

DIVISION 060 - CLAIMS ADMINISTRATION
Rulemaking advisory committee meeting
AUGUST 27, 2015

Committee members attending:

Barb Reich, Asante Work Health
Bryan Aalberg, Washington County
Carmen Jones, Legacy Health Systems
Dan Schmelling, SAIF Corporation
David White, Cummins, Goodman, Denley & Vickers P.C.
Dwayne Yoder, SAIF Corporation
George Goodman, Cummins, Goodman, Denley & Vickers P.C.
Gina Wescott, Special Districts
Jaye Fraser, SAIF Corporation
Jennifer Flood, Ombudsman for Injured Workers
Jordan Snyder, Special Districts
Julie Masters, SAIF Corporation
Julie Riddle, The Hartford Financial Services Group
Keith Semple, Oregon Trial Lawyers Association
Kevin Mealy, Oregon Nurses Association
Larry Bishop, Sedgwick CMS
Mark Hopkins, EC Company
Melissa Schnell, City of Portland
Randy Elmer, Randy M Elmer Atty at Law PC
Sara Stevenson, Washington County
Sean Warren, SAIF Corporation
Spencer Aldrich, Law Offices of Kathryn Reynolds Morton
Sue Cline-Quinones, City of Portland
Susan Wilson, Liberty Mutual Insurance
Sydney Montanaro, Swanson Thomas Coon & Newton
Zachary Brunot, Randy M. Elmer, AAL, PC

Agency staff members attending:

Barbara Belcher
Cara Filsinger
Fred Bruyns
Karen Howard
Mary Lou Garcia
Mary Schwabe
Michelle Miranda
Steve Passantino
Troy Painter

Fred welcomed the committee members, explained the ground rules, requested input on fiscal impacts of potential rule changes discussed, and asked members to present any new issues before the committee considers the prepared agenda.

Meeting minutes have been entered below in italicized text. The following is not a transcript, and some comments have been paraphrased for brevity.

New Issue: OAR 436-060-0019(1)(c) (raised by SAIF Corporation)

- *07:08 Julie Masters: This has to do with the rule that says that if the worker doesn't complete the work shift, the day shall be considered the first day of the three-day waiting period even if there is no loss of wages. Our suggestion was to change that to if there is a loss of wages, because it didn't make sense that if there is no loss of wages, yet it's the first day of the three-day wait.*
- *07:45 Fred Bruyns: I'd appreciate anybody's input on that, thoughts, or concerns.*
- *07:52 Jennifer Flood: I have concerns with how you meld that with the statute, that says when the worker leaves work or loses wages under 656.210(3) and under 656.212(1).*
- *08:25 Julie Masters: So, it says leaves work or loses wages. Well there you have it.*
- *08:40 Dan Schmelling: One of our concerns are there are two situations where they lose time from work, and only one of them starts the three-day wait. If they start their work shift, they miss time, and they complete their work shift without a loss of wages, that doesn't start the three-day wait. But, if they start their work shift, don't complete their work shift, with no loss of wages – in both situations the person is being paid the full day. In one they miss "sandwiched" time. In the other case it is just the end of the work day. Only the end of the work day starts the three day wait. Whether or not statute would allow us to do that, but, it is kind of like, shouldn't we make those two things equal, that it's loss of work and wages.*
- *09:24 Jennifer Flood: That just raises the question about the rule that says, if you leave and you come back, that it doesn't start the three day wait when the statute says that it would.*
- *09:37 Dan Schmelling: Yes. That rule's {inaudible}.*

New Issue: OAR 436-060-0025(2) (raised by SAIF Corporation)

- *10:05 Julie Masters: This has to do with pay cycles.*
- *10:34 Dan Schmelling: Currently everyone knows we pay every two weeks. Some employers don't pay every two weeks. They might pay semi-monthly or monthly or weekly. It makes it difficult when paying temporary partial disability to get the correct wages from the employer to make a TPD payment. You might have the end of one pay period and the beginning of the next pay cycle. You make a good faith estimate. Payroll records may come in after the fact and you correct the previous pay cycle. Wouldn't it be easier if insurers were allowed to align TPD payments with the payments of the employer, for example semi-monthly. Then we would ask the employer for the gross wages of the most recent pay period completed. If the modified work pays less than full wages, that is what we need to know to make the TPD payment. It is easier for the employer to give us a whole pay period. It helps the worker because they are getting a paycheck and a TPD payment at the same time for the same time period. It is easier to explain to them, you are only working half time, here's your TPD check, versus, well you had this many hours in the last pay cycle, this many hours in this pay cycle, this is what your TPD calculation is – and, oh, it's only an estimate because your*

employer couldn't provide accurate payroll. Why not change this to give us the permission. You do have latitude within the statute, which says the "director may."

- *13:16 Julie Masters: In the issue statement there is a suggestion to allow that for self-insured employers. We didn't see a reason why for regular insured employers we didn't also make the calculations better.*
- *13:37 Melissa Schnell: I have a question – a lot of payroll sync-up is beyond seven days in arrears. In City of Portland, our payroll is issued on Thursday, so it is eight days in arrears.*
- *14:00 Dan Schmelling: It may not work for you. That's why it says "may."*
- *14:03 Keith Semple: We are building in an assumption that we can get the payroll data the minute it is run, and like you said it might be eight days in arrears. You may run into the same problem when you sync it up to the pay interval, whatever it is – you are assuming you have the data immediately to then do the time loss calculations. It is a challenge for us as well when we try to audit time loss for injured workers, but I'm not sure ...*
- *14:44 Dan Schmelling: For smaller employers this might not work. For large employers, you might have 15-20 claims. It would be great to be able to call up payroll on whatever day and say, "I want payroll for these 20 people," instead of how it is now, where it might be two were paid on Monday, three paid on Tuesday, so we are going to the employer repeatedly. Will it work 100% of the time, maybe not. But if it works 50% of the time, and it benefits the employer, and it is easier to explain to the worker and is not harming the worker, maybe it is a step we want to take to make the process simpler for everybody.*
- *15:34 Jennifer Flood: From the Ombudsman's office perspective, you are right, explaining to the worker it's difficult when they are used to being paid every week, and they have to wait the two-week period and the seven days in arrears, etc. I'm not opposed to that idea because it would be wonderful if they got their time loss check the same day they got their payroll check – TPD or full time loss. Even if it's once a month – those folks have their bills associated with that. My concern – I like the flexibility but it may bring in some issues if you try it and then it is not working – the predictability for the worker of when they receive their benefits I think is vitally important. Regulating and ensuring, when is timely payment, so long as those parameters are put into place so it can be predictable and regulated for timeliness, I think that it would help.*
- *16:47 Dan Schmelling: That's where the rule would need to factor in that regular and predictable. If the employer is not paying regular and predictable, we can't match a variable.*
- *16:57 Jennifer Flood: The seven days in arrears isn't in statute.*
- *17:02 Julie Masters: That's true, and currently when we don't have this payroll information for the last seven days, it's no different under this proposed system. Maybe the director could approve it first, or I don't know if SAIF didn't want that degree of communication going on. Maybe a pilot.*
- *17:38 Dan Schmelling: The rules already say if you change the cycle or the rate you notify the worker. So it could be as simple as saying, you have returned to modified work, your employer pays you on the 15th and the last working day of the month, your TPD checks will be issued on these days.*
- *17:57 Speaker unknown: But how would you deal with seven days in arrears?*

- 17:59 Dan Schmelling: *It is not in statute. So the rule would need to say that only in this situation could you match up the pay cycle with the pay date and pay accordingly. So if you are not meeting that, then that rule wouldn't apply to your TPD.*
- 18:31 Jennifer Flood: *Not everyone applies the seven days in arrears, or applies it consistently.*
- 18:45 Jaye Fraser: *To your point Jennifer. I think this has the potential to provide more predictability for workers.*
- 18:52 Jennifer Flood: *Yes. Workers get a little confused paid wages and time loss at different times. If it could be in alignment to when they are used to getting paid, I think that would work best for workers.*

New issue, OAR 436-060-0025(5) (raised by SAIF Corporation)

- 19:58 Dan Schmelling: *For seasonal workers now, this is placed with extended gaps. When you are trying to marry these two, the seasonal worker has an extended gap. We all recognize there are workers who only work nine or ten months out of the year who might take two or three months off or might only take a few weeks off. We've had a few cases go to hearing where the decision was that what was called a seasonal gap was not a seasonal gap. It was extended and needed to be removed. So we are taking a worker where we can demonstrate a history of nine or ten years of employment with the same employer taking two to three months off in the winter for a construction job, all of sudden we are basing their wage calculation on ten months work. Their average weekly wage is then higher than what they are earning that we can demonstrate over time. We thought we could take seasonal out of where it is now and craft its own rule, and say this is how you deal with seasonal employment and this is how you deal with payroll for seasonal.*
- 21:30 Melissa Schnell: *In the City of Portland our seasonals are 1200 or 1400 hours per year, and are employed every year for multiple years. A few seasonals work minimal hours during the winter months. Some parks employees may work while going to school about 4-6 hours per week but during the summer are 40 hours per week. We typically have our seasonal people stop working in December and then start again in April.*
- 22:27 Keith Semple: *We disagree with this proposal. Folks can work in the off season if they want to, and they have no guarantee of employment in the next year. If this is a five-year contract and the worker is guaranteed to come back every year, maybe that is a different situation. If they leave the one year and may or may not be hired back to the construction job: 1) they have that time and they may work other jobs if they want, and 2), it's a brand new engagement every time they go back. There has also been case law on this as well.*
- 23:12 Randy Elmer: *The statute clearly says it should be the wage at the time of injury. That's the baseline. This is a tough issue. It may seem unfair to an employer who employers a guy for 12 hours per day at \$25 per hour on a demolition project for two weeks in January, he doesn't know if he's coming back or not but he comes back in December and does another two week project, and they either try to average it over 52 weeks, or they more honestly would try to average that chunk of wages over that year, over the four weeks. But, if there was no guaranty he was going to come back to work, though this doesn't happen that often, that wage at the time of injury is that \$25 per hour. The court looked at this in a case called Tye v. McFetridge. And they talked about the importance of the continued relationship, and it is all about that wage at injury; and it does require some continuing agreement; otherwise it is terribly unfair to the worker. So I think you have to look at the intent at the time of hire.*

This idea of seasonal when there is no contract is just another way to spread the wages thin. That's not fair to that worker.

