

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
OF THE STATE OF OREGON**

PUBLIC RULEMAKING HEARING

In the Matter of the Amendment of OAR: 436-055, Certification of Claims Examiners))))))	TRANSCRIPT OF TESTIMONY
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The proposed amendment to the rules was announced in the Secretary of State's Oregon Bulletin dated Aug. 1, 2016. On Aug. 23, 2016, a public rulemaking hearing was held as announced at 9 a.m. in Room F of the Labor and Industries Building, 350 Winter Street NE, Salem, Oregon. Fred Bruyns, from the Workers' Compensation Division, acted as hearing officer. The record will be held open for written comment through Aug. 29, 2016.

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TRANSCRIPT OF PROCEEDINGS

Hearing officer:

Good morning and welcome. This is a public rulemaking hearing. My name is Fred Bruyns, and I'll be the presiding officer for the hearing. With me this morning is Chris Clark, a policy analyst in the Policy Section of the Workers' Compensation Division.

The time is now 9:01 a.m. on Tuesday, August the 23rd, 2016. We are in Room F of the Labor & Industries Building, 350 Winter St. NE, in Salem, Oregon. We are making an audio recording of today's hearing.

If you wish to present oral testimony today, please sign in on the "Testimony Sign-In Sheet" on the table by the entrance. If you plan to testify over the telephone, I will sign-in for you. Is there anyone on the telephone with us right now?

The Department of Consumer & Business Services, Workers' Compensation Division proposes to amend chapter 436 of the Oregon Administrative Rules, specifically:

Division 55, Certification of Claims Examiners

Transcript of public rulemaking hearing
Aug. 23, 2016

The department has summarized the proposed rule changes in the Notice of Proposed Rulemaking Hearing. This hearing notice, a Statement of Need and Fiscal Impact, and proposed rules with marked changes, are on the table by the entrance.

The Workers' Compensation Division: filed the Notice of Proposed Rulemaking Hearing and Statement of Need and Fiscal Impact with the Oregon Secretary of State on July 13, 2016; mailed the Notice and Statement to its postal and electronic mailing lists; notified Oregon Legislators as required by ORS chapter 183; and posted public notice and the proposed rules to its website.

The Oregon Secretary of State published the hearing notice in its Oregon Bulletin of Aug. 1, 2016.

This hearing gives the public the opportunity to provide comment about the proposed rules. In addition, the division will accept written comment through and including Aug. 29, 2016, and will make no decisions until all of the testimony is considered.

We are ready to receive testimony. If you are reading from written testimony and give the agency a copy of that testimony, we will add it to the rulemaking record.

Jerry Keene?

Jerry Keene:

Do I come up here?

Hearing officer:

You – great, thanks.

Jerry Keene:

Thank you, Fred. My name is Jerry Keene. I'm an attorney, and also am director of the Oregon Workers' Compensation Institute, which conducts much of the certification examiner training and conducts an examination, and has since 1991. I participated in the advisory committee changes – meetings on these rules, and also it was my petition to alter the IME credit renewal that I think prompted the department, at least in part, to go ahead and consider that and include it in its changes.

I want to testify today in part to endorse what the department has done and in part to express some concerns or questions, and also in part to confirm some understanding of the rules or the department's lack of intent to change things when it changed words in a way that would alter the certification criteria and procedures, that at least our organization has been using and which were in fact designed around the rules that were already there, and helped inform the wording of those. So I just want to confirm we're still doing things in a way that will comply with the new rules or

if the department did decide to make some changes, that I could at least express my concerns about those or elicit further dialog on that.

First of all, I'd like to note, as the petitioner on the IME credits, that I completely endorse the changes that were made. I think that reducing the amount of time and effort needed to familiarize yourself with IME interactions and instead broadening the requirement to be familiar with all of the rules and statutes was a reflection of the true need for training and certification and a reflection of the amount of time and effort that claims examining requires with regard to IMEs versus all the other things that claims examiners do. So I endorse that change.

With regard to the changes to definition of processing claims, and then the provisions under 0100, paragraph (1), with regard to insurer duties and the use of claims examiners, I would just note that the changes there – I'm not sure they really clarify things further, but I would say that in my reading, they seem to imply that a person who does some – conducts some things that might be considered claims processing activities beyond compensability determinations, benefit calculations, and payments just to workers, that there's a broader definition in what employers – I'm not saying this very well – that the people who are required to become certified may be broader than the actual interaction with the claims process, because of the difference in terms and interaction between 0005, paragraphs (6), and 0100, paragraph (1). And there might be some concerns about folks who supervise claims examiners who don't actually process claims might now have to become certified where they did not have to before.

