

BEFORE THE DIRECTOR OF THE
DEPARTMENT OF INSURANCE AND FINANCE
OF THE STATE OF OREGON

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In the Matter of the Amendment of Rules)
Governing Handicapped Workers Reserve)
(OAR Chapter 436, Workers' Compensation)
Division, Division 40))

BARBARA J. ...
ORDER OF ADOPTION

The Director of the Department of Insurance and Finance, pursuant to his general rule making authority under ORS 656.726 (3) and in accordance with the procedure provided by ORS 183.335, amends OAR Chapter 436, Workers' Compensation Division, Division 40, Handicapped Workers Reserve.

On October 20, 1987, the Department of Insurance and Finance filed Notice of Public Hearing with the Secretary of State to adopt rules governing the Handicapped Workers Reserve. The Statement of Need and Legal Authority and the Statement of Fiscal Impact were also filed with the Secretary of State.

Copies of the Notice were mailed to interested persons in accordance with ORS 183.335 (7) and OAR 436-01-000 and to those on the Department's distribution mailing list as their interest indicated. The Notice was published in the November 1, 1987, Secretary of State's Administrative Rule Bulletin.

On December 4, 1987, the public hearing was held as announced. A summary of the written testimony and agency responses thereto is contained in Exhibit "C". This summary is on file and available for public inspection between the hours of 8 A.M. and 5 P.M., normal working days Monday through Friday in the Administrator's Office, Workers' Compensation Division, Room 201, Labor & Industries Building, Salem, OR 97310.

Having reviewed and considered the record of public hearing and being fully advised, I make the following findings:

- a. The applicable rule making procedures have been followed.
- b. The rules are within the Director's authority.
- c. The rules being adopted are a reasonable administrative interpretation of the statutes and are required to carry out statutory responsibilities.

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LEGISLATIVE COUNSEL'S

IT IS THEREFORE ORDERED THAT:

- (1) OAR Chapter 436, Division 40, Rules Governing Handicapped Workers Reserve, as set forth in Exhibit "A" attached hereto, certified a true copy and hereby made a part of this order, is adopted effective January 1, 1988.
- (2) A certified true copy of the Order of Adoption and these rules, with Exhibit "B" consisting of the Citation of Statutory Authority, Statement of Need, Documents Relied on and Fiscal Impact Statement, attached hereto and hereby made a part of this order, be filed with the Secretary of State.
- (3) A copy of the rules and attached Exhibit "B" be filed with the Legislative Counsel pursuant to the provisions of ORS 183.715 within ten days after filing with the Secretary of State.

Dated this 18 day of December, 1987.

DEPARTMENT OF INSURANCE AND FINANCE


Theodore R. Kulongoski, Director

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Distribution: A through N; P through V;
Plus Y through AA; CC; and LL

DEPARTMENT OF INSURANCE AND FINANCE
WORKERS' COMPENSATION DIVISION
HANDICAPPED WORKERS' RESERVE

EXHIBIT "A"
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 40

EFFECTIVE JANUARY 1, 1988

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436-40-001 Authority for Rules

These rules are promulgated under the Director's authority contained in ORS 656.726 and 656.628.

Stat. Auth: ORS Ch. 656
Hist: WCD 1-1982 (Admin), f. 1-20-82, eff. 2-1-82
WCD 6-1983 (Admin), f. 12-20-83, eff. 1-1-84

436-40-002 Purpose

The purpose of these rules is to establish guidelines for administration of disbursements made from the Handicapped Workers Reserve established to encourage the employment or reemployment of handicapped workers.

Stat. Auth: ORS Ch. 656
Hist: WCD 1-1982 (Admin), f. 1-20-82, eff. 2-1-82
WCD 6-1983 (Admin), f. 12-20-83, eff. 1-1-84

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436-40-003 Applicability of Rules

(1) These rules are effective January 1, 1988, and shall apply to all requests for reimbursement from the Handicapped Workers Reserve filed with the Director for injuries occurring on or after November 1, 1981.

(2) These rules carry out the provisions of ORS 656.628.

