

**OAR chapter 436**  
**Workers' Compensation Division Rules**  
**OAR chapter 436, divisions 030 and 060, etc.**

**Rulemaking advisory committee**  
**July 14, 2015**  
**L & I Building, Room B**  
**Salem, Oregon**

**Attending in person**

Dan Schmelling, SAIF Corporation  
Dean Spradley, Farmers Insurance  
Dwayne Yoder, SAIF Corporation  
Gina Wescott, SDAO  
Jaye Fraser, SAIF Corporation  
Jennifer Flood, Ombudsman for Injured Workers  
John Powell, John Powell and Associates  
Larry Bishop, Sedgwick CMS  
Melinda Patton, SAIF Corporation  
Michael Orlando, The Gilroy Law Firm PC  
Randy Elmer, Randy M. Elmer, AAL, PC  
Sean Warren, SAIF Corporation  
Zachary Brunot, Randy M. Elmer, AAL, PC

**Attending by telephone**

Laura Grossenbacher, Broadspire  
Lynn Hamers, Intermountain Claims  
Paul Alstadt, Matrix Absence Management  
Virginal Walker, DAVACO

**Workers' Compensation Division staff**

Cathy Ostrand-Ponsioen  
Fred Bruyns  
Jamie O'Brien  
Mary Schwabe  
Sally Coen  
Shelly Miranda  
Troy Painter

00:00  
Welcome,  
Introductions

Fred Bruyns welcomed the committee members and asked members to provide advice about the fiscal impacts of any of the potential rule changes discussed.

Committee discussion and comments have been inserted into an extract of the meeting agenda. The time stamps refer to the digital audio recording of the meeting.

**Rulemaking Advisory Committee  
Workers' Compensation Division Rules  
OAR chapter 436  
OAR chapter 436, divisions 030 and 060, etc.**

**OAR 436-030, Claim Closure and Reconsideration**

Issues Document

Senate Bill 371, relating to notice of closure of workers' compensation claims, became effective May 21, 2015. The division adopted temporary rules to implement SB 371 effective May 21, 2015; permanent rules need to be adopted no later than November 16, 2015.

**ISSUE #1 – Beneficiaries' rights**

**Issue:** Under SB 371, a beneficiary may request reconsideration in a claim in which the worker dies before final determination of issues in the claim. What about a fatal claim, in which the worker dies as a result of the injury? The issues raised by a beneficiary's request for reconsideration and the scope of ARU's review may be different depending on the type of claim.

**Background:** SB 371 provides beneficiaries with the right to: (1) request reconsideration of a notice of closure issued after the worker has died, (2) file a request for reconsideration after the worker has died, and (3) pursue a request for reconsideration filed by the worker before the worker died.

There are two types of claims in which a beneficiary may be a party:

- 1) Death benefits under ORS 656.204 if the worker died as a result of a compensable injury (or under ORS 656.208 if the worker died while PTD).
- 2) Survivor benefits under ORS 656.218 if a worker with a compensable injury later died for reasons unrelated to the injury. In that case any compensation the worker would have been entitled to is paid to the worker's beneficiaries or estate.

The case that SB 371 was intended to address, SAIF v. Wild, 237 Or App 454 (2010), was a case in which the worker filed a claim and then died while the denial of his claim was in litigation. After the worker died, the denial was set aside, the claim was accepted and closed, and the worker's attorney filed a request for reconsideration. The issue addressed by the court was whether the worker's minor daughter had to request reconsideration to pursue the benefits the worker would have been entitled to, under ORS 656.218.

In the case of a worker who dies for reasons unrelated to the injury, the closure and reconsideration processes determine the compensation (permanent and temporary disability) the worker may have been entitled to had the worker lived.

What is the purpose of the reconsideration process in a fatal claim, when benefits are not necessarily due the worker, but death benefits may be payable to the worker's beneficiaries?

**Committee Comments:**

Topic & Time	Discussion
05:27 ISSUE #1 – Beneficiaries’ rights	Fred Bruyns read issue 1 on beneficiaries’ rights.
08:26 Dan Schmelling	Would you have jurisdiction? Isn’t this with the hearings division and not the reconsideration process because this is about benefits for the beneficiary?
09:18	End of comments.

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**ISSUE #2 – SB 371, Beneficiaries**

**Rule:** 436-030-0005(9), Definitions

**Issues:** The temporary rules amended the definition of “Notice of Closure” to be notice to the worker or beneficiary. Should this rule change be adopted permanently?

Topic & Time	Discussion
09:49 ISSUE#2 – SB 371 Beneficiaries	Fred read issue 2 that deals with the definition “Notice of Closure” broadened to be notice to the worker or beneficiary.
	End of comments.

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**ISSUE #3 – Beneficiaries**

**Rule:** 436-030-0015(1)(c)(B)(ii), Insurer Responsibility

**Issue:** Should the rules continue to require the Updated Notice of Acceptance and Closure issued in an instant fatality to list the names of all known beneficiaries? Or should the rules only require a general notice to any beneficiaries that they may be entitled to death benefits?

