer's decision concerning the worker's eligibility for supplemental disability, the worker must submit an appeal of the insurer's or the assigned processing [agent's] **administrator's** decision within 60 days of the notice in section (4) of this rule. Disputes that arise about the rate of supplemental disability may be resolved pursuant to OAR 436-060-0025(5) and may be submitted at any time. However, the insurer for the primary job is not required to contact the secondary job employer. The worker is responsible to provide any necessary documentation. By requesting resolution of the dispute under OAR 436-060-0025(5), the worker authorizes the Workers' Compensation Division to contact the secondary job employer to verify information provided by the worker to resolve the dispute.

[(19)] **(22)** An insurer who elects not to process and pay supplemental disability benefits may be sanctioned upon a worker's complaint if the insurer delays sending necessary information to the assigned processing [agent] **administrator** and that delay causes a delay in the worker receiving supplemental disability benefits.

(23) In the event of a third party recovery, previously reimbursed supplemental disability benefits are a portion of the paying agency's lien.

(24) When the insurer learns of third party settlement negotiations on any claim for which it has received reimbursement from the Worker Benefit Fund for supplemental disability, the insurer should notify the division in accordance with the provisions set forth in ORS 656.593.

(25) Remittance on recovered benefits shall be made to the department in the quarter following the recovery in amounts determined in accordance with ORS 656.591 and ORS 656.593.

Stat. Auth: ORS 656.210, 656.704, and 656.726(4)

Stat. Impltd: ORS 656.210, 656.325(5), 656.704, 656.726(4), and section 3 (2)(a), chapter 865, Oregon Laws 2001

Hist: Adopted 11/30/01 as WCD Admin. Order 01-061, eff. 1/1/02

Amended 4/19/02 as WCD Admin. Order 02-056, eff. 5/10/02 (Temp.)

Amended 10/2/02 as WCD Admin. Order 02-059, eff. 11/1/02

Amended 8/28/03 as WCD Admin. Order 03-060, eff. 9/2/03 (Temp.)

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Amended 9/22/03 as WCD Admin. Order 03-061, eff 9/22/03 (Temp.)
Amended 2/17/04 as WCD Admin. Order 04-051, eff. 2/29/04

436-060-0040 Payment of Permanent Partial Disability Compensation

(1) Permanent partial disability exceeding \$6,000 may be paid monthly by the insurer. If it is paid monthly, it must be paid at 4.35 times the weekly temporary disability rate at the time of closure.

(2) If a claim is reopened as a result of a new medical condition or an aggravation of the worker's accepted condition(s) and temporary disability is due, any permanent partial disability benefits due [shall] **must** continue to be paid concurrently with temporary disability benefits.

(3) **If the worker begins a training program after claim closure, the insurer must suspend the payment of any work disability award, but continue to pay any impairment award.**

(4) The insurer [shall] **must** stop temporary disability compensation payments and resume any award payments suspended pursuant to ORS 656.268(9) upon the worker's completion or ending of the training, unless the worker is not then medically stationary. If no award payment remains due, temporary disability compensation payments [shall] **must** continue pending a subsequent claim closure.

Stat. Auth: ORS 656.268(9), 656.704, and 656.726(4)

Stat. Implt: ORS 656.268(9), 656.704, and 656.726(4)

Hist: Filed 12/23/81 as WCD Admin. Order 6-1981, eff. 1/1/82
Amended 12/29/83 as WCD Admin. Order 8-1983, eff. 1/1/84
Renumbered from 436-54-232, May 1, 1985
Amended 12/12/85 as WCD Admin. Order 8-1985, eff. 1/1/86
Amended 12/18/87 as WCD Admin. Order 4-1987, eff. 1/1/88
Amended 12/22/89 as WCD Admin. Order 7-1989, eff. 1/1/90
Amended 6/18/90 as WCD Admin. Order 8-1990, eff. 7/1/90 (Temp)
Amended 11/30/90 as WCD Admin. Order 26-1990, eff. 12/26/90
Amended 8/11/94 as WCD Admin. Order 94-055, eff. 8/28/94
Amended 2/2/96 as WCD Admin. Order 96-053, eff. 2/12/96
Amended 11/30/01 as WCD Admin. Order 01-061, eff. 1/1/02
Amended 2/17/04 as WCD Admin. Order 04-051, eff. 2/29/04

436-060-0045 Payment of Compensation During Worker Incarceration

(1) A worker is not eligible to receive temporary disability compensation for periods of time during which the worker is incarcerated for commission of a crime. All other compensation benefits [shall] **must** be provided the worker as if the worker were not incarcerated, except as provided in OAR 436-120. For the purpose of this rule:

(a) A worker is incarcerated for commission of a crime when:

(A) In pretrial detention, or

(B) Imprisoned following conviction for a crime.

(b) A worker is not incarcerated if the worker is on parole or work release status.

(2) Temporary disability compensation, if due and payable, [shall] **must** be paid the worker within 14 days of the date the insurer becomes aware the worker is no longer incarcerated.

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(3) A worker who is incarcerated shall have the same right to claim closure under ORS 656.268 as a worker who is not incarcerated. Any permanent disability awarded [shall] **must** be paid the same as if the worker were not incarcerated.

Stat. Auth: ORS 656.160, 656.704, and 656.726(4)

Stat. Impltd: ORS 656.160, 656.704, and 656.726(4)

Hist: Filed 6/18/90 as WCD Admin. Order 8-1990, eff. 7/1/90 (Temp)
Amended 9/18/90 as WCD Admin. Order 19-1990, eff. 9/18/90 (Temp)
Amended 11/30/90 as WCD Admin. Order 26-1990, eff. 12/26/90
Amended 1/3/92 as WCD Admin. Order 1-1992, eff. 2/1/92
Amended 10/2/02 as WCD Admin. Order 02-059, eff 11/1/02

436-060-0055 Payment of Medical Services on Nondisabling Claims; Employer/Insurer Responsibility

Pursuant to ORS 656.262(5) the costs of medical services for nondisabling claims, in amounts not to exceed \$500 per claim, must first be paid by the insurer and the insurer may be reimbursed by the employer if the employer so chooses. Such choice does not relieve the employers of their claim reporting requirements or the insurers of their responsibility to determine entitlement to benefits and process the claims accurately and timely. Also, when paid by the employer, such costs cannot in any way be used to affect the employer's experience rating modification or otherwise be charged against the employer. To enable the director to ensure these conditions are met, insurers and employers must comply with the following process and procedures:

(1) Notwithstanding the choice made by the employer pursuant to section (2) of this rule, the employer and insurer [shall] **must** process the nondisabling claims in accordance with all statutes and rules governing claims processing. The employer, however, may reimburse the medical service costs paid by the insurer if the employer has chosen to make such payments. The method and manner of reimbursement by the employer shall be as prescribed in section (3) of this rule. In no case, however, shall the employer have less than 30 days to reimburse the insurer.

(2) Prior to the commencement of each policy year, the insurer [shall] **must** send a notice to the insured or prospective insured, advising of the employer's right to reimburse medical service costs up to \$500 on accepted, nondisabling claims. The notice [shall] **must** advise the employer:

- (a) Of the procedure for making such payments as outlined in section (3) of this rule;
- (b) Of the general impact on the employer if the employer chooses to make such payments;
- (c) That the employer is choosing not to participate if the employer does not respond in writing within 30 days of receipt of the insurer's notice;
- (d) That the employer's written election to participate in the reimbursement program remains in effect, without further notice from the insurer, until the employer advises otherwise in writing or is no longer insured by the insurer; and
- (e) That the employer may participate later in the policy period upon written request to the insurer, however, the earliest reimbursement period shall be the first completed period, established pursuant to subsection (3)(a) of this rule, following receipt of the employer's request.

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(3) If the employer wishes to make such reimbursement, and so advises the insurer in writing, the procedure for reimbursement shall be:

(a) Within 30 days following each three month period after policy inception or a period mutually agreed upon by the employer and insurer, the insurer [shall] **must** provide the employer with a list of all accepted nondisabling claims for which payments were made during that period and the respective cost of each claim.

(b) The employer, no later than 30 days after receipt of the list, [shall] **must** identify those claims and the dollar amount the employer wishes to pay for that period and reimburse the insurer accordingly.

(c) Failure by the employer to reimburse the insurer within the 30 days allowed by subsection (3)(b) of this rule shall be deemed notice to the insurer that the employer does not wish to make a reimbursement for that period.

(d) Notwithstanding subsection (3)(b) of this rule, the employer and insurer may, by written agreement, establish a period in excess of thirty (30) days for the employer to reimburse the insurer.

(e) The insurer shall continue to bill the employer for any payments made on the claims within 27 months of the inception of the policy period. Any further billing and reimbursement will be made only by mutual agreement between the employer and the insurer.

(4) Insurers [shall] **must** maintain records of amounts reimbursed by employers for medical services on nondisabling claims. Insurers, however, shall not modify an employer's experience rating or otherwise make charges against the employer for any medical services reimbursed by the employer. For employers on retrospective rated plans, medical costs paid by the employer on nondisabling claims [shall] **must** be included in the retrospective premium calculation, but the amount paid by the employer shall be applied as credits against the resulting retrospective premium.

(5) If a claim changes from a nondisabling to a disabling claim and the insurer has recovered reimbursement from the employer for medical costs billed by the insurer prior to the change, the insurer shall exclude those amounts reimbursed from any experience rating, or other individual or group rating plans of the employer. If the employer is on a retrospective rated plan, premium calculation shall be as provided in section (4) of this rule.

(6) Insurers who do not comply with the requirements of this rule or in any way prohibit an employer from reimbursing the insurer pursuant to section (3) of this rule, shall be subject to a penalty as provided by OAR 436-060-0200(7).

(7) Self-insured employers [shall] **must** maintain records of all amounts paid for medical services on nondisabling claims in accordance with OAR 436-050-0220. When reporting loss data for experience rating, the self-insured may exclude costs for medical services paid on nondisabling claims in amounts not to exceed \$500 per claim.

