

1 **Meeting Transcript**

2 **Rulemaking Advisory Committee Workers' Compensation Division**
3 **Rules OAR chapter 436, division 060 Claims Administration**
4 **Aug. 23, 2016, 1:30 to 4:30 p.m.**
5 **Room 260, Labor and Industries Building, Salem, Oregon**

6 **Committee members:**

7 Allison Lesh, SAIF Corporation
8 Barb Reich, Asante Work Health
9 Betsy Earls, Associated Oregon Industries
10 Bryce Milam DC, Chiropractic physician
11 Chad Kosieracki, Maher & Tolleson LLC
12 Dan Schmelling, SAIF Corporation
13 David Barenberg, SAIF Corporation
14 Delmi Manzanares, Providence Health & Services
15 Diana Hendrickson, The Corvallis Clinic
16 Diana Winther, IBEW Local 48; MLAC
17 Doris Bain, ComPro Inc.
18 Emily Crocker, Gatti Law Firm
19 Heather Bogle, Georgia Pacific
20 Jaye Fraser, SAIF Corporation
21 Jennifer Flood, Ombudsman for Injured Workers
22 Jennifer Hunking, Gatti Law Firm
23 Jerry Keene, Oregon Workers' Compensation Institute
24 Jessica Epley, NCCI
25 Julie Riddle, The Hartford Financial Services Group
Keith Semple, Johnson Johnson & Schaller PC
Kevin Anderson, Sather Byerly & Holloway LLP
Laurel Gunderson, Providence MCO
Mathew Denley, Cummins, Goodman, Denley & Vickers P.C.
Myron Colvin, Worker injured on the job
Ramona St. George, Oregon Health Systems
Ronald Grice, DC, Grice Chiropractic Clinic
Sheri Sundstrom, Hoffman Construction
Ted Heus, Preston | Bunnell, LLP
Tim Simmons, ComPro Inc.
Vern Saboe, DC, Chiropractic Association of Oregon

Agency attendees:

Adam Breitenstein
Barbara Belcher
Cara Filsinger
Chris Clark
Fred Bruyns
Jamie O'Brien
Lou Savage
Ryan Delatorre
Sally Coen
Stan Fields
Steve Passantino
Theresa Van Winkle
Troy Painter

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BEFORE THE WORKERS' COMPENSATION BOARD OF

THE STATE OF OREGON

RULEMAKING ADVISORY COMMITTEE

WORKERS' COMPENSATION DIVISION RULES

The proceedings in the above-entitled matter were held in Salem, Oregon, on the 23rd day of August, 2016, before Fred Bruyns, Administrative Rules Coordinator for the Workers' Compensation Division.

1 TRANSCRIPT OF PROCEEDINGS

2
3 00:00: Okay, we're on. Thank you all very much for coming. My
4 name's Fred Bruyns. I've been in touch with I'm pretty sure all of you over the past
5 few weeks or more than a month telling you about this meeting, and I really
6 appreciate you taking the time to come down to join us. We know it's a lot of your
7 day that you give to the process and we really appreciate it.

8 There are handouts, agendas at the back of the room under the clock,
9 some extra copies. If you don't have a name tag, please help yourself, there's some
10 blank ones back there and you can fill out a name tag so that we can actually
11 address you by name when we talk to you.

12 And this is an advisory committee, this is not a public hearing. I just
13 want you to know it's an informal process, it's a conversation that we're going to
14 have with you. We don't vote; we're--as I say, it's informal. There aren't a lot of
15 ground rules; I guess just mutual respect, and that would be, well, all I'll say about
16 that. As we go along, though, if there are any fiscal impacts to what we're talking
17 about, and I'm pretty sure there will be potential fiscal impacts to what we talk about
18 today, we'd like to have your advice in terms of extent of those impacts, positive or
19 negative, either for you or the folks that you represent, because when we file
20 proposed rules with the Secretary of State we have to estimate the extent of those
21 impacts, and so we would appreciate your input.

22 If you're on the telephone with us today, please know that we'll pick up
23 background noises in your office, so keep that in mind if someone comes in. Don't
24 put us on hold, however, because we may get your background music or/and
25 messages, so--and there's no way for us to turn those off, but you may leave and

1 rejoin the conversation as many times as you'd like; it's simple to do.

2 So with that, I've introduced myself. I'd like us to begin with the folks
3 on telephone and have you introduce yourselves to the committee, please?

4 02:30: Jessica Epley, NCCI.

5 02:35: Welcome, Jessica.

6 02:40: Diana Hendrickson--

7 02:41: Julie Riddle--

8 02:42: Go ahead, Diana.

9 02:43: Yeah, Diana.

10 02:45: Diana Hendrickson, The Corvallis Clinic.

11 02:48: Welcome, Diana.

12 02:51: Julie Riddle, The Hartford.

13 02:53: Welcome, Julie.

14 02:56: This is Lynn Hammers, Intermountain Claims.

15 02:59: Thanks for joining us, Lynn. Anyone else?

16 03:05: Barb Reich, Asante.

17 03:08: Welcome, Barb. Anyone else?

18 03:17: Did you hear me, Fred?

19 03:19: Who's talking?

20 03:21: This is Barb Reich from Asante.

21 03:25: Yes, we got--we heard you. Thanks for joining us, Barb.

22 Anyone else--

23 03:30: Okay, thanks.

24 03:34: Okay.

25 03:36: I'm Chris Clark with the Workers' Compensation Division.

1 03:39: Adam Breitenstein, Workers' Compensation Division.
2 03:43: Bryce Milam, chiropractic physician.
3 03:45: Myron Colvin.
4 03:49: Ron Grice, chiropractic physician.
5 03:52: Dr. Vern Saboe, Oregon Chiropractic Association.
6 03:55: Sheri Sundstrom, Hoffman Construction.
7 03:58: Jennifer Flood, DCBS ombudsman for injured workers.
8 04:01: Ramona St. George, Majoris Health Systems.
9 04:04: Jerry Keen, Oregon Workers' Compensation Institute.
10 04:07: Mathew Denley, Cummins Goodman.
11 04:09: Heather Bogle with Georgia Pacific.
12 04:12: Barbara Belcher, Workers' Compensation Division.
13 04:14: Kevin Anderson, Sather Byerly and Holloway.
14 04:17: Dave Barenberg, SAIF Corporation.
15 04:19: Jaye Fraser, SAIF Corporation.
16 04:21: Delmi Manzanares with Providence Health and Services.
17 04:24: Troy Painter, Workers' Comp Division.
18 04:26: Dan Schmelling, SAIF Corporation.
19 04:28: Diana Winther (unintelligible) general counsel for IBEW
20 Local 48.
21 04:33: Ted Heus, Preston Bunnell.
22 04:35: Keith Semple, Oregon Trial Lawyers Association.
23 04:38: Betsy Earls, Associated Oregon Industries.
24 04:40: Lou Savage, Workers' Compensation Division.
25 04:43: Okay. And I'll let anyone in the back introduce yourselves or

1 not, you can remain anonymous, but I want to give you the chance, and I also would
2 encourage you even to pull up to a corner of the table if you'd like and we--you
3 know, just grab a chair and pull it up where there's a few couple of chairs around
4 still. Anybody who'd like to introduce yourselves to the committee, please do so.

5 05:05: I'm Chad Kosieracki with Maher and Tolleson.

6 05:09: Welcome.

7 05:10: Sally Coen, Workers' Compensation Division.

8 05:12: Okay.

9 05:12: Jamie O'Brien, Workers' Compensation Division.

10 05:17: Steve Passantino, Workers' Compensation Division.

11 05:20: Jennifer Hunking, Gatti Law Firm.

12 05:22: Emily Crocker, Gatti Law Firm.

13 05:25: Cara Filsinger (unintelligible)

14 05:31: Theresa Van Winkle (unintelligible)

15 05:39: Just to let somebody know, we're picking up a lot of
16 background noise; I don't--I don't know if you happen to be driving or anything like
17 that. We are picking up quite a bit of background. You might just want to put us on
18 mute, not on hold, but on mute.

19 And anyone else want to introduce yourselves? Allison?

20 06:04: Sure. Allison Lesh, SAIF Corporation.

21 06:06: Okay. Again welcome to you all, really appreciate you taking
22 the time to come down here.

23 We have an agenda, some of the issues are fairly lengthy. I'm going to
24 do a little bit of reading to you. I won't read it word-for-word, but I'm going to cover
25 most of it, so I ask you for your patience and kind of bear with me for a few minutes.

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Issue number one-- Anybody have any questions before we begin?
Okay. Issue number one. This probably affects Rule 10 in Division 60 having to do with notice of treatment rights to injured workers, although there's a potential impact on other divisions of rules, depending upon what the committee recommends, so a description of the issue is an injured worker has the right to receive treatment from a medical service provider of their choice under ORS 656.245, but this right may not always be fully understood or acknowledged, and in some cases an employer may direct them to a specific provider.

As we review and discuss this issue, please keep in mind that the Division intends to make some rule and form changes to require acknowledgment by the employer or worker or both of a worker's right to choose healthcare providers. Some of you have participated in past discussions about these issues--this issue over actually the last decade. What is different this time is that we have already taken many steps over the years to try to address the problem, but the prac-- protect--practice continues to occur. We want the committee's advice on the most effective ways to resolve this in terms of what will best inform everyone what is and is not allowed under the law and, if there is more than one way to achieve this, which option is the most cost effective and least disruptive to claim reporting generally. So that was just a little add-in that I had, it's not on your agenda, so on to the background.

A worker may choose their attending doctor, physician, or nurse practitioner subject to the requirements of ORS 656.245, .260, and the Division 10 medical rules. Some stakeholders have expressed concerns that worker do not always understand these rights or are sometimes directed to receive care from a medical service provider by their employer. The Division receives roughly

1 14 complaints per year about direction-of-care issues, including complaints about
2 employers directing workers to a specific medical service provider. Between 2012
3 and 2015 the Division not--did not assess any civil penalties for intentional or
4 repeated direction of care violations, although letters of education were issued to a
5 few employers.

6 Over the past 10 years again several efforts have been made to
7 address this problem, and we have an appendix at the very back of the issues
8 document that kind of shows those efforts, what those have been.

9 The Division has revised forms provided to the worker to emphasize
10 the worker's right to choose their medical service provider and has provided rules to
11 require that those forms are made available to workers by insurers and employers.
12 In addition, the Division has provided information to employers and insurers about
13 proper use of the forms through industry notices and increased education and
14 enforcement activities. Currently, workers are provided with information about their
15 right to choose a medical service provider at several points prior to a claim and at
16 the time of injury. Provider choice information is included in all of the following
17 situations.

18 Employers are required to post Form 1188 and notice of compliance in
19 central gathering areas in their workplace. The 1188 has a brief explanation of a
20 worker's right to choose a provider.

21 Employers are required to provide Form 3283, that's a guide for
22 workers recently hurt on the job, to workers at the time the worker reports an
23 accident. The employer may print the information on the back of Form 801, that is
24 the 3283 can be printed on the back of the 801, which must be readily available and
25 provided to the worker upon request. The Form 3283 was modified several years

1 ago to address direction of care issues, and that was our intent anyway and that was
2 one of our earliest efforts.

3 Medics--medical service providers are required to give Form 3283
4 along with Form 827, which is the worker's and healthcare provider's report for
5 Workers' Compensation claims, to the worker when the worker seeks treatment for
6 their workplace injury or illness.

7 The insurer or service company is required to provide Form 1138,
8 which is "What happens if I'm hurt on the job?" to every injured worker with a
9 disabling claim at the time of the first time loss payment, or provide Form 3283 to
10 every worker with a non-disabling claim.

11 While the worker may be informed of their right to choose a medical
12 service provider, there is currently no mechanism in place to verify that the worker
13 has understood and acknowledged it. The Division would appreciate stakeholder
14 feedback on the appropriate time and method of obtaining verification from the
15 worker and the employer that they understand and acknowledge their rights. In
16 previous discussions with the Division, stakeholders identified the following issues
17 while evaluating possible alternatives.

18 Delivery of information. Any acknowledgment of rights that fits into the
19 current claims processing requirements may be preferable to creating a new form or
20 process, as workers can be overwhelmed by the amount of paperwork they receive
21 at the time of injury or claim.

22 The acknowledgment should be compatible with paperless claims
23 processing, including forms that are completed electronically or by telephone.

24 Some stakeholders suggest--suggested that employers should also be
25 required to acknowledge the worker's right to choose a medical service provider.

1 The timing of this. Ideally, the acknowledgment would be secured
2 before the worker receives treatment. In many cases, however, the worker is unable
3 to complete any paperwork before they seek medical attention. The
4 acknowledgment should be secured simultaneously with the notice of their right to
5 choose a medical service provider and as close to the time a worker seeks treatment
6 as possible.

7 Enforcement. The Director must be able to monitor and assess--
8 access the acknowledgment either at the time the claim is reported or on audit.

9 It should be clear who is responsible for securing and keeping records
10 of the acknowledgment. One option is to require the insurer to maintain the
11 documents with other claims records.

12 And access to care. The acknowledgment process must not prevent
13 the worker from accessing care in a timely manner. If a worker requires emergency
14 or urgent care, there may be constraints on their choice or ability to fill out a form
15 before receiving care.

16 Referrals between medical service providers are often considered to
17 be a necessary part of the treatment process.

18 The acknowledgment process should not impose prohibitive financial
19 costs on any party, particularly costs that may discourage medical service providers
20 from treating injured workers.

21 Regardless of the acknowledgment process selected, language or
22 educational barriers may still need to be addressed through education and research.

23 So some alternatives for the committee to consider. We have there, as
24 usual, make no changes. Add worker employer acknowledgment to Form 801. Add
25 worker provider acknowledgment to Form 827. Add a worker employer

1 acknowledgment to Form 3283; again that's the information page that accompanies
2 both of these forms. Create a new form that is delivered to all workers pre-injury,
3 such as at the time of hire. Create a new form that is delivered to the worker at the
4 time of injury.

5 Here's some--you know, some pros and cons here.

6 Form 801. Form 801 is required to be filed with most claims.

7 Form 801 is usually filled out by the worker and the employer, but sometimes it may
8 be filled out by the insurer if the worker is not available or if the employer and worker
9 provide the information.

10 Under 656.265, the worker may provide notice up to 90 days after the
11 accident occurred and the notice is not required to be provided using any particular
12 form. This means that using Form 801 would be effective in reaching many, but not
13 all workers. In some cases the 801 may be completed electronically or the insurer
14 may complete the Form 801 using information provided by the worker and the
15 employer, sometimes by telephone. Any process to obtain acknowledgment would
16 need to address these situations.

17 Form 801 should be accompanied by Form 3283 in most cases and
18 the Form 3283 may be printed on the back of Form 801. So it may be possible to
19 use 80--the 801 to verify that the Form 3283 was actually delivered and read.

20 Stakeholders have also suggested that in addition to obtaining
21 acknowledgment from the worker, Form 801 could also be used to obtain
22 acknowledgment from the employer that they understand they may not direct the
23 worker to see a specific medical service provider.

24 Form 827. It's filled out by the worker and the medical service
25 provider. Form 3283 is considered to be part of Form 827 and a copy of it is

1 provided with Form 827 when the Form 827 is used as the initial report of a claim, to
2 report new or omitted conditions, aggravations, or changes in medical service
3 provider. However, Form 827 is also used for many other purposes, including
4 progress reports, closing reports, and palliative care requests.

5 One drawback of using Form 827 is that by the time the worker
6 receives it, they have already chosen or been directed to a medical service provider
7 for initial treatment. While it may be beneficial to have a medical service provider
8 discuss additional treatment options with the worker, the choice may already have
9 been made for all practical purposes.

10 Form 3283. The Form 3283 is required to be given to the worker by
11 the employer when the worker files a claim, nearly always using Form 801 for
12 Workers' Compensation benefits and when the worker completes Form 827 with a
13 medical service provider. Form 3283 provides workers with the information about
14 their rights, but currently no signature or acknowledgment is required and the form is
15 not required to be retained by the employer, insurer, worker, or medical service
16 provider.

17 Stakeholders have commented that Form 3283 is not consistently
18 provided and, even when it is, it is not always read carefully by the worker. Adding a
19 signature block may increase the likelihood that the form is delivered. However,
20 because the form is required to be given to the worker at several points in the life
21 cycle of the claim, it would be necessary to specify if the worker should be required
22 to sign the form each time it is provided or only with the initial Form 820--801 or 827.

