

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION

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**Retroactive Program**  
**Oregon Administrative Rules**  
**Chapter 436, Division 075**

**Revision-marked copy**

[Bracketed 8 point text is deleted]; **bold/underlined text is added**

**Effective January 2, 2006**

**TABLE OF CONTENTS**

<b>Rule</b>		<b>Page</b>
436-075-0001	Authority for Rules .....	1
436-075-0002	Purpose.....	1
436-075-0003	Applicability of Rules .....	1
436-075-0005	Definitions.....	1
436-075-0006	Administration of Rules .....	2
436-075-0008	Administrative Review .....	2
436-075-0010	Criteria for Eligibility.....	3
436-075-0020	Death Benefit .....	4
436-075-0030	Permanent Total Disability Benefit.....	4
436-075-0040	Death during Permanent Total Disability .....	5
436-075-0050	Temporary Total Disability.....	5
436-075-0065	Dispositions.....	5
436-075-0070	Reimbursement .....	6
436-075-0090	Third Party Recovery .....	6
436-075-0100	Assessment of Civil Penalties .....	7
436-075-0110	Suspension and Revocation of Authorization to Issue Guaranty Contracts.....	7

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**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
RETROACTIVE PROGRAM**

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**EXHIBIT "A"  
OREGON ADMINISTRATIVE RULES  
CHAPTER 436, DIVISION 075**

**436-075-0001 Authority for Rules**

These rules are promulgated under the director's authority contained in ORS 656.726 and 656.506.

Stat. Auth.: ORS 656.506 and ORS 656.726  
Stats. Implemented: ORS 656.506  
Hist: Filed 12-22-89 as WCD Admin. Order 6-1989, eff. 1-1-1990

**436-075-0002 Purpose**

The purpose of these rules is to establish guidelines for administering disbursements made from the Retroactive Program.

Stat. Auth.: ORS 656.506  
Stats. Implemented: ORS 656.506  
Hist: Filed 12-22-89 as WCD Admin. Order 6-1989, eff. 1-1-90  
Amended 12/4/97 as WCD Admin. Order 97-062, eff. 1/1/98

**436-075-0003 Applicability of Rules**

(1) These rules are effective January 1, 1998, and shall apply to all requests for reimbursement from the Retroactive Program involving benefits payable pursuant to:

- (a) ORS 656.204 Death
- (b) ORS 656.206 Permanent Total Disability
- (c) ORS 656.208 Death During Permanent Total Disability
- (d) ORS 656.210 Temporary Total Disability for injuries prior to April 1, 1974.

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

Stat. Auth.: ORS 656.209, ORS 656.206, ORS 656.208, ORS 656.210, ORS 656.236, ORS 656.289 and ORS 656.506  
Stats. Implemented: ORS 656.204, ORS 656.206, ORS 656.208, ORS 656.210, ORS 656.276, ORS 656.289 and ORS 656.506  
Hist: Filed 12-22-89 as WCD Admin. Order 6-1989, eff. 1-1-90  
Amended 6-18-90 as WCD Admin. Order 11-1990, eff. 7-1-90 (Temp)  
Amended 11-29-90 as WCD Admin. Order 23-1990, eff. 12-26-90  
Amended 12/4/97 as WCD Admin. Order 97-062, eff. 1/1/98

**436-075-0005 Definitions**

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

- (1) "Average Weekly Wage" is that wage defined in ORS 656.005.
- (2) "Child" is as defined in the laws applicable at the worker's date of injury.
- (3) "Compliance" means the Compliance Section of the Workers' Compensation Division of the Department of Consumer and Business Services.
- (4) "Department" means the Department of Consumer and Business Services.

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
RETROACTIVE PROGRAM**

---

(5) "Director" means the director of the Department of Consumer and Business Services.

(6) "Disposition" or "claim disposition" means the written agreement executed by all parties in which a claimant agrees to release rights, or agrees to release an insurer or self-insured employer from obligations, under ORS 656.001 to 656.794, except for medical services, in an accepted claim.

(7) "Expiration of Benefits" means the end of entitlement to a benefit because of limits set forth in the statute in effect at the time of the worker's injury.

(8) "Insurer" means the State Accident Insurance Fund Corporation, an insurer authorized under ORS Chapter 731 to transact workers' compensation insurance in this state, an employer or employer group who has been certified as self-insured under ORS 656.430.