Stat. Auth: ORS 656.262(5), 656.704, 656.726(4), and 656.745

Stat. Impltd: ORS 656.262(5), 656.704, and 656.726(4)

Hist: Filed 12/18/87 as WCD Admin. Order 10-1987, eff. 1/1/88 (Temp) as Rule 436-60-055
Amended 6/27/88 as WCD Admin. Order 4-1988, eff. 7/1/88 as Rule 436-60-055
Amended 12/22/89 as WCD Admin. Order 7-1989, eff. 1/1/90

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Amended 8/11/94 as WCD Admin. Order 94-055, eff. 8/28/94
Amended 11/30/01 as WCD Admin. Order 01-061, eff. 1/1/02

436-060-0060 Lump Sum Payment of Permanent Partial Disability Awards

(1) Pursuant to ORS 656.230, in all cases where an award for permanent partial disability does not exceed \$6,000, the insurer [shall] **must** pay all of the award to the worker in a lump sum. When the award for permanent partial disability exceeds \$6,000, the insurer or director may approve an application of the worker for lump sum payment when the order has become final by operation of law or the worker has waived their right to appeal the adequacy of the award. The lump sum application shall be in the form and format provided by the director.

(2) When an insurer receives a request for a lump sum application from the worker or the worker's representative, the insurer [shall] **must** send the lump sum application form to the requestor within ten business days.

(3) For the purpose of this rule, each opening of the claim is considered a separate claim and any subsequent permanent partial disability award from a claim reopening is a new and separate award. Additional award of permanent partial disability obtained through the appeal process is considered part of the total cumulative award for the open period of that claim.

(4) If the insurer agrees with the worker's request for lump sum payment of a permanent partial disability award in excess of \$6,000, they [shall] **must** make the lump sum payment within 14 days of receipt of the signed application.

(5) If the insurer disagrees with the worker's request for lump sum payment of a permanent partial disability award in excess of \$6,000, the insurer must submit the lump sum application with the reason for disagreement to the director within 14 days of receipt of the signed application. The insurer [shall] **must** simultaneously copy the worker and the worker's attorney, if represented, of the disagreement and submission to the division.

(6) **For dates of injury prior to January 1, 2005, [r]the insurer or the division [shall] may** not approve an application for lump sum payment of unscheduled permanent disability when the worker:

(a) Has been found eligible for a vocational training program and will start the program within 30 days of the date of the decision on the lump sum request;

(b) Is actively enrolled and engaged in a vocational training program under OAR 436-120; or

(c) Has temporarily withdrawn from such a program.

(7) **For dates of injury on or after January 1, 2005, the insurer or the division may not approve an application for lump sum payment of work disability when the worker:**

(a) Has been found eligible for a vocational training program and will start the program within 30 days of the date of the decision on the lump sum request;

(b) Is actively enrolled and engaged in a vocational training program under OAR 436-120; or

(c) Has temporarily withdrawn from such a program.

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(8) The insurer or the division shall not approve an application for lump sum payment of [scheduled or unscheduled] permanent disability when the worker is involved in litigation affecting the permanent partial disability award.

[(8)] **(9)** When the division approves a disputed application, the insurer [shall] **must** pay the lump sum amount to the worker within 14 days after the mailing of the order.

[(9)] **(10)** If any party disagrees with the decision of the division, the party may petition the director to reconsider the decision within 14 days after the mailing of the decision. Appeal of an order approving a lump sum payment stays payment of the lump sum until the director's review is complete and an order on the appeal is issued. The director's decision shall be final and not subject to review.

[(10)] **(11)** A lump sum payment ordered in a litigation order or which is a part of a Claim Disposition Agreement pursuant to ORS 656.236 does not require further approval by the insurer or the division.

[(11)] **(12)** When a partial payment is approved by the insurer or the division, it shall be in addition to the regularly scheduled monthly payment. The remaining balance shall be paid pursuant to ORS 656.216. Denial or partial approval of an application does not prevent another application by the worker for a lump sum payment of all or part of any remainder of the award, provided additional information is submitted.

Stat. Auth: ORS 656.704 and 656.726(4)

Stat. Impltd: ORS 656.230, 656.704, and 656.726(4)

Hist: Filed 6/23/66 as WCB Admin. Order 6-1966
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Amended 12/18/87 as WCD Admin. Order 4-1987, eff. 1/1/88
Amended 12/22/89 as WCD Admin. Order 7-1989, eff. 1/1/90
Amended 11/30/90 as WCD Admin. Order 26-1990, eff. 12/26/90
Amended 8/11/94 as WCD Admin. Order 94-055, eff. 8/28/94
Amended 2/2/96 as WCD Admin. Order 96-053, eff. 2/12/96
Amended 11/30/01 as WCD Admin. Order 01-061, eff. 1/1/02
Amended 10/2/02 as WCD Admin. Order 02-059, eff. 11/1/02
Amended 2/17/04 as WCD Admin. Order 04-051, eff. 2/29/04

436-060-0095 Medical Examinations; Suspension of Compensation; and Insurer Medical Examination Notice

(1) The division will suspend compensation by order under conditions set forth in this rule. The worker [shall] **must** have the opportunity to dispute the suspension of compensation prior to issuance of the order. The worker is not entitled to compensation during or for the period of suspension when the worker refuses or fails to submit to, or otherwise obstructs, a medical examination reasonably requested by the insurer or the director pursuant to ORS 656.325(1). Compensation will be suspended until the examination has been completed. The conditions of the examination shall be consistent with conditions described in OAR 436-010-0265. Any action of a friend or family member which obstructs the examination shall be considered an obstruction of the examination by the worker for the purpose of this rule. The division may determine

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whether special circumstances exist that would not warrant suspension of compensation for failure to attend or obstruction of the examination.

(2) The division will consider requests to authorize suspension of benefits on accepted claims, deferred claims and on denied claims in which the worker has appealed the insurer's denial.

(3) A worker [shall] **must** submit to medical examinations reasonably requested by the insurer or the director. No more than three separate medical examinations may be requested by the insurer for each open period of a claim, except as provided under OAR 436-010. Examinations after the worker's claim is closed are subject to limitations in ORS 656.268(7).

(4) The insurer may contract with a third party to schedule insurer requested medical examinations. If the third party notifies the worker of a scheduled examination on behalf of the insurer, the appointment notice is required to be sent on the insurer's stationery and must conform with the requirements of OAR 436-060-0095(5).

(5) If an examination is scheduled by the insurer or by another party at the request of the insurer, the worker and the worker's attorney shall be simultaneously notified in writing of the scheduled medical examination pursuant to ORS 656.331. The notice shall be sent at least 10 days prior to the examination. The notice sent for each appointment, including those which have been rescheduled, [shall] **must** contain the following:

- (a) The name of the examiner or facility;
- (b) A statement of the specific purpose for the examination and, identification of the medical specialties of the examiners;
- (c) The date, time and place of the examination;
- (d) The first and last name of the attending physician or authorized nurse practitioner and verification that the attending physician or authorized nurse practitioner was informed of the examination by, at least, a copy of the appointment notice, or a statement that there is no attending physician or authorized nurse practitioner, whichever is appropriate;
- (e) If applicable, confirmation that the director has approved the examination;
- (f) That the reasonable cost of public transportation or use of a private vehicle will be reimbursed and that, when necessary, reasonable cost of child care, meals, lodging and other related services will be reimbursed. A request for reimbursement must be accompanied by a sales slip, receipt or other evidence necessary to support the request. Should an advance of these costs be necessary for attendance, a request for advancement [shall] **must** be made in sufficient time to ensure a timely appearance;
- (g) That an amount will be paid equivalent to net lost wages for the period during which it is necessary to be absent from work to attend the medical examination if benefits are not received under ORS 656.210(4) during the absence; and
- (h) The following notice in prominent or bold face type:
“You must attend this examination. If there is any reason you cannot attend, you must tell the insurer as soon as possible before the date of the

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examination. If you fail to attend or fail to cooperate, or do not have a good reason for not attending, your compensation benefits may be suspended in accordance with the workers' compensation law and rules, ORS 656.325 and OAR 436-060."

(6) Child care costs reimbursed at the rate prescribed by the State of Oregon Department of Human Services, comply with this rule.

(7) The request for suspension [shall] **must** be sent to the division. A copy of the request, including all attachments, [shall] **must** be sent simultaneously to the worker and the worker's attorney by registered or certified mail or by personal service as for a summons. The request [shall] **must** include the following information:

(a) That the insurer requests suspension of benefits pursuant to ORS 656.325 and OAR 436-060-0095;

(b) The claim status and any accepted or newly claimed conditions;

(c) What specific actions of the worker prompted the request;

(d) The dates of any prior insurer medical examinations the worker has attended in the current open period of the claim and the names of the examining physicians or facilities, or a statement that there have been no prior examinations, whichever is appropriate;

(e) A copy of any approvals given by the director **for more than three insurer medical examinations**, or a statement that no approval was necessary, whichever is appropriate;

(f) Any reasons given by the worker for failing to comply, whether or not the insurer considers the reasons invalid, or a statement that the worker has not given any reasons, whichever is appropriate;

(g) The date and with whom failure to comply was verified. Any written verification of the worker's refusal to attend the exam received by the insurer from the worker or the worker's representative will be sufficient documentation with which to request suspension;

(h) A copy of the letter required in section (5) and a copy of any written verification received under subsection (7)(g);

(i) Any other information which supports the request; and

(j) The following notice in prominent or bold face type:

"Notice to worker: If you think this request to suspend your compensation is wrong, you should immediately write to the Workers' Compensation Division, 350 Winter Street NE, PO Box 14480, Salem, Oregon 97309-0405. Your letter must be mailed within 10 days of the date of this request. If the division grants this request, you may lose all or part of your benefits. If your claim has not yet been accepted, your future benefits, if any, will be jeopardized."

(8) If the division consents to suspend compensation, the suspension shall be effective from the date the worker fails to attend an examination or such other date the division deems appropriate until the date the worker undergoes an examination scheduled by the insurer or

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director. Any delay in requesting consent for suspension may result in authorization being denied or the date of authorization being modified.

(9) The insurer [shall] **must** assist the worker in meeting requirements necessary for the resumption of compensation payments. When the worker has undergone the examination, the insurer [shall] **must** verify the worker's participation and reinstate compensation effective the date of the worker's compliance.

(10) If the worker makes no effort to reinstate compensation in an accepted claim within 60 days of the date of the consent to suspend order, the insurer [shall] **must** close the claim pursuant to OAR 436-030-0034(7).

(11) If the division denies the insurer's request for suspension of compensation, it shall promptly notify the insurer of the reason for denial. Failure to comply with one or more of the requirements addressed in this rule may be grounds for denial of the insurer's request.