23 And finally, a new form as an option. Creation of a new form would
24 allow the Division to design a form specifically to acknowledge the worker's
25 understanding of their right to choose their medical provider and potentially other

1 rights and responsibilities of workers and employers. Creating a separate form
2 would also provide the Division with flexibility about when the form is delivered to
3 workers, potentially reaching workers before an injury occurs. However, creation of
4 a new form could be costly and could place an administrative burden on employers
5 and insurers. It is also not clear how effective a new form would be in ensuring
6 workers understand their rights. If a new form was provided at the time of hire, a
7 worker may forget the content before an accident or injury occurs. If it is provided at
8 injury, having another form to sign may overwhelm the worker and lessen their ability
9 to understand and absorb the new information.

10 And finally, the Division's recommendation at this point, again it's for
11 your discussion and consideration, amend Form 801 to include an acknowledgment
12 from the worker and employer that the worker has received Form 3283 and
13 understands their right to choose their medical service provider. Amending
14 Form 801 to include an acknowledgment from the worker and employer that the
15 worker has received and understands Form 3283 has been suggested as an
16 acceptable alternative by many stakeholders at previous advisory committee
17 meetings that would help reduce the number of workers who are directed to a
18 specific provider by their employers. Form 801 is well suited to this purpose
19 because a large percentage of initial claims are reported using the form, it is
20 delivered through many platforms, and would have a low cost of implementation.

21 Additional feedback is needed on the precise wording and form of the
22 acknowledgment, such as a checkbox, signature line, initial line, statement. For
23 insurers and service companies, we would also like feedback on any impact on the
24 claims process.

25 And again that was a lot of reading to you, and so I apologize for that,

1 but I think it's all fairly meaty information, and at this point I'd like to open it up to you
2 and just start the conversation.

3 21:06: I'll make a comment. Specific to the DCBS's Workers' Comp
4 Division's recommendation to amend 801 to include an acknowledgment from the
5 worker and employer that the worker has received Form 3283, I would like to see
6 where there's actually reference to verbally informing the injured worker of their
7 rights and have that tied to a disclosure statement, much like an informed consent
8 statement, and you have an amended 801, which that can easily be placed on, but
9 have it say something to the effect of "My employer has fully explained I may seek
10 care from the healthcare provider of my choice. My employer cannot choose my
11 healthcare provider. If post-injury drug testing is required by my employer, I may
12 continue medical treatment after testing at the medical service provider of my
13 choice," and then signature lines for the employer and for the injured worker and
14 date it.

15 The only thing that we would at the Oregon Chiropractic Association
16 would like to point out is there's a little bit of loophole-- Am I getting feedback? Is in
17 OAR 436-060-0010 relative to Form 801, the bugaboo is this loophole. The
18 employer must provide a copy of the report of job injury or illness, Form 440-801,
19 parenthetically Form 801, to the worker immediately upon request. The form must
20 be readily available for the workers to report their injuries.

21 So our concern is that's a loophole. The worker has to know that this
22 form exists, which they do not, and they must request the form from the employer
23 and if Form--currently Form 3283 could be printed on the back of the 801, which
24 explains their inj--treatment injury rights, if they don't have the Form 801, they're not
25 going to get the disclosure and information about their treatment rights, Form 3283.

1 So to kill two birds with one with stone, we would recommend that a
2 disclosure statement with signature lines be included in the 801 so that--and then
3 the administrative rule language has to be amended to say something along the
4 lines of upon first report of injury by the worker, the employer must provide the
5 Form 801.

6 As I said, there was a concern by Sheri Sundstrom and Hoffman
7 Construction in meetings we had in the past about, she can correct me if I get this
8 wrong, I'm sure she will, offsite or remote locations where these forms may not be
9 readily available, and I would think that an easy fix would simply be to say that when
10 that occurs, whatever language we want to use, that they will provide it within--and
11 Form 3283 and the disclosure within a 72-hour period of time so that they get that
12 form eventually.

13 The other--the other issue that you can kind of referred to also is
14 currently healthcare providers, myself included as a chiropractic physician when I
15 get an injured worker, with Form 827 we include a Form 3283, which includes all of
16 the treatment rights, it's a green sheet, we are to provide that to the injured worker,
17 which I think is the pink sheet, or the yellow sheet, a copy of the 827 they filled out.
18 The trouble is the injured workers are not getting that form from some of the clinics,
19 so they're never receiving them.

20 So we would recommend that also Form 3283 or 827 be also amended
21 so that there's that disclosure statement so that the staff at the clinic informs the
22 injured worker that they can see the healthcare provider of your choice. If the
23 injured worker goes there directly first, is directed there, and yet that's not the app--
24 the provider also informs the injured worker that in fact they can see the healthcare
25 provider, especially if they're there for drug testing, and that they both sign off on it.

1 Now, it was brought up last time that that could overburden the
2 provider in that they have so many things they have to do anyway. Well, it would be
3 simply taken care of, staff could have a verbal discussion with the injured worker
4 when they're filling out their paperwork and a staff member at the clinic could simply
5 sign off that they have verbally informed the injured worker of that. Following this
6 visit, they can go to their family medical--they can go to the healthcare provider of
7 their choice and the injured worker signs off on it, so that would be helpful when the
8 injured worker for whatever reason goes directly to urgent care or goes directly to an
9 occupational medicine clinic, however that happens, and then that is also--that
10 contingency is accommodated for

11 27:09: So, Dr. Saboe, let me ask you a question. How do you deal
12 with the MCO issue?

13 27:16: Well, first of all, I think that's another issue that was brought up
14 because workers can be restricted, in some cases arduously so, because there's so
15 few--

16 27:28: That's a separate issue, we understand that.

17 27:30: Yeah. Different topic for a different day--

18 27:33: Yeah, different topic, exactly--

19 27:35: So there is--many folks can be fixed in a very short period of
20 time. There is a continuity of care provision of seven days from the date of the
21 enrollment letter that they can continue with the healthcare provider of their choice
22 before they have to go to a panel provider. It could include also in that disclosure
23 statement initially that the healthcare provider, the--that they can initially choose the
24 healthcare provider of their choice.

25 The other issue is that when they get enrolled, it's explained to them

1 that in fact they have to now go to a provider on panel. So it's not as if they're not
2 being told. And the third issue is also the come-along provision for those injured
3 workers who go to a healthcare provider, the obviously get treatment, they may not
4 be on panel, they can continue to see their healthcare provider. That provider
5 simply has to follow that MCO rule, so I think the issue of workers being confused is
6 somewhat secondary to the blatant unlawful steering by some companies, which is
7 in some cases is quite egregious. I've seen a couple cases with disclosures with
8 releases from the injured workers, probably a few of the most egregious ones I've
9 seen in my hometown, so I think that issue trumps injured workers possibly being a
10 little confused; they already are. And explaining that they can seek the healthcare
11 provider of their--

12 29:22: So let me ask you another question. By the way, I'm going to
13 be asking a lot of questions--

14 29:26: Sure.

15 29:27: --because ultimately this issue is going to come to my desk,
16 so--

17 29:32: Right.

18 29:35: The issue of having a conversation with the worker, I guess my
19 question to you on that is, how effective, practically how effective is that going to be
20 to take care of the issue that you have raised, legitimately raised about steering a
21 worker to a particular provider?

22 30:06: Nothing's going to be perfect. There's always going to be
23 certain companies that are going to circumvent the law, and with fear of losing their
24 jobs, the answer to your question is I don't know, but this is the next evolutionary
25 step that I think will help diminish it, and the other piece of this is by having this

1 disclosure statement and getting this out there to where the employer has to go
2 through this process will educate many small employers who simply don't know what
3 the law is. And that they've been strongly marketed to by a local occ-med clinic,
4 which there's nothing wrong with that, but then they don't recognize the fact that they
5 can't force an injured worker there.

6 30:57: So with that in mind, is--would it actually be more effective to
7 have the disc--have the disclosure statement, not the disclosure statement, but the
8 statement on the 801 directed more at the employer than the worker? If ultimately
9 what we're going to do is hold the employer responsible, would it--would it actually
10 be more effective to have that statement on the employer part of the 801?

11 31:31: Well, I--that's what we're suggesting, and it's--the statement
12 states that my employer has fully explained to me my treatment rights.

13 31:43: Well, that's actually not what--may--I maybe wasn't clear.
14 Having a statement on the employer section of the 801 which specifically says to the
15 employer in whatever language, you know, we're able to craft, that you cannot direct
16 care and have--and as part of the acknowledgment that the employer signs, that that
17 be a part of that statement. I guess my question is, is that actually more effective
18 because that's who he would as a department would hold responsible for directing
19 the care. That's--

20 32:29: Well, possibly, but I'd like to see affirmation that the injured
21 worker was in fact informed and that their signature's on there, that the conversation
22 took place.

23 32:43: Would that be in lieu of the worker being notified or in addition
24 to?

25 32:49: It's really just a question. I mean, there have been comments

1 in the past that the worker has been notified in other contexts about their right to,
2 you know, choose their own provider, so really my question was at this point should
3 the department direct its efforts more at making sure that the employer knows and
4 acknowledges that they can't direct care?

5 33:22: Well, I would question the notion that they are in fact--that
6 workers are being informed. There's--we have all these forms, but they're not
7 receiving them. From those companies who are abusing the system, who are
8 unlawfully forcing injured workers to certain clinics, they're not giving them the form.
9 They're certainly not having a conversation.

10 33:48: And there's no accountability--

11 33:49: I have a comment.

12 33:51: Go ahead.

13 33:54: Being from a group of occupational medicine providers, don't
14 put the burden on the providers. We so often see injured workers who come from
15 physicians who begin care and then get burdened already with paperwork and the
16 burden of the Work Comp system and then they, excuse me for using the term, want
17 to dump their patients on us, so let's not overburden the system by putting more
18 burden on the providers. It's I see this as the employer's responsibility, not the
19 providers.

20 34:34: Thank you for that--

21 34:35: Well, I have some things to say about that.

22 34:38: Go ahead, Miss--

23 34:40: I'm just kidding.

24 34:41: Oh.

25 34:42: I'll say it later.

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34:42: Okay. Go ahead, Ramona.

34:45: I would agree with Diana that even though it may be a staff function to obtain that signature, the administrative burden on providers offices is already significant, and I don't think--we're already having problems with physicians offices wanting to participate in Workers' Comp, and anything we add is the straw that breaks the camel's back. I'd also like to comment on the inclusion of some information on the 801, and I think the potential for confusion to the worker is not insignificant and that at a minimum there should be an inclusion in any statement that we have signed that it include the clause that unless otherwise required in an MCO enrollment so that the worker knows that there may be an exception to that rather than signing this, being told you can choose whoever you want, and then getting a letter saying, "Well, I know you signed that, but, no, you can't."

35:54: Okay, thank you.

35:55: Because I-- Yeah, I have a comment--

35:57: Oh, go ahead.

35:57: --for the Albany area or actually the Albany, Lebanon, and Corvallis, maybe even Newport area, where Samaritan has a large if not total control of the medical profession or the medical providers there is that the primary care providers aren't allowed under contract to see, to the best of my knowledge, I mean, not allowed under contract to see Workers' Comp. Every Workers' Comp patient must go to this occ-med clinic. So it's not a function that they're--that the primary care physicians are being overwhelmed; it's just that when a patient has a longstanding relationship with their primary care doctor, they have a Workers' Comp injury, they have to send them to the prime--or to the occ-med clinic.

36:49: And that business model is a function of the administrative

1 burden that health systems incur, and so they are trying to condense that into a
2 narrow part of their organization so that they can create efficiencies and expertise in
3 one area and not have to train across a broad spectrum of a large healthcare
4 organization.

5 37:15: Kaiser has done that--

6 37:17: Yeah, Kaiser does that--

7 37:17: --for years--

8 37:18: --yeah, they've always done that--

9 37:19: Yeah--they--yeah. It's not uncommon.

10 37:23: Could I ask you a question that I think I know the answer to
11 already maybe to the insurers? Are we stuck with an eight-and-a-half-by-eleven
12 form?

13 37:33: Good grief. Seriously?

14 37:37: Yeah, I'm asking the question.

15 37:39: I think with the advent of electronic records where we scan
16 everything--

17 37:44: Yeah.

18 37:45: --having an 11-by-14 creates a problem.

19 37:46: Okay, yeah, I thought I knew the answer; I just wanted to ask,
20 though.

21 37:50: You know, I was going to have to say I don't know, but yikes.

22 37:54: As a provider who participates in managed care plans, the
23 amount of administrative work is arduous, but the problem appears to be not the law,
24 but the implementation or the people who are following the law. And if the issue is
25 the injured workers are not being--are actually intentionally being steered illegally, I

1 think it would be incumbent to have that stopgap measure at both the employer and
2 at the provider so that the employee has a better chance. If you have an employer
3 who's non-compliant who is steering patients to an occ-med clinic that is
4 participating in that procedure, you would be better served to have that stopgap
5 measure protected at both ends so that ultimately the injured worker is informed that
6 they have that choice, both by the employer and by the provider. Otherwise, if
7 they're only being required at one end and still being steered and not being informed
8 that they have a choice, the likelihood of that steering continuing is pretty high, I
9 think.

10 39:17: If I--if I was an employer who wanted to skirt the system,
11 couldn't I have a conversation with the worker which technically complied with what
12 folks legitimately want to see stopped, I could--I could have a conversation and
13 comply with that and still subtly or nu--or with nuance get the worker to the place that
14 I wanted him to?

15 39:56: I think we're taking an elephant gun flea hunting. I mean, we
16 had 14 complaints. In listening to Vern, there seems to be some knowledge of
17 employers who are doing this and it is not the majority, I can guarantee you, and I'm
18 sure it's a very small minority. By notifying the worker and the employer at the time
19 of the 801 and then, if we know who those employers are, taking action at the--
20 punitive action at the department level should effectively deal with that.

21 40:36: The issue is we have an elephant because if you look at
22 occupational medicine in my area, which is Portland, there is a large national
23 occupational medicine firm that's established multiple locations and has in fact
24 participated in allowing employers to steer workers to them, and they continue to go
25 and do so even though they are technically not part of the MCOs.

1 41:10: Laurel, and then we'll come to you, Diana; I think you had your
2 hand up, Laurel.

3 41:17: I apologize.

4 41:18: That's all--

5 41:18: Well, I was--we were talking about the burden on providers,
6 and we often have injured workers that need to see specialists of a specialty that
7 probably don't see a lot of injured workers, and these are the specialists that we've
8 been seeing dropping out because they say they don't see enough injured workers
9 to make it worth it to stay in the game, especially dermatologists. We need general
10 and vascular surgeons to see injured workers quite often, infectious diseases, you
11 know, there's lot of different specialties, that requiring them to explain how an injured
12 worker can treat inside or outside an MCO and what about the limitations, who can
13 be an attending physician, that's not a real easy conversation and questions pop up
14 a lot, and I answer them every day. I just can't see consistently having providers
15 verbally explain the correct information. That's not going to work, I don't--I mean, I
16 like Lou's idea of lengthening the form or whatever and maybe just, you know, had it
17 in the form or placed call or something like that; I mean, the MCO enrollment letters
18 are so long now with all of the information that we have to give injured workers, and
19 then they get that on top of all this other paper, they don't read it anyway.

20 43:20: Going back to Ramona's comment--

21 43:22: Oh, Diana, I'm sorry--Diana, I promised you that I would come
22 to you--

23 43:25: No, that's okay--

24 43:27: I'm also commenting on Ramona's comment. I--when I read
25 the 14 complaints per year I was a little bit surprised, because I can tell you within

1 the last 12 months I've had three people who were just internal in my union that have
2 called to have that question, so I wonder how accurate that information is; it may be
3 (unintelligible) time. When I talk to people, they didn't know at the time, and by the
4 time they're so far in the system, they just an't be bothered to make a change.

5 I like the idea of there being an addition to the 801 form. My question
6 is more about the phrasing, less about maybe you have a right to choose, as much
7 as it is illegal for your employer to require, because that triggers I think different
8 thought processes in people's heads, with a contact phone number for if you feel like
9 this is a problem, please call this number, so--because there is an intimidation
10 aspect. I know my members experience it a great deal in construction because
11 there is always the fear of getting laid off if your employer decides that you're not
12 worth keeping around and, you know, they're not going to have that conversation
13 with the employer, but they might have the conversation with someone in Jennifer's
14 office about what's going on so that they can have a better understanding of where
15 their rights really are.

16 44:42: Delmi. Thank you.

