

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION

PROPOSED OREGON ADMINISTRATIVE RULES

CHAPTER 436, DIVISION 001  
PROCEDURAL RULES GOVERNING RULEMAKING AND HEARINGS

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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 Oregon Administrative Rules, chapter 436, division:	)	
	)	
001, Procedural Rules Governing Rulemaking and Hearings	)	SUMMARY OF
105, Employer-at-Injury Program	)	TESTIMONY AND
110, Preferred Worker Program	)	AGENCY RESPONSES
120, Vocational Assistance to Injured Workers	)	

This document summarizes 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 Oregon Bulletin dated April 1, 2005. On April 22, 2005, a public rulemaking hearing was held as announced at 10 a.m. in Room F of the Labor and Industries Building, 350 Winter Street NE, Salem, Oregon 97301-3879. Fred Bruyns, Rules Coordinator, acted as presiding officer. Business Support Services audio-recorded the hearing and created a written transcript. The record was held open for written comment through April 29, 2005.

Exhibit #	Oral testimony received from:
14A	Gerald Rutherford, Workers’ Compensation Division
14B	Arin J. Carmack, Cardinal Services, Inc.
14C	Robert J. Malone, Liberty Northwest Insurance
14D	Jennifer O. Frank, Career Transitions
14E	Shirley L. Butcher, SAFECO Insurance

Exhibit #	Written testimony received from:
1	Gerald Rutherford, Workers’ Compensation Division
2	Jennifer Frank, Career Transitions
3	Robert J. Malone, Liberty Northwest Insurance Suzanne Barr, Liberty Northwest Insurance
4	Arin J. Carmack, Cardinal Services, Inc.
5	Grace Smith, Oregon Association of Rehabilitation Professionals
6	Jennifer O. Frank, Career Transitions
7	Linda Jefferson, Oregon Self-Insurers Association
8	Linda Jefferson, City of Portland
9	Carmen Jones, Legacy Health Systems
10	Lisa Wilch, SAIF Corporation
11	Lisa Wilch, SAIF Corporation
12	Shirley L. Butcher, SAFECO Insurance
13	Karlene Westerlund, SAIF Corporation

SUMMARY OF TESTIMONY AND AGENCY RESPONSES  
Oregon Administrative Rules, Chapter 436, – public hearing April 22, 2005

The following is a summary of the testimony received and the agency's responses to that testimony.

**OAR 436-105 (general comment) Exhibit #8, 12, 14C**

**Testimony:** The changes recommended should make this program easier to use and administer. These rule revisions generally reflect discussions by the Management Labor Advisory Committee.

**Response:** Thank you for your testimony.

**OAR 436-105-0500(6)(e) & (f) Exhibit #1, 14A**

**Testimony:** In order to prevent a lapse in a continuous medical release, the medical provider should have 14 days from a missed appointment or specific end date to provide a new medical release or a statement that the previous release is still in effect. With the current rule language, only missed appointments allow the 14-day period. The division proposes the following additional amendments to rule 0500:

(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) If the worker misses a follow-up medical appointment, the medical release will lapse ] unless, within 14 days of the **specific end date** or missed appointment, the medical service provider provides a new medical release or a signed and dated statement that the previous medical release is still in effect;

**Response:** The Workers' Compensation Division (WCD) has found that the wording of these two subsections in the current rules does not achieve the desired outcome, as it pertains to continuous medical releases. WCD wants the worker's medical service provider to have 14 days from a missed appointment or specific end date to provide a new medical release or statement that the previous release is still in effect to prevent a lapse in continuous medical releases. With the current rule language, only missed appointments allow the 14-day period. OAR 436-0500(6)(e) will be reworded to achieve the desired outcome and subsection (f) will be deleted.

**OAR 436-105-0500(6)(g) Exhibit #13**

**Testimony:** The proposed rules seem to require the worker to **return** to the provider to get continued work releases and **return** to the referring medical provider after completing treatment with the referral doctor. We recommend that the rules allow the worker to get an updated written work release and not force the worker to return to the doctor every time, as this could cause some unnecessary medical costs. We recommend the following changes:

(g) If the worker's medical service provider refers the worker to another medical service provider for treatment, restrictions specified in the medical release in effect at the time of the referral will not expire until the worker **obtains a continued or updated work release from the** ~~returns to the~~ attending physician, authorized nurse practitioner, or primary care physician with a managed care organization, except:

(A) The insurer may accept updated restrictions and releases from the medical service provider to whom the worker is referred except for a release to regular work, and

(B) If the worker does not ~~return~~ **obtain a continued or updated work release [to the referring] from the attending physician, authorized nurse practitioner, or primary care physician with a managed**

## SUMMARY OF TESTIMONY AND AGENCY RESPONSES

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care organization ~~medical service provider~~ within 30 days from the last referral appointment, the medical release will expire on the date of the last treatment with the referral medical service provider.

**Response:** The suggested wording changes are in keeping with the desired outcome for maintaining continuous releases without requiring the worker to return to the medical service provider. The permanent rule language will include the suggested changes.