(12) The division may also take the following actions in regard to the suspension of compensation:

- (a) Modify or set aside the order of consent before or after filing of a request for hearing.
- (b) Order payment of compensation previously suspended where the division finds the suspension to have been made in error.
- (c) Reevaluate the necessity of continuing a suspension.

(13) An order becomes final unless, within 60 days after the date of mailing of the order, a party files a request for hearing on the order with the Hearings Division of the Workers' Compensation Board.

Stat. Auth: ORS 656.325, 656.704, and 656.726(4)

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436-060-0105 Suspension of Compensation for Insanitary or Injurious Practices, Refusal of Treatment or Failure to Participate in Rehabilitation; Reduction of Benefits

(1) The division will suspend compensation by order under conditions set forth in this rule. The worker [shall] **must** have the opportunity to dispute the suspension of compensation prior to issuance of the order. The worker is not entitled to compensation during or for the period of suspension pursuant to ORS 656.325(2) when the worker commits insanitary or injurious acts which imperil or retard recovery; refuses to submit to medical or surgical treatment reasonably required to promote recovery; or fails or refuses to participate in a physical rehabilitation program.

(2) The insurer [shall] **must** demand in writing the worker either immediately cease actions which imperil or retard recovery or immediately begin to change the inappropriate behavior and

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participate in activities needed to help the worker recover from the injury. Such actions include insanitary or injurious practices, refusing essential medical or surgical treatment, or failing to participate in a physical rehabilitation program. Each time the insurer sends such a notice to the worker, the written demand [shall] **must** contain the following information, and a copy shall be sent simultaneously to the worker's attorney:

- (a) A description of the unacceptable actions;
- (b) Why such conduct is inappropriate, including the fact that the conduct is harmful and/or retards the worker's recovery, as appropriate;
- (c) The date by which the inappropriate actions must stop, or the date by which compliance is expected, including what the worker must specifically do to comply; and,
- (d) The following notice of the consequences should the worker fail to correct the problem, in prominent or bold face type:

“If you continue to do insanitary or injurious acts beyond the date in this letter, or fail to consent to the medical or surgical treatment which is needed to help you recover from your injury, or fail to participate in physical rehabilitation needed to help you recover as much as possible from your injury, then we will request the suspension of your workers' compensation benefits. In addition, you may also have any permanent disability award reduced in accordance with ORS 656.325 and OAR 436-060.”

(3) For the purposes of this rule, failure or refusal to accept medical treatment means the worker fails or refuses to remain under a physician's or authorized nurse practitioner's care or abide by a treatment regimen. A treatment regimen includes, but is not limited to a prescribed diet, exercise program, medication or other activity prescribed by the physician or authorized nurse practitioner which is designed to help the worker reach maximum recovery and become medically stationary.

(4) The insurer [shall] **must** verify whether the worker complied with the request for cooperation on the date specified in section (2)(c). If the worker initially agrees to comply, or complies and then refuses or fails to continue doing so, the insurer is not required to send further notice before requesting suspension of compensation.

(5) The request for suspension [shall] **must** be sent to the division. A copy of the request, including all attachments, [shall] **must** be sent simultaneously to the worker and the worker's attorney by registered or certified mail or by personal service as for a summons. The request [shall] **must** include the following information:

- (a) That the request for suspension is made in accordance with ORS 656.325 and OAR 436-060-0105;
- (b) A description of the actions of the worker which prompted the request, including whether such actions continue;
- (c) Any reasons offered by the worker to explain the behavior, or a statement that the worker has not provided any reasons, whichever is appropriate;
- d) How, when and with whom the worker's failure or refusal was verified;

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(e) A copy of the letter required in section (2);

(f) Any other relevant information including, but not limited to; chart notes, surgical or physical therapy recommendations/prescriptions, and all physician or authorized nurse practitioner recommendations; and

(g) The following notice in prominent or bold face type:

“Notice to worker: If you think this request to suspend your compensation is wrong, you should immediately write to the Workers’ Compensation Division, 350 Winter Street NE, PO Box 14480, Salem, Oregon 97309-0405. Your letter must be mailed within 10 days of the date of this request. If the division authorizes suspension of your compensation and you do not correct your unacceptable actions or show us a good reason why they should be considered acceptable, we will close your claim.”

(6) Any delay in obtaining confirmation or in requesting consent for suspension of compensation may result in authorization being denied or the date of authorization being modified by the date of actual confirmation or the date the request is received by the division.

(7) If the division concurs with the request, it shall issue an order suspending compensation from a date established under section (5) until the worker complies with the insurer’s request for cooperation. Where the worker is suspended for a pattern of noncooperation, the division may require the worker to demonstrate cooperation before restoring compensation.

(8) The insurer [shall] **must** monitor the claim to determine if and when the worker complies with the insurer’s requests. When cooperation resumes, payment of compensation [shall] **must** resume effective the date cooperation was resumed.

(9) The insurer [shall] **must** make all reasonable efforts to assist the worker to restore benefits when the worker demonstrates the willingness to make such efforts.

(10) If the worker makes no effort to reinstate benefits within 60 days of the date of the consent order, the insurer [shall] **must** close the claim pursuant to OAR 436-030-0034.

(11) If the division denies the insurer’s request for suspension of compensation, it shall promptly notify the insurer of the reason for denial. The insurer’s failure to comply with one or more of the requirements addressed in this rule may be grounds for denial of the insurer’s request.

(12) The division may also take the following actions in regard to the suspension of compensation:

(a) Modify or set aside the order of consent before or after filing of a request for hearing.

(b) Order payment of compensation previously suspended where the division finds the suspension to have been made in error.

(c) Reevaluate the necessity of continuing a suspension.

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(13) An order becomes final unless, within 60 days after the date of mailing of the order, a party files a request for hearing on the order with the Hearings Division of the Workers' Compensation Board.

(14) The director may reduce any benefits awarded the worker under ORS 656.268 when the worker has unreasonably failed to follow medical advice, or failed to participate in a physical rehabilitation or vocational assistance program prescribed for the worker under ORS chapter 656 and OAR chapter 436. Such benefits shall be reduced by the amount of the increased disability reasonably attributable to the worker's failure to cooperate. When an insurer submits a request to reduce benefits under this section, the insurer [shall] **must**:

- (a) specify the basis for the request;
- (b) include all supporting documentation;
- (c) send a copy of the request, including the supporting documentation, to the worker and the worker's representative, if any, by certified mail; and
- (d) include the following notice in prominent or bold face type:

“Notice to worker: If you think this request to reduce your compensation is wrong, you should immediately write to the Workers' Compensation Division, 350 Winter Street NE, PO Box 14480, Salem, Oregon 97309-0405. Your letter must be mailed within 10 days of the date of this request. If the division grants this request, you may lose all or part of your benefits.”

(15) The division shall promptly make a decision on a request to reduce benefits and notify the parties of the decision. The insurer's failure to comply with one or more of the requirements addressed in this rule may be grounds for denial of the request to reduce benefits.

Stat. Auth: ORS 656.325, 656.704, and 656.726(4)

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436-060-0135 Injured Worker, Worker Representative Responsible to Assist in Investigation; Suspension of Compensation and Notice to Worker

(1) When the worker refuses or fails to cooperate in an investigation of an initial claim for compensation, a claim for a new medical condition, a claim for an omitted medical condition, or an aggravation claim as required by ORS 656.262(13), the division will suspend compensation pursuant to ORS 656.262(14) by order under conditions set forth in this rule. The division may determine whether special circumstances exist that would not warrant suspension of compensation for failure to cooperate with an investigation. The worker [shall] **must** have the opportunity to submit information disputing the insurer's request for suspension of compensation prior to issuance of the order.

- (2) A worker [shall] **must** submit to and fully cooperate with personal and telephonic

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interviews and other formal or informal information gathering techniques reasonably requested by the insurer. For the purposes of this rule, "personal and telephonic interviews" may be audio or video taped by one or more of the parties if prior written notice is given of the intent to record or tape an interview.

(3) The division will consider requests for suspension of benefits pursuant to ORS 656.262(14) only after the insurer has notified the injured worker in writing of the worker's obligation to cooperate as required by section (4) or (5) of this rule and only in claims where there has been no acceptance or denial issued.

(4) For suspension of benefits to be granted under this rule, the insurer [shall] **must** notify the worker in writing that an interview or deposition has been scheduled, or of other investigation requirements, and [shall] **must** give the worker at least 14 days to cooperate. The notice [shall] **must** be sent to the worker and copied to the worker's attorney, if represented, and [shall] **must** advise the worker of the date, time and place of the interview and/or any other reasonable investigation requirements. If the insurer contracts with a third party, such as an investigation firm, to investigate the claim, the notice shall be on the insurer's stationery and must conform with the requirements of this section. The notice must inform the worker that the interview, deposition, and/or any other investigation requirements are related to the worker's compensation claim. The notice [shall] **must** also contain the following statement in prominent or bold face type:

"The workers' compensation law requires injured workers to cooperate and assist the insurer or self-insured employer in the investigation of claims for compensation. Injured workers are required to submit to and fully cooperate with personal and telephonic interviews and other formal or informal information gathering techniques. If you fail to reasonably cooperate with the investigation of this claim, payment of your compensation benefits may be suspended and your claim may be denied in accordance with ORS 656.262 and OAR 436-060."

(5) Notwithstanding section (4) of this rule, for suspension of benefits to be granted under ORS 656.262(14) for noncooperation during an investigation of a claim resulting from a worker's failure to attend or cooperate in an insurer medical examination, the notification requirements in OAR 436-060-0095(5) must be met; however, the notice required by 436-060-0095(5)(h) must be replaced with the following notice, in prominent or bold face type:

"The workers' compensation law requires injured workers to cooperate and assist the insurer or self-insured employer in the investigation of claims for compensation. Therefore, you must attend this examination. If there is any reason you cannot attend, you must tell the insurer as soon as possible before the date of the examination. If you fail to attend or fail to cooperate, and do not have a good reason for not attending, payment of your compensation benefits may be suspended and your claim may be denied in accordance with ORS 656.262 and OAR 436-060."