17 44:43: Yeah, just I was just going to say, going back to Ramona's
18 comment, you know, if there's an issue here, I believe that it needs to be handled
19 outside of the rulemaking process. It doesn't seem to be an issue that a rule or
20 adding something to a form-- I'm a Workers' Comp consultant for Providence and I
21 get calls from injured workers asking me, "Where do you want me to sign on this
22 form?" It's already long, it's already convoluted. If there--if they speak a different
23 language, it's so confusing for them, I have to highlight where I want them to sign
24 and explain the form to them already as it is. Then to add something else to that
25 form, I don't know that that would be effective. And, you know, looking at these

1 14 complaints a year and we're going on year six of not assessing any civil
2 penalties, and even the education piece, I wonder if it was even warranted for those
3 employers that you mentioned in the background of this issue. I think if there is an
4 issue, you need to focus on it, you know, with those employers and not necessarily
5 be part of the rulemaking process.

6 45:48: So what would you suggest in terms of how we would address
7 the issue?

8 45:52: I think the department would need to go back to the table and
9 figure out what these complaints are, who these employers are, and that would be
10 something that you would need to look into. Without having more information, I
11 can't--

12 46:03: So how would--how would you respond to the comment that
13 those 14 complaints are only a fraction of what is actually out there, because people
14 do not often have the time to make the phone call, it's just not--it's--and I would-- I'll
15 tell you my personal view is that as much as we try to encourage as a department
16 complaints, I'm not sure it's reflective, whether it's this issue or any other issue, that
17 the complaints that the department gets is reflective of how big the problem is; it's
18 just my personal view about that.

19 46:48: Myron, you had your hand up.

20 46:54: Yeah, what you guys are talking about exactly happened to me
21 as an employee, especially the part of getting laid off. I was hurt on July 6--July 7th, I
22 fell off a digger truck and fell six and a half feet. I ended up--I was told in the
23 emergency room at the hospital by the employer that, number one, this would not be
24 a disabling injury accident claim, this would be non-disabling; and number two, I had
25 to go to Concentra medical to get my--to get my service, okay? Which Concentra

1 medical pretty well misdiagnosed me with my injury, and then when they told me that
2 I needed to have an MRI ASAP, that took--that took six days to have that
3 accomplished because one is Concentra medical said they were waiting for
4 authorization from the insurance company or the carrier, and then when they did
5 notify me, they notified me, Concentra medical notified me out of Texas, they didn't
6 even do it locally, that "Okay, this is where you need to go to have your MRI."

7 When I went back to this Dr. Ojjay Mohagabeer (phonetic), and that
8 was his name, I'm not making this up, at Concentra medical, he goes, "Oh, you're
9 way more goofed up than we thought you were," he goes, "You have four broken
10 ribs, a fractured L1, a fractured L2, you have fluid on your lung," I goofed up this
11 diaphragm, and then he wanted me to go see a cardiothoracic surgeon and get my
12 lung drained ASAP.

13 I said, "Well, that took seven days the last time."

14 "Oh, no, if they don't, then you go to this--you go to the emergency
15 room and get it drained yourself."

16 You know, and so by fighting all this and finally getting my claim
17 reclassified to a disabling injury accident, as soon as that happened, I basically got
18 laid off. So now I'm laid off, still on a Workers' Comp claim. And so I was never
19 notified by anybody this is what I had to do and this is where I had to go until I got
20 the mailing from Workers' Comp Division that had the booklet; well, that was already
21 three, four weeks into my--into my accident--

22 49:21: Right.

23 49:22: --and I switched doctors and I'm very, very glad I did.

24 49:25: Yeah. So if I can ask a follow-up question. What would have
25 been the most effective thing for you to have happen to let you know that you had

1 your choice of--

2 49:37: While I was laying there in the hospital and they told me this is
3 where I had to go, it would have been nice to know, hey, you need a follow-up, but
4 you can go to any doctor you want to go to for your follow-up. That would have been
5 really nice to know instead of having to go to--go to a clinic that they deal with for
6 UAs and stuff, and while I'm in that clinic it took me 45 minutes to an hour to be
7 seen. I think it would have been very well, like you said, if you fill it out on that 801, I
8 think it is, on the 801 form if they declare that to you that you can go to any doctor
9 you want and not have it stamped on the bottom of the release forward from the
10 doctor that says--or from the hospital that said that you had to go there.

11 50:24: I don't know who had their hand up first, but I'm going to go to
12 Vern and then I'll come back right to you, Keith.

13 50:28: Well, we've heard that again, there's only been this many
14 complaints, so again that's just flying under the radar. I sent you a bunch of
15 redacted employees, just recent ones, and through the years, this has been going
16 back to 2007, I have three-ring binders of complaints, and the reality is that most
17 injured workers don't know who to call, they don't know who to complain to, they
18 don't know what DCBS means, they don't know what the Workers' Comp Division
19 number is, they don't know who to complain to, and more importantly, in this current
20 economy they're scared to death of even complaining, of doing anything that other
21 than what the employer tells them to do, and to take it a step further, to file a
22 complaint is just that much further removed from reality, it's just not realistic to think
23 that there was only 14 people.

24 51:23: Okay. I'll go to Keith next.

25 51:25: I just wanted to thank Myron for his testimony and just tell him

1 that that's similar to what other of my clients have experienced, maybe not telling
2 them that it's not going to be a disabling claim, but the same type of thing. In fact I
3 had one client who was working out near Columbia Gorge and his employer told him
4 where to go and he couldn't get in right away, so he went somewhere else and came
5 back and was taken by his employer to the clinic the employer wanted to go to, the
6 employer called the first doctor and said, "We don't want prescriptions of the pain
7 meds, so give that back, and let's try and do this in a way that creates a non-
8 disabling claim"--

9 52:03: Correct.

10 52:04: --so I've seen this types of egregious things and it blows my--I
11 mean it doesn't blow my mind that there's only 14 complaints, because again I think
12 what Mr. Saboe or Dr. Saboe is very well taken that people don't always, don't
13 usually know where to complain, and I--you know, it's a theme in the discussion here
14 that, well, this isn't going to maybe cure all the problem, maybe it won't be a hundred
15 percent effective, maybe there will still be those bad actors who coerce their
16 employees into doing this regardless of what form you put in front of the person, and
17 that, you know, that may be true, but that's not a reason I don't think not to take
18 action and try to educate the people that you can educate, sway the behavior of the
19 employers whose behavior can be swayed, and at least give a little bit more heft to
20 the importance of this--of this issue. It's been done in the past, and I would also
21 mention that this form has been amended, so there's a fair amount of precedent for
22 trying to take steps to address this problem, so the idea that one more step to
23 address this problem is going to create a big problem doesn't really ring true to me.

24 53:13: Thanks, Keith. Dr. Grice?

25 53:15: I think one of the statements that's generally made about the

1 employer in the emergency room stating this was not going to be an injured worker, I
2 want to know why is the employer in the emergency room with him to begin with.

3 We have an industry out in Albany that drives the injured worker,
4 regardless of the extent of the injury. I can understand if it's a limb that's falling off,
5 you know, you get them there as quick as you can, but I would think the emergency
6 or that the ambulance would be called first, but when an employer in Albany drives
7 the injured worker to one of the clinics, goes back and speaks with the staff first,
8 comes back out then and goes back with the patient and actually requires the patient
9 to allow them in the room at the time of being examined, that to me is a tremendous
10 violation of patient confidentiality and there should be no ability of--if the employer
11 wants to take the injured worker to the clinic, then don't--you don't go in with the
12 patient and the physician, or there should be no ability to drive the injured worker to
13 the--because that's another (unintelligible) steering, that's an absolute violation, and
14 much like going down I-5 on my way or coming up I-5 on the way here, the number
15 of people pulled over for speeding are greatly underscored by the number of people
16 that passed me doing 80 miles an hour. You know not everybody that speeds on
17 the freeway gets a ticket, and just because five people on a Tuesday got pulled over
18 for speeding doesn't mean only five people were speeding.

19 55:03: Okay. Sheri?

20 55:05: Thank you. So I have like several points here just of things that
21 folks have said, so--but I want to first start off with the Hoffman story. So I have
22 been in my position at Hoffman Construction since 1992 and my job is to take care
23 of our injured workers, much as our CEOs' wives take care of their families, so my
24 primary concern is to ensure that our workers get quality care as quickly as possible
25 once they're injured, so to that extent we do many things to make sure that that

1 happens, and we are very clear with our workers that they can choose the provider,
2 but as we're talking today, some--there could be a perception of steering, and I want
3 to make sure that we have a--you know, there's two different things. Egregiously
4 directing care to a provider, sitting in the emergency room with that worker, and
5 having input into the care is egregious.

6 I am very proud of the fact that my injured workers get back to work,
7 they're taken very well care of, and should they see a provider that's on our provider
8 list of clinics that are close to the job site and if they have any issues, at any given
9 time those workers can seek care from another provider. It's of value to us that
10 those workers get quality care, that is my top priority, and it is not uncommon for us
11 to if a worker is having an issue with their primary care, when they--when they're
12 concerned, to make sure that we have the MCO actively engaged to ensure at all
13 times that people are getting active--or getting quality care.

14 And you have to understand that the construction company, we do
15 have remote jobs or you have jobs within a community, we could have hundreds of
16 projects going on at a time. That means hundreds of supervisors that are
17 communicating with these workers. I know instantaneously when somebody is
18 injured on a job, it's communicated immediately, and the first things--first thing out of
19 my mouth is where do they want to go get seek care?

20 My experience in the 24 years that I've been doing this is most
21 construction workers do not have a primary care provider or a chiropractor, and in
22 that case, you know, we have--we have a list of providers in the area, workers have
23 Kaiser Permanente as their healthcare, they may want to see a Kaiser doctor, they
24 may want to see--if they like going to Providence or whatever the case may be. I
25 have been very open with the community that most of our workers do not have care,

1 and so if there's an occupational health facility that's close to the job site, we will
2 utilize that.

3 We also utilize the services of triage services like through Med Express
4 down in Eugene, Metro Medcall up in Portland, as well as AMR. They come on the
5 job site, they'll do triage services, and if the worker needs to be transported, they will
6 transport the worker to a provider of their choice or a clinic, and, yes, we do do post-
7 accident drug testing, we are a high-risk company, and we want to make sure that
8 we have at all times a drug-free workforce.

9 So I just want to be clear because what I don't want to do is have
10 unintended consequences. I do not think it's right for somebody to go into an
11 emergency room, and I always tell my supervisors, "How would you want to be
12 treated if you got injured?" Number one, most of--since most of the people do not
13 have providers, they're very thankful if there is a provider that's close that can
14 provide quality care to them, and if they don't provide quality care I would be the first
15 one to hear about it, and they will--they will be seeking care elsewhere.

16 And, you know, Vern, to your point, and I appreciate you remembering
17 some of my points, the 72 hours, I do appreciate that because I'm not the only one
18 that I think has that issue. There's the windmill people, for example, they might not
19 have forms, so I liked your comment on that.

20 I think it's important to note that typically the 801 is not completed until
21 somebody either requests it or is filing a claim because they're receiving offsite
22 medical care, so I think the discussion, you know, as to timing of when these
23 documents are filled out is very, very important because an 801 may not be filled out
24 until days after a worker has sought medical care, and the 8--hopefully not, not at--
25 on a Hoffman job it has to be done by end of shift, but it is not uncommon for that--

1 there to be a time delay on that.

2 The 827, you know, I kind of, Diana, I liked the comment that you
3 made, you made a very good comment about legally required versus choice, and I
4 think that choice can be misconstrued by a worker. I like the term required, that
5 you're not required to see a doctor--you have--you're not--you cannot be required to
6 see a certain provider. I think that can't be overemphasized enough with workers. I
7 think that workers do have this concern that they will be laid off. In the Hoffman
8 companies, that is so not true. I have fre--I call them the frequent flyers, we have
9 workers who have multiple injuries, it's okay, you know, but there is that, you know,
10 for new people in the construction industry, there is that concern, so I think it--the
11 terminology maybe could be enhanced, too, for better clarity for the workers.

12 I also on the 827, I think when you near the work--the signature, the
13 signature for the injured worker is at, I kind of like the idea of it saying as the
14 worker's signing it in very bold letters, "I understand the doctor is my choice, I get to
15 choose my doctor," or whatever you want to put there. I think that as much as I take
16 great pride in my construction teams and my--the supervisors at Hoffman, we can
17 make mistakes, and it may be that I have somebody that's filling in for a
18 superintendent and doesn't give that worker that indication and I would not want--
19 you know, so there's the second chance, you know, there's that second opportunity
20 when they're--when they're at the doctor's office to say, "Whoa, I had a choice, I
21 could have seen Dr. Saboe."

22 And one of the things I wanted to point out, Vern, I want to-- So, as I
23 said, we have--we have providers that we have set up. I put together whenever we
24 go into any new area, I do a lot of research on hospitals that are in the area and
25 providers for eye health, you know, you want to make sure if someone gets a foreign

1 body in their eye, what's the best place? They can go to the ER, but maybe going
2 directly to an eye specialist is a really good idea, and I just want to point out
3 Dr. Saboe's brother's chiropractic firm is-- But seriously, you have chiropractic.

4 So I-- You know, I understand, I'm very clear with my supervisors, I
5 have had supervisors who have gone into the emergency room and I've had to query
6 them. I have personally been at the hospital and have been asked by the family to
7 come back because they don't understand the process, so I don't want us to make
8 blanket statements about the community and certain practices of employers; I think
9 we need to target those employers. And of course I'm very supportive of what we
10 can do by rule and with these forms if there's opportunities, but I also want to make
11 sure that we do not have unintended consequences because I really think that my
12 workers have benefited over the years, those who do not have providers, which is
13 probably 95 percent of my construction folks, by knowing that there's somebody
14 close by to take care of them, and again it ultimate--we've always made it very
15 important that the workers know they can seek care wherever, so--

16 1:03:46: So, Sheri, could you walk us through a scenario? A worker
17 gets injured on the site, let's say they cut their arm--

18 1:03:57: Yeah, then (unintelligible)--

19 1:03:58: So it's not--so you wouldn't have to go to the--you wouldn't
20 have to call an ambulance.

21 1:04:02: No, but let me walk you through that. So in the Portland
22 metro area or a job where I have a nurse onsite, which I do on some of my sites
23 throughout the nation, the worker advises the supervisor they're injured, and if we do
24 have those services, those triage services available, we certainly make those
25 available to the worker, and so that I don't want my team making a decision, "Do

1 they really need to go see the doctor?" because as you indicated, you know, people
2 are trying to make decisions about OSHA recordkeeping, disabling versus not
3 disabling and all, that's where you're going with that.

4 So they go--they are seen and somebody decides, yes, you do need to
5 go to a provider, or if it's a project without those triage services, they can't deal with
6 it, you need to see a doctor. So do you have a doctor? Or a chiropractor? Or
7 whatever, do you have somebody you want to go? And nine times out of ten, even
8 more than that, is no, we don't have a provider. Okay, so this is what we have.
9 Who's your insurance with? Do you want to go to a Kaiser doctor? So we kind of go
10 through this scenario with them, and then we do transport workers, and let me
11 explain to you all at this table why Hoffman does that.

12 I do not want somebody driving--and this came from our CEOs back in
13 1992. We do not want somebody transporting themselves to the doctor and my
14 people, not being providers or doctors themselves, having somebody go off the site
15 who could be a diabetic and goes into shock. I have a diabetic husband, and I will
16 tell you he responds very differently to injuries than I do, and it's not because he's a
17 wimp; it's his body responds differently. And I think it's really important to note I do
18 not want that responsibility of somebody leaving one of our construction sites and
19 driving themselves to a medical facility and having something worse happen on the
20 way, so we do transport, it is a value to our company, and we do have if you get
21 injured on the job you do have to take a post-accident drug test, so that's one of the
22 reasons they're there is to make sure that that happens, but, okay, so they get to the
23 doctor--

24 1:06:23: Well, can--let me back up for a sec--

25 1:06:24: Okay, sure.

1 1:06:25: So worker obviously needs to go to see a doctor and you say,
2 "Do you have a doctor?" and he or she says no. Okay, so then what's next?

3 1:06:41: Well, I should back up just one thing. If they do have a
4 doctor, then they're calling and I--the problem with that, I have been found--I've been
5 finding even more problematic are those workers who do have a doctor and a half
6 hour later come back to the supervisor and say, "My doctor says, one, they will not
7 take Workers' Comp or, two, they can't see me until next week" or "My doctor's on
8 vacation," so we got to remember there's those issues as well, so then our people
9 transport the worker to the clinic--

10 1:07:18: Whoa, whoa, whoa, that's--

11 1:07:19: Okay.

