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

JUN 12 11 34 AM 1992

PHIL KEISLING
SECRETARY OF STATE

In the Matter of the Amendment)
of Rules Governing Claims)
Administration (OAR Chapter 436,)
Workers' Compensation Division,)
Division 60, Rules 60-002, 60-085)
and 60-140).)

ORDER OF ADOPTION

The Director of the Department of Insurance and Finance, pursuant to his general rule making authority under ORS 656.726(3) and in accordance with the procedure provided by ORS 183.335, amends OAR Chapter 436, Workers' Compensation Division, Division 60, Claims Administration, Rules 60-002, 60-085 and 60-140.

On April 15, 1992, the Workers' Compensation Division filed Notice of Public Hearing with the Secretary of State to amend rules governing claims administration. The Citation of Statutory Authority, Need for Rules, Principal Documents Relied Upon and Fiscal and Economic Impact were also filed with the Secretary of State.

Copies of the notice were mailed to interested persons in accordance with ORS 183.335(7) and OAR 436-01-000 and to those on the Division's distribution mailing list as their interest indicated. The notice was published in the May 1, 1992, Secretary of State's Administrative Rule Bulletin.

On May 21 and 29, 1992, the public hearings were held as announced. A summary of the written testimony and agency responses thereto is contained in Exhibit "C." This summary is on file and available for the public inspection between the hours of 8 a.m. and 5 p.m., normal working days Monday through Friday in the Administrator's Office, Workers' Compensation Division, Labor & Industries Building, Salem, Oregon 97310.

Having reviewed and considered the record of public hearing and being fully advised, I make the following findings:

- a. The applicable rule making procedures have been followed.
- b. The rules are within the Director's authority.
- c. The rules being adopted are a reasonable administrative interpretation of the statutes and are required to carry out statutory responsibilities.

IT IS THEREFORE ORDERED THAT:

- (1) Rules Governing Claims Administration, OAR Chapter 436, Division 60, Rules 60-002, 60-085 and 60-140, as set forth in Exhibit "A" attached hereto, certified a true copy and hereby made part of this order, are adopted effective July 1, 1992.

- (2) A certified true copy of the Order of Adoption and these rules, with Exhibit "B" consisting of the Citation of Statutory Authority, Need for Rules, Principal Documents Relied Upon and Fiscal and Economic Impact, attached hereto and hereby made a part of this order, be filed with the Secretary of State.
- (3) A copy of the rules and attached Exhibit "B" to be filed with the Legislative Counsel pursuant to the provisions of ORS 183.715 within ten days after filing with the Secretary of State.

Dated this 12th day of June, 1992.

DEPARTMENT OF INSURANCE AND FINANCE


for Gary K. Weeks, Director

DISTRIBUTION: A thru V;
X thru AA;

11235-WCDBC/DWZ/flr

EXHIBIT "A"

CHAPTER 436 DEPARTMENT OF INSURANCE AND FINANCE WORKERS' COMPENSATION DIVISION DIVISION 60, CLAIMS ADMINISTRATION

PURPOSE

436-60-002 The purpose of these rules is to prescribe uniform standards by which insurers shall process workers' compensation claims pursuant to ORS 656.726(3); and, the terms and conditions under which insurers may enter into dispositions of compensable claims pursuant to ORS 656.236(1). The director has charged the Workers' Compensation Division with the administration and enforcement of the applicable statute, 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(10); and, to sanctions pursuant to ORS 656.447.

History: Filed 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 436-54-008, 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 (Temporary)
Amended 11/30/90 as WCD Admin. Order 26-1990, eff. 12/26/90
Amended 6/12/92 as WCD Admin. Order 12-1992, eff. 7/1/92

SUSPENSION OF COMPENSATION AND REDUCTION OF BENEFITS

436-60-085 (1) The Division will suspend compensation by order under conditions set forth in this rule. The worker shall 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:

(a) The worker refuses or fails to submit to, or otherwise obstructs, a medical examination reasonably requested by the insurer or the director. Compensation will be suspended until the examination has been completed. The conditions of the examination shall be consistent with the conditions described in OAR 436-10-100(5). Any action of a family friend or 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 whether special circumstances exist that would not warrant suspension of compensation for failure to attend or obstruction of the examination.