### **OAR 436-105-0520(1)(a)** *Exhibit #9*

**Testimony:** Although 66 work days may give employers a higher reimbursement, not many payroll systems are set up to calculate based on days. To calculate a daily rate, we would need to hand calculate every day for the entire 66 workdays and then determine the wages for each workday. In addition, this change does not take into consideration the employer that has varying shifts, shift differentials, varying workdays, etc. I do not believe that the intent of the EAIP program was to make the reimbursement request a lengthy process. It was to entice employers to return injured workers to work. With these changes, the process would be too cumbersome for many employers.

**Response:** The Management Labor Advisory Committee proposed this rule change after conducting a study of return-to-work programs. Their stated purpose was to encourage and support return to work with the employer at injury for as many workers as possible. MLAC proposed that employers be able to combine multiple periods of transitional work to receive the number of days allowed by rule in the aggregate, instead of the employer selecting the three-month period when they would get the most benefit. After considering several options the external advisory committee recommended allowing a maximum wage subsidy of 66 workdays within a two-year period. Sixty-six workdays is the same as the maximum allowed in the current rules for a worker who works five days per week for three months. The rule as proposed gives the employer a great deal of latitude in selecting which days or weeks to include in the EAIP. Of course the employer will have to provide evidence of which days were work days in a week if the employer wants fewer than 7 days counted against the 66 work-day maximum.

The division believes that the proposed rule change will benefit employers and meet MLAC's expectations.

### **OAR 436-105-0520(3)** *Exhibit #13*

**Testimony:** This rule section is too specific and should allow for any materials required for the worker to participate in the skill building class or course (i.e.: videos, CD, DVD, audio etc). We recommend the following changes:

**436-105-0520 (3) (a)** Tuition, books, and fees, and/or materials ~~for~~ required for a class or course of instruction to **enhance an** [update] existing skill[s] or **develop a new skill** [to meet the requirements of the transitional work position] **when skills building is used as transitional work or when required to meet the requirements of the transitional work position.** Maximum reimbursement is [\$750] **\$1,000.** Tuition, books, and fees shall be provided under the following conditions:

**Response:** There are times when taking a class or course of instruction might require floppy disks, CDs or other required materials. The rule currently does not specifically address this but only states that books would be reimbursed. The intent of the program is to reimburse for those things necessary for taking the class or coursework. The suggested change will be incorporated in the permanent rules. OAR 436-105-0520(3)(B) will also be changed to reflect the new wording.

SUMMARY OF TESTIMONY AND AGENCY RESPONSES  
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**OAD 436-110 (general comment) *Exhibit 8, 14C***

**Testimony:** These rule revisions generally reflect discussions by the Management Labor Advisory Committee.

**Response:** Thank you for your testimony.

**OAD 436-110-0002(3) *Exhibit #10***

**Testimony:** We suggest the language say “The employer-at-injury may also request reemployment assistance to modify the worker’s regular employment or develop a suitable, new employment”.

**Response:** The rule language as proposed is written as it is to cover several types of request for services that the employer at injury can make. One request could be to modify the worker’s regular employment as you suggested, or the request might be for Premium Exemption and Wage Subsidy for the regular employment that has already been substantially modified through job-duty changes. It is certain that services for regular employment will only be provided if the job is modified or for a new job. The proposed rule language will be retained.

**OAD 436-110-0320 *Exhibit #10***

**Testimony:** There is a statement “the rule does not apply to employer activated assistance”. How would the employer at injury know if a worker was eligible for PWP benefits? Wouldn’t the worker have to possess an identification card in order for the employer to access the program? Should you issue a card indicating there is a timeframe for the employer at injury to access the program – possibly similar to the eligibility card?

**Response:** The division will have no way of knowing when an injured worker is eligible for services prior to claim closure, when the worker settled the claim with a CDA, or when the claim closed with a permanent partial disability award and no Preferred Worker Card was issued because of information submitted by the insurer on the 1503 form at closure. The proposed rules for employer-at-injury use rely on the employer contacting the Preferred Worker Program when they are proposing a return to regular employment or new job for one of their injured workers who has permanent injury-caused-work restrictions. Premium Exemption and Wage Subsidy are approved at the same time with one agreement form, and no card is needed. It may help if the insurer notice to the employer at injury required in OAD 436-110-0240 includes the requirement that requests for assistance be made within 180 days of the worker’s claim closure date. That wording will be added to the permanent rules.

**OAD 436-110-0326(1) *Exhibit #10***

**Testimony:** This rule implies the employer can develop a physically suitable position through use of the employer activated PWP benefits and the worker can refuse to accept it. If the worker refuses to sign the agreement, the employer at injury cannot access PWP benefits. Is that the intent of the rule? From our discussion at the advisory meetings, I believe the intent was to protect the worker’s independent access to their preferred worker benefits and work towards physically and monetarily suitable employment as soon as possible. Allowing the worker the option to reject a suitable position appears to be at odds with the overall intent to return the injured worker to suitable work.