12 1:07:20: --where I want--that's where I wanted the--

13 1:07:21: Okay.

14 1:07:22: --the gap. Okay, so if the--if the worker either can't get ahold
15 of the doctor, their doctor, or they say, "No, I don't have one," then what's the next
16 conversation?

17 1:07:35: Well, we go through the list, here's--

18 1:07:38: Okay, okay.

19 1:07:39: --the providers that are close by, do you want to see a Kaiser
20 doctor because their insurance, you know, their--a lot of the unions have Kaiser
21 insurance, so they may want to see Kaiser, or the other--and all the providers are
22 within the MCO panel. Hoffman enrolls, when you file a claim you're enrolled the
23 same day the claim is filed, so we have that relationship with our MCO. So they go
24 to the provider or to the ER. If they go to an emergency room by ambulance, a
25 supervisor does follow because somebody's got to get the worker back to the job

1 site if that's what's going to happen, and we take responsibility for that or calling the
2 family or what-have-you. So they go to the facility, and then follow-up, you know,
3 wherever the follow-up's going to be is where it's going to be. If it's with the clinic
4 they initially see or they want to go see a different doctor, you know, at that point in
5 time it's a different discussion after they initially are seen.

6 And, you know, we address return-to-work and the whole bit. You
7 know, we don't want any delay in the worker getting their benefits and continuing
8 with the work that they were doing, because that's the fear that they have is
9 somehow they're going to start missing time from work.

10 1:09:03: Dr. Saboe?

11 1:09:05: Well, I've been telling Sheri this for years that Hoffman
12 Construction I don't believe is the problem. It's the other companies who are actively
13 unlawfully forcing injured workers to particular clinics, and that's what we need to
14 address.

15 1:09:21: Thank you. Jerry?

16 1:09:23: Two things. And I don't have a great deal (unintelligible) on
17 this issue, I just have a couple of comments I'm not hearing covered here. One is
18 you don't have to go to eight-and-a-half-by-fourteen on 801s; it's about the only form
19 left that is blank on the back. And so there's room, I hate it to suggest it, but there's
20 room to print something on the back if you wanted to--

21 1:09:43: But there are some people that are using the back already--

22 1:09:44: Or that use the other side

23 1:09:45: Okay, just saying by rule--

24 1:09:46: Just an FYI.

25 1:09:47: --it's the only one, about the only one in the bulleting that's

1 still blank on the back, so just a reminder in terms of the legal requirements. The
2 other is just about most of this discussion seems to involve a clash of the titans of
3 the employer, big healthcare organizations, but I don't think that's a majority of the
4 injuries or claims in the state, yet I hear a lot of concern about trying to impose some
5 kind of medical Miranda rights on, you know, small businesses and trust that they're
6 going to be consistently and accurately giving those kinds of warnings, we're kind of
7 pointing at the wrong people. Most insurers that I know of and most TPAs I know of
8 initiate conversations with the workers themselves, they have 24-hour follow-ups
9 that are mandatory, that that's--

10 1:10:31: The three-point contact, Jerry, for those in the--

11 1:10:32: Yeah, they're called different things by different companies,
12 but they're--but I'm talking about the kind of scenarios that require 24-hour follow-up
13 we see, you know, like, well, we're just touch base and it seems to me that the
14 workers, the first authoritative conversation they get about a Workers' Comp claim
15 and what's going on is actually through the person processing it, you know, there's a
16 five-day notice right from an employer to an insured worker, there's the immediate
17 (unintelligible) required for 24-hour follow-ups whenever there's a phone report of a
18 claim, not an 801. That often comes later, but it's usually a phone or some kind of
19 other email report of an injury that the insurer responds to even before it gets an
20 801, and here we start talking about trying to create effective and consistent
21 communications about medical service rights, don't forget that that's going on, and
22 the idea that aim at the conversation between the employer and the worker when the
23 conversation that the workers are going to have start having with the insurer might at
24 least begin, don't forget that avenue because the information can be coming from an
25 insurer that the correct (unintelligible) police what's going on a small employer.

1 1:11:39: I will tell you of the complaints that we have received, many
2 of them, in fact most of them that we have received, the employer literally and did
3 not know that they could not direct care, so it really it was--it was not--there are the
4 situations where it's blatant and they're directing care and they know they're directing
5 care, but most of the ones that we have received, once we have talked to them, is
6 like, "Oh, I didn't know that I couldn't do this," so that was why the discussion about
7 some notification to the employer in some form was a suggestion.

8 1:12:33: Not to monopolize anything, but the suggestion that was
9 made earlier that rather than trying to fix it by broad-based communication
10 requirements among everybody regardless of whether they're part of the problem or
11 not, you know, Oregon's Department has shown that it can be as effective as can be
12 and maybe more effective than any other regulatory agency in the country when it
13 spots a problem and wants to focus on it, like timing the first day of compensation,
14 that you guys know how to apply the hammer where it needs to go in order to get
15 results and to show that you're focusing on an issue and to make sure that it's
16 known in the industry, and when you get a little less polite and a little more
17 enforcement against the people that are actually causing the problem, you do get
18 results. It isn't--it isn't that you're going to put a--you're going to--it's not whack-a-
19 mole. I mean, you're going to be going at in a way I--and you know how, you've
20 done it with other issues that cause all employers to all of a sudden have it on their
21 radar, so--

22 1:13:30: So no--so no first bites at the apple. We should penalize
23 them heavily and then publish that--

24 1:13:36: Well, how many of these 14 bites, 14 bites are repeats?

25 1:13:40: Well, see, that gets back to the issue of how many problems--

1 1:13:44: Well, just assume for a minute that's a universal fact, how
2 many are repeats?

3 1:13:50: And we've studied (unintelligible), but in the last five years we
4 don't have any repeats, so it's been 14 per year with no repeats and no strong
5 evidence that it was intentional, so.

6 1:14:06: So there's not this undercurrent, because it's one managed
7 care company, we're getting this picture that's creating this issue should be coming
8 up more and more often from the same sources, and it's not, so I guess it's
9 (unintelligible) clear, I'm not understanding.

10 1:14:23: Dr. Miller?

11 1:14:26: I think first the size of the problem needs to be addressed. I
12 personally know, obviously this is anecdotal, but I've seen well over 14 cases of this.
13 The problem is, is if the employee doesn't understand that they're being steered or
14 that that is a problem, how are they going to complain?

15 The size of the national occupational medicine clinics that have set up
16 here would seriously apply more than 14 people being steered to these clinics just
17 by the sheer size of volume of them in the national average. In Myron's particular
18 case, and we have to ask on the steering, if this steering is being done by employers
19 and it's being done to certain facilities, who benefits from that? I don't believe it's the
20 injured worker. In Myron's particular case, the diagnosis of one fractured rib was
21 made in the emergency room by an X-ray when in fact he had four, two fractured
22 vertebrae and contusions to his lungs. He was immediately returned back to work at
23 full duty and it wasn't until the other diagnostics were obtained that it was noted that
24 his condition was far more serious than initially thought, so in that scenario who's
25 actually benefiting?

1 And in my opinion, I don't believe it's the worker, and I think the
2 problem's actually a lot larger; you just have 14 people that were willing to come,
3 you've got 15 now, and I was here last year with a patient who didn't get to testify or
4 talk about it who now has a permanent ulnar neuropathy because of the delay in
5 care to the same national employer so--or national occupational medicine clinic.
6 Until there's some--I mean, we can have forms, but obviously, and this is probably
7 fruit for another discussion, until there is some measure of penalty for doing this to
8 workers, I don't know that there's going to be a significant change.

9 1:16:42: Delmi, I think you had your hand up.

10 1:16:45: Yeah, I just had a question, and is it Keith?

11 1:16:48: Yeah.

12 1:16:49: Yeah, you'd mentioned you'd seen a similar case like
13 Mr. Myron. Do you--have you recommended to your injured worker to call in and file
14 a complaint or have you--or does your law--would your law office provide that, you
15 know, channel that opportunity to do that? I'm just curious--

16 1:17:08: I don't recall--

17 1:17:09: --how many law firms are--

18 1:17:10: I can't recall if we did, frankly. I mean, it just kind of depends
19 on the case. But now that I hear that we're looking for, you know, we're using that
20 as a scope of the problem, you know, quite frankly I didn't know if there would be
21 actually any action taken and how we'd approve something like that. I mean, it's
22 anecdotal and, you know, then you call the employer and they say, "Oh, golly, gee,
23 gosh, I didn't know and I never meant to do that, I would never do something like
24 that," and then it gets dismissed, so--

25 1:17:38: I'm a little curious as to the injured, as to the attorneys in the

1 room, how many of them have seen his happen and proposed some sort of change
2 themselves? You're the voice of your injured worker at that point.

3 1:17:55: I guess to what--to what you're saying about the "Oh, gosh,
4 oh, golly" thing, I mean, you know, as a case of first impression, fine, they can do the
5 "Oh, gosh, oh, golly" thing and I hear what you're saying about that, but when--you
6 know, when you have a repeat of violations or something like that, that's when you're
7 starting to build up some kind of record that I think we want to see here.

8 1:18:18: I think what I actually did was recommend that he contact the
9 Bureau of Labor and Industries and I think we started a Bureau of Labor and
10 Industries claim in that particular example that I gave, so, no, I don't believe I went to
11 the department; I think I went a different direction on that one.

12 1:18:32: Oh, I think Laurel had her hand up.

13 1:18:36: Oh. Well, I was just going to mention to Delmi, too, that most
14 injured workers, very few are represented at the initial point of injury, I mean, very
15 few, although I have seen it, call an attorney before they call a doctor. But I-- At the
16 MCO we have--well, I've got, like, 6000 providers. Many of those are not providers
17 that the injured worker can get right--you know, go into, like anesthesiology and
18 radiology, so I'm not really sure how many initial-type providers we have, but many
19 employers contract with occupational medicine clinics for other services than treating
20 work injuries. They--you know, there's drug testing, DOT exams, many, many, many
21 different reasons they would contract with an occupational medicine injury, but at the
22 MCO we get calls all the time because the employers say, "Call the MCO and ask
23 them to help you find a doctor," and like Sheri was mentioning, number one, most of
24 them probably do not have a primary care doctor; otherwise, that's where they would
25 go first. If they did, that doctor, like Sheri said, doesn't take Workers' Comp or they

1 can't get the injured worker in right away, and I think getting them in right away is the
2 major problem.

3 And this is where occupational medicine clinics come in and also
4 chiropractors. Chiropractors generally can get the injured workers in almost right
5 away, so when they call, we ask them what kind of provider do you want to see?
6 They most often go, "Well, what do you mean?" and then we'll say, "Well, do you
7 want to see a chiropractor or do you want to see an MD or a DO or what?" and ask
8 them what type of injury, and then, you know, make suggestions based on that.

9 The vast majority don't want a chiropractor right away, although some
10 do. The vast majority ask for MDs and they all want to be seen right away, and the
11 only clinics that we can normally get a patient into right now is an occupational
12 medicine clinic, and so it's not--I don't think the employers, the vast majority of the
13 time it's, you know, we have I don't know how many different contracts of employers
14 and insurers who we work with, every TPA, I think, and, you know, they ask us who
15 to go to, we give them a choice, we email them a list of providers from our directory
16 in their area, but in talking with them, most of them, they have no idea; they just want
17 to go wherever they can get in, and that's where we send them.

18 And I like the idea of putting something on the 801 if we have to do that
19 that says, you know, it is illegal for the employer or TPA to tell you where to go,
20 something like that, you know, and then put something like MCO rules may apply,
21 just that you have to treat within the MCO panel, but we have occupational medicine
22 physicians because they can get people in right away.

23 1:22:44: Thank you, Laurel. Diana, you had your hand up, Betsy,
24 Myron had his hand up, so I'm going to just start with Diana, if you still remember
25 what it was you wanted to say. Please go ahead.

1 1:22:56: No, it was just in listening to some of the conversation I was
2 reminded about what Lou had said earlier about there's been a question of, you
3 know, an employer having sort of a more subtle conversation with the employee
4 about what to do in terms of, you know, not obviously steering due to the limits,
5 maybe, you know, not quite so overt, and I wondered to some degree if a lack of
6 repeat offenders, if truly they are now educated or if they have now become aware
7 of the fact that they cannot do that and they figure out a way to do it more subtly in a
8 way that's not causing more complaints, and I don't know how to follow up on that, I
9 don't know to what capacity the Division has to even do a small sampling of people
10 who have come through the system to find out, "Hey, as a follow-up phone call, you
11 know, to your Workers' Compensation claim process, at what point did you know
12 that you could go seek whatever doctor you wanted? Was it four weeks after your
13 initial injury because you finally got our pamphlet, you know, was it because your
14 employer told you, because you work for Hoffman?" You know, again it may be a
15 burden on the Division, but I would be curious when we're talking about, you know,
16 obviously some of us in here are having very different experiences than others,
17 trying to figure out really what's going on with that 14 complaints and what we can do
18 then about it.

19 1:24:20: So a question about that. So if there was a signature--well,
20 there's already a signature line for the employer, but if there was a statement in the--
21 on the employer part of the 801, do you think that's--and I'd be interested in the
22 lawyers' comments as well, is would that--is that a deterrent at all in terms of
23 potential steering? Because then the Dep--if we--if the Department actually had to
24 pursue that, that would have actually been an acknowledgment that they understand
25 what their obligations are. I don't know, does that--

1 1:24:58: You've been working with that sort of one free bite at the
2 apple, you know, "Oh, gosh, oh, golly, I didn't know"--

3 1:25:03: Well, wouldn't they take that away--

4 1:25:04: Once you've signed that--

5 1:25:05: Yeah.

6 1:25:05: --because there was then a penalty that went along with that
7 because that is counted as your one shot at not knowing and having an excuse, and
8 there's a penalty that follows up with it, I would like to think that once a couple folks
9 have experienced that, lawyers talk amongst themselves, people would recognize
10 the fact that this is a problem and they need to knock it off.

11 1:25:26: I would like to point out that I think the processes we do, we
12 will conduct an investigation when there's enough facts for us to determine kind of
13 what happened, and in the past we have issued penalties, but typically we will issue
14 a letter of education first, and then if there's a subsequent complaint, we would
15 follow up with penalties after that, so it's not like we just kind of drop it and dismiss,
16 but--

17 1:25:55: I didn't mean to--I didn't meant to suggest--

18 1:25:57: Yeah.

19 1:25:58: --that you guys--

20 1:25:59: Yeah, we--

21 1:25:59: --don't do a thorough investigation--

22 1:26:01: Yeah, we--

23 1:26:02: --it's just, you know, when it's a first-time thing, it's a first-time
24 complaint, and one person says, "I really didn't know," you know, that's
25 (unintelligible)--

1 1:26:09: Right, and if they legitimately didn't know--

2 1:26:11: And they may not have?

3 1:26:12: Yeah.

4 1:26:13: That's fair.

5 1:26:14: It'd be interesting to eliminate the "I didn't know" part of things
6 by having a signature line, though.

7 1:26:19: I mean, I agree with that--

8 1:26:20: Yeah.

9 1:26:20: Betsy, do you still have a comment then?

10 1:26:24: You know, I think it's partly relevant at this point, which is only
11 to say that we--I mean, I--we're up for, you know, making the changes to the 801
12 that we've talked about here, and I understand that, you know, there's some general
13 agreement that there is a problem of some level, but honestly when you talk about
14 14 cases, you know, it doesn't like a lot and it sounds to me a little bit like there are a
15 lot of things going on out there that for whatever reason aren't getting--aren't getting
16 reported and are flying under the radar, and, you know, I guess to some extent we'd
17 like to see more emphasis on enforcement to the extent that there are problems and
18 less emphasis on new laws and new forms and new signature lines.

19 1:27:13: Thanks, Betsy. And Myron, you've waited quite a long time--

20 1:27:15: Yeah, I was just going to add one thing to it. When I was--
21 when I was on light-duty when I got back to light-duty, there's two more cases where
22 I work at, and both of those guys were afraid to jump onboard with this and report it,
23 so there's--it's definitely being abused by some employers and I--that's a good deal,
24 it needs to be--if you had that sign right on the deal, I would have known. I'd say no,
25 I don't want to go to there; I want to go to whoever I want.

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1:27:50: Thanks, Myron. And Dr. Saboe?

