

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION



**Workers' Benefit Fund Assessment
PROPOSED Oregon Administrative Rules
Chapter 436, Division 070, Rule 0020**

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Proposed revisions are marked as follows:

Deleted text has a "strike-through" style, as in ~~Deleted~~
Added text is bold and underlined, as in **Added**

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
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RULE CAPTION

Proposed amendment of workers' compensation rules affecting injured workers, employers, medical providers, insurers, and others.

May 22, 2006	10:00 a.m.*	Room 260 (2 nd Floor, Labor & Industries Building) 350 Winter Street NE, Salem, Oregon	Fred Bruyns
Hearing date	Time	Location	Hearings Officer

***NOTE: The hearing will begin at 10:00 a.m. and end when all present who wish to testify have done so. Written testimony will be accepted through May 26, 2006.**

**The site of the hearing is accessible for individuals with mobility impairments.
 Auxiliary aids for persons with disabilities are available upon advance request.**

RULEMAKING ACTION

ADOPT: None

AMEND: OAR

436-010-0005	436-010-0230	436-010-0275	436-055-0070	436-060-0035
436-010-0210	436-010-0240	436-010-0280	436-055-0085	436-060-0095
436-010-0220	436-010-0265	436-055-0008	436-055-0110	436-070-0020

REPEAL: 436-055-0120

ORS 656.726(4)
 Stat. Auth.

Other Authority

ORS chapter 656, primarily: ORS 656.704, Enrolled House Bill (HB) 2091 – Oregon Laws (OL) 2005, ch. 26;
 ORS 656.325, Enrolled SB 311 – OL 2005, ch. 675
 Stats. Implemented

RULE SUMMARY

Proposed substantive amendments affect:

- (OAR 436-010-0220) Referrals to a specialist physician by an attending physician or authorized nurse practitioner – the authority of the specialist physician to provide services and treatment without specific authorization by the attending physician or nurse practitioner (specialist physician is defined in OAR 436-010-0005(38));
- (OAR 436-010-0230) Informed consent for attendance by an employer representative at a worker's medical exam – requirement that the consent form be written in a way that enables the worker to understand it; the worker has the right to refuse such attendance;
- (OAR 436-010-0230) Reimbursement for medications dispensed by physicians and authorized nurse

Notice of Proposed Rulemaking Hearing

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- practitioners – removal of the 10-day supply limitation;
- (OAR 436-010-0265) Independent medical examinations (IMEs) – criteria for addition to the list of qualified physicians; exemptions; criteria for removal from list; training curriculum requirements;
- (OAR 436-010-0265) IMEs - consequences for failing to use a qualified provider from the director’s list or obtaining more than three examinations without the director’s approval;
- (OAR 436-010-0265) Seven-day time frame for IME provider to send examination report to the insurer – elimination of time frame;
- (OAR 436-010-0265 & 436-060-0095) Survey of injured worker’s IME experience – requirements that the insurer send an IME survey form: (1) to the worker with the appointment notice and (2) to the IME provider with the invasive procedure authorization form; requirement that the IME provider give a survey form to the worker to complete after the examination; the survey to be a postage-paid (by the State of Oregon) self-mailer, for delivery to the Workers’ Compensation Division;
- (436-010-0275) Insurer-managed care organization (MCO) communication – requirement that the insurer pass along information to the MCO if the information was sent to the insurer in error;
- (OAR 436-055-0008) Hearings on workers’ compensation matters currently processed by the Office of Administrative Hearings – transfer to the Workers’ Compensation Board.
- (OAR 436-055-0085) Training for renewal of claims examiner certification - for director approval, a training curriculum does not need to cover all of the components listed in OAR 436-055-0085(2);
- (OAR 436-070-0020, making some temporary changes permanent) Failure to File Notice or Notice of Audit Findings – criteria for issuance of a Failure to File Notice or Notice of Audit Findings.

Request for public comment: The Workers’ Compensation Division requests public comment on whether other options should be considered for achieving the rules’ substantive goals while reducing the negative economic impact of the rules on business.

Address questions to:

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

Proposed rules are available on the Workers’ Compensation Division’s Web site:

<http://wcd.oregon.gov/policy/rules/rules.html#proprules>

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

May 26, 2006

Last Day for Public
Comment

John L. Shilts

Authorized Signer and Date

4-13-06

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.

