

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
CLAIMS ADMINISTRATION

EXHIBIT "A"
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 060, TEMPORARY RULES 0035 & 0135
EFFECTIVE MAY 10, 2002

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

(1) For the purpose of this rule:

(a) "Primary job" means the job at injury,

(b) "Secondary job" means any other job(s) held by the worker in Oregon subject employment at the time of injury,

(c) "Temporary disability" means wage loss replacement for the primary job,

(d) "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, [and]

(e) "Verifiable documentation" means check stubs or payroll records which include identification of the Oregon subject employer(s) and the time period of the date of injury to establish the worker held the secondary job, in addition to the primary job, at the time of injury[.], **and**

(f) "Insurer" includes third party administrator where applicable.

(2) Within 5 business days of receiving a claim, the insurer shall send a worker who identifies employment in addition to the primary job on the 801 form a notice informing the worker of the date the insurer received the claim and the final date by which the insurer must receive verifiable documentation to determine [if] the worker's [qualifies to receive] **eligibility for supplemental disability**. [To qualify for supplemental disability, the worker shall submit verifiable documentation of a secondary job(s), pursuant to ORS 656.210(2)(b), to the insurer or third party administrator within 30 days of the insurer or third party administrator's receipt of the initial claim.]

(3) **Within 14 days of receiving the worker's verifiable documentation,** [T]the insurer [or third party administrator] shall determine the worker's [entitlement to] **eligibility for supplemental disability[.] and shall** communicate the decision to the worker and the worker's representative, if any, in writing; advise the worker why he/she [does] **is not** [qualify] **eligible** when that is the decision; and how to appeal the decision, if the worker disagrees with the decision.

(4) A worker is eligible if:

(a) He or she was employed at the secondary job by an Oregon subject employer at the time of the injury,

(b) He or she provides verifiable documentation to the insurer within 30 days of the insurer's receipt of the initial claim, and

(c) The worker's temporary disability rate from wages at the primary job does not meet or exceed the maximum rate under section (6) of this rule.

[4] **(5)** The insurer [or third party administrator] shall calculate supplemental disability for an [qualified] **eligible** worker [employed in more than one job at injury] by adding all earnings the worker received from all subject employment, pursuant to ORS 656.210(2)(a)(B). Under no circumstances shall a worker who [qualifies] **is eligible** for supplemental disability receive less than they would if their compensation was calculated [pursuant to ORS 656.210(2)(a)(A)] **solely on wages from the primary employer.**

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[(5) Supplemental disability shall be due and processed under the same provisions, conditions, and limitations as would be applicable to temporary disability for the job at injury, even if temporary disability is not due from the primary job.]

(6) To establish the temporary disability rate, the insurer shall multiply the weekly wages, determined pursuant to OAR 436-060-0025, from the primary employer by 66 2/3% (.6667). If the results meet or exceed the maximum temporary disability rate, the worker is not eligible for supplemental disability benefits.

(7) If the rate from the primary employer does not meet or exceed the maximum rate, the insurer shall 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) To establish the combined partial disability benefits when the worker has post injury wages from either job, the insurer shall use all post injury wages from both primary and all secondary employers. The insurer shall calculate the amount due to 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 shall then calculate the amount due from the primary job based only on the primary wages at injury and the primary post injury wages. Subtract that amount from the amount due the worker and the remainder is the supplemental disability amount. If the worker receives post injury wages from the secondary job equal to the secondary wages at the time of injury, no supplemental disability is due.

(9) Except as otherwise provided in sections (6), (7), and (8) of this rule, supplemental disability shall be due 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.

[(6) The insurer or third party administrator shall determine the worker's on-going entitlement to supplemental disability and shall pay the worker supplemental disability simultaneously with any temporary disability due, if the insurer has elected to pay supplemental disability pursuant to ORS 656.210(5)(a). The insurer or third party administrator shall determine the worker's on-going entitlement to supplemental disability and shall submit a supplemental disability payment voucher to the division no later than the date the payment would otherwise be due, if the insurer has elected not to pay supplemental disability pursuant to ORS 656.210(5)(b). The worker who qualifies for supplemental disability under section (2) of this rule has an on-going responsibility to provide information and documentation to the insurer or third party administrator, even if temporary disability is not due from the primary job.]