(9) "Retroactive Program benefit" means that additional benefit paid to eligible claimants or beneficiaries to bring their benefits to a more current level.

(10) "Social Security Offset" means a reduction of permanent total disability benefits or fatal benefits based upon the amount of federal social security disability benefits received by a worker or surviving spouse.

(11) "Spouse" means the husband or wife of a worker. This definition also includes cohabitants as defined in ORS 656.226.

(12) "Statutory Benefit" means any benefit payable to or on behalf of the injured worker in accordance with the law in effect at the time of the worker's injury, as modified by marital/dependency status changes.

(13) "Through" means inclusion of a specific date.

(14) "To" means until but not including a specific date.

Stat. Auth.: ORS 656.726

Stats. Implemented: ORS 656.726

Hist: Filed 12-22-89 as WCD Admin. Order 6-1989, eff. 1-1-90

Amended 6-18-90 as WCD Admin. Order 11-1990, eff. 7-1-90 (Temp)

Amended 11-29-90 as WCD Admin. Order 23-1990, eff. 12-26-90

Amended 12/4/97 as WCD Admin. Order 97-062, eff. 1/1/98

#### **436-075-0006 Administration of Rules**

For the purpose of administering these rules, orders of Compliance are deemed orders of the director.

Stat. Auth.: ORS 656.726

Stats. Implemented: ORS 656.726

Hist: Filed 12-22-89 as WCD Admin. Order 6-1989, eff. 1-1-90

#### **436-075-0008 Administrative Review**

(1) Any party as defined by ORS 656.005 aggrieved by a proposed order or proposed assessment of civil penalty of the director or division issued pursuant to ORS 656.745 or 656.750 may request a hearing by the Hearings Division of the Workers' Compensation Board in accordance with ORS 656.740 [(section 9, chapter 170, Oregon Laws 2003)].

(a)The request for hearing must be sent in writing to the Administrator of the Workers'

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
RETROACTIVE PROGRAM**

---

Compensation Division. No hearing will be granted unless the request specifies the grounds upon which the person requesting the hearing contests the proposed order or assessment.

(b) The request for hearing must be filed with the Administrator of the Workers' Compensation Division by the aggrieved person within 60 days after the mailing of the proposed order or assessment. No hearing will be granted unless the request is mailed or delivered to the administrator within 60 days after the mailing date of the proposed order or assessment.

(2) **Under ORS 656.704(2)**, [A]ny party [as defined by ORS 656.005 aggrieved by] **that disagrees with** an action or order of the director [or division pursuant to] **under** these rules, other than as described in section (1), [where such action or order qualifies for review as a contested case,] may request [review pursuant to ORS 183.310 through 183.550 as modified by these rules pursuant to ORS 183.315(1). When the matter qualifies for review as a contested case, the process for review will be as follows:

(a) The request for hearing must be sent in writing to the Administrator of the Workers' Compensation Division. No hearing will be granted unless the request specifies the grounds upon which the action or order is contested and is mailed or delivered to the administrator] **a hearing by filing a request for hearing as provided in OAR 436-001-0019** within 30 days of the **mailing date of the order or notice of** action [or from the date of mailing or other service of an order].

(b) The hearing will be conducted by an Administrative Law Judge of the Office of Administrative Hearings.

(c) Any proposed order issued by the administrative law judge is subject to revision by the director. The director may allow objections to the proposed order to be filed for the director's consideration within 30 days of issuance of the proposed order.] **OAR 436-001 applies to the hearing.**

Stat. Auth.: ORS 656.740, 656.745, 656.750  
 Stats. Implemented: ORS 656.704, OL 2005 ch 26, 656.740, 656.745, 656.750  
 Hist: Filed 12-22-89 as WCD Admin. Order 6-1989, eff. 1-1-90  
 Amended 6-18-90 as WCD Admin. Order 11-1990, eff. 7-1-90 (Temp)  
 Amended 11-29-90 as WCD Admin. Order 23-1990, eff. 12-26-90  
 Amended 12/4/97 as WCD Admin. Order 97-062, eff. 1/1/98  
 Amended 12/3/03 as WCD Admin. Order 03-076, eff. 1/1/04  
**Amended 10/19/05 as WCD Admin. Order 05-065, eff. 1/2/06**

### **436-075-0010      Criteria for Eligibility**

(1) The department shall issue a bulletin to notify all insurers of changes in the Retroactive Program benefit levels whenever the director determines a change is necessary as indicated in ORS 656.506(7).