**Background:** Prior to SB 371, the rule has required the combined Updated Notice of Acceptance and Closure issued in an instant fatality to include the names of all known beneficiaries, the beneficiaries’ right to and the extent of fatal benefits due under ORS 656.204, and the medically stationary date. ORS 656.268(5)(a)(C) (pre-SB 371) requires a notice of closure to inform “[a]ny beneficiaries of death benefits to which they may be entitled pursuant to ORS 646.204 and 656.208.” This Advisory committee meeting requirement could be interpreted as a more general notice requirement to any and all beneficiaries that they may be entitled to benefits. See footnote 5 in *SAIF v. Wild*, 237 Or App 454, 466 (2010):

“We recognize that ORS 656.268(5)(a)(C) requires the notice of closure to inform ‘[a]ny beneficiaries of death benefits to which they may be entitled pursuant to ORS 656.204 and 656.208.’ We do not understand that provision to require insurers to identify a deceased worker's statutory beneficiaries and to provide them with a copy of the notice. Rather, we understand it to require only that the insurer include in the notice a statement that beneficiaries may be entitled to receive statutorily authorized death benefits. SAIF

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complied with that requirement by including in the August 16, 2006, notice of closure the following statement: ‘The worker's beneficiaries are entitled to any unpaid compensation for temporary or permanent partial disability.’”

Topic & Time	Discussion
10:07 ISSUE #3 – Beneficiaries, Fred Bruyns	Should the rules continue to require the Updated Notice of Acceptance and Closure issued in an instant fatality to list the names of all known beneficiaries? Or should the rules only require a general notice to any beneficiaries that they may be entitled to death benefits?
12:25 Cathy Ostrand- Ponsioen	Just to clarify this is not something we changed in the temporary rules, but is already in the permanent rules.
12:44 Dan Schmelling	Given the complexity of family relationships these days, a general notice would be great. A lot of times we are unable to identify all the beneficiaries, and as a general practice we are not copying the Notice of Closure to all beneficiaries.
13:36 unknown	It takes time and money. You have to do an investigation to figure out who all the beneficiaries are.
13:45 Jennifer Flood	Even then you may not even really know.
14:10 Randy Elmer	If you are tracking the language of SB 371, it doesn't require a list of names but only requires that you mail to the beneficiaries that are known. It seems like the proposed rule is asking for a step above what the legislative intent was.
14:26 Jennifer Flood	Is it the current rule that requires it, that no one really complies to? So they will be revising the current rule to remove the requirement to list the names that are rarely listed anyway.
14:42 Randy Elmer	The focus of SB 371 was mailing to known beneficiaries, not listing them.
15:00	End of comments.

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**ISSUE #4 – SB 371, Beneficiaries**

**Rule:** 436-030-0015(1)(c)(B)(iii), Insurer Responsibility

**Issue:** The temporary rules require language in the combined Updated Notice of Acceptance and Closure issued in an instant fatality claim to include appeal rights of beneficiaries. Should this language be adopted permanently? Is this language necessary in an “instant fatal” claim, when there wouldn’t necessarily be any issues on which a beneficiary would challenge the closure?

Topic & Time	Discussion
15:01 ISSUE #4 Beneficiaries Fred Bruyns	Should this language be adopted permanently? Is this language necessary in an “instant fatal” claim, when there wouldn’t necessarily be any issues on which a beneficiary would challenge the closure?
15:43 Dan Schmelling	Yes to first question, and no to second question. I don’t think on instant fatalities that beneficiaries have really anything to challenge. They are already getting a notice that they have the right to request reconsideration on the worker’s behalf. But this isn’t addressing their benefits, so I don’t see adding the additional notification.
16:21 Cathy Ostrand- Ponsioen	The question is: SB 371 does not differentiate between the different types of claims. It just states that the Notice of Closure must include the appeal rights. So it is already on there.
16:44	End of comments.

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**ISSUE #5 – SB 371, Beneficiaries**

**Rule:** 436-030-0020, Requirements for Claim Closure

**Issue:** Regarding the Notice of Closure, the temporary rules:

- Amended section (5) to provide that the notice is effective the date it is mailed to the worker or the worker’s estate if the worker is deceased.
- Amended subsection (6)(j) to require the notice to include the appeal rights of the worker and any beneficiaries.
- Added section (9) to provide where to mail copies of the notice if the worker is deceased.
- Amended *renumbered* section (10) to require the worker’s and beneficiaries’ copies of the notice to be mailed by regular and certified mail.

Should these rule amendments be adopted permanently? An agency committee suggested that no change be made to *renumbered* section (10), but a second sentence be added to *temporary* section (9), subsection (b), providing that if copies of the Notice of Closure are mailed to beneficiaries, they must be mailed by both regular mail and certified mail return receipt requested.