Distribution:

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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
Agency and Division

OAR CHAPTER 436
Administrative Rules Chapter Number

In the Matter of
The Amendment of OAR:)
436-010, Medical Services)
436-055, Certification of Claims Examiners)
436-060, Claims Administration)
436-070, Workers' Benefit Fund Assessment)

Rule Caption:

Proposed amendment of workers' compensation rules affecting injured workers, employers, medical providers, insurers, and others.

Statutory Authority: ORS 656.726(4)

Other Authority:

Statutes Implemented: ORS chapter 656, primarily: ORS 656.704, Enrolled House Bill (HB) 2091 – Oregon Laws (OL) 2005, ch. 26; ORS 656.325, Enrolled SB 311 – OL 2005, ch. 675

Need for the Rule(s): The majority of the proposed rule changes are for implementation of 2005 legislation, especially Senate Bill 311, affecting independent medical examinations. Section 5 of SB 311 becomes operative on July 1, 2006. The agency proposes additional changes based on recommendations from customers and stakeholders, experience with disputed issues, and the goals of regulatory streamlining.

Documents Relied Upon, and where they are available: "Issues" documents as presented to stakeholder advisory committees; advisory committee meeting minutes; written advisory committee input in response to the agency's request for input on potential amendments.

Fiscal and Economic Impact, including Statement of Cost of Compliance: (References to "insurer" in this analysis mean the workers' compensation insurer or self-insured employer; "agency" means the Department of Consumer and Business Services and the Workers' Compensation Division; "workers' compensation system" means the agency, employers, injured workers, insurers, medical providers, vocational providers, and others in any way involved in or affected by workers' compensation laws and rules.)

The following is a list of significant changes and their estimated fiscal and economic impact on persons and organizations affected by proposed changes to chapter 436:

- **(OAR 436-010-0220) Referrals to a specialist physician by an attending physician or authorized nurse practitioner – the authority of the specialist physician to provide services and treatment without specific authorization by the attending physician or nurse practitioner**

The proposed rule change does not affect common industry practices. However, some recently disputed cases reflect uncertainty about the authority of specialist physicians. The agency projects this clarification will not have a significant fiscal impact for insurers or for medical providers. To the extent this clarification prevents an acceleration of litigation, it will avert an increase in litigation costs within the workers' compensation system.

- **(OAR 436-010-0230) Informed consent for attendance by an employer representative at a worker's medical exam – requirement that the consent form be written in a way that enables the worker to understand it; the worker has the right to refuse such attendance**

The proposed rule change does not affect common industry practices. Most insurers recognize and take steps to overcome language and cultural barriers.

The agency projects that this rule change is cost-neutral. Any increased costs associated with this rule change should be offset by enhanced efficiency in claims handling and reduced litigation.

- **(OAR 436-010-0230) Reimbursement for medications dispensed by physicians and authorized nurse practitioners – removal of the 10-day supply limitation**

The agency projects that the proposed rule change will have a minor negative fiscal impact on Oregon pharmacists and a minor (equivalent) positive impact on Oregon physicians and nurse practitioners. At a 2003 Pharmacy Fee Advisory Task Force meeting, a pharmacy representative estimated that workers' compensation pharmacy represented about 1% of total pharmacy in Oregon. According to expert advice from members of the rulemaking advisory committee, probably only a small number of medical providers will choose to dispense medications, and then generally limit dispensing to a few drugs for inflammation and pain control. **Therefore, the agency projects** the extent of any impact to be less than 1/10th of one percent of pharmacy sales.

Insurers who use pharmacy benefit managers (PBMs) may incur some increased costs due to physician dispensing, to the extent their PBMs bill at less than 88% of the average wholesale price under OAR 436-009-0090. **The agency projects** that such impact will be minor, but cannot project specific costs because we do not know how much physician dispensing will occur and whether affected workers will (later in the claim) use the PBM services offered.

The proposed rule change will reduce out-of-pocket expenses for injured workers who obtain medications directly from their physicians. Reportedly, some workers do not fill their prescriptions at pharmacies because they cannot afford to pay for the drugs out-of-pocket. Lack of appropriate medication affects treatment outcomes. To the extent the proposed change will encourage early treatment, it should improve outcomes and reduce overall medical and claim costs for insurers.

