

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

In the Matter of the Amendment of: )  
 OAR 436-055, Certification of Claims Examiners ) SUMMARY OF  
 ) TESTIMONY AND  
 ) AGENCY RESPONSES

This document summarizes the significant data, views, and arguments contained in the hearing record. The purpose of this summary is to create a record of the agency’s conclusions about the major issues raised. Exact copies of the written testimony are attached to this summary.

The proposed amendment to the rules was announced in the Secretary of State’s *Oregon Bulletin* dated Aug. 1, 2016. On Aug. 23, 2016, a public rulemaking hearing was held as announced at 9 a.m. in Room F of the Labor and Industries Building, 350 Winter Street NE, Salem, Oregon. Fred Bruyns, from the Workers’ Compensation Division, acted as hearing officer. The record was held open for written comment through Aug. 29, 2016.

One person testified at the public rulemaking hearing. A transcript of the hearing is recorded below as exhibit 3. The public submitted one written document as testimony.

**Testimony list:**

<b>Exhibit</b>	<b>Testifying</b>
<a href="#"><u>1</u></a>	Notice of Proposed Rulemaking Hearing, Statement of Need and Fiscal Impact, and text of the proposed rules
<a href="#"><u>2</u></a>	Jerry Keene, Oregon Workers’ Compensation Institute
<a href="#"><u>3</u></a>	Hearing transcript: Jerry Keene, Oregon Workers’ Compensation Institute

**Testimony: OAR 436-055**

***Exhibit 3***

“\* \* \* I wanted to \* \* \* confirm, that the department has apparently taken a position that it’s not going to dictate how an insurer signifies that it is \* \* \* approving an initial certification of a claims examiner, or renewing. There’s nothing about doing it in writing. \* \* \* there’s no \* \* \* statement about a certificate. \* \* \* It could even be oral as far as the rules are concerned. I’m not saying whether I agree or disagree with that; I’m just noting that that’s a continued ambiguity in the rule. \* \* \*”

**Response:** While the division has not specified the form in which an insurer must issue or acknowledge a claims examiner’s certification, OAR 436-055-0100(4) does require the insurer to keep records sufficient to verify the certification and training of all certified claims examiners. The records must include dates of certification, documentation of any qualified trainings completed by certified claims examiners, and documentation supporting any acknowledgements of an initial certification, and must be available for inspection or review by the director upon request.

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**Testimony: OAR 436-055-0005 & 0100**

***Exhibit 3***

“With regard to the changes to definition of processing claims, and then the provisions under 0100, paragraph (1), with regard to insurer duties and the use of claims examiners, \* \* \* I’m not sure they really clarify things further \* \* \* they seem to imply that a person who \* \* \* conducts some things that might be considered claims processing activities beyond compensability determinations, benefit calculations, and payments just to workers, that there’s a broader definition \* \* \* that the people who are required to become certified may be broader than the actual interaction with the claims process, because of the difference in terms and interaction between 0005, paragraph (6), and 0100, paragraph (1). And there might be some concerns about folks who supervise claims examiners who don’t actually process claims might now have to become certified where they did not have to before.”

**Response:** This rule change was not intended to expand the scope of activities that must be performed by a certified claims examiner beyond what was included under previous rules. OAR 436-055-0100(1) was amended to consolidate language in that rule with the specific activities a claims examiner must perform that were previously specified under OAR 436-055-0005(1), and to make the rule more consistent with the language of ORS 656.780(3) which specifies that “\* \* \* insurers, self-insured employers and service companies may employ only certified workers’ compensation claims examiners to process workers’ compensation claims.” OAR 436-055-0005(6) was amended to be more consistent with the definition of “process claims” used in OAR 436-050-0005.

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**Testimony: OAR 436-055-0070**

***Exhibit 2 & 3***

[Exhibit 2] “My IME issue was certainly covered in a way that adequately addressed my concern. I also note that you increased the required “legal update” credits but now describe them as generic “law” credits. That’s a good compromise and also meshes with the original history. \* \* \* the previous rule that required examiners to focus 4 (now 6) hours on recent “changes” in the law and rules is no longer apt.”

[Exhibit 3] “\* \* \* I’d like to note, as the petitioner on the IME credits, that I completely endorse the changes that were made. I think that reducing the amount of time and effort needed to familiarize yourself with IME interactions and instead broadening the requirement to be familiar with all of the rules and statutes was a reflection of the true need for training and certification and a reflection of the amount of time and effort that claims examining requires with regard to IMEs versus all the other things that claims examiners do. \* \* \*”

**Response:** The division agrees that it is important for claims examiners to have a comprehensive understanding of the statute, rules, and case law in addition to understanding appropriate interactions with IME providers, medical case management, communication skills, and claims processing.

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**Testimony: OAR 436-055-0070**

***Exhibit 2***

“\* \* \* the proposed rules still lack provisions addressing folks who satisfy the initial certification requirement (exam) and/or can document sufficient credits for renewals while they are not actually working for an insurer. What happens if they subsequently begin or return to work as a claims examiner? There will have been no previous “insurer” to “accept” or “acknowledge” their documentation – even though it met all of the requirements. To that end, I suggest that OAR

436-055-0070 be supplemented with a subsection (6) as follows:

“(6) Retrospective acknowledgment of certification eligibility.  
Notwithstanding OAR 436-055-0070(4), an insurer may acknowledge an examiner’s eligibility for current certification by retrospectively verifying that the requirements for initial certification or renewal have been met using documentation provided by the claims examiner.”

\* \* \*

**Response:** The division recognizes that an individual may meet the requirements for initial certification or renewal while not employed by an insurer who can actually issue a certification. The division believes, however, that the suggested language is not necessary to allow such an individual to become certified at a later date. Nothing in the rules prevents an insurer from certifying a claims examiner that has met all of the requirements of the rules regardless of the claims examiner’s employment relationship with the insurer at the time the requirements were met, as long as the claims examiner provides sufficient documentation to verify their qualifications. To clarify that certification does not need to take place immediately upon completion of the test, OAR 436-055-0070(2) is amended as follows:

“(2) \* \* \* An insurer may certify an individual as an Oregon certified claims examiner upon **verification of** the individual’s satisfactory completion the test under section (1) of this rule. \* \* \*

One important caveat for any retrospective certification is that under OAR 436-055-0100(2), an initial certification expires three years from the date the claims examiner test was completed, regardless of the actual date of certification.

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**Testimony: OAR 436-055-0070(1)(b)**

***Exhibit 3***

“\* \* \* There’s a provision that has always said that folks who are undertaking the examination may use a copy of the OARs and ORSs. In our particular class, that’s always been true, but we have never interpreted that provision to be exclusive, that our folks before they even may take our examination \* \* \* must take our claims examination class, which includes review of a very extensive, 300-page claims examination notebook and the taking of exams, and the interim of taking study questions and reviewing answers. And we have always said that our students, while they are taking the exam, can use any of these materials \* \* \* we want to make it clear that we have always permitted them to make use of their study materials. \* \* \* I just want to make that clear that we understand we can continue that practice without compromising anybody’s past or current or future certification.”

**Response:** We agree that the provision allowing an individual to use a copy of ORS chapter 656 and OAR chapter 436 is not intended to be exclusive. The person providing the test is responsible for determining what materials are appropriate to be used during the testing period. Examples of inappropriate materials to use while taking a test include a copy of the test completed by the instructor or another individual, or a cell phone or similar device.

