

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Bureau of Workers' Compensation

Regulation/Package Title: BWC Handicap Reimbursement

Rule Number(s): 4123-3-35

Date: November 1, 2017

Rule Type:

☐ New

☒ Amended

☐ 5-Year Review

☐ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

In accordance with the statutory mandate to adopt rules, the Bureau is amending rule 4123-3-35 to implement the provisions of H.B. 27, and to provide guidance to parties on aspects

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CSIOhio@governor.ohio.gov

of the statute that are not expressly detailed in the statute.

The Bureau is proposing to amend paragraph (B)(2)(c) of the rule to include lump sum settlements or settlement agreements approved by an Ohio court of competent jurisdiction as a type of payment that is subject to charge to the surplus fund in a handicap Award.

Further, the Bureau is proposing to amend paragraph (B)(2)(e) of the rule to clarify the effective date of the amendment in the statute and its application to previously awarded handicaps or settlements.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

R.C. 4121.12, 4121.121, 4121.30, 4121.31, 4123.05

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

If yes, please briefly explain the source and substance of the federal requirement.

No.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

Not applicable.

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

The rule describes the Bureau's policy and procedures for the processing of employer applications for handicap reimbursement. While the statute (R.C. 4123.343) provides the basic law regarding employer handicap reimbursement, the Bureau rule informs employers on how to apply for, and how the Bureau will determine the employer's right to, these benefits. Indeed, R.C. 4123.343(B) states that BWC ". . . shall adopt rules specifying the grounds upon which charges to the statutory surplus fund are to be made."

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

The rule does not provide measurable standards or criteria. The "success" of the regulation is in informing employers of the timeframes in which they must submit applications for handicap reimbursement relief in an allowed workers' compensation claim.

Development of the Regulation

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7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

- Ohio Attorney General's Office, Workers Compensation Section
- Ohio Association for Justice
- Employer Organizations:
 - Council of Smaller Enterprises (COSE)
 - Ohio Manufacturer's Association (OMA)
 - National Federation of Independent Business (NFIB)
 - Ohio Chamber of Commerce
- BWC's Self-Insured Division's employer distribution list
- BWC's Employer Services Division's Third Party Administrator (TPA) distribution list
- BWC's Legal Division's Handicap Reimbursement distribution list

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

Please see the Stakeholders' Feedback grid below.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

Not applicable.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

The Bureau did not consider alternative regulations. The Bureau is amending the rule to conform to statutory mandates to amend the handicap rule to implement HB 27.

11. Did the Agency specifically consider a performance-based regulation? Please explain.

Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.

Not applicable.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

There are no other Bureau rules on this subject. Bureau rules are specific to the Bureau, and there are no other Ohio rules on this subject.

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13. Please describe the Agency’s plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

The Bureau will develop policy and will train the appropriate Bureau staff to provide guidance to parties on aspects of the changes to the rule that are not expressly detailed in the statute.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

- a. Identify the scope of the impacted business community;**
- b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**
- c. Quantify the expected adverse impact from the regulation.**

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.

- a. The impacted community consists of employers and employer representatives (attorneys/law firms, third party administrators).
- b. The changes to this rule do not require any license fees nor fines. This rule however requires the employer which seeks handicap reimbursement award to file a complete and timely application along with copies of relevant medical evidence. Gathering the required documentation may be the only burden, which may incur time and minor expenses for the employer.
- c. The expected adverse impact is time and supplies an employer must spend on submitting an application to receive a handicap award.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

The Bureau is statutorily obligated to adopt the proposed rule.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

Not applicable.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

Not applicable.

18. What resources are available to assist small businesses with compliance of the regulation?

The Bureau publicizes its rules and regulations on line at Ohiobwc.com. The Bureau also has customer service assistants to help employers in the workers' compensation system.

Stakeholder Feedback –Rule 4123-3-35, Employer handicap reimbursement.