**Response:** The division feels that Worker Benefit Fund dollars should not be spent on a job the injured worker won’t accept. Both the internal and external advisory committees agreed. Since the worker won’t be a party to the actual agreements approved for the employer-at-injury use of the

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Preferred Worker Program, a job offer as prescribed in 436-110-0290(4) was determined appropriate by the division.

### **OAR 436-110-0326(3) & 0380(1) Exhibit #12**

**Testimony:** Under sections 0326(3) and 0380(1) the timeframe for benefits to start is when all necessary modifications are in place. This may in fact delay some return-to-work efforts. When the modification is required to perform the entire job this makes sense. However, sometimes part of the job is within the restrictions while part needs modification. The worker may begin the suitable portion of the job and begin the rest when modifications are complete. Does this mean the wage subsidy and premium exemption are delayed also? This seems to discourage an employer from starting a worker sooner. In some cases, an Employer-at-Injury Program wage subsidy may cover the worker during this time, but other workers may be without income for a longer period under these rules.

**Response:** The rules you have cited were proposed after discussions with internal and external advisory committees. The consensus was that the job should be within the worker’s injury-caused limitations to activate all parts of the employer-at-injury-activated Preferred Worker Program. The requirement is also stated in OAR436-110-0290(3). Worksite modifications are only provided to allow the worker to perform job duties that are required by the employer. The division has long held the position that when regular work is being modified the modified position doesn’t start until all the modifications are completed. OAR 436-110-0380(3) of the current rules states in part that “The modifications provided must be sufficient for the worker to perform all required job duties within these restrictions.” This in effect stays a decision on whether the regular employment has been “substantially modified”, and Premium Exemption and Wage Subsidy are not started until the substantially-modified decision is made. This has actually worked well in the program and has been an incentive for workers and employers to get all the modifications completed.

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### **OAR 436-120-0004(4)**

#### **Exhibit #11**

**Testimony:** Nowhere under the current rules is the worker advised in writing of the need to get their training plan developed within a specific time frame. Because of the emphasis on development of a training plan within 90 days of training status, we believe the notice to the worker described in (4) of this rule should contain the following statement under new letter (f):

*Your counselor is required to submit a copy of your signed training plan to all parties no later than 90 days after the effective date of your training status. Your full cooperation is necessary to submit this plan in a timely manner.*

**Response:** The substantive changes suggested by these exhibits were not presented to the advisory committees and will not, at this time, be included in the rule revision. WCD will include this suggestion in the next rule revision and advisory meetings.

### **OAR 436-120-0004(10)(b)**

#### **Exhibit #12**

**Testimony:** Regarding the proposed requirement: “**The notice must also inform the worker that, if the job has not begun by the hire date listed in the job offer letter, the worker can request that the vocational eligibility determination be completed.**” This is too restrictive. There needs to be flexibility because there are reasons things don’t occur ‘on schedule’ ...especially as coupled with worksite modifications. This is a moot point if there will be no Deferral Notice.

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**Response:** We believe it is proper to revisit the offer of employment and vocational eligibility if the worker is not going to start employment as stated in the job offer letter. The worker in most cases will not have income until the job starts, therefore, we believe the worker should have the option of requesting that a vocational eligibility evaluation be completed.

**OAR 436-120-0007** *Exhibit #4, 14B*

**Testimony:** Regarding the process for calculating the adjusted weekly wage when the employee held multiple jobs at the time of injury or aggravation or held one or more jobs in addition to receiving unemployment insurance benefits.

Employers in industries as diverse as construction, agriculture, temporary services, or our school systems are being unfairly penalized. Seasonal employees should have their wages averaged over 52 weeks, as was true under older division 120 rules. Current rules require considering a school teacher's monthly wage as though it was paid over 12 months rather than nine months. The current system also tries to compensate for those who do not work year round by including unemployment earnings. Using the school teacher example again, the teacher is not eligible for unemployment compensation if he or she worked for a nonprofit or public school. If you want to ensure there is a floor for the adjusted weekly wage, use the Oregon minimum wage at the time of injury or the state average weekly wage to determine the floor as in SB 757 for Permanent Partial Disability.

**Response:** The proposed changes in 436-120-0007 are "housekeeping" issues that clarify the rule, and were presented as such in the external advisory committee meeting.

The substantive changes suggested by these exhibits were not presented to the advisory committees and will not, at this time, be included in the rule revision. WCD will include this suggestion in the next rule revision and advisory meetings.

**OAR 436-120-0008** *Exhibit #11*

**Testimony:** We agree with the proposed change to define further "extraordinary circumstances" in assessing attorney fees.

**Response:** Thank you for your comments. The rule will remain as proposed.

**OAR 436-120-0320(3)(b) and:**

**Rule 0004(2)(a)(A)&(F)**

**Rule 0004(10)(a)&(b)**

**Rule 0004(12)(f)**

**Rule 0005(14)(e)(A)(B)(C)&(D)**

**Rule 0350(4)&(17)**

*Exhibit # 2, 3, 7, 8, 11, 12, 14C, 14D, 14E*

**Testimony:** Employment is not considered "suitable" for employer-at-injury activated Preferred Worker Program benefits until 12 months after the start of premium exemption, if there are no worksite modifications, or 18 months from the effective date of a worksite modification agreement. These extensive timeframes may be intended to prevent employers from abusing the program. It seems that we are treating a Preferred Worker differently with the employer at injury than we would with a new employer. We are not dealing with the problem, only creating another layer of bureaucracy to counteract the actions of a few.