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**Testimony: OAR 436-055-0070(4)**

***Exhibit 2 & 3***

[Exhibit 2] “This appears to create a new 12-month grace period for the renewal of certified examiners who allow their certification to expire, but it is unclear about the time period during which the examiner is to have obtained the necessary credits. Under the proposal, such renewals are allowed within 12 months after the examiner’s certification lapses if the examiner meets “the

requirements of section (3)” but section (3) requires all hours to be obtained within a three-year period. Was this change intended to effectively stretch the original 3-year period to 4 years – or does it instead contemplate that the insurer will limit its review to the hours obtained during the 3 years immediately preceding the date that it reviews the expired examiners documents for the hours?”

[Exhibit 3] “It’s my understanding that if a person allows their certification\* \* \* to lapse by not accruing the necessary continuing education hours within the 3-year period \* \* \* There’s an additional \* \* \* 12 months to go ahead and achieve the hours necessary, but, and \* \* \* this is what I wanted to clarify, the beginning period of their initial 3 years continues to move forward as they are getting beyond the original ending point. In other words, if a claims examiner wants to take advantage of the grace period by getting a renewal of their certification more than 3 years later, they’ve got 12 months to do it, when they seek to have an acknowledgement of their certification or renewal, that’s got to be based on credits obtained within three years prior to the date they’re seeking the renewal, not dating all the way back to the beginning of the 3-year period. \* \* \*”

**Response:** The rule is intended to create a grace period for claims examiners who allow their certification to expire due to a short gap in employment or other reason, but have kept current on their training requirements. The claims examiner must have completed the required training hours during the three years immediately preceding the date of renewal, consistent with the requirements of OAR 436-055-0070(3).

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**Testimony: OAR 436-055-0070(5)**  
[Exhibit 2] “Regarding rule wording:”

*Exhibit 2 & 3*

“An insurer may acknowledge certification issued by another insurer by verifying that the requirements for initial certification or renewal have been met using documentation provided by the claims examiner.”

“I recommend a provision that conforms and coordinates this provision with OAR 436-055-0100(5), which only requires to insurers to retain certification/renewal documentation records for a period of six years. This might be accomplished by adding a second sentence to OAR 436-055-0070(5) that states something to this effect:”

“A previous insurer’s determination or acknowledgment that an examiner’s documentation met such requirements shall be deemed presumptively valid if (1) more than six years has elapsed since the determination, (2) the examiner relied upon such determination, and (3) there is no evidence that the determination was procured through misrepresentation or bad faith.”

“Absent such a provision \* \* \* Under the new rule, some subsequent insurer \* \* \* may conclude that the original certification or renewal was based on documentation or classes that were actually deficient \* \* \*. In that event, the rule would allow for the subsequent insurer’s disagreement or belated discovery of error to retroactively invalidate the original certification or early renewal – and that lapse or break in the chain would also invalidate all of the subsequent renewals (because the examiner would have been required to take the exam again). An analogous problem can arise where an examiner can establish that previous insurer/employers accepted their documentation for renewal purposes, but the original documentation has long since been discarded or lost. (Again, I note that proposed OAR 436-055-0100(5)(d) only requires an insurer to retain such records for 6 years. The worker’s obligation to retain such records should match it.) My suggestion addresses both scenarios.”

[Exhibit 3] “\* \* \* under the current [proposed] rules, it states that an insurer *may*, when they are confronted with a person giving them certification documentation, a claims examiner, they may either accept that person’s documentation or require them to go through and take a certification exam again, and that’s at their option. \* \* \* there should be some showing in the rules of a bona fide concern with the documentation they are being presented with, some burden they need to overcome \* \* \* in order to cast doubt on the certified status, not only for themselves, but for subsequent insurers that might want to employ that person\* \* \*. My preference would be that there can be no retroactive, absent fraud or dishonesty, some true criteria that would really cast genuine, legitimate doubt on the prior certification\* \* \*. And, that’s not only for fairness for the claims examiners, that’s also as a matter of efficiency and claims processing certainty, so that examiners’ claims companies don’t have to worry about some subsequent company’s different interpretation of the rules, when they accepted documentation for the purpose of allowing a person to process claims for them.”

**Response:** The division agrees that under the proposed rule, when presented with documentation of a certification issued by another insurer, self-insured employer, or service company (hereafter collectively referred to as insurers), an insurer may conclude that the original certification or renewal was based on documentation or classes that were actually deficient. SB 221 (1998) transferred responsibility for the administration of certification program for workers’ compensation claims examiners from the division to insurers, and provided the director with the authority to impose civil penalties for violation of certification and record provisions. Because the division holds the insurer responsible for employing only certified claims examiners, and for ensuring that those certified claims examiners receive adequate training, it does not seem appropriate for the division to require the insurer to accept and acknowledge a certification when it questions the validity of the certification, or the sufficiency of the documentation provided to verify it.

It should be noted that the rules do not provide an insurer with the authority to retroactively change or cancel a certification issued by another insurer, or otherwise make a determination about the validity of a certification of a claims examiner who is employed by another insurer. In addition, the division requires each insurer to maintain records sufficient to verify the certification and training of all certified claims examiners they employ for six years. These records are required to be kept, in part, to provide evidence to support the legitimacy of a certification if it is questioned after the claims examiner is no longer employed by the insurer.

The division does recognize your concern that a claims examiner should have reasonable assurance that once they obtain certification, that certification will be accepted and acknowledged by the division and within the industry. To provide some guidance on when it is appropriate to require a claims examiner to recertify, OAR 436-055-0070(5) is amended as follows:

**(5) Acknowledgement of certification issued by another insurer.**

If the individual provides the insurer with documentation of current certification issued by another employer, the insurer may:

**Oregon Administrative Rules, Chapter 436**

**Public Testimony & Agency Responses**

**Page 6**

- (a) Issue an acknowledgement of the certification stating that the individual has met the requirements for initial certification or renewal if the documentation is sufficient to verify that the individual has met the requirements for initial certification or renewal; or
- (b) Require the individual to recertify under section (2) of this rule, if the documentation is not sufficient to verify that the individual has met the certification requirements.

**Dated this 8<sup>th</sup> day of November, 2016.**



# Oregon

## Exhibit

Kate Brown, Governor

“1”

Department of Consumer and Business Services  
Workers' Compensation Division  
350 Winter St. NE  
P.O. Box 14480  
Salem, OR 97309-0405  
1-800-452-0288, 503-947-7810  
www.wcd.oregon.gov

July 13, 2016

## Proposed Changes to Workers' Compensation Rules

### Training, certification, and employment of claims examiners

The Workers' Compensation Division proposes changes to:

- OAR 436-055, Certification of Claims Examiners

Please review the attached documents for more information about proposed changes and possible fiscal impacts.

The department welcomes public comment on proposed changes and has scheduled a public hearing.

**When is the hearing?** Aug. 23, 2016, 9 a.m.

**Where is the hearing?** Labor & Industries Building, Room F  
350 Winter Street NE  
Salem, Oregon 97301

**How can I make a comment?** Come to the hearing and speak, send written comments, or do both. Send written comments to:  
Email – [fred.h.bruyns@oregon.gov](mailto:fred.h.bruyns@oregon.gov)  
Fred Bruyns, rules coordinator  
Workers' Compensation Division  
350 Winter Street NE (for courier or in-person delivery)  
PO Box 14480, Salem, OR 97309-0405  
Fax – 503-947-7514

**The closing date for written comments is Aug. 29, 2016.**

**How can I get copies of the proposed rules?**

On the Workers' Compensation Division's website –  
<http://wcd.oregon.gov/laws/Pages/proposed-rules.aspx>.