<b>Topic &amp; Time</b>	<b>Discussion</b>
16:45 ISSUE #5 – SB 371 Beneficiaries Fred Bruyns	Should these rule amendments be adopted permanently?
18:09 Cathy Ostrand- Ponsioen	The rule would still require that beneficiaries copies be mailed by regular and certified mail return receipt requested.
18:58 Jaye Fraser	Does the statute require return receipt requested to beneficiaries?
19:07 Cathy Ostrand- Ponsioen	No, I believe it's a requirement for the workers copy currently, so it would just be the same as when the worker's copy is sent.
19:10 Jaye Fraser	First, return receipt is extraordinarily expensive, and secondly, most people don't go pick it up.
19:41 Cathy Ostrand- Ponsioen	The bill does not require the beneficiaries notice to be mailed in any particular manner. It would just be consistent with what the current requirement is for the worker's copy.
19:49 Jennifer Flood	Agreed that it can be an extra expense. There is not much of an increase to have beneficiaries to be mailed a copy, and it's more reasonable to make it consistent if the Notice of Closure is being mailed to worker or beneficiary that it has the same type of mailing requirements.
20:15 Fred Bruyns	Clarified if question was more about the general requirements as opposed to...
20:18 Jaye Fraser	The statutory change says may. It is not going to encourage us to do so. It's almost \$5.00 to mail something return receipt request.
21:00 Fred Bruyns	We did ask for fiscal impacts, and you named one. I don't know if anyone can quantify to help us put a dollar amount on it. We would welcome any data that may be available.
21:20 Jaye Fraser	Consistency for the purpose of having a mirror is not really a very good reason.
22:47	End of comments.

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**ISSUE #6 – SB 371, Beneficiaries**

**Forms:**

- 1644, Notice of Closure
- 1644c, Correcting Notice of Closure
- 1644r, Rescinding Notice of Closure
- 1644p, Notice of Closure-Permanent Total Disability Reduction
- Bulletin 139, Claim closure

**Issue:** Effective May 21, 2015, the division revised the notice of closure forms 1644, 1644c, and 1644r, and accompanying Bulletin 139, “Claim closure,” to include a “Notice to Beneficiaries and add a cc: box for beneficiaries. Should further changes be made to these forms or the bulletin?”

The division has not revised the 1644p, “Notice of Closure-Permanent Total Disability Reduction,” to include the same language that was added to the other closure forms. Should the language also be added to this form? The appeal rights for a notice of closure that reduces PTD are under ORS 656.206(6)(a): “Notwithstanding ORS 656.268 (5), if a worker objects to a notice of closure issued under this subsection, the worker must request a hearing.”

<b>Topic &amp; Time</b>	<b>Discussion</b>
22:50 ISSUE #6 – SB 371 Beneficiaries Forms Fred Bruyns	Should further changes be made to these forms or the bulletin?
25:00 Dan Schmelling	In reference to 1644p “Notice of Closure-Permanent Total Disability Reduction”: You have to go to hearing first to address the reversal of the PTD before you can take the next step. It’s not that it couldn’t apply, but that it wouldn’t apply. You have to go to hearing first to see if it can be reversed. It’s a right that isn’t relevant at this time.
25:14 Cathy Ostrand- Ponsioen	The notice to beneficiaries wouldn’t apply. The appeal rights wouldn’t apply.
26:04	End of comments.

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**ISSUE #7 – SB 371, Beneficiaries**

**Rule:** 436-030-0023, Correcting and Rescinding Notices of Closure

**Issue:** The temporary rules amended sections (6), (7), and (9) of this rule to reference *temporary* OAR 436-030-0145(1) for the applicable appeal period that is initiated when a rescinding notice of closure, a notice of closure that rescinds and reissues the closure, or a correcting notice of closure is issued. (*Temporary* OAR 436-030-0145(1), in turn, adds language providing the time

period during which a beneficiary may request reconsideration (see issue #10 below).) Should these rule changes be adopted permanently?

<b>Topic &amp; Time</b>	<b>Discussion</b>
26:04 ISSUE #7 – SB 371 Beneficiaries Fred Bruyns	Should these rule changes be adopted permanently?
27:30	No comments.

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**ISSUE #8 – SB 371, Beneficiaries**

**Rules/forms/bulletin:**

436-030-0115, Reconsideration of Notices of Closure  
436-030-0125, Reconsideration Form and Format  
Form 2223a, Worker Request for Reconsideration  
Form 2223b, Insurer Request for Reconsideration  
Bulletin 227, Request for reconsideration forms

**Issue/Background:** In the temporary rules, the division amended 436-030-0115(1) to include a beneficiary as a party that may request reconsideration of a notice of closure, and 436-030-0125(7) to provide that a request made by a beneficiary should include the beneficiary's and attorney's names.

- Is there any other information or documentation that a beneficiary should include with their request?
- Is the current form for worker requests sufficient for a beneficiary's request, or should a new form be created for beneficiaries to request reconsideration?
- The division has not made any changes to the worker or insurer request forms (2223a, 2223b) or to Bulletin 227 as a result of SB 371. Do any changes need to be made to these forms and bulletin?

