

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 105**

**PROPOSED EMPLOYER-AT-INJURY PROGRAM RULES
INCLUDING PUBLIC TESTIMONY AND AGENCY RESPONSES**

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

In the Matter of the Amendment of)
OAR Chapter 436-105,) **SUMMARY OF TESTIMONY**
Employer-at-Injury Program) **AND AGENCY RESPONSES**
)

This document relates to the Order of Adoption, Workers' Compensation Division Administrative Order 03-057. It constitutes and contains a summary of the significant data, views, and arguments contained in the hearing record. The purpose of this summary is to provide the Director with a record of the agency conclusions about the major issues raised.

The amendment to the rules was announced in the Secretary of State's Administrative Rules Bulletin dated April 1, 2003. On April 22, 2003 a public rulemaking hearing was held as announced at 10:00 a.m. in Room B of the Labor and Industries Building, 350 Winter Street NE, Salem, Oregon 97301-3879. Fred Bruyns, Rules Coordinator, acted as presiding officer. Joyce Watterson, Business Support Services, recorded the proceedings. The record was held open for written comment through 5:00 p.m. April 25, 2003

The public hearing involved three divisions of chapter 436. The following individuals gave oral testimony on these rules at the public hearing:

Subject Division	Testimony received from:
009	Brian Battalia, M.D. Legacy Health System, Concentra Medical Centers
009	Cathy Zarosinski Representing the Oregon Physical Therapy Association
009	Diana Godwin, Attorney Representing Oregon Physical Therapists in Independent Practice
009	Pamela Lundsten Department of Consumer and Business Services
009	Karen Poague Brady, P.T. Physical Therapy Services
050	John Booton Small Business Ombudsman
050	Mike Freeman Cardinal Services, Inc.
050	Bill Cardwell Business Administrative Services
050, 105	Jaye Fraser SAIF Corporation

The following written testimony was received:

Subject Division	Exhibit #	Testimony received from:
009	Exhibit 1	Debbe Klaja and Luke Klaja Luke Klaja Physical Therapy
009	Exhibit 2	Pamela Lundsten Department of Consumer and Business Services
009	Exhibit 3	Cathy Zarosinski Representing the Oregon Physical Therapy Association
009	Exhibit 4	Byron (Bud) Herigstad, P.T.
050	Exhibit 5	Mike Freeman Cardinal Services, Inc.
009	Exhibit 6	Joe Kozlowski, P.T. Physical Therapy Services
009	Exhibit 7	Lesli Godfrey, P.T.A. Physical Therapy Services
009	Exhibit 8	Joyce Wheeler, P.T., M.S., President Oregon Physical Therapy Association
009	Exhibit 9	Karen Poague Brady, P.T. Physical Therapy Services
009	Exhibit 10	Carla Knoll, P.T. Physical Therapy Services
105	Exhibit 11	Jaye Fraser SAIF Corporation
050	Exhibit 12	Jaye Fraser SAIF Corporation
050	Exhibit 13	Kathleen A. Dykzeul Paralegal, Miller Nash, LLP
009	Exhibit 14	Joe Martinez Concentra Medical Centers
009	Exhibit 15	Diana Godwin, Attorney Representing Oregon Physical Therapists in Independent Practice
009	Exhibit 16	Linda Olsen SAIF Corporation
009	Exhibit 17	Linda Olsen SAIF Corporation

The following is a summary of the testimony received regarding OAR Chapter 436-105, "Employer-at-Injury Program," and the agency response to that testimony.

OAR 436-105-0003

Testimony: In OAR 436-105-0003, Applicability of Rules, WCD proposes two implementation dates. Different effective dates for rules within the same program lead to confusion and create an unnecessary complication for WCD, insurers and employers. SAIF recommends that all of

the proposed rules apply to all individual Employer-at-Injury Programs which began on or after October 1, 2001. (Exhibit 11)

Response: OAR 436-105-0510 (2)(c) effective 10/01/01 requires that an Employer-at-Injury Program (EAIP) end if the worker does not have a release for work. A worker who is receiving temporary total disability does not have a release to work. The division's intent was always to allow an EAIP to continue even if the worker is removed from work temporarily by his or her medical provider, and WCD staff gave rules training which indicated that the EAIP would not end under this circumstance. Therefore, for consistency with intent and actual practice, the change in wording to this rule will apply retroactively to all individual EAIPs which began on or after 10/01/01.

The other proposed substantive changes resulted from input from internal and external stakeholders. These changes are not to correct rules that were effective 10/01/01 and it would not be appropriate to backdate the effective date of these changes. The changes other than the change in wording of OAR 436-105-0510(2)(c) will apply to all individual EAIPs which began on or after June 8, 2003.

OAR 436-105-0008

Testimony: The proposed rule uses an undefined term, "affected parties". SAIF recommends that a definition describing who an affected party might be would add clarity to this section. (Exhibit 11)

Response: In order to request a reconsideration section (2) of this rule requires the party to be directly affected by a division Employer-at-Injury decision. A reconsideration must precede a director's review. For instance, when an employer is denied reimbursement for an EAIP by the insurer, the employer can't ask the division for a reconsideration because it was not a division decision. The rule language seems clear to the division and will not be changed at this time.

Having reviewed and considered all data, views and arguments presented, I hereby submit this report as a summary of statements given and exhibits received. I recommend the adoption of the amendments to the rules consistent with the above responses.

Dated this 15th day of May, 2003.