Or call 503-947-7717 to get free paper copies

**Questions?** Contact Fred Bruyns, 503-947-7717.

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Secretary of State  
**NOTICE OF PROPOSED RULEMAKING HEARING\***  
A Statement of Need and Fiscal Impact accompanies this form

**FILED**  
7-13-16 10:04 AM  
ARCHIVES DIVISION  
SECRETARY OF STATE

Department of Consumer and Business Services, Workers' Compensation Division  
Agency and Division

436

Administrative Rules Chapter Number

Fred Bruyns

(503) 947-7717

Rules Coordinator

Telephone

Department of Consumer and Business Services, Workers' Compensation Division, PO Box 14480, Salem, OR 97309-0405

Address

**RULE CAPTION**

Training, certification, and employment of claims examiners

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

Hearing Date	Time	Location	Hearings Officer
8-23-16	9:00 a.m.	Rm F Labor & Industries Bldg, 350 Winter St. NE, Salem, OR	Fred Bruyns

**RULEMAKING ACTION**

Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

**ADOPT:**

**AMEND:**

436-055-0003, 436-055-0005, 436-055-0008, 436-055-0070, 436-055-0085, 436-055-0100, 436-055-0110

**REPEAL:**

436-055-0001, 436-055-0002

**RENUMBER:** Secure approval of new rule numbers with the Administrative Rules Unit prior to filing.

**AMEND AND RENUMBER:** Secure approval of new rule numbers with the Administrative Rules Unit prior to filing.

**Statutory Authority:**

ORS 656.726, 656.780

**Other Authority:**

**Statutes Implemented:**

ORS 656.780

**RULE SUMMARY**

The public may also listen to the hearing or testify by telephone:

Dial-in number is 1-213-787-0529; Access code is 9221262#.

Proposed amendments to OAR 436-055, "Certification of Claims Examiners" include:

- Repeal of obsolete or redundant rules, and deletion of obsolete, redundant, or erroneous rule text;
- Revision and reorganization, including consolidation, of rules to enhance clarity, ease of reading, and consistency;
- Revision of definitions, including the definition of "process claims";
- Clarification of the insurer's responsibilities related to renewal of claims examiner certification;
- Reduction of the required number of training hours related to interactions with independent medical examination providers for renewal of claims examiner certification from three hours to one hour;
- Increase in the required number of training hours related to rules, statutes, and case law for renewal of claims examiner certification from four hours to six hours;
- Addition of some record-keeping requirements currently published on an agency website;
- Insertion of rule wording, inadvertently deleted during previous rulemaking, while removing obsolete elements;
- Clarification of an insurer's responsibility to issue certificates, acknowledge certifications from other insurers, and verify documentation that requirements have been met;
- Clarification of the roles and qualifications of a claims examiner trainee and a temporary claims examiner;
- Allowing a person who has not been certified for more than one year to be hired as a trainee;

- Allowing a person whose certification has lapsed for one year or less to renew certification if training requirements have been met; and
- Clarification that nothing in the rules precludes an insurer from providing additional training.

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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08-29-2016 Close of Business	Fred Bruyns	fred.h.bruyns@oregon.gov
Last Day ( <i>m/d/yyyy</i> ) and Time for public comment	Rules Coordinator Name	Email Address

\*The Oregon Bulletin is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation.

Secretary of State  
**STATEMENT OF NEED AND FISCAL IMPACT**  
A Notice of Proposed Rulemaking Hearing accompanies this form.

**FILED**  
7-13-16 10:04 AM  
ARCHIVES DIVISION  
SECRETARY OF STATE

Department of Consumer and Business Services, Workers' Compensation Division  
Agency and Division

436  
Administrative Rules Chapter Number

Training, certification, and employment of claims examiners

Rule Caption (Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.)

In the Matter of:

Amendment of: OAR 436-055, Certification of Claims Examiners

**Statutory Authority:**

ORS 656.726, 656.780

**Other Authority:**

**Statutes Implemented:**

ORS 656.780

**Need for the Rule(s):**

This rulemaking was begun in response to a petition for rulemaking under ORS 183.390 and OAR 137-001-0070, and the agency is proposing rule changes consistent with the petition. In addition, these rules have not been thoroughly reviewed in the past ten years, and this is an opportunity to make some corrections and to improve clarity, ease of reading, and consistency.

**Documents Relied Upon, and where they are available:**

Petition for rulemaking ' advisory committee meeting records and written advice. These documents are available for public inspection. Please contact Fred Bruyns, 503-947-7717, fred.h.bruyns@oregon.gov.

**Fiscal and Economic Impact:**

The agency projects that proposed rule changes will have no positive or negative fiscal impacts on the agency. Possible economic effects on other state agencies, units of local government, and the public are described below under "Statement of Cost of Compliance."

**Statement of Cost of Compliance:**

**1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):**

The agency projects that none of the proposed rule changes will significantly increase costs for state agencies, units of local government, or the public. The proposed changes should clarify and improve the efficiency of certification procedures, and the overall fiscal impact of the changes may therefore be slightly positive.

**2. Cost of compliance effect on small business (ORS 183.336):**

**a. Estimate the number of small business and types of businesses and industries with small businesses subject to the rule:**

The parties most affected by the proposed rule changes are certified claims examiners, people who wish to become certified claims examiners, and the insurers, self-insured employers, and service companies that employ claims examiners. Insurers and self-insured employers are not small businesses as defined in ORS 183.310. Approximately five service companies are small businesses.

The agency does not have reliable data, but is aware of at least two small businesses that provide training to prospective claims examiners, as well as continuing education for current claims examiners.

**b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:**

The agency projects no increased costs for small businesses for reporting, recordkeeping, or other administrative activities required for compliance, including costs for professional services.

**c. Equipment, supplies, labor and increased administration required for compliance:**

The agency projects no increased costs for small businesses for equipment, supplies, labor, or increased administration required for compliance.

**How were small businesses involved in the development of this rule?**

Small business owners participated on the rulemaking advisory committee.

**Administrative Rule Advisory Committee consulted?: Yes  
If not, why?:**

08-29-2016 Close of Business	Fred Bruyns	fred.h.bruyns@oregon.gov
Last Day (m/d/yyyy) and Time for public comment	Printed Name	Email Address

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION

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**Certification of Claims Examiners  
Oregon Administrative Rules  
Chapter 436, Division 055**

*Proposed*

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**NOTE:** Revisions are marked as follows:

Deleted text has a "strike-through" style, as in ~~Deleted~~

Added text is underlined, as in Added

**Historical rules are available for each division of chapter 436 – see:**  
<http://wcd.oregon.gov/laws/Pages/current-rules.aspx>.

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**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
Proposed CERTIFICATION OF CLAIMS EXAMINERS**

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**OREGON ADMINISTRATIVE RULES  
CHAPTER 436, DIVISION 055**

**436-055-0001 Authority for Rules**

~~These rules are promulgated under the director's authority pursuant to ORS 656.726 and 656.780.~~

Statutory authority: ORS 656.726(3)(a); ~~and~~ ORS 656.780(1)  
Hist: Amended 7/14/94 as WCD Admin. Order 94-054, eff. 9/1/94

**436-055-0002 Purpose of Rules**

~~The purpose of these rules is to establish standards for the certification of workers' compensation claims examiners pursuant to ORS Chapter 656.~~

Statutory authority: ORS 656.780(1)  
Hist: Amended 12/21/99 As WCD Admin. Order 99-063, eff. 01/01/00

**436-055-0003 Applicability and Purpose of Rules****(1) Applicability.**

These rules apply to the certification of all workers' compensation claims examiners on or after the effective date of these rules.

**(2) Purpose.**

The purpose of these rules is to establish standards for the certification of workers' compensation claims examiners under ORS chapter 656.