(6) The request for suspension [shall] **must** be sent to the division after the 14 days in section (4) have expired. If the request is for failure to attend an insurer medical examination

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pursuant to section (5), the request [shall] **must** be sent to the division after the date of the examination, or after the insurer receives written documentation from the worker or the worker's representative that the worker will not attend the examination. Any delay in requesting suspension may result in authorization being denied. A copy of the request, including all attachments, [shall] **must** be sent simultaneously to the worker and the worker's attorney by registered or certified mail or by personal service. The request [shall] **must** include the following information sufficient to show the worker's failure to cooperate:

(a) That the insurer requests suspension of benefits pursuant to ORS 656.262(14) and this rule;

(b) Documentation of the specific actions of the worker or worker's representative that prompted the request;

(c) Any reasons given by the worker for failure to comply, or a statement that the worker has not given any reasons, whichever is appropriate. Any written verification the insurer receives from the worker or the worker's representative of the worker's refusal to cooperate or attend an exam will be sufficient documentation with which to request suspension;

(d) **The dates of any prior insurer medical examinations the worker has attended in the current open period of the claim and the names of the examining physicians or facilities, or a statement that there have been no prior examinations, whichever is appropriate (if the suspension request is for not attending an insurer medical examination);**

(e) **A copy of any approvals given by the director for more than three insurer medical examinations, or a statement that no approval was necessary, whichever is appropriate (if the suspension request is for not attending an insurer medical examination);**

(d) (f) A copy of the notice required in section (4) or (5) of this rule; a copy of any written verification received under subsection (6)(c); and

(e) (g) All other pertinent information, **including, but not limited to, a copy of the claim for a new or omitted condition when that is what the insurer is investigating.**

(7) After receiving the insurer's request as required in section (6) of this rule, the division will promptly notify all parties that the worker's benefits will be suspended in five working days unless the worker or the worker's attorney contacts the division by telephone or mails a letter documenting that the failure to cooperate was reasonable or unless the insurer notifies the division that the worker is now cooperating. The notice of the division will also advise that the insurer's obligation to accept or deny the claim within 60 days is suspended unless the insurer's request is filed with the division after the 60 days to accept or deny the claim has expired.

(8) If the worker cooperates after the insurer has requested suspension, the insurer [shall] **must** notify the division immediately to withdraw the suspension request. The division will notify all the parties. An order may be issued identifying the dates during which the insurer's obligation to accept or deny the claim was suspended.

(9) If the worker documents the failure to cooperate was reasonable the division will not suspend payment of compensation. However, an order may be issued identifying the dates during which the insurer's obligation to accept or deny the claim was suspended.

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(10) If the worker has not documented that the failure to cooperate was reasonable, the division will issue an order suspending all or part of the payment of compensation to the worker. The suspension will be effective the fifth working day after notice is provided by the division as required by section (7) of this rule. The suspension of compensation shall remain in effect until the worker cooperates with the investigation. If the worker makes no effort to reinstate compensation within 30 days of the date of the notice, the insurer may deny the claim under ORS 656.262(14) and OAR 436-060-0140(10).

(11) Under ORS 656.262 (13), an insurer who believes that a worker's attorney's unwillingness or unavailability to participate in an interview is unreasonable may notify the director in writing and the division will consider assessment of a civil penalty against the attorney of not more than \$1,000. The worker's attorney [shall] **must** have the opportunity to dispute the allegation prior to the issuance of a penalty. Notice under this section [shall] **must** be sent to the division. A copy of the notice [shall] **must** be sent simultaneously to the worker and the worker's attorney. Notice to the division by the insurer [shall] **must** contain the following information:

- (a) What specific actions of the attorney prompted the request;
- (b) Any reasons given by the attorney for failing to participate in the interview; and
- (c) A copy of the request for interview sent to the attorney.

(12) Failure to comply with the requirements of this rule will be grounds for denial of the insurer's request.

Stat. Auth: ORS 656.704 and 656.726(4)

Stat. Implt: ORS 656.262(14) and (15), 656.704, 656.726(4), and section 7 (6)(a), chapter 865, Oregon Laws 2001

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436-060-0140 Acceptance or Denial of a Claim

(1) The insurer is required to conduct a "reasonable" investigation based on all available information in ascertaining whether to deny a claim. A reasonable investigation is whatever steps a reasonably prudent person with knowledge of the legal standards for determining compensability would take in a good faith effort to ascertain the facts underlying a claim, giving due consideration to the cost of the investigation and the likely value of the claim.

(2) In determining whether an investigation is reasonable, the director will only look at information contained in the insurer's claim record at the time of denial. The insurer may not rely on any fact not documented in the claim record at the time of denial to establish that an investigation was reasonable.

(3) The insurer [shall] **must** give the claimant written notice of acceptance or denial of a claim within:

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(a) 90 days after the employer's notice or knowledge of an initial claim or the insurer's receipt of written notice of an aggravation claim or written notice of a new medical condition claim for claims with a date of injury prior to January 1, 2002; or

(b) 60 days after the employer's notice or knowledge of an initial claim or the insurer's receipt of written notice of an aggravation claim or written notice of a new medical or omitted condition claim for claims with a date of injury on or after January 1, 2002.

(4) The director may assess a penalty against any insurer delinquent in accepting or denying a claim beyond the days required in (3) in excess of 5 percent of their total volume of reported disabling claims during any quarter.

(5) A notice of acceptance [shall] **must** comply with ORS 656.262(6)(b) and the rules of Practice and Procedure for Contested Cases under the Workers' Compensation Law, OAR chapter 438. It [shall] **must** include a current mailing date, be addressed to the worker, be copied to the worker's representative, if any, and the worker's attending physician, and specify to the worker:

(a) What conditions are compensable;

(b) Whether the claim is disabling or nondisabling;

(c) Of the Expedited Claim Service, of hearing and aggravation rights concerning nondisabling injuries including the right to object to a decision that the injury is nondisabling by requesting the insurer review the status;

(d) Of the employment reinstatement rights and responsibilities under ORS chapter 659A;

(e) Of assistance available to employers from the Reemployment Assistance Program under ORS 656.622;

(f) That expenses personally paid for claim related expenses up to a maximum established rate [shall] **must** be reimbursed by the insurer when requested in writing and accompanied by sales slips, receipts, or other reasonable written support, for meals, lodging, transportation, prescriptions and other related expenses;

(g) That if the worker believes a condition has been incorrectly omitted from the notice of acceptance, or the notice is otherwise deficient, the worker must first communicate the objection to the insurer in writing specifying either that the worker believes the condition has been incorrectly omitted or why the worker feels the notice is otherwise deficient; and

(h) That if the worker wants the insurer to accept a claim for a new medical condition, the worker must put the request in writing, clearly identify the condition as a new medical condition, and request formal written acceptance of the condition.

(6) On fatal claims, the notice [shall] **must** be addressed "to the estate of" the worker and the requirements in (5)(a) through (h) shall not be included.

(7) The first acceptance issued on the claim [shall] **must** contain the title "Initial Notice of Acceptance" near the top of the notice. Any notice of acceptance [shall] **must** contain all accepted conditions at the time of the notice. Additionally, when reopening a claim, the notice of

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acceptance [shall] **must** specify the condition(s) for which the claim is being reopened. Under ORS 656.262(6)(b)(F) the insurer must modify acceptance from time to time as medical or other information changes. An insurer [shall] **must** issue a "Modified Notice of Acceptance" (MNOA) when they:

(a) Accept a new or omitted condition: on a nondisabling claim, while a disabling claim is open or after claim closure;

(b) Accept an aggravation claim;

(c) Change the disabling status of the claim; or

(d) Amend a notice of acceptance, **including correcting a clerical error.**

(8) Notwithstanding OAR 436-060-0140(7)(d), to correct an omission or error in an "Updated Notice of Acceptance at Closure"(UNOA), pursuant to OAR 436-030-0015(1)(e), the insurer [shall] **must** add the word "Corrected" to the UNOA.

(9) When an insurer accepts a new or omitted condition on a closed claim, the insurer must reopen the claim and process it to closure under ORS 656.262 and 656.267.

(10) A notice of denial [shall] **must** comply with the rules of Practice and Procedure for Contested Cases under the Workers' Compensation Law, OAR chapter 438, and [shall] **must**:

(a) Specify the factual and legal reasons for the denial, including the worker's right to request a Worker Requested Medical Examination and a specific statement indicating if the denial was based in whole or part on an insurer medical examination, pursuant to ORS 656.325, and one of the following statements, as appropriate:

(A) "Your attending physician agreed with the insurer medical examination report"; or

(B) "Your attending physician did not agree with the insurer medical examination report"; or

(C) "Your attending physician has not commented on the insurer medical examination report"; and

(b) Inform the worker of the Expedited Claim Service and of the worker's right to a hearing under ORS 656.283.

(c) If the denial is pursuant to ORS 656.262(14), it must inform the worker that [for] an appeal [to be considered,] **may occur sooner if** the worker [must] requests an expedited hearing pursuant to ORS 656.291.

(d) If paragraph (10)(a)(B) above applies, the denial notice must also include the division's website address and toll free Infoline for the worker's use in obtaining a brochure about the Worker Requested Medical Examination.

(11) The insurer [shall] **must** send notice of the denial to each provider of medical services and health insurance when compensability of any portion of a claim for medical services is denied at the same time the denial is sent to the worker. If the insurer receives any billings from medical providers after claim denial, they [shall] **must** send a copy of the denial to the medical provider and advise the medical provider of the status of the denial. When compensability of the

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claim has been finally determined or when disposition of the claim has been made, the insurer [shall] **must** notify each affected service provider of the results of the compensability determination or disposition. The notification [shall] **must** include the results of the proceedings under ORS 656.236 or 656.289(4) and the amount of any settlement.

(12) The insurer [shall] **must** pay compensation due pursuant to ORS 656.262 and 656.273 until the claim is denied, except where there is an issue concerning the timely filing of a notice of accident as provided in ORS 656.265(4). The employer may elect to pay compensation under this section in lieu of the insurer doing so. The insurer [shall] **must** report to the division payments of compensation made by the employer as if the insurer had made the payment.

(13) Compensation payable to a worker or the worker's beneficiaries while a claim is pending acceptance or denial does not include the costs of medical benefits or burial.

Stat. Auth: ORS 656.704 and 656.726(4)

Stat. Implt: ORS 656.262(6), 656.704, 656.726(4), and sections 7 (6)(a) and 13 (1)(b), chapter 865, Oregon Laws 2001

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436-060-0147 Worker Requested Medical Examination

(1) Pursuant to ORS 656.325(1)(b) the director shall establish and maintain a list of physicians in accordance with OAR 436-010-0330.