Stat. Auth: ORS Ch. 656
Hist: WCD 1-1982 (Admin), f. 1-20-82, eff. 2-1-82
WCD 6-1983 (Admin), f. 12-20-83, eff. 1-1-84
Amended 12-18-87 as Admin. Order 6-1987, eff. 1-1-88

436-40-005 Definitions

As used in OAR 436-40-001 through 436-40-080 unless the context requires otherwise:

(1) "Compensation" includes all benefits, including medical services and attorney fees, provided for a compensable injury to a subject worker or the worker's beneficiaries. However, it does not include incidental costs of claims administration and administrative claims costs. For purposes of this definition, administrative claims costs include medical and legal expenses incurred for the benefit of the paying agent to secure evidence for presentation before an official body. Any cost incurred for the direct or indirect benefit of the worker is not considered an administrative claims cost.

(2) "Compliance" means the Compliance Section of the Workers' Compensation Division of the Department of Insurance and Finance.

(3) "Deductible" means the initial \$1,000 of cumulative compensation paid on qualifying claim(s) applied once per handicapped worker.

(4) "Director" means the Director of the Department of Insurance and Finance or the Director's delegate for the matter.

(5) "Employer" means an employer who qualifies pursuant to the provisions of ORS 656.017, either as a carrier-insured employer or as a self-insured employer under ORS 656.407.

(6) "Evaluation" means the Evaluation Section of the Workers' Compensation Division of the Department of Insurance and Finance.

(7) "Handicapped Worker" means a worker who is afflicted with, or subject to, any permanent physical or mental impairment, whether congenital or due to an injury or disease, including periodic impairment of Consciousness or muscular control of such character that the impairment would prevent the worker from obtaining or retaining employment.

(8) "Handicapped Worker Claim Reserve" means the total anticipated liability (paid plus future) including any relief granted under the Handicapped Workers Reserve program.

(9) "Handicapped Workers Reserve" means the reserve established under ORS 656.628 to fund reimbursement under this program.

(10) "Paying Agency" means the insurer, self-insured employer, or designated representative of the self-insured employer, responsible for paying compensation for a compensable injury.

Stat. Auth: ORS Ch. 656

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Hist: WCD 1-1982 (Admin), f. 1-20-82, eff. 2-1-82
WCD 6-1983 (Admin), f. 12-20-83, eff. 1-1-84
Amended 12-18-87 as Admin. Order 6-1987, eff. 1-1-88

436-40-006 Administration of Rules

For the purpose of administration of the Handicapped Workers Reserve, orders of Compliance and Evaluation are deemed orders of the Director.

Stat: Auth: ORS Ch. 656
Hist: WCD 1-1982 (Admin), f. 1-20-82, eff. 2-1-82
WCD 6-1983 (Admin), f. 12-20-83, eff. 1-1-84
Amended 12-18-87 as Admin. Order 6-1987, eff. 1-1-88

436-40-008 Administrative Review

(1) If a paying agency or employer is aggrieved by a decision of Evaluation or Compliance, the Director may be petitioned for reconsideration.

(2) The Director shall examine the application and such further evidence filed, and enter an order. Copies of the order shall be sent to the paying agency, Compliance, and employer, if applicable. Granting or denying reimbursement from the Handicapped Workers Reserve is at the sole discretion of the Director. Any such order issued by the Director is not appealable.

(3) In adopting the rules herein, the Director reserves the right to reexamine any liability hereby created against the Handicapped Workers Reserve and to modify or terminate liability created herein, where, in the Director's opinion, such action is justified.

Stat. Auth: ORS Ch. 656
Hist: WCD 1-1982 (Admin), f. 1-20-82, eff. 2-1-82
WCD 6-1983 (Admin), f. 12-20-83, eff. 1-1-84
Amended 12-18-87 as Admin. Order 6-1987, eff. 1-1-88

436-40-010 Criteria for Eligibility

(1) The criteria used to determine eligibility for relief from the Handicapped Workers Reserve are:

(a) Without regard to employer knowledge, a worker must have a permanent physical or mental impairment, whether congenital or due to an injury or disease which would prevent the worker from obtaining or retaining employment. For the purpose of this section, a worker is considered to have a preexisting permanent impairment that would prevent the worker from obtaining or retaining employment if the permanent impairment is equal to or greater than twenty five percent (25%) of the whole person.