Next, this is with regard to the, my hope that the department is not intending to change the practice that has been in place for a long, long time. There has always been a reference in the examination provisions, 0070, paragraph (1), small paragraph (b), that those who conduct the examination, and as a sidelight, the examination under the rules is actually something that the insurers bear the authority and the responsibility to approve, that the exam itself, whether or not it complies with the department's general rules, is something that the insurers have the primary responsibility to confirm rather than the department overseeing it. There's a provision that has always said that folks who are undertaking the examination may use a copy of the OARs and ORSs. In our particular class, that's always been true, but we have never interpreted that provision to be exclusive, that our folks before they even may take our examination are required, and this is a consistently enforced provision, must take our claims examination class, which includes review of a very extensive, 300-page claims examination notebook and the taking of exams, and the interim of taking study questions and reviewing answers. And we have always said that our students, while they are taking the exam, can use any of these materials, but we rely on the timing element. It's an extensive exam, with 130, 140 questions, timed, under an enforced time limit, and that requires them to be familiar with even more materials than just the rules and examination. But we allow them to use those materials, but then it puts a premium on being familiar them and all the materials aimed at familiarity with the rules and statutes. So that we want to make it clear that we have always permitted them to make use of their study materials. We're not sure whether that makes it harder or easier than just having the rules or statutes, because there's more to organize and more to become familiar with, but I want to make sure that the department has always accepted our interpretation of – I've approached them in the past. It was always okay to let students use other study materials as long as we're not compromising or conflicting with the purpose of the exam under the rules, and as long as we are not engaging in

anything that's fraudulent or dishonest under the rules, which is the other limitation. So I just want to make that clear that we understand we can continue that practice without compromising anybody's past or current or future certification.

Next I wanted to mention, just confirm, that the department has apparently taken a position that it's not going to dictate *how* an insurer signifies that it is certifying – approving an initial certification of a claims examiner, or renewing. There's nothing about doing it in writing. There's nothing about the kind of record that needs to be maintained, except with regard to other references about keeping records of the training that's involved. But there's no such thing as a statement about a certificate. There's not such thing about any kind of writing at all. It just seems to be that the insurer in whatever way it deems appropriate must somehow acknowledge, or in its mind, approve the records that the claims examiner has with regard to their exam and to their continuing education training. There's no form. There's no certificate. It could even be oral as far as the rules are concerned. I'm not saying whether I agree or disagree with that; I'm just noting that that's a continued ambiguity in the rule. In the past, I know I've had questions from folks wondering about the certification rules, about what it takes, what an insurer is supposed to do, what paperwork is involved, and we have just made stuff up. We have just ginned up forms and things we assumed would pass muster if there was ever a department audit, but have never had any guidance with regard to, you know, more than just common sense that that would be enough. That continues to still be the case.

With regard to expired certifications, I submitted a question to the department about the proposed rules and got an answer that I think should probably be placed on the record in terms of – not specifically, you don't have to go in and incorporate it by reference or add it to the record.

Hearing officer:

Okay

Jerry Keene:

It's my understanding that if a person allows their certification, either their initial certification or renewed certification to lapse by not accruing the necessary continuing education hours within the 3-year period, that there's a new provision under the rules that a person now has essentially a 12-year grace period to – for an additional year they can approach an insurer and wherever they're going to, meet the requirements for renewal within a subsequent 12-year period to the 3-year period that has just expired. There's an additional 12 years – 12 months to go ahead and achieve the hours necessary, but, and this is important, this is what I wanted to clarify, the beginning period of their initial 3 years continues to move forward as they are getting beyond the original ending point. In other words, if a claims examiner wants to take advantage of the grace period by getting a renewal of their certification more than 3 years later, they've got 12 months to do it, when they seek to have an acknowledgement of their certification or renewal, that's got to be based on credits obtained within three years prior to the date they're seeking the renewal, not dating all the way back to the beginning of the 3-year period. In other words the 12-month grace period does not extend their 3-year period for getting the hours. That 3-year period

continues to move forward in time, so that when they seek certification, it's still got to be hours that were obtained within the prior 3 years, 3 years prior to the date.

Hearing officer:

Jerry, that's my understanding. Is that yours as well?

Chris Clark:

Yeah. That is the intent.

Jerry Keene:

I used a lot of words to do that, but I just anticipated questions and possible – you've got to read a couple of rules in conjunction with each other to get to that point, so I just wanted to pull that all together in a really sloppy way, but explicitly in the record in case there's ever a question.

