BEFORE THE DIRECTOR OF THE
DEPARTMENT OF INSURANCE AND FINANCE
OF THE STATE OF OREGON

In the Matter of the Amendment of OAR Chapter 436, Workers' Compensation Division, Division 35, Rule 003 Applicability, Rule 005 Definitions, Rule 007 General Principles, and Rule 010 Standards for Rating Scheduled Permanent Disability	)	ORDER OF ADOPTION OF TEMPORARY RULE

The director of the Department of Insurance and Finance, pursuant to the rule making authority in ORS 656.726(3); and in accordance with the procedure provided by ORS 183.335, amends OAR Chapter 436, Workers' Compensation Division, Division 35, Rule 005 Definitions, Rule 007 General Principles and Rule 010 Standards for Rating Scheduled Permanent Disability.

The amendment is being adopted by Temporary Rule as provided by ORS 183.335(5) and (6), without prior notice. Statement of Findings: I conclude that failure to act promptly will result in serious prejudice to the public interest.

OAR 436-35-003 as amended in this Order of Adoption, corrects an error in the rule adopted September 14, 1990, in WCD Administrative Order 15-1990. The earlier temporary rule incorrectly interpreted Section 54, Chapter 2, Oregon Laws 1990, Special Session (SB 1197).

OAR 436-35-005 is amended to clarify the method used to combine impairments under the standards.

OAR 436-35-007 is amended to clarify language in section (4) and (7) of the rule.

OAR 436-35-010, as amended in this Order of Adoption, corrects a typographical error in the rule adopted September 14, 1990, in WCD Administrative Order 15-1990 and clarifies how contralateral joint comparison affects the value of impairment in a joint.

IT IS THEREFORE ORDERED:

(1) OAR Chapter 436, Division 35, Rule 003, 005, 007 and 010, as set forth in Exhibit "A", attached hereto, certified a true copy and hereby made made a part of this Order, is temporarily adopted effective November 20, 1990.

(2) A certified true copy of the Order of Adoption and this Rule, Exhibit "A", with Exhibit "B" consisting of the Citation of Statutory Authority, Statement of Need and Documents Relied Upon, hereby made a part of this Order, be filed with the Secretary of State.

(3) A copy of the Rules and attached Exhibit "B" be filed with the Legislative Counsel, pursuant to the provisions of ORS 183.715 within 10 days after filing with the Secretary of State.

Dated this 20th day of November, 1990.

DEPARTMENT OF INSURANCE AND FINANCE

Theodore R. Kulongoski

Theodore R. Kulongoski, Director

Distribution: A through V
Y through AA

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APPLICABILITY OF RULES

436-35-003 [(1) Except as provided by Section (2) of this rule,] These rules govern all evaluations of a worker's disability made pursuant to ORS Chapter 656 on or after October 1, 1990[.] **,for workers medically stationary after July 1, 1990.**

[(2) These rules do not apply to any matter regarding a claim in litigation under ORS Chapter 656 and regarding which matter a request for hearing was filed before May 1, 1990, and a hearing was convened before July 1, 1990, unless said claim became medically stationary after July 1, 1990.]

History: Formerly OAR 436-30-003; Filed 6-3-87 as WCD Admin. Order 3-1988, effective 7-1-88; Amended 12-21-88 as WCD Admin. Order 6-1988, effective 1-1-89; Amended 9-14-90 (temp) as WCD Admin. Order 15-1990, effective 10-1-90. **Amended 11-20-90 (temp.) as WCD Admin. Order 20-1990 effective 11-20-90.**

DEFINITIONS

436-35-005 As used in rules 436-35-001 through 436-35-440, unless the context requires otherwise:

(1) "Attending physician" means a doctor or physician who is primarily responsible for the treatment of a worker's compensable injury or illness and who is:

(a) A medical doctor or doctor of osteopathy licensed under ORS 677.100 to 677.228 by the Board of Medical Examiners for the State of Oregon or a board certified oral surgeon licensed by the Oregon Board of Dentistry; or

(b) For a period of thirty (30) days from the date of first chiropractic visit on the initial claim or for twelve (12) chiropractic visits during that thirty (30) day period, whichever first occurs, a doctor or physician licensed by the State Board of Chiropractic Examiners for the State of Oregon; or

(c) As otherwise provided for, in accordance with a managed care organization contract.