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(b) 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 Division may also take the following actions in regards 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.

(3) The insurer may not later recover compensation it pays after receipt of an order suspending such payments.

(4) An order becomes final unless, within 60 days after the date of mailing of the order, a party files a request for reconsideration or hearing on the order.

(5) 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.

Hist *Filed 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 6/12/92 as WCD Admin. Order 12-1992, eff. 7/1/92*

ACCEPTANCE OR DENIAL OF A CLAIM

436-60-140 (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 give the claimant written notice of acceptance or denial of a claim within (90) days of the employer's notice or knowledge of the claim.

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(4) The director may assess a penalty against any insurer delinquent in accepting or denying a claim beyond the (90) days prescribed in ORS 656.262 in excess of 5 percent of their total volume of reported disabling claims during any quarter.

(5) The notice of acceptance shall comply with ORS 656.262 and the rules of Practice and Procedure for Contested Cases under the Workers' Compensation Law. It shall 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 a determination pursuant to ORS 656.268 within one year of the date of injury;

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

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

(f) That expenses personally paid for claim related expenses up to a maximum established rate shall 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.

(6) The notice of denial shall comply with the rules of Practice and Procedure for Contested Cases under the Workers' Compensation Law and shall:

(a) Specify the factual and legal reasons for the denial; and

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

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

(8) The insurer shall 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

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employer may elect to pay compensation under this section in lieu of the insurer doing so. The insurer shall report to the Division payments of compensation made by the employer as if the insurer had made the payment.

(9) 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.

Hint: 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
Amended 12/29/83 as WCD Admin. Order 8-1983, eff. 1/1/84
Renumbered from 436-54-300, 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 (Temporary)
Amended 11/30/90 as WCD Admin. Order 26-1990, eff. 12/26/90
Amended 6/12/92 as WCD Admin. Order 12-1992, eff. 7/1/92

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EXHIBIT "B"

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

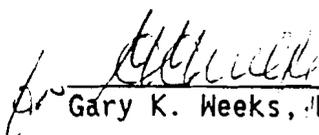
In the Matter of the Amendment) Statutory Authority,
of Rules Governing Claims) Statement of Need,
Administration (OAR Chapter 436) Principal Documents Relied
Workers' Compensation Division,) Upon, and Statement of Fiscal
Division 60 Rules 60-002, 60-085) Impact
and 60-140).)

1. Citation of Statutory Authority. The Statutory Authority for promulgation of these rules is ORS 656.325 and 656.726(3).
2. Need for Rules. The need for such rules is to govern the provisions of claims administration in accordance with existing law.
3. Principal Documents Relied Upon. The commands of the statutes above referenced and Attorney General's opinion signed by Donald C. Arnold, Chief Counsel, and dated February 5, 1992 regarding Workers' Compensation Claims Processing create the need for these rules. No other principal documents, reports, or studies were relied upon.
4. Fiscal and Economic Impact. (1) The department has identified that these rules may have an economic impact on: (a) state agencies, in their role of employer; (b) units of local government, in their role of employer; (c) large and small private sector employers subject to the Workers' Compensation Law; and (d) insurance companies processing workers' compensation claims. The amount of that impact cannot be quantified based on available data, but should result in an overall savings to large and small employers within the workers' compensation system. Identified areas of possible impact are:
 - a. There may be a negative impact on employers as interim compensation may be paid for a longer period of time while the insurer investigates the claim to determine compensability;
 - b. There may be negative impact on employers as a result of the increased cost to perform reasonable investigation.
 - c. There may be a positive impact on employers due to fewer denials of claims causing less litigation as a result of reasonable investigations.

