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September 30, 2016

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RE: Workers Compensation Division  
Proposed Rule Changes to OAR 436-060-0018

Dear Mr. Bruyns,

Please accept these comments to the proposed rule changes affecting OAR 438-060-0018, governing claim classification.

**Proposed OAR 436-060-0018(3)(b)**

The Workers' Compensation Division (WCD) proposes to amend subsection (3)(b) to require insurer to review a reclassification request and respond within 14 days *of receipt* of the workers' request. (Emphasis added). With respect, that is not what the statute requires. ORS 656.277(1)(a) provides, "The insurer or self-insured employer shall classify the claim as disabling or nondisabling within 14 days *of the request*." (Emphasis added). The addition of "receipt" as the event triggering the 14-day response period is not supported by the statute, as the statute does not mention "receipt." Rather it is the "request" that triggers the time period.

It is well established that the WCD cannot expand or limit a statutory requirement. *Miller v. Employment Div.*, 290 Or 285 (1980) ("An agency may not amend, alter, enlarge or limit the terms of a legislative enactment by rule.") (citing *University of Oregon Coop. Store. v. Dept. of Rev.*, 273 Or 539, 550 (1975)). If legislature intended the 14-day period to run from receipt, it would have said so. *See, e.g., Dept. of Consumer & Bus. Servs. v. Muliro*, 359 Or 736 (2016) (interpreting statutes expressly using the term "received" and "mailed"). That makes sense, as payment of temporary disability is particularly time sensitive, and any rules that extend the time in which payment is required harms workers greatly.

Further, an administrative rule dictating when an insurer must *respond* to a request for reclassification could create a conflict or confusing double standard applicable to that process. Specifically, while ORS 656.277(1)(a) is a *processing* statute, ORS 656.386(3) is an *attorney fee* statute, which provides, "If a claimant requests claim reclassification as provided in ORS 656.277 and the insurer or self-insured employer does not respond within 14 days *of*

*the request*\* \* \* the director, Administrative Law Judge, board or court may assess a reasonable attorney fee.” (Emphasis added). As such, insurers may comply with the proposed rule by *processing* the worker’s request with 14 days from receipt, but still be held liable for an *attorney fee* under ORS 656.386(3).

For example, consider a request for reclassification mailed on January 1, 2017. Insurer receives the request on January 3, 2017. It issues a Modified Notice of Acceptance on January 17, 2017, 14 days after it received the request. In such circumstance, insurer has complied with the amended rule, but is still liable for a fee for failing to respond within 14 days of the request. As such, I recommend retaining the current rule that mirrors the statutory language.

### **Proposed OAR 436-060-0018(3)(d)**

The changes to this subsection are not comprehensive. I propose the following language for subsection (3)(d), with recommend additions in italics:

(d) If the insurer does not respond to the worker’s request for reclassification within 14 days<sup>1</sup> of the worker’s request:

*(A) The worker’s request to reclassify the claim shall be deemed de facto refused, and the worker may appeal to the director under subsection (3)(c) of this rule; and*

*(B) The director may assess civil penalties under OAR 436-060-0200, attorney fees under ORS 656.386(3), or both.*

At the August 23, 2016 advisory meeting, a question arose of how to handle situations in which the insurer does not respond to a worker’s request to reclassify within 14 days or before a request for review is initiated. The WCD’s solution has been to dismiss the appeal without prejudice. The WCD appears to question its authority to deem such a nonresponse a “*de facto*” refusal subject to adjudication. That belief is not supported by the law.

There is clear authority allowing an agency to consider an insurer’s failure to issue a notice timely a *de facto* action. In *SAIF v. Allen*, 320 Or 192 (1994), the court explained that statutory duty to accept or deny a claim within the allowed period of time is absolute, and failure to do one or the other gives rise to a *de facto* denial, the compensability of which the Workers’ Compensation Board (WCB) has authority to address.

