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Meeting Transcript

**Workers' Compensation Division Rules
OAR chapter 436, division 060, Claims Administration Rule 0025
Rate Of Temporary Disability Compensation
July 18, 2016, 2 p.m. to 5 p.m.
Room 260, Labor and Industries Building, Salem, Oregon**

Attendees:	WCD attendees:
Allison Lesh, SAIF Corporation	Adam Breitenstein
Barb Reich, Asante Work Health	Barbara Belcher
Chris Frost, Swanson, Thomas, Coon & Newton	Cara Filsinger
Dan Schmelling, SAIF Corporation	Chris Clark
Denise Williams	Fred Bruyns
Jaye Fraser, SAIF Corporation	Karen Howard
Julie Riddle, The Hartford Financial Services Group	Louis Savage
Karen Betka, Farmers Insurance	Mary Lou Garcia
Keith Semple, Johnson Johnson & Schaller PC	Sally Coen
Kimberly Wood, Perlo Construction	Steve Passantino
Mark Hopkins, EC Company	Troy Painter
Melissa Schnell, City of Portland	
Randy Elmer, Randy M Elmer Atty at Law PC	
Sheri Sundstrom, Hoffman Construction	
Spencer Aldrich, Law Offices of Kathryn Reynolds Morton	
Sue Quinones, City of Portland	

BEFORE THE WORKERS' COMPENSATION BOARD OF

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THE STATE OF OREGON

RULEMAKING ADVISORY COMMITTEE

WORKERS' COMPENSATION DIVISION RULES

OAR CHAPTER 436-006, CLAIMS ADMINISTRATION

RULE 0025, RATE OF TEMPORARY DISABILITY COMPENSATION

The proceedings in the above-entitled matter were held in Salem, Oregon, on the 18th day of July, 2016, before Fred Bruyns, Administrative Rules Coordinator for the Workers' Compensation Division.

TRANSCRIPT OF PROCEEDINGS

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3 00:14: So thank you very much for coming, and welcome. My name is
4 Fred Bruyns. I coordinate the rulemaking process for the Workers' Compensation
5 Division. I think most of you have been at these meetings in the past. This is an
6 Advisory Committee meeting. Much less formal than a public hearing. It's a
7 conversation, really, a chance to talk about the issues and add as much value to the
8 rules and the rules' issues before we file proposed rules as possible, so that we can
9 actually publish a good product, subject, of course, to public testimony.

10 There are some handouts at the back of the room. If you didn't print
11 an agenda and bring one with you, there probably are still a few copies of the
12 agenda and the draft rules. If you're on the telephone with us today, all of this
13 information is on our website under Laws and Rules, and then Meetings. And you
14 can just scroll down to today's date, and you'll find everything you need there, I
15 think.

16 As we go along today, I want you to think about the fiscal impact of
17 anything that we're doing. That could be an impact on workers who get injured on
18 the job. It could be an impact on insurance companies who pay their benefits.
19 Anybody else you can think of in the system where there might be a direct, or even
20 an indirect, impact. Because when we file proposed rules with the Secretary of
21 State, we have to estimate what those impacts are. And we do rely on the input
22 from folks like you, so please keep that in mind as we go along.

23 Just a few words. If you're on the telephone with us today, we will pick
24 up background noises in your office. So you can always put us on mute, if you
25 would like, and, you know, just turn the mute button off when you'd like to speak. I

1 do encourage you to speak up whenever you want to. You won't have the
2 advantage of seeing who might have their hand up here, or the eye contact. So
3 please, we do want you to be full participants in this meeting.

4 If you do get another call or something, or someone comes in and--
5 please don't put us on hold, because we might get your background music or
6 canned messages, that kind of thing. And there's really no way for us to turn those
7 off without actually shutting down the conference call, so we don't want to have to do
8 that. So with that, I've introduced myself. I'd like to begin with those on the
9 telephone with us today and have you introduce yourselves to the Committee. Go
10 ahead.

11 2:43: Julie Riddle, the Hartford.

12 2:44: Okay. Welcome, Julie.

13 2:47: Hi. Barb Reich, Asante.

14 2:50: Welcome, Barb.

15 2:52: Paul Altstadt with Matrix.

16 2:55: Welcome, Paul.

17 2:59: Sue Quinones and Melissa Schnell from City of Portland.

18 3:04: Welcome, Sue and Melissa. Anyone else? And we'll begin with
19 you, Spencer. We're going to introduce ourselves around the table.

20 3:16: Hi. My name is Spencer Aldrich. I'm an attorney with Kathryn
21 Reynolds Morton's office. Its in-house Liberty Mutual defense.

22 3:22: Cara Filsinger with the Division.

23 3:26: Mary Lou Garcia with the Division.

24 3:28: Karen Howard with Information Technology and Research.

25 3:32: Karen Betka, Farmers Insurance.

1 3:33: Sheri Sundstrom, Hoffman Construction and OSIA.
2 3:37: Lou Savage with the Division.
3 3:40: Randy Elmer. I'm a claimant's attorney here in Salem, and I'm
4 here on behalf of OTLA as well.
5 3:44: Keith Semple. I'm a claimant's attorney in Eugene, and I'm here
6 on behalf of OTLA.
7 3:48: Barbara Belcher, the Division.
8 3:50: Troy Painter with the Division.
9 3:52: Denise Williams, retired Workers' Compensation auditor, but I'm
10 here as a citizen.
11 3:57: Jaye Fraser, SAIF Corporation.
12 4:00: Dan Schmelling, SAIF Corporation.
13 4:02: Sally Coen, Workers' Comp Division.
14 4:05: Adam Breitenstein, Workers' Comp Division.
15 4:06: Chris Clark, Workers' Compensation Division.
16 4:10: Again, welcome to all of you. Thank you for coming and taking
17 your-- I know it's not easy to give up an entire afternoon for this, but we really do
18 appreciate it. Of course, we don't know how long this meeting will run. We said
19 2:00 to 5:00. We'll be here that long if we need the time, but if we finish early-- One
20 thing I do want to tell you, that we've had a number of questions as to whether we're
21 going to focus only on Rule 25 today, on the average weekly wage and how that
22 affects benefits, or if we're going to, you know, review all of the draft rules. And our
23 focus really is Rule 25, but if we're--if we complete our conversation about that and
24 we have time, we will--we'll talk about any other draft rules that you would like to.
25 And then we would invite your input in writing, or you can just pick up the phone and

1 call me, and I will document what you want to say about the draft. And then of
2 course, you'll have a chance to weigh in on the draft--or on the proposed rules when
3 they're no longer draft, in terms of testimony. So with that, do you have any
4 questions before we begin? Okay.

5 If we could turn now then to our agenda? And I'm going to read a little
6 bit. I'm not going to read everything here, except probably the first page. I'm going
7 to read most of it, especially if you're on the telephone and for any reason you don't
8 have an agenda. I think this will be important, and it won't take too long. So
9 everything I'm going to talk about affects Rule 25, which is the rate of temporary
10 disability compensation.

11 So the issue before this Committee is should this rule be completely
12 rewritten to eliminate the current approach to determining the worker's average
13 weekly wage, and replace it with a simpler method, a 52-week gross
14 earning average or some other option, that can be applied in almost all situations?

15 Some background. The Division has been considering how the
16 Division 060 rules could better facilitate improved industry accuracy in determining
17 workers' average weekly wage, which is the basis for calculating temporary disability
18 benefits, due to consistently unsatisfactory performance in this claims
19 processing area. In reviewing nearly 23,000 time loss payments during the recently
20 completed pre-closure accuracy audit, WCD found an overall accuracy of 63.2
21 percent. Almost one in four, or 23.3 percent, of average weekly wage calculations
22 were inaccurate, the most common reason for 70.7 percent of payment
23 inaccuracies. Inaccurate average weekly wages were the sole cause for 61.1
24 percent of inaccurate payments. This particular error tends to cause all claim
25 payments to be inaccurate, while other errors tend to affect just one or two

1 payments. Eliminating average weekly wage calculation errors would have raised
2 the overall payment accuracy in the pre-closure accuracy audit to nearly 87 percent.

3 Regulated parties and their claims processors often, and
4 understandably, complain about the length and complexity of the average weekly
5 wage rule with its many permutations intended to address particular work, schedule
6 and pay variables. At the same time, as the nature of employment situations
7 continuously evolve, the industry also requests this rule's expansion to address
8 traditional work and wage scenarios. Interestingly, the most common error identified
9 in the pre-closure accuracy audit in calculating the average weekly wage, about 25
10 percent, was due to processors averaging gross earnings when the current
11 rule required that they average workers--hours worked, and use the at-injury pay
12 rate.

13 This finding likely reflects the existing rule's complexity and
14 shortcomings. In addition to the general method for calculating the average weekly
15 wage, 19 of the 31 topics addressed in the current rule attempt to provide direction
16 on handling specific situations, and what to include or exclude in the worker's wage.
17 This fact, combined with the audit findings, also raised the questionable value of
18 further clarifying revisions, and point to the need for a simpler, common sense
19 alternative.

20 WCD met with a focus group of insurer, self-insured employer, and
21 service company representatives in three meetings in late 2014. A recurring theme
22 among attendees was the need for an average weekly wage calculation method that
23 is simpler, cleaner and easier, increases consistency and predictability, and can be
24 more easily explained. The Division has similar interests. So WCD is offering the
25 following proposal both for consideration, and as the basis for the advisory

1 committees' discussions of other possible approaches. It is one option, but Division
2 wants to hear about other alternatives or variations.

3 So the initial proposal for us to consider is to eliminate all rules
4 addressing various wage scenarios from the rule, define wage at injury with an
5 average weekly wage calculation more easily applied in the majority of cases that
6 incorporates situation-specific differences and considers equity for both workers and
7 employers. Specifically, averaging gross earnings for the 52 weeks prior to the
8 injury, considering extended gaps. Salaried workers with no pay variations could be
9 the exception.

10 Adopt--or adapt-- Excuse me. Adapt North Carolina's approach,
11 determining earnings based on the length of the worker's employment, while
12 considering the fairness and equity for new employees and mitigating circumstances
13 or factors. Define gross earnings. Define extended gaps, to facilitate consistency in
14 average weekly wage calculations. Defer changing Oregon's five-day working--
15 excuse me, five-day worker methodology regarding how to treat scheduled days
16 off, weekends, et cetera, to a seven-day worker basis until after the new average
17 weekly wage calculation method has been implemented and evaluated.

18 And this is followed by a number of pros and cons that I hope you've
19 had a chance to review. I'm not going to run down each one of them. We're--I'm
20 glad to talk about any of them that you might agree or disagree with at any point.
21 But I'm going to just say a couple more things about some items on--I believe it is
22 Page 4.

23 Separately, if Rule 25 is revised to implement a different methodology
24 for determining the average weekly wage used in calculating temporary disability
25 rate, Division 120 vocational services rules may need to be reviewed for possible

1 impact on rules establishing the adjusted weekly wages for determining suitable
2 wage. That's something for us to keep in mind, and for you all to keep in mind as
3 well.

4 And under Fiscal Impacts, including cost of compliance for small
5 business, we anticipate that after the initial transition this will lower administrative
6 costs associated with claims processing. Some workers may see slightly lower
7 benefits, but on average we do not expect benefit rates to be significantly affected.

8 And with that, we may--well, may want to go back to what we put
9 forward as our initial proposal and discuss any one of those bullet points that you'd
10 like, including what we don't have here, if you have ideas that you don't see on here
11 in terms of what we should do. I'll just open it up for discussion. Who wants to be
12 first?

13 11:53: I have a question.

14 11:55: Okay.

15 11:59: Why North Carolina?

16 12:00: That's a good question.

17 12:01: That's a good question.

18 12:05: Some of their--it was more adopting some of their language
19 around...

20 12:11: You need to tell us what the question is here on the phone,
21 because we can't hear the question.

22 12:20: Okay. One of the points that we made in the proposal was to
23 adapt North Carolina's approach, determining earnings based on the length of the
24 worker's employment, while considering the fairness and equity for new employees
25 and mitigating circumstances or factors. So that was meant--what was meant by the

1 North Carolina approach.

2 12:41: Yeah. And I believe that's the-- Is that referring to the change
3 in wage earning agreement? So it was essentially the most similar thing to us. And
4 I could pull up the specific language, but it was...

5 12:58: The phone--I don't know if this mic isn't working. I guess it's
6 fine to do that, but I don't know-- I'm not familiar with North Carolina's Workers'
7 Compensation system enough to know whether what their sy--what they do in their
8 system is really--you know, where you can take a piece of it and dump it into our
9 system. I just--it just seemed a little-- I hadn't experienced it in my 20 years of doing
10 this, where the Division was looking...