The agency projects that the proposed change will have a small positive fiscal and economic impact on the workers' compensation system as a whole.

- **(OAR 436-010-0265) Independent medical examinations (IMEs) – criteria for addition to the list of qualified physicians; exemptions; criteria for removal from list; training curriculum requirements**

ORS 656.325, as revised by Enrolled Senate Bill 311 (2005), requires the director to develop training requirements and educational materials for IME providers. Private companies and the agency will provide training required for a provider to be added to the director's list of authorized IME providers. The cost for training now available is \$0 to \$325, though the higher dollar amount is for a two-day educational conference*, of which IME training is just one component. In 2004, the agency identified 407 IME providers for the purpose of a survey, but the true number of IME providers for Oregon workers is likely closer to 500. If the average cost of initial training is \$100, the dollar cost to providers will be approximately \$50,000. In addition, providers will have to take about four hours away from their practices, though some training is offered in the evening or on videotape. At \$100 per hour for time away, the cost for 500 IME providers would be \$100 x 4 hours x 500 = \$200,000. The agency will require continuing education for IME providers, but the time and extent of such training will vary depending on whether relevant laws and rules are changed. The options for continuing education will be less costly and less demanding on time away from medical practice, in part because pre-recorded and possibly web-based training will be available. The annual cost of continuing education should be less than \$50,000.

*The May 2006 educational conference will be presented by the Workers' Compensation Division and the International Workers' Compensation Foundation, a nonprofit corporation dedicated to workers' compensation research and education. 19 providers have registered as of 3/27/06. Prior to 4/1/06, the cost is \$225. After 3/31/06, the cost is \$275. Late registration cost is \$325.

The agency projects direct and indirect dollar cost to IME providers for initial IME training of approximately \$250,000 during the first year, and no more than \$50,000 per year in subsequent years. With the exception of the educational conference, the agency will not charge for training. Other training providers to date are themselves Oregon medical providers or associations of providers; for these trainers the fiscal impact may be positive, depending on the trainer's cost of providing the training.

The agency projected in its analysis of Senate Bill 311 (when SB 311 was being considered by the Oregon Legislature) increased agency costs for administration of IME programs of \$525,608 for the 2005-07 biennium and \$635,090 for the 2007-09 biennium.

- **(OAR 436-010-0265) Independent medical examinations (IMEs) - consequences for failing to use a qualified provider from the director's list or obtaining more than three examinations without the director's approval**

The proposed rule changes will raise costs for insurers that do not comply with statutory limitations on independent medical examinations, because:

- a) In some cases, the claims processor may not be allowed to use an IME report to make decisions about the claim. However, the fiscal impact is limited, because the IME report may be used unless someone objects to its use and the director then finds that the insurer violated ORS 656.325(1).
- b) DCBS may issue civil penalties to insurers who violate ORS 656.325(1). ORS 656.745 provides for penalties up to \$2,000 per violation and up to \$10,000 in aggregate for a three-month period.

The agency projects that the increased costs for Oregon insurers who do not comply with ORS 656.325 will be offset by:

- a) Use of trained and authorized IME providers, with improved IME reports;
- b) Increased compliance with statutory IME limits.

- **(OAR 436-010-0265) Seven-day time frame for IME provider to send examination report to the insurer – elimination of the time frame**

The agency is rarely asked to enforce the existing time frame. Market forces will favor IME providers who report examination results to insurers within reasonable time frames.

The agency projects that this proposed rule change will have no fiscal or economic impact on any party.

- **(OAR 436-010-0265 & 436-060-0095) Survey of injured worker's IME experience – requirements that the insurer send an IME survey form: (1) to the worker with the appointment notice and (2) to the IME provider with the invasive procedure authorization form; requirement that the IME provider give a survey form to the worker to complete after the examination; the survey to be a postage-paid (by the State of Oregon) self-mailer, for delivery to the Workers' Compensation Division**

The agency will bear the costs of printing the survey and distribution to insurers and medical providers upon request. We estimate agency costs to be no more than \$5,000 annually.