WORKERS' COMPENSATION DIVISION

/s/ Gerald V. Rutherford

Gerald V. Rutherford, Manager
Reemployment Assistance Unit
Workers' Compensation Division

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

Dept of Consumer and Business Services, Workers' Compensation Division	OAR CHAPTER 436
Agency and Division	Administrative Rules Chapter Number
Fred Bruyns	(503) 947- 7717 Fax (503) 947-7581
Rules Coordinator	Telephone
350 Winter Street NE, Rm 27, Salem Oregon 97301-3879	
Address	

Room B (basement) Labor & Industries Building 350 Winter Street NE			
April 22, 2003	10:00 a.m.	Salem, Oregon	Fred Bruyns
Hearing date	Time	Location	Hearings Officer

NOTE: The hearing will convene at 10:00 a.m. and end when all present who have indicated their intention to testify have been called to present testimony. Written testimony will be accepted until 5:00 p.m., April 25, 2003 (must be received by the Workers' Compensation Division).

**Auxiliary aids for persons with disabilities
are available upon advance request.**

RULEMAKING ACTION

AMEND:

OAR 436-009-0004, 436-009-0005, 436-009-0008, 436-009-0010, 436-009-0015, 436-009-0020, 436-009-0022, 436-009-0030, 436-009-0040, 436-009-0050, 436-009-0060, 436-009-0070, 436-009-0090

OAR 436-050-0003, 436-050-0400, 436-050-0410, 436-050-0420, 436-050-0440, 436-050-0450, 436-050-0460, 436-050-0470

OAR 436-105-0003, 436-105-0008, 436-105-0500, 436-105-0510, 436-105-0520, 436-105-0530

REPEAL:

OAR 436-050-0430

ORS 656.726(4), 656.704

Stat. Auth.

ORS 183.335; OAR 137-001; OAR 436-001-0000 and 436-001-0005

Other Authority

ORS chapter 656

Stats. Implemented

RULE SUMMARY

Amendment of OAR 436-009 (Medical Fee and Payment Rules) is proposed to include several substantive changes. These proposed rules:

- Adopt the Centers for Medicare & Medicaid Services 2003 Medicare Resource-Based Relative Value Scale, Addendum B "Relative Value Units (RVUs) and Related Information" except the "status indicators," and Addendum C "Codes with Interim RVUs," 67 *Federal Register* No. 251 December 31, 2002 as the fee schedule for payment of medical service providers except as otherwise provided in these rules.

Notice of Proposed Rulemaking Hearing

- Adopt the *American Society of Anesthesiologists (ASA), Relative Value Guide 2003* as a supplementary fee schedule for payment of anesthesia service providers except as otherwise provided in these rules for those anesthesia codes not found in the Federal Register.
- Adopt *Current Procedural Terminology (CPT® 2003)*, Fourth Edition Revised, 2002 for billing by medical providers except as otherwise provided in these rules. The guidelines are adopted as the basis for determining level of service.
- Provide that if a current Form 2552 (form published by the Centers for Medicare & Medicaid Services) is not available, then financial statements may be used to develop estimated data. If the adjusted cost/charge ratio (CCR) is determined from estimated data, the hospital will receive the lower ratio of (1) the hospital's last published CCR or, (2) the hospital's CCR based on estimated data.
- Provide that rural hospitals which are designated as critical access hospitals under the Oregon Medicare Rural Hospital Flexibility Program are automatically exempt from imposition of the adjusted cost/charge ratio (in addition to those determined exempt pursuant to OAR 436-009-0020(3)(k)).
- Eliminate the requirement that the Workers' Compensation Division publish adjusted cost/charge ratios for Oregon hospitals on or before March 20th and September 20th of each year.
- Adjust the conversion factors to be applied to medical service categories of evaluation/management (from \$55.70 to \$66.84), anesthesiology (from \$45.42 to 52.23), radiology (from \$78.17 to \$66.45), lab & pathology (from \$89.43 to \$58.63), medicine (from \$89.43 to \$73.33), physical medicine and rehabilitation (from \$66.42 to \$62.43), and multidisciplinary and other Oregon-specific codes (from \$9.53 to \$58.63). Factors were adjusted following input from a medical fee advisory committee and the Workers' Compensation Division estimates the net effect of the changes will be essentially "revenue-neutral."
- Reduce the relative value units used for multidisciplinary and other Oregon-specific codes to exactly offset the increase in the conversion factors for these Oregon-specific codes, in order to achieve a "revenue-neutral" result.
- Provide that insurers and self-insured employers must advance payment to workers who need pre-payment in order to attend a medical arbiter examination or an examination needed to resolve a medical treatment dispute pursuant to ORS 656.327.

Amendment of OAR 436-050 (Employer/Insurer Coverage Responsibility) is proposed to include several substantive changes. These proposed rules:

- Eliminate rules that simply repeat the statutory requirements in ORS 656.850 and 656.855.
- Provide that a worker-leasing company shall not provide workers' compensation coverage for another worker-leasing company or for a temporary employer.
- Incorporate the information/data requirements now in Bulletins 271 and 273 and the related forms (used for workers' compensation coverage notification and application for worker leasing company license).
- Clarify the requirement that a licensed worker leasing company must have at least one Oregon location where all Oregon leasing records are kept.
- Include criminal conviction for theft or embezzlement among the reasons for disqualification, suspension or revocation of a worker-leasing company license.

Amendment of OAR 436-105, (Employer-at-Injury Program) is proposed to include several substantive changes. These proposed rules:

- Make permanent changes implemented by temporary rules that became effective 12/11/02, by:
 - Requiring the insurer or self-insured employer to retain at the authorized claim processing location, documentation of the transitional work, to include the start date, wage and hours, and a description of the job duties.
 - Eliminating the eligibility requirement that the worker be released for work, so that a temporary period of temporary disability doesn't end the Employer-at-Injury Program; revised rules require only that the worker have cited restrictions from the medical service provider which prevent the worker from performing regular work.
- Simplify the process to resolve Employer-at-Injury Program disputes by: (1) making it the insurer's option to request or not request a director's review; (2) providing that if the insurer does want director's review, it may submit additional information in support of its position. Currently, if the Workers' Compensation Division disagrees with the insurer's position following reconsideration pursuant to OAR 436-105-0008, the file is automatically referred for a director's review.