<b>Topic &amp; Time</b>	<b>Discussion</b>
27:38 ISSUE # 8– SB 371 Beneficiaries Rules/forms/bulletin Fred Bruyns	Is there any other information or documentation that a beneficiary should include with their request?
28:45 Dan Schmelling	We thought relationship might be beneficial.
29:11 Virginia Walker	Would the beneficiary's age be relevant if the beneficiary were a minor?

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29:24  
Cathy Ostrand-  
Ponsioen For purposes of reconsideration

29:31  
Committee Good question (group consensus) End of comments for first question.

29:49  
Fred Bruyns Is the current form for worker requests sufficient for a beneficiary's request, or should a new form be created for beneficiaries to request reconsideration?

30:00  
Cathy Ostrand-  
Ponsioen On the current form we can add blocks for beneficiary, so the beneficiary can be indicated as appropriate.

30:30 End of comments for second question. Consensus that this is good.

30:30  
Fred Bruyns The division has not made any changes to the worker or insurer request forms (2223a, 2223b) or to Bulletin 227 as a result of SB 371. Do any changes need to be made to these forms and bulletin?

30:50  
Cathy Ostrand-  
Ponsioen Both forms reference the appeal rights and one of the questions is should we have a reference for the beneficiary appeal rights referring to the statute?

31:36  
Jennifer Flood My only concern is the understanding that if the beneficiary doesn't get the Notice of Closure they have a year instead of 60 days; if we try to explain too much of this on the general worker's form, then the workers that only have 60 days may unintentionally interpret that only the year time frame applies to them. If the form is modified, it should mainly address the needs of workers that are still living.

32:06  
Jaye Fraser What about just a reference to the rule for beneficiaries?

32:11  
Jennifer Flood That would be fine. We are talking about very few cases.

32:50 End of comments.

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**ISSUE #9 – SB 371, Beneficiaries**

**Rule:** 436-030-0135(1), Reconsideration Procedure

**Issue:** In the temporary rules, the division amended this rule to require the insurer to provide a copy of the record to the beneficiary or the beneficiary’s attorney, if the request for reconsideration was made by the beneficiary. Should this rule change be adopted permanently?

Topic & Time	Discussion
32:50 ISSUE #9 – SB 371 Beneficiaries Fred Bruyns	In the temporary rules, the division amended this rule to require the insurer to provide a copy of the record to the beneficiary or the beneficiary’s attorney, if the request for reconsideration was made by the beneficiary. Should this rule change be adopted permanently?
33:23	End of comments.

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**ISSUE #10 – SB 371, Beneficiaries**

**Rule:** 436-030-0145, Reconsideration Time Frames and Postponements

**Issue:** In the temporary rules, the division amended:

- Section (1) to add the timeframes for beneficiaries to request reconsideration.
- Section (2) to provide that the reconsideration proceeding begins upon receipt of the worker’s or beneficiary’s request.

Should these rule changes be adopted permanently?

Topic & Time	Discussion
33:24 ISSUE # 10– SB 371 Beneficiaries Fred Bruyns	Should these rule changes be adopted permanently?
33:56	End of comments.

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**ISSUE #11 – *Sather v. SAIF*, worker’s estate**

**Rule:**

436-030-0115, Reconsideration of Notices of Closure

436-030-0125, Reconsideration Form and Format

436-030-0135, Reconsideration Procedure

436-030-0145, Reconsideration Time Frame and Postponement

Other rules?

**Issue/Background:** In *Sather v. SAIF*, 357 Or 122 (2015), the Oregon Supreme Court interpreted ORS 656.218(3) to allow a deceased worker's estate to pursue litigation initiated by the worker if the worker does not have statutory beneficiaries. SB 371 amended ORS 656.218(3) and (4) to include a request for reconsideration, in addition to a request for hearing, as a matter that the worker's beneficiaries may file and pursue if the worker dies before final determination. In light of *Sather v. SAIF* and the changes to ORS 656.218(4) by SB 371, should the rules be amended reflect the right of the worker's estate to request and pursue reconsideration in the absence of beneficiaries?

<b>Topic &amp; Time</b>	<b>Discussion</b>
34:02 ISSUE #11 – <i>Sather v. SAIF</i> , worker's estate Fred Bruyns	In light of <i>Sather v. SAIF</i> and the changes to ORS 656.218(4) by SB 371, should the rules be amended reflect the right of the worker's estate to request and pursue reconsideration in the absence of beneficiaries?
34:58 Cathy Ostrand-Ponsioen	This isn't something that we have taken a position on, but just to ask a question while we are discussing these issues. Should we make any changes to clarify the outcome of that case?
35:39	No comments.

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**ISSUE #12 – SB 371, Interpreter services**

Rule: 436-030-0115(4)(c), Reconsideration of Notices of Closure

Issue/Background: SB 371 also requires the insurer or self-insured employer to pay the cost of necessary interpreter services for the worker's deposition at reconsideration. The division added this language to temporary OAR 436-030-0115(4)(c). Is the language in the temporary rule sufficient to implement this part of SB 371?