~~(2) The certification of any workers' compensation claims examiner valid on December 31, 1999 shall continue without expiration until December 31, 2000. However, this provision does not shorten any two year certification period.~~

~~(3) Any claims examiner certified on October 22, 1999, with a renewal date between October 23, 1999 and December 31, 1999, may present records to the insurer for renewal. The claims examiner's certification period shall be renewed for two years upon verification that the certified claims examiner met the continuing education requirements under the rules in effect on the date renewal was due, however no course taken after October 22, 1999 needs to be certified.~~

**(4) Director's discretion.**

~~Applicable to this chapter, t~~The director may waive any procedural rule as justice requires, unless otherwise obligated by statute, ~~in the director's discretion waive any procedural rules as justice so requires.~~

Statutory authority: ORS 656.726; ORS 656.780  
Statutes implemented: ORS 656.780  
Hist: Amended 12/21/99 As WCD Admin. Order 99-063, eff. 01/01/00

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES**  
**WORKERS' COMPENSATION DIVISION**  
*Proposed* **CERTIFICATION OF CLAIMS EXAMINERS**

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**436-055-0005 Definitions**

Except where the context requires otherwise, ~~these rules are governed by the following definitions~~ under ORS 656.005 and the following apply to OAR 436-055-0008 to 436-055-0110:

(1) **“Claims examiner”** means anyone who has primary responsibility for decision making or benefit determination in a claim.

~~This includes those who decide compensability of new claims or aggravations, calculate benefits, authorize payments, or who represent employers by direct contact with the department or Board. This definition does not include attorneys representing employers before the department or Board, or those who primarily perform clerical functions.~~

(2) **“Claims Examiner Trainee”** means a person hired by an insurance company, self-insured employer or third party administrator to decide compensability of new claims or aggravations, calculate benefits, or authorize payments, who works under the direct supervision of a certified claims examiner.

(3) **“Director”** means the director of the Department of Consumer and Business Services or the director’s designee.

(4) **“Hearings Division”** means the Hearings Division of the Workers’ Compensation Board.

(5) **“Insurer”** means the State Accident Insurance Fund Corporation; an insurer authorized under ORS chapter 731 to transact workers’ compensation insurance in this state ; an assigned claims agent selected by the director under ORS 656.054; an employer certified under ORS 656.430 that meets the qualifications of a self-insured employer under ORS 656.407; or a ~~third party administrator~~ service company who processes claims for an insurer or self-insured employer under the conditions prescribed in ORS 731.475(3) and ORS 656.455(1).

(6) **“Party”** means a claimant for compensation, the employer of the worker at the time of injury, the insurer of the employer, or the insurer’s service company, if any. ~~includes anyone listed in ORS 656.005(21) and a third party administrator.~~

(7) **“Process ~~c~~Claims”** means the determination of compensability and management of workers’ compensation claims. ~~receipt, review and payment of compensation for workers’ claims.~~

(8) **“Temporary Claims Examiner”** means a person with at least two years of prior claims processing experience hired by an insurance company, self-insured employer or service company to decide compensability of new claims or aggravations, calculate benefits, or authorize payments in Oregon workers’ compensation claims, who works under the direct supervision of a certified claims examiner.

(9) **“Third party administrator”** means a service company who processes claims for an insurer or self-insurer under the conditions prescribed in ORS 731.475(3) and ORS 656.455(1).

Statutory authority: ORS 656.726(3)(a)

Statutes implemented: [ORS 656.780](#)

Hist: Amended 12/21/99 As WCD Admin. Order 99-063, eff. 01/01/00

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
Proposed CERTIFICATION OF CLAIMS EXAMINERS**

**436-055-0008    Administrative Review and Contested Cases**

**(1) Requests for hearings on sanctions and civil penalties.**

Any party that disagrees with a proposed order, or proposed assessment of civil penalty ~~of~~ issued by the director ~~issued under ORS 656.745~~ these rules, may request a hearing by the Hearings Division of the Workers' Compensation Board in accordance with under ORS 656.740. To request a hearing, the party must:

(a) Mail or deliver a written request to ~~The request for hearing must be mailed or delivered to the Administrator of the Workers' Compensation Division by the aggrieved person within 60 days after~~ of the mailing ~~date of the proposed order or assessment;~~ and

(b) S~~The request must specify, in the request, the grounds upon which~~ reasons why the party disagrees with the proposed order or assessment ~~is contested.~~

~~(2) Under ORS 656.704(2), any party that disagrees with an action or order of the director under these rules, other than as described in section (1), may request a hearing by filing a hearing request as provided in OAR 436-001-0019 within 60 days of the mailing date of the order or notice of action. OAR 436-001 applies to the hearing.~~

**(2) Requests for administrative review.**

~~Any person~~ party that disagrees that disagrees with an action taken under these rules ~~by another person, except as described in sections (1) and (2);~~ may request administrative review of the action by the director. To request administrative review, the party must: as follows:

~~(a) The request for administrative review must be m~~ Mailed or deliver a written request for review to the Administrator of the Workers' Compensation Division within 90 days of the action; and. ~~The request must s~~

(b) Specify, in the request, the grounds upon which reasons why the party disagrees with the action. ~~is contested.~~

~~(b) The review will be conducted by the director.~~

~~(c) The director will review the relevant information submitted by all parties.~~

~~(d) The director will issue an administrative order that specifies whether the determination constitutes a final order or whether an aggrieved party may request a hearing under section (2).~~

**(3) Requests for hearing on any other action or order of the director.**

Any party that disagrees with an action or order of the director, except as described in section (1) of this rule, may request a hearing by filing a hearing request as provided in OAR 436-001-0019 within 60 days of the mailing date of the order or notice of action. OAR 436-001 applies to the hearing.

Statutory authority: ~~ORS 656.735(5) through (7); ORS 656.704; ORS 656.745(4); ORS 656.726; ORS 656.745 (4)~~  
Statutes implemented: ORS 656.726; ORS 656.740; ORS 656.726  
History: Amended 6/15/06 as WCD Admin. Order 06-055, eff. 7/1/06

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES**  
**WORKERS' COMPENSATION DIVISION**  
*Proposed* **CERTIFICATION OF CLAIMS EXAMINERS**

**436-055-0070 Certification of Claims Examiners****(1) Claims Examiner Test.**

To become an Oregon certified claims examiner, an individual must complete Claims examiners shall be certified by the insurer upon satisfactory completion of a test examination that demonstrates the individual's competency in claims processing activities, subject to the following:

(a) The test must include questions that which demonstrate the individual's; the individual's:

(aA) Familiarity Familiarity with the workers' compensation statutes ORS chapter 656;

(bB) Ability Ability to navigate the administrative rules found in this chapter OAR chapter 436;

(cC) Ability to Capability to perform claim processing activities; and

(dD) Understanding of all of the components Understanding of activities related to interactions with independent medical examination providers that includes all the components in OAR 436-055-0085(12-); and

(b) (2) Any The person individual taking an examination may use a copy of ORS Chapter 656 and the Oregon Administrative Rules AR Chapter 436 during the examination;:

(3) A passing score on an examination shall be 80 percent or greater.

(4) Any examination completed through dishonest or fraudulent means shall be considered invalid.

**(2) Initial certification.**

An insurer may certify an individual as an Oregon certified claims examiner upon the individual's satisfactory completion of the test under section (1) of this rule. (5) The Certification ion will be for a three year period. The certification date shall be remain in effect for three years from the date of the test examination. As used in this section, "satisfactory completion" means:

(a) The individual received a score of at least 80 percent on the test; and

(b) The test was not completed through dishonest or fraudulent means;

**(63) Renewal of certification.**

An insurer may renew a claims examiner's Ccertification upon verification that the claims examiner has completed 24 hours of training within the past three years. The 24 hours of training shall be renewed at any time during the certification period by providing verification of completion of 24 hours of training during the current certification period must include:

(a) At least , to include at least:

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES**  
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*Proposed* **CERTIFICATION OF CLAIMS EXAMINERS**

~~(a) Four hours~~six hours of training on the workers' compensation statutes ORS chapter 656, administrative rules OAR chapter 436, and relevant case law ~~since the last certification; and~~

~~(b) At least~~ For renewals on or after January 1, 2007, ~~three~~one hours of training related to interactions with independent medical examination providers that has been approved that under covers all the components in OAR 436-055-0085(1)~~(2); and~~.