Notice of Proposed Rulemaking Hearing

- Provide that (an additional) type of medical release meets Employer-at-Injury Program criteria: A statement by the medical service provider that indicates the worker is not released to regular employment, accompanied by an approval of a job description, which includes the job duties and physical demands required for the transitional work.
- Provide that a medical release which indicates restrictions are permanent does not expire in 30 days.
- Clarify time frames for expiration of medical releases due to missed medical appointments. If the worker misses a follow-up appointment, the medical provider must, within 14 days from the date of the missed appointment, provide a new medical release or a signed and dated statement indicating previous restrictions are still in effect in order for the medical releases to be continuous.

NOTICE OF PERIODIC REVIEW

Oregon law requires an agency to review its rules not less than every three years to minimize the economic effect on businesses. Pursuant to ORS 183.545 and 183.550, the Workers' Compensation Division invites public comment upon these rules concerning the continued need for the rules; the complexity of the rules; the extent to which the rules duplicate, overlap, or conflict with other state rules, federal regulations, and local government regulations; the degree to which technology, economic conditions, or other factors have changed in the subject area affected by the rules; and the legal basis for the rules. Oral comments may be presented at the rulemaking hearing; written comments must be received, at the address listed on the top of this form, by the date specified below.

Address questions to: Fred Bruyns, Rules Coordinator; phone 503-947-7717; fax 503-947-7581; or e-mail fred.h.bruyns@state.or.us

The proposed rules are available on the Workers' Compensation Division's Web site:

www.oregonwcd.org/policy/rules/permanent/rules.html#proprules

or from WCD Publications at 503-947-7627 or fax 503-947-7630.

April 25, 2003

5 p.m.

Last Day for Public Comment

/s/ John L. Shilts, March 13, 2003

Authorized Signer and Date

John L. Shilts, Administrator, Workers' Compensation Division

Printed name

*The *Oregon Bulletin* is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 pm on the preceding workday.

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

Department of Consumer and Business Services, Workers' Compensation Division	OAR CHAPTERS 436: Division 009 Division 050 Division 105
Agency and Division	Administrative Rules Chapter Number

In the Matter of) The Amendment of:) OAR 436-009, Oregon Medical Fee and Payment Rules) OAR 436-050, Employer/Insurer Coverage Responsibility) OAR 436-105, Employer-at-Injury Program)	Statutory Authority, Statutes Implemented, Statement of Need, Principal Documents Relied Upon, Statement of Fiscal Impact
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Statutory Authority: ORS 656.704, 656.726(4)

Other Authority: ORS 183.335; OAR 137-001; OAR 436-001-0000 and 436-001-0005

Statutes Implemented: ORS chapter 656

Need for the Rule(s):

Amendment of OAR 436-009 is needed to:

1. Update medical fee schedules and coding references: Centers for Medicare & Medicaid Services 2003 Medicare Resource-Based Relative Value Scale, *American Society of Anesthesiologists (ASA), Relative Value Guide 2003*, and *Current Procedural Terminology (CPT® 2003)*, Fourth Edition Revised; ORS 656.248(1)(a) requires the director to adopt fee schedules based on certain criteria;
2. Simplify hospital data reporting and broaden eligibility criteria for Oregon hospitals to qualify as rural hospitals;
3. Adjust the conversion factors to be applied to medical service categories in order to better reflect the costs of providing these services; and
4. Require advance payment for workers who must attend certain medical examinations and who are unable to pay the costs necessary to attend the examinations.

Amendment of OAR 436-050 is needed to:

1. Prevent worker-leasing companies from providing workers' compensation coverage for other worker-leasing companies or for temporary employers;
2. Provide authority to require specific data on worker-leasing company forms and license applications;
3. Clarify the requirement that a licensed worker leasing company must have at least one Oregon location where all Oregon leasing records are kept; and
4. Include criminal conviction for theft or embezzlement among the reasons for disqualification, suspension or revocation of a worker-leasing company license.

Amendment of OAR 436-105 is needed to:

1. Require insurers to keep specific types of documentation of the transitional work;
2. Eliminate the potential for a temporary period of disability to end a worker's eligibility;
3. Simplify the process to resolve Employer-at-Injury Program disputes;
4. Broaden the definition of a qualified medical release and provide that a medical release with permanent restrictions does not expire in 30 days; and
5. Clarify time frames for expiration of medical releases due to missed medical appointments.

Documents Relied Upon: Advisory committee meeting minutes.

These documents are available for public inspection in the Administrator's Office, Workers' Compensation Division, 350 Winter Street NE, Salem, Oregon 97301-3879, upon request and between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday. Please call (503) 947-7810.

Fiscal and Economic Impact:

Regarding OAR 436-009, Medical Fee and Payment Rules (numbering below corresponds to changes described under "Need for the Rule(s)"):

1. The Centers for Medicare & Medicaid Services publishes "nationally uniform relative value units" (RVUs). The overall fiscal impact of RVU adjustments on insurers, self-insured employers, and medical providers is expected to be minor.
2. We estimate the automatic application of the rural hospital exemption to critical access hospitals under the Oregon Medicare Rural Hospital Flexibility Program will increase the number of hospitals that qualify for the exemption. Based on current critical access hospital designations, 3 additional hospitals will qualify for the exemption from the adjusted cost/charge ratio when WCD publishes updated ratios and rural hospital exemptions in September 2003. The fiscal impact is expected to be minor because such hospitals are small and their workers' compensation billings are small relative to large hospitals. The exact dollar impact is unknown, as hospitals send data to the Department that includes a mixture of workers' compensation and non-workers' compensation charges.
3. Conversion Factors were adjusted following input from a medical fee advisory committee. The Workers' Compensation Division estimates the net effect of the changes will be essentially "revenue-neutral." However, medical service providers will be directly affected by increases and decreases in the factors, depending on their utilization and service category.
4. This change affects only the timing of the payment and not the amount, so no fiscal impact is anticipated.

