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BARBARA BOSSERT  
SECRETARY OF STATE

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

In the Matter of the Amendment )  
of OAR Chapter 436, Workers' )  
Compensation Division, Division 40, )  
Handicapped Workers' Reserve; Rule )  
003, 005, 008, 050 and 070 )

ORDER OF ADOPTION  
OF TEMPORARY RULES

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

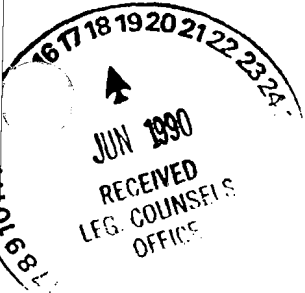
These amendments are being adopted by Temporary Rule, as provided by ORS 183.335(5) and (6), without prior notice. Statement of Findings: I conclude that failure to act promptly will result in serious prejudice to the public interest.

On May 7, 1990, during a Special Session the Legislature enacted Senate Bill 1197 which made several changes in the Workers' Compensation Law, including a change which permits the parties to dispose of any matter regarding a claim, except medical services. In addition, the change requires that claims into which the parties enter a disposition are not eligible for reimbursement from the Handicapped Workers' Reserve without prior approval by the director.

This change in the law becomes effective on July 1, 1990. Immediate action is necessary to permit all parties to claims how to submit such dispositions to the director and obtain the required approval, and how to appeal if aggrieved by the decision of the director. The immediate adoption of these rules will assure that all parties involved in the workers' compensation system are aware of how the change will affect them.

IT IS THEREFORE ORDERED:

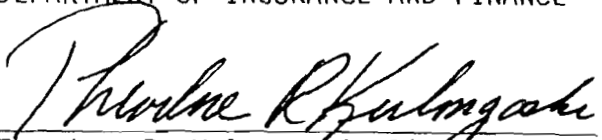
- (1) OAR Chapter 436, Division 40, as set forth in Exhibit "A", attached hereto, certified a true copy and hereby made a part of this Order, is temporarily adopted effective July 1, 1990.
- (2) A certified true copy of the Order of Adoption and these Rules, Exhibit "A", with Exhibit "B" consisting of the Citation of Statutory Authority, Statement of Need and Documents Relied Upon, hereby made a part of this Order, be filed with the Secretary of State.
- (3) A copy of the Rules and the attached Exhibit "B" be filed with the Legislative Counsel, pursuant to the provision of ORS 183.715 within 10 days after filing with the Secretary of State.



Order of Adoption  
of Temporary Rule  
Division 40  
Page 2

Dated this 18<sup>th</sup> day of June, 1990.

DEPARTMENT OF INSURANCE AND FINANCE

  
Theodore R. Kulongoski, Director

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

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

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

EFFECTIVE JULY 1, 1990

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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.

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 the administration of the Handicapped Workers Reserve program established to encourage the employment or reemployment of handicapped workers.

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 12-22-89 as Admin. Order 3-1989, eff. 1-1-90

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**436-40-003      Applicability of Rules**

(1) These rules are effective [January] **July** 1, 1990, and apply to all applications for relief **submitted prior to May 1, 1990** and all requests for reimbursement from the Handicapped Workers Reserve filed with the Director on or after [January] **July** 1, 1990 for injuries occurring on or after November 1, 1981.

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

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  
Amended 12-22-89 as Admin. Order 3-1989, eff. 1-1-90  
**Amended 6-18-90 as WCD Admin. Order 12-1990, eff. 7-1-90**

**436-40-005      Definitions**

Except where the context requires otherwise, these rules are governed by the following definitions:

(1) "Compensation" means 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 expenses as defined by the National Council on Compensation Insurance, in its Workers' Compensation Statistical Plan, Part IV.

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

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

(4) "Division" means the Workers' Compensation Division of the Department of Insurance and Finance.

(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) "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.

(7) "Handicapped Worker Claim Reserve" means the total anticipated liability (paid plus future reimbursable costs) regardless of any relief granted under the Handicapped Workers Reserve program.

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

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

(10) "Settlement" means [the] **any** agreement produced as a result of the act or process of settling differences between a paying agent and a Handicapped Worker, **or disposition of a**

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**claim pursuant to ORS 656.236.**

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  
Amended 12-22-89 as Admin. Order 3-1989, eff. 1-1-90  
**Amended 6-18-90 as WCD Admin. Order 12-1990, eff. 7-1-90**

**436-40-006 Administration of Rules**

For the purpose of administration of the Handicapped Workers Reserve, orders of the Division are deemed orders of the Director.

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 the Division, 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 will be sent to the paying agency, the Division, and employer, if applicable. Granting or denying reimbursement from the Handicapped Workers Reserve is at the sole discretion of the Director. Pursuant to ORS 656.628(7), the Director's order is final and not subject to review by any court or other administrative body.