1:27:53: Well, again just a couple of questions, comments relative to Jerry Keene's comment, but we've been dealing with this issue since 2007, so we've been playing whack-a-mole since 2007, and part of the complaint investigation process where it falls apart is most--this is almost always done, when it's done knowingly by an employer, it's all he-said she-said, it's all verbal, so when you go to investigate, the comments back, I'm sure, are "Well, no, we recommended, we suggested they go here or there," and so how do you--you know, so then it's the injured worker's comments versus the employer, so the signature lines would help to validate the fact the conversation took place. If there's a complaint by an injured worker, then the Division simply contacts the insurer, forms go to the insurer, and asks the insurer to produce the amended 801 or amended 827 with the signature lines that if the worker injured was in fact informed.

1:29:03 So one thing I'd like to ask you in follow-up, earlier you suggested that we also have them sign that they conducted a verbal discussion with the worker. And I feel like in some ways that might contribute or give them evidence that they did tell the worker, and so I think one of our original reasons why we recommended that they--we have them sign and verify that they provided the Form 38--3283 is that we can verify what information was given to the worker, whereas if it's provided verbally, we don't know and we kind of run into these other problems where they might be subtly making recommendations or suggestions.

And so I want to ask and maybe pose to the room, if providing maybe-- maybe even enhancing the language on the 3283 to explain kind of some of the subtleties with the MCOs, and maybe if there's some way to increase the likelihood that they would receive the 3283 with the 801, if just having the acknowledgment

1 that they received the 801 or that they received the 3283 with the 801 would be
2 acceptable or effective.

3 1:30:36: Well, let me respond to that, because our initial--our initial
4 suggestion was to include the disclosure statement on 3283, which discusses the
5 MCO issue.

6 1:30:46: Right.

7 1:30:47: But the language, as far as verbally, the language--I stuck
8 verbally in there, but just fully explained, I guess, verbally is assumed, I'm talking
9 about a disclosure statement saying, "My employer has verbally fully and explained
10 to me," the rationale is you need to sign right there. And never discussing it with
11 them, just saying I signed; okay, you need to sign and date there.

12 1:31:21: And then go to this clinic.

13 1:31:24: Yeah.

14 1:31:24: So--

15 1:31:25: Sheri?

16 1:31:25: --can I? Speaking to that, so I--the part I'm a little concerned
17 about is "fully explained." I have some superintendents that would be there an hour
18 explaining something to somebody, I have some people that don't even know what
19 the heck--you know. So what we've done at Hoffman, and this is in response to
20 Vern's concerns several years ago, when the accident documentation comes in to
21 me at Hoffman, it has a cover transmittal on it because there's so much paperwork
22 that has to come in, and so we have the injured worker sign that they have received
23 their copy of the 801 and the 3283. There's a prescription card that they're given if
24 they get a prescription. And then also the return-to-work letter that with the
25 transitional work agreement. And we have--we have put in here in bold letters,

1 "Workers have the right to choose their doctor," so they're initialing that they
2 received the documents and that they actually, you know, they understand that they
3 have a right to choose, so--and I can't tell you how many years that we've been
4 doing this. You know, Vern mentions 2007; I'm not sure if it goes all the way back to
5 that.

6 But I will tell you this. I have not had a request come out of the worker
7 signing this to say, "Hey, I didn't--I didn't click in that I wasn't getting my choice of
8 doctor," so--and I--you know, I'm not going to say that my people are perfect at
9 explaining in minutia what you have the right to choose your doctor; that's all they
10 have to say as far as I'm concerned. I would not want them to go into a long
11 dissertation about, you know, choosing providers, so I just wanted to put that out
12 there that we have been doing that. I kind of did it as an experiment based on
13 Vern's concerns years ago and I just haven't seen anything really come out of it, so I
14 support the signature, I think that it can--that maybe that's why I haven't had any
15 concerns because right there they're signing that they have the choice, and so their
16 name--their name goes right above that, so hopefully they're reading it, but I don't
17 know, so--

18 1:33:49: Did I mention we have a problem--

19 1:33:50: Ramona?

20 1:33:51: I know about the problem and I'm hoping to participate in the
21 solution.

22 1:33:56: Thank you, Sheri--

23 1:33:56: My concern, Oregon is an economy made up primarily of
24 pretty small employers, and these are the same folks who probably legitimately
25 didn't know that they couldn't direct the care, so to ask them to verbally explain the

1 worker's treatment options, I have to check the rules half the time to remember what
2 the treatment options are in an out of an MCO. I think that might have a greater
3 margin for error than just having the signature line and modifying the 3283, I think
4 there are probably some things that could be clarified on there to give better
5 informa--more specific information to the worker, but I agree that requiring the
6 individual employers who don't have the resources that they devote to safety and
7 loss control that Hoffman does, it could be problematic and result in some significant
8 miscommunication.

9 1:35:04: Okay, thanks, Ramona.

10 1:35:04: I agree with that, just I think that's opening up a huge can of
11 worms to have people who really don't know trying to explain something like that.

12 1:35:17: Especially when you get subjective words in there like fully
13 explained.

14 1:35:25: Well, I mean, I've heard both the employers who are sitting
15 around--sitting around the table and the insurers saying that it's actually okay for the
16 department to penalize employers?

17 1:35:40: Yeah.

18 1:35:41: Okay.

19 1:35:42: Yeah.

20 1:35:43: I think those are blatantly, again I would like some--

21 1:35:45: Yes.

22 1:35:46: --judgement involved in that for these again the moms and
23 pops who really don't know, didn't intend to cause harm, and that they don't do it
24 again once they're educated about it.

25 1:36:00: What would--but what would happen if the Department

1 decided to put a statement in the 801 that they signed? Then really the question is
2 do they still get a free bite at the apple?

3 1:36:16: You know what I think might be useful in a situation like that
4 is to go with what the OSHA model has been in the past, where with the first penalty
5 you're kind of starting low, and then as you--you know, if--but it's still you notice it, I
6 mean, because you're having to pay. It's not like, oh, no problem, you know, go
7 away and it'll be good next time. I'm not sure that's going to last at OSHA. But, you
8 know, then you move forward, and if it becomes again and again, then it ratchets up
9 to something real.

10 1:36:52: And I think it would require some clarification of where the
11 line between suggestion--suggesting and requiring is because a lot of employers do
12 have relationships with the occupational medicine facilities, like Hoffman, who says,
13 "Well, hey, why don't you go here," while they clearly said you can go wherever you
14 want, but most of the workers will go there because it's convenient and you get in
15 that same day and get back to work. And we don't want to penalize those people.

16 1:37:28: Well--

17 1:37:29: Go ahead. Well, Dr. Grice, you had your hand up and so did
18 you, Jennifer, but--

19 1:37:33: I don't think that it's the small business that we're talking
20 about. I'm a small business, we have 12 or 13 employees, and I've been in practice
21 for 34 years, I've never had a work injury, so I don't think it's us that the small
22 employer that we're talking about; it's the large corporations who have different
23 divisions and onsite nurses and onsite triage places that make that decision for the
24 worker that tramples on their rights. And I don't--I don't understand what your
25 computer software system would allow, but in today's ability to run any report you

1 want, it would seem that if you did a search for employer's first date of--or first report
2 of injury, what clinic or corporation that employee--that the employees who were
3 injured saw for that, it would start to run some pretty good figures on what employers
4 were sending their employee--injured workers to what clinics exactly. It's not going
5 to take--I mean, I don't know, I'm not a software engineer, I don't know--

6 1:38:48: That gets us into the Hoffman thing that because, like, again
7 90 percent of our workers don't have providers, so it would show a pattern that
8 they're seeing certain--they're not seeing the clinic that Myron, I (unintelligible), but--

9 1:39:04: I can understand that, but you also have--

10 1:39:06: But, you know, that's a problem, that--

11 1:39:08: Right.

12 1:39:09: --that can be a problem (unintelligible)--

13 1:39:10: But then you probably haven't had any complaints against
14 you.

15 1:39:12: No, I haven't--

16 1:39:13: But for those corporations who have had complaints, then
17 you run an investigation and you say, hey, now 97.3 percent of their workers go to
18 this clinic, then you could start interviewing, I know it'd take some manpower, but
19 start interviewing the people who were injured on the job to, you know, "How did you
20 get to this clinic?" "Well, me employer drove me." I mean, it wouldn't take that
21 much.

22 1:39:42: Yeah. Jennifer, you had your hand up awhile there.

23 1:39:44: Yeah, I just kind of wanted to make the comment about the
24 numbers and what we get in our office, okay, because there are workers that they
25 don't--they go, "Oh, I don't know, my employer just drove me here." I will agree that

1 nine times out of ten they're just happy to get to a provider that's going to be able to
2 fix them, okay, but for those that are having--are disgruntled about "Yeah, my
3 employer said, well, you have your choice, wink wink, but you're going over here,"
4 okay, I've told you you have your choice but you're going to go over here, I will say
5 the majority of the time--and it's all anecdotal, that, you know, we tell them, well, you
6 can--you can file a complaint that your employer, you know, if you feel your
7 employer is directing your care. You know what? These people are really just
8 focused on getting better and getting back to work and not losing their job, and they
9 got to pick their battles, and this just hasn't been one that they're willing to pick, but I
10 will say that putting that burden more on the employer and off of the worker,
11 because the way that it is now is that "Well, worker, you're told, you're told," well,
12 that puts it on the worker to say to the employer, "Although you did wink wink, I know
13 I can go and go seek my own provider." There are some folks that will say, "By God,
14 I know that, I'm going to go back and tell them you can't tell me where to go." I'm
15 talking even some pretty strong construction-- Not your people, I didn't mean to
16 point that way, that will say, "Well, yeah, I can go tell them off, but I'm not going to
17 pick that battle right now because I really just need this surgery authorized at this
18 point and I'm going to go forward on another issue."

19 I share that because 14, 12, whatever the number is, is a really small
20 number, but it's out there, and in my opinion the more employers that are ignorant
21 about it that can be educated about it, the less workers that will be forced into really,
22 excuse me, really being directed. Actually I do agree with Sheri, the ones that are
23 going--maybe not some of those clinics, but to some of them, they're happy that they
24 get to go down and go to that clinic, just like myself with my health insurance, you
25 know, I go down to the basement, I can get on the video, and I get it; that's the only

1 way I can go and do that that quick, okay, so it's not that going to occ-med is always
2 a bad thing for 100 percent of the workers, but those workers that are being told,
3 "Wink wink, you have your choice, but you're going over here," if they had somebody
4 else that could stand up for them and have the system put that burden on those
5 employers to do the right thing, I think that it would be a better approach.

6 1:42:41: Thanks, Jennifer. I think we're at a point where we were
7 supposed to--we have a scheduled break now, and I think we had an excellent
8 conversation. You've provided input that we can use.

9 1:42:58: So quiet.

10 1:42:59: Jaye?

11 1:43:00: I just had--just one thing. I think I guess we're--SAIF is
12 comfortable with adding something to the 801 where the employer acknowledges
13 because, you know, we attempt to educate our employers, but probably--I mean, we
14 insure 54,000 policyholders, and the vast majority of those, more than 40,000, are
15 small employers, so we work really hard to educate employers, but we can't do it, I
16 mean, with each one of them, touching every one of them is sometimes a challenge,
17 so we'd be comfortable with that, but we also would suggest maybe adding
18 something about the department has the ability to fine--

19 1:43:43: Yeah, right.

20 143:44: Uh-huh.

21 1:43:44: --in that little--that little statement, and I think that there's
22 room in the 3283, the added state, because it says that the worker, you know, you
23 have your choice, but like the--this lovely little pamphlet that goes out where it says,
24 "Remember, your employer cannot choose your healthcare provider for you," you
25 know, something that's more affirmative in the 3283.

1 And then finally I would like to personally say I am Jaye Fraser and, if
2 somebody has a worker who has been directed and is one of SAIF's insured, to
3 please let me know and we will go to the employer because we don't want
4 employers directing care, that's--we work very hard to make sure that that's not
5 happening, but we know--I mean, I would be really naïve if I thought that it didn't
6 occasionally happen, so I will--I will go and we will have that conversation because I
7 know we have not renewed employers who refused to comply with that, but we like
8 to have the conversation and train them first.

9 1:44:58: Okay.

10 1:44:58: Can I throw one other thing out there? If that penalty, that
11 penalty, how about, if there is a penalty found, that it goes to the worker and not the
12 state?

13 1:45:10: Thank you.

14 1:45:12: Exceptions (unintelligible)--

15 1:45:12: I don't know, we can certainly look at that, we'll have--we
16 have--

17 1:45:16: (unintelligible)

18 1:45:18: Yeah, we'd have to look at what--

19 1:45:20: I'm not sure we can do that--

20 1:45:21: We'd have to look at what we legally could do.

21 1:45:25: Yeah, that's a great idea.

22 1:45:27: No, no, she's serious, I'm serious.

23 1:45:30: And one more thing that, Lou, that I think that then there's a
24 poster that most employers are supposed to hang up--

25 1:45:36: Right.

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1:45:36: --maybe something in bold on the--on the poster, too--

1:45:39: Yeah, there is something there, actually--

1:45:40: But, I know, but it's--how many people? There--I mean, there--because we're really faced with so many things that we have for the worker to know, so many things for the employer to know, it's, yeah, calling out various things at various times and things get lost, that might be good.

1:45:59: There's so many posters you have to post, too--

1:46:00: No, I don't think the workers ever read them.

1:46:02: Yeah.

1:46:03: I don't think they do. They go to HR and HR explains their-- the (unintelligible).

1:46:07: If there's an HR department.

1:46:09: Oh, there's that.

1:46:11: We have two addition--we have two additional issues that we--that we really need to discuss with the committee this afternoon, very important issues as well, and I'd like us to take a 15-minute break now and then begin with those other two issues, and I don't mean to cut anyone off; I just know that we're not going to--we're not going to finish today unless we actually move on to those, but the information you provided on the direction of care issue's been extremely helpful, so if you can--we can get back together about 22 minutes after the hour, we'll get started then.

(off the record)

1:47:04: Okay, thank you very much, I think we're a slightly smaller

1 group now, so there's a lot of room at the table. I would encourage anybody who
2 would like to join us to come up and do so. Okay. We're on to issue number two,
3 which affects Rule 18 in Division 60; those are the claims administration rules. And
4 the subject is attorney fees for claim reclassification.

5 Under ORS 656.277 the Division may award an attorney a reasonably
6 assessed attorney fee when the attorney is instrumental in obtaining an order from
7 the Director reclassifying a claim from non-disabling to disabling. Insurers, however,
8 may voluntarily reclassify a claim or otherwise resolve a contested decision in a
9 notice of refusal to reclassify after a worker has appealed a decision but before the
10 Director orders reclassification. A stakeholder raised the issue that when this
11 occurs, the worker's attorney does not receive an attorney fee, even when the
12 attorney was instrumental in reclassifying the claim to disabling.

13 Some background. A simplified overview of the reclassification
14 process is provided in figure one, and again I think there might be some extra copies
15 of the agenda at the back of the room, but there's a flowchart, if that's--it's kind of a
16 graphic way to understand this issue.

17 Under Rule 18 in Division 60 a worker may submit a request to
18 reclassify a non-disabling claim to the insurer if the claim has been classified as non-
19 disabling for a year or less. Within 14 days of the worker's request, the insurer must
20 review the claim and either issue a modified Notice of Acceptance changing the
21 classification to disabling or send a notice of refusal to reclassify. If the insurer does
22 not respond within 14 days, the Director may assess a civil penalty and attorney
23 fees.

24 If the insurer sends a notice of refusal to reclassify, the worker can
25 request review by the Director, again under 656.277, the Director will issue a

1 Director's review order either reclassifying the claim or affirming the insurer's
2 classification decision. Either party can request a hearing on the Director's order.

3 Under ORS 656.277, which became effective January 1 of 2016, if the
4 worker's attorney is instrumental in obtaining an order from the Director that
5 reclassifies the claim from non-disabling to disabling, the Director may award the
6 attorney a reasonably assessed attorney fee.

7 In some cases, however, the insurer may voluntarily reclassify the
8 claim as disabling after the worker has requested review but before the Director
9 issues an order. In these cases the Director dismisses the worker's request before
10 the worker has already obtained--because the worker has already obtained the relief
11 requested and there is no substantive issue for the Department to review. The
12 language in the statute does not provide for an attorney fee to be assessed in these
13 circumstances, even if the attorney was instrumental in the class--reclassification of
14 the claim, because it is the insurer's action that reclassifies the claim, not an order
15 from the Director. It should be noted, however, that even when the attorney is not
16 awarded a fee under the statute, it is possible that a fee could be awarded under
17 656.262(11) if the delay in payment of temporary disability came as a result of a
18 refusal to reclassify and is found to be unreasonable.