Rule #	Draft Rule Suggestions	Stakeholder Rationale/Suggestions	BWC Response	Resolution
4123-3-35	John Van Doorn, OAJ 10/30/17	<p>On behalf of the OAJ Workers' Compensation leadership, it is my pleasure to express our strong support for the proposed amendment to OAC 4123-3-35. The Ohio Association for Justice or OAJ is the state bar association for plaintiff attorneys, many of whom provide legal representation for injured workers with claims pending before the Bureau.</p> <p>The proposed rule amendment is an improvement that benefits both employers and injured workers.</p> <p>Currently, employers are eligible to receive a handicapped reimbursement only if the claimant receives his/her award of compensation over time. The reimbursement program is important to employers because, if granted, a portion of the claimant's compensation is charged to the Surplus Fund instead of to the employer's experience. OAJ agrees with the policy that employers who hire handicapped workers should get a break on their workers' comp costs if the handicapped employee is subsequently injured on the job. However, the current policy makes employers unwilling to settle a claim with a handicapped employee because the employer is not eligible for the handicapped reimbursement, which can be significant. As a result, almost every attempt to settle claims for handicapped claimants is stymied because employers understandably aren't interested in throwing away their potential reimbursement.</p> <p>The proposed rule will facilitate the settlement of more claims involving handicapped workers by requiring a settlement agreement to be treated the same as an award of compensation for the purpose of determining whether the employer may participate in the handicapped reimbursement program.</p>	BWC thanked the OAJ for its support of the rule	No change to the rule

		<p>We would point out that the Administrator retains complete discretion over whether the claim qualifies for the handicapped reimbursement program.</p> <p>Please count the OAJ as strongly in support of the proposed rule amendment.</p>		
4123-3-35	<p>David C. Korte Attorney at Law Coolidge Wall Co., L.P.A. 10/26/17</p>	<p>Question: If a claim is denied by the Industrial Commission and appealed to court, and the court appeal is settled, can the state fund employer request handicap reimbursement thereafter and have the percentage credit applied to the settlement amount?</p>	<p>Effective September 29, 2017, H.B. 27 permits BWC to include a settlement, whether administrative or court, in the types of claims payments that are chargeable to the surplus fund under a handicap reimbursement.</p> <p>However, in the situation described, the employer cannot receive credit for a handicap reimbursement for the court settlement of a disallowed claim because BWC does not have jurisdiction to process the application. BWC would dismiss the application for lack of jurisdiction.</p> <p>H.B. 27 did not change the requirement of R.C. 4123.343(B) that the provisions of R.C. 4123.343 “apply only in cases of death, total disability, whether temporary or permanent, and all disabilities compensated under division (B) of section 4123.57 of the Revised Code.” Thus, one of these types of payments must be made in the claim for BWC to adjudicate the application. If one</p>	<p>David Korte expressed appreciation for the clarification.</p> <p>No change to the rule.</p>

			<p>of these types of compensation has been paid, then BWC determines a handicap percentage, and a settlement is included in the costs that are chargeable to the surplus fund (as are medical payments and claims reserves, not mentioned in R.C. 4123.343(B) but which by rule BWC charges to the surplus fund). But first, to process the application, one of the listed forms of payment must have been made. In a disallowed claim, none of these payments would have been made.</p>	
4123-3-35	<p>Julie A. Keil, MPA, CL 17 S. High Street, Suite 280 Columbus, OH 43215 Capital Success, LLC 10/31/17</p>	<p>Rehab Providers Resource Organization (Rehab PRO) supports incentivizing employers to settle claims by permitting settlements to be charged to the Surplus Fund. However, we have concerns about their projected fiscal impact on the Fund and other programs and services it the Fund supports.</p> <p>Use of the Surplus Fund for various purposes has expanded over the past half dozen years in part to minimize charges to employers' accident or occupational disease experience and for health and safety prevention programs. An expansion of the Surplus Fund's use could jeopardize funds for existing programs and services.</p> <p>It bears reminding that Vocational Rehabilitation services to injured workers are provided from the Surplus Fund (also not charged to employers' experience), and it would be prudent to assure ample funds remain for these services indefinitely.</p> <p>It would be helpful to see a report of the current and projected financial stability of the Surplus Fund in aggregate</p>	<p>The surplus account of the State Insurance Fund is in no danger of running out of funds. The surplus fund is not a separate fund but rather a term used to refer to an account within the State Insurance Fund where the payment is not included in the historical experience of one specific employer. However, all of the surplus losses are included within the development of the base rates. Therefore, the expected future surplus losses are, in a sense, mutualized among all employers in the rate-making process.</p>	<p>Julie Keil thanked BWC for the response.</p> <p>No change to the rule.</p>