- *24:47 Dan Schmelling: I don't disagree with that case. I'll use the example of my neighbor. He works in construction. He doesn't work in the winter. He has three months off. He is driving the company truck all three months. He uses it to go to the shop occasionally, but he is not getting paid. So for that worker if we had something specifically about seasonal that addressed that and gave us more guidance, when there's that continuation of employment, when there is not that guarantee of continuation, whether or not we can demonstrate a pattern over a period of time, versus looking at short chunks of time, and saying you can't look back beyond 52 weeks, even though you can demonstrate a ten year pattern. That's where I think there would be a benefit for a separate rule on seasonal employment.*
- *26:09 Randy Elmer: In your example, I agree that would be a 52 week situation. I think the court would agree that there was a continuous relationship. It would be fair to average wages over the entire period of that relationship. But, if we try to create a rule that tries to define every person who has a break in employment as seasonal, and we get to count the wages for the whole time as having that relationship, then you are going to unfairly put a lot of people into that category that don't fit in that category. We need to look at the facts of each case, I think. It is hard to pigeon hole everyone by rule. We can't predict everything.*
- *26:43 Jaye Fraser: But would you object to a rule that includes limitations, that doesn't throw everybody into it – basically a two pronged approach.*
- *26:58 Dan Schmelling: We have teachers now, which you could argue are seasonal. They have their own rule. This is how you calculate an average weekly wage for a teacher or someone employed in a like manner. That is much the same argument here. It is not all workers, but those that you know are seasonal, such as farm laborers, logging, and construction. I wouldn't say you still wouldn't look at averaging out their wages, but just provide something where you are not trying to define what is a gap, should we include this gap, not include that gap – look at it more as a seasonal and whether we can demonstrate a seasonal nature to that employment, versus looking at each gap individually.*
- *27:51 Randy Elmer: I'm generally opposed to creating more rules to try to capture every situation. I think it is fair to take those issues to a fact finder. I don't know that you could create criteria that would be fair to everyone in a seasonal situation. Teachers are so predictable. We know how the school systems work. As compared to logging, where every year is different.*
- *28:54 Julie Masters: To the extent a rule could be crafted that would cover more situations – the idea you have to take every extended gap case to a judge to decide doesn't serve the system, you have all kinds of people making these decisions on a short time frame. They have to figure out the average weekly wage and start paying in 14 days based on the information they can gather in that time. There is potential for a lot of litigation that is best avoided by having more clarity than what we currently have.*

New issue, OAR 436-060-0030 – add (13) (raised by SAIF Corporation)

- *30:32 Julie Masters: This is about the employer verbally offering physically suitable modified work, and the worker returns to modified work, having the same effect as if the offer was in writing – it's just not reflected in the rules. We have a citation to Ricky J. Haflich and Viking Industries v. Gilliam, but I think there is a more recent case called Fidel Vivanco that is kind of the same thing. Once the worker begins the modified job, if they then leave the job,*

the requirements to go through all of the formal job offers aren't necessary in that case. It is as though they were given a written offer. If they later quit or are terminated for reasons unrelated, then their time loss ceases. It's just to codify what is there in the case law because the rules don't do that now.

- *31:48 Jennifer Flood: How is it approved by the attending physician if it is not in writing? How is that documented?*
- *31:57 Julie Masters: It is not. It is just a matter that they have returned to modified work under ORS 656.268. That is one of the bases for stopping time loss – temporary total. All those requirements of approved etc. – that's only if the employer is going to ...*
- *32:23 Jennifer Flood: Terminate later.*
- *32:25 Julie Masters: Yes, I think so.*
- *32:27 Jennifer Flood: In your proposed language, it does say verbally offered but approved by the attending physician.*
- *32:35 Dan Schmelling: This is a situation where the worker has come back to work voluntarily and demonstrated their ability to do the modified work and then quits on their own.*
- *32:45 Jennifer Flood: So where does the attending physician come into play.*
- *32:46 Speaker unknown: The physician has already approved the light duty job description.*
- *32:51 Julie Masters: Not necessarily. Under 656.268(4)(a), temporary total disability benefits shall continue until whichever of the following events first occurs: (a) the worker returns to regular or modified employment – no rules around this, no requirements; (b) the attending physician or nurse practitioner advises the worker and documents in writing that the worker is released to return to regular employment; or documents in writing released to return to modified employment, job is offered and the worker fails to begin. All of those things are necessary only if they don't begin. It's already in statute. It is just a matter of completing the rule.*
- *33:37 Jennifer Flood: I understand, but I am confused about it being verbal but approved by the attending physician in your suggestion.*
- *33:52 Mark Hopkins: It appears I am one of the only employers in here. If a guy comes back and has a return to work recommendation on the form, returning back from the doctor, that states what his light duty could be, then is that what you are talking about?*
- *Several committee members: Yes.*
- *34:25 Speaker unknown: Then he comes back to work under those restrictions and starts working.*
- *34:30 Randy Elmer: Here is the step in between that creates the problem. Most employers try to match the limitations with what they interpret the release to say. It doesn't always happen. It is not necessarily appropriate for the employer to try to make a medical decision about what that worker can and cannot do. Currently, it is incumbent upon the employer and its insurer to take whatever job it thinks is the appropriate job, and then ask the physician to say if the job described is a suitable job. Otherwise the worker may go back to a job that may be totally inappropriate, and if he abandons it because he can't do it, it wasn't sanctioned by the doctor. Now he has lost all protections the statute affords him, because he won't voluntarily come back to work.*
- *35:44 Julie Masters: That does happen, but then the worker needs to go back to the doctor, and they often do within a day or two.*

- 35:51 Randy Elmer: *If they can get in to see the doctor.*
- 35:52 Jennifer Flood: *Then there is a delay in the benefits. I have concerns with this concept because of the harm it can do to workers. Many workers return to work without a written modified job offer and things go smoothly. But for those who return and the employer says you might have a 30 lb. limitation and now you can do 29 ½ lbs. all day long – in reality not within the worker’s restrictions the doctor truly intended for him.*
- 36:36 Keith Semple: *I think it provides more protection to the worker and the employer when all of these things are done more formally, in writing. Then the employer says, you come, you report, you do this job, etc. and if you don’t we are going to take credit for them as though you came and worked them, unless you have a doctor’s note saying otherwise, so everyone knows what is supposed to be going on.*
- 37:01 Jennifer Flood: *You are right. When the worker calls and says they cannot do the job but confirm that they are working according to the job description, I advise the worker to talk to the doctor. It might hurt a little to do what is being asked but that might be a way to get you back into the workforce. That protects that employer when they are following the guidelines of the doctor.*
- 37:32 Randy Elmer: *We’ve see so many releases say no heavy lifting, no excessive bending, twisting, kneeling, stooping – what does that mean? If you are going to ask a worker to come back to a job, then you need to say to the doctor that you are not sure what it means, but this is the job we want him to do. Do these things match? Then we are back on track. Then it is appropriate for the worker to come back to the job that’s offered or to be terminated and lose his benefits if he doesn’t.*
- 38:00 Larry Bishop: *What about the cases where it doesn’t happen and the worker is given a clerical job and it works? Are you saying we should be doing the letters and getting approval on all of those cases?*
- 38:16 Randy Elmer: *There are going to be a lot of times where the worker knows they can do the job and the employer knows they can do the job and there is not going to be this issue. It comes up when the employer discretionarily decides they have a job they think is appropriate, it turns out not to be appropriate, the worker can’t do it, they can’t get back to the doctor and get an off work slip. They are terminated for not completing a shift and walking off the job in pain. Or they can’t report the next day – and then the excuse is that you lose your time loss because you did come back to work. That proved to me that you thought the job was appropriate that I came up with.*
- 38:51 Larry Bishop: *That’s not right.*
- 38:54 Mark Hopkins: *How often does that happen?*
- 38:56 Larry Bishop: *In most cases when people do come back to light duty jobs and it works, the administrative burden to go through all of those steps, if mandatory, will delay return to work and increase costs.*
- 39:08 Jennifer Flood: *I don’t see it being mandatory. It’s just mandatory if the insurer is going to terminate benefits if the worker doesn’t do the job. I think in the majority of claims the worker goes back without a written job offer. The adjusters know the ones that might go south. Workers may know that they have to protect themselves.*
- 39:41 Fred Bruyns: *Mark, you asked how often this happens.*
- 39:43 Mark Hopkins: *How often do you suppose that happens?*
- 39:49 Keith Semple: *We see the ones that go sideways. We see an unrepresentative sample.*

- 39:58 Mark Hopkins: *In my world it seems like none.*
- 40:08 Julie Masters: *The request was just to codify what the law already is.*

New issue, OAR 436-060-0500(6) (raised by SAIF Corporation)

- 40:38 Fred Bruyns: *Regarding an industry notice issued June 30, 2015, that appeared to be more prescriptive than the rule.*
- 41:33 Dan Schmelling: *There was an industry notice that said the department reserved the right to ask for more specific documentation on what was paid and what was gathered in the supplemental disability reimbursement process. It seems to go beyond what we are required to provide by rule. So we think you may have overstepped a bit in your industry notice.*
- 42:10 Jennifer Flood: *Is that just related to the reimbursement process?*
- 42:12 Dan Schmelling: *Yes.*
- 42:28 Jennifer Flood: *So, no impact on a worker, just the relationship between the insurer and the department?*
- 42:32 Dan Schmelling: *No. And knowing that you probably have the right to get it anyway, but why not put it in rule.*

New issue, OAR 436-060-0150 (raised by SAIF Corporation)

- 43:48 Dan Schmelling: *The current rule talks about when the claims disposition agreement is approved and how much time we have to issue the payment. It refers to a postcard or this, - well the department is changing how it provides notification, so instead of trying to catch up with the board each time they change their rules, you could reference the method by which CDAs are approved – it would be more appropriate. You could say, approval under one of the methods listed under 438-009-0028(1), which is the WCB portal or a postcard or whatever method they come up with to provide notice of approval of the CDA. That way we don't have to keep changing this rule.*
- 44:50 Fred Bruyns: *Any concerns?*
- 44:52 Committee members (several): *Good idea.*