<b>Topic &amp; Time</b>	<b>Discussion</b>
35:39 ISSUE #12 – SB 371, Interpreter services Fred Bruyns	Is the language in the temporary rule sufficient to implement this part of SB 371?
36:19 Cathy Ostrand-Ponsioen	It mirrors what is in the statute after senate bill 371.
36:35 Randy Elmer	Will not often see this anyway.
36:50	End of comments.

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**ISSUE #13 – Post-training claim closures**

Rule:

436-030-0020(14)

Issue: Does this rule need to be revised in light of Liberty Northwest Ins. Corp. v. Olvera-Chavez, 267 Or App 55 (2014)?

Background: ORS 656.268(10) provides that a claim must be re-closed when the worker is no longer in training, and permanent disability is redetermined for work disability only. The Court of Appeals has interpreted this provision, together with ORS 656.268(1), to require both a redetermination of the worker’s medically stationary status and a closing medical examination for the purpose of redetermining work disability. The court stated in footnote 6, “To the extent that the ARU’s interpretation of OAR 436-030-0020[(14)](c) conflicts with our conclusion that a closing examination is required under ORS 656.268, the director’s interpretation is neither plausible nor entitled to deference.”

<b>Topic &amp; Time</b>	<b>Discussion</b>
36:50 ISSUE #13 – Post-training claim closures Fred Bruyns	Does this rule need to be revised in light of Liberty Northwest Ins. Corp. v. Olvera-Chavez, 267 Or App 55 (2014)?
38:32 Dan Schmelling	Why put us through having to get a closing exam when we can’t redetermine the impairment. There seems to be some hassle factor for all involved. We hassle the worker to go back to the attending physician to get a closing exam when we can’t redetermine the impairment. We can relook at the work disability but that isn’t going to be impacted by the new closing exam. Our current practices is that we go back to the attending physician and ask if the worker is stationary and if yes, has the impairment changed since the last closure of the claim, yes or no, it doesn’t matter how they respond because we can’t redetermine it anyway. It is adding an extra burden here that really doesn’t have any impact.
39:25 Unknown	We ask if they continue to agree with the work restrictions also.
39:30 Randy Elmer	Those are the same arguments that were set forth in front of the court that were rejected. So the court’s decision is a proper interpretation of the current law. They need to at least establish a medical stationary date.
39:48 Dan Schmelling	At this point it would have to be a statutory fix. So, yes, if we need to change the rules, we need to change the rules.
39:59	End of comments for the main issues.

### Housekeeping

- 436-030-0015(1)(c)(A)(iii), Insurer Responsibility – This language should have been updated with other rule changes adopted effective March 1, 2015, to reflect Brown v. SAIF, to focus on the “compensable injury” instead of the accepted conditions.
  - 436-030-0020(2), (2)(b), (4), (5), (13)(a)(B) – spacing, punctuation
  - 436-030-0020(9)-(14) – section numbering
  - 436-030-0023(4) – cross-reference
  - 436-030-0023(5)(c) – grammar
  - 436-030-0023(7) – spacing
  - 436-030-0125(7)-(10) – section numbering
  - 436-030-0135(3)(a) – grammar
  - 436-030-0145(2)(b), (3)(a), (3)(c), (6)(b) – punctuation
  - 436-030-0165(10) – replace cross-reference to 436-009-0015 (which no longer exists) with 436-009-0010
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## DIVISION 060 (CLAIMS) ISSUES DOCUMENT FOR 2015 LEGISLATIVE CHANGES

### ISSUE #1 – OAR 436-060-0012

**Issue:** Should the director amend this rule to specify where the Notice of Closure for a worker who has died must be sent, and to address the possible provision of Notice of Closure copies to the worker’s beneficiaries?

**Background:** Senate Bill 371, relating to notice of closure of workers’ compensation claims, became effective May 21, 2015. SB 371 provides a worker’s beneficiaries the right to request reconsideration of a notice of closure after the worker has died, or to pursue a request for reconsideration filed by the worker before the worker died. In addition to requiring the worker’s copy of the notice of closure (addressed to the worker’s estate) to be mailed to the worker’s last known address, the new law provides that the insurer or self-insured employer “may mail copies of the notice of closure to any known or potential beneficiaries” to the estate.

The division adopted temporary Division 030 (“Claim Closure and Reconsideration”) rules to implement SB 371 provisions, effective May 21, 2015. To ensure consistency among the claims processing and claim closure rules, this rule addressing notices and correspondence following the death of a worker should be amended to reflect the new law. Since notices of acceptance/denial and closure are both addressed in 060-0012(2) although the latter isn’t applicable when a claim is denied, it may be helpful to split this rule to address the current and new requirements for each notice separately.