19 We actually provided some data in a table here, I'm not going to go into
20 all the details, except to point out the order type 2349, that's a Director's
21 classification review dismissal order. Not all dismissal orders involve cases where
22 the insurance company actually changes its mind. Some of these could be claims
23 disposition agreements, what-have-you, but a sizeable portion of them are those
24 situations that we're actually talking about today in which there is no attorney fee
25 awarded.

1 The statutory change was enacted by House Bill 2764 in 2015, it
2 modified the circumstances under which attorney fees may be award and the
3 amount of attorney fees awarded under several statutes. The bill was intended to
4 ensure that workers attorneys were compensated for services performed while
5 representing workers. The Division is considering alternatives to improve the
6 workers attorney's ability to receive a fee when the attorney is instrumental in
7 reclassifying the claim to disabling after the worker has submitted a request for claim
8 reclassification review.

9 Alternatives other than, you know, the status quo, is amend Rule 18,
10 Section 6, to provide that an insurer may only voluntarily reclassify a claim on or
11 before the day the Director receives a request for claim classification review
12 establish--or establish a clear process for review of reclassification when the insurer
13 does not respond to the worker's initial request for review. That's actually a
14 somewhat separate issue and which I'll describe a little further down the page.

15 Alternative to would add language similar to Division 30, that's claim
16 closure and reconsideration rules, Rule 23 in Division 30, Section 1, which provides
17 that an insurer may rescind or correct its Notice of Closure prior to the expiration of
18 the appeal period for that notice and prior to or on the same day that the Director
19 receives a request for reconsideration of the Notice of Closure. This alternative
20 would establish a cutoff point where the insurer may no longer voluntarily reclassify
21 a claim after the worker has requested review by the Director and reduce the
22 number of dismissal orders.

23 There are concerns, however, that restricting the insurer's ability to
24 reclassify claims would delay payment of benefits to the worker. In many cases the
25 insurer has legitimate reasons to voluntarily reclassify a claim after the worker has

1 requested the Director's review. And under Rule 18, the accepted condition meets
2 the disabling criteria, the Director's classification review process takes around
3 50 days on average, and even if the Director issues an order reclassifying the claim,
4 the worker may still have to wait until the expiration of the 30-day appeal period to
5 receive compensation. On the other hand, increasing the likelihood that an attorney
6 fee will be awarded after the reclassification review may incentivize insurers to be
7 more proactive about gathering information regarding classification decisions earlier
8 in the process.

9 During analysis of this issue, the Division also found that because the
10 Director's authority to reclassify a claim stems from the insurer's refusal to reclassify
11 the claim under 656.277, current practice is to dismiss a request for classification
12 review if the insurer fails to respond to the worker's initial request for reclassification.
13 The Division would appreciate stakeholder input on what, if any, actions should be
14 taken to move the worker's request forward, in addition to penalties and fees
15 authorized under the statute.

16 So with that, that's the issue. Let's see here, is there more? No, that's
17 it. So the alternative, number two, we would appreciate your input on whether that's
18 an appropriate alternative to address the issue or whether other alternatives would
19 be appropriate to actually address the problem of providing no fees, even when the
20 attorney has been instrumental. Keith?

21 1:56:14: I just want to be a hundred percent clear that the trial lawyers
22 and plaintiffs counsel, claimants counsel in general, are not okay with any option
23 that's going to result in the delay of benefits to the injured worker. That is absolutely
24 not what we are asking for. All we are asking for is that the department adjudicate
25 when they're asked to adjudicate and adjudicate things to completion if the claim

1 was--should have been classified as disabling and qualified to be a disabling claim
2 on the date that the refusal was given. I don't quite understand why we can't just
3 take the process through to its conclusion when that's requested as opposed to
4 pulling the plug when the insurer says, "Maybe we've got another reason to
5 reclassify, maybe suddenly there is a work restriction that says we have to pay time,"
6 I mean, there's--fine, things can change after the denial. An insurer should be able
7 to reclassify if new information comes to light, but if on the date of the refusal they
8 said that the claim shouldn't be reclassified and the department finds evidence that it
9 should have been, I don't understand why we would just dismiss that and say that no
10 further action is needed.

11 1:57:22: So walk us through how this would work in terms of the
12 process.

13 1:57:26: I request an insurer reclassify a claim, the insurer refuses, I
14 bring evidence forward or start to bring evidence forward as part of that process that
15 demonstrates clearly that the claim should have been reclassified and that
16 reclassification shouldn't have been refused, perhaps somewhere along the line
17 when the insurer sees the strength of my evidence, they say, "Oh, yeah, okay, just
18 kidding. We did--we were going to actually reclassify that," the department should
19 continue that review and say that as of the date the refusal was given, the claim
20 should have been disabling, and therefore the insurer was ordered as of that date to
21 reclassify the claim, pay an attorney fee.

22 I don't see why an order can't be given even though someone has
23 already agreed to do something. Yeah, we've agreed to voluntarily do it, but what if
24 we don't? Why can't an order still be-- Can't an order still issue even though
25 someone's voluntarily agreed to do something? I mean, when we have voluntary

1 rescissions of denials, there's an attorney fee for that, so maybe we add some
2 administrative rule language that says this is treated the same as voluntary
3 rescissions of claims denials.

4 1:58:39: Yeah, and I think we received--we received a letter that kind
5 of--that was kind of--walked us through this. So is the argument that there's not--that
6 it's not moot or that in for--or that because it's voluntary, it's not final?

7 1:59:02: The disp--well, both--

8 1:59:04: Okay.

9 1:59:05: Both. I mean, the dispute is being adjudicated based on the
10 day that the denial was issued and not just based on what develops afterwards, so I
11 don't understand why a subsequent agreement that "Oh, no, actually we didn't--we
12 were not going to continue fighting this," why that renders an issue moot; that
13 doesn't--that doesn't render the issue moot, because there's two issues. One is
14 getting the order and an order that can't just be, you know, somebody can't go back
15 on, but the other issue is the attorney fees. It's not a moot issue. There's another
16 issue to be decided, and we're not just--we're just not deciding that issue; we're
17 saying, oh, we don't need to decide that issue anymore. I disagree. I mean, I
18 understand that there's a desire to facilitate, keep things going smoothly. I support
19 that mission of the Department and I think the Department does an excellent job of
20 that, but there's got to be a distinction between where we have our facilitator hat on
21 and we're just trying to get the dispute resolved and we've got our adjudicator hat
22 on, we've been asked to issue an order, and now we're deciding not to complete that
23 process through.

24 2:00:10: So do you think that the Department needs to amend its
25 current rules or that we could actually do what you're suggesting now without an

1 amended rule.

2 2:00:19: Both, both. I would like to start doing what I'm suggesting
3 now without an amended rule and I think that we can, but I would also like to see the
4 rule be amended so that policy doesn't vanish in the future at some point.

5 2:00:33: So we did--we did consider that as an option in our initial
6 analysis, and one of the reasons why we dropped it, and this is not a final answer at
7 all, but part of our analysis, we were concerned about the narrowness of the
8 statutory construction of .277(1)(b), which says that if the worker's represented by an
9 attorney and the attorney is instrumental in obtaining an order from the Director that
10 reclassifies the claim from non-disabling to disabling, the Director may award an
11 attorney fee. And there's been some case law in other ways, in other places that
12 says when the Director, you know, does an action after an action has already been
13 taken, it's no longer the Director's order that's would be reclassifying it, so we're
14 worried that, you know, our authority to award the fee only stems from the act of
15 reclassification--

16 2:01:41: That's fair.

17 2:01:42: And if the reclassifications happen, then anything we do is
18 not going to allow us to award a fee anymore, so--

19 2:01:51: I'd ask that you allow the practitioners that are being affected
20 to try to vindicate the Department's authority in that regard, and if the Department,
21 you know, ends up--

22 2:02:02: Yeah.

23 2:02:03: --not having that authority, then we will look at taking that in
24 front of MLAC, but we'd like to at least have the opportunity to make those
25 arguments and see if that does produce a fight. Maybe it would, but I guess I--when

1 the Department--the Department ordered it, the Department ordered it. I mean,
2 whether that's what was essential to getting the result is the Department's order or
3 not, I don't see that as necessary. As long as the Department's ordered it, then the
4 Department's--you know, then the criteria for an attorney fee, I think, is satisfied, and
5 I think it's just--I mean, you know, I hope that it's relatively easy enough, you know, I
6 mean, I hope that people are bringing--I mean, I don't just ask for department review
7 of a refusal to reclassify unless I've got some evidence that it should be reclassified,
8 I don't expect the Department to put that together for me, so, you know, ideally I'm
9 bringing new evidence that you can issue an order relatively easily based on what I
10 brought forward, so I'm hoping that it wouldn't be a whole lot more of an
11 administrative burden to see that process through based on what the attorneys
12 presented, and if they don't come with enough evidence, then, you know, then
13 maybe that doesn't trigger an attorney fee.

14 2:03:18: Ted, and then we'll go to Diana.

15 2:03:20: What--you said there was some authority set--precedent out
16 there that suggests that the WCD's authority was limited to issuing an order or list--
17 or saying they can't reclassify, saying--

18 2:03:31: Yeah.

19 2:03:31: --we'll take an action that's already been taken by--

20 2:03:36: Yeah, it doesn't necessarily affect this issue, so there was--
21 there was some case law on reconsideration, I think there's a case, it's Warren Bull
22 (phonetic), so it's not in this area, but that was kind of where our concerns stemmed
23 from, so there is no legal case law that says--

24 2:03:57: Right, okay, that was my--

25 2:03:59: --that we cannot issue an order--

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2:03:59: --my analysis of the case law--

2:04:03: Yeah, but that's why we were concerned about it, so--

2:04:08: Right, and so I understand the--I think the construction of the statute that you identified is reasonable and that it requires an order of some kind reclassifying the claim. What that doesn't really translate very well to me is why the Division has decided that it cannot issue an order reclassifying the claim. That seems to me, well, my personal opinion is that they don't get to dismiss it, but even if you think the Division has authority to dismiss it, you still get to choose which path you want to take, and I don't see any necessarily legal guidance other than internal policy discussions about which path you get to take. You can still issue an order reclassifying the claim. The requirements for whether the claim is disabling or not have nothing to do with the modified Notice of Acceptance, so they are--whether temporary disability is due and payable, whether there's an expectation of a permanent disability, or whether there is permanent disability, time limitations, nothing in the rules, nothing in the statutes say, well, once the employer issues it, it's disabling. In fact there's a rule to the opposite saying that once an employer issues a modified Notice of Acceptance and classifies the claim as disabling, they can take that back, they can change it back to non-disabling if evidence supports that, so the notion that, like, mootness is in play here is, I think, wrong both legal, because of my authority analysis, but also on a factual basis that you can't really find a case moot when the order would have set those rights, you know, in stone, pending appeal of course, versus "Oh, we're just going to do this, get rid of it," and now--nothing's stopping us from, you know, redoing it or taking it back. That's kind of the purpose of adjudication and litigation, in my opinion, is that finality, so...

Yeah, one thing I didn't add to my letter that I'll add right now is sort of,

1 you know, my personal process of how I approach a reclassification issue. When I
2 request reclassification initially from, you know, from an insurer, I go that--I base that
3 on my client's word. "Yeah, I was off work, I didn't get paid."

4 I'm like, "No problem. We'll send off the request."

5 You know, the insurer has that 14 days once the--getting the request to
6 sort of look at the record, decide if there's an authorization, decide if they're off work
7 or not, and they get to make that decision. They can reduce or they can reclassify.
8 If they don't, if they refuse, then I get that. Then I look at the file and be like, all right,
9 I'm going to build my case, like he said, I'm going to look at the record and let the
10 records decide if there's an authorization, decide if it's, you know, related to work.
11 And then I'm going to request review and I want--I want a decision made based on
12 the evidence at that point.

13 One of the cases that I have currently, the only document in the entire
14 record after a request for review was a Notice of Acceptance, a modified Notice of
15 Acceptance. That's it. The order was one line, and that dismissed it, and it didn't
16 explain why, there was no medical evidence in the--in the--you know, in the record
17 for their actual decision to be made on, and I was just, I looked at it, and I was just
18 incredulous that that could happen, that one document could kill the entire process
19 without any other kind of analysis, so that's why I'm look--you know, I brought the
20 issue and I'm fired up about it.

21 2:07:27: All right, Diana.

22 2:07:29: I think Ted covered most of the things that I was going to ask
23 most (unintelligible) precedent what it really applied to. Workers' Compensation is
24 not my area of practice. I did have sort of maybe a silly logistical question because
25 it's not my area of practice. When an insurer opts to reclassify during that period,

1 what is the effective date of that reclassification? Is it the day that the insurer
2 decides or does it reset back to the date of initial denial? Because I can see there
3 being a distinction between, okay, well, you know, you denied them on this day,
4 during this period of time you've changed your mind, and--but you're only going to
5 start, you know, a week from that because you've seen Keith or Ted's evidence and
6 you now realize that you made a terrible mistake that you don't want to deal with, but
7 there's that person's still only getting the benefit from that start date. Well, they get
8 the Department to, say, make a decision then they--and they reset it to the initial
9 date of denial, you know, saying that your benefits are run through that whole period,
10 I can see how that argumentatively in my, at least my mind, would trump any sort of
11 questions about whether or not the Director specifically ordered the classification--
12 reclassification because really theirs should trump it because it's for a wider period of
13 time.

14 2:08:50: Yeah, and I think that's two questions, so--

15 2:08:54: You don't actually have to answer it--

16 2:08:56: Right, yeah, and there is this kind of--I mean, it is difficult
17 because it's a two-step, I mean, process of the classification and then the
18 determination of compensability and what the period of compensability is, so--

19 2:09:13: Chris, just from an insurer's perspective, reclassification after
20 we've issued a refusal to reclass and then it goes to the Department is usually what
21 happens in these requests is we'll get a request six, nine, ten months after the date
22 of injury saying this is a non-disabling claim, my client's been working but isn't
23 working at full hours, full wages; therefore, there might be temporary partial disability
24 due. So we have 14 days to essentially gather payroll records going back
25 10 months, calculating an average weekly wage, seeing if TPD is due for any of

1 those two-week time periods throughout, which just to get the payroll records from
2 the employer in 14 days might be hard, depending upon the employer. Some, you
3 know, two minutes later it's emailed to you; others, a month later they're saying,
4 "Well, we need to go to our payroll service to get this information," so that might be
5 the reason why we refuse and then, after the request gets to the Department, we go,
6 "Oh, we finally got the payroll, we've determined that temporary partial disability is
7 due, and we don't want to delay benefits any longer. We're reclassing and we're
8 paying that temporary partial disability."

9 If we do refuse and then we later reclassify, it's not from that start point
10 forward; it's from the point we reclassify clear back to the date of injury, that entire
11 time period becomes disabling, and for any time period that there was a modified
12 work release or a complete off-work slip, we need to determine whether or not TTD
13 or TPD was due for any of that time period, and then from the reclassification
14 forward we have 14 days to get that paid and then keep it current, so, you know,
15 that's what we're looking at is we have 14 days. You're saying the Department
16 sometimes takes up to 50 days, you might understand the difficulty we have when
17 we're saying, "Hey, can you reclass this?" and we're going to the employer saying,
18 "We need your payroll, we're going to a doctor that's saying you haven't sent us
19 medical reports in two months. We didn't even know the worker was still treating.
20 What's going on?" and we're gathering all of this information, so that's kind of what
21 we're dealing with.

22 2:11:47: And I just want to make it clear from SAIF's standpoint, we
23 don't want to see anything that will delay benefits either. You know, I just--that's--
24 that for us is the most important part of this conversation, but it's not because when
25 we do turn around and then accept the reclassification, it's not because we've said,

1 "Ooh, look, there--you know, now they're going to really hold us to it, so we're going
2 to do something." It's more because there is information we had to gather. It's not
3 quite as simple as it seems maybe at first blush.