New issue, OAR 436-060-0153 (raised by SAIF Corporation)

- 44:56 Dan Schmelling: *Regarding statement of issue, it is not that US Bank is not in compliance, it is that federal banking requirements limit how much you can take out of an ATM. The rule says you must be able to take out the full amount without chart. Federal banking law trumps that. I think the ReliaCard is a great vehicle for paying benefits. A lot of workers sign up for it. It gets benefits to them timely. The worker can only get their benefits within the federal banking requirements. So maybe we need to adjust the rule to allow withdrawal of an amount up to the federal limit.*
- 46:03 Speaker unknown: *If you had a check you could get the full amount.*
- 46:09 Speaker unknown (on phone): *Not always.*
- 46:12 Dan Schmelling: *Assuming you have a bank and you are not going to a check cashing store.*
- 46:17 Speaker unknown (on phone): *Depending on the amount of the check, the bank might hold part of it anyway because it is a check.*
- 46:35 Dan Schmelling: *Don't throw out the payment card methodology. Just know that there are restrictions over which the insurer has no control.*

- 47:05 Speaker unknown: Frankly we hope they don't change those requirements; otherwise you get ATM and debit card fraud.
- 47:14 Jennifer Flood: There used to be a rule that said a check could not be written that would not allow the worker to cash it.
- 47:36 Randy Elmer: It can't be a site draft, but must be a negotiable instrument.
- 47:40 Jennifer Flood: Right, it needs to be negotiable. I do understand this concern. Workers using a ReliaCard may ask for settlement amount by check. The ReliaCard is still an option, correct? It is not that workers have to do it. I am concerned about removing the statement that the payment needs to be negotiable.
- 48:07 Dan Schmelling: No, it's just that if we put a \$50,000 CDA payment on a ReliaCard, and they go to the ATM, they are not going to get it all out. The rule now says they must be able to get the entire amount. They can't because the federal government says you can't.
- 48:37 Keith Semple: I understand, but why would you issue such a large amount on a ReliaCard. Would they have to go back every day and get \$2500 a day?
- 48:41 Dan Schmelling: They have opted in to this payment method.
- 48:45 Jennifer Flood: Or, they just use the ReliaCard because they don't ever go into the bank. They just use it as a debit card.
- 48:50 Julie Masters: So maybe drafting the rule to say it is going to be an instrument of payment, it needs to be an option to be the full amount unless the worker chooses to receive it through a bank card – or some other language you can come up with to express that sometimes workers are opting in, and if they do, the banking law says \$2500 per day.
- 49:21 Zachary Brunot: If there is a mistake with putting the CDA on the ReliaCard, is there a mechanism to pull it back out?
- 49:27 Dan Schmelling: It is not a mistake that it went on.
- 49:28 Zachary Brunot: No, but they didn't speak up and say please don't. Can you pull the money off and issue a check for the remainder?
- 49:37 Dan Schmelling: I'd have to check with our financial people. The worker is provided up front a copy of the cardholder agreement. They are told that if they keep money on the card, here are the limitations, such as how much you can withdraw per day, charges associated with that, etc.
- 50:27 Jennifer Flood: We have run into this with some CDAs. Workers are now better informed about the card's limitations.
- 50:56 Julie Masters: Maybe the rule can say that they have to be given that – beware of how they are going to be paid. The document already says they are asking for this in a lump sum. The CDA itself has that verbiage in there.
- 51:24 Jennifer Flood: Section (3) is about more than just the ReliaCard. It applies to checks and everything, right?
- 51:31 Dan Schmelling: I think that rule just applies to electronic payment. It was originally anticipated it would just be time loss checks. Now there are CDAs, DCSs, back time loss following an overturned denial – and the worker cannot get the full amount.
- 52:17 Jennifer Flood: We do have to explain to workers even with a check, the bank might not give them the full amount, and that has nothing to do with the insurance company.
- 52:54 Jaye Fraser: That is true of any negotiable. The bank will often hold it.
- 53:04 Keith Semple: I would support an opt out option. I wouldn't support just getting rid of section (3). I would like to see a disclaimer or notice to the worker when a large payment is

being put on one of these cards. Maybe a payment over \$10,000. You are not going to be able to get this all at once. Sign and check the box if you want this.

- *53:40 Jaye Fraser: Do you want that with checks too?*
- *53:42 Keith Semple: No, these are different things. There isn't a specific limit on a check.*
- *53:56 Jaye Fraser: Sometimes a bank will hold an entire check.*
- *53:59 Jennifer Flood: They will give them \$200 typically.*
- *54:00 Jaye Fraser: They actually get more off the ReliaCard.*
- *54:04 Jennifer Flood: I am just concerned, like Keith, about it being removed completely without the protection to the worker.*
- *54:12 Keith Semple: There is a reason it was there. Check laws have been in place for however long, and someone thought it was a good idea to put this in to begin with. Check laws haven't changed and we are now talking about a different instrument.*

New issue, OAR 436-060 (general issue) Changing wording to make the rules less restrictive on electronic communication between the parties (raised by SAIF Corporation)

- *54:46 Fred Bruyns: I think we have a similar or identical issue on our document. Do you want to talk about that now or at that time?*
- *54:50 Jaye Fraser: We can discuss later.*

New issue, OAR 436-060-0025(5)(f) (raised by SAIF Corporation)

- *55:20 Julie Masters: Overtime hours only when the worker worked overtime on a regular basis – we thought it was simpler if we just look at the 52 weeks. If it includes overtime, whether it is regular or not, which of course is hard to define, we felt it should just be included.*
- *55:50 Speaker unknown: Just keep it simple.*
- *55:52 Fred Bruyns: So you are recommending striking the entire paragraph?*
- *55:54 Julie Masters: Yes.*
- *55:58 Carmen Jones: I'm not in favor of that. I may have a nurse who works one day of overtime in an entire year. I don't consider that regular. Our time system tracks to the minute and we might have someone who works two minutes of overtime. Someone may be filling in and it is not a regular overtime issue. Just leave it at regular.*
- *56:27 Keith Semple: That person's two minutes of overtime in a year is not going to make any difference in their time loss rate.*
- *56:35 Carmen Jones: Right, but somebody might work a standby 12 hour shift of overtime only once in a year, and that is going to make a difference, especially when you have a nurse paid at \$50 an hour.*
- *56:49 Keith Semple: I don't see why the person shouldn't get credit for their overtime.*
- *56:56 Carmen Jones: They are only working it once. And we do credit it as regular, so they do get credit for those hours. The rule states you have to do it regularly. I do have people who work regular overtime, and they do get credit for it. One shift here or there shouldn't be considered regular overtime.*
- *57:20 Melissa Schnell: If we keep the rule, part of the problem is interpretation of regular. When we have gone through audits, regular can be during the winter season we know our people are going to work overtime during the two weeks we have freezing rain, and that is considered regular under the rules. Or, we may have someone who doesn't really work*

overtime but has two hours once a year, and it is not considered regular. It is difficult to be consistent. Part of the other problem is that if you are able to accommodate full, modified work, and the overtime occurs during the winter, during a snow storm, and they are injured in the summer, but there is a loss of earnings, so you have a nondisabling claim based only on average weekly wage based on that two or four hours of overtime they do every Christmas. It is hard to be fair, accurate, and consistent and pay benefits correctly. This is what we struggle with.

- *59:16 Dan Schmelling: We are on the side of just including the overtime. If it's two minutes it makes such a small difference to the average weekly wage. We aren't going to get into a dispute over it.*
- *59:32 Speaker unknown: It could cause an insurer to have to make it a disabling claim.*
- *59:45 Dan Schmelling: That's true, and the employer has the option of offering modified work at a rate commensurate with the average weekly wage to avoid that. We often calculate the weekly wage on a nondisabling claim just to let the employer know how much they have to offer in the modified job so they don't have to pay TPD.*
- *01:00:07 Carmen Jones: You can't always adjust someone's wages to match an average weekly wage. I can't offer you overtime in my modified job, so you are saying I have to increase their wages. When you have unions and other things going on, that can't happen. You've made that a disabling claim.*
- *01:00:33 Julie Masters: It sounds like this won't work for everyone. We were looking in general at rule 0025 and trying to think of ways to streamline and simplify it, because it is complicated and fuzzy, with lots of words like regular, extended gap – these different things that lack a bright line.*
- *01:01:09 Jennifer Flood: That was a good point about those claims becoming disabling. But there is also the issue of overtime earned post-injury. To exclude them from the front end but exclude them from the back end, it doesn't seem fair.*
- *01:01:32 Keith Semple: I think she is saying if you earn overtime on a modified duty job, that would be counted against you, even if you didn't regularly earn overtime working modified duty, everything you earn is offset against your time loss, so why shouldn't you get credit for it on the front end.*
- *01:01:59 Mark Hopkins: I'm confused. People pay overtime when people are on modified duty?*
- *01:02:04 Speakers unknown: Yes. Union contracts require it.*
- *01:02:05 Mark Hopkins: Why? Not our union contracts.*
- *01:02:18 Melissa Schnell: Flaggers for fixing a sewer leak, for example – there may be overtime – nothing about their restrictions to prevent it.*
- *01:02:49 Mark Hopkins: What I find more troubling is that because we don't work any of our people more than 40 hours per week when they are on modified duty, this drives us into scenarios where we have to pay our people, especially if they were injured on a large overtime project – a crew working six ten-hour days for four months – they get hurt, but we don't work our injured person more than 40 hours. What does that do for us to avoid time loss now? It drives this guy's wage skyrocketing. So now we have a guy on light duty making 20 to 40 percent more than the guy next to him who is doing a regular job.*
- *01:04:12 Keith Semple: I hope the crew doesn't know what the guy on light duty is making.*
- *01:04:21 Mark Hopkins: They don't hear it from us. The worker tells everyone.*