(b) There must be a subsequent compensable injury or injuries:

(A) To the handicapped worker resulting in cumulative claim(s) costs in excess of \$1,000; or

(B) To other workers employed by the handicapped workers' employer resulting in cumulative claim(s) costs in excess of \$1,000.

(c) It must be shown that the subsequent injury or injuries:

(A) Would not have been sustained except for the handicapped worker's impairment; or

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(B) Would not have occurred, to workers of the same employer, except for the act or omission of a handicapped worker which occurred as a result of the handicapped worker's impairment; or

(C) Resulted in disability which is substantially greater by reason of the worker's preexisting impairment as determined by Evaluation. For the purpose of this paragraph "substantially" means an increase of at least one-fourth.

(2) An employer who is in a noncomplying status as defined in ORS 656.052 is not eligible for relief from the Handicapped Workers Reserve for injuries to subject workers occurring during any period of noncompliance.

(3) A paying agency is not eligible for reimbursement from the Handicapped Workers Reserve for any claim occurring to a worker during a period for which the employer is receiving premium reimbursement from the Workers' Reemployment Reserve for that worker pursuant to ORS 656.622(3).

Stat. Auth: ORS Ch. 656
Hist: WCD 1-1982 (Admin), f. 1-20-82, eff. 2-1-82
WCD 6-1983 (Admin), f. 12-20-83, eff. 1-1-84
Amended 12-18-87 as Admin. Order 6-1987, eff. 1-1-88

436-40-020 Limitation of Program

(1) Reimbursement shall be limited to the monies available in the Handicapped Workers Reserve.

(2) In the event of insufficient funds in the Reserve, the Director shall have final authority to determine an equitable distribution which will proportionately distribute the available funds among the claims having qualified for reimbursement from the reserve.

Stat. Auth: ORS Ch. 656
Hist: WCD 1-1982 (Admin), f. 1-20-82, eff. 2-1-82
WCD 6-1983 (Admin), f. 12-20-83, eff. 1-1-84

436-40-030 Application for Determination of Relief From the Handicapped Workers Reserve

(1) The paying agency is responsible to provide the Director adequate evidence to establish eligibility for determination of relief from the Handicapped Workers Reserve.

(2) When the deductible has been met and possible eligibility for relief becomes known, the paying agency shall make prompt application to Compliance in a form and format prescribed by the Director requesting determination of relief from the Handicapped Workers Reserve.

(3) The application shall be supported by sufficient evidence establishing the eligibility for reimbursement under the general provisions herein and in accordance with OAR 436-40-010.

(4) To meet the requirements of OAR 436-40-030(3), the paying agency shall:

(a) Specify the condition which caused permanent impairment and which constituted a handicap;

(b) Specify whether this request is based on a causal relationship per OAR 436-40-010(1)(c)(A) and (B) or a contributory relationship per OAR 436-40-010 (1)(c)(C);

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(c) Provide documentation of prior impairment, including, but not limited to: medical reports, prior Determination Orders, Opinion and Orders, Orders on Review; and

(d) Provide the 801 form and medical reports on any supporting prior workers' compensation claims not previously submitted and identify all pertinent claims filed with the Department.

(5) Compliance will review the application to assure it is complete and the \$1,000 deductible has been met. The application, supporting documentation, and claims involved will then be submitted to Evaluation for an eligibility determination.

Stat. Auth: ORS Ch. 656
Hist: WCD 1-1982 (Admin), f. 1-20-82, eff. 2-1-82
WCD 6-1983 (Admin), f. 12-20-83, eff. 1-1-84
Amended 12-18-87 as Admin. Order 6-1987, eff. 1-1-88

436-40-040 Eligibility Determination

(1) The determination of whether or not a claim qualifies for reimbursement and the percentage of reimbursement, if any, shall be made by Evaluation.

(2) Evaluation shall issue a determination order accepting or denying the application within 30 calendar days after receipt of the application and supporting documentation. The order of acceptance shall contain the percentage of reimbursement.