11 13:28: Well, we sometimes do look at what other states do. But I think
12 probably for the most part, we can just look at what we're proposing to do, even if
13 you sort of disregarded that it has anything to do with North Carolina. The question
14 would be then, are the draft rules that we provided, and these other--basically, just
15 other bullets on this proposal, whether that gets us to where we need to be in terms
16 of streamlining the average weekly wage ca--you know, calculation, and providing
17 the most benefit to--with the least harm to any player in the system.

18 14:07: And I guess to clarify that initial proposal, in the--on the agenda
19 is referring to what we discussed at the September 21, 2015 meeting. So this is now
20 the proposal that we've based on the input from that meeting and the prior meeting,
21 so...

22 14:25: Yeah. Just for a little bit of history, we met three times last
23 summer. I guess it ran into the autumn a little bit. And one of those meetings was,
24 again, devoted to this very rule, Rule 25, almost exclusively, although I think we
25 touched upon it in other rules as well. Randy?

1 14:41: Well, I just wanted to comment that I think the Department did a
2 very good job of trying to consolidate all of the issues that can arise in determining
3 average weekly wage into a much cleaner rule. I congratulate you for that. As
4 adopted-- I know it's a very tough subject, because there's an innumerable number
5 of variations to calculating average weekly wage that can come up that are probably
6 only limited by one's imagination.

7 But under irregular wages, I have a concern that in-- That would be
8 4(b)(2). That would be on Page 2 of the draft. The legislative edict and the idea has
9 always been in Work Comp to try to, as much as possible, pay the worker at the
10 wages he's earning at the time of injury. That is the ultimate guiding principle. In
11 this particular proposal, where it says that if the worker's wage earning agreement
12 changed in the 52 weeks before date of injury or verification of disability caused by
13 occupational disease due to reasons other than only the change in rate of pay, my
14 concern is that if we don't capture-- I think it should say, "including change in a rate
15 of pay," because I think we're trying to capture where that worker is on the day that
16 he's injured. And so a rate would be terribly important, and it wouldn't dilute the
17 average weekly wage to penalize him, based on the fact that he's gotten a raise.
18 That should actually be the worker's advantage, reflecting what he was worth in the
19 marketplace at that time. So I would propose changing other than only to including--
20 only to including the change.

21 16:31: Okay. Thanks, Randy. I appreciate your--the Committee's
22 thoughts on that, as well.

23 16:37: Can you tell us what you're referencing? Because I thought if I
24 looked at the-- This is Sue. If you look at the table that you provided, it shows that
25 we should use the average number of hours. Oh, I see. Nevermind.

1 16:59: Oh. That's okay. That's okay. And just for your reference--
2 And I know this won't help you phone. Just before noon today, I realized the copy
3 was very hard to read. The rule has so many draft changes in it, it's very difficult to
4 read. So there are some clean copies on the table at the back of the room. And
5 again, I apologize to those of you on the phone who are with us today. It was just a
6 very late-breaking thought on my part. But it is there. It's just got a lot of mar--
7 changes on it.

8 17:31: I guess, Randy, to respond somewhat to your concern, we do--
9 you understand that's something we spend a lot of time thinking about as well. So
10 the rationale, I think for not including a change in wage earning agreement that's
11 only for a pay raise is that that happens pretty frequently, and it wouldn't necessarily
12 provide an accurate picture of the worker's overall earnings, and any substantial
13 change of pay--or change in wage earning agreement would be usually
14 accompanied by a change in position or title. And we try to be pretty broad with that
15 amount of--with the themes that we consider to con--be considered not only change
16 in rate of pay.

17 So--and also, we did look at-- The most substantial effect would really
18 only happen if that person had only recently had that change in pay. So if it was two
19 weeks before, maybe the person's average weekly wage would be much different
20 than if it was earlier in the year. So if that wage earning agreement--because a rate
21 of change happened 50 weeks ago, the actual change in average weekly wage
22 wouldn't be very much. But if it was a few weeks ago, it would be. But we still think
23 that this is a pretty fair thing. But we--I mean, we're open to looking at it. I just
24 wanted to provide some background on what we were thinking.

25 19:00: Additional thoughts about that?

1 19:06: I'd like to also point out that you see 52 weeks of wages in
2 those examples also include periods of higher employment, number of hours. So if
3 the wage earning agreement happened in a lower--you know, a lower number of
4 hours, then the wages would not really reflect what a worker worked in 52 weeks.

5 19:35: This is Keith. I'm concerned because I see a lot more workers
6 personally that have, you know, a dollar rate increase. And currently, they have to
7 take the number of hours average worked per year, and then multiply it and add that
8 increase in as though the worker had the raise for the entire year. And we're going
9 from that, which may be a little bit to the worker's advantage in some situations--
10 we're going from that to kind of almost the opposite, in a way.

11 I mean, now we're--for those workers that just got a raise a month
12 before, you're taking that way from them when I don't think you really have to word it
13 that way. I mean, I guess I don't see the downside of allowing that change in wage
14 earning agreement to be reflected in the average, as though the worker was
15 continuing to work as though they didn't get injured. That's the rate of pay that they
16 would receive.

17 So I--yeah, I realize that this may not affect a tremendous number of
18 workers, but I'll say that that is probably the more common scenario from my
19 experience, that you get a raise, but you don't get a totally different job. And I think
20 it's relatively uncommon for a worker to get a raise to be working suddenly less
21 hours. I mean, typically, when people are promoted more is asked of them. So I
22 would have a hard time imagining where a worker had a ton of overtime, suddenly
23 gets a raise, and then, you know, no overtime, so there's a lower number of hours
24 post-raise. So it just seems to me like this would affect quite a number of workers.
25 And it would be easy to rework so that they would get their average after their raise,

1 they would just look at the average from the date of the raise on.

2 21:20: Thanks, Keith.

3 21:21: And...

4 21:22: This is Melissa from the City of Portland. I just needed a-- I
5 may be a little confused. We have employees. Let's say the date of injury is July
6 5th. We have an annual cost of living increase for all employees on July 1st. And a
7 full-time, 40-hour-a-week employee, they earn--it's 2,080 hours per year. So would
8 we take the wage they earn at the time of injury times the 2,080 hours for a normal
9 full-time employee? Is that-- That's how I understand you're supposed to do it
10 under the new rules, and it appears to be new...

11 22:05: I don't-- I think the new rules...

12 22:07: So under the new rule currently, you would average their
13 earnings...

14 22:12: At the old rate?

15 22:13: At the old rate.

16 22:13: So you would av--would you average it? Because most of the
17 year-- They had a different rate of pay on June 30th, they were injured on July 5th,
18 and they had a higher rate of pay on July 5th than they did on June 30th. And they
19 worked full-time 52 weeks prior, which is 2,080 hours.

20 22:34: Chris?

21 22:35: At what rate of pay would you calculate the time loss average
22 weekly wage?

23 22:39: If I could ask a clarifying question? If I could answer her
24 question, Sue's?

25 22:44: Sure.

1 22:45: Sue, this is Dan with SAIF Corporation. In your example, are
2 you talking about a regularly employed worker or an irregularly employed worker?

3 22:54: Regularly employed worker who worked 40 hours a week.
4 Previous 52 weeks is a total of 2,080.

5 23:02: This rule is--my interpretation of it, would not apply in that
6 situation, because this rule is talking about irregularly employed workers, not
7 regularly employed workers. So your regularly...

8 23:17: And I just was not clear with all the discussion, so thank you.

9 23:22: With irregular wages, we're not trying to classify the type of
10 employee. We're trying to classify the type of wages.

11 23:31: Right. But in 4 and...

12 23:33: A regularly employed worker can have irregular wages.

13 23:36: They can.

14 23:37: Yes.

15 23:37: And that's...

16 22:38: That's right.

17 23:38: My concern with some of the way the rules are written is yeah,
18 you can have the regularly employed at different rates of pay, which I think they're
19 an irregular worker regularly working 40 hours a week, but at different rates of pay
20 depending upon what hours they're working in a given day, versus what appears to
21 be what you're trying to get is a regular worker that has no variation in paycheck to
22 paycheck. Their weekly pay is always the same, and monthly pay.

23 24:10: Right. But you're still going to--you're going to go back 52
24 weeks. The new rule-- I'm looking at the matrix again. So I'm looking with workers
25 with change in WEA pay only,--

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24:25: Right.

24:25: --hourly rate at--

25:28: And sorry. That...

24:29: --date of injury at 52 weeks,--

24:30: Yeah.

24:31: --average the hours--

24:32: Right.

24:32: --times the current rate of pay. That's how we were taught during that focused audit where everybody did so lousy in the state, and we went back and started averaging the number of hours times the current rate. With the new rule, you're saying just go back to the old way of doing things before that focused audit. And if I'm making \$11 an hour on July 1st it doesn't matter, the \$10 an hour is going to be my 52-week average wage for the prior year. So I'm going to use actual wages from when I was making \$10, and not \$11 an hour. Am I getting that right? Because then to the right, it says the projected impact is a slight decrease.

25:25: Yes. That would be correct, actually, for an hourly worker, unless they had no variation in the change of pay. So this statute is a little vague on what a regular worker is, and we tried to address that as much as possible. So in this case, yes, you would use the 52-week average. It would be a little bit over the \$10 for whatever the last period was--

24:48: Right.

24:49: --after the pay change.

25:51: So Chris,--

25:51: Yeah.

1 25:51: --actually, if I could? This is Allison Lesh with SAIF
2 Corporation. I don't have my little name tag in front of me. But it sounds like, in
3 Melissa's scenario, if she's got a worker regularly working, I mean, 80 hours a week,
4 you know, 2080 a year, that that worker would be considered making regular wages,
5 irrespective of whether or not he or she had a wage increase prior to the injury,
6 based on your section definition of (15)(b) where it talks about regular wage being a
7 money rate paid at a constant rate at uniform intervals, but "hourly wages may be
8 considered regular if the same number of hours are worked each pay period." So I
9 think in her scenario you would take the worker's \$11 an hour and apply the
10 regularly employed calculation, wherever that might be. It looks like (5) of 0025.

11 27:02: Right, yeah. So that's...

12 27:02: If I may?

13 27:03: Yeah.

14 27:03: This is Randy Elmer again. So you can see if you're treating
15 someone with irregular wages differently than someone who's getting regular
16 wages-- Because the guy with regular wages, we're just going to take on the date of
17 injury what his daily wage is and multiply it times the number of days he works per
18 week. He captures his raise. The guy who had irregular wages doesn't get his raise
19 included. We're treating them as two different classes of workers, in addition.

20 27:25: And I can tell you, they are two different classes of workers.
21 The person who makes the irregular wage, 90 percent of the time is making a hell of
22 a lot less than the person making the regular wage, just because people who are on
23 salary tend to be the ones making a regular wage, and people that are scraping by
24 hour to hour are the ones who making less, and are working irregular wages.

25 27:45: So-- Yeah.

1 27:46: That's important.

2 27:47: So I guess I would open up to the room. Would anybody see
3 problems, or object to change in the rule based on OTLA's recommendation?

4 27:56: You're basically suggesting status quo in that regard, because
5 that's where we are today, yeah.

6 28:03: Well, it's not exactly status quo, because status quo today is
7 you go back and you capture his hours for the last year, and you multiply it by the
8 higher wage. I think that's probably even a little bit better for the worker in most
9 situations. What we're saying is we'd like to take--at least take an average from the
10 date of the raise on, instead of going back 52 weeks and capturing a whole bunch of
11 time when that raise wasn't in place. And yeah, there may be a situation that
12 someone could conceive of that that worker had a ton of overtime. And that would
13 actually be better for that worker than getting their raise factored in and going--taking
14 a shorter average. But I would envision that would be a lot more rare than the other
15 situation, the one that we're concerned about.

16 28:47: So I would say-- This is Allison again with SAIF Corporation.
17 The flip side of that would be based on the way the rules read now. And I believe
18 the proposed rules also, when you've got the wage earning agreement and it's new,
19 all of a sudden you start that potential intent at hire situation over again. So if
20 someone gets a raise, two weeks later they get injured, now you're back at that
21 intent at hire. And from the insurer's perspective, it seems like that would end up
22 creating potentially significant litigation where it would be unnecessary.