<b>Topic &amp; Time</b>	<b>Discussion</b>
41:37 ISSUE #1 – OAR 436-060-0012 Fred Bruyns	Should the director amend this rule to specify where the Notice of Closure for a worker who has died must be sent, and to address the possible provision of Notice of Closure copies to the worker’s beneficiaries?
43:36 Dan Schmelling	I don’t think the rule needs to be changed. This was added a few years ago for the issue of sending out notices for deceased workers saying you are ineligible for vocational services. The intent of this rule was to say if the worker is deceased you send out a notice to the worker’s estate or beneficiaries, but you don’t address it to the worker. In the case of notices under (2), these are the only notices that are required. This doesn’t need to be amended or changed. It’s how you send out the notice not when you send out the notice.
44:46 Jennifer Flood	It was quantified for sensitivity. Why is it that (2) is just to the estate and not to qualified beneficiaries?
45:18 Dan Schmelling	On the notice of closure, a denial, or an acceptance, that would still need to be to the worker’s estate because it’s the notice intended for the worker.
45:30 Jennifer Flood	That’s the answer to the question.
45:42	End of comments.

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**ISSUE #2 – OAR 436-060-0150(5)(a) and (b)**

**Issue:** Should the director amend this rule to provide that timely first payment of temporary disability (“time loss”) benefits must occur within 14 days of the employer’s notice or knowledge of the claim and of the worker’s disability?

**Background:** House Bill 2797, addressing the first payment of time loss benefits, will be effective January 1, 2016. Currently, an insurer or self-insured employer must make the first payment of time loss benefits within 14 days of the employer’s knowledge of the claim, if the attending physician or authorized nurse practitioner authorizes the time off work. HB 2797 links initial payment of time loss to the date the worker begins missing work due to the injury, because the start of temporary disability does not always coincide with the filing of the worker’s claim. Injured workers may file a claim but continue working without losing wages, or may not miss work until later. With HB 2797 changing the “first payment” timeframe to require payment no later than the 14th day after the employer’s knowledge of the claim and of the worker’s disability, this rule addressing timely payment of compensation should be amended. A related question is whether any changes need to be made to Forms 801 or 827 to facilitate claims processing given this new “trigger” for timely first payment? The new law won’t change what

occurs (be applicable) in many claims, so form changes may not be necessary. If not, is anything else needed to facilitate timely processing under the dual “employer knowledge of claim/disability” standard?

**Alternatives:**

- Amend 060-0150 as suggested.
- Amend Forms 801 or 827.
- Other?

<b>Topic &amp; Time</b>	<b>Discussion</b>
47:37 ISSUE #2 – OAR 436-060-0150(5)(a) and (b) Fred Bruyns	Should the director amend this rule to provide that timely first payment of temporary disability (“time loss”) benefits must occur within 14 days of the employer’s notice or knowledge of the claim and of the worker’s disability?
47:54 Larry Bishop	I don’t see any reason to change the form because it doesn’t change the requirement we have to verify authorization.
48:24 Sean Warren	We agree with that. If you have a worker that leaves on a Friday, and they leave work early, the employer is aware of the claim but the worker treats for it on Monday and gets their time authorization – would we be paying from Monday? Is that the intent of the rule? Or does it begin when they start missing time from work?
49:00 Sally Coen	That is WCD’s interpretation of the words. We look for the proponents of the bill to make sure that was your intention.
49:13 Jennifer Flood	Because the employer has knowledge that there is a disability because the worker is leaving work early.
49:21 Sean Warren	So it’s not tied to the date of the time loss authorization.
49:35 Committee	Discussion on what happens when the three day wait is triggered, what happens after 14 days, and discussion of scenarios.
53:02 Committee	It was proposed that having some examples would be helpful to address the confusion.
56:23 Fred Bruyns	If we do an industry notice we need to be aware of the types of examples we include in it.
56:25 Sally Coen	Please send us some of these good examples.
56:53	End of comments.

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**ISSUE #3 – OAR 436-060-0200(3) and (7)**

**Issue:** Should these two related rules be amended to address the specific situation when the director may assess a service company a civil penalty for violations of claims processing requirements?

**Background:** House Bill 2211, relating to civil penalties for service companies, will be effective January 1, 2016. Under ORS 656.745, the director may currently assess civil penalties against an employer, insurer, or managed care organization for violating workers' compensation statutes, rules, or orders of the director. The law limits civil penalties to \$2,000 for each violation or \$10,000 for all violations within any three-month period. HB 2211 adds service companies (that process claims for an insurer or self-insured employer) to the list of parties that the director may issue a civil penalty for violations. However, the penalty is limited to a single situation: violations identified in the director's annual audits of claims processing performance. Further, the bill only allows one such penalty for each separate violation; the responsible insurer or self-insured employer and its service company could not both receive a penalty for the same violation identified in an annual audit. HB 2211 is permissive and does not require the department to change audit practices or penalty procedures, so potential rule amendments would state the director "may" assess a civil penalty to the service company in this sole situation.

**Alternatives:**

- Amend 060-0200(3) and (7) as suggested.
- Only one of the two rules needs to be amended; do not amend 060-0200(specify).