Regarding OAR 436-050, Employer/Insurer Coverage Responsibility (numbering below corresponds to changes described under "Need for the Rule(s)"):

1. Re-leasing to temporary employment agencies or other worker-leasing companies is not a common practice, and loss of related business opportunities is expected to be minor. For worker-leasing companies that do not engage in this practice currently, this will serve to "level the playing field" and promote a fair and uniform marketplace. This change should result in a small decrease in regulatory costs for this agency.
2. Data reporting will change very little from current practice and this change is not expected to have a fiscal impact.
3. This is a clarification of an existing rule; to the extent worker-leasing companies have been storing records outside of Oregon, they are in violation of current rules. However, we have recently learned that some companies have been keeping records outside Oregon, and transferring those records to Oregon will involve some costs. Because we don't know how many records are stored in other states, the distances involved, etc., we cannot quantify the costs, but we expect them to be small relative to the size of a given company and proportional to that size, i.e., small companies should have few records to transfer and small transfer costs while large companies may have many records and larger costs.
4. This is a minor rule change and should have no significant fiscal impact on worker-leasing companies, insurers, or regulators. However, to the extent this rule helps to minimize dishonest practices within the worker-leasing industry, it will promote a better business climate for worker leasing companies and their clients.

Regarding OAR 436-105, Employer-at-Injury Program (numbering below corresponds to changes described under "Need for the Rule(s)"):

1. Documentation of transitional work is routine for almost all insurers and self-insured employers; we expect no significant fiscal impact due to this rule revision.

Statement of Need and Fiscal Impact

2. A literal reading of the current rule would cause an early end to Employer-at-Injury Program services if the worker is temporarily removed from work by his or her doctor. This was never the intent of the Department. This rule change should have a small positive fiscal impact on insurers, employers, and injured workers. Because Employer-at-Injury Program services are reimbursed from the Workers' Benefit Fund, this change may slightly increase payments from the Fund. Given the importance of early return to work in controlling workers' compensation costs, any increased use of the Employer-at-Injury Program should have a positive fiscal impact on the workers' compensation system as a whole.
3. By eliminating the automatic referral of certain disputes to the director for review, and instead reviewing only those cases in which the party or parties want review, the Department's administrative costs should decline slightly.
4. Broadening the definition of a qualified medical release is a substantial simplification of the Employer-at-Injury Program. This change should reduce insurers' and employers' administrative costs, expedite injured workers' return to work, and reduce medical providers' paperwork burdens. This change may increase use of the Employer-at-Injury Program services; to the extent that use does increase, the costs and benefits will be as described in #2 above.
5. This clarification of the impact of missed appointments on medical releases should help insurers and self-insured employers avoid a premature end to Employer-at-Injury Program services. To the extent premature termination of services can be avoided, this rule change would have the same costs and benefits as described in #2 above.

Administrative Rule Advisory Committee consulted:

OAR 436-009	November 18, 2002
OAR 436-050	February 13, 2003
OAR 436-105	February 25, 2003

/s/ John L. Shilts, March 13, 2003

Signature and Date

John L. Shilts, Administrator, Workers' Compensation Division

Printed name

Administrative Rules Unit, Archives Division, Secretary of State, 800 Summer Street NE, Salem, Oregon 97310.

EXHIBIT "A"
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 105
EMPLOYER-AT-INJURY PROGRAM

436-105-0001 Authority for Rules

The director has adopted OAR Chapter 436, Division 105 under the authority of ORS 656.622 and 656.726.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Adopted 8/14/01 as WCD Admin. Order 01-057, eff. 10/1/01

436-105-0002 Purpose of Rules

(1) These rules explain what assistance and reimbursements are available from the Employer-at-Injury Program, who is qualified, and how to receive assistance and reimbursements.

(2) The Employer-at-Injury Program encourages the early return to work of injured workers by providing incentives to employers who return their injured workers with open claims to transitional work.

(3) The Employer-at-Injury Program is an employer-option and employer-activated program, administered by the insurer at the time of injury. The program consists of Wage Subsidy, Worksite Modification, and Employer-at-Injury Program Purchases.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Amended and renumbered from OAR 436-110-0510(1st ¶), 8/14/01 WCD Admin. Order 01-057, eff. 10/1/01

436-105-0003 Applicability of Rules

(1) **OAR 436-105-0510(2)(c) applies to all individual Employer-at-Injury Programs which began on or after October 1, 2001.**

(2) **Except for OAR 436-105-0510(2)(c), t_[T]hese rules apply to all individual Employer-at-Injury Programs which began on or after [the effective date of these rules] June 8, 2003.**

[2)](3) Applicable to this chapter, the director may, unless otherwise obligated by statute, in the director's discretion waive any procedural rules as justice so requires.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Adopted 8/14/01 as WCD Admin. Order 01-057, eff. 10/1/01

Amended XX/XX/XX as WCD Admin. Order XX-XXX eff. XX/XX/XX

436-105-0005 Definitions

For the purpose of these rules, unless the context requires otherwise:

(1) "Administrator" means the Administrator of the Workers' Compensation Division, or the administrator's delegate for the matter.

(2) "Client" means a person to whom workers are provided under contract and for a fee on a temporary or leased basis.

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PROPOSED EMPLOYER-AT-INJURY PROGRAM RULES, MARCH 2003**

(3) "Director" means the Director of the Department of Consumer and Business Services, or the director's delegate for the matter.

(4) "Division" means the Workers' Compensation Division of the Department of Consumer and Business Services.

(5) "Employer-at-Injury" means the organization in whose employ the worker sustained the injury or occupational disease, or made the claim for aggravation.

(6) "Fund" means the Workers' Benefit Fund.