23 29:20: And especially when we're looking at what the annual minimum
24 wage increase is every July 1st, they vary throughout the entire stage. It's--every
25 July, we're basically going to be looking at all of these minimum wage workers

1 going, oh, if we're only looking at from the rate change forward, we're going to have
2 intent throughout the entire month of July, versus they had a pay increase, what
3 we're doing now, we average the hours going back 52 weeks. So we're still taking
4 into account what they're working for the prior 52 weeks, but they are at the benefit
5 of the rate at the time of injury, when there has not been an otherwise change in the
6 wage earning agreement if it's just the (unintelligible) rate of pay.

7 30:10: This is Melissa again. I just want to get further clarification.
8 Because when we go back 52 weeks from the time of injury, we have a lot of
9 employees that are regularly employed, but they get a lot of extra pay on top of their
10 base rate of pay. So we'll have things like emergency underground work. So we
11 would then just go back to 52 weeks, what their wages--gross wages were, divide it
12 by the 52. Is that what the rules say, just to kind of confirm in my mind?

13 30:52: It is if this--if their wages are considered irregular; right?

14 30:55: Yeah. Yeah, I think that would really be determined on a case-
15 by-case basis. Because, conceivably, if they were working multiple jobs and those
16 multiple jobs had different kinds of pay, you could see one rate where they would
17 receive a rate of compensation that was one rate for the flexible rate, summed with
18 an average rate for the other kinds of pay, if those other kinds of pay were paid for
19 separate jobs. So I think that--yeah, that level of specificity would have to be
20 contemplated at an individual case-by-case basis.

21 But essentially, the rule as it's written does say if the worker receives
22 irregular wages or receives earning that are not based on wages alone, so then you
23 would calculate it using the 52-week average method. So if those other types of
24 earnings they're getting are not wages necessarily, and their base rate does not pay,
25 it would be mathematically the same if you average their base rate of pay, and then--

1 or if you--yeah, average their base rate of pay and the other earnings together, or if
2 you gave them their base rate of pay and an average of their bonus earnings. And
3 that's--essentially, what we're trying to do is make everything so that they're
4 mathematically the same and more fair in that way, if that makes sense, but...

5 32:30: What do you mean, more fair?

6 32:36: Well, I think--yeah, well, I think more fair is one, that they're
7 more accurate, so people are getting the benefits that they're entitled to, because
8 there's been a problem with underpayments and overpayments. But two, yeah, I
9 think that it's supposed to be 66.666 percent of their wages at the time of injury, and
10 we're trying to find the most accurate representation of what those wages are for
11 people that do not receive a uniform rate of pay, or a rate of pay that's solely based
12 on a uniform wage. So I hope that makes sense.

13 33:17: Can I ask you a question? Why--

14 33:18: Uh-huh.

15 33:18: --did we take out the union call board?

16 33:22: Yeah.

17 33:23: Because that has been really important in my industry. It
18 makes it much easier. And the calculations, I think, are--they--it may make some--
19 since you're not doing the 52-week average, it could make some of the awards
20 higher than what people may want, but it really has--it's very accurate. In fact, I took
21 that rule to the State of Washington and asked them if they could add that in up
22 there, because it just makes it so much easier, because it is a nightmare to figure
23 this stuff out when you have a transient workforce like we do in the construction
24 industry.

25 33:58: Yeah, we looked at that very closely. And we pulled some BLS

1 employment data to look at how susceptible part-time workers in the construction
2 and manufacturing trades are to being involuntarily part-time, and we found that
3 there--even during the financial crisis, there was-- I think it was-- At the peak, it
4 was-- Let me actually pull it, so I'm not mistaking something. Yeah. Essentially, we
5 found that there is--not a large percentage of the workforce would be economically
6 forced into being part-time, and that putting that 40 hours a week was most likely
7 imposing a cap on a lot of people, which is a complaint we've also heard. So
8 instead of-- So we think that in good years when people are working some overtime,
9 their benefits would probably increase, and the amount of people that would be
10 adversely--or their benefits would be adversely impacted during the lean years is
11 probably pretty minimal, because the people working part-time in those trades are
12 mostly people that usually work part-time, and not people that were forced to work
13 part-time because of lack of work, if that makes sense.

14 35:16: Yes. And I don't have part-time construction workers--

15 35:19: So everybody...

16 35:19: --what we're talking about.

17 35:20: So everybody-- You work with people that are employed
18 through union hall call boards?

19 35:24: Correct.

20 35:24: And they all only work 40 hours a week?

21 35:26: Well, they work--they can work 40, or the workers may not work
22 40 on their own.

23 35:31: Yeah.

24 35:32: Or maybe, like, on our site for, you know, 32 hours, on another
25 site--someplace else for 8 hours. But at the end of the day, it's the 40 hours.

1 35:41: And it's only 40 hour?

2 35:44: Correct.

3 35:45: So in that case, would they--would their benefits change at all
4 under this new rule?

5 35:49: I don't know. I just think it....

6 35:51: Yeah.

7 35:52: Because then you're going to have to--aren't you going to go
8 have to go back and do this calculation now on the average weekly wage? Are you
9 going to have to do the 52 weeks? Because construction workers are in and out and
10 they may only be on my job site for two weeks, and they get hurt the first week on
11 the jobsite, but I'm going to be paying them for that wage at injury based on a 40-
12 hour work week. So if they earn 50 bucks, you know, an hour, and they've only
13 been on my job two weeks, they're going to get-- Their calculation is going to be
14 based on that 50-- I mean, I think it's been very-- I think it works its way out. It's a
15 fair-- It's been a fair calculation.

16 36:30: I...

17 36:30: Probably the most fair I've seen for our industry across the
18 board, because we have such a transient workforce.

19 36:37: Well, I'd certainly defer to our...

20 36:38: I don't know how popular--

21 36:39: Yeah.

22 36:39: --it is with other people, but I just think it's fair to the worker,
23 and it's a wash as far as I'm concerned. I don't know why it's being taken out. And I
24 don't know if labor is aware that it's being taken out, because I think that-- My
25 understanding from years ago when I was MLAC is that particular rule had

1 something to do with the construction industry, and that's why it was in there. So I
2 don't know what the history of it, Fred, is, but I think there was some strong
3 negotiations at some point in time for that particular rule.

4 37:10: As far as how it's perceived by workers, it depends on whether
5 they had a lot of overtime at that job or not. I mean, it all depends on...

6 37:16: I can understand that.

7 37:17: Like you said, it comes out in the wash--

8 37:19: Exactly.

9 37:20: --over a lot of claims--

10 37:21: Yeah.

11 37:21: --for each individual, you know.

12 37:22: Yeah.

13 37:24: Obviously, they don't really care about that.

14 37:25: So if I have a worker, you know, that's been on the site for two
15 days and gets injured and hasn't worked for a while, it's a sweet deal for that person
16 because it's based on 40 hours and they may only put in 8 hours on the jobsite. So I
17 don't know.

18 37:39: I think it...

19 37:40: It just seems like it's been an easier way. And it's very difficult
20 sometimes to get all these--you know, all these records from the halls. Again, it's a
21 transient workforce, so they're not going there with the intent they're going to be
22 there for 12 months. Typically, a construction site is-- You know, it's ever-evolving,
23 and you've got people coming and going. So I know that you said that you didn't
24 really want to discuss it. It looked like it was not going to be a topic, but it's a really
25 important topic.

1 38:05: Oh. No, I mean,--
2 38:07: Oh.
3 38:06: --we definitely wanted it--
4 38:07: Oh. We want to talk about...
5 38:07: --to be discussed.
6 38:08: We want to talk about everything here.
7 38:10: Okay.
8 38:10: And as far as MLAC, we did--as usual, always invite MLAC
9 members to--
10 38:16: They wouldn't remember.
11 38:16: --these committee meetings.
12 38:17: Yeah.
13 38:18: We wouldn't remember.
14 38:18: It would be...
15 38:19: There's all new people.
16 38:20: Yeah.
17 38:20: This is like--years ago, I asked why that rule was in there
18 because initially, I thought, well, this is not very fair. But as you--as I've gone over it
19 over the years, it's been a wash.
20 38:29: Yeah. I think it's been there for many decades.
21 38:32: It's been there for a long time, right.
22 38:33: A long time.
23 38:33: That's what everybody said. It was like way back to the early
24 90s.
25 38:37: At least, yeah.

1 38:37: Yeah.

2 38:40: Additional thoughts about the union hall call board rule? Again,
3 almost everything in terms of the special provisions, I think, irregular work
4 schedules, overtime, tips, things like that, were removed as special cases in favor of
5 something that would be more streamlined. But, you know, it's just a draft at this
6 point. And so nothing--certainly, nothing is set in stone, so we'd like your thoughts.

7 39:17: I was curious about...

8 39:17: Hey, Fred. This is Mark Hopkins with EC Company.

9 39:19: Hi, Mark.

10 39:20: Regarding the union call board thing, I agree with the previous
11 speaker that the system works well, it's worked well for many years. I don't know
12 why we're changing it either. I think it's going to be more of a burden to everyone.
13 And the system as it was seemed to work well for everyone involved, is my opinion.

14 39:40: Thank you, Mark. Someone here had their hand up, and I don't
15 remember who now.

16 39:45: I was going to ask about tips. I couldn't quite figure out what
17 happens with tips. They were supposed to be included in some way, based on what
18 the employer is required to report. But are they-- How is that handled here?

19 40:01: So tips are actually written into the statute under--

20 40:05: Okay.

21 40:05: --the definition of wages. So I mean, I'm guessing that
22 wherever wage is defined in the rules, it would also incorporate the tips that, I guess,
23 employers are supposed to report.

24 40:18: Total earnings.

25 40:20: Yeah.

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40:20: Yeah.

40:22: Well, that--it's just--it's defined under wages, .005(29).

40:30: But specifically in this rule, you think it's still included in total wages under (a), other remunerations?

40:37: Oh, I don't know about that. All I'm saying is that wages include tips as per the statute, and the statute is referenced under the actual definition of wage in the definition section of (unintelligible).

40:51: Yeah. Under the new rule, that is--that's correct.

41:14: But I guess kind of on that note, I have some concern about 4(a) and this definition of total earnings with regard to wages, salary, commission, and especially this other remuneration for services rendered. Without that being defined, things are going to get pretty hairy, pretty fast. You know, what is other remuneration? And you know, I question whether we even need this total earnings section in the rule, just because, again, it seems to be pretty clear what wages mean. And so is it really necessary to define wages, kind of separate things out, and then again, bring back in this total earnings idea.

42:14: I'd be interested in any--everyone's thoughts on that, whether the definition actually is helpful, if it's on point. Is it going to be clear without listing those items there that say commissions are, in fact, total earnings and...

42:51: I think any time you change something it's open for interpretation.

42:53: Yeah.

42:54: So if you change the rules substantively, even though you might not be intending to have this massive overhaul, I think we're going to have a few years of give and take of finding where the new norm is, and it might not be what

1 your intent was, based on the language that you used. So I don't want to say the
2 comfort of having the old administrative rules, but we've got to all understand what
3 those mean.

4 And to go-- Well, and I'll throw this out there, because I have
5 calculated a few average weekly wages in my day. The difficulty is not calculating
6 the average weekly wage. The difficulty is getting the information from the employer
7 that you understand--that you can calculate the average weekly wage. And with as
8 many small employers that we have, we're lucky sometimes just to get a gross wage
9 amount for their weekly check or their bimonthly check. And so a lot of what is in the
10 rules about a change in the rate of pay, a change in their job duties, a change in
11 their hours, we can't ferret out from gross wage. And the more information we
12 gather, you know, okay, now we need to change the average weekly wage because
13 we know that there was a rate increase. So then we're going to the employer and
14 asking for hours.

15 So a lot of the difficulty isn't in the rules. It's in getting information from
16 the employer. And so maybe if we look with some clarity within here-- My big issue
17 is extending gaps. What is it? And I think this new term of seven consecutive
18 workdays, and then you have to define beyond that whether it's a gap--well, that
19 doesn't do any good. Because now we just know that if there's a gap with more than
20 a week, which I'm assuming it's a week because it says seven consecutive
21 workdays, but if you only work one day a week then is it seven weeks, that's going to
22 create a whole mess of litigation around that.

23 45:10: Even more so than when it was undefined or...

24 45:13: Yeah.

25 45:14: Okay.

1 45:14: Because now if you have a construction worker, a farm worker,
2 a logger, and they're off of work a week or two here or there, there's usually not a
3 dispute whether or not that two week is a gap, because you'd say to the employer
4 why didn't you work? The woods were too wet. Oh, okay. Well, now you say it's
5 seven consecutive workdays. Okay. Now, it's the expectation that each time we
6 see more than that we actually get clarification. Is it going to be challenged? What's
7 in the wage earning agreement? So it's just introducing a whole lot more concepts
8 that haven't been there before.