(2) The director shall determine the worker's eligibility for a Worker Requested Medical Examination (Exam). The worker is eligible for an exam pursuant to this rule if the worker

(a) Has made a timely request for a Workers' Compensation Board hearing on a denial of compensability as required by ORS 656.319(1)(a); and

(b) The denial was based on one or more Insurer Medical Examination reports with which the attending physician disagreed.

(3) The worker [shall] **must** submit a request for the exam to the director. A copy of the request [shall] **must** be sent simultaneously to the insurer or self-insured employer. The request [shall] **must** include:

(a) The name, address, and claim identifying information of the injured worker;

(b) A list of physicians, including name(s) and address(es), who have previously provided medical services to the worker on this claim or who have previously provided medical services to the worker related to the claimed condition(s);

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- (c) The date the worker requested a hearing and a copy of the hearing request;
- (d) A copy of the insurer's denial letter; and
- (e) Document(s) that demonstrate that the attending physician did not concur with the Insurer Medical Examination report(s).
- (4) The insurer [shall] **must**, upon written notice from the worker, mail to the director no later than the 14th day following the insurer's receipt of the worker's request, the names and addresses of all physicians who have:
- (a) Acted as attending physician;
- (b) Provided medical consultations and/or treatment to the worker;
- (c) Examined the worker at an insurer medical examination; or
- (d) Reviewed the worker's medical records on this claim. For the purpose of this rule, "Attending Physician" and "Insurer Medical Examination" have the meanings defined in OAR 436-010-0005 and 436-010-0265(1), respectively.
- (5) Failure to provide the required documentation described in section (4) in a timely manner will subject the insurer to civil penalties under OAR 436-060-0200.
- (6) The director will notify all parties in writing of the physician selected, **or will provide the parties a list of appropriate physicians.**
- (7) If the director provides a list of physicians, the following applies:**
- (a) The parties must respond. All responses must be in writing, signed, and received by the director within five business days of providing the list.**
- (b) The parties may agree to one physician from the list.**
- (c) If the parties do not agree, each party may eliminate one physician from the list.**
- (d) If the parties do not respond as provided in this section, the director will select a physician.**
- (e) The director will notify the parties in writing of the physician selected.**
- [(7)] **(8)** The worker and/or the worker's legal representative shall schedule the exam with the selected physician and notify the insurer and the Workers' Compensation Board of the scheduled exam date within 14 days of the notification date in (6) of this rule. An unrepresented worker may consult with the Injured Worker Ombudsman for assistance.
- [(8)] **(9)** The insurer [shall] **must** send the physician the worker's complete medical record on this claim and the original questions asked of the Insurer Medical Examination(s) physician(s) no later than 14 days prior to the date of the scheduled exam.
- [(9)] **(10)** The worker or the worker's representative shall communicate questions related to the compensability denial in writing to be answered by the physician at the exam to the physician at least 14 days prior to the scheduled date of the exam. An unrepresented worker may consult with the Injured Worker Ombudsman for assistance.

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[(10)] **(11)** Upon completion of the exam the physician [shall] **must** address the original Insurer Medical Examination(s) questions and the questions from the worker or the worker's representative pursuant to section (9) and send the report to the worker's legal representative, if any, or the worker, and the insurer within 5 working days.

[(11)] **(12)** The insurer [shall] **must** pay the physician selected pursuant to this rule in accordance with OAR 436-009. Delivery of medical services to injured workers shall be in accordance with OAR 436-010.

[(12)] **(13)** If the worker fails to attend the scheduled Worker Requested Medical Exam, the insurer [shall] **must** pay the physician for the missed examination. The insurer is not required to pay for another examination unless the worker did not attend the missed examination for reasons beyond the worker's reasonable control.

[(13)] **(14)** The insurer [shall] **must** reimburse the worker for all necessary related services pursuant to ORS 656.325(1).

Stat. Auth: ORS 656.704, 656.726(4), and section 13 (1)(b), chapter 865, Oregon Laws 2001

Stat. Impltd: ORS 656.325(1), 656.704, and 656.726(4)

Hist: Adopted 11/30/01 as WCD Admin. Order 01-061, eff. 1/1/02
Amended 10/2/02 as WCD Admin. Order 02-059, eff. 11/1/02
Amended 12/12/03 as WCD Admin. Order 03-071, eff. 1/1/04 (Temp.)
Amended 2/17/04 as WCD Admin. Order 04-051, eff. 2/29/04

436-060-0150 Timely Payment of Compensation

(1) Benefits are deemed paid when addressed to the last known address of the worker or beneficiary and deposited in the U.S. Mail or deposited in the worker's or beneficiary's account by approved electronic equivalent. Payments falling due on a weekend or legal holiday pursuant to ORS 187.010 and 187.020 may be paid on the last working day prior to or the first working day following the weekend or legal holiday. Subsequent payments may revert back to the payment schedule prior to the weekend or legal holiday.

(2) For the purpose of this rule, legal holidays in the State of Oregon are:

- (a) Each Sunday;
- (b) New Year's Day on January 1;
- (c) Martin Luther King, Jr.'s Birthday on the third Monday in January;
- (d) Presidents Day, for the purpose of commemorating Presidents Washington and Lincoln, on the third Monday in February;
- (e) Memorial Day on the last Monday in May;
- (f) Independence Day on July 4;
- (g) Labor Day on the first Monday in September;
- (h) Veterans Day on November 11;
- (i) Thanksgiving Day on the fourth Thursday in November; and
- (j) Christmas Day on December 25.

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(k) Each time a holiday, other than Sunday, falls on Sunday, the succeeding Monday shall be a legal holiday. Each time a holiday falls on Saturday, the preceding Friday shall be a legal holiday.

(l) Additional legal holidays shall include every day appointed by the Governor as a legal holiday and every day appointed by the President of the United States as a day of mourning, rejoicing or other special observance only when the Governor also appoints that day as a holiday.

(3) First payment of time loss must be timely. An insurer's performance is in compliance when 80% of payments are timely. The director may assess a penalty against an insurer falling below these norms during any quarter.

(4) Compensation withheld pursuant to ORS 656.268(12) and (13), and ORS 656.596(2), shall not be deemed untimely provided the insurer notifies the worker in writing why benefits are being withheld and the amount that must be offset before any further benefits are payable.

(5) Timely payment of temporary disability benefits means payment has been made no later than the 14th day after:

(a) The date of the employer's notice or knowledge of the claim, provided the attending physician or authorized nurse practitioner has authorized temporary disability. Temporary disability accrued prior to the date of the employer's notice or knowledge of the claim shall be due within 14 days of claim acceptance;

(b) The date the attending physician or authorized nurse practitioner authorizes temporary disability, if the authorization is more than 14 days after the date of the employer's notice or knowledge of the claim;

(c) The start of authorized vocational training pursuant to ORS 656.268(9), if the claim has previously been closed;

(d) The date the insurer has notice or knowledge of a medically verified inability to work due to an aggravation of the worker's condition under ORS 656.273. For the purpose of this subsection, compensation for authorized temporary disability is due and payable on a claim for aggravation, unless the claim is denied;

(e) The date of any division order, including, but not limited to, a reconsideration order, which orders payment of temporary disability. If a reconsideration order has been appealed by the insurer, the appeal stays payment of temporary disability benefits except those which accrue from the date of the order, pursuant to ORS 656.313;

(f) The date of a notice of claim closure issued by the insurer which finds the worker entitled to temporary disability;

(g) The date a notice of closure is set aside by a reconsideration order;

(h) The date any litigation authorizing retroactive temporary disability becomes final. Temporary disability accruing from the date of the order [shall] **must** begin no later than the 14th day after the date the order is filed. For the purpose of this rule, the "date the order is filed" for litigation from the Workers' Compensation Board, is the signature date and from the courts, it is the date of the appellate judgment;

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(i) The date the division refers a claim to the insurer for processing pursuant to ORS 656.029;

(j) The date the division refers a noncomplying employer claim to an assigned claims agent pursuant to ORS 656.054; or

(k) The date a claim disposition is disapproved by the Board, if temporary disability benefits are otherwise due;

(l) The date the division designates a paying agent pursuant to ORS 656.307;

(m) The date a claim is reclassified from non[-]disabling to disabling, if temporary disability is due and payable; and

(n) The date an insurer voluntarily rescinds a denial of a disabling claim.

(6) Temporary disability [shall] **must** be paid to within seven days of the date of payment at least once each 14 days. When making payments as provided in OAR 436-060-0020(1), the employer may make subsequent payments of temporary disability concurrently with the payroll schedule of the employer, rather than at 14-day intervals.

(7) Permanent disability and fatal benefits [shall] **must** be paid no later than the 30th day after:

(a) The date of a notice of claim closure issued by the insurer;

(b) The date of any litigation order which orders payment of permanent total disability or fatal benefits. Permanent total or fatal benefits accruing from the date of the order [shall] **must** begin no later than the 30th day after the date the order is filed. For the purpose of this rule, the "date the order is filed" for litigation from the Workers' Compensation Board, is the signature date and from the courts it is the date of the appellate judgment;

(c) The date of any division order, including, but not limited to, a reconsideration order, which orders payment of compensation for permanent disability;

(d) The date any litigation authorizing permanent partial disability becomes final; or

(e) The date a claim disposition is disapproved by the Board, if permanent disability benefits are otherwise due.

(f) The date authorized training ends if the worker is medically stationary and any previous award remains unpaid, pursuant to ORS 656.268(9) and OAR 436-060-0040(2).

(8) Subsequent payments of permanent disability and fatal benefits are made in monthly sequence. The insurer may adjust monthly payment dates, but [shall] **must** inform the beneficiary prior to making the adjustment. No payment period shall exceed one month without the division approval.

(9) The insurer [shall] **must** notify the worker or beneficiary in writing when compensation is paid of the specific purpose of the payment, the time period for which the payment is made, **how the temporary disability payment is calculated** and the reimbursable expenses. The insurer [shall] **must** maintain records of compensation paid for each claim where benefits are due and payable. If the worker submits a request for reimbursement of multiple items and full

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reimbursement is not made, the insurer [shall] **must** provide specific reasons for non-payment or reduction of each item.

(10) Payment of a Claim Disposition Agreement [shall] **must** be made no later than the 14th day after the Board mails notice of its approval of the agreement to the parties, unless otherwise stated in the agreement.

(11) Pursuant to ORS 656.126(6), when Oregon compensation is more than the compensation under another law for the same injury or occupational disease, or compensation paid the worker under another law is recovered from the worker for the same injury or occupational disease, the insurer [shall] **must** pay any unpaid compensation to the worker up to the amount required by the claim under Oregon law within 14 days of receipt of written documentation supporting the underpayment of Oregon compensation.