Similarly, the WCB considers a failure to issue a Notice of Closure or a Notice of Refusal to Close within 10 days of a worker’s request for closure under ORS 656.268(5)(d) a “*de facto*” refusal to close subject to adjudication. See *Adrienne Dombrosky*, 60 Van Natta 185 (2008)

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<sup>1</sup> Notice that “receipt” is also omitted from this subsection for the same reasons discussed above. The WCD does not have authority to expand or limit deadlines contained in a statute, and any “receipt” requirement that expands the time will surely be challenged in the courts.

(interpreting ORS 656.268(5)(d) as giving rise to a *de facto* refusal to close the claim when no response is given to a worker's request for closure within the statutory time frame).

Based on the above, the WCD clearly has the authority and duty to consider a refusal to respond to a request to reclassify the claim as a "de facto" refusal to reclassify the claim and adjudicate the matter as a refusal. As such, the WCD should adopt that application to allow the parties to adjudicate the issue of classification when an insurer fails to respond timely to a worker's request.

**Proposed OAR 436-060-0018(3)(f)**

Finally, the WCD should add OAR 436-060-0018(3)(f), and I propose the following language:

(f) If claimant appeals to the director under subsection (3)(c) of this rule, the director must issue an order classifying the claim.

My August 19, 2016 letter to the WCD and my testimony at the August 23, 2016 advisory meeting explains why this rule is needed. Briefly, the WCD has adopted an internal policy of dismissing "appeals"—requests for administrative review—of refusals to reclassify.<sup>2</sup> This subverts the intent of ORS 656.277(1)(b), which requires an "order from the director reclassifying the claim" in order to award an attorney fee.

Clarification that the WCD must issue an order classifying the claim avoids the recurring tactic of voluntarily accepting the claim as disabling after the worker's attorney initiates an appeal, thus avoiding exposure to fees, despite the work of claimant's attorney before the director. Unless the WCD truly lacks subject matter jurisdiction, such as when the appeal is untimely or the claim has been classified a non-disabling for more than one year, the director should issue an order as described under ORS 656.277(1)(b).

Thank you for considering of my suggestions. As always, if you have questions, please let me know.

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<sup>2</sup> Please refer to my August 19, 2016 letter for more detail of the law and the problem. For convenience, a copy of the letter is attached.

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August 19, 2016

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RE: Rule Making Advisory Committee – OAR Chapter 436, Division 060 –  
Fees in Claim Classification Disputes

Dear Mr. Bruyns,

Thank you for the invitation to participate in the Rulemaking Advisory Committee, scheduled to meet August 23, 2016. I have reviewed the committee's agenda, and I wish to offer my comments on the proposed alternatives to Issue #2, concerning attorney fees in claim classification disputes.

The Workers' Compensation Division's (WCD) summary of the problem is accurate. Essentially, insurers are avoiding fees by issuing Modified Notices of Acceptances, which accepts the claim as disabling, after a claimant has requested administrative review before the WCD. This is because the WCD has made an internal policy decision to dismiss requests for review, instead of issuing an order reclassifying the claim. Because the statute, ORS 656.277(1)(b), provides for an attorney fee only when an attorney is "instrumental in obtaining an order from the director that reclassifies the claim," the insurer avoids paying a fee because a dismissal is not an order reclassifying the claim.

The WCD correctly recognizes the legislative purpose of amending ORS 656.277(1)(b). The statute was intended to create a process in which insurers were allowed a period of time to voluntarily reclassify the claim without being exposed to fees. However, if insurer refused to do so timely, then a worker was permitted to raise a formal dispute and the insurer thereafter would be exposed to fees based on the efforts of the attorney if successful in getting the claim reclassified.

Thus, there are several problems with the WCD's current dismissal process. Specifically, it is not authorized by law, and even if it were, the rationale for the process is incorrect. The best alternative is to resolve the dispute by issuing an order of reclassification, regardless of the insurer's actions taken after the request for administrative review is initiated.

