

Exclusive Remedy

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Before workers' compensation

- More frequent litigation
- “Who is at fault?”
- No guaranteed benefits for workers
- Costly and unpredictable



The 'no-fault' system

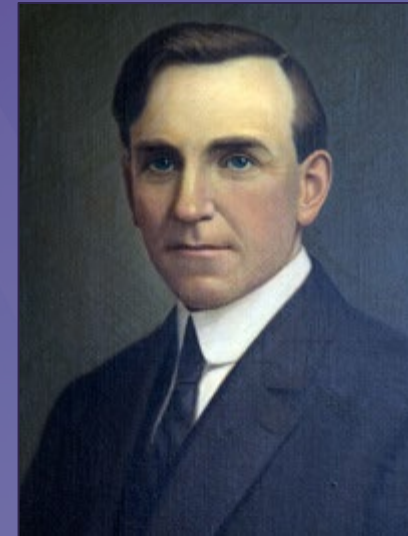


- Injured workers don't have to prove negligence
- Workers can't be denied benefits on the basis they were negligent
- Benefits are the worker's *exclusive remedy* for workplace injury

1914: Oregon's first workers' compensation law

Section 12. Every workman subject to this act while employed by an employer subject to this act, who after June 30th

next following the taking effect of this act, while so employed sustains personal injury by accident arising out of and in the course of his employment and resulting in his disability, or the beneficiaries as hereinafter defined, of such workman in case such injury results in death, shall be entitled to receive from the Industrial Accident Fund hereby created the sum or sums hereinafter specified and the right to receive such sum or sums shall be in lieu of all claims against his employer on account of such injury or death except as hereinafter specially provided; *provided, however*, that if the injury to a



Gov. Oswald West
1911 – 1915

1965: House Bill 1001 and the modern system



Gov. Mark Hatfield
1959 – 1967

656.018 Effect of providing coverage; exclusive remedy. (1) Every employer who satisfies the duty required by subsection (1) of ORS 656.016 is relieved of all other liability for compensable injuries to his subject workmen, the workmen's beneficiaries and anyone otherwise entitled to recover damages from the employer on account of such injuries, except as specifically provided otherwise in ORS 656.001 to 656.794.

Current state



- Who is immune from a lawsuit?
- What are the exceptions?
- Disclaimer and apology

ORS 656.018(1) and (2)

656.018 Effect of providing coverage; exclusive remedy. (1)(a) The liability of every employer who satisfies the duty required by ORS 656.017 (1) is exclusive and in place of all other liability arising out of injuries, diseases, symptom complexes or similar conditions arising out of and in the course of employment that are sustained by subject workers, the workers' beneficiaries and anyone otherwise entitled to recover damages from the employer on account of such conditions or claims resulting therefrom, specifically including claims for contribution or indemnity asserted by third persons from whom damages are sought on account of such conditions, except as specifically provided otherwise in this chapter.

An employer's liability under the chapter is in place of any other liability

(2) The rights given to a subject worker and the beneficiaries of the subject worker under this chapter for injuries, diseases, symptom complexes or similar conditions arising out of and in the course of employment are in lieu of any remedies they might otherwise have for such injuries, diseases, symptom complexes or similar conditions against the worker's employer under ORS 654.305 to 654.336 or other laws, common law or statute, except to the extent the worker is expressly given the right under this chapter to bring suit against the employer of the worker for an injury, disease, symptom complex or similar condition.

A worker's rights under the chapter are in lieu of any other remedies

ORS 656.018(3)

The employer's insurer and DCBS can't be sued over claims-handling matters

(3) The exemption from liability given an employer under this section is also extended to the employer's insurer, the self-insured employer's claims administrator, the Department of Consumer and Business Services, and to the contracted agents, employees, partners, limited liability company members, general partners, limited liability partners, limited partners, officers and directors of the employer, the employer's insurer, the self-insured employer's claims administrator and the department, except that the exemption from liability shall not apply:

Fellow workers and responsible parties can't be sued for causing an injury

ORS 656.018 (4) and (5)

- Worker leasing companies and clients
- Temporary service companies and clients



Gov. Barbara Roberts
1991 – 1995

ORS 656.018(7)