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

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  
Amended 12-22-89 as Admin. Order 3-1989, eff. 1-1-90

**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 has a preexisting permanent impairment if it 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) The insurer or employer must demonstrate that the subsequent injury or injuries:

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- (A) Would not have been sustained except for the handicapped worker's impairment; or
- (B) Would not have occurred, to workers of the same employer, except for the act or omission of a handicapped worker which resulted from the handicapped worker's impairment; or
- (C) Resulted in disability which is at least one-fourth greater by reason of the worker's preexisting impairment, as determined by the Division.

(2) An employer declared noncomplying in accordance with 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 Assistance Reserve, for that worker, pursuant to ORS 656.622(3).

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  
Amended 12-22-89 as Admin. Order 3-1989, eff. 1-1-90  
Amended 6-18-90 as WCD Admin. Order 12-1990, eff. 7-1-90

**436-40-020      Limitation of Program**

(1) Reimbursement is 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 which have qualified for reimbursement from the reserve.

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 12-22-89 as Admin. Order 3-1989, eff. 1-1-90

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

(1) The paying agency must 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 the Division requesting determination of relief from the Handicapped Workers Reserve in a form prescribed by the Director.

(3) The application shall be submitted prior to the date of the last valuation affecting an employer's experience rating, prior to the last valuation for retrospective rating, whichever is the last to occur and prior to the employer ceasing to do business. The application shall be supported by sufficient evidence establishing eligibility for reimbursement under the general provisions herein and in accordance with OAR 436-40-010. For employers that are not experience rated, application shall be submitted prior to the date there would have been a last valuation, had the employer been so rated, and prior to the employer ceasing to do business. The preceding application time frames do not apply to self insured employers or their paying agencies.

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(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 or contributory relationship pursuant to OAR 436-40-010(1)(c);

(c) Provide documentation describing prior impairment: such as medical reports, direct information from the worker, employer documentation, prior Determination Orders, Opinion and Orders, and Orders on Review;

(5) The Division 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 the Division for an eligibility determination.

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  
Amended 12-22-89 as Admin. Order 3-1989, eff. 1-1-90

**436-40-040 Eligibility Determination**

(1) The Division shall determine whether a claim qualifies for reimbursement, and the percentage of the reimbursement.

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

(3) The reimbursement percentage shown on the determination order 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).

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  
Amended 12-22-89 as Admin. Order 3-1989, eff. 1-1-90

**436-40-050 Reimbursement**

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

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

(3) Requests for reimbursement are not to include: costs incurred for conditions unrelated to the compensable claim; costs incurred due to inaccurate, untimely, or improper processing; expenses; and settlement amounts not approved by the Division, to which the parties agreed after relief was granted.

(4) The Division will authorize reimbursement to the paying agency quarterly after receipt and approval of documentation of compensation paid from the paying agency. Documentation shall include, but not be limited to:

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(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.

(5) For purposes of subsection [3]4(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.

(6) Periodically the Division will audit the physical file of the paying agency to validate the amount reimbursed. Reimbursement shall not be approved if, upon such audit, any of the following are found to apply:

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

(b) Compensation has been paid for treatment of any condition unrelated to the compensable claim for which Handicapped Workers Reserve relief was granted.

(c) 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;

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

(e) The subject employer was no longer doing business at the time of application for the Handicapped Workers Reserve determination; that the employer was on a retrospective rating plan that was closed prior to the application for the Handicapped Workers Reserve determination; or, if not on an open retrospective rating plan, that the last valuation for experience rating modification purposes that could affect the employer was completed prior to the application for the Handicapped Workers Reserve determination;

(f) 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, or did not make the necessary monetary adjustments with the employer; or

(g) The insurance carrier is not able to provide applicable records relating to experience rating, retrospective rating or dividend calculations at the time of audit or within ten working days thereafter. Any reimbursements received on claims, for which the insurer is unable to provide records, will be returned to the Division at least until the next annual audit is conducted and all applicable records are reviewed.

(7) The Division will authorize reimbursement to insurance companies only for compensation which could reasonably be projected;

(a) At the time of the last claim evaluation which would affect the employer's experience rating modification or retrospective rating adjustment, whichever is later; or



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(b) At the time the employer ceases to do business, if that occurs first.

(8) The insurance company shall submit a claim valuation to the Division as of:

(a) The last claim valuation date which would affect the employer's experience rating modification or retrospective rating adjustment, whichever is later (usually three and one half years after the inception of the policy period); or

(b) At the time the employer ceases to do business, if that occurs first. The valuation shall include future reserves for the claim at that time. The Division will verify the future reserves are reasonable and based on the appropriate valuation date. If the Division determines the submitted claim valuation is unreasonable or based on inappropriate information, the Division may establish the claim valuation or adjust the claim valuation period. The claim valuation, when approved by the Division, shall be the maximum Handicapped Worker Claim Reserve used as the basis for reimbursement for the claim.