No statute or rule expressly permits the WCD to dismiss a request for review of a classification decision. Specifically, ORS 656.277(1)(a) provides, "The worker may ask the Director of the Department of Consumer and Business Services to review the classification by the insurer or self-insured employer by submitting a request for review within 60 days of the mailing of the classification notice by the insurer or self-insured employer. If any party objects to the classification of the director, the party may request a hearing under ORS 656.283 within 30 days

from the date of the director's order." Nothing in that statute suggests that dismissal is appropriate once claimant requests review of a refusal to reclassify.

The WCD's sole rationale for dismissing a request for review is that if an insurer voluntarily accepts a disabling claim after review, "there is nothing left to decide." That rationale fails on several levels. First, to the extent that such rationale invokes the notion of "mootness," the mootness doctrine does not apply to, and is not available to, Oregon agencies.

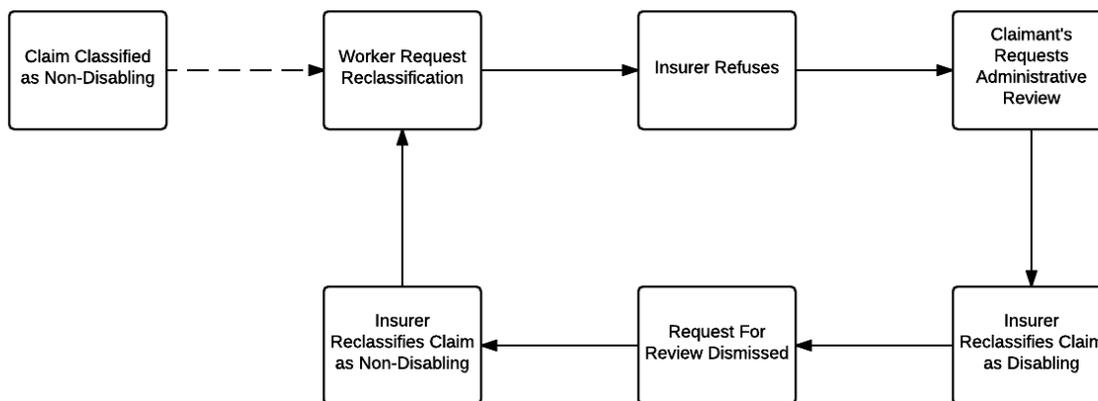
"'Mootness' is a term of art concerning the authority of the courts to exercise the judicial power conferred by Article VII of the Oregon Constitution. It is an aspect of justiciability that *applies only to the courts and not to local governments or administrative agencies.*" *Leupold & Stevens, Inc. v. City of Beaverton*, 206 Or App 368, 374 (2006) (citing *Just v. City of Lebanon*, 193 Or App 132, 142 (2004)) (emphasis added). Because the judicial doctrine does not apply to agencies, an agency may consider mootness only if expressly authorized by statute. There is no such statute applicable to the workers' compensation division.

Further, even assuming that the mootness doctrine is available, reclassification disputes are not mooted by an insurer's Modified Notice of Acceptance. Such action is a concession of fact, but does not conclusively resolve all of the issues concerning reclassification.

The mootness doctrine applies only when circumstances change such that the "exercise of authority would no longer 'have some practical effect on the rights of the parties to the controversy.'" *Thunderbird Hotels, LLC v. City of Portland*, 218 Or App 548, 556 (2008) (quoting *Leupold*, 206 Or App at 374). An order unequivocally affects the rights of the parties in, at least, two specific ways: preclusion and attorney's fees.

An order precludes an insurer from reclassifying the claim again as non-disabling. Specifically, OAR 436-060-0018(12) provides, "If a claim has been classified as disabling and the insurer determines the criteria for a disabling claim were never satisfied, the insurer may reclassify the claim to nondisabling." Procedurally, this rule allows an insurer to voluntarily classify the claim as disabling, and then change that classification again to nondisabling. Thus, a voluntary Modified Notice of Acceptance does not legally bind the insurer, as it can later unilaterally reclassify a claim as non-disabling.