9 46:00: Yeah, that's...

10 46:01: Yeah, we're...

11 46:02: That's valid, yeah.

12 46:03: By taking out regularly worked overtime, that's a no-brainer. I
13 tell my folks if they work overtime one day a year, don't get in litigation over
14 excluding it. Include it, because the average weekly wage is going to change 10
15 cents. We'll let that one go. Okay. Get rid of regularly worked overtime. Overtime
16 is always included. Same with bonuses. Christmas bonus of 50 bucks. Put it in
17 there. It's going to make, what, 95 cents difference on the worker's average weekly
18 wage. Don't get in a dispute over a \$50 bonus, that you don't know what it was for,
19 if it was part of the wage earning agreement. Those are kind of the no-brainers. But
20 some of it's just a big shift.

21 46:51: We're open to ideas in terms of--you said that the difficulty is
22 getting the information you need from employers. If--you know, if the rules could be
23 streamlined in such a way that you, perhaps, could get by with less information from
24 employers, the kind of information that's most difficult to get, I'd certainly like to hear
25 your ideas about what that might look like.

1 47:15: Just so you know, the--you know, the state of Washington has
2 been looking at this wage stuff. They have a committee that's been meeting for two
3 years. So I just want you all to know, this is--it's a very difficult discussion to have.
4 So it's pretty impressive that you've gotten as far as you have in such short...

5 47:34: Well, we started meeting last August. I guess they have us
6 beat. But--

7 47:37: Yeah.

8 47:37: --we've been talking about it for nearly a year now, so...

9 47:40: Well, the original focus group on this was in 2014;--

10 47:42: '14:

11 47:43: --right? So we're...

12 47:43: Okay. Yeah, I guess we're even.

13 47:44: We're at about two years, too.

14 47:45: Well, there you go.

15 47:47: I--this is Chris Frost. I have a question that was brought up by
16 the last gentleman who was talking. It's on Page 34 at (8), and it talks about wage
17 disputes. It says, "If the worker disputes the wage used to calculate the rate of
18 compensation, the insurer must attempt to resolve the dispute by contacting the
19 employer; if the worker still does not agree, then the worker may request a hearing."

20 This means--bec-- Sometimes, we--the worker doesn't have time to
21 wait a long time for the employer to get the wage information, or doesn't know if
22 that's ever going to happen. It looks like this is kind of open ended, and that--they
23 can't--they aren't allowed to file a hearing request. It just--it's a little-- I worry that
24 they may be waiting a long time before they can file a hearing request. Sometimes,
25 employers--it is difficult to get stuff for them, and the worker shouldn't have to be in

1 limbo.

2 49:04: So Chris, would you'd want them to go maybe straight to the
3 Hearings Division and request a hearing, or...

4 49:09: No. Or just-- You know, I worry about-- Well, I think if they--
5 Yeah, if they're anxious to figure it out, they should be able to do that. You know, if
6 they need an expedited hearing because--I don't know, because they think it's so far
7 off, they're not able to meet their needs. This just seems like they could be in a
8 limbo for a long time if the employer just can't get its act together.

9 49:41: Okay. Thank you, Chris.

10 49:45: Isn't this existing language?

11 49:48: Yes, it is. It just moved...

12 49:49: Is it in 0025 now,--

13 49:50: Yes.

14 49:51: --or did it move from someplace else?

15 49:52: It's in 0025 now.

16 49:53: And we currently can request a hearing straight away, and--

17 49:57: Yeah.

18 49:58: --frequently do. The way I read this language, I guess, is that
19 the--if the worker goes this route, then the insurer must do something, but it doesn't
20 really say the worker must attempt to conciliate or...

21 50:08: Right.

22 50:09: So...

23 50:10: Yeah. I guess it's to encourage that kind of communication, but
24 it--yeah, it doesn't preclude the worker from filing a hearing request.

25 50:17: Okay. All righty.

1 50:19: Okay.

2 50:20: This is Keith. I shared-- I mean, Dan kind of alluded to this
3 when he was talking about the--you know, all of the litigation that might follow. I
4 mean, if you make some minor changes here and there, you know, you're going to
5 prompt a lot less searching for meaning among the bar--

6 50:37: Yeah.

7 50:37: --than you're going to prompt if you do a complete overhaul. I
8 mean, we really are going to spend years, you know, not fighting because we want
9 to fight, but litigating these issues for clarity for our clients on both sides of the bar.
10 So I guess I'm kind of in the camp personally--and I won't speak for all of my OTLA
11 colleagues, but I'm in the camp personally where, you know, this has been well-
12 defined. It's maybe not easy in every situation, but ultimately we do get it right. You
13 know, I'm not sure it's a good idea to overturn this and just do something new,
14 because we don't know what problems-- I mean, we may be sitting here again in ten
15 years talking about all the problems of what we came up with in the new system ,and
16 all of the different shortcomings.

17 51:20: Five years.

18 51:22: Five years--

19 51:22: I agree.

20 51:22: --maybe, Jaye says. I mean, I guess I personally haven't
21 experienced enough of a problem in 13 years of practice applying the current rules
22 that I would even consider, you know, changing the--changing it in such a massive
23 way and creating that level of uncertainty.

24 51:40: Yeah.

25 51:41: And I know a lot of work has done into this, and I'm sure there's

1 probably some momentum, but I don't know. I've got a lot of reservations about
2 changing it this dramatically.

3 51:50: Yeah. I guess to push back a little bit, and I'm not completely
4 disagreeing with you, I would say that you even heard a few bits of testimony today
5 that this is more in keeping with the insurer's old practice than it is with how the rule
6 was previously written. So I think-- Dan, maybe it was you. I'm sorry, I'm going to
7 get the person wrong. But you were saying that people were using this gross
8 averaging method previously in a lot of cases where they didn't have enough
9 information, and it wasn't until the Division started enforcing their Rule 5 that they
10 found out that they weren't doing that, or weren't able to do that.

11 So we do think that there are some underlying problems with the way
12 the rule is currently written that requires some clarification. And if there's places
13 where the new language is ambiguous, I think that's something that we really do
14 want to fix. If there's something that's maybe incorrect or unfair, that's also
15 something we would definitely like to fix now. But I would just state that there has
16 been a need for some changes demonstrated both by our audit and by kind of the
17 anecdotal testimony of people and the stakeholders, so...

18 53:07: Well, and I was...

19 53:08: This is Jaye Fraser again with SAIF Corporation. I was going
20 to save this until a little later, but I guess I would echo Keith's concern a little bit in
21 that this is really-- At the whole of Division 60 is a massive rewrite. Things were
22 moved around. When we were reviewing this, it was like, well, where--I know that's
23 somewhere. And so from a practical standpoint, you have people who have been
24 used to going to a spot in the rules and knowing that the answer is there. And when
25 you start rewriting and moving things around, it makes it--I mean, it's basically a

1 wholesale--how do I use these rules again process.

2 And I--and the other concern that I think SAIF has is that-- And just
3 again to echo Keith, we're--I'm afraid-- And Allison has mentioned it, as well. We're
4 going to end up in litigation in places where we haven't had to have litigation,
5 because we knew what the--you know, what the Courts--what the ALJs and what the
6 Court of Appeals said about all of these. So that's--I mean, and frankly, as I read it,
7 the writing is crisper, it's--in many places. It was much better to read. But with all of
8 that said, I was concerned that there are some unintended consequences lurking.

9 54:36: Yeah.

10 54:37: So when we rewrote the ten and then-- What are the other
11 one, the rules?

12 54:41: Provision 9 and 10.

13 54:42: Nine and ten. Did you...

14 54:45: I think the 60s--I think the 60s are more complex than the 9s or
15 the 10s. I just think the 9s and 10s are just a very different, much narrower scope.
16 These are--this is very broad.

17 54:59.: Chris?

18 55:00: Uh-huh.

19 55:00: So this is Lou Savage. So Jaye,--

20 55:01: Yes?

21 55:02: --how do we fix the problems that we've identified?

22 55:08: Well, I guess the question is, can we fix the problems without
23 completely rewriting?

24 55:12: Well, that's the question.

25 55:13: Yeah.

1 55:13: Yeah, that's the question.

2 55:14: We have a 63-percent accuracy industry-wide--

3 55:18: Well...

4 55:18: --benefit accuracy, which is unacceptable.

5 55:21: I think we were over 90 percent. So maybe that's part of...

6 55:24: Hey. This is Paul with Matrix. And I've been entrenched in the

7 Washington process quite a bit. And the audit process there has changed

8 somewhat from changing the rules to looking at the variances. Has the Department

9 looked at the variance between the auditor's calculations and the examiner's

10 calculations? The reason I bring that up is in the State of Washington, now they're

11 looking at wage rates in compliance with the auditor if they're within a percentage--a

12 small percentage of the auditor's calculation, knowing there's all kinds of factors

13 involved. And rather than change the rules, maybe we want to look at the audit

14 process, and what is an allowable variance.

15 56:13: We...

16 56:13: Any thoughts?

17 56:15: I'm sorry. This is Barb Belcher, the audit manager for the

18 Workers' Compensation Division. And that audit did include a weighing standard for

19 the weekly wage calculations and the payments issued on a two--on a weekly basis

20 and a net overall finding.

21 56:34: That's a good point, though.

22 56:36: What was the variance? What--I mean, at what level was it

23 considered out of compliance?

24 56:44: I believe it was \$1 per week, \$5 net overall, and a \$5 weekly

25 wage calculation variance, I believe. I...

1 56:55: So that's probably, realistically, less than 1-percent variance.
2 The State of Washington is looking at a 5-percent variance.

3 57:09: I tend to agree. This is Keith. I tend to agree. That's pretty
4 small. I mean, I would imagine you'd find a lot of mistakes in that. I mean, the--
5 Yeah, it's curious, like, what--how-- And I'm not trying to create more work for
6 anybody, especially for...

7 57:24: Yeah.

8 57:26: But I would--I think it is an interesting question, you know. How
9 many of the mistakes are within that 5 percent, versus how many of the mistakes
10 are, you know, 10, 15 percent. It would be interesting to know that. It would also be
11 interesting to know whether there's particular insurers that are driving this average
12 sky high or sky low, I guess, or--you know.

13 57:50: Well, and to that point, I'm going to kind of jump over to my
14 experience over in the insurance side of things with premium audit and with test
15 audits that NCCI does of employers. And then with the audits and how the insurers
16 are doing, there's a provision in the rules that allows the Insurance Commissioner to
17 actually sanction and put insurers on some kind of, yeah, remediation program.
18 That's an interesting thought.

19 58:25: We would really like to see that. I'll just broaden the
20 discussion. Because there are some folks--I'm not going to name names, but there
21 are some insurers out there that are off the rails with penalties. And it is ridiculous
22 that we're sitting here with all of the stakeholders when we do have, truly, some
23 outliers in the system. So I would like to--the Department really to focus in and do
24 some comparative statistics. I don't know what you guys do, quite frankly. I don't
25 know if that's already done. But I would be fascinated about the results and the

1 breakdown between who gets the penalties, who's getting this wrong, because I
2 have a feeling I know.

3 59:01: I agree with Keith.

4 59:06: So you agree--so you would be okay with increasing our
5 penalty authority?

6 59:09: Absolutely. Yeah, absolutely.

7 59:12: (Unintelligible) Instead of fixing the whole--breaking the whole
8 system...

9 59:18: I haven't heard any of the insurers, but yes, I would.

10 59:21: You know, if we're-- I guess, you know, Lou, I don't have any
11 authority to say this, but-- No. But with all seriousness, if an insurer is messing up,
12 or a self-insured employer, their TPA, then--or the--what are they supposed to be
13 called?

14 59:41: Service company.

15 59:41: Service company.

16 59:45: Then I think it is within the Department's authority to say fix it. I
17 like to think that if we were making a mistake and the Insurance Division or the
18 Workers' Compensation comes to us and says your behavior is not within a
19 reasonable range, then--that we would have an opportunity to fix it. And if we ignore
20 you, then yeah. Unfortunately, there are some players who would keep going. I
21 mean, they would--you would say something, and they would ignore you.

22 60:27: The frequent flyers.

23 60:28: The frequent flyers, yeah.

24 60:30: It's not (unintelligible).

25 60:32: So we agree again.