Stat. Auth: ORS 656.704 and 656.726(4)

Stat. Implt: ORS 656.262(4), 656.268(9), 656.273, 656.278, 656.289, 656.307, 656.313, 656.704, and 656.726(4)

Hist: Amended 1/11/80 as WCD Admin. Order 1-1980, eff. 1/11/80
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Amended 12/22/89 as WCD Admin. Order 7-1989, eff. 1/1/90
Amended 6/18/90 as WCD Admin. Order 8-1990, eff. 7/1/90 (Temp)
Amended 11/30/90 as WCD Admin. Order 26-1990, eff. 12/26/90
Amended 1/3/92 as WCD Admin. Order 1-1992, eff. 2/1/92
Amended 8/11/94 as WCD Admin. Order 94-055, eff. 8/28/94
Amended 2/2/96 as WCD Admin. Order 96-053, eff. 2/12/96
Amended 11/30/01 as WCD Admin. Order 01-061, eff. 1/1/02
Amended 10/2/02 as WCD Admin. Order 02-059, eff. 11/1/02
Amended 12/12/03 as WCD Admin. Order 03-071, eff. 1/1/04 (Temp.)
Amended 2/17/04 as WCD Admin. Order 04-051, eff. 2/29/04

436-060-0155 Penalty to Worker for Untimely Processing

(1) Pursuant to ORS 656.262(11), the director may require the insurer to pay an additional amount to the worker as a penalty when the insurer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim.

(2) Requests for penalties under this section must be in writing, stating what benefits have been delayed or remain unpaid, and mailed or delivered to the division within 180 days of the alleged violation.

(3) For the purpose of this section, "violation" is either:

(a) A late payment or the nonpayment of any single payment due, in which case a request for penalty must be mailed or delivered to the director within 180 days of the date payment was due; or

(b) A continuous nonpayment or underpayment such as with yearly cost of living increases for temporary disability compensation. In these instances, a request for penalty must be mailed or delivered to the director within 180 days of the date of the last underpayment. All prior underpayments will be considered as one violation, regardless of when the first underpayment occurred.

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(4) When notified by the director that additional amounts may be due the worker as a penalty under this rule, the insurer [shall] **must** respond in writing to the division. The response must be mailed or delivered to the division within 21 days of the date of the division's inquiry letter, with copies of the response, including any attachments, sent simultaneously to the worker and the worker's attorney (if represented). If an insurer fails to respond or provides an inadequate response (e.g. failing to answer specific questions or provide requested documents), assessment of a civil penalty may occur pursuant to OAR 436-060-0200. In addition, failure to provide copies of the response to the worker and/or attorney timely may result in the assessment of a \$50.00 civil penalty pursuant to OAR 436-060-0200.

(5) When no written reason for delay is provided by the insurer as required in section (4) and no reason for the delay is evident from the worker's or division's records, the delay shall be considered unreasonable, unless the worker has provided insufficient information to assess a penalty. In such cases, a civil penalty may be assessed pursuant to OAR 436-060-0200.

(6) The director will only consider a penalty issue where the assessment and payment of additional amounts described in ORS 656.262(11) is the sole issue of any proceeding between the parties. If a proceeding on any other issue is initiated before the Hearings Division of the Workers' Compensation Board between the same parties prior to the director issuing an order under this section, and the director is made aware of the proceeding, jurisdiction over the penalty proceeding before the director shall immediately rest with the Hearings Division and result in referral of the proceedings to the Hearings Division. If the director has not been made aware of the proceeding before the Hearings Division and issues a penalty order which becomes final, the penalty of the director will stand.

(7) The director will use the matrix attached to these rules in Appendix "B" in assessing penalties. When there are no "amounts then due" upon which to assess a penalty, no penalty will be issued under this rule.

(8) Penalties ordered under this rule [shall] **must** be paid to the worker no later than the 30th day after the date of the order, unless the order is appealed. **If the order is appealed and later upheld, the penalty will be due the date on which the order upholding the penalty becomes final.** Failure to pay penalties in a timely manner will subject the insurer to civil penalties under OAR 436-060-0200.

(9) Disputes regarding unreasonable delay or unreasonable refusal to pay compensation, or unreasonable delay in acceptance or denial of a claim may be resolved by the parties. In cases where the parties wish to resolve such disputes and the assessment and payment of additional amounts described in ORS 656.262(11) is the sole issue of a proceeding between the parties, and the violation(s) occurred within the last 180 days in accordance with section (3), then a stipulation must be submitted to the division for approval. The stipulation must specify:

(a) The benefits delayed and the amounts;

(b) The time period(s) involved;

(c) If applicable, the name of the medical provider(s) and the date(s) of service(s) relating to medical bills; and

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(d) The amount of the penalty not to exceed 25 percent of the amount of compensation delayed.

(10) Payment of the penalty is due within 14 days after the date the division approves the stipulation, unless otherwise stated in the stipulation. Failure to pay penalties in a timely manner will subject the insurer to civil penalties under OAR 436-060-0200.

(11) Any other agreements between the parties to pay a penalty without benefit of a stipulation approved by the division will not be acknowledged as a violation as it applies to the matrix attached to these rules.

Stat. Auth: ORS 656.262(11), 656.704, 656.726(4), and 656.745
Stat. Impltd: ORS 656.262(11), 656.704, and 656.726(4)
Hist: Filed 6/18/90 as WCD Admin. Order 8-1990, eff. 7/1/90 (Temp)
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 Amended 11/30/01 as WCD Admin. Order 01-061, eff. 1/1/02
 Amended 10/2/02 as WCD Admin. Order 02-059, eff. 11/1/02

436-060-0160 Use of Sight Draft to Pay Compensation Prohibited

Insurers shall not use a sight draft to pay any benefits due a worker or beneficiary under ORS chapter 656. Such benefits include temporary disability, permanent disability and reimbursement of costs paid directly by the worker.

Stat. Auth: ORS 656.704 and 656.726(4)
Stat. Impltd: ORS 656.704 and 656.726(4)
Hist: Filed 12/19/75 as WCB Admin. Order 18/1975, eff. 1/1/76
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 Amended 10/2/02 as WCD Admin. Order 02-059, eff. 11/1/02

436-060-0170 Recovery of Overpayment of Benefits

(1) Insurers may recover overpayment of benefits paid to a worker as specified by ORS 656.268(13), unless authority is granted by an Administrative Law Judge or the Workers' Compensation Board.

(2) Insurers may recover an overpayment from any benefits currently due on any claim the worker has with that insurer. Insurers [shall] **must** explain in writing the reason, amount and method of recovery to the worker and the worker's attorney or to the worker's survivors.

(3) When overpaid benefits are offset against monthly permanent partial disability award payments, the recovery shall be from the total amount of the award with the remainder of the award being paid out at 4.35 times the temporary total disability rate and no less than \$108.75, starting with the first month's payment.

Stat. Auth: ORS 656.704 and 656.726(4)
Stat. Impltd: ORS 656.268(13) and (15), 656.704, and 656.726(4)
Hist: Filed 1/11/80 as WCD Admin. Order 1-1980, eff. 1/11/80
 Amended 12/23/81 as WCD Admin. Order 6-1981, eff. 1/1/82
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Amended 6/18/90 as WCD Admin. Order 8-1990, eff. 7/1/90 (Temp)
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Amended 10/2/02 as WCD Admin. Order 02-059, eff 11/1/02

436-060-0180 Designation and Responsibility of a Paying Agent

(1) For the purpose of this rule:

(a) "Compensable injury" means an accidental injury or damage to a prosthetic appliance, or an occupational disease arising out of and in the course of employment with any Oregon employer, and which requires medical services or results in disability or death.

(b) "Exposure" means a specific incident or period during which a compensable injury may have occurred.

(c) "Responsibility" means liability under the law for the acceptance and processing of a compensable claim.

(2) The division shall designate by order which insurer [shall] **must** pay a claim if the employers and insurers admit that the claim is otherwise compensable, and where there is an issue regarding:

(a) Which subject employer is the true employer of a worker;

(b) Which of more than one insurer of a certain employer is responsible for payment of compensation to a worker;

(c) Which of two or more employers or their insurers is responsible for paying compensation for one or more on-the-job injuries and/or occupational diseases; or

(d) Which of two or more employers is responsible when there is joint employment.

(3) With the consent of the Workers' Compensation Board, Own Motion claims are subject to the provisions of this rule.

(4) Upon learning of any of the situations described in section (2), the insurer [shall] **must** expedite the processing of the claim by immediately investigating the claim to determine responsibility and whether the claim is otherwise compensable. For the purposes of this rule, insurers identified in a potential responsibility dispute pursuant to ORS 656.307 [shall] **must**, upon request, share claim related medical reports and other information without charge pertinent to the injury in order to expedite claim processing. The act of the worker applying for compensation benefits from any employer identified as a party to a responsibility dispute shall constitute authorization for the involved insurers to share the pertinent information in accordance with the criteria and restrictions provided in OAR 436-060-0017 and 436-010-0240. No insurer who shares information in accordance with this rule shall bear any legal liability for disclosure of such information.

(5) Upon learning of any of the situations described in section (2), the insurer [shall] **must** immediately notify any other affected insurers of the situation. Such notice [shall] **must** identify the compensable injury and include a copy of all medical reports and other information pertinent

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to the injury. The notice [shall] **must** identify each period of exposure which the insurer believes responsible for the compensable injury by the following:

- (a) name of employer;
- (b) name of insurer;
- (c) specific date of injury or period of exposure; and
- (d) claim number, if assigned.

(6) Upon deciding that the responsibility for an otherwise compensable injury cannot be determined, the insurer [shall] **must** request designation of a paying agent by writing to the division and sending a copy of the request to the worker and the worker's representative, if any. The request shall not be contained in or attached to any form or report the insurer is required to submit pursuant to OAR 436-060-0010 or in the denial letter to the worker required by OAR 436-060-0140. Such a request, or agreement to designation of a paying agent, is not an admission that the injury is compensably related to that insurer's claim; it is solely an assertion that the injury is compensable against a subject Oregon employer. The insurer's written request to the division [shall] **must** contain the following information:

- (a) Identification of the compensable injury(s);
- (b) That the insurer is requesting designation of a paying agent pursuant to ORS 656.307;
- (c) That the insurer acknowledges the injury is otherwise compensable;
- (d) That responsibility is the only issue;
- (e) Identification of the specific claims or exposures involved by
 - (A) employer,
 - (B) insurer,
 - (C) date of injury or specific period of exposure, and
 - (D) claim number, if assigned;
- (f) Acknowledgment that medical reports and other material pertinent to the injury have been provided to the other parties; and
- (g) Confirmation the worker has been advised of the actions being taken on the worker's claim.