(2) "Impairment" means a decrease in the function of a body part or system as measured by a physician according to the methods described in the American Medical Association Guides to the Rating of Permanent Impairment, 2nd Edition, copyright 1984.

(3) "Medical arbiter" means a physician pursuant to 656.005(12)(b)(A) selected by the director pursuant to 436-Division 10; after consultation with the Board of Medical Examiners for the State of Oregon and consultation with the labor/management advisory committee by the department.

(4) "Scheduled disability" means a permanent loss of use or function which results from injuries to those body parts listed in ORS 656.214(2)(a) through (4).

(5) "Unscheduled disability" means the permanent loss of earning capacity due to the compensable on the job injury or disease as described in these rules; arising from those losses contemplated by ORS 656.214(5) and not to body parts or functions listed in ORS 656.214(2)(a) through (4).

(6) "Combine" describes the way any two percentages of impairment are merged [put together]. Unless the standard specifically calls for them to be added [values] percentages of impairment are combined. [The values are derived from the formula A+B (1-A) = Combined value of A and B, where A+B are the decimal equivalents of the impairment ratings. This method is expressed as A% + B% (100% - A%) where A and B are written as decimals. If A and B are not whole numbers the number(s) are rounded to the nearest whole number (i.e., 3.5 and above round up; 3.4 and below round down). Refer [also] to Appendix A: combined values chart.] Combined values are obtained by first rounding percentages of impairment to their nearest whole numbers (e.g. 3.4% rounds to 3%; 3.5% rounds to 4%). The whole number percentages of impairment are then converted to their decimal equivalents, A and B (e.g. 12% converts to .12; 3% converts to .03). The combined value is obtained by inserting A and B into the formula A + B(1.0-A) and then converting the decimal result back to its percentage equivalent (e.g. .146 converts to 14.6%).

(7) "Preponderance of medical opinion" means the greater weight of medical evidence. Medical evidence when weighed with that opposed to it has more convincing force and is more probably true and accurate.

(8) "Time of Determination" is the mailing date of the Determination Order or Notice of Closure issued pursuant to ORS Chapter 656.268.

History: Formerly OAR 436-30-005; Filed 6-3-87 as WCD Admin. Order 3-1988, effective 7-1-88; Amended 12-21-88 as WCD Admin. Order 6-1988, effective 1-1-89; Amended 9-14-90 (temp) as WCD Admin. Order 15-1990, effective 10-1-90. Amended 11-20-90 (temp.) as WCD Admin. Order 20-1990 effective 11-20-90.

General Principles for Rating Disability

436-35-007(1) A worker is entitled to a value under these rules only for those findings of impairment that are proven to be due to the accepted injury and/or its accepted conditions. Other unrelated or noncompensable impairment findings shall be excluded and shall not be valued under these rules to determine the worker's total impairment.

(2) Where a worker's impairment findings are due to the accepted injury or accepted conditions and the findings are also due to other unrelated and/or noncompensable causes, the combined findings are rated and valued under these rules. After the total amount of disability has been determined, that portion or percentage of the permanent disability that is attributable to the noncompensable or unrelated causes by a preponderance of medical opinion shall be deleted from the total amount and the worker shall receive an award for the

remainder of the disability. However, where a worker has an asymptomatic and nondisabling preexisting condition(s) or other physical defect(s), and the preponderance of medical opinion establishes that the injury caused the preexisting condition or defect to become symptomatic and disabling, the percentage of disability attributable to the increased symptoms from the preexisting conditions(s) or defect(s) is not deleted from the worker's award.

(3) Where a worker has a prior award of permanent disability under Oregon Workers' Compensation Law **in a different claim for injury to the same body part as that being evaluated on the current claim**, the prior award of permanent disability shall be subtracted from the amount of disability determined under these rules on a degree-for-degree basis.