1 60:36: And the frequent flyers--it isn't just time loss; right? It's
2 everything. It starts with discovery. They refuse to get discovery until you threaten a
3 Request for Hearing or write a letter over here, but it happens on every single case.
4 And I often wonder if it's cyclical business-wise, they just engaged in too much
5 business maybe in recent months or years, and all of a sudden now it's coming back
6 to haunt them, that now the claims are being made and they're just totally
7 unequipped, unprepared to handle the onslaught of claims and the processing that it
8 takes. I don't know. But as Keith says, without mentioning names, there's some that
9 have been around-- I've been doing this 32--

10 61:12: Been around.

11 61:12: --years, and there are some companies that I said 32 years
12 ago, these are the ones I want to get my penalties against. These are the same
13 companies I'm going and getting my penalties against today. It hasn't changed with
14 a handful of them. So I--and I often wondered, is that because we're not
15 complaining loud enough, you know, it's not brought to your attention, or that even if
16 it's brought to your attention, you can't do anything about it? Or as Jaye suggested,
17 maybe we complained, it was heard, you have authority, and they said, we don't
18 care, this is how we do business, and what are you going to do about it? You know,
19 I'm not sure what it is, exactly.

20 61:53: We have a \$10,000 per quarter cap, and for some insurers
21 that's taking it out (unintelligible).

22 62:00: Yeah. Yeah.

23 62:02: They don't see the penalty.

24 62:04: They see it as the--

25 62:05: It's part of doing business.

1 62:06: --cost of doing business.

2 62:07: And has this changed at all with, like, the service companies
3 being--instead of going after the carrier, they can go for those carriers that use
4 service companies? Is--are we going to see a change with the service companies
5 because now they don't have to--they're paying those fees, those penalties direct, as
6 opposed to going through the carr--the carrier and being penalized. Did I say that
7 right?

8 62:28: Yeah, I think it's...

9 62:29: This is Paul at Matrix. That's kind of incorrect. While the fee
10 may be to the carrier, it's often passed through to the TPA. So just because the TPA
11 isn't being fined, it's usually a pass-through if it's been identified as the TPA's fault,
12 and those discussions happen all the time.

13 62:53: Okay. Thank you, Paul.

14 62:55: (Unintelligible) directly to the...

15 62:57: Yeah.

16 62:57: The new statutes...

17 62:59: Yeah, with the new--under the new law, there can be direct
18 penalties to the service company, or what we used to call the TPA. Certain kinds of
19 penalties. It's only a limited type. Isn't it a performance audit of some kind?

20 63:17: Yes.

21 63:17: Okay.

22 63:20: So I'd like to pull us back maybe a little bit towards Rule 25.
23 And Jaye, I guess to respond to your earlier question, I--we--I do recognize that
24 these are pretty significant changes. And some of the editing has been pretty
25 significant, but these rules haven't been opened in--

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63:39: Oh, I know.

63:40: --a long time. And you know, I'm working...

63:43: And I wasn't kidding when I said that the writing is--

63:45: Oh.

63:46: --crisper. I mean, I saw a lot of the changes happened. Yes.

But just overall,--

63:52: Uh-huh., yeah.

63:53: --it's a concern that--I would be remiss if I didn't raise it.

63:56: Yeah. Oh, no. Yeah, we definitely understand. And I'll take the compliments. But also, you know, that is a--overall, we are under a mandate to kind of create rules that are in plain language, and we are really trying hard to make these user friendly. And some of the changes are just a result of the fact that we had over--well over 60 issues raised by stakeholders to address in this rule revision. So that's kind of the overall-- I don't even know if it's an excuse. But we are, you know, facing some constraints about how little we can change. And we also kind of feel like, I think, improving what we can now is better than kind of going back and making incremental revisions a lot and changing things up on people more frequently, so...

But getting back to Rule 25, there were a couple of things specifically, I guess, I'd like to talk to. If we could go back to the extended gap conversation a little bit more? So one thing, I think we do feel like we want to define that, what an extended gap is, because having it undefined is also sort of litigation. That said, we would appreciate feedback on what the appropriate amount of days is, or an appropriate phrasing, or if somebody does have an alternative solution to how to define it.

1 65:35: So Dan Schmelling would really like gaps four weeks or less
2 being included in the average calculation, and gaps of more than four weeks being
3 automatically excluded from the calculation.

4 65:53: And that's four calendar weeks.

5 65:55: Yeah.

6 65:55: So yeah, just from--if you were looking from an ease of
7 calculation-- And I don't know if this is SAIF's position or...

8 66:02: Could you-- Do you mind speaking up so those of--

9 66:08: Oh, yeah.

10 66:08: --us on the phone can hear?

11 66:10: Oh, yeah. Just-- Yeah, sorry. This is Dan with SAIF. Just
12 from an ease of calculation, if a gap of less than four weeks was included in the
13 calculation, regardless of the reason, and a gap of more than four weeks was
14 excluded, regardless of the reason, you don't have to discuss, well, was this
15 contemplated at the time of hire 3 months ago, 3 years ago, 15 years ago? You
16 simply look and you say, there is a gap of three weeks and five days, it's included;
17 there is a gap of four weeks and a day, it's excluded from the calculation. It could be
18 20 weeks. But if it's more than four, it's excluded. I mean, to me, that would be easy
19 to apply because you're looking at the payroll and you see a gap of employment.
20 You don't see reasons for the gaps on the payroll record. That's a conversation you
21 have to have with the employer, you have to have with the worker; was this
22 contemplated, okay, you know, you discussed it a year ago, but you didn't discuss it
23 three years-- When? So just a thought on the whole gap issue.

24 67:25: I do appreciate that. This is Chris Frost. But, you know, when
25 you have folks who have been working less than a year and--maybe they've been

1 working there six months and then they get hurt at the six-month mark, if they have
2 been out for a family medical leave issue for three-and-a-half weeks, that can really
3 have tremendous impact on their time loss rate that really wasn't-- You know, we
4 have to worry about those folks who have time loss rates because of such a rule that
5 then they can't live on or, you know, that it doesn't serve its purpose.

6 68:08: That would be an example of an unanticipated absence that I
7 think would be excluded under the current rule, because you didn't expect that.

8 68:17: Current rule. Uh-huh.

9 68:18: How would you treat an employee who has already an open
10 Workers' Compensation claim for something else, and then have the second injury,
11 and you can't say that it was-- I guess you would have to say it's not anticipated, so
12 you don't include any of the time they were off for a Workers' Comp claim.

13 68:43: For working at a reduced wage?

14 68:45: Working at a reduced wage, TPD, modified duty.

15 68:50: That's a good question. That's--there--you know, I've had that
16 situation occur once. And it was super detrimental to the injured worker to be injured
17 on light duty, because his time loss rate was so low.

18 69:08: This is Allison with SAIF Corporation. And I think those are the
19 unfortunate outliers that, you know, as was alluded to earlier, sort of end up coming
20 out in the wash. My understanding is, the way the current rules read, you know, if
21 you're on, let's say, light duty because you had a Workers' Comp claim and you
22 return back to full duty and then get injured again, your time loss rate would be
23 based on when you return to full duty, because it would be a change in the wage
24 earning agreement, because you wouldn't have been performing your regular job
25 duties while you were on light duty or off for a period of time. So I don't think that

1 having a specific sort of delineated time frame for when you include a gap, when you
2 exclude a gap, would really change the situation, Chris, that you mentioned.

3 70:06: Well, I didn't quite follow that, because your example was
4 different than mine, but...

5 70:13: I think what she was saying is that if you were off on time loss
6 performing light duty that would be a change in your job duties.

7 70:21: Yes. But if you're injured on-- My thing was if you're injured on
8 light duty, then you're stuck with that light-duty wage.

9 70:28: That's how it is now, though.

10 70:30: I know. It's a problem.

11 70:32: Okay. Well, thank you, Chris.

12 70:34: Correct.

13 70:35: I have a-- This is Melissa from the city, and I have another kind
14 of follow-up along with what Sue was saying, if you have an employee that's injured,
15 worked modified work, had a period of time loss, returned to regular work, a month
16 later they have another injury. So what we've been doing is capturing the wages
17 from the time of the release to regular work through the date of injury under the old
18 rules to determine what the average weekly wage at that time is. So that's what
19 we're trying to confirm moving forward, what would be an interpretation, because we
20 do have several employees that will have two or three injuries after they've been
21 released to regular work from their prior claim.

22 71:29: Well, I think, similarly to the other example-- Yeah, it's a tough
23 question. So if they were not working, it would be an unanticipated gap. If they
24 were working, it would--you'd have to really look at what the wage earning
25 agreement is and where the changes to that wage earning agreement occurred, and

1 what the changes wherein were. So I think-- Yeah, that's a little bit in the weeds of
2 how the changes would affect these, because I think it would be kind of some of the
3 same problems in the rule before. Yeah, and those--yeah, those very specific
4 questions may be easier to answer in writing, if we could look it all out. I'm just trying
5 to think. If anybody, Troy or Barb, maybe, has an opinion on how you would treat
6 that or-- Allison is doing a good job of fielding these questions.

7 72:28: (Unintelligible) the problem. I don't know how to fix it. I've
8 worked with them, actually, throughout--probably not long ago, and it is--it does not
9 work out fairly sometimes, but I don't know what else you do. Do you just use the
10 same average weekly wage on every claim (unintelligible) files or how, do you
11 handle that? Do you have a suggestion? I don't know if they can hear me.

12 72:51: Can you hear him, Chris?

13 72:54: Chris?

14 72:54: No.

15 72:55: Oh.

16 72:56: My vocal...

17 72:57: Yeah. So what Troy was saying is that he agrees that it's a
18 problem. We don't know how to fix it. So do you have a suggestion on how to fix it?
19 Is there maybe an opportunity to use the same weekly wage on every single claim
20 that happens in those 52 weeks, if it happens in the...

21 73:19: Chris, I--in the situation I dealt with, I really--I was unaware of
22 this problem before. It seemed to me that if a person gets injured with a new injury
23 on light duty, you're--if you're--and that person is working at a reduced wage and
24 reduced hours, we're penalizing them for following through with the purposes of the
25 Workers' Comp back--law to get them back into some sort of light-duty position. It

1 really makes sense, I would think, if they're injured on light duty, to use their average
2 weekly wage of the job--of their original job, because the job that they're injured at is
3 not their real job. It's their job that they're required to do to--you know, to--for policy
4 reasons.

5 And then if they accidentally get injured on that, to have them suffer
6 the consequences of a bad rate then, it just doesn't seem right. So yes, I would
7 think that in such a situation-- And it doesn't occur that often. Luckily, I don't think
8 too many injured workers are getting injured on light duty. I do think they should be
9 able to--they should be--they should capture their average weekly wage for the job
10 they were hired for, and that would be the AWW for the original injury.

11 74:51: Yeah. I think that's actually with--outside of the scope of this
12 rule. Somebody else may be able to--

13 74:56: Yes.

14 74:56: --know where it is. But if you are no longer able to perform
15 your modified work, wouldn't the payment of partial disability be suspended? I
16 mean, that's more of a-- And you would go back to the original total temp--I...

17 75:15: You would think it was a withdrawal of the modified job offer.

18 75:17: Yeah.

19 75:18: No, we're talking about a totally new...

20 75:21: Another injury,--

21 75:21: A new injury. A brand new injury.

22 75:22: --based on...

23 75:23: We couldn't really consider that a--

24 75:25: Okay.

25 75:26: --withdrawal of the modified job offer on the earlier claim. It's a

1 whole new claim that has its own average weekly wage. And I agree with Chris
2 Frost that it can only make sense that since the worker was unable to show what he
3 could do in the workplace in a realistic fashion or sense of the word because he's on
4 an injury claim, with working around modifications that we had to fall back on, well,
5 where was this worker in the labor market when he incurred the first injury that got
6 him into the situation where he was subsequently injured? To me, it's something
7 that makes sense.

8 75:58: So I would say-- This is Allison again. I would say be careful,
9 because I see quite a few claims where the worker on light duty ends up in a
10 different position where he's actually--he or she is actually making more money than
11 the job at injury. So I mean, you know, again, I think it's one of those things that, for
12 the most part-- One, I don't think it happens all that often to where maybe it
13 shouldn't necessarily require a rule. But two, it's one of those things where I think it
14 kind of comes out in the wash.

15 76:40: Just be aware that every time you say it kind of comes out in
16 the wash it means that's an injured worker that's going down the drain. That's what--
17 It all comes out in the wash, that's--what we're doing is we're saying we know that
18 there's going to be some injured workers circling the drain. That's my only...

19 76:57: And...