(7) The division will not designate a paying agent where there remains an issue of whether the injury is compensable against a subject Oregon employer, or if the 60 day appeal period of a denial has expired without a request for hearing being received by the Board or the division receiving a request for a designation of paying agent order, or if an insurer included in the question of responsibility opposes designation of a paying agent because it has received no claim.

(8) When notified by the division that there is a reasonable doubt as to the status of the claim or intent of a denial, the insurer [shall] **must** provide written clarification to the division, the worker, insurers involved and other interested parties within 21 days of the date of the

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notification. If an insurer fails to respond timely or provides an inadequate response (e.g. failing to answer specific questions or provide requested documents), a civil penalty will be assessed pursuant to OAR 436-060-0200.

(9) Insurers receiving notice from the division of a worker's request for designation of a paying agent [shall] **must** immediately process the request in accordance with sections (4) through (6).

(10) Upon receipt of written acknowledgment from the insurers that the only issue is responsibility for an otherwise compensable injury claim, the division will issue an order designating a paying agent pursuant to ORS 656.307. The division will designate the insurer with the lowest compensation considering the following factors:

(a) The claim with the lowest temporary total disability rate.

(b) If the temporary total disability rates and the rates per degree of permanent disability are the same, the earliest claim.

(c) If there is no temporary disability or the temporary total disability rates are the same, but the rates per degree of permanent disability are different, the claim with the lowest rate per degree of permanent disability.

(d) If one or more claims have disposed of benefits in accordance with ORS 656.236(1), the claim providing the lowest compensation not released by the claim disposition agreement.

(e) If one claim is under "Own Motion" jurisdiction, the Own Motion claim even if not the claim with the lowest temporary total disability rate.

(f) If more than one claim is under "Own Motion" jurisdiction, the Own Motion claim with the lowest temporary total disability rate.

(11) By copy of its order, the division will refer the matter to the Workers' Compensation Board to set a proceeding pursuant to ORS 656.307 to determine which insurer is responsible for paying benefits to the worker.

(12) The designated paying agent [shall] **must** process the claim as an accepted claim through claim closure pursuant to OAR 436-030-0015(9) unless relieved of the responsibility by an order of the Administrative Law Judge or resolution through mediation or arbitration pursuant to ORS 656.307(6). The parties to an order under this section shall not settle any part of a claim pursuant to ORS 656.236 or 656.289, except to resolve the issue of responsibility, unless prior approval and agreement is obtained from all potential responsible insurers. Resolution of a dispute by mediation or arbitration by a private party cannot obligate the Consumer and Business Services Fund without the prior approval of the director. The Consumer and Business Services Fund shall not be obligated when one party declines to participate in a legitimate settlement conference under an ORS 656.307 order. Compensation paid under the order [shall] **must** include all benefits, including medical services, provided for a compensable injury to a subject worker or the worker's beneficiaries. The payment of temporary disability due [shall] **must** be for periods subsequent to periods of disability already paid by any insurer.

(13) After a paying agent is designated, if any of the insurers determine compensability is or will be an issue at hearing, they [shall] **must** notify the division. Any insurer [shall] **must** notify

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the division and all parties to the order of any change in claim acceptance status after the designation of a paying agent. When the division receives notification of a change in the acceptance of a claim or notification that compensability is an issue after designation of a paying agent, the division shall order termination of any further benefits due from the original order designating a paying agent.

Stat. Auth: ORS 656.307, 656.704, 656.726(4), and 656.745

Stat. Impltd: ORS 656.307, 656.308, 656.704, and 656.726(4)

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Amended 1/3/92 as WCD Admin. Order 1-1992, eff. 2/1/92
Amended 8/11/94 as WCD Admin. Order 94-055, eff. 8/28/94
Amended 2/2/96 as WCD Admin. Order 96-053, eff. 2/12/96
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Amended 10/2/02 as WCD Admin. Order 02-059, eff. 11/1/02
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436-060-0190 Monetary Adjustments Among Parties and Department of Consumer and Business Services

(1) An order of the director pursuant to ORS 656.307 and OAR 436-060-0180 applies only to the period prior to the order of the Administrative Law Judge determining the responsible paying party. Payment of compensation made thereafter shall not be recovered from the Consumer and Business Services Fund, unless the director concludes payment was made before the Administrative Law Judge's order was received by the paying agent designated under OAR 436-060-0180. Any monetary adjustment necessary after the Administrative Law Judge's order shall be handled under OAR 436-060-0195.

(2) When all litigation on the issue of responsibility is final, the insurer ultimately held to be responsible [shall] **must**, prior to paying any compensation, contact any nonresponsible insurer to learn what compensation has already been paid. When contacted by the responsible insurer, the nonresponsible insurer [shall] **must** provide the requested information necessary for the responsible insurer to make a timely payment to the worker, medical providers or others, but in any case no later than 20 days after the date of the notification. Failure to respond to the responsible insurer's inquiry in a timely manner may result in non-reimbursement otherwise due from the responsible insurer or from the Consumer and Business Services Fund.

(3) The responsible insurer [shall] **must** reimburse any nonresponsible insurers for compensation the nonresponsible insurer paid which the responsible insurer is responsible for, but has not already paid within 30 days of receiving sufficient information to adequately determine the benefits paid and the relationship to the condition(s) involved. Any balance remaining due the worker, medical providers or others [shall] **must** be paid in a timely manner [pursuant to] **under** OAR 436-009 and 436-060-0150. Payment of compensation which results in duplicate payment to the worker, medical providers or others as a result of failing to contact the nonresponsible insurer shall not release the responsible insurer from the requirement to reimburse any nonresponsible insurers for its costs.

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(4) The division shall direct any necessary monetary adjustment between the parties involved which is not otherwise ordered by the Administrative Law Judge or voluntarily resolved by the parties, but shall not order an insurer to pay compensation over and beyond that required by law, as it relates to the insurer's claim, except in the situation described in section (3). Failure to make monetary adjustments within 30 days of an order by the division will subject the insurer to civil penalties under OAR 436-060-0200. Only compensation paid as a result of an order by the director [pursuant to] **under** OAR 436-060-0180 and consistent with this rule shall be recoverable from the Consumer and Business Services Fund when such compensation is not reimbursed to the nonresponsible insurer by the responsible insurer.

(5) When the division determines improper or untimely claim processing by the designated paying agent has resulted in unnecessary costs, the division may deny reimbursement from the responsible insurer and the Consumer and Business Services Fund.

Stat. Auth: ORS 656.704 and 656.726(4)

Stat. Impltd: ORS 656.307(3), 656.704, and 656.726(4)

Hist: Filed 6/3/70 as WCB Admin. Order 5-1970
Amended 1/11/80 as WCD Admin. Order 1-1980, eff. 1/11/80
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Amended 10/1/80 as WCD Admin. Order 7-1980, eff. 10/1/80
Amended 12/23/81 as WCD Admin. Order 6-1981, eff. 1/1/82
Amended 12/29/83 as WCD Admin. Order 8-1983, eff. 1/1/84
Renumbered from 436-54-334, May 1, 1985
Amended 12/12/85 as WCD Admin. Order 8-1985, eff. 1/1/86
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Amended 12/22/89 as WCD Admin. Order 7-1989, eff. 1/1/90
Amended 11/30/90 as WCD Admin. Order 26-1990, eff. 12/26/90
Amended 1/3/92 as WCD Admin. Order 1-1992, eff. 2/1/92
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Amended 11/30/01 as WCD Admin. Order 01-061
Amended 10/2/02 as WCD Admin. Order 02-059, eff. 11/1/02
Amended 2/17/04 as WCD Admin. Order 04-051, eff. 2/29/04

436-060-0195 Miscellaneous Monetary Adjustments Among Insurers

(1) The director may order monetary adjustments between insurers under authority provided by ORS 656.726(4) and 656.202 where a claimant has a right to compensation, but there is a dispute between insurers that does not fall under the director's authority in ORS 656.307 and OAR 436-060-0190. Any failure to obtain reimbursement from an insurer under this rule shall not be recoverable from the Consumer and Business Services Fund. The purpose of this rule is to ensure the claimant properly receives all compensation due under the workers' compensation law, but is not unduly compensated for more than the law intended.

(2) When any litigation on issues in question is final, insurers [shall] **must** make any necessary monetary adjustments among themselves consistent with the determination of coverage for compensation paid to the worker, medical providers and others for which they are responsible and payment has not already been made within 30 days of receiving sufficient information to adequately determine the benefits paid and the relationship to the condition(s) involved. Any balance due after making such adjustments [shall] **must** be paid in a timely manner to the worker, medical providers and others [pursuant to] **under** OAR 436-009 and 436-060-0150.

(3) The division may direct any necessary monetary adjustment between parties, but shall not order an insurer to pay compensation over and beyond that required by law, as it relates to

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the insurer's claim, except where an insurer unduly compensates a claimant while having knowledge such compensation has already been paid by another insurer. Notwithstanding, each insurer has its own independent obligation to process its claim and pay interim compensation due until the claim is either accepted or denied. When notified by the division that a dispute over monetary adjustment exists the insurer [shall] **must** provide a written response to questions or issues raised, including supporting documentation, to the division, insurers involved and other interested parties within 21 days of the date of the notification.

(4) Failure to respond to the division's inquiries or make monetary adjustments within 30 days of an order by the division will subject the insurer to civil penalties under OAR 436-060-0200.

(5) When the division determines improper or untimely claim processing by an insurer resulted in unnecessary costs, the division may deny monetary adjustment between the insurers.

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

Stat. Impltd: ORS 656.704 and 656.726(4)

Hist: Filed 1/3/92 as WCD Admin. Order 1-1992, eff. 2/1/92
Amended 8/11/94 as WCD Admin. Order 94-055, eff. 8/28/94
Amended 11/30/01 as WCD Admin. Order 01-061, eff. 1/1/02
Amended 10/2/02 as WCD Admin. Order 02-059, eff. 11/1/02
Amended 2/17/04 as WCD Admin. Order 04-051, eff. 2/29/04

436-060-0200 Assessment of Civil Penalties

(1) The director through the division and pursuant to ORS 656.745 shall assess a civil penalty against an employer or insurer who intentionally or repeatedly induces claimants for compensation to fail to report accidental injuries, causes employees to collect accidental injury claims as off-the-job injury claims, persuades claimants to accept less than the compensation due or makes it necessary for claimants to resort to proceedings against the employer to secure compensation due.