(9) In the event that a denied claim is found 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.

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  
Amended 12-22-89 as Admin. Order 3-1989, eff. 1-1-90

**436-40-060        Effects on Rates; Reporting**

(1) Where an order of acceptance has established the percentage of reimbursement to an insured, the incurred claim cost 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.

(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 will not be included in data reported that will affect the rates and/or dividend eligibility.

(3) If compensation reported to the 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 the Division 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 the Division. Any necessary calculation(s) will be made, retroactively if necessary, when the annual experience

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rating modification is calculated.

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  
Amended 12-22-89 as Admin. Order 3-1989, eff. 1-1-90

**436-40-070 Settlements**

(1) [After a determination that reimbursement will be made from the Handicapped Workers Reserve,] [a] Any [form of] settlement of the claim by the parties is [void only for the purpose of receiving] **not eligible for** reimbursement from the Handicapped Workers Reserve unless made with the **prior** written approval of the Division. [Settlements related to noncompensable portions of claims, regardless of when made, are not eligible for reimbursement.]

(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 **if the settlement does not involve a bona fide dispute or disposition of a claim;**

(c) Additional medical reports not available at the time of the determination **if the settlement does not involve a bona fide dispute or disposition of a claim;** and

(d) Other material which would support the proposed settlement as an appropriate manner to handle the claim.

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

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  
Amended 12-22-89 as Admin. Order 3-1989, eff. 1-1-90  
**Amended 6-18-90 as WCD Admin. Order 12-1990, eff. 7-1-90**

**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 claim if payment from the reserve has been made prior to the third party recovery as provided in ORS 656.591 and ORS 656.593(1)(c).

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

**436-40-090 Assessment of Civil Penalties**

The Director, through the Division and pursuant to ORS 656.745, may assess a civil penalty against an insurer. When the Division imposes a penalty under this section, the Order shall be issued in accordance with ORS 656.447, ORS 656.704 and the contested case provisions of the Administrative Procedures Act (ORS Chapter 183).

Hist: WCD 3-1989, filed 12-22-89, eff. 1-1-90

## EXHIBIT "B"

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

In the Matter of the Amendment	)	CITATION OF STATUTORY AUTHORITY;
of OAR Chapter 436, Workers'	)	STATEMENT OF NEED; PRINCIPAL
Compensation Division, Division 40,	)	DOCUMENTS RELIED UPON; FISCAL AND
Handicapped Workers' Reserve, Rule	)	ECONOMIC IMPACT
003, 005, 008, 050 and 070	)	

1. Citation of Statutory Authority: The statutory authority for promulgation of these rules are ORS 656.236, 656.289, 656.628 and 656.726(3).
2. Statement of Need: Legislation enacted May 7, 1990 in Chapter 2, Oregon Laws 1990, Special Session, made significant changes in the Workers' Compensation Law. These changes in the law become effective upon passage of Senate Bills 1197 and 1198 on May 7, 1990, or on July 1, 1990; and, where applicable, apply to all injured workers' claims existing on or arising after July 1, 1990.

Immediate action is necessary to ensure timely implementation of programs and program modifications in order to carry out the letter and intent of the law. Immediate adoption of this temporary rule will assure that the parties affected by this change will be able to properly submit dispositions in which reimbursement from the Handicapped Workers' Reserve is involved, and will minimize confusion and misunderstanding among all parties affected by this legislation.

The scale of the changes caused by this legislation requires that all parties and the department have a period of time to work through the inevitable problems inherent in the implementation of such complex legislation, to assure that the permanent rules will be as consistent with the intent and letter of the law, and that they will be as administratively practical as possible. This temporary rule will afford the public that opportunity.

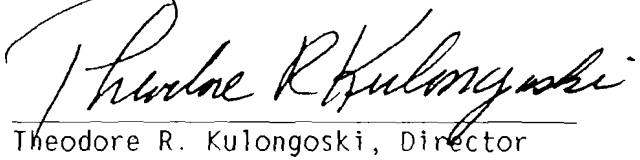
3. Principal Documents Relied Upon:
  - a. ORS Chapter 656.
  - b. Chapter 2, Oregon Laws 1990, Special Session.
  - c. ORS Chapter 183 and the Oregon Attorney General's Administrative Law Manual, June, 1988.

4. Economic Impact:

The following entities are economically affected: (a) Oregon subject workers; (b) Oregon subject employers; (c) workers' compensation insurers; (d) self-insured employers; (e) service companies; and, (f) workers' compensation attorneys.

Dated this 18<sup>th</sup> of June, 1990, at Salem, Oregon.

DEPARTMENT OF INSURANCE AND FINANCE

  
Theodore R. Kulongoski, Director