(7) "Premium" means the premium which results from calculating payroll multiplied by applicable rates of the employer's individual insurer multiplied by the employer's experience rating modification less any discount, assessments, surcharges, or taxes.

(8) "Regular employment" means the employment the worker held at the time of injury or the claim for aggravation.

(9) "Reimbursable wages" means the money rate paid a worker for services performed including paid leave, overtime, commission, and reasonable value of board, rent, housing, lodging, and similar advantage received from the employer, as determined by the division in accordance with OAR 436-060. Bonus pay shall be considered reimbursable only when provided as part of a written contract as a means to increase a worker's wages. Any other form of remuneration is not reimbursable.

(10) "Transitional Work" means temporary work with the employer-at-injury which is not the worker's full duty regular work and is assigned because the worker cannot perform full duty regular work. Transitional work must be within the worker's injury-caused limitations and may be created through modification of the worker's regular work, job restructuring, assistive devices, worksite modification(s), reduced hours, or reassignment to another job. Transitional work must be within the employer's course and scope of trade or profession.

(11) "Worker Leasing Company" means the person which provides workers, by contract and for a fee, as prescribed in ORS 656.850.

(12) "Work site" means a primary work area available for a worker to use to perform the required job duties. The work site may be the employer's, client's, or worker's premises, property, and equipment used to conduct business under the employer's or client's direction and control. A work site may include a worker's personal property or vehicle if required to perform the job.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Adopted 8/14/01 as WCD Admin. Order 01-057, eff. 10/1/01

436-105-0006 Administration of Rules

(1) Orders issued by the division to enforce ORS 656.622 or these rules are orders of the director.

(2) The department maintains the financial integrity of the fund and all reimbursement is subject to the availability of funds. If the funds are too low for all reimbursements, the director has the final authority to determine how the funds will be disbursed.

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(3) The director may use monies from the fund for activities to provide information about and encourage the reemployment of injured workers. A maximum of \$250,000 may be used in a fiscal year, July 1 to June 30. The director must approve all expenditures. Activities include, but are not limited to:

(a) Advertisements and promotion of reemployment assistance programs and associated production costs; and

(b) Public reemployment assistance program conferences and workshops.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Adopted 8/14/01 as WCD Admin. Order 01-057, eff. 10/1/01

436-105-0008 Reconsideration/Appeal to the Director

(1) The division will deny any reimbursement for Employer-at-Injury Program assistance it finds in violation of these rules. The division has the discretion to deny any reimbursement of Employer-at-Injury Program assistance it determines is not reasonable, practical, or feasible, or considers an abuse of the program.

(2) Parties directly affected by a division Employer-at-Injury Program decision may request a reconsideration by sending a written request for reconsideration to the administrator no later than 60 days after the date the decision is issued. Facsimiles that are legible and complete are acceptable and will be processed the same as originals. Reconsideration must precede a director's review.

(3) The request for reconsideration shall specify the reasons why the decision is appealed and may include additional documentation. No reconsideration shall be granted unless the request meets the requirements of this rule.

(4) The division will reconsider the decision [prior to a director's review] and [will] notify all directly affected parties of its decision [upon reconsideration] **in writing**.

[(5)] If, upon reconsideration, the division upholds the original decision, [t] **The affected parties may request a director's review by sending a written request no later than 60 days after the date the reconsideration was issued. The request shall specify the reasons why the decision is appealed and may include additional documentation.** [director's review shall begin].

[(6)] **(5)** The director may require any affected party to provide information or to participate in the director's review. If the party requesting the director's review fails to participate without reasonable cause as determined by the director, the director may dismiss the review.

[(7)] **(6)** The director's review decision will be issued in writing and all directly affected parties will be notified. The director's review decision is final and not subject to further review by any court or other administrative body.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Adopted 8/14/01 as WCD Admin. Order 01-057, eff. 10/1/01

Amended XX/XX/XX as WCD Admin. Order XX-XXX eff. XX/XX/XX

436-105-0500 Insurer Participation in the Employer-At-Injury Program

(1) When the employer-at-injury requests assistance, the insurer shall be an active participant in providing reemployment assistance. Participation includes issuing notices of the available assistance and administering the Employer-at-Injury Program as specified in these rules.

(2) The insurer shall notify the worker and employer-at-injury in writing of the assistance available from the Employer-at-Injury Program. A notice shall be issued:

(a) Upon acceptance or reopening of a non-disabling or disabling claim; and

(b) Within five days of a worker's first release for work after claim opening unless the release is for regular work.

(3) The notices of Employer-at-Injury Program assistance shall contain the following language:

(a) The notice to the worker shall appear in bold type as follows:

The Reemployment Assistance Program provides Oregon's qualified injured workers help with staying on the job or getting back to work. Because of your injury, your employer may be eligible for assistance to return you to transitional work through the Employer-at-Injury Program while your claim is open. Your employer may contact [insurer name and phone number].

(b) The notice to the employer-at-injury shall appear in bold type as follows:

Because of your worker's injury, you may be eligible for assistance through the Employer-at-Injury Program to return the worker to transitional work while the worker's claim is open. To learn more about the assistance available from the program, please call [insurer name and phone number].

(4) The insurer shall respond to the employer's request for assistance and administer the Employer-at-Injury Program according to these rules. The insurer shall assist the employer to:

(a) Obtain a **qualifying** medical release, **pursuant to section (6) of this rule**, [citing the injury-caused restrictions which prevent the worker from performing regular employment]from the medical service provider;

(b) Identify a transitional work position;

(c) Process employer Wage Subsidy requests specified in OAR 436-105-0520(1);

(d) Make Worksite Modification purchases as specified in OAR 436-105-0520(2);

(e) Make Employer-at-Injury Program purchases as specified in OAR 436-105-0520(3);
and

(f) Request Employer-at-Injury Program reimbursement from the division as specified in OAR 436-105-0540.