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The focus of the Preferred Worker Program should be to maintain the employer/employee relationship. Suitability of the position should be determined at the time the employer and employee enter into the Preferred Worker contract. At the advisory committee meeting, we discussed having suitability extended to include a 6-month period. The worker still has the option of activating the Preferred Worker Program with another employer. The proposed rules would make employers less likely to consider Preferred Worker benefits when offering suitable work. We recommend you amend 436-120-0005 (14)(e) (A)&(B) to the discussed length of 180 days.

All other rules state that 60 days of employment is considered suitable. I thought our discussion at the advisory meeting extended this time to 120 days, because this is a new program. We believe 120 days is more than fair to determine if the job is suitable. Insurers may have to hold reserves for the *potential* of vocational assistance for up to 18 months on a worker who is suitably employed. We do not believe this is reasonable or necessary.

The proposed rules require new notice, “Notice of Deferral of Vocational Eligibility Determination,” when the employer at injury provides suitable modified work accessing the Preferred Worker Program benefits. Since there has been no determination of eligibility made because the worker returned to work with the employer-at-injury, there is no refusal of services, so including refusal of vocational assistance because of EAI activation of PWP becomes moot. The issue, if there is one, would always default to suitability or premature end of job without cause. We recommend against requiring a “Notice of Deferral . . .” that extends employer exposure to vocational assistance 12 to 18 months in every case. “Deferral” denotes postponement with a follow-up action. “Follow-up” would occur only if the worker requested review of the suitability or premature ending of the job without cause – these do not require a Notice of Deferral to initiate review.

There is no need to treat the return-to-work situations differently by creating a separate class. This rule is discriminatory. A “new” employer is not subject to the same risks as the employer at injury. Only the employer at injury is required formally to defer vocational assistance, and the effect is to extend exposure for vocational assistance 12 to 18 months beyond the hire date of a worker in a suitable modified job. This would extend the exposure on ALL of the many suitable modified jobs we urge employers to provide for their employees each year. The extension in indemnity reserves will affect the employer’s experience modification rating and even premium costs. Oregon employers will decide not to access Preferred Worker benefits, as the risks outweigh the gains.

Rules for this should be kept in Division 110. The return-to-work and job suitability procedures are adequately covered under the existing Division 120 rules without requiring additional modification. This includes provision for bona fide job offers to be made in accordance with Division 060 rules. The Division 120 rules already contain provisions to make sure a worker has the opportunity to challenge the suitability of a job, complete with appeal rights. This process also provides the employer with the knowledge that services will be based on the injury-caused limitations. Both parties are protected. This would keep the existing criteria that the insurer is not required to determine eligibility if the worker returns to work with the EAI. Preferred Worker Program documents can inform the worker of his or her rights, including what to do if the job is not suitable or ends prematurely without cause.

The insurer is not a party to the PWP contracts. Once the worker has returned to work with the EAI and the claim is closed, there is no reason for the insurer to be involved. We don’t currently track suitable work where the employer is using the Preferred Worker Program. The intent is to provide

## SUMMARY OF TESTIMONY AND AGENCY RESPONSES

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benefits and incentives that serve both the injured worker and employer and that promote an earlier return to work for the injured worker in a suitable job. We understood the Management-Labor Advisory Committee's intent was to increase use of Preferred Worker Program benefits. As this rule is proposed, we think employers will be less inclined to consider accessing Program benefits. We support the current dispute resolution process and workers' access to the Ombudsman's office as sufficient safeguards against the infrequent unscrupulous actions by employers.

**Response:** Testimony and responses to this proposed rule change covered two primary areas: (1) the requirement of a new notice (Notice of Deferral of Vocational Eligibility) and (2) the requirement that employment that results from the employer at injury activation of Preferred Worker Program benefits would not be considered suitable; (a) until 12 months from the effective date of the premium exemption if there are no worksite modifications, or (b) until 18 months from the effective date of the worksite modification agreement.

The rules require insurers to determine a worker's eligibility for vocational assistance within a specified time frame. Failing that, insurers could be liable for sanctions. The Notice of Deferral is to inform workers and WCD that an eligibility evaluation will not be completed because the employer at injury has activated preferred worker benefits. The notice would protect the insurer from requests for sanctions and requests for further information because the WCD data system would be showing no activity. We believe it is necessary to have a Notice of Deferral issued.

WCD proposed in the definition of suitable employment OAR 436-120-0005(14) that employers who activate preferred worker benefits retain a worker for 12 months if there is no worksite modification and 18 months if there is a worksite modification. Written and oral testimony have raised objections to those time frames offering a variety of opinions with different time frames suggested. The changes in the OAR 436-110 rules that allow the employer-at-injury to activate the preferred worker benefits provide that employer with substantial financial benefits. A worker who is eligible for vocational assistance but forgoes training in order to return to a modified job with the employer-at-injury is returning to a job that does not exist elsewhere in the labor market. If that job were to end 60 days after all modifications were in place, as under the existing rules, that worker would not be eligible for any vocational assistance.

