

**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 ) OF TEMPORARY RULES  
Administration, 436-060-0003, 0135 & 0140 )

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, benefits of an injured worker may be suspended if the worker does not cooperate with an insurer's investigation. Penalties may also be assessed against a claimant's attorney if the worker's non-cooperation is as a result of the attorney's actions. This applies even after the claim is denied if the worker has appealed the denial and continues to assert that the claim should be accepted. Public input suggests that suspension of benefits for non-cooperation by the claimant after the claim has been denied is not appropriate and is not the best construction of the statutory language. The rule conflicts with the Workers' Compensation Board's administration of litigated claims and several protective orders have been issued. The rule change is necessary to encourage insurers to fully investigate a claim prior to acceptance or denial and is a better application of the statutory language. This temporary rule replaces the current rule and modifies the time periods within which suspension of benefits will be considered.

A definition is needed of what constitutes cooperation "with personal and telephonic interviews and other formal or informal gathering techniques" as contained in ORS 656.262(14). A considerable amount of confusion currently exists about whether or not claimants must submit to taped interviews. This temporary rule clarifies that "personal and telephonic interviews" may be audio or video taped by one or more of the parties.

Additional notification requirements are necessary to injured workers when insurers are requesting their benefits be suspended for non-cooperation because the injured worker has refused to attend an insurer medical examination. Without such notification injured workers will not be fully advised of their rights and responsibilities.

Further clarification is required on what constitutes notice by a claimant to an insurer "that a condition has been incorrectly omitted from a notice of acceptance," "written notice of acceptance or denial of claims for aggravation or new medical conditions . . . ." ORS 656.262. This temporary rule provides clarification in that area.

**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 August 12, 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 5 day of August, 1996.

DEPARTMENT OF CONSUMER  
AND BUSINESS SERVICES

*/s/ Kerry Barnett*

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Kerry Barnett, Director

Attachments

Distribution: WCD-ID,S,T,U,AT,CE,FM,IP,IA,LU,EG  
Affected Claimants, Insurers, and Representatives

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

EFFECTIVE AUGUST 12, 1996

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**436-060-0003 Applicability of Rules**

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;
  - (e) ORS 656.264. Required reporting of information to the Department;
  - (f) ORS 656.265. Notices of accidents from workers;
  - (g) ORS 656.268. Insurer claim closures, insurer recovery of overpayments;
  - (h) ORS 656.307. Determination of responsibility for compensation payments;
  - (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;
  - (j) ORS 656.331. Notice to worker's attorney; and,
  - (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.

**(3) The provisions of OAR 436-060-0135(2), (3)(a) and (5) are applicable June 7,**

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**1995.****(4) The provisions of OAR 436-060-0140(5)(g) and (6) are effective August 12, 1996**

Stat. Auth: ORS656.210, ORS656.212, ORS656.230, ORS656.262, ORS656.264, ORS656.265, ORS656.268, ORS656.307, ORS656.325, ORS656.331, ORS656.704 and ORS656.726(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  
 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)  
 Amended 8/5/96 as WCD Admin. Order 96-066, eff. 8/12/96 (Temp)

**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 a claim for compensation 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.**

[2](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 [(3)](4) of this rule and only in[

(a) Deferred claims;] claims where there has been no determination of compensability made.

[ (b) Accepted claims where there is no other provision for suspension for noncooperation or where there is an allegation of fraud;

(c) Denied claims in which the worker has appealed the insurer's denial. ]

[(3)](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 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. The notice shall also contain a statement that failure of the worker to cooperate may result in suspension of

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all or part of the payment of compensation and denial of the claim.

**(5) Notwithstanding section (4) of this rule, for suspension of benefits to be granted for noncooperation resulting from a worker's failure to attend 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 make reference to ORS 656.262 instead of ORS 656.325 and must also contain a statement that failure of the worker to cooperate may result in denial of the claim.**

[(4)]**(6)** The request for suspension shall be sent to the Division. A copy of the request 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 make a prima facie showing of 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; and

(d) A copy of the notice required in section [(3)] **(4) or (5)** of this rule.