(c) Additional training that covers any of the following subjects: ~~The three hours of training may be completed in increments.~~

~~(7) Training may be provided in the form of a seminar, workshop, association meeting, forum, correspondence, video or similar course. It may include any of the following subjects:~~

~~(a) (A) Medical case management including, but not be limited to, medical terminology, basic human anatomy and~~ the interpreting-interpretation of medical reports.

~~(b) (B) Communication skills including, but not be limited to, courses in ethics, mediation, negotiation and dealing with angry people~~conflict management; or

~~(c) (C) Instruction dealing specifically with the processing of Oregon workers' compensation claims~~ processing skills relevant to Oregon workers' compensation claims.

**(4) Expired certification.**

An insurer may renew a claims examiner's certification that expired within the past 12 months if they meet the requirements of section (3) of this rule. An insurer may recertify a claims examiner who has not held current certification in the past 12 months under section (2) of this rule.

**(5) Acknowledgement of certification.**

If the individual provides the insurer with sufficient documentation to verify that they have met the requirements for initial certification or renewal the insurer may:

(a) Acknowledge the current certification issued by another insurer; or

(b) Certify the individual under section (2) of this rule.

Statutory authority: ORS 656.726, ORS 656.780

Statutes implemented: ORS 656.780(+)

History: Amended 6/15/06 as WCD Admin. Order 06-055, eff. 7/1/06

**436-055-0085      Training for Interactions with Independent Medical Examination Providers**

**(1) Director approval of training curricula.**

Any training ~~provided under OAR 436-055-0070 or OAR 436-055-0100(4)~~ relating to interactions with independent medical examination providers ~~interaction~~ must first follow a curriculum that has been be approved by the director.

~~(2) To be approved, a training c~~Curriculum a for initial certification ~~must include at least some of~~ operate the following components:

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES**  
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*Proposed* **CERTIFICATION OF CLAIMS EXAMINERS**

- (~~a~~) Appropriate and ethical communication with independent medical examination providers;
- (~~b~~) Insurers' rights and responsibilities;
- (~~c~~) Injured workers' rights and responsibilities;
- (~~d~~) Independent medical examination providers' standards of conduct requirement;
- (~~e~~) IME complaint process and investigations by WCD; and
- (~~f~~) ~~Training specific to~~ The requirements of ORS 656.325 and OAR 436-010.

(3) ~~To be approved, a training curriculum for renewal of certification must incorporate some or all of the components in (2).~~

**(42) Request for approval.**

Any person may develop a training curriculum and ~~receive request approval by~~ from the director under this section ~~by submitting an application in a format prescribed by the director.~~

(a) ~~The application request for approval~~ must be made in writing, and must:

(A) ~~Describe the~~ how the training content ~~that meets the criteria~~ relates to the components in section (12) of this rule; and

(B) ~~Specify, in the request,~~ the total number of training hours to be provided ~~for that topic.~~

(b) The director will accept or deny the request and notify the person of the decision within 30 days of the receipt of the request.

(A) If the request is accepted, t

(5) ~~The director's approval~~ curriculum will ~~remain in effect~~ be approved until either the content ~~or~~ number of hours of training change, at which time. ~~At that time, the person~~ a new request for approval must be submitted ~~will be required to resubmit an application that meets the requirements of sections (2) and (4) or (3) and (4) of this rule.~~

(6) ~~The division will review an application and notify the applicant of the results within 30 days of receipt of the application. The division will reject incomplete applications.~~

(7B) If the request for approval ~~If an application is rejected or disapproved~~ denied, the director will notify the applicant ~~person~~ will be notified of the reasons for denial. ~~The person may~~ application may be resubmitted ~~the request~~ when the reasons for the rejection or disapproval denial ~~have been corrected~~ addressed.

**(83) Registry of approved curricula.**

The director will maintain a registry of approved training curricula.

Statutory authority: ORS 656.726

Statutes Implemented: ORS 656.780(4)

History: Amended 6/15/06 as WCD Admin. Order 06-055, eff. 7/1/06

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
Proposed CERTIFICATION OF CLAIMS EXAMINERS**

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**436-055-0100 Insurer Duties****(1) Insurer's responsibility to employ certified or qualified examiners.**

An insurer shall may only employ Oregon certified claims examiners to process claims. An Oregon certified claims examiner must have primary responsibility for all claims processing activities related to a claim, including but not limited to, determining the compensability of a claim, calculating benefits, and authorizing payments to workers.

~~who are certified or that qualify as a claims examiner trainee or a temporary claims examiner.~~ **(2) Claims examiner trainees and temporary claims examiners.**

Notwithstanding section (1) an insurer may employ a claims examiner trainee, or a temporary claims examiner to assist with claims processing activities if the claims examiner trainee or temporary claims examiner works under the direct supervision of a certified claims examiner. Claims examiner trainees and temporary claims examiners may not represent the insurer in communications with the director or the Workers' Compensation Board.

(a) A "claims examiner trainee" is an individual hired by an insurer to assist with claims processing activities that has no previous experience as an Oregon certified claims examiner, or who did not have current Oregon claims examiner certification in the 12 months before the date of hire. An individual may only work as a claims examiner trainee for up to 12 months in any five-year period. must work under the direct supervision of a certified claims examiner, and may work for up to 12 months in this status. An individual is limited to one 12-month period as a claims examiner trainee.

(b) A "temporary claims examiner" is an individual hired by an insurer to assist with claims processing activities with at least two years of prior experience as an Oregon certified claims examiner. A temporary claims examiner must have at least two years prior claims processing experience and work under the direct supervision of a certified claims examiner. An individual may only work as a temporary claims examiner for up to 90 days in any 12-month period. as a temporary claims examiner.

**(3) Responsibility for training.**

The insurer must ensure that training required under these rules, including training related to interactions with independent medical examination providers, is provided for any claims examiners it employs. No provision of these rules is intended to prevent an insurer from providing training to its employees beyond the requirements of these rules.

**(24) Records.**

The insurer must keep records sufficient to verify the certification and training of Insurers shall maintain a list of all certified claims examiners, temporary claims examiners, and claims examiner trainees who are employed by the insurer or who to process claims for the insurer.

**(a) The records must include:**

(A) The names of all certified claims examiners, claims examiner trainees and temporary claims examiners, and keep records sufficient to verify their certification

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES**  
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*Proposed* **CERTIFICATION OF CLAIMS EXAMINERS**

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~~and training currently employed by the insurer; The list and records shall be subject to inspection by the director.~~

(B) The names of the certified claims examiner supervising any claims examiner trainee or temporary claims examiners currently employed by the insurer;

(C) The date of certification and date of expiration of certification for all certified claims examiners;

(D) The dates of employment of any temporary claims examiner who has been employed by the insurer within the past 24 months;

(E) The dates of employment of any claims examiner trainee who has been employed by the insurer within the past five years;

(F) Documentation of any qualified trainings completed by certified claims examiners during the most recent period of certification, including:

(i) The name(s) of the instructor(s) providing the training;

(ii) The syllabi;

(iii) The date(s) of training; and

(iv) The number of training hours completed for each component under OAR 436-055-0070(3); and

(G) Documentation provided to the insurer to support any acknowledgment of an initial certification or renewal issued by another insurer.