(2) Eligibility for Retroactive Program benefits shall be based upon the worker's injury date as follows:

(a) Workers or beneficiaries eligible to receive either death or permanent total disability benefits become eligible for Retroactive Program benefit increases when the benefits granted under the Retroactive Program bulletin exceed the benefits provided by the statute in effect at the time of the injury.

(b) For workers receiving temporary total disability benefits, the injury must have occurred prior to July 1, 1973. Workers with injuries occurring between July 1, 1973 and April 1, 1974 may qualify for benefits according to the limits defined in the Retroactive Program bulletin. Workers injured on or after April 1, 1974 are not entitled to receive Retroactive Program increases to their temporary total disability benefit.

(3) A claim shall not be eligible for Retroactive Program benefits if all issues except

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
RETROACTIVE PROGRAM**

---

compensable medical services are disposed of pursuant to ORS 656.236 or settled pursuant to ORS 656.289 prior to becoming eligible under section (2) of this rule.

(4) Costs for claims of subject workers of an employer which is noncomplying as defined in ORS 656.052 are not eligible for reimbursement from the program, but remain a cost recoverable from the employer as provided by ORS 656.054(3).

Stat. Auth.: ORS 656.506  
Stats. Implemented: ORS 656.236, ORS 656.289 and ORS 656.506  
Hist: Filed 12-22-89 as WCD Admin. Order 6-1989, eff. 1-1-90  
Amended 11-29-90 as WCD Admin. Order 23-1990, eff. 12-26-90  
Amended 12/4/97 as WCD Admin. Order 97-062, eff. 1/1/98

**436-075-0020      Death Benefit**

(1) Death benefits shall be paid to eligible beneficiaries pursuant to ORS 656.204, and the Retroactive Program benefit schedules.

(2) Burial benefits shall be paid pursuant to ORS 656.204 (1) and the Retroactive Program benefit schedules.

(3) The statutory death benefit for injuries occurring from July 1, 1973 to April 1, 1974 will be reduced by the Social Security benefit received, up to the July 1, 1973 statutory benefit level. The amount of reduction to the statutory benefit is a Retroactive Program benefit. The insurer shall request reimbursement only for the adjusted Retroactive Program benefit.

(4) Benefits payable for a partial month shall be calculated by dividing the monthly benefit by the actual number of days in the month and multiplying that result by the number of days payable.

(5) Benefits for dependents shall be paid to the date of any status change.

(6) Remarriage allowance shall be paid pursuant to ORS 656.204 and the Retroactive Program benefit schedules.

Stat. Auth.: ORS 656.506  
Stats. Implemented: ORS 656.204  
Hist: Filed 12-22-89 as WCD Admin. Order 6-1989, eff. 7-1-90  
Amended 12/4/97 as WCD Admin. Order 97-062, eff. 1/1/98

**436-075-0030      Permanent Total Disability Benefit**

(1) Permanent total disability benefits shall be paid in accordance with ORS 656.206 and the benefit schedules set forth in the Retroactive Program bulletin.

(2) Benefit amounts payable for a partial month shall be calculated as set forth in 436-075-0020(4).

(3) Benefits for dependents shall be paid to the date of any status change.

(4) Any Social Security Offset determined pursuant to ORS 656.209 shall be first applied against the statutory portion of the permanent total disability benefit. Any amount of the social security offset that exceeds the statutory benefit shall be applied against the Retroactive Program benefit. The insurer shall request reimbursement only for that portion of the Retroactive Program benefit which has not been offset.

Stat. Auth.: ORS 656.506

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
RETROACTIVE PROGRAM**

---

Stats. Implemented: ORS 656.206 and ORS 656.209  
Hist: Filed 12-22-89 as WCD Admin. Order 6-1989, eff. 1-1-90  
Amended 12/4/97 as WCD Admin. Order 97-062, eff. 1/1/98

**436-075-0040 Death during Permanent Total Disability**

(1) If the injured worker dies during the period of permanent total disability, death benefits shall be paid to eligible beneficiaries pursuant to ORS 656.208 and ORS 656.204, and the Retroactive Program benefit schedules.