(3) The reimbursement percentage will be:

(a) 100% after the \$1,000 deductible in those cases qualifying under OAR 436-40-010(1)(c)(A) and (B); or

(b) In direct proportion to the percentage the resulting disability was increased as a result of the preexisting impairment in those cases qualifying under OAR 436-40-010(1)(c)(C).

Stat. Auth: ORS Ch. 656
Hist: WCD 1-1982 (Admin), f. 1-20-82, eff. 2-1-82
WCD 6-1983 (Admin), f. 12-20-83, eff. 1-1-84
Amended 12-18-87 as Admin. Order 6-1987, eff. 1-1-88

436-40-050 Reimbursement

(1) Reimbursement shall be made to the paying agency based on the percentage of reimbursement ordered by Evaluation.

(2) Request for reimbursement shall not be made until the deductible has been met.

(3) Reimbursement shall be made by Compliance quarterly after receipt and approval of documentation of compensation paid from the paying agency. Documentation as prescribed by the Director shall include, but not be limited to:

(a) Net amounts paid, separated into disability benefits, by type, and medical benefits for corresponding quarterly time periods;

(b) The current Handicapped Worker Claim Reserve as defined in these rules;

(c) Payment certification statement; and

(d) Any other information deemed necessary by the Director.

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(4) For purposes of subsection 3(a) of this rule, "net amounts paid" means the total compensation paid less any recoveries, including but not limited to, third party recovery, Retroactive Reserve reimbursement and Rehabilitation Reserve reimbursement.

(5) Periodically Compliance shall audit the physical file of the paying agency to validate the amount reimbursed. Reimbursement shall not be approved if, upon such audit, it is found:

(a) Compensation has been paid as a result of untimely, inaccurate, or improper claims processing; or

(b) The compensability of the accepted claim is questionable and the rationale for acceptance has not been reasonably documented, as required under generally accepted claims management procedures; or

(c) The separate payments of compensation have not been documented, as required under generally accepted accounting procedures; or

(d) The insurer did not adjust the claims reserve value used in dividend, retrospective evaluation, or any claim valuation for experience rating determination to the percentage level specified in the order of acceptance, allowing for the \$1,000 compensation minimum, nor did it make the necessary monetary adjustments with the employer.

(6) Reimbursement to insurance companies shall only be made for compensation which could reasonably be projected, at the time of the last claim evaluation, which would affect the employer's experience rating modification or retrospective rating adjustment. The insurance company shall submit a claim valuation to Compliance three and one half years after the inception of the policy period. The valuation shall include future reserves for the claim. Compliance shall verify that the future reserves are reasonable. If Compliance determines that the submitted claim valuation is unreasonable, Compliance shall have the option of establishing the claim valuation or extending the claim valuation period. The claim valuation, when approved by Compliance, shall then become the maximum Handicapped Worker Claim Reserve used as the basis for reimbursement for the claim.

(7) In the event that a denied claim is found to be compensable by a hearing referee, the Workers' Compensation Board, or the Court of Appeals, and that decision is reversed by a higher level of appeal, the paying agency shall receive reimbursement for claim payments required to be made while the claim was in accepted status.

Stat. Auth: ORS Ch. 656
Hist: WCD 1-1982 (Admin), f. 1-20-82, eff. 2-1-82
WCD 6-1983 (Admin), f. 12-20-83, eff. 1-1-84
Amended 12-18-87 as Admin. Order 6-1987, eff. 1-1-88

436-40-060 Effects on Rates; Reporting

(1) Where an order of acceptance has been issued indicating the percentage of reimbursement to an insured, the incurred cost of the claim above \$1,000, prior to reimbursement shall be reduced by that percentage. The net incurred cost after such reduction shall be used in any dividend calculation, retrospective rating evaluation or experience rating computation, retroactively if necessary, and shall be reported at that net incurred cost to the rating organization. Any subsequent reevaluation of the claims reserve requirements under the rules of the Unit Statistical Plan Manual shall be similarly reduced by the percentage of reimbursement.