- 01:04:28 Jennifer Flood: *In your scenario, when would you not include the overtime hours?*
- 01:04:36 Mark Hopkins: *It is project by project.*
- 01:04:38 Jennifer Flood: *But if they are injured on that project, when would you not include the overtime wages?*
- 01:04:43 Mark Hopkins: *We always would. We'll go back as far as we can, to the 52 weeks to get our average. In construction, especially if we got them from the hall, they might not be with us for 52 weeks. So now we only have them for say four months, and all of that was on overtime.*
- 01:05:12 Jennifer Flood: *I believe this concept about not identifying the overtime wages when determining the average – just include them all.*
- 01:05:37 Randy Elmer: *We can always find an anomalous situation that seems unfair. The point of the rule is to try to make it more consistent. Nobody knows what regular means, and it has been litigated with varying results. SAIF's suggestion is well taken. It gets us to what is just the average weekly wage. Just take all the gross wages up to 52 weeks. TPD on modified work is just going to be function of that accordingly. Sometimes it will be fair and sometimes unfair. In general to calculate the wages more consistently is the point. It needs to be easier to calculate the average weekly wage than rule 0025 makes in now.*
- 01:06:24 Mark Hopkins: *I've always thought that for some industries, 52 weeks is way too long. In the construction trades, half of our labor force turns over in 52 weeks. That rule doesn't make sense to us. Maybe we shorten it to half a year.*
- 01:06:45 Jennifer Flood: *It used to be.*
- 01:06:46 Mark Hopkins: *That might make more sense in the construction world.*
- 01:06:52 Dan Schmelling: *If you have a worker with you for only eight weeks, we can only use those eight weeks.*
- 01:06:59 Mark Hopkins: *I guess we are doing that anyway.*
- 01:07:00 Jennifer Flood: *It was the industry that pushed for the 52 week average. Based on my recollection, if it is based on six months, and that was the high period of the season, they felt it was more fair to go the 52, but there are arguments both ways.*
- 01:07:29 Julie Masters: *It would be nice and it would be simpler. We don't necessarily have a problem with the two hours of overtime.*
- 01:07:51 Fred Bruyns: *We did hear the concerns as well. We will take all of this back with us and really consider it and share it with our administration.*

New issue, 436-060-0017(1)(a) (raised by Keith Semple, OTLA)

- 01:09:53 Keith Semple: *We'd like to start with amendment of the definition of documents to include audio and video recordings of the alleged injury incident, the worker's personnel file, including payroll and time-keeping records, and any surveillance video obtained prior to a request for hearing. Of these things, I think the most important are the audio and video recordings of the incident. In third party motor vehicle cases, at least one involving a school bus driver, and we've yet to obtain the school bus video. The insurer has been unhelpful in assisting us in obtaining that. The employer has been reluctant to provide that. That should be part of the claim file. We would like that to be clarified.*
- 01:10:58 George Goodman: *A reason it should be excluded – what if it is impeaching evidence? Under the board rules there is an absolute prohibition against us being forced to*

disclose impeaching evidence. A department rule contradicting the board rule and statute would create legal conflict.

- *01:11:36 Randy Elmer: Could the rule require discovery unless it is considered impeachment under board rule?*
- *01:11:41 George Goodman: Sure.*
- *01:11:42 Julie Masters: There is already language in there that says you can ask for specific things. So you have the ability ask for those recordings. If particular employers are unhelpful in that regard, when within the rule provisions currently you can ask for anything you want, maybe that is a matter you take to Sanctions to try to get what you need.*
- *01:12:23 Jaye Fraser: On the personnel files, we don't get them and we don't want them. The worker has the right to ask for their personnel file.*
- *01:12:40 George Goodman: I think the law is clear that personnel files aren't relevant other than in mental stress claims.*
- *01:12:56 Sean Yoder: The wording makes me wonder if we would be required to go get it to comply with that.*
- *01:13:05 Larry Bishop: If the personnel file is in the claim file and it is not impeachment evidence ...*
- *01:13:12 George Goodman: Under ORS 659 the personnel file the entitlement is there – workers can get them. There is no need to get it under the workers' compensation side. I'm not sure claims handlers are entitled to see personnel files.*
- *01:13:31 Jaye Fraser: We don't want them. There could be information in there that is none of our business.*
- *01:13:38 George Goodman: Privacy issues come to bear and it is unnecessary given the statutory entitlement that already exists.*
- *01:13:46 Keith Semple: The problem we run into is when the insurer gets, say a hand-written note from the employer as to what the pre-injury wages were for average weekly wage calculations, we ask for actual copies of the payroll record and they say we don't have them, so here is the hand-written form. We want copies of the pay records and the schedules. Those are essential for calculating the average weekly wage and for doing time loss audits. This just slows the process down. This should be part of the claim file. A lot of the things that are legitimately part of the claim file could be used for impeachment, so I don't think we can use the impeachment rule to say that anything that could be used to impeach the worker may be left out of the file. I think that is a little bit overbroad reading of the impeachment rule.*
- *01:14:45 Jaye Fraser: We have a difficult time getting payroll records. We would like them too. We do a lot of premium audit work with our employers, and we have difficulty getting those records. Not every employer has a robust filing system. They may pay people out of their personal checking accounts. Sometimes there is only the hand written note saying this is what I paid this worker.*
- *01:15:49 George Goodman: I wasn't implying that payroll records would not be appropriate discovery if they exist.*
- *01:15:58 Speaker unknown: They aren't part of the personnel file.*
- *01:16:00 Jaye Fraser: I just want to make it clear that payroll records are sometimes no more than a handwritten note.*

- 01:16:07 Fred Bruyns: *Is this assuming it is already in the insurer's claim file and should be released upon request to the claimant and the claimant's attorney, or are you saying you think it should be obtained by the insurer to make it available if it is requested?*
- 01:16:22 Keith Semple: *It depends on the type of claim. I agree that you can get it through statute. You can request it directly from the employer. I think some of those documents should be part of the file, though not necessarily the entire personnel file, but at least the payroll and time keeping records and audio and video recordings of the incident.*
- 01:16:55 Jaye Fraser: *The rule already addresses payroll records.*
- 01:17:05 Dan Schmelling: *There is a potential financial impact to our policy holders. We have 40-45,000 claims a year and only about a quarter of those are disabling. To go to those other 30,000 claims and say we need payroll records on those because we are required to get them in case an attorney wants them, it puts that burden onto policy holders to get their payroll records and send them in, when we don't need them to handle the claim.*
- 01:17:38 George Goodman: *The discover rule is limited to pertinent claim documents. Payroll records are not pertinent on a nondisabling claim.*
- 01:17:55 Melissa Schnell: *You mentioned the difficulty getting the video of the bus driver, which would be pertinent if it means financial reimbursement for the employer too. All of us who have handled claim know how difficult it can be to obtain information from our clients when it benefits all parties. I was curious whether any of the solutions has the client talk to their employee directly and say, the insurer is kind of stuck too, they are trying. The want to be able to get their {inaudible} back and not have it negotiated to one-third of the medical expenses. They'd like to get 100%.*
- 01:19:10 Speaker unknown: *If they are in the file they are pertinent and should be released unless they are impeaching. She is right it is hard to get those things.*
- 01:19:22 Keith Semple: *Hopefully the rules are geared towards giving some direction that – it shouldn't be so hard to get some of these things. That's the problem.*
- 01:19:28 Speaker unknown: *Can employers be required to provide this? They aren't really a party unless they are self-insured.*
- 01:19:46 Keith Semple: *They can share in penalties if they cause the insurer to incur penalties.*
- 01:20:00 Jennifer Flood: *I understand the difficulty in getting payroll. It is critical to ensure accurate benefits to the worker.*
- 01:20:18 Jaye Fraser: *I just want people to understand that it is not necessarily nice, clean Excel document or printout from ADP.*

New issue, 436-060-0017(1)(b) (raised by Keith Semple, OTLA)

- 01:20:19 Keith Semple: *We propose that the insurer be deemed to be in possession of any documents subject to the control of the employer. The insurer is the employer's agent in providing coverage. We have no mechanism to get documents from the employer. We usually don't get to talk to the employer directly. So, we'd like documents to include those that should be available to the insurer through their relationship with the employer. Based on our previous discussion, I understand there will be objections, and that there is an arms-length relationship between the insurer and the employer. If documents are withheld by the employer and penalties are imposed, that is between the insurer and the employer. We shouldn't be harmed by that.*

- 01:21:50 *Jaye Fraser: Short of nonrenewing the policy holder, there is only so much you can do. We don't take a penalty that is due to the employer's actions and send them a bill for the penalty. Some penalties get rolled into the overall expenses. Others are associated with the claim. We are already asking employers for all of the documents that we are entitled to, to properly adjudicate a claim. It is in our best interest. If an employer says either that they don't have it or no I'm not going to give it to you, there is not a lot that we can do. Putting it in a rule is not going to do anything.*
- 01:22:47 *George Goodman: It would provide penalties. There is a remedy already out there. If claimants don't think they are getting the documents they are entitled to, request a hearing. Issue a subpoena against the employer. Then you can still raise the penalty issue as well. If they didn't cooperate, they can get penalized, but the standard is reasonableness. Don't put a strict liability standard on claims handlers for areas they have no control over.*
- 01:23:36 *Carmen Jones: I get nervous when you talk about that. Being an employer that is self-insured, self-administered, but also being a health care system, the line gets grey and I already have issues. So when you say held by the employer, I might also be the attending physician. I caution you to consider how you word this.*

New issue, OAR 436-060-0017(4) (raised by Keith Semple, OTLA)

- 01:24:28 *Keith Semple: We would like to eliminate the 180 day deadline for providing discovery. We would like to continue to be provided discovery until the worker is not represented. Some of us continue to monitor things after issues seem to have been resolved. It seems that we should be the ones letting you know that we no longer represent this person.*
- 01:25:23 *Melissa Schnell: Without a cap on it? So, after a CDA/DCS is done, and two years later we receive chart notes, then you want that as well?*
- 01:25:33 *Keith Semple: If the representation is completed, then I would send a note saying we have settled the claim. You no longer need to send this document; please send them all to our client.*
- 01:25:45 *Melissa Schnell: We'd have to have that as a requirement.*
- 01:25:48 *Larry Bishop: We'd have to have that in writing.*
- 01:25:52 *Dan Schmelling: There would be a fiscal impact.*
- 01:25:57 *George Goodman: It is very unusual for the claimant's lawyer to say they are out.*
- 01:26:01 *Keith Semple: It was a concern raised by our members.*

New issue, OAR 436-060-0020(4) (raised by Keith Semple, OTLA)