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(5) The insurer may use the Employer-at-Injury Program upon establishing the worker and employer meet the eligibility criteria stated in OAR 436-105-0510(1) and (2). [The insurer must possess all medical releases citing restrictions from the medical service provider.]

(6) For purposes of the Employer-at-Injury Program, medical releases must meet the following criteria:

(a) All medical releases [must state the worker's specific injury-caused restrictions, and]**must be dated and related to the accepted conditions of the claim**. The date the medical release is issued by the medical provider is considered the effective date if an effective date is not otherwise specified;

(b) [For Employer-at-Injury Program purposes, a medical release for "light work," "light duty," or "modified work," without other specific restrictions, are not considered restrictions unless the medical service provider references the Dictionary of Occupational Titles standards]**Two types of medical releases qualify under these rules:**

(A) A medical release that states the worker's specific restrictions; or

(B) A statement by the medical service provider that indicates the worker is not released to regular employment accompanied by an approval of a job description which includes the job duties and physical demands required for the transitional work;

(c) A medical release must cover any period of time for which benefits are requested, except as provided in subsection (f) of this [rule]**section**;

(d) A medical release with no specific end date expires in 30 days, **except medical releases that indicate the restrictions are permanent**;

(e) A medical release with a specific end date or follow-up medical appointment date expires on the end date, or the follow-up appointment date, if the worker does not return to the medical service provider for a follow-up appointment, **except as provided in subsection (f) of this section**; and

(f) [Once restrictions have been in place,]**I**[f **the worker misses** a follow-up medical appointment[is missed by the worker], **the medical release will lapse unless, within 14 days of the missed appointment**, [restrictions previously issued by] the medical service provider [will be allowed to remain in effect for up to 14 days from the date of the missed appointment]**provides a new medical release or a signed and dated statement that the previous medical release is still in effect**[if the worker subsequently attends a medical appointment].

(7) The insurer shall maintain all records of the Employer-at-Injury Program for a period of three years from the date of the last *Employer-at-Injury Program Reimbursement Request*. The division may request additional information from the insurer in order to perform and complete an audit. The insurer shall maintain the following information at the authorized claim processing location(s) for future audit by the division:

(a) The worker's claim file;

(b) Documentation from the worker's medical service provider that the worker is unable to perform regular employment due to the injury and dated copies of [the] **all** work releases from the worker's medical service provider;

(c) A legible copy of the worker's payroll records for the wage subsidy period as follows:

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(A) Payroll records shall state the dates (daily), hours worked, wage rate(s), and the worker's gross wages for the wage subsidy period;

(B) Payroll records shall state the wage rate or rates if the worker is paid by any method other than hourly wage. If only part of the period covered by the payroll record is for transitional work, the payroll record must be supplemented with documentation of how the worker's earnings were prorated for the Wage Subsidy; and

(C) If a partial day's reimbursement is requested after a worker is released for transitional work, or prior to returning from a medical appointment with a regular work release, documentation of the time of the medical appointment and hours and wages of transitional work shall be provided for those days.

(d) A legible copy of invoices, proof of payment, and proof of the delivery date of the item(s) for Worksite Modification purchases and Employer-at-Injury Program purchases; [and]

(e) Written justification for Worksite Modification as specified in OAR 436-105-0520(2)(f)[.]; **and**

(f) Documentation of the transitional work, which must include the start date, wage and hours, and a description of the job duties.

[~~(7)~~](8) The insurer may end the Employer-At-Injury Program at any time while the worker's claim is open. The insurer shall end the Employer-At-Injury Program when the worker or employer meet any of the end of eligibility criteria listed in OAR 436-105-0510(3).

Stat. Auth.: ORS 656.340, 656.622, 656.726(4)

Stats. Implemented: ORS 656.340, 656.622

Hist: Amended and renumbered, sections (4)-(7) from OAR 436-110-0540(2), (3), & (7), 8/14/01, WCD Admin. Order 01-057, eff. 10/1/01

Amended 12/11/02 as WCD Admin. Order 02-063 eff. 12/11/02 (Temp)

Amended XX/XX/XX as WCD Admin. Order XX-XXX eff. XX/XX/XX

436-105-0510 Eligibility and End of Eligibility for the Employer-at-Injury Program

(1) The eligibility criteria for an employer are:

(a) The employer has and maintains Oregon workers' compensation insurance coverage during and through the Employer-at-Injury Program period;

(b) The employer is the employer at injury as defined in OAR 436-105-0005;

(c) The employer is re-employing an eligible worker while the worker's claim is open; and

(d) The employer is not currently ineligible for Employer-at-Injury Program benefits under OAR 436-105-0560.

(2) The eligibility criteria for a worker are:

(a) The worker has an accepted Oregon compensable injury or occupational disease. Injuries covered by the Injured Inmate Law do not qualify;

(b) The worker has not returned to regular work under the most recent claim opening except when there is a release for regular work and the worker is subsequently **not** released for **regular** work [with restrictions] under the same claim opening; and

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(c) The [worker is released for work with cited restrictions from the] medical service provider [which prevent the worker from performing] **has not released the worker to perform** regular work.