		and by program use, including the projected fiscal impact of the implementation of this draft rule, assuming that BWC has that data.		
4123-3-35	Paul Hicks, MD, MSHCM Vice President of Clinical and Physician Affairs Ohio Hospital Association 155 East Broad Street, Suite 301 Columbus, OH 43215-3640 11/1/17	<p>Thank you for the opportunity to respond to OAC 4123-3-35. Below please find our concerns and potential remedies</p> <p>Page 4 paragraph 3: Requiring an individual to have an inpatient stay at a recognized medical or mental institution places an undue burden on the claimant. Inpatient care for behavioral health issues is limited to the acutely suicidal or most acutely decompensated patients. It is not intended nor utilized as a treatment program for the chronically disabled even with decompensation if that does not lead to acute suicidality, psychosis or other profoundly delusional states.</p>	BWC is only amending this rule to incorporate changes required by the amendment to R.C. 4123.343 in H.B. 27. BWC did not perform a comprehensive review of all of the other existing provisions of the rule. However, while your observation about the state of current treatment for mental health conditions may be accurate, BWC's rule is based on the language in the statute. R.C. 4123.343(A)(14) defines, as one of the handicap conditions, "Psycho-neurotic disability following treatment in a recognized medical or mental institution."	No change to the rule.
4123-3-35	Paul Hicks, MD, MSHCM Vice President of Clinical and Physician Affairs Ohio Hospital Association 155 East Broad Street, Suite 301 Columbus, OH 43215-3640 11/1/17	<p>Page 4 paragraph 4: "employer is not eligible for handicap reimbursement in the same claim in which the employee participated in a rehabilitation program." This limitation is counterintuitive and likely to have the unintended consequence of leading patients and potentially employers to avoid rehab for fear of nullifying access to this fund. Individuals with chronic disabilities who are in the workforce have overcome multiple barriers to reach employment. Part of that is likely past utilization of rehabilitation services. In a given claim, the patient may want to try such services again, services that previously allowed for gainful employment. If rehabilitation services though were unsuccessful, the patient would no longer be eligible for access to this fund- nor would he or she be able to continue working.</p>	There are multiple existing incentives to encourage rehabilitation. The rehabilitation costs are charged to the surplus fund. If an employer hires a person who has completed a rehabilitation program, BWC often pays a work incentive to the employer. And, there is the incentive in the handicap statute. The purpose of the handicap statute is to charge to the surplus fund costs of claims attributable to an employee's pre-existing condition. If an employee has a claim, and then goes through	No change to the rule.

			rehabilitation in that claim, the rehabilitation was not a pre-existing condition in that claim. The only way this provision in the law makes sense is for the injured worker to be rehired by that employer or another employer, and then have a new injury where the handicap plays a role in the cost of that new claim.	
4123-3-35	Paul Hicks, MD, MSHCM Vice President of Clinical and Physician Affairs Ohio Hospital Association 155 East Broad Street, Suite 301 Columbus, OH 43215-3640 11/1/17	Page 4 paragraphs 9-12 and page 5 paragraphs 1-2: Can you clarify that the deadlines for submission are altered from previous requirements?	There are no changes in the filing deadlines of paragraph (B)(1)(b) from the existing version of the rule. This language was last amended effective January 1, 2016.	No change to the rule.
4123-3-35	Paul Hicks, MD, MSHCM Vice President of Clinical and Physician Affairs Ohio Hospital Association 155 East Broad Street, Suite 301 Columbus, OH 43215-3640 11/1/17	Page 8 paragraph 2: “(F) No employer shall in any rating year receive credit under section 4123.343 of the Revised Code in an amount greater than the premium it paid.” It is likely that lump sum payments thru settlements would exceed the amount an employer paid in premiums for at least one year and possibly multiple years. Disallowing that credit would effectively negate the intention of the amendment and this section should be modified to reflect that exception. Thank you for your consideration. We look forward to partnering on improving this rule going forward.	The purpose of charging costs to the surplus fund is to eliminate the impact of those costs on the employer’s premium. Even if an employer has no claims, it still pays premium. The rule actually is very generous in the possibility of reducing an employer’s premium to zero in some cases.	No change to the rule.
4123-3-35	Crystal Sikes Employee Engagement Specialist 513.673.2890 csikes@matrixtpa.com	My understanding is basically that the percentage of handicap savings that has historically been deducted to all aspects of the claim besides settlements, will now include settlements. So if an employer gets a 50% handicap on a claim, that 50% will be taken from the max claim amount and if they settle the claims for 100k, only 50k will impact	The rule change itself will not be applied retroactively to any situations where both the handicap was awarded and the settlement occurred prior to the effective date of the statutory	No change to the rule.

		<p>their loss ratio.</p> <p>This is good for the employer and could also increase the amount of settlements finalized. The only thing that I think should be considered is retroactively applying this rule for the experience of the client. That would be a huge benefit for the employer.</p>	<p>change. However, if BWC awards a handicap in claim that is settled or if the parties settle a claim where there is a prior handicap, BWC would indeed retroactively adjust the appropriate experience period in accordance with the typical way BWC adjusts prior experience for handicap awards.</p>	
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