(2) A penalty under section (1) will only be assessed after all litigation on the matter has become final by operation of the law. For the purpose of section (1):

(a) "Intentionally" means the employer or insurer acted with a conscious objective to cause any result described in ORS 656.745(1) or to engage in the conduct so described in that section; and

(b) "Repeatedly" means more than once in any twelve month period.

(3) Pursuant to ORS 656.745, the director may assess a civil penalty against an employer or insurer who fails to comply with rules and orders of the director regarding reports or other requirements necessary to carry out the purposes of the Workers' Compensation Law.

(4) An employer or insurer failing to meet the time frame requirements set forth in OAR 436-060-0010, 436-060-0017, **436-060-0018**, 436-060-0030, 436-060-0060, 436-060-0147, 436-060-0155 and 436-060-0180 may be assessed a civil penalty up to \$1,000.

(5) An insurer who willfully violates OAR 436-060-0160 shall be assessed a civil penalty of \$1,000.

(6) An insurer that does not accurately report timeliness of first payment information to the division may be assessed a civil penalty of \$500 for reporting inaccurate information plus

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\$50 for each violation, or \$10,000 in the aggregate for all violations within any three month period. For the purposes of this section, a violation consists of each situation where a first payment was reported to have been made timely, but was found upon audit to have actually been late.

(7) Notwithstanding section (3) of this rule, an employer or insurer who does not comply with the claims processing requirements of ORS chapter 656, and rules and orders of the director relating thereto may be assessed a civil penalty of up to \$2,000 for each violation or \$10,000 in the aggregate for all violations within any three month period.

(8) Any employer or insurer which misrepresents themselves in any manner to obtain workers' compensation claims records from the director, or which uses such records in a manner contrary to these rules, is subject to a civil penalty of \$1,000 for each occurrence. In addition, the director may suspend or revoke an employer's or insurer's access to workers' compensation claims records for such time as the director may determine. Any other person determined to have misrepresented themselves or who uses records in a manner contrary to these rules shall have access to these records suspended or revoked for such time as the director may determine.

(9) For the purpose of section (7), statutory claims processing requirements include but are not limited to, ORS 656.202, 656.210, 656.212, 656.228, 656.234, 656.236, 656.245, 656.262, 656.263, 656.264, 656.265, 656.268, 656.273, 656.307, 656.313, 656.325, 656.331, and 656.335.

(10) In arriving at the amount of penalty, the division may consider, but is not limited to:

- (a) The ratio of the volume of violations to the volume of claims reported, or
- (b) The ratio of the volume of violations to the average volume of violations for all insurers or self-insured employers, and
- (c) Prior performance in meeting the requirements outlined in this section.

(11) Insurer performance data is reviewed every quarter based on reports submitted by the insurer during the previous calendar quarter. Civil penalties will be issued for each of the performance areas where the percentages fall below the acceptable standards of performance as set forth in these rules. The standard for reporting claims to the division will allow insurers to report claims by filing a Form 1502 accompanied by a Form 827 where the Form 801 is not available. Penalties will be issued in accordance with the matrix set forth in Appendix "C."

(12) Pursuant to ORS 656.262(13), an injured worker's attorney that is not willing or available to participate in an interview at a time reasonably chosen by the insurer within 14 days of the request for interview may be assessed a civil penalty not to exceed \$1,000 if the director finds the attorney's actions unreasonable.

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

Stat. Impltd: ORS 656.202, 656.210, 656.212, 656.228, 656.234, 656.236, 656.245, 656.262, 656.263, 656.264, 656.265, 656.268, 656.273, 656.307, 656.313, 656.325, 656.331, 656.335, 656.704, 656.726(4), and 656.745

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Amended 12/12/85 as WCD Admin. Order 8-1985, eff. 1/1/86
Amended 12/18/87 as WCD Admin. Order 4-1987, eff. 1/1/88
Amended 12/22/89 as WCD Admin. Order 7-1989, eff. 1/1/90

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Amended 4/18/91 as WCD Admin. Order 3-1991, eff. 6/1/91
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 Amended 10/2/02 as WCD Admin. Order 02-059, eff. 11/1/02
 Amended 2/17/04 as WCD Admin. Order 04-051, eff. 2/29/04

436-060-0210 Issuance/Service of Penalty Orders

Stat. Auth: ORS 656.704 and 656.726(4)

Stat. Impltd: ORS 656.704, 656.726(4), and 656.740

Hist: Filed 1/11/80 as WCD Admin. Order 1-1980, eff. 1/11/80
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 Amended 12/22/89 as WCD Admin. Order 7-1989, eff. 1/1/90
 Amended 8/11/94 as WCD Admin. Order 94-055, eff. 8/28/94
 Amended 11/30/01 as WCD Admin. Order 01-061, eff. 1/1/02
 Repealed 2/17/04 as WCD Admin. Order 04-051, eff. 2/29/04

436-060-0500 Reimbursement of Supplemental Disability for Workers with Multiple Jobs at the Time of Injury

(1) When an insurer elects to pay supplemental disability due a worker with multiple jobs at the time of injury, reimbursement of the supplemental amount shall be made by the director quarterly, after receipt and approval of documentation of compensation paid by the insurer or the third party administrator. The director will reimburse the insurer, in care of a third party administrator, if applicable.

(2) Requests for reimbursement [shall] **must** be submitted on Form 3504, "Supplemental Disability Benefits Quarterly Reimbursement Request," and [shall] **must** include, but may not be limited to:

- (a) Identification and address of the insurer responsible for processing the claim;
- (b) The worker's name, WCD file number, date of injury, social security number, and the insurer claim number;
- (c) Whether the claim is disabling or non[-]disabling;
- (d) The primary and secondary employer's legal names;
- (e) The primary and secondary employer's WCD registration numbers;
- (f) The weekly wage of all jobs at the time of the injury separated by employer;
- (g) The dates for the period(s) of supplemental disability due and payable to the worker. Dates must be inclusive (e.g., 1-16-02 through 1-26-02);
- (h) The amount of supplemental disability paid for the periods in (2)(g);
- (i) The quarter and year in which the payment was made;
- (j) A signed payment certification statement verifying the payments; and

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(k) Any other information required by the director.

(3) In addition to the supplemental disability reimbursement, the division shall calculate and the insurer shall be paid an administrative fee based on the annual claim processing administrative cost factor, as published in Bulletin 316.

(4) Periodically the division will audit the physical file of the insurer responsible for processing the claim to validate the amount reimbursed. Reimbursement will be disallowed and repayment will be required if, upon such audit, it is found:

(a) Payments exceeded statutory amounts due, excluding reasonable overpayments, as determined by the division;

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

(c) Payments of compensation have not been documented, as required by OAR 436-050.

(5) Supplemental disability benefits due subject workers of an employer who is in a noncomplying status as defined in ORS 656.052 are not eligible for separate reimbursement under this rule, but remain a cost recoverable from the employer as provided by ORS 656.054(3).

(6) Claim Dispositions or Stipulated Settlements, pursuant to ORS 656.236 or 656.289 which include amounts for supplemental disability benefits due to multiple jobs, are not eligible to receive reimbursement from the Workers' Benefit Fund unless made with the prior written approval of the director.

(a) Requests for written approval of proposed dispositions [shall] **must** include:

(A) A copy of the proposed disposition or settlement which specifies the amount of the proposed contribution to be made from the Workers' Benefit Fund;

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

(C) Any other information required by the director.

(b) The director will not approve the disposition for reimbursement if the proposed contribution exceeds a reasonable projection of that claim's future liability to the Workers' Benefit Fund.

Stat. Auth: ORS 656.704, 656.726(4), and section 3 (5)(a), chapter 865, Oregon Laws 2001

Stat. Impltd: ORS 656.210, 656.704, and 656.726(4)

Hist: Adopted 11/30/01 as WCD Admin. Order 01-061, eff. 1/1/02
Amended 10/2/02 as WCD Admin. Order 02-059, eff. 11/1/02
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Amended 9/22/03 as WCD Admin. Order 03-061, eff. 9/22/03 (Temp.)
Amended 2/17/04 as WCD Admin. Order 04-051, eff. 2/29/04

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APPENDIX "A"

436-060-0017 Matrix for Assessing Penalties

NUMBER OF DAYS LATE	VIOLATION NUMBER				
	1	2	3	4	5+
1-7	\$0	\$100	\$250	\$500	\$1,000
8-14	\$100	\$250	\$500	\$1,000	\$1,000
15-21	\$250	\$500	\$1,000	\$1,000	\$1,000
22+	\$500	\$1,000	\$1,000	\$1,000	\$1,000

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APPENDIX "B"

436-060-0155 Matrix for Assessing Penalties

NUMBER OF DAYS LATE	VIOLATION NUMBER			
	1	2	3	4
1-2	0%	10%	20%	25%
3-7	5%	15%	25%	
8-14	10%	20%	25%	
15-21	15%	25%		
22 +	25%			

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APPENDIX "C"

436-060-0200 Matrix for Assessing Penalties

Number of Quarters Below Standard Performance Level Per Year

CATEGORY	1	2	3	4
Timely Filing of Claim (Form 1502)	\$50 each violation \$250 Max	\$100 each violation \$500 Max	\$150 each violation \$750 Max	\$200 each violation \$1000 Max
[Request for Closure Submitted Timely (Form 1503)]	[\$50 each violation] [\$250 Max]	[\$100 each violation] [\$500 Max]	[\$150 each violation] [\$750 Max]	[\$200 each violation] [\$1000 Max]
Notice of Closure Issued Timely	\$50 each violation \$250 Max	\$100 each violation \$500 Max	\$150 each violation \$750 Max	\$200 each violation \$1000 Max
Accept/Deny Timely	\$50 each violation \$250 Max	\$100 each violation \$500 Max	\$200 each violation \$1000 Max	\$400 each violation \$2000 Max
1st Payment Timely	\$50 each violation \$250 Max	\$100 each violation \$500 Max	\$200 each violation \$1000 Max	\$400 each violation \$2000 Max