4 2:12:24: So I think it's a general consensus, and if anybody disagrees
5 you can speak otherwise, that the alternative presented here is off the table.
6 Nobody wants to see workers benefits delayed. We don't either; we just--this was
7 one technical fix that we identified and we were presenting it and hoping for
8 discussion. So-- Yeah, and the second ish--the second alternative which has been
9 brought forward of issuing an order based on either the time of request for review or
10 based on the modified Notice of Acceptance that's issued after, which I think, Ted,
11 you'd--

12 2:13:16: Well, yeah, I mean, I think that you can issue an order based
13 on essentially a concession as to the fact, that the claim is disabling, so you can
14 then say, all right, well, it looks like one party's conceded this point, so I'm going to
15 issue an order finding that the claim is now disabling. Not saying that the claim's
16 already been reclassified and so we can't do anything; I'm saying based on that--
17 Because really, like I said, I mean, you know, sometimes an order is sought because
18 we want final findings of fact, and so, you know, it seems perfectly okay to me to say
19 that, all right, one or more of these factual scenarios has occurred because the
20 insurer has conceded, one party has conceded that they concur, and then you can
21 issue an order based on that. Not issue an order because it's been reclassified;
22 issue an order because it's been conceded that it is disabling. And that may be a
23 semantic difference, but I don't think it is. That would be my suggested alternative.

24 2:14:16: So essentially stippling to it--

25 2:14:19: Yeah, other than it's--other than it's unilateral, I assume you

1 could probably stip to that, you know-- Well, if we're talking about a unilateral
2 process, it wouldn't be a stipulation necessarily.

3 2:14:30: Well, because it--

4 2:14:30: Frequently you would, though, I mean--

5 2:14:31: Yeah.

6 2:14:31: --the practical implication of what we're talking about here is it
7 gives rise to an incentive to say what's a reasonable attorney fee? Can the parties
8 work that out? No. If not, then we need an order as to what that is. But I imagine
9 the outcome of this, knowing that an order will issue one way or the other, will be
10 that we'll just stipulate to a reasonable fee. And, you know, some of these take more
11 time than others, some of them take relatively little time because the evidence is
12 right there in the record. You know, I mean, we're sympathetic to the timelines that
13 insurers are under and some are more responsive than others, quite frankly--

14 2:15:09: Well, and--

15 2:15:09: --and some go get the evidence--

16 2:15:11: Yeah.

17 2:15:11: --and do the leg work; others, we have to do all the leg work--

18 2:15:15: Yeah, I understand that--

19 2:15:15: --so it's just, I mean, it's across the board, so it's--

20 2:15:16: Well, and I think the statute says that when you're
21 instrumental, and I ask--so that becomes one of those "What does that mean?" But
22 is it possible that there would be a way to--for the insurer to say, "We're gathering
23 information," and to, you know, to give us kind of the benefit of the doubt so that if
24 we communicate with claimants counsel and say, "We're working on it," I mean--

25 2:15:45: I think that's a case-by-case thing. I mean--

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2:15:47: Well, yeah.

2:15:47: --if I got that call frankly from Allison, I would listen to what she had to say, and if it wasn't going to be detrimental to my client's rights, then I would--you know, I might agree to a reasonable extension. You know, if I didn't have a good track record with someone, maybe I'd be less likely to do that, but certainly that can be done and that can be done--that can currently be done. You know, there's nothing that suggests that we can't, you know, even before I go and haul off on day 14 and request a dispute, you know, that I couldn't get a phone call two days earlier and say, "Hey, you know, we're working on it, we've almost got it, you know, just let me have another couple days," and, you know, I'm--

2:16:25: Okay.

2:16:26: That would be fine with me as long as the client's not suffering.

2:16:32: I think when--

2:16:33: If I may insert?

2:16:34: We got somebody who was just about ready to talk, so hang on.

2:16:38: So I think when--

2:16:39: Okay.

2:16:40: --this attorney fee statute was passed last legislative session, right, we had a public meeting like this to talk about whether attorney fees needed to be--when they're appropriate, and I think that middle ground that Jaye was kind of talking about is we're looking for is that 50 days when the Department's gathering, saying they do have 14 days to make their initial determination of a refusal or to reclassify then, but allowing extra time for the employer to keep looking for that stuff

1 even if there is a claimants attorney involved, if they get it reclassified quickly, then
2 that--no attorney fee would be awarded, but if you're sitting on your hands not doing
3 anything waiting for the Department to issue, that's when it's appropriate for a fee to
4 come in.

5 2:17:33: Okay, there was someone who wanted to talk on the phone.
6 Go ahead.

7 2:17:37: Yeah, that was Tim at ComPro. In a way, this kind of stems
8 from a subject yet to be discussed, but I recall a claim in the last year, single
9 instance, where the Department, it was either Department or hearings ordered that a
10 claim was disabling as a result of counsel's efforts. And when that claim arrived on
11 my desk for purposes of calculating second job time loss, it occurred to me that in
12 fact the primary claim was not disabling, although it had been ordered so. The
13 benefits the worker was seeking were second-job time loss benefits and that brought
14 me to what I'm staring at right now, which is ORS 656.210(2)(c), which says
15 notwithstanding that a worker may have another job, a claim is not disabling if no
16 temporary disability is due and payable for time loss from the job at injury. And I
17 think whether it was by Department order or an ALJ's order in that particular case,
18 they got it wrong. The claim was in fact non-disabling, although the worker lost time
19 from a second job.

20 2:19:30: Thanks, Tim. But that'd be subject to appeal by the parties,
21 though, right? I mean-- Yeah.

22 2:19:37: And they did not appeal. Counsel wanted his share of his fee
23 out of those supplemental benefits that were ultimately obtained, but the problem
24 comes back to the delay in payment to worker while that order was pending as well.
25 Even after ordered, it still couldn't be paid until they referred it over for second-job

1 time loss.

2 2:20:08: Thanks, Tim. I don't know if this is really a separate issue in
3 its own way. I mean--

4 2:20:21: In a way, but I think if the Department's analyzing the issue
5 you're discussing directly, this also should be considered in the process of that
6 analysis, it could have pushed that claim more quickly to the direction it should have
7 gone.

8 2:20:42: Okay. Thanks, Tim.

9 2:20:44: I'd just quickly respond to Kevin. Somewhat these points
10 about the 14-day, I'm pretty sympathetic that it's sometimes hard to get information
11 from anyone in 14 days and sometimes people even a longer period, and I
12 personally would be, you know, willing to sort of extend that deadline if I was asked
13 and not pursue like a penalty for not refusing to reclassify a claim within that 14 days
14 if, you know, the circumstances warranted it, sort of what Keith said, but I don't think
15 that that justifies just ignoring that, issuing a refusal to close, allowing a request for
16 review, and then deciding that you have enough information to reclassify a claim.
17 You can do that, but I don't think that somehow excepts you in the statute. The
18 statute sets the deadline of 14 days.

19 So I don't think when they were drafting the statute, and I admit that I
20 have not looked up the legislative history behind it, but I don't think they would have
21 put that requirement in there and then said, "Oh, but, you know, we understand it's
22 going to take longer, and so we're going to let them reclassify a claim and avoid an
23 attorney fee if they refuse to classify within 14 days but then reverse their decision
24 once review is requested," I mean, I don't, I just don't--that doesn't make a lot of
25 drafting sense to me, so I would think they'd be at least more explicit or structure it

1 differently entirely if they were intending to sort of do that, so I'm sympathetic to
2 (unintelligible), but I don't think that has anything to do with whether an order should
3 issue or not. That's a separate--

4 2:22:13: I agree, that's a completely separate issue that's a statutory
5 issue and it doesn't real--I mean, I understand kind of the request and it would be
6 nice if insurers had a grace period and kind of had the 14 days but then had a little
7 bit more time, but that's not the way the law reads and, you know, if that concept
8 wants to be advanced by someone, that's fine, but that's an MLAC issue and, you
9 know, we're talking about what the Department does with issuing these orders.

10 2:22:38: So you don't think the department would have the authority to
11 grant an extension of time once the--once it comes to us?

12 2:22:46: I don't think the rules provide for that; I mean, I think that's
13 really between the parties. The rules say the insurer has to make a decision within
14 14 days, the rules say if the claimant disagrees with that decision, they can request
15 an order from the Board or from the Department. Where we're breaking down is
16 whether the Department's actually going to go and issue the order once it's
17 requested or whether they're going to stop at some point in that process and say,
18 "No, we're not going to issue an order, we're going to dismiss it" or "We're, you
19 know, just not--you know, this is moot now." We're just asking that we complete the
20 process; once we request the process be started, we request the process be
21 completed, period. We ask--we're just asking for an order, that's all we're asking for.
22 Once we get an order, if the fees are unenforceable somehow by some fiat of
23 statutory construction that one of our colleagues can come up with, fine. All we're
24 asking the Department to do is issue the order. That's it.

25 2:23:44: But Keith--so, go ahead.

1 2:23:46: I think it was--I was just going to tag on about I don't have a
2 problem, you know, as somebody who sat in with OTLA when we were talking
3 about, you know, the attorney fees changes last legislative session, I don't have a
4 problem with attorneys getting fees for work that they're doing, and I think for me I
5 think there is a problem with the statutory construction, unfortunately, because it
6 says when, you know, when the Department issues the order making the claim, you
7 know, reclassifying the claim as (inaudible) and it is a very precise phrase that I think
8 that--I don't think that it's as easy to gloss over, but again we can argue about all that
9 later, but to Keith's earlier point about, you know, them getting fees where they are
10 instrumental in--you know, when they go and develop the evidence that shows that it
11 is a disabling claim in fact, then I don't--I don't have a problem with them getting paid
12 for that work, even if it isn't necessarily something that under the--you know, the
13 clear statutory construction of .277(1)(b), I don't--I don't think it's necessarily bad to
14 track the compensability litigation where eventually we agree that, yes, it is a
15 compensable claim, so the only thing remaining is to talk about the attorney fee, but
16 again that has to go back to the word instrumental in there, and when we're talking
17 about whether the attorney's instrumental in effecting that change, I think that it
18 would be at least fair to have the ability to present evidence to a fact finder as to, you
19 know, what really led to this decision? Because there's plenty of times where I
20 worked on something where, you know, I'll look through the entire thing, I don't see
21 any time loss authorization, I don't see any expectation of PPD, and then so we
22 issue a refusal to reclassify, and then a week later the doctor says, "Actually, change
23 of plans, I'm going to do surgery on this person," and at that point the door is wide
24 open and we have essentially a claim that probably is going to be disabling now, and
25 so in a situation like that where it's something where they've asked us to look at it,

1 we say no, they request a hearing, and then the doctor says, puts in something like
2 that, as I read the statute, that would not be a situation that would--

3 2:26:36: So the question is what's the support, what's the supporting
4 document? The doc--what's the documentation that causes the change in the
5 decision?

6 2:26:48: Yeah, I mean, it's close to that, I think--I think I see it a little
7 bit differently as is this--is this something--is this--is this something that is being
8 changed due to--

9 2:26:59: Yeah.

10 2:26:59: --at least in some part by something that claimant's attorney--

11 2:27:03: As opposed to--

12 2:27:04: As opposed to just something that came in--

13 2:27:06: In to you.

14 2:27:07: In to us or was just sent in from a medical provider that
15 changes the picture of the claim so that it is now disabling.

16 2:27:14: Is that--how does that square?

17 2:27:17: That makes sense to me. I mean, I don't env--I envision that
18 being a different situation. Again I envision, you know, to some extent that we're
19 looking at the date the insurer refused. I mean, if we develop subsequent evidence,
20 I mean, I don't know, I guess sometimes we might develop, we might have the
21 insurer refuse based on no expectation of permanent impairment, and then we go
22 and talk to the doctor and the doctor says, "Oh, yeah, I do expect permanent
23 impairment," so, I mean, I guess in theory there could be a situation where new--but
24 that's a situation where the claimant's attorney solicited that--

25 2:27:50: Right.

1 2:27:51: --so that's a different situation, that's not just happenstance;
2 now the claim happens to be disabling because the doctor now wants to do surgery,
3 yeah, no, I would agree that there could be some dispute over, you know, you could
4 do it in writing, you could--you could probably appeal, I mean, I--at least I imagine
5 that you would be able to appeal this order if the attorney fee seemed excessive.
6 You know, if the attorney really didn't appear to have done anything, then, you know,
7 the attorney fee shouldn't be huge.

8 2:28:20: Or another one where you have, you know, doctors saying all
9 along range of motion is normal, but then if you were to develop something saying
10 actually it looks like he's got about, you know, 10 degrees loss of motion, you know,
11 in his shoulder or something like that, like clearly that's something that changes the
12 picture and that's something that you develop, but--

13 2:28:37: I mean, well, so you're talking about instrumentality of an
14 attorney and what (unintelligible) the case, but you're also talking about this sort of
15 distinction about when the dispute started versus whether the claim is ultimately
16 going to be disabling later, and I know--and I've looked at this issue and it's not
17 always clear whether, especially with medical services types of situations,
18 new/omitted conditions, it's not always clear that the Department or the Board is
19 always focusing on when the dispute is raised, when the Request for Hearing is
20 filed, whether the request for administrative review is filed; it's my opinion that it
21 should be.

22 2:29:15: I agree with you.

23 2:29:16: And so in that case, that should resolve a lot of that because
24 if, you know, you need an opinion, you get an opinion from a doctor saying, "Yes, it
25 was disabling" or "The range of motion was less, even though I didn't record it, it

1 was, you know, lacking," before the request for review was filed, that seems to go to
2 that issue, whereas if they require, you know, "Oh, he's going to have to have
3 surgery now," months or--you know, after the request for reclassification was made
4 or something like that, that seems different. It wasn't disabling at that point, maybe
5 it'll be disabling at the time of surgery, if he, you know, was off work for surgery or
6 something like that.

7 That seems like a good way--a way to divide that sort of dispute. We
8 don't--well, I don't file disputes that I don't think are worthy of administrative review. I
9 plan on winning, when I, you know, I think every attorney plan on winning when they
10 file a dispute. Mmm, not every attorney. But, you know, I mean, there's a dispute
11 there, I've looked at the file, I think it's worth filing a request for review, and I want
12 that decided based on the time that I--you know, the dispute arose. You know, I'm
13 not going to be searching for trying to make that claim disabling now; I'm arguing
14 that that claim was disabling when we first requested it be disabling. So I think that
15 maybe will help divide that issue up a little bit. You still have the instrumentality
16 problem and I agree with Keith that I think, you know, attorneys need to do work, get
17 paid for the work they do. If they don't do any work, they shouldn't get paid.

18 2:30:41: Do our current rules allow for the Department to make that
19 assessment or do they need to be (unintelligible) that?

20 2:30:49: There's nothing prohibiting us from making that assessment--

21 2:30:53: Well, yeah, I just, I'm--

22 2:30:58: I don't know, I don't know that I have an answer for you just
23 sitting right here, honestly.

24 2:31:01: Okay.

25 2:31:02: I can look into that.

1 2:31:03: Yeah, there's nothing prohibiting from us doing it, I
2 understand, but is it--would it be useful to have language or do you think we--

3 2:31:10: The instrum--about instrumentality? This statute has been
4 interpreted. I know that I think there was actually a recent Court of Appeals decision
5 on instrumentality under .386 that--and I know the Board had instrumentality issue at
6 least several times in the context of a .386 assessed fee for overturning a denial,
7 but, yeah, I don't--I don't know.

8 2:31:41: I think this is a little different than the denial-- Is the attorney
9 fee for the denial, does it say instrumental in rescinding the denial or is it
10 instrumental in obtaining--

11 2:31:52: Yeah, I'm only talking about the definition of instrumentality or
12 instrumental, and so, yes, there's a difference between rescinding the denial and
13 reclassifying the claim and, you know, the statutes are written a little bit differently,
14 so I'm not talking about that portion of it; just the instrumentality definition was what I
15 thought we wanted to define by the rule.

16 2:32:12: There was another component to this issue, and I don't mean
17 to cut off talk, discussion, on the first part, but we'd appreciate your input on
18 establishing a clear process for review of reclassification when the insurer does not
19 respond to the worker's initial request for review, because currently we dismiss
20 those, right?

21 2:32:34: Yeah, that's also another case where we would--yeah, my
22 understanding is that we dismiss because there's nothing for us to review upon and--

23 2:32:42: And that's even more astounding to me, actually.

24 2:32:46: I mean, I understand--

25 2:32:47: I mean--

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2:32:47: --that we (unintelligible).

2:32:48: It sounds to me like that's a situation where the employer or insurer is clearly ignoring the law and the Department--

2:32:57: Well, we would issue--we can issue a penalty in that case--

2:33:00: Okay.