(b) Upon the director's request, the insurer must make the records available for inspection or review. ~~The director may require submission of such lists and records in lieu of on-site inspection.~~

~~(3) Insurers may issue an initial certification or renewal for any individual pursuant to the standards set in OAR 436-055-0070.~~

~~(4) Insurers must ensure that training related to interactions with independent medical examination providers is provided for certified claims examiners in their employ.~~

~~(5) Insurers shall not misrepresent any information to a worker, employer or the director related to the certifications of its employees.~~

(c) (6) The insurer must provide a claims examiner with a complete copy of all records verifying the most recent certification and any subsequent training completed by the claims examiner ~~Within~~ within 14 days of the termination of the claims examiner's employment, or upon receipt of a written request.

~~of a certified claims examiner, an insurer shall provide the certified claims examiner a complete copy of all records verifying the most recent acknowledgement of certification and any subsequent training.~~

(d) (7) The insurer shall ~~must~~ retain records used to ~~verifying~~ the certification and renewal of any ~~certified claims examiners it employs~~ who are employed by the insurer or

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
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Proposed CERTIFICATION OF CLAIMS EXAMINERS**

~~who process claims for the insurer for six years from its~~ the date of the most recent ~~acknowledgement of current certification~~ or renewal.

**(5) Civil Penalties.**

An insurer that fails to comply with the requirements of this rule, or misrepresents information related to the certification of any of its employees to a worker, employer or the director may be subject to a civil penalty under OAR 436-055-0110.

Statutory authority: ORS 656.726, ORS 656.780

Statutes implemented: ORS 656.780(1) ~~and (2)~~

History: Amended 12/5/05 as WCD Admin. Order 05-076, eff. 1/1/06

**436-055-0110 Assessment of Civil Penalties**

**(1) Penalties for failure to comply with statutes, rules and orders.**

~~Under ORS 656.745~~ The director may assess a civil penalty against an insurer ~~which~~ that fails to comply with these rules under ORS 656.745.

**(2) Penalties for failure to comply with ORS 656.780.**

~~Under ORS 656.780~~ The director may assess a civil penalty against an insurer that fails to maintain or produce certification and training records, or that employs anyone other than a certified ~~workers' compensation~~ claims examiner to process ~~workers' compensation~~ claims.

**(3) Penalty amounts.**

~~The~~ No insurer shall be civil penalty will exceed subject to a penalty of not more than \$2000 ~~per~~ for each violation or \$10,000 in aggregate for all violations within a three-month period. Each violation, or each day a violation continues, shall will be considered a separate violation.

Statutory authority: ORS 656.726; ORS 656.780

Statutes implemented: ~~ORS 656.447(1)(a); ORS 656.745(2)(b); ORS 656.780(3)~~

History: Amended 6/15/06 as WCD Admin. Order 06-055, eff. 7/1/06

The following advice from Jerry Keene will be stamped in as testimony. Refer to Mr. Keene's testimony at the public hearing of Aug. 23, 2016.

Fred Bruyns, rules coordinator  
Workers' Compensation Division  
8/23/16

**From:** Jerry Keene <jerryk@oregoncomp.com>  
**Sent:** Thursday, July 07, 2016 12:54 PM  
**To:** CLARK Christopher M \* DCBS  
**Cc:** BRUYNS Fred H \* DCBS; 'Jaye Fraser'  
**Subject:** RE: Division 055 Rules

Christopher –

Thank you for the opportunity to review the proposed changes. My IME issue was certainly covered in a way that adequately addressed my concern. I also note that you increased the required “legal update” credits but now describe them as generic “law” credits. That’s a good compromise and also meshes with the original history. The “legal update” requirement was originated at a time when the legislature (and therefore the Department and litigation tribunals) were constantly changing the workers' compensation statutes in major ways. Such major do not happen so frequently these days, so the previous rule that required examiners to focus 4 (now 6) hours on recent “changes” in the law and rules is no longer apt.

I offer these questions or concerns regarding some of the other proposals.

First, I suggest some further clarification on how proposed OAR 436-055-0070(4) will work.

**(4) Expired certification.**

An insurer may renew a claims examiner’s certification that expired within the past 12 months if they meet the requirements of section (3) of this rule. An insurer may recertify an claims examiner who has not held current certification in the past 12 months under section (2) of this rule.

This appears to create a new 12-month grace period for the renewal of certified examiners who allow their certification to expire, but it is unclear about the time period during which the examiner is to have obtained the necessary credits. Under the proposal, such renewals are allowed within 12 months after the examiner’s certification lapses if the examiner meets “the requirements of section (3)” but section (3) requires all hours to be obtained within a three-year period. Was this change intended to effectively stretch the original 3-year period to 4 years – or does it instead contemplate that the insurer will limit its review to the hours obtained during the 3 years *immediately preceding* the date that it reviews the expired examiners documents for the hours? For example, assume an examiner obtains some, but not all of the needed credits during the first few months of their 3-year period but then fails to obtain the rest before the end of the three years. If that examiner then satisfies the rest of their hours during the 4<sup>th</sup> year and seeks a renewal by a subsequent insurer, does that insurer review all of the credits during the four years (which would lead to a renewal) or just the credits obtained within the three-period prior to the renewal (in which case there would be no renewal)?

Second, I am looking at proposed OAR 436-055-0070(5).

**(5) Acknowledgement of certification issued by another insurer.**

An insurer may acknowledge certification issued by another insurer by verifying that the requirements for initial certification or renewal have been met using documentation provided by the claims examiner.

I recommend a provision that conforms and coordinates this provision with OAR 436-055-0100(5), which only requires to insurers to retain certification/renewal documentation records for a period of six years. This might be accomplished by adding a second sentence to OAR 436-055-0070(5) that states something to this effect:

**A previous insurer's determination or acknowledgment that an examiner's documentation met such requirements shall be deemed presumptively valid if (1) more than six years has elapsed since the determination, (2) the examiner relied upon such determination, and (3) there is no evidence that the determination was procured through misrepresentation or bad faith.**

Absent such a provision the proposed rule still does not address the situation where one insurer accepts and renews an examiner's documentation of an original certification and/or one of his/her early renewals, and then that examiner continues on for years obtaining multiple renewals along the way. Under the new rule, some subsequent insurer (with a different subjective view of what the statute or rules require) may conclude that the original certification or renewal was based on documentation or classes that were actually deficient (for example, a questionable IME credit or a math error by the earlier insurer in adding up the credits). In that event, the rule would allow for the subsequent insurer's disagreement or belated discovery of error to retroactively invalidate the original certification or early renewal - and that lapse or break in the chain would also invalidate all of the subsequent renewals (because the examiner would have been required to take the exam again). An analogous problem can arise where an examiner can establish that previous insurer/employers accepted their documentation for renewal purposes, but the original documentation has long since been discarded or lost. (Again, I note that proposed OAR 436-055-0100(5)(d) only requires an insurer to retain such records for 6 years. The worker's obligation to retain such records should match it.) My suggestion addresses both scenarios.

Third, and finally, the proposed rules still lack provisions addressing folks who satisfy the initial certification requirement (exam) and/or can document sufficient credits for renewals while they are not actually working for an insurer. What happens if they subsequently begin or return to work as a claims examiner? There will have been no previous "insurer" to "accept" or "acknowledge" their documentation - even though it met all of the requirements. To that end, I suggest that OAR 436-055-0070 be supplemented with a subsection (6) as follows:

**"(6) Retrospective acknowledgment of certification eligibility.**

**Notwithstanding OAR 436-055-0070(4), an insurer may acknowledge an examiner's eligibility for current certification by retrospectively verifying that the requirements for initial certification or renewal have been met using documentation provided by the claims examiner."**

You will note that I did not include such examiners in my "good faith" exception above. It continues to require a person who never worked for an insurer (or stopped doing so for a while) to maintain and provide their *actual records* for retrospective review no matter how long ago they took the original test or documented intervening renewal credit hours.