If that eligible worker were to receive training the insurer would need to reserve for the length of the training program *and* pay all the training costs. We have, however, reviewed current data to determine whether the time frames proposed by WCD are too long. We believe 9 months where no worksite modification contract is used and 12 months when a modification contract is used is adequate.

### **OAR 436-120-0400**

### ***Exhibit #12***

**Testimony:** The proposed rule requires selection of the category of service (DEP/ATP) prior to referral to vendor...this generally is simultaneous/seamless. The proposed requirement could actually delay services.

**Response:** The focus of this rule change is to reduce the time required for injured workers to begin receiving vocational services. The Management Labor Advisory Committee (MLAC) recommended that workers be referred "in status" thus eliminating the current 30 day period to determine the category of vocational assistance. The division supports that recommendation.

SUMMARY OF TESTIMONY AND AGENCY RESPONSES  
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**OAR 436-120-0410** *Exhibit #11, 12*

**Testimony:** You propose to eliminate the entire category of vocational evaluation. We should retain this category of vocational assistance. At the advisory meeting we discussed elimination of this as a category of services following a determination of eligibility. We still believe this category would be appropriate in the event you are evaluating a worker's permanent total disability entitlement under 656.206 (5). The proposed legislation on permanent total disability under discussion at the Management Labor Advisory Committee also continues to refer to a vocational evaluation. We recommend retaining the category within these rules, but make clear the intent following eligibility for services is to designate a worker eligible for either direct employment or training.

We recommend vocational evaluation be retained as a category of services but not a choice in the eligibility process. If PTD rules are going to reference this process, we need consistency.

**Response:** The intent of the Management Labor Advisory Committee (MLAC) was to eliminate the 45-day vocational evaluation option as an allowable category of vocational assistance. However, we agree that a description of the various activities that comprise a vocational evaluation should remain in the rules to provide guidance. Paragraph (1) will be rewritten to remove reference to vocational evaluation as a category of vocational assistance and to remove the 45-day time frame. Paragraphs (7) & (8) would be deleted. These changes will comply with MLAC's recommendation and preserve a section in the rules that provides guidance regarding vocational evaluation.

**OAR 436-120-0500(3)** *Exhibit #2, 3, 5, 6, 11, 12, 14C, 14D, 14E*

**Testimony:** During the Management-Labor Advisory Committee's subcommittee process, we discussed the use of conferences with the Workers' Compensation Division to identify and remove obstacles to return-to-work plan completion and approval, for those workers not in plan status within 45/90 days respective to the plan type. I attended those meetings and we did not agree on the mandatory meetings. This was discussed and there were opinions on both sides of this issue. The intent was to better integrate the process, and certainly not to sanction the insurers over this matter. Sanctions were never discussed.

Consider requiring a PLAN DELAY summary. This would include what has been done, where the case is headed, and specific time frames when the plan can be expected. If the division does not find the reason for the delay acceptable, it can contact the parties involved (by phone). This makes the process more approachable, open, and "if necessary", and does not micromanage the case. We need to resolve the plan delay reason at the lowest level, and in the least amount of time.

We refer as many as 200 cases a year, of which 100-150 would not have an approved plan within 90 days of referral. Less than 25% of these are contentious. Where the insurer and worker agree on the obstacles to plan and the efforts to overcome those obstacles, a conference would not be required. Mandatory conferences would place a workload burden on the Workers' Compensation Division. This is especially true because we often refer 4-6 months before an anticipated medically stationary date, and many of these cases require more than 90 days to develop a suitable return-to-work plan.

At the advisory meeting, we discussed the *option* of involving the Workers' Compensation Division in situations where the claim is stalled and no plan is forthcoming. This would be optional at the request of the counselor, the injured worker, his or her representative, or the insurer. We strongly oppose making this mandatory.

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Mandatory conferences would give counselors less time than they have traditionally had for plan development. Factors to consider include: testing must occur; multiple barriers to employment such as brain injury, inability to speak English, etc.; many insurers require submittal of a plan within two weeks of the start date (thus compressing the timeframe down to 75 days); and the counselor may not have done the eligibility evaluation and would have to meet the worker, schedule testing, and develop a plan all within approximately 75 days.

The rules do not explain whether these meetings will be in-person or done by phone. In addition, the rules don't outline what happens if concurrence cannot be reached; will the division issue an order in this event?

We support the concept, but the conference should be optional, not mandatory, because mandatory conferences would restrict the process flow. The original goal around the idea of the conference is to insure a speedier process, so workers can get back on time-loss. Giving any concerned stakeholder the *option* of calling a conference has the advantage of moving workers to plan more quickly. The process only becomes cumbersome when it is made *mandatory*.