(4) Only impairment findings based upon the [measurements and] methods described in the AMA guide to the Evaluation of Permanent Impairment, 2nd edition, copyright 1984, shall be used to describe impairment under these rules. Impairment findings describing lost ranges of motion shall be converted to retained ranges of motion by subtracting the measured loss from the normal ranges established in these rules.

(5) A worker is entitled to a redetermination of permanent disability under these rules when a claim has been reopened pursuant to ORS 656.273 and the worker's condition has permanently worsened. If a claim has multiple accepted conditions, only those conditions which have permanently worsened shall be redetermined.

(6) A worker is entitled to a redetermination of permanent disability subsequent to the last arrangement of compensation if a worker ceases to be enrolled and actively engaged in training pursuant to ORS 656.268(8) or if a new condition, not previously evaluated and determined at the last arrangement of compensation, becomes an accepted portion of the claim. If the redetermination is for a new condition, only the new condition shall be redetermined.

(7) Except as provided [under] **by** ORS 656.325 and 656.268(8), where a redetermination of permanent disability pursuant to ORS **656.273** [under these rules] results in an award that is less than the cumulative total of the worker's prior awards **in the claim**, the award shall not be reduced. [on redetermination. Nothing in this section precludes a reduction by Evaluation, the Appellate Unit, Hearings Division, Board or Court due to an incorrect application of the standards.]

(8) Impairment findings made by an "attending physician" other than the worker's attending physician at the time of claim closure [shall] **may** be used to determine impairment if the worker's "attending physician" concurs with the findings.

(9 Where the medical arbiter and attending physician have different impairment findings for an injured worker, the findings of the arbiter shall be used to determine impairment under these rules.

(10) Where there is a conflict in the medical opinion regarding a worker's physical capacities for the purpose of determining the adaptability factor under OAR 436-35-310, a preponderance of medical opinion shall control. Where the medical opinions are equally persuasive, deference shall be given to the opinion of the attending physician, unless an actual Physical Capacities Evaluation has been performed, in which case the capacities of the PCE shall control. Where a worker fails to cooperate or use maximal effort in the PCE, the worker's physical capacities shall be determined based upon the expertise of the PCE evaluators as to the worker's likely physical capacities had the worker cooperated and used maximal effort.

History: Filed 9-14-90 (temp) as WCD Admin. Order 15-1990, effective 10-1-90. Amended 11-20-90 (temp.) as WCD Admin. Order 20-1990 effective 11-20-90.

STANDARDS FOR RATING SCHEDULED PERMANENT DISABILITY

436-35-010 (1) Rules 436-35-010 through 436-35-260 describe the rating of scheduled disability. All physical disability ratings in these rules shall be established on the basis of objective medical evidence that is supported by objective findings from the attending physician or as provided in OAR 436-35-007(8) and (9).

(2) Disability is rated on the permanent loss of use or function of a body part due to an on-the-job injury. These losses, as defined and used in these standards, shall be the sole criteria for the rating of permanent disability in the scheduled body parts under these rules.

(3) Pain is considered in these rules to the extent it results in objective measurable impairment. If there is no impairment under these rules, no award of scheduled permanent partial disability is allowed.

(4) The movement in a joint is measured in active degrees of motion. It is first compared to the degrees of motion possible in the contralateral joint if the contralateral joint has no history of injury or disease. [Any] Loss of motion of the joint shall result in impairment proportionately to the full motion in the contralateral joint if that motion does not exceed the normal ranges of motion established under these rules. Where the contralateral joint has a history of injury or disease, the joint being rated shall be compared to the normal ranges of motion established under these rules.

(5) ORS 656.214 provides the maximum values to be given for a complete loss of use or function of a body part. A percentage of that figure shall be given for less than complete loss. A value of $305 per degree shall be allowed only for injuries sustained on or after May 7, 1990.

(6) The total disability rating for a body part cannot be more than is allowed for amputation of the part.

(7) Scheduled disability is awarded in 1% steps rounding to the next higher 1% step. This does not apply to loss of sight or hearing, which is rounded to the next higher hundredth of 1%.