There is no other anticipated cost of compliance.

Dated this 12th day of June, 1992.

DEPARTMENT OF INSURANCE AND FINANCE



Gary K. Weeks, Director

EXHIBIT "C"

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) SUMMARY OF TESTIMONY
Administration (OAR 436,) AND AGENCY RESPONSES
Workers' Compensation Division,)
Division 60, Rules 60-002, 60-085)
and 60-140).)

This document relates to the Order of Adoption, WCD Administrative Order 12-1992, in the above referenced matter. It constitutes and contains a summary of the significant data, views, and arguments contained in the hearing record. It includes data submitted in accordance with the announcement that additional material could be submitted until May 29, 1992.

The purpose of this summary is to provide the Director with a record and let interested parties know of the agency's conclusions about the major issues raised.

The amendment of the rules was announced in the Secretary of State's Administrative Rules Bulletin dated May 1, 1992. Public hearings were held on May 21, and 29, 1992. The hearings were adjourned with the record being held open until May 29, 1992, to receive additional written testimony. During the hearings and intervening period interested persons presented written statements, arguments and recommendations in regard to the proposed rules. The major issues raised were:

TESTIMONY: OAR 436-60-085 should be amended to add a very tight definition of what constitutes a "friend." The definition should exclude legal counsel or staff of legal counsel. ("U")

RESPONSE: The section is amended to reflect the concern and intent of the testimony by identifying in OAR 436-10-100(6) that only a "family" friend or member may accompany the worker.

TESTIMONY: OAR 436-60-085 should be amended to add: (1) The worker must advise the physician or insurer at least 72 hours in advance if the worker intends to bring a friend, relative, camera or tape recorder; (2) The documentation caused by a video tape or recording of the examination should become part of the medical record and a copy provided to the insurer upon request; and (3) The party who requests the exam be video taped or tape recorded is responsible for providing all equipment and costs of it. Notice of intent described in (1) is important so if the physician objects, the insurer can cancel the exam to avoid a cancellation fee imposed on the employer. ("R")

RESPONSE: OAR 436-10-100(6) provides for the person conducting the examination to determine the conditions under which the examination will be conducted including whether a video camera or tape recorder may be used. Since the physician controls the conditions of the examination, prior notice that the worker wants to record the examination is not necessary. If the examination is recorded, the recording may be subpoenaed if necessary. Since any recording is the property of the worker, the worker is responsible for the cost to produce it. The section remains as written relating to this testimony.

TESTIMONY: OAR 436-60-085(1)(a) should be amended to require the physician to have reasonable grounds to eject a friend or family member of the worker from an independent medical examination and must explain the reasons for ejection. It should be defined as to what criteria or special circumstances would warrant the physician to terminate the examination. ("E") ("G") ("R")

RESPONSE: The section is amended to reflect the concern and intent of the testimony. OAR 436-10-100(6) requires the physician to document the reasons if the worker's request is not approved to record an examination and/or allowed to be accompanied during the examination. This would include any reasons for terminating the examination as a result obstruction by a family friend or member.

TESTIMONY: OAR 436-60-085(1)(a) should be amended to not restrict who is permitted to attend an examination with the worker, and should at least be expanded to include the worker's attorney or a representative of the attorney. ("G")

RESPONSE: The examination should be conducted in a normal matter, which may involve a family friend or member being present during the examination. To permit others may obstruct the ability of the physician to perform a normal examination. The examination should not become adversary in nature. The section remains as written relating to this testimony.

TESTIMONY: OAR 436-60-085(1)(a) should be amended to retain existing language. There is no legitimate reason for allowing a family member or friend to attend an IME with the injured worker. This opens up the door for attorneys and attending physicians being friends and allowed to be present during the examination. This creates "witnessed situations" in which accusations can be made by unscrupulous claimants against the examining doctor as to what was or was not done in the course of the IME. If the proposed rule stands, then the insurer should be allowed to be in attendance to insure the exam remains a bi-partisan and unbiased medical exam. ("T") ("W")

RESPONSE: The language relating to the conditions under which an examination will be conducted now appears in OAR 436-10-100(6). The person conducting the examination continues to determine the conditions under which an examination is conducted. The rule reflects the concern and intent of the testimony.