Insurers must include the survey with each appointment notice (for the worker) and with each invasive procedure authorization form (for the medical provider). Based on information obtained from insurers and agency testing of mailing weights, inclusion of the survey with the appointment notice will sometimes increase mailing weight to greater than 1 oz (but less than 2 oz), depending on whether the appointment notice is printed on one or two sheets of paper. Some insurers may be able to hold mailings to one ounce by printing the appointment notice on one sheet of paper, front and back. However, the survey will potentially increase the cost of each mail piece by \$0.24 (the same postage increase whether regular or certified mail). 15,000 (estimated annual) IMEs x \$0.24 = \$3,600 annually.

We estimate a handling cost of \$0.25 per examination for insurers and an equal amount for IME providers. This would entail a cost to insurers of \$0.25 x 15,000 (estimated annual) IMEs = \$3,750 annually and a cost to IME providers of \$3,750 annually.

The agency projects that the proposed rule changes would increase postage and handling costs for insurers and medical providers by approximately \$11,100.

A key purpose of the survey is to gather data needed to monitor the effects of legislative reform. In addition, because the worker's evaluation of his or her IME experience will be mailed to the agency, use of the IME survey form may promote improvements in the quality of IMEs. Improvements could offset some or all of the survey costs by improving cooperation with the IME process and reducing litigation.

The agency projects that this proposed rule change would increase costs for insurers and medical providers by no more than the amounts listed above, and that the net economic impact to the workers' compensation system may be neutral or positive.

- **(436-010-0275) Insurer-managed care organization (MCO) communication – requirement that the insurer pass along information to the MCO if the information was sent to the insurer in error**

The agency projects that this proposed rule change will not have a significant fiscal impact on any party.

- **(OAR 436-055-0008) Hearings on workers' compensation matters currently processed by the Office of Administrative Hearings – transfer to the Workers' Compensation Board**

Proposed rules do not substantially alter the actions required of the parties to a hearing.

The agency projects that this proposed rule change will not have a significant fiscal impact on any party.

- **(OAR 436-055-0085) Training for renewal of claims examiner certification - for director approval, a training curriculum does not need to cover all of the components listed in OAR 436-055-0085(2)**

The agency projects that this proposed rule change will have a small positive fiscal impact on companies that provide training to claims examiners and to insurers who provide training in-house.

- **(OAR 436-070-0020, making some temporary changes permanent) Failure to File Notice or Notice of Audit Findings – criteria for issuance of a Failure to File Notice or Notice of Audit Findings**

The proposed change is important for the efficient administration of the Workers' Benefit Fund assessments collection program.

The agency projects that this proposed rule change will not have a significant fiscal impact on any party.

- **The agency estimates that additional proposed rule changes will not have any significant fiscal or economic impact on any persons or businesses, including small businesses.**

Cost of compliance effect on small businesses:

Identify the types of businesses and industries with small businesses subject to the proposed rule:

Medical providers who perform IMEs for Oregon injured workers.

Estimated number of small businesses subject to the proposed rule:

The agency does not have an exact count of medical providers in Oregon. Our data system only includes medical providers required to carry workers' compensation insurance and thus excludes sole proprietors who do not elect to be covered. However, based on available information, we estimate the number of small medical providers exceeds 8,200.

Describe the projected reporting, record-keeping and other administrative activities required for compliance with the proposed rule, including costs of professional services

Record-keeping: The proposed rule changes do not impose record-keeping requirements. However, although the revised IME laws and related rules do not specify how medical offices are to keep track of staff who are authorized to provide IMEs, most offices will maintain records in order to monitor their own compliance with ORS 656.325(1). The agency will publish a list of authorized IME providers to its Web site.

Reporting: The proposed changes will require reporting of IME training attendance to the agency. The agency will use this information to verify completion of the training required for providers to be added to the director's list of authorized providers under ORS 656.325(1).

Administrative activities: The proposed changes would increase administrative activities related to handling of the IME survey, as well as the use of professional services in the form of IME training necessary to be added to the list of authorized IME providers under ORS 656.325(1).

Identify the equipment, supplies, labor and increased administration required for compliance with the proposed rule:

Equipment: The proposed rule changes do not require equipment purchases or modifications.

Supplies: The proposed rule changes do not require increased purchase of supplies.

Labor: The proposed rule changes affect labor costs indirectly, by requiring medical providers to obtain IME training, and such training may require time away from the medical practice.

Increased administration: The proposed rule changes may result in some increased costs for administration in medical offices, primarily in order to monitor staff compliance with IME training requirements.