- 01:26:09 *Keith Semple: Authorization can be inferred now at claim closure or at reconsideration of claim closure. We would like authorization be able to be inferred throughout the claim, if necessary. We don't understand why it is limited to the very end of the claim.*
- 01:26:32 *Julie Masters: That would be contrary to the statute that requires that the attending physician authorize temporary disability. It doesn't refer to issuance of a document from which someone may infer authorization. I'm not sure that as it is currently drafted that inference is supported. However, I wouldn't support expanding it beyond what we have already.*
- 01:27:13 *Fred Bruyns: Additional discussion? Including whether the current rule is within the rulemaking authority.*

- 01:27:40 Keith Semple: *My recollection is that it has been addressed by case law and that inference is an appropriate way to get a time loss authorization if the person just had surgery or they are obviously immobile, even if the doctor doesn't say after the surgery that the person can't work. It's not clear to me why the rule says it may be inferred at the end of the claim and not throughout the claim.*
- 01:28:10 Randy Elmer: Yes, [Dawkins v. Pacific Motor Trucking](#) already addressed this – Supreme Court. It requires an adjuster to make a reasonable inference.
- 01:28:29 Keith Semple: *So we are essentially just asking that that be codified at the end of the rule.*

New issue, OAR 436-060-0030(6) (raised by Keith Semple, OTLA)

- 01:28:34 Keith Semple: *Regarding a situation where a worker is terminated and the insurer starts prorating their time loss, as though they had continued working at a job that would have been offered but for the termination, we would like to add an additional requirement for a written explanation of the reason for the termination be provided, as well as documentation relied upon in making that decision. Frequently workers are terminated and it is not clear why. We'd like more on the front end so we can better understand, and our clients can better understand why benefits are being cut off.*
- 01:29:28 George Goodman: *This is not a little more information.*
- 01:29:35 Speaker unknown: *We don't have access to the information. Wouldn't there be another avenue to dispute the termination?*
- 01:29:43 Keith Semple: *How would you know if it is appropriate to suspend time loss if you don't know the reason for the termination?*
- 01:29:50 George Goodman: *Because the employer says we fired him for cause. If not, there are BOLI remedies available.*
- 01:30:05 Jaye Fraser: *To put in rule that you will require employers to put why they fired somebody ... again, you go to a large employer who has people who deal with all of these issues as a specialist, maybe, but the small employers with three or four employees, and they fire someone, and you are going to ask them to put it in writing? It is frightening.*
- 01:30:35 Julie Masters: *If we were operating in a vacuum and there was no employment law, maybe, but this really gets into another area where you are going to get a lot of push back.*
- 01:30:55 Carmen Jones: *I'm self-insured and technically the employer, and I don't even get told why someone is terminated. I don't think you want to muddy those lines.*
- 01:31:08 George Goodman: *There are privacy concerns.*
- 01:31:11 Keith Semple: *So how is a worker supposed to know why they are being terminated and why their time loss is being suspended if they can't even know why the termination has taken place?*
- 01:31:22 Speaker unknown (phone): *Their employer should be telling them why they are being terminated.*
- 01:31:29 Speaker unknown (phone): *That's not our job. It is the employer's job.*
- 01:31:38 Keith Semple: *The workers' compensation law allows time loss to be suspended in some of these situations, and the worker has no ability to know where the insurer is going with that unless they are given some information, and that information is routinely lacking in these situations. I understand it is a burden to employers and a burden to insurers to police the employers, but we are dealing with suspending benefits here. There are a lot of other*

notice requirements in the statute and it doesn't seem that onerous to give a reason for a termination when that is the basis for suspending benefits.

- *01:32:19 Melissa Schnell: Normally when we suspend time loss benefits because someone was terminated for cause, we say you were terminated for cause on {date}, no further benefits will be paid, and the rest of the statutory language. It would be the employee's responsibility if they disagreed with why they were terminated, to pursue other rights they have under employment law. If they prevail, we end up paying back time loss.*
- *01:32:54 Speaker unknown: Some times if somebody is on probation for six months, there doesn't have to be a documented reason – also true for some union employees etc.*
- *01:33:14 Jennifer Flood: But then you wouldn't be able to terminate time loss.*
- *01:33:16 Keith Semple: Those are the situations we are trying to distinguish from the ones where there has been a violation of work rules or other disciplinary reason.*
- *01:33:38 Jaye Fraser: It is up to the employer to tell the worker, not the insurer.*
- *01:33:42 Jennifer Flood: But when you stop time loss benefits, you have to inform the worker why you are stopping them. Would you not tell them that benefits are being stopped because your employer indicated you were fired for cause?*
- *01:33:53 Speaker unknown: Yes.*
- *01:33:57 Carmen Jones: If we are told why they were fired. A lot of times we just say you were terminated from your employment.*
- *01:34:09 Jennifer Flood: I don't believe that would be enough to stop time loss.*
- *01:34:17 Carmen Jones: Because I don't know the exact reason the employer is terminating the employee? That is between the employee and the manager, not my knowledge.*
- *01:34:28 Keith Semple: It becomes a matter between the worker and the insurer when the worker's benefits are being cut. There is obviously communication going on that this person was terminated for violation of work rules or other disciplinary causes. One more question would be what are those work rules and disciplinary causes and do you have some documents for that.*
- *01:34:52 Carmen Jones: How is that important to the claim? I'm processing a lumbar strain or a shoulder injury. I'm more concerned about their condition, not what their employment looks like.*
- *01:35:01 Keith Semple: It is important to the injured worker when they are working a modified job and suddenly they get terminated and the insurer tells them they don't owe them time loss anymore because they were terminated for violation of work rules or other disciplinary reasons ...*
- *01:35:19 Carmen Jones: My point is, why is it important for me to know the reason for the termination? My employees don't want me to know that.*
- *01:35:30 Speaker unknown: Only if you are going to suspend time loss benefits.*
- *01:35:36 Carmen Jones: I just don't think it is important to the claim. It might be a private reason. They might have deviated, drugs, all sorts of things. I'm still going to be processing the claim to closure.*
- *01:36:12 Melissa Schnell: If you are going to suspend time loss, we do generic for cause – we don't lay it out and say you didn't pass a drug test. We still pay TPD on our seasonals when the season ends because there is no modified work available. They are no longer an employee, but we continue to pay benefits.*

- 01:36:52 George Goodman: *If you want to blend BOLI and workers' compensation cases together, I think you need a statutory change. There are BOLI remedies available for any employee who thinks they were not properly terminated for violation of a work rule or other disciplinary reasons. You also have an interesting remedy in the workers' compensation statute that says when time loss has ceased you have an expedited hearing. Within 30 days you get a hearing. If the employer says the employee was terminated for cause, I think the judge's inquiry ends. Go to BOLI. I don't think you get into the workers' compensation system, whether that termination was valid or not.*
- 01:38:10 Randy Elmer: *As soon as we allowed the insurer to suspend benefits for one of those stated reasons, and one of them is violation of a work rule, then we've opened the door in the comp system to digging into what facts match that term. And I disagree that an ALJ should stop as soon as the employer refers to violation of a work rule.*
- 01:38:41 George Goodman: *Some judges may do funny things, but jurisdictionally, BOLI has jurisdiction over that.*
- 01:38:52 Randy Elmer: *It is dual jurisdiction, and the judge has a right to delve under the reason for the termination to see if the suspension of the benefit was appropriate. I don't know if I agree with the suggestion that we need more out of the employer to determine that. I do agree that the reason ultimately has to be revealed. If the employer doesn't tell me why, only that it fits under one of those stated reasons, I'm going to assume I can suspend payment of time loss – is not right.*
- 01:39:24 George Goodman: *There is no hiding going on.*
- 01:39:25 Carmen Jones: *It is not hiding. It is a need to know. The injured worker has privacy too. I don't need to know exactly why they were fired. I shouldn't need to know that and for the privacy of my employees I don't want to know that.*
- 01:39:40 George Goodman: *Do you want the employer to tell the claims handler to tell the claims handler that someone was fired for sexual harassment, so they can put that in a letter that goes out to the world, so the person accused of that can then sue them for slander?*
- 01:39:52 Jennifer Flood: *Okay, I get that point. My concern is, although it would be great on the worker's attorney side to have it all, my concern is that I've heard some say that the employer can just say they have been terminated, and the adjuster doesn't have to find out whether it was for cause or work violation. Just the employer saying, you are fired, does not mean that you can stop time loss. You have to be able to have that documentation that the employer indicates it was for cause or work violation.*
- 01:40:37 Julie Masters: *The statute already has that requirement.*
- 01:40:39 Jennifer Flood: *My concern is if there is that impression that, as the adjuster, all I have to know is that you were terminated and I can stop time loss, because I don't believe that is our statute.*
- 01:40:55 Larry Bishop: *I don't want to put my examiners in the position of having to determine whether a termination was just. They are not in a position to make that call. If the employer says it was for cause, it is not for them to adjudicate whether that was an appropriate termination.*
- 01:41:21 Speaker unknown: *As we said before, the employee can request a copy of their personnel file.*

Ten minute break

- *01:41:57 Fred Bruyns: I just want to say to SAIF Corporation, all of you who weighed in on the issues you brought, and to Keith for bringing the issues we've talked about, we think we are doing the right thing in discussing your issues before the ones we have on our agenda, because there is nothing on our agenda that is more important, and it is exactly what we are here to do. My experience is that if we leave things until the end, sometimes they don't happen at all.*

New issue, OAR 436-060-0030(11)(c)(B) (raised by Keith Semple, OTLA)

- *01:42:50 Keith Semple: This is the situation where the employer or insurer negotiates a verbal release with the attending physician, and the insurer is instructed to document the facts. We would also like them to, instead of just communicating the release to the worker, provide a copy of the release to the worker within seven days. We would like that not just to be contained in an offer of modified employment. We'd like workers to have more heads up when their work restrictions are negotiated over the phone or changed. We'd like them to have something in writing so they understand why their time loss is being cut off.*
- *01:43:40 Julie Masters: Does this come from ORS 656.268(4)(c), where the attending physician or nurse practitioner advises the worker and documents in writing that the worker is released to modified employment? I'm just trying to determine if what you are asking is beyond what the statute requires.*
- *01:44:40 George Goodman: The rule talks about a verbal or oral communication between a doctor and a claims person. It doesn't say anything about putting it in writing in this rule. In this rule it says to provide a copy of the oral release – I don't know how you do that.*
- *01:45:03 Julie Masters: It does say communicate the release to the worker by mail within seven days.*
- *01:45:10 George Goodman: That just means you can write a letter and say I spoke with your doctor, but that doesn't mean you have a written release from your doctor under this rule. Maybe other rules require it.*
- *01:45:20 Julie Masters: That makes it kind of an internally inconsistent rule.*
- *01:45:32 Jennifer Flood: In my office, we deal with this issue when a worker doesn't know they have been released to return to work, but their benefits stop. If you wait seven days to notify the worker, then that is seven days of employment they may have missed out on. That's just a general statement regarding the rule.*