TESTIMONY: OAR 436-60-085(1)(a) should be amended to provide a specific exception to allowing a friend or family member during an examination when a

psychiatric examination is being performed because of the personal and potentially embarrassing questions. Also, the rule should preclude the use of video or audio taping of an examination to assure physician privacy, as well as the privacy of the patient. The parameters of an examination should fall within the discretion and professional judgment of the physician as long as it falls within ethical guidelines. ("M" "N")

RESPONSE: The language in OAR 436-10-100(6) reflects the concern and intent of the testimony. The use of video or audio taping of an examination is at the discretion of the person conducting the examination. The privacy of the examination will be a decision between the physician and the worker.

TESTIMONY: OAR 436-60-140 should be amended to delete the proposed language regarding "reasonable investigation" and replace with an alternative approach that allows for a warning to the insurer that investigation standards are not up to standard and order the insurer to implement a remedial program under department supervision. Failure to follow a remedial program would then subject the insurer to civil penalties. ("U")

RESPONSE The language has been amended to reflect that a reasonable investigation shall be conducted by the insurer and that the director will look only at the information contained in the insurer's record at the time of denial to ascertain whether an investigation is reasonable. The rules as written allow for a whole range of sanctions by the director, from warnings to penalties.

TESTIMONY: OAR 436-60-140 should be amended to include the complete standard for evaluating investigations determined by the Department of Justice if the premise is that a reasonable investigation needs to be defined. The abbreviated version contained in the proposed rules does more harm than good because it omits too much of the original opinion. ("Q")

RESPONSE: The section has been amended to quote relevant language from the Department of Justice's February 5, 1992 opinion. The list of factors has been eliminated due to overwhelming public concern that the factors would be used as a checklist when that was not the intent.

TESTIMONY: OAR 436-60-140 proposed amendments are inappropriate as the duty to conduct a reasonable investigation is already implied in the law and supported by case law. The standard of "reasonable investigation" is ambiguous and would be difficult to enforce. What constitutes a "reasonable investigation" can and should be left to case by case determination by the referee. Nothing in ORS 656.262 sets up standards to which an insurer must adhere in order to arrive at compensability decisions. Penalties and attorney fees already exist for unreasonable claims handling in ORS 656.262(10)(a), 656.382, 656.447 and 656.745. The proposed rule as written could penalize the insurer three times for the same infraction. The department should not add on additional administrative requirements just to protect workers who have not exercised their right to challenge investigative conduct of an insurer. ("N" "O") ("R") ("T") ("U") ("X") ("Y") ("Z") ("AA") ("BB") ("DD")

RESPONSE: The director has a responsibility to regulate the claim processing of the insurer. This includes patterns of practice generally, as well as egregious individual cases, in determining whether a reasonable investigation is performed by the insurer before denying a claim. We do not intend to duplicate the Board's penalty assessments.

We agree that the determination of whether an investigation was reasonable will be made on a case by case basis. By quoting from the Department of Justice's February 5, 1992 opinion we have given the parties the best guidance we can as to what constitutes a "reasonable investigation."

TESTIMONY: OAR 436-60-140 proposed amendments are inappropriate as they negate the need for examiner certification. The administrative rules provide for examiner certification and claim file audit procedures to ensure the fair claim handling. The existing rules provide remedies for the correction of inappropriate claim processing by decertification of examiners and penalties or fees based on audit findings. It is impossible to develop a step by step approach that must be used on each claim. ("J") ("L") ("CC")

RESPONSE: At this time there is not an authorized process to decertify a claims examiner who may violate the claims processing rules. Without the reasonable investigation rule, there would be no remedy. The list of factors have been eliminated and replaced with language directly from the Department of Justice's February 5, 1992 opinion.