A order of dismissal does nothing to prevent this. Under the current rules, something like this can occur:<sup>1</sup>



<sup>1</sup> To be clear, this likely does not occur. However, only an order prohibits this from occurring, and thus affects the parties rights.

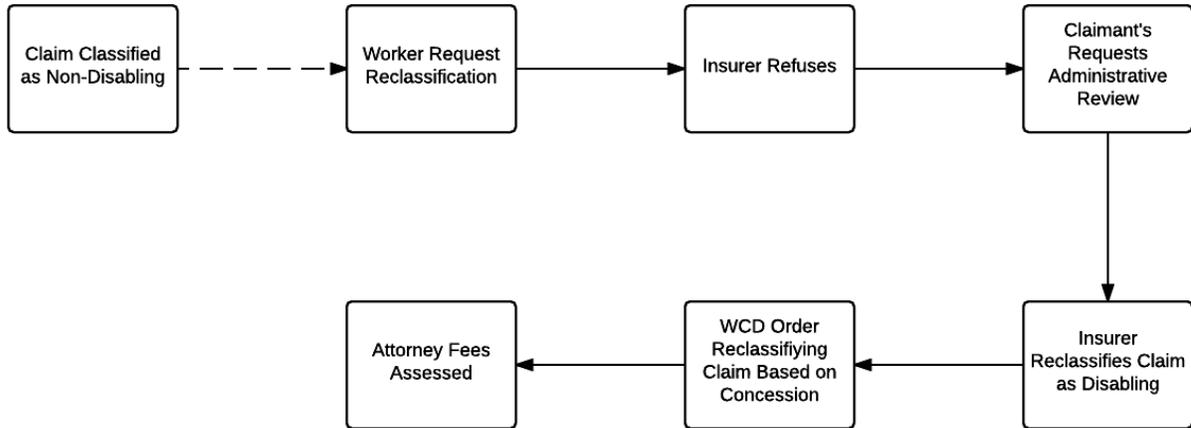
In contrast if an order issues, the order necessarily makes findings of fact and conclusions of law that preclude later reclassification. The final preclusive effect of an order is a substantive effect on the parties' rights.

In addition to preclusion, the parties' rights and obligations regarding an attorney fee are determined by an order. The right to a fee remains at least until the order is issued or the matter dismissed. Thus, an order would have a substantive affect on the parties' rights and obligations, and a dismissal because of alleged mootness is circular reasoning; he WCD cannot dismiss a dispute because there are no remaining issues because it dismissed the dispute! Based on the above, mootness is not legal basis to dismiss a request for review.

The WCD also seems to have a limited notion of what claim classification means. Neither "classification" nor "reclassification" is defined by statute or rule. Although ORS 656.262(6)(b)(B) provides, "[t]he notice of acceptance shall \* \* \* [a]dvice the claimant whether the claim is considered disabling or nondisabling," it does not dictate that a notice of acceptance is the definitive method to claim classification. Rather, classification depends on the factual context of the claim. Specifically, in the context of a dispute, the WCD is charged with making factual findings to determine if 1) temporary disability is due and payable, 2) the worker is medically stationary within one year of the date of injury and the worker will be entitled to an award of permanent disability; or 3) the worker is not medically stationary, but there is a reasonable expectation that the worker will be entitled to an award of permanent disability when the worker does become medically stationary. See OAR 436-060-0018(2)(a)-(c); *Jimmie L. Wilson*, 68 Van Natta 1330, 1330 n1 (2016) ("An injury is not disabling if no temporary disability benefits are due and payable, unless there s a reasonable expectation that permanent disability will result from the injury.") (citing OAR 436-060-0018(2)); *Donna Halpin*, 55 Van Natta 4350, 4351-52 (2003) (same) (citing former OAR 436-030-0045(5), *renumbered* OAR 436-060-0018).