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

Representatives from small businesses participated in the stakeholder advisory committee. Small businesses affected by these rules are primarily medical providers.

Reduction of economic impact on small businesses:

After considering advice from the rulemaking advisory committees and the available data, the agency finds no basis to say that these impacts would be “significantly adverse” (under ORS 183.540), but we invite public testimony on the probable extent of the impacts.

Administrative Rule Advisory Committee consulted:

Yes. The agency met with committees on February 24, 2006 and March 3, 2006 to discuss potential changes to OAR 436-010, 436-055, and 436-060. The agency conducted a telephone, e-mail, and facsimile survey of an advisory committee for OAR 436-070 during March 2006.

John L. Shilts *4-13-06*

Signature and Date

John L. Shilts, Administrator, Workers’ Compensation Division

Printed name

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
WORKERS' BENEFIT FUND ASSESSMENT**

436-070-0020 Assessments: Manner and Intervals for Filing and Payment

(1) Every employer must compute the total assessment amount due for each employee by multiplying the assessment rate determined in OAR 436-070-0010 by the number of hours or parts of an hour the employee worked in the pay period.

(a) If actual hours worked are not tracked, an employer may either calculate the assessments using a flat rate, use contract information stating the number of hours an employee works, or come up with a reasonable method for calculating hours worked. If the flat rate method is used, the calculation must be based on 40 hours per week for employees paid weekly or biweekly, or 173.33 hours per month for employees paid monthly or semi-monthly.

(b) The employer will retain from the moneys earned by each employee one half (1/2) of the amount due. In addition, the employer will be assessed an amount equal to the amount retained from each employee.

(2) Every employer must file a report of employee hours worked and remit amounts due upon a combined tax and assessment report form prescribed by the Department of Revenue. The report must be filed with the Department of Revenue:

(a) At the times and in the manner prescribed in ORS 316.168 and 316.171; or

(b) Annually as required or allowed pursuant to ORS 316.197 or 657.571.

(3) For employers required to report quarterly, reports and payments are due on or before the last day of the first month after the close of each calendar quarter. For employers that report annually, reports and payments are due on or before the last day of January following the close of each calendar year.

(4) Employers who fail to timely and accurately file and remit assessments may be charged interest on all overdue balances at the rate established by ORS 82.010 and may be assessed civil penalties in accordance with OAR 436-070-0050.

(5)~~(a)~~ **(a)** If an employer fails to file a report or the director determines, based on the available data, that the report filed understates ~~and remit assessments due timely and accurately,~~ the director may send to the employer a written Failure to File Notice or Notice of Audit Findings. The notice will include a warning that failure to timely and accurately resolve all issues addressed in the written notice may result in the imposition of a civil penalty. The director may coordinate with the Department of Revenue and Employment Department to provide written notice of failure to file.

~~(a)~~**(b)** Within 30 days of the Failure to File Notice or the Notice of Audit Findings, the employer must file an accurate report and remit the assessments due, or otherwise resolve to the satisfaction of the director all issues identified in the written notice. If an employer fails to comply with the notice, the director may estimate the assessments due, including penalties and interest, and send to the employer a Notice of Estimation.

~~(b)~~**(c)** Within 30 days of the Notice of Estimation, the employer must pay the director's estimated assessment or file and remit accurate assessment due. If the employer fails to comply with the notice, the director may send to the employer an Order of Default assessing all amounts

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
WORKERS' BENEFIT FUND ASSESSMENT

due as calculated by the director.

~~(e)~~(d) Within 30 days of the Order of Default, the employer must remit the estimated assessment due, unless the order is timely appealed as provided in OAR 436-070-0008.

(6) Employers or the director may initiate activity to resolve reporting errors, omissions, or discrepancies for a period not to exceed the current calendar year plus three prior calendar years. No calendar year limitation applies to cases involving fraud.

(7) When the director determines that the department has received moneys in excess of the amount legally due and payable or that it has received moneys to which it has no legal interest, the director will refund or credit the excess amount. For amounts less than \$20, the director will refund to employers the excess amount only upon receipt of a written request from the employer or the employer's legal representative.

Stat Auth: ORS 656.506 and 82.010
Stats. Impltd: ORS 656.506 and 293.455445
Hist: Filed 6/30/83 as WCD Admin. Order 3-1983, eff. 7/1/83
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