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(2) The paying agency "eligible for" or receiving reimbursement from the Handicapped Workers Reserve, shall report the subject claims in such method and manner as the Insurance Commissioner shall require. Notwithstanding the reporting requirements of the Insurance Commissioner and an authorized rating organization, the paying agency must be able to document that such reimbursed costs are not, and/or will not be, included in data reported that will affect the rates and/or dividend eligibility.

(3) If compensation reported to an appropriate rating organization subsequently becomes eligible for reimbursement from the Handicapped Workers Reserve, the insured paying agency shall immediately file a "reevaluation of losses" report, pursuant to the Insurance Commissioner's rules, with a rating organization licensed by the Insurance Commissioner.

(4) If compensation used by Compliance for experience rating purposes becomes eligible for reimbursement from the Handicapped Workers Reserve, the self-insured paying agency may file a request for reevaluation of experience rating modification(s) with Compliance. Any necessary recalculation(s) will be made when the annual experience rating modification is calculated.

Stat. Auth: ORS Ch. 656
Hist: WCD 1-1982 (Admin), f. 1-20-82, eff. 2-1-82
WCD 6-1983 (Admin), f. 12-20-83, eff. 1-1-84
Amended 12-18-87 as Admin. Order 6-1987, eff. 1-1-88

436-40-070 Settlements

(1) After a determination that reimbursement will be made from the Handicapped Workers Reserve, any settlement of the claim by the parties is void only for the purpose of receiving reimbursement from the Handicapped Workers Reserve unless made with the written approval of Compliance.

(2) Requests for written approval of proposed settlements should include:

- (a) A copy of the proposed settlement;
- (b) Correspondence between the paying agency and the claimant or claimant's representative which establishes the basis for settlement;
- (c) Additional medical reports not available at the time of the determination; and
- (d) Other material which would support the settlement basis of handling the claim.

(3) The paying agency shall submit settlements to Compliance in the format prescribed by the Director.

Stat. Auth: ORS Ch. 656
Hist: WCD 1-1982 (Admin), f. 1-20-82, eff. 2-1-82
WCD 6-1983 (Admin), f. 12-20-83, eff. 1-1-84
Amended 12-18-87 as Admin. Order 6-1987, eff. 1-1-88

436-40-080 Third Party Recoveries

(1) If a third party recovery is made prior to a claim qualifying for Handicapped Workers Reserve relief, compensation recovered shall be credited against the compensation of the claim prior to any request for reimbursement.

(2) The Handicapped Workers Reserve shall be a party to any third party recovery on a

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claim if payment from the reserve has been made prior to the third party recovery as provided in ORS 656.593(1)(c).

Stat. Auth: ORS Ch. 656
Hist: WCD 1-1982 (Admin), f. 1-20-82, eff. 2-1-82
WCD 6-1983 (Admin), f. 12-20-83, eff. 1-1-84

EXHIBIT "B"

BEFORE THE DIRECTOR OF THE
DEPARTMENT OF INSURANCE AND FINANCE
OF THE STATE OF OREGON

In the Matter of the Amendment)	Statutory Authority,
of Rules Governing Handicapped)	Statement of Need,
Workers Reserve (OAR Chapter 436)	Principal Documents Relied
Workers' Compensation Division,)	Upon, and Statement of Fiscal
Division 40).)	Impact

1. Citation of Statutory Authority. The Statutory Authority for promulgation of these rules is ORS 656.726(3) and 656.628.

2. Need for Rules. The need for such rules is to govern reimbursements made from the Handicapped Workers Reserve in accordance with existing law and statutory amendments passed by the 1987 Legislature.

3. Principal Documents Relied Upon. The commands of the statutes above referenced create the need for these rules. No other principal documents, reports, or studies were relied upon.

4. Fiscal and Economic Impact. The following entities are economically affected: (a) state agencies, in their role of employer; (b) units of local government, in their role of employer; (c) large and small private sector employers subject to the Workers' Compensation Law; and (d) insurance companies processing workers' compensation claims.

The economic effect of promulgating these rules should result in savings to large and small employers within the workers' compensation system. The actual amount cannot be determined, but it could be considerable.

DATED THIS 18 DAY OF DECEMBER, 1987.

DEPARTMENT OF INSURANCE AND FINANCE

Theodore R. Kulongoski
Theodore R. Kulongoski, Director 