A Modified Notice of Acceptance is not evidence of temporary disability being due and payable, it is not evidence of medically stationary status, and it is not evidence of actual or expected permanent disability. As such, a Modified Notice of Acceptance does *not* provide the necessary factual basis necessary to determine if a claim is, in fact, disabling or not. Thus, a dismissal cannot be appropriate based solely on a Modified Notice of Acceptance.

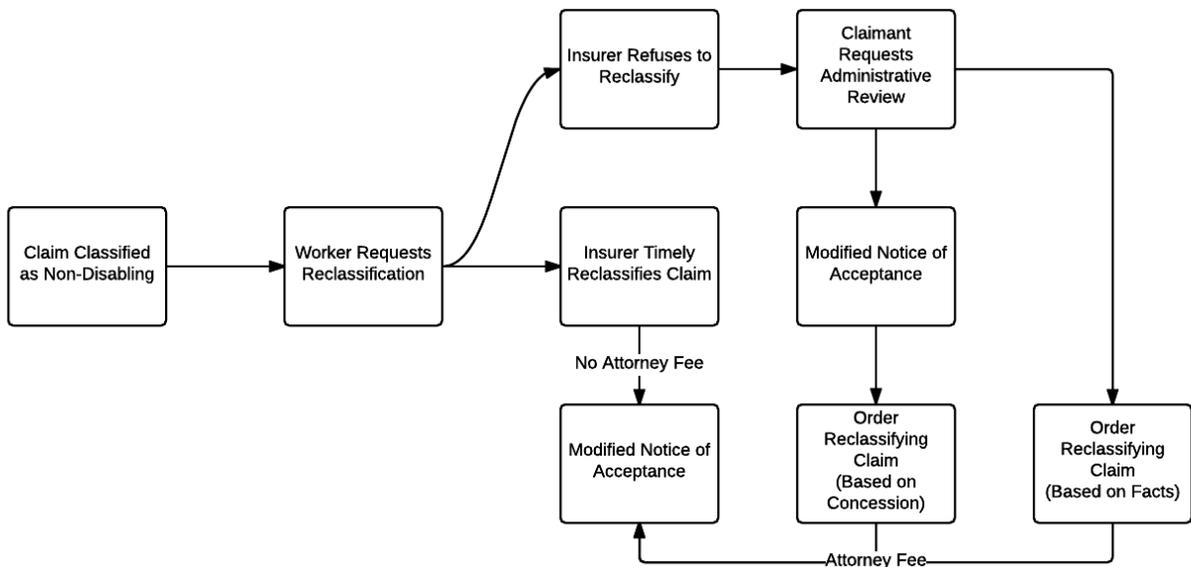
However, a Modified Notice of Acceptance accepting a disabling claim *may* be considered a unilateral concession that the claim is, factually, disabling for one or more of the reasons identified above. Thus, a procedurally correct alternative to dismissal would be to issue an order reclassifying the claim based on the insurer's factual concession, as represented by is Modified Notice of Acceptance, that that the claim is disabling for at least one of the reasons that make a claim disabling. Again, the order does not issue by operation of law because the insurer "reclassified the claim," rather the WCD's decision and order remains a fact-based order. The WCD is simply able to reach its conclusion that the claim was or has become disabling under the three potential ways based on insurer's concession. That process would look something like this:



Finally, the current proposed “alternative,” restricting an insurer’s ability to reclassify the claim during the period of review is unworkable. First, I question the WCD’s legal authority to prohibit an insurer from issuing a Modified Notice of Acceptance. No statute suggest the WCD possesses such authority. Further, I question the wisdom of such a prohibition, as it could conflict with an insurer’s other obligations deadlines. For instance, a “freeze” on accepting a claim could cause an insurer to delay accepting a new or omitted condition claim or otherwise processing the claim.

Further, such an alternative is poor policy. Forcing parties to litigate an issue that one party is willing to concede is in no party’s best interest. Rather, a party should be allowed to concede an issue, pay what is due under the law, and move on.

Based on the above, I envision a properly functioning reclassification process looks something like this:



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