And then finally, one point of disagreement or a plea for additional consideration is that, under the original rules, two iterations ago, the rules contained an express provision – and this was while the department was engaging in the approval of certifications, before it was privatized – but under the original rules, the department made it clear that once there had been an initial approval of a worker's certification, that that approval would then have dignity with regard to subsequent approvals, that once it was approved and accepted, other people with a different idea about what the initial certification required could not go back and second guess it and essentially “unrecognized” the original certification and require the claims examiner to do it all over again, rather than just meeting subsequent continued education requirements. And, under the current rules, it states that an insurer *may*, when they are confronted with a person giving them certification documentation, a claims examiner, they may either accept that person's documentation or require them to go through and take a certification exam again, and that's at their option. And, I think that that doesn't pay sufficient attention or give sufficient recognition to the amount of effort that might have gone into the original certification. And, it allows one insurer retrospectively to cast doubt on the certification that was previously obtained and approved by another insurer simply by saying we don't accept it. You need to take the whole examination over again. Now to be clear, any insurer could at any time, as part of their own training requirements, require anybody applying for a job with them, to engage in whatever additional training requirements they want to do as a matter of their internal criteria, but I don't think it's appropriate to say that an insurer may at their option either recognize or refuse to recognize the legal status of having been certified, when working for another insurer who had recognized and approved their documentation, that there should be at least some requirement in the rules for an insurer that's going to cast doubt on, and potentially for subsequent reviewers, cast doubt on whether that initial certification was appropriate – require an examiner to go through the considerable effort of becoming certified again – that there should be some showing in the rules of a bona fide concern with the documentation they are being presented with, some burden they need to overcome, not to require additional training – that's completely outside of the certification rules – but in order to cast doubt on the certified status, not only for themselves, but for subsequent insurers that might want to employ that person, and potentially casting doubt

on the appropriateness of the work they did for a prior examiner, or for a prior insurer that accepted that, before that kind of doubt can be raised, that there should be some showing of bona fide concern, some identification of an actual problem. My preference would be that there can be no retroactive, absent fraud or dishonesty, some true criteria that would really cast genuine, legitimate doubt on the prior certification, that all certifications should be prospectively – prospective only; there should be a ratchet effect of prior certifications. Once it's accepted under a good faith look at the rules, that that should maintain dignity into the future, and not be able to be second guessed by a subsequent insurer. And, that's not only for fairness for the claims examiners, that's also as a matter of efficiency and claims processing certainty, so that examiners' claims companies don't have to worry about some subsequent company's different interpretation of the rules, when they accepted documentation for the purpose of allowing a person to process claims for them.

And that concludes my comments and testimony. I appreciate your courtesy for my lengthy presentation.

Hearing officer:

Oh no – thank you very much Jerry. Appreciate it. Would anyone else like to testify this morning?

Again, the record remains open for written testimony through and including Aug. 29, 2016. You may submit testimony in any written form, whether hard copy or electronic. I encourage you to submit your testimony by e-mail or as attachments to e-mail. However, you may also use fax, USPS mail, courier, or you may hand deliver testimony to Workers' Compensation Division Central Reception on the second floor of this building. On the table by the entrance are business cards that include any contact, or my contact information, and I will acknowledge all testimony received.

It's our practice to leave the hearing open a minimum of one-half hour, so I'm going to recess the hearing and pick it up again if someone arrives, or we'll conclude at 9:30.

The hearing is recessed at 9:18, and you're welcome to stay with us, or if you go, then thank you very much, Jerry, for your testimony. And, I will ask again – actually, I'm going to resume the hearing for a moment here. You did mention some advice that you had submitted before we filed the proposed rules, and you said you didn't necessarily need us to incorporate that into the testimony. I just want to find out for sure whether you'd like us to do that, because that's no problem. We can just find that memo and stamp it in. Or, if you covered everything you wanted to cover here, then that's fine too.

Jerry Keene:

I think probably that presentation included some examples of my concern that were more concrete than I did today, so I would say sure, it might be helpful, so sure I would ask that you incorporate it.

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Hearing officer:

Okay, and we will do so. And the time is now 9:19, and we are recessed again. Thank you.

Okay, this hearing is resumed at 9:30. Is there anyone on the telephone or here in person who'd like to testify? Okay, hearing no one, the time is 9:31. Thank you very much for coming. This hearing is adjourned.

Transcribed from a digital audio recording by Fred Bruyns, Aug. 25, 2016.