<b>Topic &amp; Time</b>	<b>Discussion</b>
56:56 ISSUE #3 – OAR 436-060-0200(3) and (7) Fred Bruyns	Should these two related rules be amended to address the specific situation when the director may assess a service company a civil penalty for violations of claims processing requirements?
58:24 Dean Spradley, Famers Insurance	What is the definition of service company?
58:28 Fred Bruyns	In a following issue we are talking about how the law changed the statute to eliminate any references to TPA's, or third party administrators. For our purposes we've thought of them as the same entity. But they are commonly used one way in health insurance and another way in the workers' comp world. Now everything will be "service companies."
59:50	End of comments.

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**ISSUE # 4 – OAR 436-060-0200(4)**

**Issue:** Should this rule be amended to address the director’s ability to assess a civil penalty to a service company for violations of referenced rules related to time frame requirements, if identified in an annual audit?

**Background:** This rule currently provides that the director may assess a civil penalty to an employer or insurer for failing to meet the time frame requirements in other specified rules, including 060-0010. Effective January 1st, HB 2211 (see #3) will allow the director to assess a penalty to a service company for violations identified in annual audits of claims processing performance. The director’s annual audit evaluates the timeliness of insurers’ and self-insured employers’ filing of all disabling, and denied nondisabling, claims based on the standards in 060-0010(10) and 060-0010(14). Thus, this rule should clarify that a service company may receive the civil penalty in lieu of the responsible insurer or self-insured employer, if the timely filing violations were identified in the annual audit.

Alternatives:

- Amend 060-0200(4) as suggested.

<b>Topic &amp; Time</b>	<b>Discussion</b>
01:00:15 ISSUE #4 – OAR 436-060-0200(4) Fred Bruyns	Should this rule be amended to address the director’s ability to assess a civil penalty to a service company for violations of referenced rules related to time frame requirements, if identified in an annual audit?
01:01:05	No comments.

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**ISSUE #5 – OAR 436-060-0200(6)**

**Issue:** Should this rule be amended to reflect that the director may assess the civil penalty for inaccurately reporting “timeliness of first payment” information to the service company processing the claims, in lieu of the insurer?

**Background:** As summarized above in #3 and #4, HB 2211 will allow the director to assess 656.745 civil penalties to service companies for violations identified in annual audits of claims processing performance. The accuracy of timely first payment reporting by insurers and self-insured employers addressed in this rule is one of the categories reviewed in the division’s annual audit. Under the new law, the division could assess the civil penalty for violations of this audit category to either the service company or the responsible insurer or self-insured employer.

Alternatives:

- Amend 060-0200(6) as suggested.

<b>Topic &amp; Time</b>	<b>Discussion</b>
01:01:06 ISSUE #5 – OAR 436-060-0200(6)	Should this rule be amended to reflect that the director may assess the civil penalty for inaccurately reporting “timeliness of first payment” information to the service company processing the claims, in lieu of the

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Fred Bruyns insurer?

01:02:01 No comments.

### **HOUSEKEEPING CHANGES**

HB 2211 changed the current references to “third party administrators” in ORS 656.780 (certification of claims examiners) to “service companies” because the Insurance Code uses the former term for life and health insurance claims, while stating that service companies process workers’ compensation claims. We suggest the same change be made to the following rules:

OAR 436-060-0005(15)

OAR 436-060-0009(2) and (4)(a)

OAR 436-060-0010(9) and (21)

OAR 436-060-0015(3) and (7)

OAR 436-060-0017(3)

OAR 436-060-0035(1)(g)

OAR 436-060-0500(1)

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## **DIVISION 075 – RETROACTIVE PROGRAM RULEMAKING FOR LEGISLATIVE BILLS EFFECTIVE JANUARY 2016**

### **ISSUE #1 – OAR 436-075-0005(11)**

**Issue:** Should the definition for “spouse” be amended to reflect changes made by HB 2478?

**Background:** HB 2478, awaiting the Governor’s signature, will require the use of gender neutral language with respect to legally recognized marriages, effective January 1, 2016. Assuming the Governor signs the bill, it is suggested that 075-0005(11) be amended to replace “the husband or wife of a worker” with terms used in the bill. For example, “spouses married to each other” or “spouses in a marriage” are options. Other non-workers’ compensation statutes and rules may provide other appropriate options, including “two persons married to each other.” The term “spouse” is currently used in 075-0005(10), so updating the definition in (11) should be sufficient. The remainder of Div. 075 refers to the worker’s beneficiaries.

#### **Topic & Time**

#### **Discussion**

01:02:51 ISSUE # 1– OAR 436- 075-0005(11) Fred Bruyns	Should the definition for “spouse” be amended to reflect changes made by HB 2478?
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01:04:31 Jennifer Flood	Spouse on its own isn’t sufficient? Spouse by marriage, is there a spouse by something else?
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- 01:04:53  
Fred Bruyns                      That's a good question, but we don't want to make this more complicated than it has to be. I think we refer to spouse in a number of our rules already, but there are some rules that haven't been revised in a while.
- 01:05:09  
Zachary Brunot                      There is an issue lurking in the cohabitant's survivor benefits statute. It doesn't say spouse but clearly says living as a man and a women with children. It's a constitutional challenge.
- 01:05:28  
Committee                      Discussion on how ORS 656.226 still reads man and wife with children that has been there since 1913. This is something that may be addressed in February. Ultimately we found that HB 2478 did amend ORS 656.226.
- 01:07:42                      End of comments.