TESTIMONY: OAR 436-60-140 should be amended to define the meaning of the terms "reasonable investigation", "reasonably prudent person with knowledge of the legal standards for determining compensability" and "legal standards for determining compensability." ("I")

RESPONSE: The department has quoted directly from the Department of Justice's February 5, 1992 opinion. It is understood that what may be reasonable in one claim may not be reasonable in another. Claim examiners must now be certified and are expected to be trained in what is necessary to make a decision to accept or deny a claim. The audit process is to determine whether the decisions being made are based on sufficient information.

TESTIMONY: OAR 436-60-140 proposed amendment is strongly opposed as suggested language would be used as a checklist to cross examine claims examiners who have denied claims to bolster penalty and fee issues. The rule should be amended to state only that a reasonable investigation should occur before denying a claim. To establish a checklist of actions that must occur to be considered a reasonable investigation and make the evidence discoverable will increase litigation. Even the Department of Justice has stated: "It is impossible to provide a list of specific steps that an insurer must follow in every claims investigation to make that investigation reasonable." The checklist shifts the emphasis of the dispute from the substantive validity of the denial to its procedural reasonableness. The failure to fully complete the checklist can result in penalties or the denial being made void or voidable, even though there may be no question over the compensability of the injury and the denial has become final. Suggested replacement language to be

added to the rules is: "The insurer is required to conduct a "reasonable" investigation based upon all reasonable available information in ascertaining whether to accept or deny any part of or all of a worker's compensation claim." ("F") ("I") ("L") ("Q") ("R") ("S") ("T") ("U") ("W") ("CC") ("EE")

RESPONSE: The section is amended to reflect the concern and intent of the testimony. The factors, which were not intended as a checklist, have been eliminated.

TESTIMONY: OAR 436-60-140 should be amended to permit denial of a claim only after review of evidence from steps listed under OAR 436-60-140(1)(a-g). To allow the insurer to give due consideration to the cost of the investigation and likely value of the claim in determining the degree of the investigation gives justification to the insurer to deny a claim with little or no investigation if the claim was of little monetary value. ("G")

RESPONSE: The language used is a direct quote from the Department of Justice's February 5, 1992 opinion. Each claim must be reviewed on its own merits. To require every claim to go through the same steps before a decision to accept or deny a claim is unreasonable. The section remains as written relating to this testimony, but is amended to remove reference to a step by step process.

TESTIMONY: OAR 436-60-140 should be amended to permit the insurer its right to three independent medical examinations while conducting its investigation, but once a denial of compensability has issued, not allow further examinations with "respect to any denied conditions". This amendment would enforce the requirement that the insurer must conduct a reasonable investigation before denying a claim. This would also permit any insurer that has solely disclaimed responsibility to continue to obtain additional medical evidence to determine the compensability aspect of the claim and not preclude the issuance of an order under ORS 656.307. ("H")

RESPONSE: The rule provides sufficient protection to ensure a reasonable investigation occurs. The insurer is entitled to three examinations for each opening of a claim prior to or after claim closure. The denial of a claim does not stop the worker from continuing to seek compensation under the workers' compensation system as he/she may appeal the denial. The Workers' Compensation Board has determined that as long as such rights are available to the worker, the insurer is entitled to its right to three insurer medical examinations even after the claim has been denied. It has been the Board's longstanding view that the Board and its Hearings Officers have the authority to suspend proceedings unless and until the worker submits to the insurer medical examination. The director will not suspend compensation pursuant to ORS 656.325 for failure to attend the insurer medical examination as there is no compensation to suspend on a denied claim.

TESTIMONY: OAR 436-60-140 should be amended as it makes previously undiscoverable file documents (i.e., attorney/client correspondence or video tapes used for impeachment purposes) now discoverable in determining whether or not a reasonable investigation was conducted prior to denial. ("Y") ("CC")

RESPONSE: The director in carrying out his responsibility in determining whether or not a reasonable investigation was performed must have access to all information contained in the insurers claim record used to make the denial decision. This rule does not make previously undiscoverable file documents any more discoverable than before. In response to this concern, the rule has been reworded to state: "(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."