20 76:57: That's my only concern. And I agree. I don't think-- You know,
21 frankly, it's not addressed by these rules, because the problem was it wasn't
22 addressed in the rules in the first place, but it--I do think it is an issue.

23 77:15: Well, thanks for raising it, Chris. Any additional thoughts here
24 about that? Oh, I'm sorry. You had your hand up--

25 77:24: Yeah.

1 77:24: --quite a long time ago.

2 77:25: That's okay.

3 77:25: Okay.

4 77:26: Kimberly Wood with Perlo Construction. I was just going to say
5 from an employer's standpoint, we're a union employer. And so how we have to get
6 to average weekly wage is a little different than other people, because we're set at a
7 wage. So we have--if we wanted to adjust to an average weekly wage, we have to
8 adjust the hours. So for us, we're pretty proactive. So when an injured worker gets
9 injured, the day they're injured--we're hoping to hand them a modified job letter that
10 day. Since we have to have the average weekly wage immediately, we have to
11 figure that out. And for us, we don't always agree with what the carrier has. So for
12 me, I agree, that makes it a lot easier to just say four weeks in, four weeks--you
13 know, over four weeks out, or whatever that breakdown is.

14 As an employer trying to figure it out on my own, that helps me a lot, at
15 least get closer to what the insurer comes back with when they find--you know, when
16 they--when they're able to get all of the information. But it's really difficult for us an
17 employer to get them the information the day of the injury and have them tell us the
18 average weekly wage the same day, and get the letter out and do all of the things
19 we've got to do to try to stop time loss. So for us to be able to have some clear set
20 in or out, that's really helpful for us.

21 78:39: Okay. Yeah, maybe we didn't a-- We didn't talk about that a
22 whole lot, but the four week kind of delineation between what is and is not an
23 extended gap, that would be a good conversation to have more input from the
24 committee. Do you think it's a good threshold, four weeks?

25 79:03: I like it. This is Spencer from Liberty Legal. I see a lot of

1 confusion with the adjusters that I deal with in breaking this down. And I think the
2 closer we can get to hard delineations like Dan suggested, the better. I mean, we do
3 see a lot of litigation over what was the wage earning agreement, and when did it
4 change, and what do these two people agree on? So where possible, putting
5 something that just gives a pretty easy yes or no, I think will make life easier for
6 everyone. I know the adjusters I work with would very likely agree, as well.

7 79:39: We did hear some concerns about four weeks. Does anybody
8 else have concerns about four weeks as being too short or too long?

9 79:49: This is Keith. I mean, I don't like litigating whether a gap is
10 extended and was intended and was expected, any--all of that stuff any better than
11 anyone else. I mean, that's not something I personally enjoy doing. But, you know,
12 some of the stuff that--alluding to what Chris Frost said, some of this stuff isn't all
13 one-size-fits-all, and it's not easy, and it's not designed to just necessarily give the
14 one answer, so-and-so gets a windfall and so-and-so gets screwed. I mean, that's
15 not the way the system should be designed just so we can bump up the compliance
16 rate.

17 I mean, it just seems kind of backwards in a big way to me, that we just
18 kind of homogenize everything and it all comes out in the wash. I mean, these are
19 people, and they get on the phone and they tell you that they're losing this, they're
20 losing that, and that-- You know, I'm not here to give a big sob story for them, but
21 that's the reality. I mean, when somebody is a loser and the other person gets the
22 windfall, that's a major problem. And I know you can't take every single person and
23 give them exactly what they need, but, you know, trying to eliminate litigation just by
24 a one-size-fits-all isn't necessarily the best thing to do.

25 And you're creating--again, you're creating litigation over the

1 uncertainty in what these rules are going to mean in the future. So I don't--I'm not
2 a--I guess I'm not a fan of the idea of making one-size-fits-all and further, you know,
3 doing that. I mean, like I said, I personally still feel like the system isn't broken, I
4 mean, as far as this goes. You know, there are still some winners and losers. But
5 we're talking about, in my opinion, kind of a lot less when you're not making a one-
6 size-fit-all.

7 81:27: Thanks, Keith. Additional thoughts?

8 81:41: It should be easy for an employer to figure out. I'm sorry. I
9 understand where you're coming from. But as an employer, it's my job to manage
10 that liability and that risk. And one of the ways that I can do that is to know what the
11 average weekly wage is, so that I can offer them-- We always offer light duty
12 immediately if we can, but it makes it very difficult for me to do that if I don't know
13 what my average weekly wage is. So I don't--I have to pay them full wages. I'm not
14 going to get full out of them; right? But that's okay with me. What I don't want to do
15 is pay them for 40 hours if really they only should be getting 32 hours because that's
16 what their average weekly wage would really, you know, work out to.

17 And I get-- I'm already taking a lot, because I'm getting something--
18 I'm paying them full and getting not a full day's work in construction. And so for me,
19 that's my ability to manage the cost of that claim. And when I don't know the
20 average weekly wage, it makes it really, really difficult for me to do. And I've had--
21 I've gone back to our carrier and said, "I don't know how you got that number." But I
22 mean, I just looked at the numbers, I added it all up, divided it by this many weeks. I
23 still can't come up with a number. And when I do that, I always get a different
24 number coming back to me. If I challenge it, I get a different number. I don't--very
25 rarely do I get the exact same one.

1 And I've asked for the calculations from the carrier. I can't figure them
2 out. I look at them and I go, "I don't get how you got to that number, but it--you
3 know, if that's what it is, that's fine." It should be easier for me as an employer to be
4 able to figure out that number a little bit easier and match, at least so I could figure
5 out the process so I don't come up with different numbers, because that puts me at a
6 disadvantage. I don't want to underpay anybody. That's my bigger-- You know, I
7 want to hit their average weekly wage. I just don't want to go tremendously over it if
8 they're only at, you know, 32 hours versus 40, so...

9 83:31: Kim, are your people a union call board? You mentioned that
10 you were union when you said...

11 83:35: So some of them are, but not always, so...

12 83:36: Oh, okay. Some of them are.

13 83:37: Yeah, I mean...

14 83:38: I just wanted to make sure that--

15 83:39: Not always.

16 83:40: --we're using the union call board--

17 83:41: Well,--

18 83:41: --versus the...

19 83:42: --the problem is they're not a union call board when they come
20 to your jobsite and knock on your door. They're searching you out. We get that a
21 lot. So it's not the same as us saying right now everything's (unintelligible), using the
22 call board, because of the way the industry is right now, but...

23 84:02: Yeah.

24 84:02: But a lot of them know that's not the case, so ours don't always
25 go that route. So it just--it makes it difficult. And I hope that there are employers

1 that are actually being as proactive and trying to get that employee back. Because
2 for us, it's not just about managing the money, but it's about helping that employee
3 (unintelligible). We understand that that's a bad thing for them to do that. We want
4 them back as soon as we can get them back so they stay engaged. But it makes it
5 difficult to do that, to do it quickly, especially now if I read this correctly that the
6 three-day wait starts regardless of whether you bring them back to light duty or not.
7 Is that right? That's a huge, bad thing for me.

8 84:42: (Unintelligible), doesn't it?

9 84:45: No, the three-day wait doesn't start until they miss work.

10 84:48: The clock starts ticking if they're off work for the three-day wait.

11 84:50: I think the difference is it used to be if they...

12 84:52: Came back and finished.

13 84:53: If they came back and finished their shift,--

14 84:55: Oh. Okay.

15 84:55: --the three-wait didn't start with no loss of wages. Now, any
16 missed time from work starts the three-day wait period.

17 85:03: Yes. So that's a big change. That's an impact for us. Then it
18 really does affect us if we can't get the average weekly wage. And I've had to wait a
19 couple days sometimes. Just from an employer's standpoint.

20 85:19: I'm going to turn to Chris here. Are there some outstanding
21 questions that you need to--so that we can take back enough information to
22 actually-- I'm going to ask you to--the Committee, if there's any remaining points on
23 here that you want to discuss, we'd like to discuss them. And then after we do, or if
24 we need longer after the break, we'll do that as well. But after we take a break and
25 come back, at some point we'll be just opening up discussion for any of the other

1 Draft 60 rules, if you have input on those, because I know that Rule 25 is not the
2 only rule affected, by any means. It's the most affected. Any concerns about the
3 five-day worker versus the seven-day worker, and then--and our tentative decision to
4 defer changing that? I'll just welcome your thoughts on it.

5 86:18: I don't really understand the repercussions for that. Do you
6 mind? I just didn't get why--how that would change things.

7 86:28: Okay. I'm going to defer to one of my coworkers, how a seven-
8 day worker would really change how benefits are paid.

9 86:39: So paying time-- This is Barb with the Workers' Compensation
10 Division, the audit manager. Changing the--shifting the seven-day-a-week worker--
11 shifting to a seven-day-a-week worker pays temporary disability one-seventh of
12 every day of the week. So if a worker is only on three days, they're only getting
13 three-sevenths temporary disability. However, if they were off work for three
14 workdays, as the rule is now, they're getting paid three-fifths of temporary disability
15 for that week.

16 87:20: Why do we want to change it?

17 87:22: The difficulty is in the partial workweeks, front end or back end
18 of authorization. And typically, an insurer at the time of injury will set the scheduled
19 days off, which could change when they come back to modified work. Or depending
20 upon when they're released back to work, it could be, oh, they were released back
21 on Sunday and I paid them through Thursday, so I only owe them for one day, but
22 they were scheduled to work that Saturday and Sunday in their modified work or--
23 you know, their schedule change. So now they're not getting paid for those days,
24 because the employer says, we will pay you only when you miss Monday through
25 Friday or Thursday through Saturday, whatever the work schedule is that they

1 established at the time of injury.

2 So like in Washington where they pay a seven-day workweek, they're
3 basically saying you're going to get one-seventh of your time-loss rate for each
4 calendar day that the doctor has you off of work or on modified restrictions. So then
5 it really doesn't matter if you are released to return to full regular duty on this day,
6 which was the start of a weekend, or that day, which was your first day back. You're
7 just going to be paid for that time off. Especially when you're paying TPD. If the
8 doctor takes you off work for two scheduled days and one was a scheduled day off
9 and the other is a scheduled workday, at the time you're being paid you would get
10 paid for one of those days, and not the other day. But at the time you were injured,
11 maybe both of those were scheduled work days. So the employer goes ahead and
12 pay--they insurer pays you for those two scheduled days. It's the mechanics of
13 making the payments versus the amount that you're paying them.

14 89:22: So you just brought up a good point, though, on the TPD point,
15 back to Kim's point of making sure that she is aware of what their actual hours were,
16 you know, if they're working 32 hours versus 40 hours. So what happens? Are we
17 going to owe TPD for Saturday, Sunday while they're on light duty?

18 89:41: You would be paying for one-seventh. As long as a worker is
19 taken off of work for a week and misses a week, they're going to get their weekly
20 time loss rate. It's those partial weeks where Keith said sometimes you have
21 winners, sometimes you have losers. With TPD, sometimes you have winners
22 where they're being compensated for what was a workday when they were injured,
23 but is now a scheduled day off further on into the development of the claim when
24 they're working modified work.

25 So the insurer doesn't look and say, oh, these are the scheduled

1 workdays this week, so I'm going to pay time loss on these days. They say, what
2 was it at the time of injury? Switching to a seven-day calendar week, you just go,
3 oh, you have a work restriction that date, here's one-seventh of your time-loss rate,
4 regardless if it's a workday or a scheduled day off.

5 90:41: Is this a bigger issue in the industry--in the service industries,
6 like--

7 90:46: It...

8 90:47: --restaurants and grocery stores where they have different--

9 90:50: Yes.

10 90:51: --schedules?

11 90:51: Yes. If you're working a regular Monday through Friday,--

12 90:55: Right.

13 90:56: --we don't see the problems. It's, yes, in the service industries
14 where they never work the same schedule week to week, but yet based on the date
15 of injury week that's their scheduled workweek. So we always pay them time loss
16 based on that, even though that might not be what they're doing modified work later
17 on, so...

18 91:23: Okay. Well, let's take a 15-minute break. And we'll go ahead
19 and either talk more about Rule 25 if you'd like, or we'll actually move on to the other
20 draft rule changes.

21
22 (off the record)

23
24 91:36: Okay. We're back on the record. So before we move on, I
25 want to just make sure there's a chance--if you have anything else on Rule 25, that

1 we can talk about it now. And I will also let you know, as with everything we're going
2 to talk about today, if you have additional thoughts after the meeting, you can send
3 your thoughts to me in an email, or just pick up the phone and call me, and I can
4 document what you have to say, and we will not lose track of that. So before we
5 move on, do you want to talk about Rule 25, any other points?