Gov. John Kitzhaber
1995 – 2003
and 2011 – 2015

(7) The exclusive remedy provisions and limitation on liability provisions of this chapter apply to all injuries and to diseases, symptom complexes or similar conditions of subject workers arising out of and in the course of employment whether or not they are determined to be compensable under this chapter. [1965 c.285 §6; 1975 c.115 §1; 1977 c.514 §1;

Exceptions: Noncomplying employers

656.020 Damage actions by workers against noncomplying employers; defenses outlawed. Actions for damages may be brought by an injured worker or the legal representative of the injured worker against any employer who has failed to comply with ORS 656.017 or is in default under ORS 656.560. Except for the provisions of ORS 656.578 to 656.593 and this section, such noncomplying employer is liable as the noncomplying employer would have been if this chapter had never been enacted. In such actions, it is no defense for the employer to show that:

- A subject employer who fails to provide coverage is not protected by exclusive remedy
- Noncomplying employers are denied certain defenses

Exceptions: Third-party claims

- A worker can sue someone other than their employer or a fellow worker
- Third-party suits are subject to special procedural rules, and insurers are entitled to a portion of the recovery.



Exceptions: Willful and unprovoked aggression



- Fellow workers and responsible parties can be sued over injuries caused by their willful and unprovoked aggression
- Aggression can include harassment
(*Palmer v. Bi-Mart*, 1988)

Exceptions: Intentional injuries

- Employers can be sued over an injury they deliberately intended to cause.
- A jury can infer intent from an employer's failure to take safety measures (*Kilminster v. Day*, 1996), but such a failure is not actionable if it's motivated solely by cost (*Davis v. U.S. Employers Council*, 1997).
- *Weis v. Allen* (1934) and booby traps in the workplace.

(2) If injury or death results to a worker from the deliberate intention of the employer of the worker to produce such injury or death, the worker, the widow, widower, child or dependent of the worker may take under this chapter, and also have cause for action against the employer, as if such statutes had not been passed, for damages over the amount payable under those statutes.
[Amended by 1965 c.285 §20]

Exceptions: Red warning notices



Gov. Robert Straub
1975 – 1979

- Employers can be sued over an injury caused by their noncompliance with a “red warning notice.”
- A red warning notice is an Oregon OSHA order prohibiting an employer from using a workplace or piece of machinery until safety issues are addressed.

Exceptions: Acts outside qualifying capacity

- Fellow workers and responsible parties can be sued when acting outside of the capacity in which they qualify for immunity.
- Acts in a dual capacity may still be immune (*Nancy Doty Inc. v. WildCat Haven Inc.*, 2019).



Exclusive remedy and major contributing cause denials

656.018

(7) The exclusive remedy provisions and limitation on liability provisions of this chapter apply to all injuries and to diseases, symptom complexes or similar conditions of subject workers arising out of and in the course of employment whether or not they are determined to be compensable under this chapter. [1965 c.285 §6; 1975 c.115 §1; 1977 c.514 §1;

Employers are entitled to exclusive remedy protections on noncompensable injuries

656.019 Civil negligence action for claim denied on basis of failure to meet major contributing cause standard; statute of limitations. (1)(a) An injured worker may pursue a civil negligence action for a work-related injury that has been determined to be not compensable because the worker has failed to establish that a work-related incident was the major contributing cause of the worker's injury only after an order determining that the claim is not compensable has become final. The injured worker may appeal the compensability of the claim as provided in ORS 656.298, but may not pursue a civil negligence claim against the employer until the order affirming the denial has become final.

Workers may pursue actions for noncompensable injuries only after exhausting appeal rights

How do we reconcile these provisions?

Exclusive remedy and major contributing cause denials

- **1995:** Legislature enacts ORS 656.018(7).
- **2001:** Oregon Supreme Court finds 656.018(7) unconstitutional (*Smothers v. Gresham Transfer Inc.*).
 - Legislature enacts ORS 656.019 in response.
- **2016:** Oregon Supreme Court overrules *Smothers* in *Horton v. OHSU*.
- **2023:** Oregon Supreme Court finds 656.019 is not a substantive exception to ORS 656.018(7); says Legislature enacted 656.019 as a procedural law to govern lawsuits under *Smothers*.





Gov. Tom McCall
1967 – 1975

Questions?



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