TESTIMONY: OAR 436-60-140(2) should be amended to delete the requirement that an insurer document its file with a statement clarifying why no further investigation is needed. The insurer has the right to back up and deny a claim within 2 years from the date of "good faith acceptance" if fraud or misrepresentation is a factor. A good claims examiner continues to investigate a claim up to the date of closure and does not conclude the investigation on the 90th day. Suggested language in place of existing language is: "The insurer shall clearly document in it's claim file as to the efforts and results of it's investigation and the basis for denial of denied claims." There should be no need to document reasons for acceptance of claims or why no further investigation is needed as the cost in time and effort to document reasons is significant, where as the reasons for denial must be included in the denial itself. ("R") ("V") ("EE")

RESPONSE: The section is amended to reflect the concern and intent of the testimony.

TESTIMONY: OAR 436-60-140(3) should be amended, if the proposals are not withdrawn, to make it abundantly clear that a claim can be denied whenever an insurer determines in good faith that there is sufficient doubt about the compensability that further investigation will not change the assessment. An example being not contacting all witnesses that dispute the workers claim before denying the claim if one witness is not immediately available. The Department of Justice said: "An insurer does not have an affirmative obligation to clarify all ambiguities in the evidence relating to a claim or to develop evidence to support a claim." It should be made clear that further investigation after a denial is not construed as evidence that the denial was premature as an insurer may choose to investigate after a denial is appealed in order to cover all theories of compensability and prepare the best possible defense. ("Q") ("S") ("Y")

RESPONSE: The rule has been significantly changed to reflect the concern and intent of testimony. The new language is quoted directly from the Department of Justice's February 5, 1992 opinion and recognizes that each case is determined on its own merits.

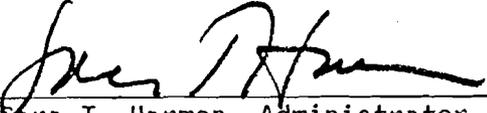
TESTIMONY: OAR 436-60-140(3) and (5) are inappropriate as they are simply statements of existing law. Penalties may occur if a denial is not sustained at hearing, but the law does not contemplate penalties even for unreasonable denial if the denial turns out to be correct on the merits. To the extent this proposed subsection conflicts with existing case law it would be invalid. ("N")

RESPONSE: Section (3) has been significantly changed to reflect the concern and intent of the general public testimony, while Section (5) has been deleted in its entirety.

TESTIMONY: OAR 436-60-140(5) should be amended to identify what sanctions under the Insurance Code are contemplated, or better yet, beef up the penalty provisions of ORS Chapter 656 as penalties for workers' compensation claims processing violations logically should flow from Chapter 656 rather than the Insurance Code. ("V") ("EE")

RESPONSE: The section has been removed, however, the director still has the option to issue penalties pursuant ORS 731.988 or ORS 656.745.

Dated this 25th day of August, 1992


Sara T. Harmon, Administrator, WCD
Presiding Officer

**LIST OF PARTIES TESTIFYING
AT HEARING ON
DIVISION 60 RULES**

ORAL TESTIMONY:

People Testifying at Hearing on May 21, 1992 in Salem, Oregon:

Jan Bair, Asst. Small Business Ombudsman
Chris Davie, SAIF Corporation
Jan Reese, United Grocers
Mark Davison, Safeway Stores, and Oregon Self-Insurance Assoc.
Dick Disher, Claims Management Services Division, Sedgwick James
Jack Monroe, American Insurance Association
Bill Brooks, Insurance Division, DIF

People Testifying at Hearing on May 29, 1992 in Medford, Oregon:

Dennis Olson, Health Future Enterprises, Inc.; Susan Olsen,
Boise Cascade Corporation; Brent Rigby, Crystal Springs
Packing Company; and Scott Plouse, Cowling and Heysell,
on behalf of Chamber of Medford/Jackson County
George Thomas, Roseburg Forest Products
Adam Stamper, Attorney with Cowling and Heysell
Allen Marsh/Sue Worthington, Medford Corporation, on behalf
Southern Oregon Employer's Assoc.
Royal Inman, Risk Manager, Naumes, Inc.
Mike Benke, LTM, Inc.
Randy Lundberg, Cascade Wood Products
Ree Ayres, CSC, Inc.
Tom Wood, Occupational Health Dept., Rogue Valley Medical Center

WRITTEN EXHIBITS:

- "E" Royce, Swanson & Thomas, Attorneys at Law, signed by Geoffrey G. Wren, dated May 4, 1992.
- "F" Roseburg Forest Products, signed by John Clemons, Workers' Compensation Manager, dated May 4, 1992.
- "G" Paul S. Bovarnick, Attorney at Law, dated May 7, 1992.
- "H" Royce, Swanson & Thomas, Attorneys at Law, signed by Douglas A. Swanson, dated May 4, 1992.
- "I" Cowling & Heysell, Attorneys at Law, signed by H. Scott Plouse, dated May 7, 1992.
- "J" Health Future Enterprises, Inc., signed by Dennis Ray Olson, Vice President, dated May 13, 1992.
- "K" Health Future Enterprises, Inc., signed by Dennis Ray Olson, Vice President, dated May 7, 1992.
- "L" Crystal Springs Packing Co., Inc., signed by Brant Rigby, Personnel Manager, dated May 13, 1992.

- "M" Medical Consultants Northwest, Inc., submitted by Brian L. Grant, M.D., President and Medical Director, dated May 15, 1992.
- "N" Weyerhaeuser, signed by John M. Pitcher, Corporate Counsel, dated May 15, 1992.
- "O" SAFECO, signed by Cathy Olson, Unit Manager, Portland Workers' Compensation Claims, dated May 14, 1992.
- "P" DIF - WCD, signed by Tom Mattis, Manager, Compliance Section, dated May 21, 1992.
- "Q" SAIF Corporation, signed by Christopher J.T. Davie, CPCU, Government Affairs Coordinator, dated May 20, 1992.
- "R" United Grocers, signed by Jan Reese, Claims Supervisor, dated May 20, 1992.
- "S" John R. Munro, Government Affairs Counsel, dated May 21, 1992.
- "T" Industrial Indemnity, signed by Jerry Wilson, Action Claims Manager, dated May 20, 1992.
- "U" Kevin L. Mannix, State Representative, dated May 19, 1992.
- "V" Liberty Northwest, signed by Charles E. Lundeen, CPCU, Corporate Counsel, submitted May 21, 1992.
- "W" Oregon Self-Insurers Association, signed by Mark J. Davison, Vice Chairman, OSIA, dated May 21, 1992.
- "X" The Chamber of Medford/Jackson County, signed by Royal Inman, Chairperson Workers' Compensation Committee, dated May 28, 1992.
- "Y" Boise Cascade Timber and Wood Products Division, signed by Susan S. Olsen, dated May 29, 1992.
- "Z" Medford Corporation, signed by Allen Marsh, Administrator Workers' Compensation Department, dated May 29, 1992.
- "AA" Southern Oregon Employers Council, signed by Toni Whiteley, Acting Chairperson, dated May 28, 1992.
- "BB" City of Klamath Falls, Oregon, signed by Pat Sickler, Personnel Manager, dated May 29, 1992.
- "CC" Naumes, Inc., signed by Royal Inman, dated May 28, 1992.
- "DD" CSC Inc., signed by Ree Ayers, Corporate Personnel/Safety Administrator, dated May 29, 1992.
- "EE" SAIF Corporation, signed by Christopher J.T. Davie, CPCU, Government Affairs Coordinator, dated May 22, 1992.