**Response:** The respondents providing testimony agree on the need for a conference with the Rehabilitation Review Unit (RRU), however disagree as to whether that conference should be mandatory or optional. Under current rules there exists an optional system, either party can now contact RRU with concerns about the provision of vocational services. RRU is rarely contacted to help with cases where there is difficulty getting injured workers into training plans. The Management-Labor Advisory Committee (MLAC), when reviewing vocational assistance, wanted to find ways to shorten timeframes and move the process along so workers were not in situations where there were periods of time without income. Given those objectives, they recommended requiring a meeting when the worker was not in a training plan within 90 days or a direct employment plan within 45 days. Having said that, we realize that the parties may be satisfied with the progress of plan development even if it extends beyond the established time frames. The proposed rule provides for the parties to agree and postpone the conference for 30 days. RRU has no interest in reviewing a plan development process if the parties are in agreement. We will change the 30 day language to: **“The conference may be postponed for a period of time agreeable to the parties”** or similar language.

The role of RRU in this process is not to issue orders or “take over” the process but to bring a “fresh set of eyes” to the process and assist with removing the obstacles to the completion of the plan development process.

### **OAR 436-120-0710(10)**

#### ***Exhibit #11***

**Testimony:** If you retain vocational evaluation as a category of vocational assistance as described under 436-120-0410, we suggest you retain the ability to pay a living expense during a vocational evaluation.

**Response:** We agree. Since 0410 has now been retained, 0710(10) will also be retained.

### **OAR 436-120-0720**

#### ***Exhibit #12***

**Testimony:** You need to update the reference to the date of the fee schedule. Why is the chart included in the rules, when the rules instead could refer to the chart in the bulletin?

SUMMARY OF TESTIMONY AND AGENCY RESPONSES

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**Response:** We realize the chart in the rules will be out of date after the first of July and that this can cause confusion if a person is not aware of the changes, which occur every July 1<sup>st</sup>. The chart is placed in the rules because the division has made an effort to remove prescriptive language from bulletins and place them in the rules. Your comment concerning the date of the chart is noted and we will make changes to the chart to make it more clear as to where the most current costs can be found. A note will be placed, in bold, at the bottom of the chart with language that states:

**NOTE: Spending limits listed in this chart are adjusted annually, effective each July 1<sup>st</sup>, and are published in Bulletin 124.**

Language in OAR 436-120-0720(1) would be changed to delete the sentence: The amounts in section (3) do not include the adjustment effective July 1, 2005.

When the rules are next opened for revision, we will revisit your concerns and look for a better solution.

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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 1<sup>st</sup> day of July, 2005.

WORKERS' COMPENSATION DIVISION

*/s/ Fred Bruyns*

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Fred Bruyns, Rules Coordinator  
Policy Section  
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	
<b>Agency and Division</b>		<b>Administrative Rules Chapter Number</b>	
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<b>Rules Coordinator</b>		<b>Telephone</b>	
PO Box 14480, Salem, OR 97309-0405; 350 Winter Street NE, Rm 27, Salem, OR 97301-3879			
<b>Address</b>			
		Room F (basement, Labor & Industries Building	
April 22, 2005	10:00 a.m..	350 Winter Street NE, Salem, Oregon	Fred Bruyns
<b>Hearing date</b>	<b>Time</b>	<b>Location</b>	<b>Hearings Officer</b>

**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 April 29, 2005.**

**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:** OAR 436-110-0290, 436-110-0326, 436-110-0327, 436-110-0336, 436-110-0337, 436-110-0346, 436-110-0347, 436-110-0351, 436-110-0352

**AMEND:** OAR 436-001-0265, and chapter 436, divisions 105, 110, and 120

**REPEAL:** OAR 436-120-0410

ORS 656.283, 656.340, 656.622, 656.704, 656.726(4)

Stat. Auth.

ORS 183.335; OAR 137-001; OAR 436-001

Other Authority

ORS chapter 656; ORS 656.340, 656.622

Stats. Implemented

**RULE SUMMARY**

**The agency proposes to amend OAR 436-001-0265, "Attorney Fees." This proposed rule:**

- Clarifies that extraordinary circumstances, for the purpose of determining attorney fees, are not established by merely exceeding eight professional hours or exceeding a benefit to the worker of \$6000. This proposed rule change is consistent with changes to OAR 436-010-0008, proposed January 14, 2005, and to OAR 436-120-0008, proposed March 9, 2005 (see below).

