

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

In the Matter of the Amendment of)
OAR Chapter 436, Workers' Compensation) ORDER OF ADOPTION
Division, Division 060, Claims Administration,) OF TEMPORARY RULES
WCD Administrative Order 96-053 [*correction*,)
96-062]

The Director of the Department of Consumer and Business Services, pursuant to the rule making authority in ORS 656.726(3), and in accordance with the procedure provided by ORS 183.355, amends OAR Chapter 436, Workers' Compensation Division, Division 060, Claims Administration.

These rules are being adopted by Temporary Rules, 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.

Under the current rules, Department and industry staff are unable to award time loss benefits at the time of closure in claims where authorized time loss is not documented but files indicate periods of time that would reasonably be expected to result in compensable disability. This temporary rule addresses insurers' and self-insureds' obligation to document time loss authorization and clarifies that certain events where such authorization is not documented may be construed as authorization if supported by contemporaneous reports.

PURSUANT TO ADA GUIDELINES, ALTERNATE FORMAT COPIES OF THE RULES WILL BE MADE AVAILABLE TO QUALIFIED INDIVIDUALS UPON REQUEST TO THE DIVISION.

IT IS THEREFORE ORDERED:

- (1) OAR Chapter 436, Division 060, Claims Administration, as set forth in Exhibit "A", attached hereto, a certified true copy and hereby made part of this Order, is temporarily adopted effective May 31, 1996.
- (2) A certified true copy of Order of Adoption and these Rules, 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 the attached Exhibit "B" be filed with the Legislative Counsel, pursuant to the provision of ORS 183.715 within 10 days after filing with the Secretary of State.

Dated this 31st day of May, 1996.

DEPARTMENT OF CONSUMER AND
BUSINESS SERVICES

/s/ Deborah Lincoln for
Kerry Barnett, Director

Attachments

Distribution: WCD-ID, S, T, AT, CE, FM, IP, IA, LU, EG

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

EXHIBIT "A"
 OREGON ADMINISTRATIVE RULES
 CHAPTER 436, DIVISION 060

EFFECTIVE MAY 31, 1996

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436-060-0003 Applicability of Rules

- (1)** These rules govern claims processing and carry out the provisions of:
- [(1)]**(a)** ORS 656.210. Temporary total disability;
 - [(2)]**(b)** ORS 656.212. Temporary partial disability;
 - [(3)]**(c)** ORS 656.230. Lump sum payments;
 - [(4)]**(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;
 - [(5)]**(e)** ORS 656.264. Required reporting of information to the Department;
 - [(6)]**(f)** ORS 656.265. Notices of accidents from workers;
 - [(7)]**(g)** ORS 656.268. Insurer claim closures, insurer recovery of overpayments;
 - [(8)]**(h)** ORS 656.307. Determination of responsibility for compensation payments;
 - [(9)]**(i)** 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;
 - [(10)]**(j)** ORS 656.331. Notice to worker's attorney; and,
 - [(11)]**(k)** ORS 656.726(3). The Department's powers and duties generally.

(2) The provisions of OAR 436-060-0020(6) apply to all claims where temporary disability occurred on or after June 7, 1995.

Statutory Authority: ORS 656.210, ORS 656.212, ORS 656.230, ORS 656.262, ORS 656.264, ORS 656.265, ORS 656.268, ORS 656.307, ORS 656.325, ORS 656.331, ORS 656.704 and ORS 656.726(3)
 Stats. Implemented: ORS 656.704 and ORS 656.726(3)
 Hist: 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 12/23/81 as WCD Admin. Order 6-1981, eff. 1/1/82

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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
 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 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)

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 provide adequate payment documentation as the insurer may require to meet its responsibilities.

(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. The three day waiting period is three consecutive calendar days beginning with the day the worker first loses time or wages from work 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 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 authorization of time loss is not required to begin the waiting period; however, the waiting period would not be payable unless authorized.

(c) If the worker returns to any type of work within 14 days of leaving work, no disability payment is due the worker for the three day waiting period. The three day waiting period, as it applies to loss of wages, is discussed in OAR 436-060-0030.

(3) For workers employed with varying days off or cyclic work schedules, the three day wait shall be determined using the work schedule of the week the worker begins losing time or wages as a result of the injury. For such workers who are no longer employed with the employer at injury or who do not have an established schedule at the time they begin losing time/wages, the three day wait and scheduled days off shall be based on the work schedule of the week the worker was injured.

(4) No compensation is due and payable for any period of time in which the worker has

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withdrawn from the workforce. For the purpose of this rule, a worker has withdrawn from the workforce when:

(a) If, prior to reopening pursuant to ORS 656.273 or 656.278, the worker was not working and had not made reasonable efforts to obtain employment unless, but for the compensable injury, such efforts would be futile.