(3) Reasons for ending Employer-at-Injury Program eligibility include the following, whichever occurs first:

(a) The worker or employer no longer meet the eligibility provisions stated in sections (1) and (2) of this rule. **A period of temporary total disability by itself does not end eligibility;**

(b) The worker **works beyond a medical release provided** [exceeds the hourly or physical restrictions cited] by the medical service provider;

(c) The worker's claim is closed;

(d) The worker's transitional work ends;

(e) The medical release lapses per OAR 436-105-0500([s]6);

(f) The worker's need for transitional work is no longer due to the compensable injury which gave cause for use of the Employer-at-Injury Program;

(g) The Employer-at-Injury Program reimbursement is requested; or

(h) Sanctions under OAR 436-105-0560 preclude eligibility.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Amended and renumbered from OAR 436-110-0520, 8/14/01, WCD Admin. Order 01-057, eff. 10/1/01

Amended XX/XX/XX as WCD Admin. Order XX-XXX eff. XX/XX/XX

436-105-0520 Assistance Available from the Employer-at-Injury Program

The Employer-at-Injury Program may be used only once per worker per claim opening, for a non-disabling claim or a disabling claim. If a non-disabling claim becomes a disabling claim after one year from the date of acceptance, the disabling claim is considered a new opening and the Employer-At Injury Program may be used again. The worker must return to transitional work in order for the employer to receive Employer-at-Injury Program assistance except as provided in paragraph (2)(c)(B) of this rule. Assistance available includes:

(1) Wage Subsidy provides 50 percent reimbursement of a worker's gross wages for transitional work. The wages must have been paid the worker. Wage Subsidy benefits are restricted to the following conditions:

(a) A Wage Subsidy is limited to a maximum duration of three consecutive months occurring between the dates of worker and employer eligibility and end of eligibility;

(b) A Wage Subsidy may not start or end with paid leave;

(c) Reimbursement is limited to wages for hours actually worked, or hours of paid leave;

(d) If the worker has hourly restrictions, reimbursable paid leave shall be limited up to the maximum number of hours of the worker's hourly restrictions. Paid leave exceeding the worker's hourly restrictions is not subject to reimbursement; and

(e) When a worker is released for regular work during the Wage Subsidy period, and the worker is subsequently released for transitional work under the same claim opening, the Wage

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Subsidy may continue until the end of the three consecutive month period. The wages earned during the time the worker was released for regular work are not subject to reimbursement.

(2) Worksite Modification means altering a work site by renting, purchasing, modifying, or supplementing equipment, or changing the work process to enable a worker to work within the stated specific work restrictions caused by the compensable injury. Maximum reimbursement is \$2,500. Worksite Modification assistance is limited to the following conditions:

(a) The worker's restrictions must be known on, or prior to, the date Worksite Modification purchases are initiated;

(b) The form of modification shall be determined based solely on the worker's inability to perform the job due to the stated specific work restrictions caused by the compensable injury. The insurer makes the approval/denial decision and may deny a worksite modification if it determines the modification will be of little or no use to the worker during the Employer-at-Injury Program;

(c) Modifications must be provided for and used by the worker during the Employer-at-Injury Program, except under the following conditions:

(A) The modification equipment had been ordered during the Employer-at-Injury Program, and documentation is provided that the equivalent modification item(s) were loaned to and used by the worker while the worker and employer were eligible for the Employer-at-Injury Program; or

(B) The employer can demonstrate that the modification(s) were provided in good faith and the worker refused to return to work;

(d) The maximum reimbursement for a chair is \$1000;

(e) Worksite modification items become the employer's property upon the end of the Employer-at-Injury Program, except for modification items unique to the worker, such as a custom-designed tool to adapt the worker's prosthesis to a job-related task. Such items become the worker's property; and

(f) Justification for a Worksite Modification must be documented and include a written statement of the worker's specific work restrictions from the medical service provider; identification of job duties which exceed the worker's stated limitations; and a statement of how the Worksite Modification overcame the worker's restrictions.

(3) Employer-at-Injury Program Purchases are limited to:

(a) Tuition, books, and fees for a class or course of instruction to update existing skills or to meet the requirements of the transitional work position. Maximum reimbursement is \$750. Tuition, books, and fees shall be provided under the following conditions:

(A) Instruction must be provided by an educational entity accredited or licensed by an appropriate body; and

(B) Costs for tuition, books, and fees may be fully reimbursed if the worker began participation in the class or course while eligible for the Employer-at-Injury Program. Those costs will not be reimbursed if the class or course began after eligibility for the Employer-at-Injury Program ended;

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(b) Tools and equipment required for the transitional work position limited to items mandatory for employment. Tools and equipment shall be provided under the following conditions:

(A) Purchases do not include items the worker possesses or duplicate Worksite Modification items;

(B) Tools and equipment may be rented or purchased;

(C) Tools and equipment that were purchased become the employer's property upon the end of the program;

(D) Tools and equipment are for future transitional work unless the tools and equipment are assigned to the worker due to the worker's injury-caused permanent limitations;

(E) The purchase of tools and equipment do not qualify for reimbursement if their use exceeds the worker's injury-caused [restrictions]**medical release**; and

(F) Maximum reimbursement is \$1000;

(c) Clothing required for the job, except clothing the employer normally provides or the worker already possesses. Clothing becomes the worker's property. Maximum reimbursement is \$400.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Amended and renumbered from OAR 436-110-0510, 8/14/01, WCD Admin. Order 01-057, eff. 10/1/01

Amended XX/XX/XX as WCD Admin. Order XX-XXX eff. XX/XX/XX

436-105-0530 Employer-at-Injury Program Procedures for Concurrent Injuries

(1) A worker is eligible for only one Employer-At-Injury Program at a time.

(2) When a worker in an Employer-at-Injury Program incurs a new compensable injury, transitional work for the first Employer-At-Injury is considered regular work for the second Employer-at-Injury Program.

(3) If the new injury [causes new restrictions which] makes the first Employer-at-Injury Program unsuitable, the worker may be eligible for a second Employer-at-Injury Program under the new injury.

(4) When the worker is no longer eligible for the second Employer-At-Injury Program, the first Employer-At-Injury Program may be resumed if the employer and worker still meet eligibility criteria under that claim.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Adopted 8/14/01 as WCD Admin. Order 01-057, eff. 10/1/01

Amended XX/XX/XX as WCD Admin. Order XX-XXX eff. XX/XX/XX

436-105-0540 Employer-at-Injury Program Reimbursement Procedures

(1) The insurer must receive all insurer required documentation for reimbursement from the employer within one year from the end of the Employer-at-Injury Program in order to qualify for reimbursement. The insurer shall date stamp each reimbursement request document with the receipt date.