New issue, OAR 436-060-0030(12) (raised by Keith Semple, OTLA)

- *01:46:07 Keith Semple: Moving on to section (12), that kind of addresses what you were just talking about, Jennifer, asking that the worker get a statement of the reasons for discontinuation of benefits in the same manner that they would get a notification that there has been a change in the compensation rate or method of computation when a change is being made. That would give the worker at least an understanding of what has changed and how suddenly they are not eligible for lost wages any more.*
- *01:46:53 Julie Masters: On the surface it sounds like a fair and reasonable idea, but we wouldn't want what we put in the letter to be a limitation to any defense that might be raised. Would this be burdensome?*
- *01:47:40 Jaye Fraser: Aren't we already doing that?*

- 01:47:46 Dan Schmelling: *We are already doing it but are we required to do it?*
- 01:47:50 Keith Semple: *Are you the only one doing it?*
- 01:47:51 Dan Schmelling: *We communicate the release to regular work, but we don't say you are released to regular work and now your time loss benefits end.*
- 01:47:59 Keith Semple: *Or, we talked to your doctor and now your time loss benefits end, etc.*
- 01:48:06 Julie Masters: *Or, your doctor stopped authorizing for this time period. Or, you didn't go to your next appointment.*
- 01:48:16 Jennifer Flood: *Some people do that, but the rule only requires it if there is a change in the rate ...*
- 01:48:23 Dan Schmelling: *This specific rule only requires that. I think you have to go through all of the rules and say in which situation is the insurer required to provide notification, such as if you are released to regular work, if you are terminated for cause, etc. Find out – does it cover 100% of the situations and this isn't necessary, or, are there situations where the worker may not receive the notification – okay, now let's look at instead of having it in five different places, can we do a rule that says in instances where a worker's time loss ends, you need to provide an explanation, rather than having various pieces. Look at the rules holistically, and say when time loss ends, this is how you communicate.*
- 01:49:28 Julie Masters: *Is there a fiscal impact to that, because although you say that we are doing that now, I don't think we are in all circumstances. So every time there is no longer a time loss authorization or the worker didn't show up for their next appointment, and the insurer now has to send a letter, like in what time period – what if they don't – there are concerns about that. Although it does seem on the surface to be kind of a good idea just in terms of fairness.*
- 01:50:05 Jennifer Flood: *I think Dan is right. There are multiple rules that imply that the communication is there. It would be nice to have it in one spot. Then if there are some cases that aren't currently addressed in rule, that would be very few in my opinion, and the fiscal impact would seem to be small.*
- 01:50:37 Fred Bruyns: *Thanks for remembering to tell us about the fiscal impacts.*

New issue, OAR 436-060-0095(15) (raised by Keith Semple, OTLA)

- 01:50:39 Keith Semple: *We would like IMEs to be scheduled closer to the worker's residence. I have people who are being asked to travel from Klamath Falls to Portland or Eugene and other great distances when there are medical communities that are much closer to them, that surely have some practitioners who can provide an examination for an insurer. We would like to have the director be asked if they are to be scheduled further away for the worker, so the worker doesn't always have to demonstrate hardship, that they have to travel for hours to get to an IME.*
- 01:51:33 Julie Masters: *This is really a statutory issue. We already have a statute that the legislature chose to take it to a certain level. If there is a hardship, the worker has the option to ask the director to review the reasonableness of it. SAIF would object to moving the bar further without legislation.*
- 01:52:04 Dan Schmelling: *If we are having the worker travel from Klamath Falls to Portland it is not to create a hardship for the worker, but either because we have a time frame to accept or deny the claim or there is a surgical request, and to get an IME in*

Klamath Falls, we might be eight weeks out, but we can get an orthopedist within two weeks in Portland. We are trying to be efficient and speed up the delivery of benefits to the worker, by balancing distance versus ease of scheduling and getting the worker in sooner. My guess is that 80% of the IME vendors are in the Willamette Valley. When you are in eastern Oregon, southern Oregon, the coast – that's fifty miles. There would be a fiscal impact on WCD if we have to come to you for approval on blanket fifty miles.

- *01:53:14 Keith Semple: 50 miles doesn't have to be the number, but it is a concern that people are forced to drive even from Eugene up to Portland. For the burden to be on the worker to establish that it is a hardship or burden, it should be presumed to be a hardship unless it is shown that it is absolutely necessary.*
- *01:53:59 Jaye Fraser: We only use IMEs when we have to because they are expensive. If we are sending someone some place other than their immediate location, it is because there are specific reasons as Dan explained. In addition, the Management-Labor Advisory Committee is going to study IMEs over the next couple of years. So, I'd hate to see us prescribe something that puts a burden on the Workers' Compensation Division and is going to add expense to the system, when we are going to be looking at a study. 50 miles is not unreasonable.*
- *01:54:52 Keith Semple: Maybe 100 miles.*
- *01:54:57 George Goodman: This seems to be an attempt to get through the back door what was not obtained through the front door of a statutory change. The statute gives the employer the right to identify the medical provider for the IME. The law is clear that when it comes to litigating cases, those medical opinions that are the best analyzed and best reasoned are going to be given the most weight, and if the insurer thinks that opinion can be generated from a doctor in Portland ... the employee has the right to object to the location at any time. IME companies universally do exit interviews with people undergoing IMEs. It would be interesting to have the department get those interviews and see how many workers are complaining about distance. I don't hear about that from the companies I interact with.*
- *01:56:03 Jaye Fraser: In fact, that information was provided by Mr. Shilts at a hearing in front of Senate Workforce Committee this year. There were very few complaints.*
- *01:56:16 George Goodman: I think this is an issue without a lot of substance.*

New issue, OAR 436-060-0140(10)(e) and 0147(1) (raised by Keith Semple, OTLA)

- *01:56:30 Keith Semple: Regarding worker requested medical exams (WRMEs), there are requirements listed in the rule of what the denial must contain. The question is whether the denial was based on one or more independent medical exam reports or the denial did not contain information explaining what it was based on.*
- *01:57:13 Zachary Brunot: Paragraphs (A) through (C) state the denial was based on an IME, was not based on an IME, or it was based in part on an IME. I've been receiving deficient denials that basically sandbag a claimant's ability to seek an IME, because it doesn't specify. I think that there should be a rule that if the insurer provides a deficient denial, that it be construed in favor of the worker in getting the WRME.*
- *01:57:49 Keith Semple: Unless the insurer says that the denial was not based on an IME, or comments on that, it is assumed to be based on an IME?*
- *01:57:58 Zachary Brunot: If the denial is insufficient, then we will presume it was based on an IME for purposes of the WRME.*

- 01:58:15 Julie Masters: *So you say defective because it doesn't contain that statement one way or another, did concur or did not concur.*
- 01:58:28 Zachary Brunot: *Rule 0140 says a denial must include these things. It doesn't give a remedy for when it doesn't include those things.*
- 01:58:57 Keith Semple: *Let me read the things that are supposed to be – the denial under section (10)(a), must state the factual legal reasons for the denial, including the worker's right to request a worker requested medical exam, and a specific statement indicating if the denial was based in whole or in part on an independent medical exam, and must include one of the following statements as appropriate: Your attending physician has agreed with the independent medical exam report, your attending physician did not agree with the independent medical exam report, or your attending physician has not commented on the independent medical exam report. The purpose of our proposal is that if those statements are lacking, then we presume that if the report is there and it is supporting the denial, that the denial is based on the IME. The presumption would be that the attending physician did not agree if you are not telling us. Frequently the attending physician isn't asked to comment on the IME. That makes it very difficult for a worker to request a WRME, even though everyone in the case knows that the denial is based on the IME and that is going to be the argument at hearing. So the worker has to solicit a nonconurrence from the attending physician in order to make themselves eligible for a WRME. We're trying to streamline that process by putting some onus on the insurer to say whether the attending physician has received the report and whether they have commented on it.*
- 02:00:56 Dan Schmelling: *Currently we are not required to ask the attending physician whether or not they concur with the IME.*
- 02:01:04 Keith Semple: *You are not required to.*
- 02:01:05 Dan Schmelling: *We are required to provide it within 72 hours. We are not required to ask about concurrence. It might be that the IME report is clear on its own, that it stands, and we don't need to have the attending physician sign off on that or request concurrence. My question is, currently, from WCD's practices, are you seeing a lot of WRME requests come in where the denial is deficient in commenting on whether an IME was relied upon, and if it is deficient, what are you doing in determining whether or not a WRME is appropriate or not? Are you asking the insurer – did you rely on the IME? Depending upon how they respond, do you have concurrence. Are you getting a lot of WRME denials because of the IME or because the denial letter was deficient?*
- 02:01:58 Zachary Brunot: *Currently, under rule 0147(1), the requirement is, in order for us to get a WRME, that the denial states one of these things. If it doesn't state it then we don't get one.*
- 02:02:11 Dan Schmelling: *I understand it says you are not supposed to if it is not there, but it doesn't stop you from going to the department and requesting a WRME.*
- 02:02:20 Zachary Brunot: *And we won't get one.*
- 02:02:23 Dan Schmelling: *Is that the current practice from WCD?*
- 02:02:36 Speaker unknown: *It is treated like a check the box I think.*
- 02:02:44 Julie Masters: *I'm fairly sure this concept would expand on the statutory authority.*
- 02:03:03 Spencer Aldrich: *I worry about creating the presumption that the attending has not concurred. Even if it is just limited for the purpose of a WRME, I wouldn't want litigation to then proceed where the attending hasn't actually commented on something. Suddenly the*

argument is being made, well, you didn't indicate it, there was not anything there, so we are going to presume it was a nonconurrence.