(8) A worker may be entitled to scheduled chronic condition impairment when a preponderance of medical opinion establishes that the worker is unable to repetitively use a body part due to a chronic and permanent medical condition as follows. "Body part" means the foot/ankle, knee, leg, hand/wrist, elbow, and arm.

(a) Scheduled chronic condition impairment is considered after all other scheduled impairment, if any, has been rated under these rules and converted, pursuant to OAR 436-35-120 and/or 436-35-240 to the appropriate body part proximal to the body. Where a worker suffers an injury to only the fingers or toes, the worker is not entitled to any scheduled chronic condition impairment. Where impairment in a body part is equal to or in excess of 5%, the worker is not entitled to any scheduled chronic condition impairment.

(b) Where the worker has rateable impairment of less than 5% in a body part, the worker is entitled to 5% scheduled chronic condition impairment in lieu of all other rateable impairment for that body part.

(c) Where scheduled chronic condition impairments exist for more than one body part in the same extremity, the worker shall receive only one 5% chronic condition impairment for the body part which results in the larger dollar amount of compensation to the worker. In no event is a worker entitled to more than one 5% scheduled chronic condition impairment in each injured extremity, regardless of how many body parts within that extremity are injured or have chronic conditions.

History: Formerly OAR 436-30-120; Filed 6-3-87 as WCD Admin. Order 3-1988, effective 7-1-88; Amended 12-21-88 as WCD Admin. Order 6-1988, effective 1-1-89; Renumbered from 436-30-050, Amended 9-14-90 (temp) as WCD Admin. Order 15-1990, effective 10-1-90. **Amended 11-20-90 (temp.) as WCD Admin. Order 20-1990 effective 11-20-90.**

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EXHIBIT "B"

BEFORE THE DIRECTOR OF THE
DEPARTMENT OF INSURANCE AND FINANCE
OF THE STATE OF OREGON

In the Matter of the Amendment of Rules Governing Claims Evaluation and Determination (OAR Chapter 436 Workers' Compensation Division, Division 35, Rule 003 Applicability, Rule 005 Definitions, Rule 007 General Principles, and Rule 010 Standards for Rating Scheduled Permanent Disability).	)	Statutory Authority, Statement of Need, Principal Documents Relied Upon, and Statement of Fiscal Impact

1. Citation of Statutory Authority. The Statutory Authority for promulgation of these rules is ORS 656.268, 656.270, and 656.726.

2. Need for Rules. The need for such rules is to govern the provisions in accordance with existing law and statutory amendments passed by the 1990 Legislature Special Session. On September 14, 1990, the Department issued temporary rules governing claims evaluation and determination. Since adoption of those temporary rules, the Department has identified rules needing correction or further clarification:

   a. OAR 436-35-003 as amended in this Order of Adoption, corrects an error in the rule adopted September 14, 1990, in WCD Administrative Order 15-1990. The earlier temporary rule incorrectly interpreted Section 54, Chapter 2, Oregon Laws 1990, Special Session (SB 1197).

   b. OAR 436-35-005 is amended to clarify the method used to combine impairments under the standards.

   c. OAR 436-35-007 is amended to clarify language in section (4) and (7) of the rule.

   d. OAR 436-35-010, as amended in this Order of Adoption, corrects a typographical error in the rule adopted September 14, 1990, in WCD Administrative Order 15-1990 and clarifies the evaluation of impairment in a joint.

3. Principal Documents Relied Upon. (a) The commands of the statutes above-referenced create the need for these rules; (b) Legal opinion from the Department of Justice dated November 9, 1990, signed by D. Kevin Carlson (copies available upon request); and (c) Temporary Rule OAR 436 Division 35 adopted September 14, 1990, as WCD Administrative Order 15-1990.

4. Fiscal and Economic Impact. The following entities are economically affected: (a) Oregon subject workers; (b) Oregon subject employers; and (c) workers' compensation insurers, self-insured employers, and service companies.

DATED THIS 20th DAY OF NOVEMBER, 1990.

DEPARTMENT OF INSURANCE AND FINANCE

Theodore R. Kulongoski

Theodore R. Kulongoski, Director

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