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(2) The insurer may request Employer-at-Injury Program reimbursement only once per Employer-at-Injury Program. The insurer shall mail, send by facsimile, hand-deliver, or with prior division approval provide electronically, the request for reimbursement to the division within one year and 30 days from the end of the Employer-at-Injury Program on an *Employer-at-Injury Program Reimbursement Request*, Form 2360, published in Bulletin 260. Reimbursements may include Wage Subsidy, Employer-at-Injury Program Purchases, and Worksite Modification. An administrative cost factor shall be computed by the division and applied to each reimbursement request.

(3) An Employer-at-Injury Reimbursement Request must be a minimum of \$100, not including the administrative cost factor, to be subject to reimbursement.

(4) The insurer may send an *Employer-at-Injury Program Reimbursement Request* to the division when a claim was initially denied and was subsequently accepted after the Employer-at-Injury Program eligibility ended and more than one year and 30 days have passed. In that case, the insurer shall send a completed *Employer-at-Injury Program Reimbursement Request* to the division within 60 days of the first Order or Stipulation and Order accepting the claim. A copy of the Order accepting the claim, or Stipulation and Order accepting the claim, must be attached.

(5) Amended reimbursement requests must be sent to the division within one year and 30 days from the end of the Employer-at-Injury Program eligibility except as provided in section (7) of this rule. Wage Subsidy start and end dates may be amended only due to typographical errors, if satisfactory evidence of the error is provided. The insurer may not request additional administrative cost reimbursement for filing an amended reimbursement request.

(6) Amendments are to be made on a completed *Employer-at-Injury Program Reimbursement Request*, Form 2360. The amended reimbursement request must cite the corrected information with the statement "Amendment" written across the top of the form. The corrected information should be highlighted.

(7) When the division finds the insurer has submitted an *Employer-at-Injury Program Reimbursement Request* which is incomplete or contains an error, the division may return the form to the insurer for correction. When this occurs, the insurer has 60 days from the date the insurer receives the reimbursement request, or one year and 30 days from the end of Employer-at-Injury Program eligibility, whichever is greater, to make the corrections and return the corrected form to the division.

(8) The insurer shall not use Employer-at-Injury Program costs subject to reimbursement for rate making, individual employer rating, dividend calculations, or in any manner that would affect the employer's insurance premiums or premium assessments with the present or a future insurer. The insurer must be able to document that Employer-at-Injury Program costs do not affect the employer's rates or dividend.

(9) If a Preferred Worker employed by an eligible employer with active Premium Exemption incurs a new injury, the claim is subject to Claim Cost Reimbursement under OAR 436-110. If the worker subsequently enters an Employer-at-Injury Program, program costs are to be separated from claim costs and will not be reimbursed as claim costs.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Amended and renumbered, sections (1), (2), (5), (6), (8), & (9) from OAR 436-110-0540(8), (9), (10), (12), & (13), 8/14/01, as WCD Admin. Order 01-057, eff. 10/1/01

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436-105-0550 Audits

(1) Insurers and employers are subject to periodic program and fiscal audits by the division. All reimbursements are subject to subsequent audits, and may be disallowed on any of the grounds set forth in these rules. Disallowed reimbursements must be repaid to the department.

(2) When conflicting documentation exists, the division will utilize a preponderance of evidence standard to decide eligibility for reimbursement and if there is no clear preponderance, reimbursement will be allowed.

(3) The division reserves the right to visit the work site to determine compliance with these rules.

Stat. Auth.: ORS 656.455, 656.622, 656.726(4), 731.475
Stats. Implemented: ORS 656.455, 656.622, 731.475
Hist: Adopted 8/14/01 as WCD Admin. Order 01-057, eff. 10/1/01

436-105-0560 Sanctions

(1) Any person who knowingly makes a false statement or misrepresentation to the director or an employee of the director for the purpose of obtaining any benefits or reimbursement from the Employer-at-Injury Program or who knowingly misrepresents the amount of a payroll, or knowingly submits a false payroll report, is subject to penalties under ORS 656.990.

(2) Reasons for the director to sanction an insurer, self-insured employer, employer or their representative include, but are not limited to:

(a) Misrepresenting information in order to receive Employer-at-Injury Program assistance;

(b) Making a serious error or omission which resulted in the division approving reimbursement in error;

(c) Failing to respond to employer requests for assistance or failing to administer Employer-at-Injury Program assistance; or

(d) Failure to comply with any condition of these rules.

(3) Sanctions by the director may include one or more of the following:

(a) Ordering the person to take corrective action within a specific period of time;

(b) Ordering the person being sanctioned to repay the department all, or part, of the monies reimbursed, with or without interest at a rate set by the department. The order may include the department's legal costs;

(c) Ending the employer's eligibility to use the Employer-at-Injury Program for a specific period of time; and

(d) Pursuing civil penalties under ORS 656.745 or criminal action against the party.

Stat. Auth.: ORS 656.622, 656.726(4)
Stat. Implemented: ORS 656.622, 656.745, 656.990
Hist: Adopted 8/14/01 as WCD Admin. Order 01-057, eff. 10/1/01

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436-105-0570 Issuance/Service of Sanction or Penalty Orders

(1) When a sanction or penalty order is assessed as provided in OAR 436-105-0560, the order shall be served to the party.

(2) The director shall serve the order by delivering a copy to the party in the manner provided by Oregon Rules of Civil Procedure 7D, or by sending a copy to the party by certified mail with return receipt.

Stat. Auth.: ORS 656.268, 656.622, 656.726(4)

Stats. Implemented: ORS 656.268, 656.622, 656.704, 656.726

Hist: Adopted 8/14/01 as WCD Admin. Order 01-057, eff. 10/1/01