(b) A worker 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 worker 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.

(5) No compensation is due and payable for any period of time where the insurer has requested from the worker's attending physician verification of the worker's inability to work and the physician cannot verify it pursuant to ORS 656.262(4)(c), unless the worker has been unable to receive treatment for reasons beyond the worker's control. Before withholding compensation under this section, the insurer shall 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 document its file regarding those findings. The insurer shall provide the Department a copy of the documentation within 20 days, if requested. **If no verification of authorized temporary disability is received from the attending physician, the insurer shall stop temporary disability payments and send the worker an explanation for stopping the temporary disability in place of the scheduled payment.** When verification of temporary disability is received from the attending physician, the insurer shall pay compensation within 14 days of receiving the verification of any authorized period of time loss, unless otherwise denied.

(6) **The insurer or self-insured employer shall verify and document temporary disability authorization from the attending physician within five days of notice or knowledge of the worker's disability or claim. Authorization from the attending physician may be oral or written, and may be inferred 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 ceases to authorize temporary disability or for any period of time not authorized by the attending physician pursuant to ORS 656.262(4)(f). [Authorization of temporary disability may be given to the insurer orally or in writing; however, oral authorization must be followed up with written documentation from the attending physician. When the insurer stops temporary disability payment the insurer shall send the worker an explanation for stopping the temporary disability in place of the scheduled payment.]

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

(a) The worker has missed a regularly scheduled appointment with the attending physician;

(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; stating the time and date of the

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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)(d)."

(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 Department 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."

(8) 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 ORS 656.212. The insurer shall 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 ORS 656.245. Claims subject to the pro rata order approved by the Division shall 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 (9) 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.

(9) 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 ORS 656.212 without an order by the Division. The worker shall receive compensation at the highest temporary disability rate of the claims involved.

(10) 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 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.

(11) If a denied claim has been determined to be compensable, the insurer shall begin

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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.

Statutory Authority: ORS 656.210(2), ORS 656.245, ORS 656.262, ORS 656.307(1)(c), ORS 656.704 and ORS 656.726(3)
Stats. Implemented: ORS 656.210, ORS 656.212, ORS 656.262, ORS 656.307, ORS 656.704 and ORS 656.726(3)
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Amended 12/12/85 as WCD Admin. Order 8-1985, eff. 1/1/86
Amended 12/22/89 as WCD Admin. Order 7-1989, eff. 1/1/90
Amended 12/18/87 as WCD Admin. Order 4-1987, eff. 1/1/88
Amended 6/18/90 as WCD Admin. Order 8-1990, eff. 7/1/90 (Temp)
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Amended 5/31/96 as WCD Admin. Order 96-062, eff. 5/31/96 (Temp)

**STATEMENT OF NEED AND FISCAL IMPACT
BEFORE THE DIRECTOR OF THE
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
OF THE STATE OF OREGON**

Chapter 436-060

In the Matter of the Adoption of)	Statutory Authority, Statement of Need
Temporary Rules Governing Workers')	Principal Documents Relied Upon and
Compensation Division, Oregon)	Statement of Emergency Justification
Administrative Rules Chapter 436,)	
Division 060, Claims Administration,)	
Rules 0003 and 0020)	

1. Citation of statutory authority: ORS 656.210, ORS 656.212, ORS 656.230, ORS 656.245, ORS 656.262, ORS 656.264, ORS 656.265, ORS 656.268, ORS 656.307, ORS 656.325, ORS 656.331, ORS 656.704 and ORS 656.726(3)
2. Statutes being implemented: ORS 656.210, ORS 656.212, ORS 656.262, ORS 656.307, ORS 656.704 and ORS 656.726(3)
3. Need for the rules: Department and industry staff are unable to award time loss benefits at the time of closure in claims where authorized time loss is not documented but files indicate periods of time that would reasonably be expected to result in compensable disability. These rules clarify that authorization of time loss is to be documented and that certain circumstances may be construed as authorization if supported by contemporaneous reports.
4. Documents Relied Upon: ORS Chapter 656
5. Justification of Emergency: The inability of the Department and insurers to award time loss benefits in cases where file information indicates they may be due and payable but time loss authorization has not been documented results in workers being awarded lower benefits than those to which they are entitled. Since, in many cases, time loss benefits would have been paid for those periods, the omission of those periods from closure orders has the effect of establishing "false" overpayments with the potential for future recovery.

Dated this 31st day of May, 1996

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

/s/ Deborah Lincoln for
Kerry Barnett, Director