(2) Permanent total disability benefits shall be paid to the date of death, at which time death benefits will commence. Where death benefits are not due, permanent total disability benefits shall be paid through the date of death.

(3) Social Security benefit for injuries occurring between July 1, 1973 and April 1, 1974 will be applied as set forth in 436-075-0020 (3).

(4) Benefit amounts payable for a partial month shall be calculated as set forth in 436-075-0020(4).

(5) Burial benefits shall be paid in accordance with ORS 656.208 (1) and 656.204 (1) and the Retroactive Program benefit schedules; however if the injury date is prior to July 1, 1973, burial benefits are due only if death results from the accidental injury causing the permanent total disability.

Stat. Auth.: ORS 656.506  
Stats. Implemented: ORS 656.204 and ORS 656.208  
Hist: Filed 12-22-89 as WCD Admin. Order 6-1989, eff. 1-1-90  
Amended 12/4/97 as WCD Admin. Order 97-062, eff. 1/1/98

**436-075-0050 Temporary Total Disability**

(1) Temporary total disability benefits shall be paid in accordance with ORS 656.210, OAR 436-060-0150 and the benefit schedules set forth in the Retroactive Program bulletin.

(2) In no case shall the computation of benefits under these rules and the Retroactive Program bulletin cause a reduction in temporary total disability benefits currently being paid.

Stat. Auth.: ORS 656.506  
Stats. Implemented: ORS 656.210  
Hist: Filed 12-22-89 as WCD Admin. Order 6-1989, eff. 1-1-90  
Amended 12/4/97 as WCD Admin. Order 97-062, eff. 1/1/98

**436-075-0065 Dispositions**

(1) Any disposition of the claim by the parties pursuant to ORS 656.236, or settlement of the claim pursuant to ORS 656.289, is not eligible to receive reimbursement from the Retroactive Program unless made with the prior written approval of the director.

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

(a) A copy of the proposed disposition which specifies the amount of the proposed contribution to be made from the Retroactive Program;

(b) A statement from the insurer indicating how the amount of the contribution was calculated;

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
RETROACTIVE PROGRAM**

---

- (c) Any other information as required by the director.
- (3) The director will not approve the disposition for reimbursement if:
  - (a) The ratio of the amount requested from the program to the total amount of the disposition exceeds the percentage of current benefits due the worker from the program; or
  - (b) The settlement exceeds a reasonable projection of future liability.
- (4) The insurer shall submit dispositions to the division in the format prescribed by the director.

Stat. Auth.: ORS 656.506  
 Stats. Implemented: ORS 656.236 and ORS 656.289  
 Hist: Amended 6-18-90 as WCD Admin. Order 11-1990, eff. 7-1-90 (Temp)  
 Filed 11-29-90 as WCD Admin. Order 23-1990, eff. 12-26-90  
 Amended 12/4/97 as WCD Admin. Order 97-062, eff. 1/1/98

**436-075-0070 Reimbursement**

- (1) Reimbursement from the Retroactive Program will be authorized by the Compliance Section on a quarterly basis.
- (2) Requests for reimbursement must be mailed or delivered to Compliance within 30 days after the end of each quarter to be processed in that quarterly disbursement.
- (3) Requests for reimbursement mailed or delivered to Compliance more than 30 days after the end of the quarter will be held over and processed with the next quarterly disbursement.
- (4) A separate request for reimbursement shall be submitted for each insurer and shall include a signed certification that the payments reported on the request have been made in the amounts reported.
- (5) Requests for reimbursement must be submitted in the format prescribed by the director. Each request must accurately reflect the marital/dependency status in effect and eligible for reimbursement in the period requested.
- (6) Compliance will not process any request failing to meet the requirements of section (4) or (5), until such requirements are met.
- (7) The department shall recover any overpayment made to an insurer as a result of an insurer error in reporting, or incorrect information submitted on a quarterly request form.
- (8) In the event 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 insurer shall receive reimbursement for Retroactive Program benefit payments required to be made while the claim was in an accepted status.

Stat. Auth.: ORS 656.506  
 Stats. Implemented: ORS 656.506  
 Hist: Filed 12-22-89 as WCD Admin. Order 6-1989, eff. 1-1-90  
 Amended 12/4/97 as WCD Admin. Order 97-062, eff. 1/1/98

**436-075-0090 Third Party Recovery**

- (1) In the event of a third party recovery, previously reimbursed Retroactive Program benefits are a portion of the paying agency's lien.