6 92:12: Yeah. We had some concerns just with the way the rule is
7 written. Under the new (3), rate of compensation, general, the opening paragraph, it
8 goes into, "During the period of temporary total disability, the worker must receive"--
9 and it's basically restating what's already in statute. But that's dependent upon the
10 worker's date of injury, so it's not applicable to all workers. If you have an old date of
11 injury, you might meet a hundred percent of the average weekly wage. But a really,
12 really old injury, you might be at a different-- So rather than going to that statement
13 there, why not just either reference the statute or reference Bulletin 111 as to this is
14 where you would go to the information for a specific date of injury?

15 93:10: Okay. Thanks, Dan.

16 93:10: And then in (a), it goes into, "The benefits of a worker who
17 incurs an injury must be based on the worker's wages at the time of injury." I think
18 we all agree it's the wage with the employer at injury. But in your agenda, one of the
19 pros that you listed was--it goes, "All worker wages in the prior 52 weeks." And so
20 for clarity, it would be nice if that referenced the wages with the employer at injury.
21 We, from time to time, will have litigation. It's usually the supplemental where they'll
22 want the combined rate used for the work disability or vocational eligibility, and I
23 think it's clear that it's the rate for the average weekly wage for the employer at
24 injury, and not that combined.

25 So say the average weekly wage is based on the employer at injury

1 wages, and not leave it wages at the time of injury. And kind of the same in that (c).
2 It goes on to say, "Must be based on the worker's earnings from all subject
3 employment under"--and that references the supplemental disability under 0035. I
4 don't know if it would be easier to say eligible subject employment. I think the rules
5 are clear that it would be only for what was determined to be eligible, but I would
6 hate to get in a situation where we determine the worker was eligible for
7 supplemental disability for one of three other jobs that they had, and then to have
8 someone come back and say, "Well, no, it says all subject employment, not just
9 what they were found eligible for." So again, when you change words, you're going
10 to have questions come up.

11 In the new (4), in the opening paragraph, you say that, "The insurer
12 must calculate the worker's rate of compensation under Section (3)." But then under
13 the new (5), you say that, the insurer shall calculate the worker's average weekly
14 wage based on outlined in statute. Why does one reference Section (3) and the
15 other reference statute? Either both Section (4) and Section (5) should reference
16 Section (3), or they should both reference statute. It seems like you're maybe
17 implying that there's a different methodology.

18 Then in--we're still in the new (4)(a)(B), "The insurer must not include
19 expenses incurred due to the job and reimbursed by the employer." Meals, lodging,
20 per diem, et cetera. I guess the general question here is, was there any
21 consideration to addressing Sparks, in that you have reimbursement for expenses
22 that the worker doesn't have to actually account for those expenses? And in Sparks,
23 that became part of the worker's average weekly wage, even though these are
24 untaxed reimbursements for what's intended to be expenses. If someone's, I guess,
25 working--like a union worker is working outside of their local area, and so you might

1 be paying them a traveling fee, which is intended to reimburse them for those
2 expenses when they're working out of their area. It's my understanding, like, for a
3 hotel or for food.

4 97:12: Subsistence.

5 97:13: Subsistence, yeah. Well, in Sparks, because the worker didn't
6 have to account for the expenses, that was all brought into the worker's average
7 weekly wage.

8 97:27: And I'm...

9 97:27: So...

10 97:28: Do you know if Sparks was a rule interpretation or a statutory...

11 97:32: It was Supreme Court, so I'm assuming that they were
12 addressing-- Well, they, I think, looked at the claim language of the rule and says,
13 well, if you have an expense, there must be a reimbursement that was submitted,
14 and if there was no reimbursement that was submitted then it's not an expense.

15 97:49: If the rule is re--were written--rewritten in this way, do you think
16 that would actually...

17 97:54: I don't know.

18 97:55: Okay.

19 97:55: I guess the general question is, were you addressing Sparks?

20 97:58: Oh.

21 98:00: I'm guessing...

22 98:04: I can't remember whether the original issue was written up with
23 that in...

24 98:09: Yeah. I'm trying to see what was in the original rule.

25 98:28: I do remember us talking about that case.

1 98:50: And then you touch on equipment rental in there, but you
2 don't-- I mean, equipment rental comes up occasionally, but saw rent or tool
3 expense is usually what comes up, so it would be nice if the clarity was there that
4 saw rent is considered an expense, and not brought into the calculation. That's the
5 common one that we see.

6 99:14: Thanks, Dan.

7 99:18: And then on the new (5)(d), "Wages paid on a regular cyclic
8 schedule must be calculated as though the cycle has no scheduled days off." It
9 looked like, on your agenda, the intent was to put it into new Section (3), because it
10 would appear that a cyclic work would apply to both regularly employed and
11 irregularly employed workers. So it seems like it might be better in (3) than in (5),
12 where once again the intention is, does it only apply to regular workers?

13 100:02: Well, I think our interpretation there was that if the cycle is not
14 regularly paid, then they would be paid under the gross earnings method anyways.
15 And there is similar language now about cyclic schedules put into the payment rule.
16 So that wasn't an intentional change just because of-- We're not sure-- If you had a
17 cycle that was hourly, you would not be necessarily considered a regular worker
18 anyway, if that...

19 100:43: But you have the cyclic schedule under regular wages.

20 100:47: Right.

21 100:48: It's not under irregular wages.

22 100:50: Right. Because only a regular cyclic schedule would fall
23 under that calculation method, anyways. It would be kind of irrelevant under...

24 101:01: But we have a lot of, like, firefighters that are 24 on, 48 off. It
25 repeats after a what, three-week cycle. And you could have irregular wages with

1 them, because they might pick up another shift. So whereas they're regularly
2 employed in that they might receive a base salary, rarely do you see them only that
3 a base salary. There's a lot of other pays that are included into that. So to me, that
4 would make them an irregular worker because they have irregular earnings. So then
5 they would be in (4), not in (5). But then how do we deal with cyclical workers that
6 are in (4), when it doesn't say that for the purposes of their cycle there's no
7 scheduled days off?

8 101:52: So you would average their gross earnings. And then when
9 you pay...

10 101:59: It's not about--

11 102:00: Yeah.

12 102:02: --the--I guess the averaging of the wages. To me, it's about
13 how it's paid.

14 102:06: Right.

15 102:07: And how it's paid seems to--should be applied to everybody,
16 which would be in Section (3).

17 102:23: Oh, we can certainly look at that. The intent was--

18 102:24: Yeah.

19 102:24: --probably that they were--you know, if the wages were
20 irregular for any reason, then you would go to (4). But maybe by saying only regular
21 cyclic schedule in (5)--maybe that doesn't pick up the fireman situation that you just
22 described, so...

23 102:46: Yeah. And I think as far as the scheduled days off, for
24 payment purposes goes-- So this would be-- We tried to move all of that into Rule
25 30, and we left the regular in here partially to not cause too much confusion about

1 how do you calculate--how do you convert somebody who has a 21-day schedule
2 into a weekly wage? So that's--that was one rule addressing two different scenarios,
3 the part of it where it's if you always work--in a month, you were--you know, if you
4 were to work three days--three weeks on and one week off, you would calculate the
5 weekly wage by averaging the whole month.

6 103:29: What if you have irregular wages?

7 103:31: If you have irregular wages, you are now completely under the
8 irregular wage rule, so you would average their weekly earnings over 52 weeks.

9 103:37: And they--an adjuster that knows that it's a cyclic schedule is
10 going to be smart enough to know, "Oh, this cyclic doesn't mean this cyclic, it means
11 irregular in this situation," which is what we have in the current rules of--when you
12 see a key word like commission or tips, you think that's the only rule that applies to
13 that situation. If it could be applied broadly, then put it where it applies broadly.
14 Because I think some of--

15 104:08: Yeah.

16 104:09: --my confusion now is folks don't realize that tips should be
17 included in the averaging of their wages, because tips is here and wages is
18 someplace else in the rule. When you look at 0025, you have to read the entire rule
19 to come to an average weekly wage calculation. And so by piecing things out and
20 putting it in a specific that only applies to a certain set of folks, then I think that's
21 where some of the confusion comes in of oh, it only applies to these people, it
22 doesn't apply to irregular workers because it doesn't say it because it's silent,
23 because everybody should know that those are irregular cyclic workers, and we're
24 just going to average them anyways.

25 104:56: Yeah. And I guess that takes some education. I mean,

1 obviously there's more education needed on the current rule as well. But yeah, it's--
2 Yeah, I mean, I appreciate your concern. And that's a balancing act between
3 leaving enough of the original rules in, or kind of special exceptions that were there,
4 but maybe misplaced before, to keep some consistency, and also kind of trying to
5 create a more clear set of expectations. Because really, those two things wouldn't
6 have ever been different. They shouldn't have been different.

7 If you were a cyclic work--if you--if you're an hourly worker with a
8 varying cyclic schedule, under the old rule you shouldn't--you should have been
9 gross earnings anyways. But because this old system of determining the hours and
10 determining the wage was wedded onto an average earnings method, you know,
11 that was kind of an artifact of--

12 105:58: Yeah.

13 105:59: --those changes, so...

14 106:00: Yeah. I mean, we...

15 106:01: Yeah.

16 106:02: In all honesty, we rarely see a regular cyclic schedule.

17 106:06: Yeah. And...

18 106:07: I'm not sure of the last time I've seen one.

19 106:10: I cannot think of an example of somebody that would work
20 that way. But at the same time, you know, it's--it was--it's something that--we did not
21 want to think we were smart enough to think of every eventuality, and didn't feel like
22 taking something out that might impact somebody or--in a (unintelligible).

23 106:33: Thank you, Dan. Do you have any else--

24 106:33: Yeah.

25 106:34: --anything else on Rule 25?

1 106:36: I think that...

2 106:39: Okay. Anyone else? Okay. With that, then what I'd like to do
3 is open up a discussion of any aspects of the draft rules that you'd like to talk about.
4 I know that's pretty open-ended, but it's intended to be. So, you know, I hope you've
5 had a chance to review the draft. If you have not, that's okay. We will be taking
6 written input for a while. I would say we should have--you know, the next three
7 weeks or so would be excellent. We do have another meeting scheduled on the
8 23rd of August, I believe, but that's going to be a dedicated meeting to talk about
9 workers' choice of healthcare providers, direction of care, an issue that has been
10 around for a while, but we will be talking about that one again. So we won't actually
11 be talking about general rulemaking issues at that time. So any draft changes that
12 you'd like to talk about?

13 107:55: Well, I'm going to jump on something that's not a change,
14 because I didn't see it, but I think it was a pretty strong consensus when we talked
15 last year about this. And that's the insurer service company's ability to pay
16 temporary partial disability on the employer's pay cycle. And I thought there was
17 pretty strong consensus that if we're really looking at, you know, making sure
18 payments are to be made accurately and reducing the burden on employers and
19 providing a system that we can predictably explain benefits to workers that the
20 insurer or service company's ability to pay temporary partial disability in conjunction
21 with an employer's regular payroll cycle would have pretty big bang for the buck.

22 And as a perfect example of this, when we're calling up our employers
23 and our payment cycle doesn't sync with the employer's pay cycle, we're asking
24 them, hey, can you please give me hours from the last pay period and hours from
25 this pay period, because I need to make a temporary partial disability payment.

1 Well, what I found out from one of our large clients is--policyholders is they can give
2 us with certainty the last pay period. The current pay period, they can give us the
3 hours that have reported worked. But those not might not be accurate, because
4 maybe their electronic payroll system was down that day, and so they didn't get the
5 eight hours that the person worked, or maybe the person left work early and only
6 worked six hours. They can't give us that information until the end of the payroll
7 cycle when they finalize the payroll.

8 And so the very information that we're getting in making a TPD
9 payment based on is incorrect. Not because we did anything wrong or because the
10 employer did anything wrong, but it's because the payroll isn't finalized until the
11 payroll system says it's done. And so that would seem to be an easy fix. The
12 statute allows the Director to--whereas the first payment must be made within 14
13 days, any subsequent payments are within the adjust--or the Director's discretion.
14 So why not write a rule that says we can pay on the employer's pay cycle? That
15 way, looking over here, you don't have an adjuster calling you up mid pay cycle
16 saying, I need the payroll reports.