[(5)]**(7)** After receiving the insurer's request as required in section [(4)]**(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 90 days is suspended unless the insurer's request is filed with the Division after the 90 days to accept or deny the claim has expired [or unless the insurer has already accepted or denied the claim].

[(6)]**(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 required by section [(5)]**(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.

[(7)]**(9)** If the worker documents that the failure to cooperate was reasonable the Division will not suspend payment of compensation. However, an order will be issued suspending the 90 days to accept or deny the claim from the filing date of the insurer's complaint to the date of the order as long as the insurer initially made a prima facie showing that the worker was noncooperative.

[(8)]**(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

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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.

[~~(9)~~](11) Failure to comply with the requirements of this rule will be grounds for denial of the insurer's request.

Stat. Auth: ORS656.704 and ORS656.726(3)  
Stat. Impltd: ORS656.262(14) and (15), ORS656.704, and ORS656.726(3)  
Hist: Filed 2/2/96 as WCD Admin. Order 96-053, eff. 2/12/96  
Amended 8/5/96 as WCD Admin. Order 96-066, eff. 8/12/96 (Temp)

**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 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.

(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(6)(b) and the rules of Practice and Procedure for Contested Cases under the Workers' Compensation Law, OAR Chapter 438. 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

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(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.

(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.**

**(6) A claim for a new medical condition must clearly identify the condition as a new medical condition and must request formal written acceptance of the condition.**

[(6)](7) The notice of denial shall comply with the rules of Practice and Procedure for Contested Cases under the Workers' Compensation Law, OAR Chapter 438, 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)](8) 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)](9) 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 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)](10) 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: ORS656.704 and ORS656.726(3)  
Stat. Impltd: ORS656.262(6), ORS656.704, and ORS656.726(3)  
Hist: Filed 1/11/80 as WCD Admin. Order 1-1980, eff. 1/11/80  
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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 8/5/96 as WCD Admin. Order 96-066, eff. 8/12/96 (Temp)

**STATEMENT OF NEED AND EMERGENCY JUSTIFICATION  
BEFORE THE DIRECTOR OF THE  
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
OF THE STATE OF OREGON**

**Chapter 436-060**

In the matter of proposed rule making  
regarding:

OAR 436-060-0003, 0135 & 0140  
Claims Administration

Statutory Authority, Statement of Need  
Principal Documents Relied Upon and  
Statement of Emergency Justification

1. Citation of statutory authority: ORS 656.262(14), 656.262(15), 656.704 & 656.726(3)
2. Statutes being implemented: ORS 656.262.
3. Need for the rules:

OAR 436-060-0135 conflicts with the Workers' Compensation Board's administration of litigated claims which are in a denied status. Public input and staff analysis strongly suggests that suspension of benefits for claimant's non-cooperation after the claim has been denied is in conflict with the law.

Confusion exists about whether or not claimants must submit to taped interviews.

Additional notification requirements are necessary to injured workers when insurers are requesting their benefits be suspended for non-cooperation because the injured worker has refused to attend an insurer medical examination.

OAR 436-060-0140 does not currently require claimants to identify whether the conditions that they want accepted are conditions which were omitted from an acceptance notice, new conditions that have been identified or aggravation of a existing condition.
4. Documents Relied Upon: Public comment, input from the Department of Justice, "Protective Orders" issued by the Worker's Compensation Board's Hearing Division & ORS Chapter 656.
5. Justification of Emergency: "Protective Orders" issued by the Workers' Compensation Boards Hearings Division prohibit insurers from interviewing or deposing claimants by means of personal and telephonic interviews or other formal or informal information gathering techniques after the claim has been

denied even if the denial is on appeal. This position is in conflict with the current rules.

Investigation of claims is currently being delayed because injured workers are not allowing taped interviews.

If additional notification requirements are not provided to injured workers when an insurer intends to request suspension of benefits, they will not be fully advised of their rights and responsibilities.

In some cases injured workers are not identifying whether conditions they want accepted are those omitted from the notice of acceptance or those which are as a result of an aggravation or new conditions. As a result, the various time frames allowed for processing the requests can not be determined and the processing of claims is being delayed.

Dated this 5 day of August, 1996.

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

/s/ Kerry Barnett

Kerry Barnett, Director