**The agency proposes to amend OAR 436-105, "Employer-at-Injury Program." These proposed rules:**

- Allow the insurer to request that reimbursement be based on the rules in effect on the date an individual Employer-at-Injury Program began; otherwise the rules in effect at the time of the request apply;
- Clarify that Employer-at-Injury Program benefits are available for "own motion" claim openings under ORS 656.278;
- Extend benefits to include a "skills building," class or course taken to enhance an existing skill or develop a new skill;
- Allow the insurer to accept updated restrictions and releases from a medical service provider treating the worker on a referral basis, with the exception of a regular work release;
- Do not require payroll records to show hours worked each day unless the worker has hourly restrictions;
- Provide that if the insurer or the Workers' Compensation Division disallows wage subsidy reimbursement for part of a payroll period, and payroll records do not show individual dates and hours worked, the gross wages will be divided by the number of days in the payroll period, and the prorated value of each day will be multiplied by the number of eligible days to determine the reimbursement amount for the payroll period – currently all reimbursement may be disallowed;
- Provide for the compilation of up to 66 days of wage subsidy during a 24-month period, due to gaps in transitional work;
- Disallow reimbursement for any day during which the worker exceeds his or her injury-caused limitations -- currently this terminates Employer-at-Injury Program benefits; however, if an employer uses a time clock, up to 30 minutes per day will be allowed for the worker to get to and from the time clock and the worksite without exceeding hourly restrictions;
- Allow the insurer or employer to get clarification about the medical worker's release any time prior to submitting the reimbursement request;
- Increase the maximum reimbursement from \$750 to \$1,000 for tuition, books, and fees for a class or course of instruction; provide that accredited on-line or accredited self-study courses qualify for reimbursement; and

**Notice of Proposed Rulemaking Hearing**

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- Allow reimbursement if the employer in good faith paid for the costs of a class or course after the worker agreed to take part in the training and then refused to attend.

**The agency proposes to amend OAR 436-110, “Preferred Worker Program.” These proposed rules:**

- Increase access to Preferred Worker Program benefits by allowing the employer at injury to request reemployment assistance for modified regular employment or a new job offered to its worker – up to \$25,000 for a worksite modification, up to six months of wage subsidy, and obtained employment purchases;
- Redefine “hire date” such that requests for reemployment assistance received more than 30 days after the hire date can be processed – the hire date is 12:01 AM the day following the request if the request is sent to the division more than 30 days after the start-work date;
- Delete the requirement that workers submit requests for premium exemption and wage subsidy within 90 days of the hire date and clarify how the effective dates will be determined.
- Clarify that Preferred Worker Program benefits are available for “own motion” claim openings under ORS 656.278;
- Provide that if the worker is not eligible under the most recent disabling claim or claim opening, eligibility may be based on the most recent disabling claim closure where injury-caused permanent restrictions prevented the worker from return to regular employment; and
- Provide that worksite modification may also include the means to protect modifications purchased by the Preferred Worker Program in an amount not to exceed \$2,500.

**The agency proposes to amend OAR 436-120, “Vocational Assistance to Injured Workers.” These proposed rules:**

- Combine vocational evaluation with eligibility evaluation for vocational assistance, thus shortening the vocational preparation time by up to 45 days;
- Require that if the insurer does not approve a return-to-work plan within 90 days of determining the worker is entitled to a training plan, or within 45 days of determining the worker is entitled to a direct employment plan, the insurer must schedule a conference with the Workers’ Compensation Division, Rehabilitation Review Unit. The insurer or worker may also request a conference when any other delays in the vocational rehabilitation process occur;
- Clarify the process for calculating the adjusted weekly wage when the worker held multiple jobs at the time of injury or aggravation, or held one or more jobs in addition to receiving unemployment insurance benefits;
- Clarify that extraordinary circumstances, for the purpose of determining attorney fees, are not established by merely exceeding eight professional hours or exceeding a benefit to the worker of \$6000; This proposed rule change is consistent with changes to OAR 436-001-0265, proposed March 9, 2005 (see above), and to OAR 436-010-0008, proposed January 14, 2005.
- Require that if the employer at injury has activated Preferred Worker benefits, the insurer must send the worker notice of “deferral of vocational assistance eligibility determination,” to inform the worker that the insurer will not complete the vocational eligibility process;
- Provide that modified or new employment that results from an employer activated use of the preferred worker program, under OAR 436-110, will not be considered “suitable” until: (a) one year from the date of the premium exemption if there are no worksite modifications, or (b) eighteen months from the date the division approves a worksite modification contract – with two exceptions: 1) the worker is terminated for cause; 2) the worker voluntarily resigns for a reason unrelated to the work injury; and
- Require that the notice of eligibility also include a notice of entitlement that informs the worker which type of assistance will be provided, direct employment or training.

**Request for public comment:**

The agency 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](mailto: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 at 503-947-7627 or fax 503-947-7630.**

April 29, 2005  
Last Day for Public Comment

/s/ John L. Shilts 3/9/05  
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 CHAPTER 436

**Agency and Division**

**Administrative Rules Chapter Number**

In the Matter of	)	
The Amendment of:	)	Statutory Authority,
OAR 436-001, Procedural Rules Governing Rulemaking and Hearings	)	Statutes Implemented,
OAR 436-105, Employer-at-Injury Program	)	Statement of Need,
OAR 436-110, Preferred Worker Program	)	Principal Documents Relied Upon,
OAR 436-120, Vocational Assistance to Injured Workers	)	Statement of Fiscal Impact

**Statutory Authority:** ORS 656.704, 656.726(4)

**Other Authority:** ORS 183.335; OAR 137-001; OAR 436-001

**Statutes Implemented:** ORS chapter 656; ORS 656.340, 656.622

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

The proposed amendments will increase access to return-to-work assistance by Oregon employers and injured workers. The Employer-at-Injury and Preferred Worker programs are funded by the Workers' Benefit Fund (WBF). Both workers and employers pay into the WBF through payroll deductions. Changes to the vocational assistance rules will expedite training and direct employment services to eligible workers. Minor revisions to OAR 436-001-0265 will make the attorney fee provisions of this rule consistent with OAR 436-010 and 436-120.