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
RETROACTIVE PROGRAM**

---

(2) When the insurer learns of third party settlement negotiations on any claim for which it has received reimbursement from the Retroactive Program, the insurer should notify Compliance in accordance with the provisions set forth in ORS 656.593.

(3) Remittance on recovered Retroactive Program benefits shall be made to the department in the quarter following the recovery in amounts determined in accordance with ORS 656.591 and ORS 656.593.

Stat. Auth.: ORS 656.506  
Stats. Implemented: ORS 656.591 and ORS 656.593  
Hist: Filed 12-22-89 as WCD Admin. Order 6-1989, eff. 1-1-90  
Amended 12/4/97 as WCD Admin. Order 97-062, eff. 1/1/98

**436-075-0100 Assessment of Civil Penalties**

Pursuant to ORS 656.745 the director may assess a civil penalty against an insurer for failure to comply with these rules. Penalty orders shall be issued in accordance with ORS 656.447 and 656.704 and are subject to review under OAR 436-075-0008.

Stat. Auth.: ORS 656.745  
Stats. Implemented: ORS 656.204, ORS 656.726, ORS 656.745 and ORS 656.447  
Hist: Filed 12-22-89 as WCD Admin. Order 6-1989, eff. 1-1-90  
Amended 6-18-90 as WCD Admin. Order 11-1990, eff. 7-1-90 (Temp)  
Amended 11-29-90 as WCD Admin. Order 23-1990, eff. 12-26-90

**436-075-0110 Suspension and Revocation of Authorization to Issue Guaranty Contracts**

(1) Pursuant to ORS 656.447, the director may suspend or revoke the insurer's authority to issue guaranty contracts upon a determination that the insurer has failed to comply with its obligations under such contract or that it has failed to comply with the rules or orders of the director.

(2) For the purpose of this rule:

(a) "Suspension" and its variations means a stopping by the director of the insurer's authority to issue new guaranty contracts for a specified period of time.

(b) "Revocation" and its variations means a permanent revocation by the director of an insurer's authority to issue guaranty contracts.

(c) "Show-cause hearing" means an informal meeting with the director or designee in which the insurer shall be provided an opportunity to be heard and present evidence regarding any proposed orders by the director to suspend or revoke an insurer's authority to issue guaranty contracts.

(3) Suspension or revocation under this rule will not be made until the insurer has been given notice and the opportunity to be heard through a show-cause hearing before the director and "show cause" why it should be permitted to continue to issue guaranty contracts.

(4) A show-cause hearing may be held at any time the director finds that an insurer has failed to comply with its obligations under a guaranty contract or that it failed to comply with rules or orders of the director.

(5) Following a show-cause hearing, the director may rescind the proposed order if the insurer establishes to the director's satisfaction its ability and commitment to comply with ORS

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
RETROACTIVE PROGRAM**

---

Chapter 656 and these rules.

(6) A suspension may be in effect for a period of up to 18 months. A suspended insurer may continue to serve existing accounts and renew any existing policy, unless the policy lapses or is canceled during the period of suspension.

(7) After 12 months of the suspension has elapsed, the division may audit the performance of the insurer. If the insurer is in compliance, the administrator may request the director to lift the suspension before the 18 months has elapsed. If the insurer is not in compliance, the administrator may request the director revoke the insurer's authority to issue guaranty contracts.

(8) When an insurer's authority to issue guaranty contracts has been revoked, the insurer may serve an existing account only until the policy lapses, is canceled or until the next renewal date, whichever first occurs.

(9) After a revocation of an insurer's authority to issue guaranty contracts has been in effect for five (5) years or longer, it may petition the director to restore its authority by submitting a plan in the form prescribed by the director, demonstrating its ability and commitment to comply with the workers' compensation law, these rules and orders of the director.

(10) Appeal of proposed and final orders of suspension and revocation issued under this rule may be made as provided in OAR 436-075-0008.

(11) Any order of suspension or revocation issued by a referee or other person pursuant to ORS 656.447 and this rule is a preliminary order subject to revision by the director.

Stat. Auth.: ORS 656.447

Stats. Implemented: ORS 656.446

Hist: Filed 11-29-90 as WCD Admin. Order 23-1990, eff. 12-26-90