(10) If the insurer has elected to pay supplemental disability pursuant to ORS 656.210(5)(a), the insurer shall determine the worker's on-going entitlement to supplemental disability and shall pay the worker supplemental disability simultaneously with any temporary disability due. If the insurer has elected not to pay supplemental disability pursuant to ORS 656.210(5)(b), the insurer shall determine the worker's on-going entitlement to supplemental disability and shall submit a supplemental disability payment voucher to the division no later than the date the payment would otherwise be due.

(11) The worker who is eligible for supplemental disability under section (4) of this rule has an on-going responsibility to provide information and documentation to the insurer, even if temporary disability is not due from the primary job.

[(7) When a worker returns to work at the primary job, but not the secondary job, because of the injury, supplemental disability shall continue until the worker is released to return to modified or regular work at the secondary job or the worker is declared medically stationary.]

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(8) When a worker returns to or is released to perform modified work at the secondary job, supplemental disability shall be pro rated based upon the percentage of wages lost on the secondary job. When a worker returns to or is released to regular or modified work at the primary job, only wages at the secondary job that exceed the amount considered in determining the supplemental disability may be used to determine temporary partial disability pursuant to OAR 436-060-0030.]

[(9)] **(12)** Supplemental disability applies to occupational disease claims the same as injury claims, pursuant to ORS 656.210(2)(d)(A) and (B).

[(10)] **(13)** 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 [or third party administrator] shall maintain a record of supplemental disability paid to the worker, separate from temporary disability paid as a result of the job at injury.

[(11)] **(14)** If a worker disagrees with the insurer's decision about the worker's [entitlement to] **eligibility for** supplemental disability or the [correct] 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, the worker must submit an appeal of the insurer's decision about the worker's eligibility for supplemental disability within 60 days of the notice in section (3) of this rule.** Disputes that arise about the [correct] rate of supplemental disability may be resolved pursuant to OAR 436-060-0025(5). However, the insurer [or third party administrator] 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** [d]Division to contact the secondary job employer to verify information provided by the worker to resolve the dispute.

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
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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(14), the division will suspend compensation pursuant to ORS 656.262(15) 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 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 submit to and fully cooperate with personal and telephonic 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(15) 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 notify the worker in writing that an interview or deposition has been scheduled, or of other investigation requirements, and shall give the worker at least 14 days to cooperate. The notice shall be sent to the worker and copied to the worker's attorney, if represented, and shall 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 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(15) 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

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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 be sent to the division after the 14 days in section (4) have expired. [or] **If the request is for failure to attend an insurer medical examination pursuant to section (5), the request shall be sent to the division** after the date of the [insurer medical] examination [in section (5)], **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 be sent simultaneously to the worker and the worker's attorney by registered or certified mail or by personal service. The request shall 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(15) 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) 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) All other pertinent information.

(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 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 pursuant to ORS 656.262(15) and OAR 436-060-0140(7).

(9) If the worker documents that the failure to cooperate was reasonable, or the insurer notifies the division that the worker has cooperated, the division will not suspend payment of compensation. However, an order will be issued suspending the 60 days to accept or deny the claim from the filing date of the insurer's complaint through the date of the if the worker's

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actions were reasonable, or to the date the worker cooperated, whichever is applicable. If the worker cooperates after the insurer has requested suspension, the insurer shall notify the division. If the insurer withdraws its request for suspension, the division will provide notice to all parties.

(10) Pursuant to ORS 656.262(14), 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 have the opportunity to dispute the allegation prior to the issuance of a penalty. Notice under this section shall be sent to the division. A copy of the notice shall be sent simultaneously to the worker and the worker's attorney. Notice to the division by the insurer shall 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.

(11) 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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