- *02:03:26 Zachary Brunot: I'm up for any suggestion on how to fix the deprivation of getting a WRME based on an insufficient denial.*
- *02:03:36 Fred Bruyns: I'm not sure we can give you a definitive answer on how the division would look at that. We have to follow our own rules and the law. So if they don't meet that letter of the law, we might well say you can't. But we'll take that back and look into it.*
- *02:03:54 Julie Masters: Is there some kind of penalty authority against a claims processor whose denials don't meet the rules of the workers' compensation board, and also the division, that it has to have one of those statements?*
- *02:04:27 Speaker unknown: I'm curious if the matter has been litigated.*
- *02:04:40 Keith Semple: The final thing on the worker requested medical exam is in rule 0147(1)(e). The concurrence with the IME report must be a complete concurrence in all respects. Failure of the insurer to determine whether the attending physician or authorized nurse practitioner concurs with the IME, shall be treated as a nonconurrence. These are concepts. We are not wed to this language. It has been noted by our members that there is a lot of minutia going into whether a worker requested medical exam can be authorized or not. Some of it is minutia under the insurer's control to clarify. We would like things to be clear so those examinations can go forward without the worker having to go and solicit a nonconurrence.*
- *02:05:44 Fred Bruyns: This is one of the issues we did have on our document, but if we have already opened the door and started to talk about it, it deserves discussion. This is about the now presumed concurrence – it's not clear.*
- *02:06:13 Keith Semple: We would just like to see more clarity in this area, so it is clear what the insurer is obligated to do with the IME in terms of soliciting concurrence or nonconurrence, and so it is clearly communicated when that is done or not done, so the worker can respond accordingly.*
- *02:06:34 George Goodman: I think the form letter that goes out has the rule language in it that refers to a concurrence in all respects. That's what I see from my clients. I've always had trouble with that language, because there are all sorts of things in IMEs that have nothing to do with the causation question. It is a misleading way to frame the question. The question is whether he agrees with the part of the IME that supports the issuance of the denial. If you are going to change the rule, focus the rule on the part of the IME that supports the issuance of the denial, and whether the treating doctor has agreed with that part of the IME. That is what matters.*
- *02:07:45 Melissa Schnell: We support George on this. We see doctors make little sub-notes all the time. They say I concur and put one little note – except for this thing here. It is just their two cents.*
- *02:08:05 Speaker unknown: Or they check the "I do not concur."*
- *02:08:06 George Goodman: They say I do not concur – the X-rays show "y."*
- *02:08:10 Melissa Schnell: We see that a lot. Or, I concur but I think this little finding ... It doesn't mean they don't really agree with the IME.*
- *02:08:27 Spencer Aldrich: Or the doctor checks no box and writes a letter.*
- *02:08:36 Speaker unknown: How many times have you requested WRMEs?*

- 02:08:40 Zachary Brunot: *I like using them. I think it is good for our workers. IMEs are expensive, and doctors feel like they are trying to do the injured workers a favor by reducing their rate, and maybe charging \$500 for a report instead of \$1300. Or, \$300, because they know this person's situation. You get what you pay for. A \$100 report stinks. If the doctor gets to charge for their time, I think the product will be better on all sides.*
- 02:09:20 Julie Masters: *What I noticed when this law first came into effect, workers and their attorneys signed up for a lot of WRMEs, and they ended up with reports that didn't support the outcome they were looking for, and there was a big fall-off in the use of these. In the medical realm, reasonable minds differ, but sometimes the majority of doctors will tend to agree with the insurer's decisions.*
- 02:10:10 Speaker unknown: *Because they are the same physicians.*
- 02:10:12 Zachary Brunot: *If the causation isn't there, then good, that's the case. I don't feel we need to squeeze a round peg into a square hole and try to pay for an opinion we want to get. If an independent person agrees with the IME, we know the truth now.*
- 02:10:50 Julie Masters: *So now we are talking about the issue of complete concurrence in all respects. There is another rule somewhere that says concurrence with an opinion is concurrence with all aspects of that, whether they say so or not. I don't know if that is necessary to put here. The issue of doctor's notes and interpretation of whether there is concurrence with the causation – some of that goes to good letter writing. Sometimes you have to write back to the doctor and get them to clarify that opinion. I don't know that putting maybe extreme language in the rule is going to solve the problem or be consistent with the statute, which doesn't provide that you can infer things.*

New issue, OAR 436-060-0150 (10)(a) (raised by Keith Semple, OTLA)

- 02:12:30 Keith Semple: *This dovetails with the prior discussion of discontinuation of time loss benefits. If the worker is not notified, this is saying that the insurer will continue to issue temporary disability benefits until the worker is mailed notice as to why the benefits are stopped, and provided documents that establish benefits are no longer payable.*
- 02:13:09 Speaker unknown: *Then that would be an overpayment at the time of closure?*
- 02:13:12 Keith Semple: *Potentially. The problem is, the worker, on the 14th day, when he or she is expecting a check, the check doesn't come. They call us, and we have to start the process of, well, is it in the mail, is it being withheld because someone forgot to print it, is it being withheld for a reason – do I need to tell this person to go collect unemployment or some other benefit. We would like that notice to be provided when the check is due – either a check or a notice as to why there is no check. A lot of times the first notice for the worker is when the check is due and it is not there.*
- 02:14:30 Dan Schmelling: *If the worker was released to regular work, presuming the doctor gave him that release, but it is delayed coming in to the insurer, for a couple of weeks – are we then responsible for paying time loss until we get that regular work release, and then turn around and try to notify the worker, when the attending physician already gave them the regular work release? We are then creating an overpayment.*
- 02:15:01 Keith Semple: *No, that makes sense. That would be an unintended consequence of poor drafting of the language.*
- 02:15:12 Jennifer Flood: *Maybe when the worker has not already been informed ...*

- 02:15:17 *Keith Semple: Again, the problem is the worker doesn't get a check, doesn't know why, it takes days to find out why the check isn't there, and that there is not going to be another one. They really need that time to figure out what next, if they are not getting any other checks.*
- 02:15:46 *Julie Masters: At the time the carrier knows they're not issuing the check, they also know the reason why, unless they forgot to print it or something like that. So, to the extent they know that, it seems to me the worker ought to have that information at the same time. That said, that thing where they have to keep paying if they don't give the notice, I think that is outside statutory authority. The idea of notice is essentially fair.*
- 02:16:28 *Jaye Fraser: Reasonable. I don't like the language, but I agree. You shouldn't find out you are not getting your time loss check when you open the mail and there is nothing.*

New issue, OAR 436-060-0400(1) (raised by Keith Semple, OTLA)

- 02:16:50 *Keith Semple: Just reiterating that penalties and attorney fees can't be waived prospectively – CDA, DCS – there have been fights and arguments over when those things may be waived in those instruments, and we'd like that to be reiterated in this rule. Certainly they can be waived after the fact, you can say I don't want a penalty. I think this rule is about late payment of a disputed claim settlement.*
- 02:17:36 *Julie Masters: Wasn't there a case at the Supreme Court about giving away rights to future attorney fees?*
- 02:17:59 *Jennifer Flood: It was the [Stoltz](#) decision that came out of the department – director's order. SAIF Corporation automatically includes the language that indicates the worker is not giving up the right to enforce the CDA or disputes after the CDA. Without that in there, the worker doesn't retain that right. Attorneys for almost all represented workers will make sure this is included. For unrepresented workers, we end up calling the defense attorneys and asking if they'd agree to an addendum to preserve that right to enforce payment of the CDA.*
- 02:18:45 *Julie Masters: Now I'm remembering there was a decision where the ALJ said you can't not have that, and the director in the final order said, well, that's what it says.*
- 02:18:59 *Jennifer Flood: Yes, that was the [Stoltz](#) decision.*
- 02:19:02 *Speaker unknown: Which time period are you concerned with – post-approval of the order?*
- 02:19:06 *Keith Semple: Yes, late payment of a disputed claim settlement. There has been argument that you gave up the right to penalties for late payment of a DCS that says you give up rights to future penalties and fees and so on. We disagree with this. We'd like to have this codified in the rule, what can and can't be done in those instruments.*
- 02:19:36 *George Goodman: I don't understand why this isn't the subject of negotiation. Why can't an employer buy those rights? There is no prohibition. This isn't something the department should be delving into. There are no rules or statutes that require this either way. Unless we've tried to buy it, all of our settlement documents would say we settle all issue raised or raisable after the date of the signing of the document, or they would say you have given up your rights to future this or that.*
- 02:20:25 *Speaker unknown: Was this something that came up in the legislative session in relation to claimant attorney fees that just didn't move forward?*
- 02:20:31 *George Goodman: I don't recall. I wasn't there.*

- 02:20:35 *Jaye Fraser: No [it didn't come up at the legislative session]. I'm going to disagree with George a little bit. From a fairness standpoint, if a represented employer is dealing with an unrepresented worker, they stand in different position. What we are really talking about is penalties and fees associated with an employer's failure to pay on the agreement that they have just signed. If we just limit it to that – otherwise, I would agree that you should be able to wrap everything up into your settlement.*
- 02:21:20 *George Goodman: I understand that, but the point is you can't waive those rights without saying it. Claimant's lawyers have raised this in the last six to eight months. I put it in if they ask me to, but I don't put in the opposite. If I don't say you have waived it, I don't understand why I have to put in that we haven't waived it. You have to put that in there in order to waive it – unrepresented claimants, okay fine, maybe they don't understand what that means, but the judges look at those really hard, if the claimant is unrepresented. If there are some defense lawyers trying to take advantage in those situations, then shame on them, but I've never encountered that situation.*
- 02:22:09 *Jennifer Flood: I've been working on this issue with the Workers' Compensation Board, and hopefully later this year it will come up in one of their board meetings regarding CDAs, a clear understanding for the worker as to what they are giving up and getting. There has been some talk that the Stoltz case would require a statutory change. Another view is that we just have to build that into the administrative rule process. I'm hopeful that the board will be looking at that when they look at their rules that center around the CDAs.*
- 02:22:53 *Fred Bruyns: Could it be that the director doesn't have authority over the content of these two types of agreements, and that it would be the board's rules that would have to ...*
- 02:23:00 *Jennifer Flood: The director issued the Stoltz decision.*

New issue, OAR 436-060- xxxx (raised by Keith Semple, OTLA)

- 02:23:14 *Keith Semple: We'd like to have a new rule that allows the director to authorize pre-hearing statements of employer witnesses and employer representatives. We have a situation now where the worker has many obligations to cooperate with investigation of the claim, but when claim benefits are denied, there's no obligation on the other side to cooperate with any statements or anything, so we know what might be said about specifically whether the injury happened, credibility cases, cases involving whether timely notice was given, cases involving termination for violation of work rules – those are completely trial by ambush. We have no ability to know what any of the witnesses would say despite the fact that the employer is allowed to take witness statements from coworkers and from the worker. We would like a mechanism for a reciprocal ability to take statements and get the facts of the case straight.*
- 02:24:36 *George Goodman: This is statutory. It's not a rule question. The employer's rights and the employee's obligations are set out in statute. This is way overreaching in its current form and would have to be the subject of significant vetting.*
- 02:25:15 *Jaye Fraser: SAIF would concur with that.*

ISSUE #1 – OAR 436-060-0009 – “Access to Department of Consumer and Business Services Workers’ Compensation Claim File Records”

Issue: Should this rule referring to DCBS rules regarding public records requests and fees include a hyperlink to OAR 440-005?