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**DIVISION 075 – ADDENDUM (NON-LEGISLATIVE CHANGE)**

**ISSUE #2 – OAR 436-075-0020**

**Issue:** Should this rule be amended to require insurers, self-insured employers, or the service companies processing their claims to conduct “alive and well” checks on deceased workers’ spouses every two years? If so, should similar checks also be done for children and dependents receiving monthly payments? Does the rule need to clarify the nature of the status check(s)?

**Background:** Division 030 (“Claim Closure and Reconsideration”) rules require insurers to reexamine permanent total disability claims at least once every two years. For deceased workers’ claims, insurers’ largest continuing payment obligations are often death benefits paid to the surviving spouse, if any. Insurers are reimbursed quarterly from the Worker Benefit Fund’s (WBF) Retroactive Program for the non-statutory portion of the monthly benefit. Over time, the annual “cost-of-living” increases paid by that program constitute a growing portion of the monthly benefit. Some, but not all, insurers and service companies conduct periodic status checks on surviving spouses. WCD has addressed three situations where an elderly spouse died and no one notified the insurer or the division. In two cases, an adult child continued to cash the monthly checks. One situation continued for six years and created a \$144,000 Retroactive overpayment. In the second case, the department recovered almost \$23,000 in a just-in-time lien on the sale of the widow’s home; here, the service company identified the fraud during a wellness check. In the third case, the service company learned through civil court documents that the widow had been cohabitating since the late 1990s and had a child by the companion. Even with court judgments, WCD was not able to collect \$66,000 in over-reimbursed Retroactive payments. These examples don’t address the sums the insurers were not able to recover. Insurers and service companies usually monitor the ages of children receiving benefits to ensure they end at the appropriate time (based on age and schooling parameters). However, the division’s interests in requiring status checks for spouses may also apply to children and dependents receiving benefits that are partially reimbursed from the Retroactive Program. It would be helpful for the committee(s) to provide input on both options: requiring checks for spouses only, or for all recipients of death benefits. Separately, WCD and the Injured Worker Ombudsman

occasionally receive complaints about overly-intrusive status checks on older spouses, sometimes by contracted vendors. In these cases, the intent of status checks is to verify that the intended recipients of these long-term payments are still alive. Doing so seems both reasonable and prudent, will benefit insurers and WCD, and ensure that WBF/Retroactive benefits funded by workers and employers are only paid to the appropriate survivors.

<b>Topic &amp; Time</b>	<b>Discussion</b>
01:07:48 ISSUE # 2– OAR 436-075-0020 Fred Bruyns	Should this rule be amended to require insurers, self-insured employers, or the service companies processing their claims to conduct “alive and well” checks on deceased workers’ spouses every two years? If so, should similar checks also be done for children and dependents receiving monthly payments? Does the rule need to clarify the nature of the status check(s)?
01:10:47 Jaye Fraser	We do them.
01:10:50 Larry Bishop	I would like to see it defined.
01:11:28 Committee	Discussion on this process from different committee members. Comment was made that the division set the standard for carriers. Possibly a list of appropriate items to follow-up on.
01:15:16 Jennifer Flood	One of the common complaints is when the investigator wants a copy of their driver’s license. In cases where the person’s license has been taken away, it can be a sensitive subject. I think that is we say what they are entitled to would be helpful.
01:16:15 Jaye Fraser	Being able to visually verify should be enough for us. We don’t need a picture ID as long as someone was able to verify the information. We just need something that will allow us to address those anomaly situations.
01:22:04	End of comments.

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**DIVISION 100 – WORKERS’ COMPENSATION BENEFITS OFFSETS  
RULEMAKING FOR LEGISLATIVE BILLS EFFECTIVE JANUARY 2016**

**ISSUE #1 – OAR 436-100-0005(2)**

**Issue:** Should the definition for “beneficiary” be amended to reflect changes made by HB 2478?  
**Background:** HB 2478, awaiting the Governor’s signature, will require the use of gender neutral language with respect to legally recognized marriages, effective January 1, 2016. Assuming the

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Governor signs the bill, it is suggested that 100-0005(2) be amended to replace “the husband, wife” with some variation of the terms used in the bill. For example, “a spouse married to the worker” is an option. Other non-workers’ compensation statutes and rules may provide other appropriate options.

<b>Topic &amp; Time</b>	<b>Discussion</b>
01:22:20 ISSUE #1 – OAR 436- 100-0005(2) Fred Bruyns	Should the definition for “beneficiary” be amended to reflect changes made by HB 2478?
01:23:08	No comments.
01:23:08 Fred Bruyns	Please send me additional advice you think of after the meeting.
01:24:36	End of meeting