Please feel free to contact me with concerns, responses or questions about my ideas. I sincerely appreciated the opportunity to weigh in.

Jerry Keene



Oregon Workers' Compensation Institute, LLC / Jerald P. Keene, Attorney  
Email: [jerryk@OregonComp.com](mailto:jerryk@OregonComp.com) Cell Phone: (503) 320-5087

*This email may contain confidential and/or privileged information. If you receive it in error, please delete it and any attachments immediately without sharing their contents, then inform Jerry Keene immediately.*

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**From:** CLARK Christopher M \* DCBS [<mailto:Christopher.M.Clark@oregon.gov>]  
**Sent:** Wednesday, July 6, 2016 11:43 AM  
**To:** 'Jerry Keene'  
**Cc:** BRUYNS Fred H \* DCBS  
**Subject:** Division 055 Rules

Jerry,

WCD is preparing to file our proposed revisions to the division 055 rules next week. Because the rules were opened in response to your petition, we wanted to give you a chance to review the draft rules to see if your concerns were adequately addressed before we file. Please note that some additional changes were made to OAR 436-055-0070 and OAR 436-055-0100 in response to the discussion on your second issue, regarding the two subsections that were omitted from OAR 436-055-0100(3) during the 2005 revision of that rule. In particular, we hope that the changes address the issue of a claims examiner's certification expiring during a period where they are not associated with an insurer who can renew their certification.

We would greatly appreciate any feedback you may have on these changes, and the other revisions by next **Monday, July 11**. I am also attaching an updated version of the issues document for your reference, but don't hesitate to contact me or Fred Bruyns with any questions.

Thank you,

Christopher M. Clark, Policy Analyst  
Department of Consumer and Business Services  
Workers' Compensation Division  
503-947-7512; fax 503-947-7514  
Email: [Christopher.M.Clark@oregon.gov](mailto:Christopher.M.Clark@oregon.gov)

**community**  
Workers' Compensation

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

**PUBLIC RULEMAKING HEARING**

In the Matter of the Amendment of OAR:  436-055, Certification of Claims Examiners	) ) ) ) ) )	TRANSCRIPT OF TESTIMONY
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The proposed amendment to the rules was announced in the Secretary of State’s Oregon Bulletin dated Aug. 1, 2016. On Aug. 23, 2016, a public rulemaking hearing was held as announced at 9 a.m. in Room F of the Labor and Industries Building, 350 Winter Street NE, Salem, Oregon. Fred Bruyns, from the Workers’ Compensation Division, acted as hearing officer. The record will be held open for written comment through Aug. 29, 2016.

**INDEX OF WITNESSES**

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**TRANSCRIPT OF PROCEEDINGS**

**Hearing officer:**

Good morning and welcome. This is a public rulemaking hearing. My name is Fred Bruyns, and I’ll be the presiding officer for the hearing. With me this morning is Chris Clark, a policy analyst in the Policy Section of the Workers’ Compensation Division.

The time is now 9:01 a.m. on Tuesday, August the 23<sup>rd</sup>, 2016. We are in Room F of the Labor & Industries Building, 350 Winter St. NE, in Salem, Oregon. We are making an audio recording of today’s hearing.

If you wish to present oral testimony today, please sign in on the “Testimony Sign-In Sheet” on the table by the entrance. If you plan to testify over the telephone, I will sign-in for you. Is there anyone on the telephone with us right now?

The Department of Consumer & Business Services, Workers’ Compensation Division proposes to amend chapter 436 of the Oregon Administrative Rules, specifically:

Division 55, Certification of Claims Examiners

Transcript of public rulemaking hearing  
Aug. 23, 2016

The department has summarized the proposed rule changes in the Notice of Proposed Rulemaking Hearing. This hearing notice, a Statement of Need and Fiscal Impact, and proposed rules with marked changes, are on the table by the entrance.

The Workers' Compensation Division: filed the Notice of Proposed Rulemaking Hearing and Statement of Need and Fiscal Impact with the Oregon Secretary of State on July 13, 2016; mailed the Notice and Statement to its postal and electronic mailing lists; notified Oregon Legislators as required by ORS chapter 183; and posted public notice and the proposed rules to its website.

The Oregon Secretary of State published the hearing notice in its Oregon Bulletin of Aug. 1, 2016.

This hearing gives the public the opportunity to provide comment about the proposed rules. In addition, the division will accept written comment through and including Aug. 29, 2016, and will make no decisions until all of the testimony is considered.

We are ready to receive testimony. If you are reading from written testimony and give the agency a copy of that testimony, we will add it to the rulemaking record.

Jerry Keene?

**Jerry Keene:**

Do I come up here?

**Hearing officer:**

You – great, thanks.

**Jerry Keene:**

Thank you, Fred. My name is Jerry Keene. I'm an attorney, and also am director of the Oregon Workers' Compensation Institute, which conducts much of the certification examiner training and conducts an examination, and has since 1991. I participated in the advisory committee changes – meetings on these rules, and also it was my petition to alter the IME credit renewal that I think prompted the department, at least in part, to go ahead and consider that and include it in its changes.

I want to testify today in part to endorse what the department has done and in part to express some concerns or questions, and also in part to confirm some understanding of the rules or the department's lack of intent to change things when it changed words in a way that would alter the certification criteria and procedures, that at least our organization has been using and which were in fact designed around the rules that were already there, and helped inform the wording of those. So I just want to confirm we're still doing things in a way that will comply with the new rules or

if the department did decide to make some changes, that I could at least express my concerns about those or elicit further dialog on that.

First of all, I'd like to note, as the petitioner on the IME credits, that I completely endorse the changes that were made. I think that reducing the amount of time and effort needed to familiarize yourself with IME interactions and instead broadening the requirement to be familiar with all of the rules and statutes was a reflection of the true need for training and certification and a reflection of the amount of time and effort that claims examining requires with regard to IMEs versus all the other things that claims examiners do. So I endorse that change.

With regard to the changes to definition of processing claims, and then the provisions under 0100, paragraph (1), with regard to insurer duties and the use of claims examiners, I would just note that the changes there – I'm not sure they really clarify things further, but I would say that in my reading, they seem to imply that a person who does some – conducts some things that might be considered claims processing activities beyond compensability determinations, benefit calculations, and payments just to workers, that there's a broader definition in what employers – I'm not saying this very well – that the people who are required to become certified may be broader than the actual interaction with the claims process, because of the difference in terms and interaction between 0005, paragraphs (6), and 0100, paragraph (1). And there might be some concerns about folks who supervise claims examiners who don't actually process claims might now have to become certified where they did not have to before.

Next, this is with regard to the, my hope that the department is not intending to change the practice that has been in place for a long, long time. There has always been a reference in the examination provisions, 0070, paragraph (1), small paragraph (b), that those who conduct the examination, and as a sidelight, the examination under the rules is actually something that the insurers bear the authority and the responsibility to approve, that the exam itself, whether or not it complies with the department's general rules, is something that the insurers have the primary responsibility to confirm rather than the department overseeing it. There's a provision that has always said that folks who are undertaking the examination may use a copy of the OARs and ORSs. In our particular class, that's always been true, but we have never interpreted that provision to be exclusive, that our folks before they even may take our examination are required, and this is a consistently enforced provision, must take our claims examination class, which includes review of a very extensive, 300-page claims examination notebook and the taking of exams, and the interim of taking study questions and reviewing answers. And we have always said that our students, while they are taking the exam, can use any of these materials, but we rely on the timing element. It's an extensive exam, with 130, 140 questions, timed, under an enforced time limit, and that requires them to be familiar with even more materials than just the rules and examination. But we allow them to use those materials, but then it puts a premium on being familiar them and all the materials aimed at familiarity with the rules and statutes. So that we want to make it clear that we have always permitted them to make use of their study materials. We're not sure whether that makes it harder or easier than just having the rules or statutes, because there's more to organize and more to become familiar with, but I want to make sure that the department has always accepted our interpretation of – I've approached them in the past. It was always okay to let students use other study materials as long as we're not compromising or conflicting with the purpose of the exam under the rules, and as long as we are not engaging in

anything that's fraudulent or dishonest under the rules, which is the other limitation. So I just want to make that clear that we understand we can continue that practice without compromising anybody's past or current or future certification.