Background: During the 2010 revision of OAR 440-005 (“Access of Public Records, Fees for Record Search and Copies of Public Records”), the DCBS director’s office and WCD Rules Coordinator reviewed 060-0009 for potential overlap or conflict. While that matter was resolved, this rule was flagged for review during the next comprehensive revision of Division 060. This rule section addresses accessing worker records. 060-0009(2), though, more generally addresses fees and the first copies provided free to allowed requestors. It would be helpful to users referencing this rule to include the hyperlink to the department’s rules:

http://arcweb.sos.state.or.us/pages/rules/oars_400/oar_440/440_005.html

Notes:

- 02:26:25 Fred Bruyns: Should this rule referring to DCBS rules regarding public records requests and fees include a hyperlink to OAR 440-005?
- 02:27:13 Julie Masters: Yes, let’s have lots of hyperlinks.
- 02:27:23 Fred Bruyns: Kind of a Wikipedia model.
- 02:27:30 Julie Masters: There is a lot of cross-referencing.
- 02:27:39 Fred Bruyns: So you mean every time we would make a rule reference within a rule to a rule or statute, you’d like to see a hyperlink to go to that location.
- 02:27:46 Committee members (several): Yes.

ISSUE #2 – OAR 436-060-0010(1) – “Reporting Requirements”

Issue: Should this rule be amended to state the employer must provide both Form 801 and Form 3283 (“A Guide for Workers Hurt on the Job”) at the time the worker reports an injury, or is this sufficiently addressed in 060-0015(4)?

Background: Section 060-0010 addresses claim reporting requirements, with (1) requiring the employer to provide an injured worker Form 801 immediately upon request, to use for filing their claim. 060-0015 addresses required provision of notices and information, with (4) stating that insurers must provide Form 3283 to their insured employers, who must then provide it to their workers when they file a claim. That rule also allows the content of Form 3283 to be printed on the back of Form 801. A stakeholder suggested that provision of Form 3283 also be addressed in 060-0010(1). If this change is made, should 060-0015(4) also reference 060-0010(1)?

Alternatives:

- If this change is made, the agency committee noted that the rule could state “...the employer must provide a copy of...Form 440-801...to the worker immediately upon request **and Form 440-3283, under OAR 436-060-0015(4)**...”

Notes:

- 02:29:59 Julie Masters: *So it is really a housekeeping matter to repeat what it says someplace else.*
- 02:30:03 Fred Bruyns: *Somewhat housekeeping, yes. It repeats a little bit of the rule.*
- 02:30:11 Jennifer Flood: *It is not an additional requirement.*
- 02:30:12 Fred Bruyns: *Not a new requirement, no.*
- 02:30:16 Julie Masters: *SAIF already has the second form on the back of the 801, so we didn't have a problem with it.*
- 02:30:29 Dan Schmelling: *The 3283 is a great notice. It gives the worker notice of their rights in a nice one-page format. But, the requirement to provide the Form 801, in this day and age are we moving beyond the Form 801 to telephonic reporting, to on-line reporting. And to require the employer to provide an 801 when they are already have another mechanism to file the claim ...*
- 02:30:53 Jaye Fraser: *I think that is a general comment. To the extent we keep talking about forms, and if we are moving into a more electronic world, that we are really looking for the information contained in the forms.*
- 02:31:15 Fred Bruyns: *When we say a copy of Form 801, are you thinking that means it is a piece of paper?*
- 02:31:20 Jaye Fraser: *That is kind of what it says.*
- 02:31:24 Dan Schmelling: *It says must provide a Form 801.*
- 02:31:25 Fred Bruyns: *Couldn't that be an electronic copy?*
- 02:31:27 Dan Schmelling: *What if it is telephonic?*
- 02:31:32 Fred Bruyns: *What would the worker receive if it was telephonic?*
- 02:31:36 Dan Schmelling: *It would be interesting if someone who receives claims telephonically could speak to this.*
- 02:31:43 Larry Bishop: *Sedgwick provides at the time a claim is reported to us – we provide them Form 3283. We don't provide Form 801. We do provide the division Form 801 because that is required by the division, filled out by our staff. We send the 3283 because it has other information relating to their rights. We also provide the brochure.*
- 02:32:21 Jennifer Flood: *Is there an acknowledgement that the claim has been filed? *
- 02:32:26 Larry Bishop: *They are getting a letter.*
- 02:32:32 Carmen Jones: *At Legacy, we do it similarly but we do send them an 801. It is an electronic filing through our intranet or through the phone. We populate the 801 and send it to them after they have filed it.*
- 02:32:49 Jaye Fraser: *The point I wanted to make is that I'd like the department to be thinking about this, because the world is going to change. We are not going to be sending you forms. You are going to get metadata that will populate your databases.*
- 02:33:10 Fred Bruyns: *That is a good point and we will take that seriously. Do you think the cross reference for Form 3283 is necessary?*
- 02:33:24 Jaye Fraser: *I don't think it is necessary.*
- 02:33:26 Carmen Jones: *I think in keeping with what you are talking about, moving to electronic, putting things, like it has to be printed on the back of the 801 is once again implying that everything is done on paper.*

- 02:33:47 Fred Bruyns: *In this case it is permissive. It may be printed on the back of the 801, but your point is well taken. That kind of wording could in some cases cause someone to do something the old fashioned way.*

ISSUE #3 – OAR 436-060-0010(4) – “Reporting Requirements”

Issue: Does this rule need to be amended to further clarify what constitutes “first aid?”

Background: First aid following work incidents or claims, and what is required or allowed in these situations, is sometimes confusing for insurers and employers. WCD periodically gets complaints about and investigates employer-retained services that provide first aid. The division doesn’t have a concern with employers using first aid services as long as the employers or services don’t provide medical treatment or restrict the worker’s right to travel to or see their own provider or to file a claim. This is now addressed in ORS 656.260(21)(b).

Alternatives:

- One insurer suggested amending language addressing who may provide first aid by shifting from “a person who does not require a license” to one who is “**not qualified to be an attending physician or authorized nurse practitioner...**”
-

Notes:

- 02:35:13 Carmen Jones: *Can we just mirror the OSHA definition of first aid?*
- 02:35:27 Dan Schmelling: *OSHA provides that first aid may be medical treatment provided by a medical provider that might be billed, so you need to look at OSHA before you try to marry that to this.*
- 02:35:41 Fred Bruyns: *OSHA has a different definition of first aid, unfortunately. But that’s an excellent thought – the 801 is even used for OSHA record keeping. There is a lot of cross over.*
- 02:35:55 Carmen Jones: *OSHA has a first aid definition. They also have a medical treatment definition. They are not necessarily the same definitions.*
- 02:36:05 Jaye Fraser: *Their purposes are different. I don’t understand the purpose (of issue). What are we getting at here?*
- 02:36:22 Larry Bishop: *So first aid is done on site and there is no cost and it’s not a claim. This would seem to say if you have an ANP doing this on site ...*
- 02:36:38 Dan Schmelling: *It becomes a claim?*
- 02:36:39 Larry Bishop: *And there is no cost. I think now when the report of losses goes in, if you are self insured, you have to report nursing cost even though there is no cost to the claim.*
- 02:36:54 Keith Semple: *The tension I see is, of course we want first aid to be provided. But at the same time we don’t want people feeling that they don’t have the option to see a doctor and they have to go to the employer’s first aid or the employer’s doctor on site. Some shopping centers, CVS and Walmart, now have doctors on site. We would be very uncomfortable if the first chart note generated came from a doctor who is employed by the same company. Maybe first aid should be emergency care or something to that effect – where*

something has to be done immediately, as opposed to my back has been hurting, well go to the nurse in employee health.

- *02:38:01 Jennifer Flood: I think of first aid as more of the Band-Aid. In my mind and whether it is a claim or not, I don't think of it in terms of whether it is a licensed person who is putting the Band-Aid on or my coworker who is putting the Band-Aid on. If it is a Band-Aid and that is all that is necessary and there is not a bill that is generated, then it would be first aid. Emergency treatment to me means medical services that are hopefully done by a licensed person.*
- *02:38:46 Sean Warren: That would be SAIF's position. It's the treatment provided, not necessarily the qualifications of the person providing the services. The Band-Aid applied by a nurse would still be first aid.*
- *02:39:00 Jennifer Flood: Now there are horror stories where the guy is told he has to see the doc-shop in the office. His arm is messed up and they say no, it's fine, and you need to not go to the doctor.*
- *02:39:15 Jaye Fraser: The statute already inhibits an employer from directing care.*
- *02:39:22 Jennifer Flood: Exactly. I always think of first aid as what moms do.*
- *02:39:34 Fred Bruyns: I think the committee's focus is on the nature of the care provided rather than who provides it.*
- *02:39:41 Speakers- several: Right.*
- *02:39:43 Fred Bruyns: So our current rule is perhaps not on point, because it talks about someone who doesn't require a license to provide the service. So, the other solution is not necessarily any better.*