The Management-Labor Advisory Committee (established under ORS 656.790) recommended several of the proposed rule changes.

**Documents Relied Upon:** Rulemaking advisory committee meeting records and issues documents. These records 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) 947-7717 to request copies.

**Fiscal and Economic Impact:**

Oregon injured workers, employers, and insurers should benefit economically from these changes. Our research shows that workers who use reemployment assistance program benefits have more income over time than workers who are eligible but do not use the available assistance. Early return to work lowers claim costs, and program benefits such as wage subsidies and worksite modifications inject WBF dollars into Oregon businesses. Purchases for tools, clothing, and other items needed in order for a worker to begin a job are a direct benefit to injured workers, who otherwise would have to purchase the items out-of-pocket in order to take the job.

It is not possible to estimate dollar benefits that will result if the proposed rule changes are made permanent, in part because each reemployment program influences the others. However, we do project that benefits will be substantial. There will be increased demands placed on the WBF, but the Fund has adequate reserves to support the proposed changes.

**Statement of Need and Fiscal Impact**

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We project no net negative fiscal impact to any party, including the Department of Consumer and Business Services, if the proposed changes are made permanent.

**Administrative Rule Advisory Committee consulted:** Yes, 1/7/2005, 1/18/2005, & 1/20/2005

*/s/ John L. Shilts*

3/9/05

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**Signature and Date**

John L. Shilts, Administrator, Workers' Compensation Division

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**Printed name**

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

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
PROPOSED PROCEDURAL RULES GOVERNING RULEMAKING AND HEARINGS**

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**436-001-0265 Attorney Fees**

(1) In cases where the director is required to assess an attorney fee under ORS 656.385(1) [§2, ch. 756, OL 2003]:

(a) The fee must be based on the factors listed in ORS 656.385(1) [ §2, ch. 756, OL 2003].

(b) Absent a showing of extraordinary circumstances or unless otherwise agreed by the parties, the fee may not exceed \$2,000 nor fall outside the ranges provided in the following matrix:

<b>Estimated [Results] Benefit Achieved</b>	[Attorney Time] <b>Professional Hours Devoted</b>				
	1-2 hours	2.1-4 hours	4.1-6 hours	6.1-8 hours	[8.1-12] <b>Over 8 hours</b>
\$1-\$2000	\$100-400	\$200-700	\$300-750	\$600-1000	\$800-1250
\$2001-\$4000	\$200-500	\$400-800	\$600-900	\$800-1300	\$1050-1500
\$4001-\$6000	\$300-700	\$600-1000	\$800-1250	\$1000-1450	\$1300-1750
[ \$6001-\$10000] <b>Over \$6000</b>	\$400-900	\$800-1300	\$1050-1600	\$1350-1800	\$1550-2000

**(c) Extraordinary circumstances are not established by merely exceeding eight hours or exceeding a benefit of \$6000.**

[c](d) In cases under ORS 656.245, 656.260, or 656.327, the factors listed in OAR 436-010-0008(13) may also be considered.

[d](e) In cases under ORS 656.340, the factors listed in OAR 436-120-0008(2) may also be considered.

(2) Except as provided in section (3), in cases where the administrative law judge or director assesses an attorney fee, the following factors may also be considered:

- (a) The complexity of the issue(s) involved;
- (b) The quality of the legal representation;
- (c) The value of the interest involved;
- (d) The nature of the proceedings;
- (e) The risk in a particular case that an attorney’s efforts may go uncompensated;
- (f) The assertion of frivolous issues or defenses;
- (g) A statement of services, if submitted within seven days of the hearing date, unless the administrative law judge instructs otherwise; and
- (h) Any other relevant consideration deemed appropriate by the administrative law judge or director.

(3) In cases under ORS 656.262(11) [ §1, ch. 756, OL 2003] where the issue is solely the assessment and payment of a penalty and attorney fee, OAR 438-015-0110 applies.

(4) If an attorney fee has been assessed by an administrative law judge in a proposed

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
**PROPOSED PROCEDURAL RULES GOVERNING RULEMAKING AND HEARINGS**

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order, the opposing parties may file written exceptions to the fee under OAR 436-001-0275.

**Stat. Auth.:** ORS 656.726(4)

**Stats. Implemented:** ORS 656.262, 656.385, 656.388 and 656.704(2) [(and ch. 756, OL 2003)]

**Hist:** Filed 2/12/96 as WCD Admin. Order 96-055 eff. 2/12/96  
Amended 08/10/98 as WCD Admin. Order 98-057, eff. 9-15-98  
Amended 12/12/03 as WCD Admin. Order 03-067, eff. 1/1/04 (Temporary)  
Amended 3/4/04 as WCD Admin. Order 04-053, eff. 4/1/04  
Amended xx/xx/xx as WCD Admin Order xx-xxx, eff. xx/xx/xx