17 And if you have multiple people off of work, the adjuster is not calling
18 you on Monday for one worker, on Tuesday for the next worker, on Thursday for the
19 third worker. We're calling up a day or two before your pay cycle ends and saying,
20 we need payroll for these five employees, can you e-mail it to us or fax it to us
21 tomorrow when you run your payroll? We get all of that information in. We know
22 that they're going to cut checks on Friday. We cut our time loss checks on Friday. It
23 coincides with the worker's payroll and TPD check. And that's missing from the
24 rules. And I think, you know, your whole idea of let's make the benefit payments
25 accurate--I'm assuming that would make, you know, the auditor's job a lot easier,

1 because we're mirroring what the employer is paying.

2 111:34: Yeah.

3 111:34: We didn't ignore that consensus. We talked about that in
4 great length, and decided that the--with all of the other changes happening in
5 Division 60 overall, that that might be--that would be an issue that we would pend
6 until the next rulemaking, which will not be 20 years from now. I can guarantee that.

7 111:55: Okay.

8 111:58: So we did hear the consensus. We acknowledge that. We
9 agree with you. I agree with you personally. Maybe not the Department
10 (unintelligible), but...

11 112:08: I mean, that's just something that we're dealing with on a daily
12 basis. I hate calling up the employer and saying, can you run two payroll reports for
13 us, can you call up your supervisors and get the hours worked for these three days,
14 because it's not in your payroll system yet?

15 112:28: And I think one of the reasons why we thought staging that
16 might be beneficial is to kind of--what insurers become used to this new system of
17 calculation, and not create confusion with the changes to Section (1) and Section (2)
18 of Rule 25, which we felt like there was already some lack of clarity about what is
19 wage continuation, what is paying temporary disability benefits concurrently with the
20 payroll schedule, but--or when the employer pays them with the payroll schedule.
21 And that is not technically temporary disability benefits, it's--or that's not wage
22 continuation. They're not paying the wages.

23 113:10: Yeah.

24 113:11: They're paying temporary disability. So we kind of thought
25 that--yeah, we're not against that idea, but we thought staging might help reduce

1 some confusion, so...

2 113:28: Additional thoughts about the draft?

3 113:33: Can I just go back to that for one second, though,--

4 113:35: Certainly.

5 113:36: --and maybe ask the Department to reconsider? I understand
6 what you're talking about, but sometimes it's ripping the Band-Aid off, you know.
7 They make a lot of changes anyway. Just to maybe again make it-- If it was
8 something that we had consensus amongst the prior Advisory Committee. Just a
9 thought.

10 113:56: Okay. Thanks, Jaye.

11 114:08: Okay. So kind of a quick question about the newly drafted,
12 let's see, 060-0017(4)--no, you're right, (3)(f), that talks about, you know, after a
13 hearing has been requested before the Board, the request for discovery is made
14 under OAR 438, any subsequent request for documents made after hearing request
15 is withdrawn or when the hearing record is closed, it says, "Must continue to be
16 made under OAR Chapter 438." And that's sort of the--well, not sort of. It is the
17 opposite as to how things have been in the past. Usually, the discovery will revert
18 back to 436. And so I'm just curious as to why that change was made, just because
19 there are different timelines for things between 436 and 438.

20 115:25: That's (g), you said?

21 115:27: (f).

22 115:28: (f).

23 115:30: On the top of Page 19.

24 115:39: So it's just rewritten, but the...

25 115:43: It's not-- So if it was intended to have the same meaning as

1 before, it would say under OAR Chapter 436, not 438.

2 115:56: So the original language of the rule-- And I'm--

3 116:00: Oh, you're...

4 116:00: --just going to read it out loud, so--

5 116:02: Yes.

6 116:02: --we can all hear it. It would be, "Once a hearing is requested

7 before the Workers' Compensation Board, the release of documents is controlled

8 under--is controlled by OAR chapter 438; this rule applies subsequently if the

9 hearing request is withdrawn, or when the hearing record is closed, provided a

10 request for documents is renewed."

11 116:28: So this rule means 436, not 438?

12 116:33: I'm not sure. No, because once-- I'm not sure why our rules

13 would apply to a request under a hearing at the Workers' Compensation Board.

14 116:45: After the hearing is complete?

15 116:47: It's--oh, yeah.

16 116:47: And so there's no current litigation.

17 116:48: Okay.

18 116:50: There's no reason for 438 to be involved. Discovery falls back

19 under 436.

20 116:35: Okay. Well...

21 116:55: (Unintelligible.)

22 116:57: This is Keith.

23 116:58: Yeah.

24 116:58: I totally agree.

25 116:59: Yeah, is it-- Okay.

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117:00: Yeah.

117:01: At this would create a pretty big dep-- I mean, they've got seven days to turn-- We always like our timelines--

117:05: Yeah.

117:06: --more quickly, but they've got seven days to turn it over under 438 and they've got 14 days under 436 on that end. I mean,--

117:14: Okay.

117:15: --in fairness,--

117:15: I'm just going to...

117:16: --if that makes a difference to...

117:17: And also with a-- You know, if you're an attorney for a worker, and maybe you didn't know that there had been a prior hearing or anything, you're requesting documents under 436 most likely,--

117:27: Right.

117:28: --not knowing that it should be under 438. And there are some insurers that maybe wouldn't (unintelligible).

117:32: This would be a departure from the status quo, and not for--it doesn't seem like it's for an actual...

117:39: Okay. Yeah. And I'll play the new guy card and say that is what the rule used to say, and I took it at face value. So that's a good reason why we're going through the process, yeah.

117:48: This is a perfect example of a rule that was not particularly clear.

117:52: Right.

117:53: Because you can read it. And I was sitting here reading it,

1 and I went, oh, yeah, now I remember what it was.

2 117:57: Yeah.

3 118:00: But it's--if you don't practice-- These people do,--

4 118:01: Yeah.

5 118:02: --in the area.

6 118:04: Well, yeah. Thank you for bringing that to our attention.

7 118:05: Yeah, of course.

8 118:07: Additional...

9 118:14: This is Keith. I actually wanted to talk a little bit about the
10 same provision, about the provision of documents and 0017. It seems to always
11 refer to documents in the insurer's possession, and it doesn't seem to put any
12 obligation on the insurer to ask their client or make reasonable attempts to obtain
13 documents, I'm thinking particularly of surveillance video. Sometimes, the injury is
14 actually caught on video. And the employer may have that, and the insurer may say,
15 well, the rules don't really obligate me to go and get that from my employer, even
16 though I might be able to-- It sounds like an odd situation. But it would be nice if
17 those rules would give some statement to the effect of the insurer to make
18 reasonable efforts to obtain discoverable documents that are requested by an
19 attorney.

20 119:06: A little discussion on that? Do the insurers have the authority
21 to get it from the employers?

22 119:17: We can ask.

23 119:18: Well, reasonable investigation...

24 119:21: Right. I mean, I would like to say that they absolutely have to
25 get it to the employer. The employer and the insurer are the same, and anything the

1 employer has is deemed to be in the insurer's possession. But I realize from the last
2 conference and discussion we had that really, that is absolutely, unfortunately,
3 unworkable, it sounds like. So at minimum, I would like to be able to see that they
4 made reasonable attempts to obtain what's been requested. And then if a subpoena
5 has to go out, then a subpoena has to go out. But, you know, without that being
6 specified in the rule, I'm not sure that's entirely clear.

7 119:54: Okay.

8 119:55: I've had some negative experiences. Well, maybe those are
9 outliers. But that's my two cents.

10 120:02: Okay. Thanks, Keith. Additional thoughts on the draft?

11 120:35: And I think that we've already talked about the three-day
12 waiting period change.

13 120:40: A little bit, yes.

14 120:41: Yeah, I guess we talked about that a little bit outside of the
15 meeting, too. So to clear the ground of the change to 19--Rule 19(2), now the three-
16 day waiting period is consecutive--three consecutive calendar days beginning with
17 the first day the worker leaves work or loses wages, rather than loses time. So
18 before, I guess the rule said that it could be either of those things, so if they--or both
19 of those things, I guess, if they lost work and lost wages, and that is not in keeping
20 with the statute. So the rule change was to bring it line with the statute.

21 121:45: And it actually looks like Provision 2, the start of the three-day
22 waiting period, it used to read that if the worker, you know, left work on the date of
23 injury, but returned on that same date and completed his or her shift--

24 122:00: Right.

25 122:00: --that that didn't start the three-day wait, whereas now if a

1 worker leaves work but returns and completes the work shift with or without loss of
2 wages, it says that date is the first day of the three-day waiting period. So was that
3 an intentional...

4 122:16: That isn't an intentional...

5 122:18: Okay. Okay.

6 122:18: Because we found that that provision was contrary to--

7 122:21: Okay. Okay.

8 122:23: --the statute.

9 122:24: Great. Thank you.

10 122:28: I think this is a change as well, too, in terms of defining what
11 would be the first day you would count. When a worker's shift extends into another
12 calendar day, the date used to determine the start of the three-day waiting period is
13 the day the employer used for payroll purposes.

14 122:44: And that moved--

15 122:48: From 0025.

16 122:52: --from 0025. And--so wait, are you...

17 122:57: Was that merely a move, or was that a change?

18 123:00: I believe it's just a move.

19 123:01: Okay.

20 123:01: It's just a move.

21 123:12: Okay. Additional thoughts? In case you have not seen it, I
22 think it's only fair to bring to your attention that we had talked about something in
23 another advisory committee about the eligibility for an IME, and what concurrence
24 means versus nonconcurrence, is absence of concurrence--is that the same as
25 nonconcurrence, et cetera, and I believe that the MLAC is going to look at that issue.

1 So maybe some of you had already heard that that much, but right now it's not in the
2 draft rule in terms of a change.

3 124:10: Really? I thought I saw that the word was changed, slightly.

4 124:14: In the draft rule?

5 124:16: There's one word changed in it.

6 124:17: Oh. There--it is no longer-- We did change the word disagree
7 to do not concur, to be consistent with the statute.

8 124:23: Okay.

9 124:24: And...

10 124:25: But was that...

11 124:26: And our...

12 124:27: Was that intended, then, to change does not concur to
13 requiring an affirmative nonconcurrence, or being silent and not...

14 124:36: I think our practice will not change, that if there--that
15 concurrence needs to be an active act. So the physician has to say, I do not concur,
16 and they have to have a statement. But if MLAC--the MLAC subcommittee does
17 recommend that change, then we would be one step closer to being able to comply
18 with it, so...

19 Maybe it's just a good time to again remind you that we can--that we'll
20 take written advice, and that you can just pick up the phone and call me at any time.
21 You don't have to put it in writing. Whatever is easiest for you. But e-mail is also
22 fine. Nothing formal. And again, I know there's a lot here to look at, so I know that
23 we have not exhaustively looked at the Division 60 text today. We did, I think, a
24 really nice job of talking about Rule 25, and we appreciate your input about that. It's
25 very helpful. And we'll take it all back, and we'll keep you informed going forward. I

1 don't want to actually cut things off too soon, if you'd like to talk further about the
2 rules today. On the other hand, I don't want to keep you here longer than you need
3 to be, so I'll leave it up to you. Do you have any additional questions about the
4 draft? Anything you want to talk about before we break?

5 126:43: I just want to have one little clarification on the change from
6 the five day to the seven day. That just--is that just in payments of--is that just to
7 determine payments,--

8 126:59: Actually, we're...

9 127:00: --rather than...

10 127:01: Yeah. We're not changing from the-- We deferred action on
11 that, actually.

12 127:05: You're just going to wait? Okay.

13 127:07: We're going to wait.

14 127:07: Yes.

15 127:07: All right. That's fine.

16 127:08: Okay.

17 127:09: Because we agree, it's confusing and...

18 127:10: It's going to be a big change.

19 127:11: Right. Right. I appreciate that.

20 127:15: Okay. Thanks, though. Okay. With that, I'll let you all go.

21 And thank you very much. You have been very helpful. And I will stay in touch, so
22 please stay in touch with me as well if you have additional advice. Goodbye.

23 127:28: Thank you very much.

24 (WHEREUPON, the proceedings were adjourned.)

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CERTIFICATION OF TRANSCRIPT

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I, Darlene Siska, as the transcriber of the oral proceedings at the 7/18/16 hearing before Administrative Law Judge Bruyns, certify this transcript to be true, accurate, and complete.

Dated this 3rd day of August, 2016.



Transcriber

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I, Ashlee Kohan, as the proofreader of the oral proceedings at the 7/18/16 hearing before Administrative Law Judge Bruyns, certify this transcript to be true, accurate, and complete.

Dated this 3rd day of August, 2016.



Proofreader