Next I wanted to mention, just confirm, that the department has apparently taken a position that it's not going to dictate *how* an insurer signifies that it is certifying – approving an initial certification of a claims examiner, or renewing. There's nothing about doing it in writing. There's nothing about the kind of record that needs to be maintained, except with regard to other references about keeping records of the training that's involved. But there's no such thing as a statement about a certificate. There's not such thing about any kind of writing at all. It just seems to be that the insurer in whatever way it deems appropriate must somehow acknowledge, or in its mind, approve the records that the claims examiner has with regard to their exam and to their continuing education training. There's no form. There's no certificate. It could even be oral as far as the rules are concerned. I'm not saying whether I agree or disagree with that; I'm just noting that that's a continued ambiguity in the rule. In the past, I know I've had questions from folks wondering about the certification rules, about what it takes, what an insurer is supposed to do, what paperwork is involved, and we have just made stuff up. We have just ginned up forms and things we assumed would pass muster if there was ever a department audit, but have never had any guidance with regard to, you know, more than just common sense that that would be enough. That continues to still be the case.

With regard to expired certifications, I submitted a question to the department about the proposed rules and got an answer that I think should probably be placed on the record in terms of – not specifically, you don't have to go in and incorporate it by reference or add it to the record.

**Hearing officer:**

Okay

**Jerry Keene:**

It's my understanding that if a person allows their certification, either their initial certification or renewed certification to lapse by not accruing the necessary continuing education hours within the 3-year period, that there's a new provision under the rules that a person now has essentially a 12-year grace period to – for an additional year they can approach an insurer and wherever they're going to, meet the requirements for renewal within a subsequent 12-year period to the 3-year period that has just expired. There's an additional 12 years – 12 months to go ahead and achieve the hours necessary, but, and this is important, this is what I wanted to clarify, the beginning period of their initial 3 years continues to move forward as they are getting beyond the original ending point. In other words, if a claims examiner wants to take advantage of the grace period by getting a renewal of their certification more than 3 years later, they've got 12 months to do it, when they seek to have an acknowledgement of their certification or renewal, that's got to be based on credits obtained within three years prior to the date they're seeking the renewal, not dating all the way back to the beginning of the 3-year period. In other words the 12-month grace period does not extend their 3-year period for getting the hours. That 3-year period

continues to move forward in time, so that when they seek certification, it's still got to be hours that were obtained within the prior 3 years, 3 years prior to the date.

**Hearing officer:**

Jerry, that's my understanding. Is that yours as well?

**Chris Clark:**

Yeah. That is the intent.

**Jerry Keene:**

I used a lot of words to do that, but I just anticipated questions and possible – you've got to read a couple of rules in conjunction with each other to get to that point, so I just wanted to pull that all together in a really sloppy way, but explicitly in the record in case there's ever a question.

And then finally, one point of disagreement or a plea for additional consideration is that, under the original rules, two iterations ago, the rules contained an express provision – and this was while the department was engaging in the approval of certifications, before it was privatized – but under the original rules, the department made it clear that once there had been an initial approval of a worker's certification, that that approval would then have dignity with regard to subsequent approvals, that once it was approved and accepted, other people with a different idea about what the initial certification required could not go back and second guess it and essentially “unrecognized” the original certification and require the claims examiner to do it all over again, rather than just meeting subsequent continued education requirements. And, under the current rules, it states that an insurer *may*, when they are confronted with a person giving them certification documentation, a claims examiner, they may either accept that person's documentation or require them to go through and take a certification exam again, and that's at their option. And, I think that that doesn't pay sufficient attention or give sufficient recognition to the amount of effort that might have gone into the original certification. And, it allows one insurer retrospectively to cast doubt on the certification that was previously obtained and approved by another insurer simply by saying we don't accept it. You need to take the whole examination over again. Now to be clear, any insurer could at any time, as part of their own training requirements, require anybody applying for a job with them, to engage in whatever additional training requirements they want to do as a matter of their internal criteria, but I don't think it's appropriate to say that an insurer may at their option either recognize or refuse to recognize the legal status of having been certified, when working for another insurer who had recognized and approved their documentation, that there should be at least some requirement in the rules for an insurer that's going to cast doubt on, and potentially for subsequent reviewers, cast doubt on whether that initial certification was appropriate – require an examiner to go through the considerable effort of becoming certified again – that there should be some showing in the rules of a bona fide concern with the documentation they are being presented with, some burden they need to overcome, not to require additional training – that's completely outside of the certification rules – but in order to cast doubt on the certified status, not only for themselves, but for subsequent insurers that might want to employ that person, and potentially casting doubt

on the appropriateness of the work they did for a prior examiner, or for a prior insurer that accepted that, before that kind of doubt can be raised, that there should be some showing of bona fide concern, some identification of an actual problem. My preference would be that there can be no retroactive, absent fraud or dishonesty, some true criteria that would really cast genuine, legitimate doubt on the prior certification, that all certifications should be prospectively – prospective only; there should be a ratchet effect of prior certifications. Once it's accepted under a good faith look at the rules, that that should maintain dignity into the future, and not be able to be second guessed by a subsequent insurer. And, that's not only for fairness for the claims examiners, that's also as a matter of efficiency and claims processing certainty, so that examiners' claims companies don't have to worry about some subsequent company's different interpretation of the rules, when they accepted documentation for the purpose of allowing a person to process claims for them.

And that concludes my comments and testimony. I appreciate your courtesy for my lengthy presentation.

**Hearing officer:**

Oh no – thank you very much Jerry. Appreciate it. Would anyone else like to testify this morning?

Again, the record remains open for written testimony through and including Aug. 29, 2016. You may submit testimony in any written form, whether hard copy or electronic. I encourage you to submit your testimony by e-mail or as attachments to e-mail. However, you may also use fax, USPS mail, courier, or you may hand deliver testimony to Workers' Compensation Division Central Reception on the second floor of this building. On the table by the entrance are business cards that include any contact, or my contact information, and I will acknowledge all testimony received.

It's our practice to leave the hearing open a minimum of one-half hour, so I'm going to recess the hearing and pick it up again if someone arrives, or we'll conclude at 9:30.

The hearing is recessed at 9:18, and you're welcome to stay with us, or if you go, then thank you very much, Jerry, for your testimony. And, I will ask again – actually, I'm going to resume the hearing for a moment here. You did mention some advice that you had submitted before we filed the proposed rules, and you said you didn't necessarily need us to incorporate that into the testimony. I just want to find out for sure whether you'd like us to do that, because that's no problem. We can just find that memo and stamp it in. Or, if you covered everything you wanted to cover here, then that's fine too.

**Jerry Keene:**

I think probably that presentation included some examples of my concern that were more concrete than I did today, so I would say sure, it might be helpful, so sure I would ask that you incorporate it.

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**Hearing officer:**

Okay, and we will do so. And the time is now 9:19, and we are recessed again. Thank you.

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Okay, this hearing is resumed at 9:30. Is there anyone on the telephone or here in person who'd like to testify? Okay, hearing no one, the time is 9:31. Thank you very much for coming. This hearing is adjourned.

**Transcribed from a digital audio recording by Fred Bruyns, Aug. 25, 2016.**