2:33:00: --but we--

2:33:03: The claim wouldn't be--

2:33:04: --do not review the reclassification--

2:33:05: The reclassify, yeah, it doesn't help the worker because they're the ones waiting for time loss or waiting for whatever other benefits would flow from the reclassification. I guess again I would like to see these provisions mirror the compensability when we're talking about compensability disputes and we're talking about denied claims. I mean, there is a procedure, we've already got a well worn procedure for when responses aren't given and it becomes *de facto* status that it's the requested relief is denied and then we adjudicate based on the assumption that it was denied, and if that's a mistake, then the insurer comes and says, "Oops, we missed a deadline. We'll go ahead and reclassify this. How much do you want for a fee?" and then we get that taken care of, but, yeah, I mean, if people know that that's just going to get dismissed if they--I mean, maybe penalized, but, you know, it's not going to move the process forward, I don't see that that provides any incentive to follow the law, so... But I guess I would--I would like to see a clear process, I would like to see some amended rules just to make it clear that the Department does have that authority to move forward in that situation.

2:34:19: So like a *de facto* refusal?

2:34:21: Yeah, something that, like I said, kind of--kind of mirrors the,

1 you know, if it's beyond 60 days for a request to accept a condition, then it becomes
2 in *de facto* status, and if it's later rescinded, the denial's later rescinded, then that
3 gives rise to a fee.

4 2:34:39: So, Keith, I think the only problem with that as things
5 currently stand is that there's no statutory function that allows it.

6 2:34:49: Right. So it may be, I mean--

7 2:34:51: There is under .386.

8 2:34:53: It may be, I'm not sure, I'm not going to--I can't agree or
9 disagree with that--

10 2:34:57: Yeah, yeah, yeah, yeah, yeah.

11 2:34:58: --but I--you know, there may be issues like that that, you
12 know, that need--you know--

13 2:53:03: Right, right.

14 2:53:03: --that we're going to address this issue, it may be a bigger
15 issue than just rulemaking.

16 2:35:09: I would really like it if we didn't have to open up the statute at
17 the capitol. I just would (unintelligible).

18 2:35:19: I think we're in complete agreement on that because it
19 wouldn't be done until 2019 anyway, so--

20 2:35:25: Yeah, and then who knows what's going happen then?

21 2:35:27: Yeah.

22 2:35:28: I mean, who knows what happens the minute you open it?

23 2:35:34: But that's probably, that obviously is something the
24 Department will want consider in deciding how to approach this issue. I just think for
25 purposes of continuity across, you know, it just, it creates, you know, you understand

1 how this one's going to work, you understand how that one's going to, you
2 understand how this, you know, it just makes it a lot easier for practitioners on both
3 sides to know what to expect out of the process.

4 2:36:59: Any last thoughts before we move on to our final issue?

5 2:36:05: The only thought I have, Fred, is that on this last little, little
6 piece is it shouldn't be less expensive for an insurer to ignore the request for
7 reclassification than paying the time loss or whatever's owed. I mean, I just
8 fundamentally it's just not the way that our system is supposed to work, so if the
9 Department can find a way to move that forward, that would be good (unintelligible)--

10 2:36:38: Thanks, Jenn. Okay. Issue number three, our final issue.
11 This affects Rule 35 in Division 60, notice of worker--notice to worker of eligibility for
12 supplemental disability benefits. The issue is that under Rule 35, an insurer is not
13 required to notify a worker of a determination that the worker is ineligible for
14 supplemental disability until the insurer has received verifiable documentation of the
15 worker's wages from their secondary job. It is unclear if the issue--the insurer has a
16 responsibility to inform the worker that they have been determined to be ineligible for
17 supplemental disability benefits in other situations and when the worker's appeal
18 rights begin and end when notification is not provided.

19 Some background. Again there's an illustration, figure two, it's a
20 flowchart, kind of another way to look at this particular process. There are several
21 scenarios where the insurer may determine that the worker is ineligible to receive
22 supplemental disability benefits. One, the worker does not provide notification of the
23 secondary job to the insurer within 30 days of the insurer's receipt of the initial claim.
24 Two, the insurer or service company determines the worker is already receiving the
25 maximum allowable benefit under 656.210 based on the wages from the primary job

1 prior to the request for verifiable documentation. Three, the worker does not provide
2 verifiable documentation of their wages from their secondary employment within
3 60 days after the insurer's request or the insurer service company or assigned
4 processing administrator determines the worker is ineligible for supplemental
5 disability based upon the worker's verifiable documentation.

6 Rule 35, Section 5 provides that within 14 days of receiving a worker's
7 verifiable documentation of wages from a secondary job, an insurer or assigned
8 processing administrator must determine the worker's eligibility for supplemental
9 disability and communicate the decision to the worker and advise the worker how to
10 appeal the decision.

11 In the request for verifiable documentation, the insurer is required to
12 inform the worker that they will be determined to be ineligible if they fail to respond,
13 but it is not clear what, if any, responsibility the insurer has to notify the worker after
14 such determination has been made or when the period to appeal the determination
15 begins or ends. It is also unclear when the worker should be informed of an
16 eligibility determination that occurs before the request for verifiable documentation is
17 sent.

18 I'm dropping down the page just a little bit here into the third
19 paragraph. Under 656.210(2)(b) the verifiable documentation must be received by
20 the insurer or self-insured employer or assigned claims agent for a noncomplying
21 employer for the worker to be eligible for supplemental disability benefits. This list
22 does not include an assigned processing administrator, yet the worker is directed to
23 send the verifiable documentation to the assigned processing administrator in the
24 notice under 30--Rule 35, section (3), subsection (c), the requirement for assigned
25 processing administrators insurers to cooperate and share documentation to

1 coordinate benefits. And Section (18) may be sufficient to establish that if the
2 assigned processing administrator has received the documentation, the insurer
3 should as well, but it is unclear that this is true in practice. The Division would
4 appreciate any additional suggestions to make the rules more consistent with the
5 statute.

6 So the alternatives for the committee to consider are making no
7 changes or amending Rule 35, Section 2 to require that the ins--require the insurer
8 to notify the worker of the determination that the worker is not eligible for
9 supplemental disability benefits because they are already receiving the maximum
10 under 656.210 and then their right to appeal within 14 days of that determination.

11 Remove Section 2 and require the insurer to make an eligibility
12 determination only after requesting verifiable documentation from the worker and
13 follow the notification procedures in Section 5.

14 Amend Section 5 to require the insurer to notify the worker of the
15 ineligibility determination and of their right to appeal within 14 days after the end of
16 the 60-day period after the request for documentation or within 14 days after
17 receiving verifiable documentation.

18 Amend Section (3) subsection (c) to provide that the notice sent to the
19 worker must advise them to send the verifiable documentation to the insurer and the
20 assigned claims administrator.

21 Amend that same subsection (c) to require the worker to send
22 verifiable documentation to the insurer and require the insurer to forward it to the
23 assigned processing administrator.

24 Or finally, amend Rule 18 to clarify that the assigned claims processing
25 administrator is responsible for providing the insurer with the verifiable

1 documentation.

2 Some discussion. The Division did not consider any alternatives that
3 would require the insurer to notify the worker when they are determined to be
4 ineligible for supplemental disability because the insurer does not receive notice or
5 knowledge of the worker's employment at a secondary job. All alternatives seek to
6 inform the worker of the determination of ineligibility and the reasons why the worker
7 has provided notice of the secondary job under scenarios two to four.

8 Alternatives two and three would inform workers of their ineligibility for
9 supplemental disability if they are determined to already be receiving the maximum
10 benefit under 656.210. Informing the worker of the reason why their request is
11 denied in these cases will reduce the likelihood of confusion and litigation later in the
12 claim and clearly communicate what benefits the worker can expect.

13 Alternative two could be issued through a separate notice or by
14 including the eligibility determination for supplemental disability in the Notice of
15 Acceptance. It may be desirable for the insurer to request verifiable documentation
16 in every case they have knowledge of secondary employment, as suggested in
17 alternative three. However, the increase in reporting may increase administrative
18 costs to the insurer with limited benefit to the worker.

19 Alternative four would reduce uncertainty about the timing of the
20 appeal period by providing the worker a notice of determination they are ineligible for
21 supplemental disability because they did not provide the requested verifiable
22 documentation within the 60-day timeframe. While the worker is already provided
23 notice of the consequences of not providing the documentation, under Section 3,
24 providing notice after the determination has occurred may improve transparency in
25 the process and give the worker to appeal in a timely manner.

1 Alternative five through seven address the secondary problem of
2 meeting the requirement and rule in statute, section .210, subsection (2)(b).
3 Alternative five or six would be most consistent with the statutory requirement for the
4 documentation to be received by the insurer, but alternative five would add some
5 cost to the worker. Alternative six would not add costs to the workers, but may result
6 in delays if the assigned processing agent does not receive the documentation in a
7 timely manner.

8 Alternative seven has the least costs for all the parties, but is
9 dependent on cooperation between the assigned processing administrator and the
10 insurer. It is possible that this issue could be addressed through education efforts;
11 however, there still may be some benefits to clarifying the expectation in the rule.

12 So this last set of alternatives is really about the notice technically
13 being required to go to the insurer, and right now it may get there, but it doesn't flow
14 directly there.

15 So I'm sorry again to have read so much to you, but we appreciate
16 your input on those alternatives, maybe starting with those situations where it's
17 appropriate to send the worker notice where they're not currently required to send a
18 notice of ineligibility and to provide appeal rights at that time.

19 2:45:42: Can you help us to understand? I mean, there's so much
20 information here. How did this become a problem in the first place or what--I'm not
21 sure I totally understand the problem in other vendors, a total lack of communication,
22 but has there been like a number of workers who have not had that determination
23 made for whatever reason and-- Because that's paid out of the Worker Benefit
24 Fund, the supplemental disability?

25 2:46:10: Ultimately.

1 2:46:11: Ultimately out of the Worker Benefit Fund, and how--has the
2 Worker Benefit Fund been negatively impacted by lack of communication? I just
3 kind of trying to figure out, okay, there's got to be something more between the
4 lines--

5 2:46:23: Yeah, so--

6 2:46:24: --that's going on.

7 2:46:25. So the--why this came up kind of is that we had a request
8 about what notice a worker should be sent when they don't ever send in their
9 verifiable documentation, because right now if they want to appeal, they're not really
10 required to be notified of their appeal rights, so we do treat it as kind of an open-
11 ended, there was no action establishing the initiation of their appeal, 60-day appeal
12 period, so we'll take that at anytime, but it also kind of makes it so that they might not
13 realize that they never received their supplemental disability for sometime down the
14 road, and so we really just kind of wanted to make it clear that when there has been
15 a claim for supplemental disability and the worker's determined to be ineligible, that
16 they are informed of that determination--

17 2:47:32: I think DOJ saw it as a potential due-process issue.

18 2:47:39: Exactly. Due process was mentioned to me by Carol Parks,
19 DOJ, sometime ago following a hearing we were at, and she just simply asked me,
20 "Are you issuing a letter if nothing is received?"

21 And I said, "No, there's nothing in the rule to tell me to," and it was her
22 suggestion that all workers deserve due process.

23 2:48:14: How does issuing a letter provide due process?

24 2:48:20: This is Dan from SAIF Corporation. We process our own
25 supplemental disability benefits, and I appreciate that you recognize that all workers

1 could be eligible for supplemental disability benefits and that it's only in those
2 situations where a request is triggered, either there's a checkbox on the 827 or 801
3 that says, "I have a secondary job," and in those situations the insurer, we call it a
4 five-day letter, sends out a letter within five days saying, "Worker, you may be
5 eligible for supplemental disability benefits. Please provide this information." Also, if
6 we take a statement, if we get any other information within those 30 days that the
7 worker may have a secondary job, we're triggering that five-day letter.

8 I agree that the problem in the rule is that when a response is received
9 by the insurer to that five-day letter, meaning suitable verifiable information, that then
10 we have 14 days to make that determination of eligibility. If you never receive any
11 information, your 14 days is never triggered. Our practice is, if the five-day letter
12 goes out, at 60 days we're looking at it and saying, do we have enough if we haven't
13 received anything yet to make a determination of eligibility? If no, best practice
14 would be to send out a "You're not eligible because you have not provided suitable
15 documentation." We also have an alternative that says, "You're not eligible because
16 you're receiving maximum time loss from your job at injury; therefore, you're not
17 eligible for supplemental," so we're doing those things, but, yes, the rule doesn't
18 require it until it's submitted, which in a (unintelligible)--

19 2:50:21: Dan, do I hear you to say that SAIF is sending a letter once
20 the five-day letter has been generated, there's a diary at 60 days, and if there was a
21 five-day letter, you will send a notice of ineligibility?

22 2:50:39: I said our best practice is, after 60 days, to send a
23 determination of eligibility or ineligibility, depending upon what we received in the
24 file.

25 2:50:52: Do those have appeal, does that have appeal rights in it--

1 2:50:54: Yeah, it says if you disagree with this, this is your rights, so,
2 yeah, following--

3 2:50:59: Well--

4 2:50:59: --the administrative rule.

5 2:51:01: I might point out right there, those rights are codified
6 nowhere. There is no bold paragraph published in the rule; it has been invented by
7 SAIF and ComPro.

8 2:51:19: So--

9 2:51:20: You're saying that in a positive way, right?

10 2:51:22: --kudos for doing that.

11 2:51:25: It didn't sound, it didn't sound like a positive statement, but
12 I'm taking it as a positive statement--

13 2:51:29: Yeah, that's why we're talking about it.

14 2:51:33: I mean, for our purposes, we--I mean, and frankly due
15 process works both ways. I mean, if there's not a (unintelligible) appeal right given,
16 when does the deadline start to run? And I'm not trying to establish insurers due-
17 process rights, but this is of interest to both sides of the aisle because, you know--

18 2:51:52: Yeah.

19 2:51:53: But that's bad for workers, I mean, workers need to know if
20 there's something that hasn't been given, they need to be given notice of that so
21 they can correct it if it had been given, if it--I mean, there's all kinds of scenarios and
22 permutations, so I think these proposals, I mean, I don't have real specific comments
23 on them, but I think their head's in the right place in terms of making sure that
24 notices, one, require and, two, give it in a specific way that everybody knows what
25 they're supposed to do and doesn't have to kind of make up best practices and, you

1 know, I mean, I think that is a good practice--

2 2:52:27: Yeah.

3 2:52:27: --but we shouldn't have to exercise that level of creativity

4 necessarily--

5 2:52:30: Right, the rule should be a little clearer saying at 60 days if

6 you don't have anything--

7 2:52:38: Yeah.

8 2:52:39: --you need to make them ineligible. Well, you should

9 evaluate what's in the claim to make a proper determination, which is likely to be

10 ineligible because you have not provided suitable documentation. That's

11 (unintelligible)--

12 2:52:52: And that also informs the worker if they had sent something

13 and you didn't receive it--

14 2:52:57: Right.

15 2:52:57: --that it's out there lost; otherwise, they would--they would

16 think that they did comply with the 60 days and would never know that--

17 2:53:05: Right, and we would want to deal with that situation now, not

18 two years down the road--

19 2:53:10: Right.

20 2:53:10: --when the worker may then start be losing time from their

21 secondary job and saying, "Hey, hey, where's this benefit?"

22 It's like, "Oh, you never responded. Here's your ineligibility letter."

23 2:53:24: Yes.

24 2:53:24: And the lack of clarity in the rules gives an unlimited amount

25 of time.

1 2:53:31: It says when you receive suitable documentation--

2 2:53:34: Right, right, right.

3 2:53:35: --you have 14 days--

4 2:53:36: Right, okay.

5 2:53:37: If you never receive anything, the best practice is at 60 days
6 you need to start moving that process along. Otherwise, it just drags it out.

7 2:53:50: Well, if you take that to its ultimate conclusion, then whether
8 a worker ever declares that they have a second job or not, is the 801 checked, is the
9 827 checked, was there a recorded state--let's say it never ever, ever comes up,
10 even that worker is entitled to a letter that says, "You're not eligible because the
11 issue was never raised."

12 2:54:20: That's why I suggested it should only trigger when we've sent
13 out our five-day letter, which is in the rule that says if this, this, or this happens,
14 when the--when the insurer knows about secondary employment, they should send
15 out a five-day letter, that's the trigger. If the five-day letter goes out, you've put the
16 worker on notice that they have 60 days to provide suitable. We process a couple
17 hundred supplemental disability eligibility determinations per year out of 40,000
18 claims, so, yeah, we would like it to be in those instances where the worker has said
19 to us "I have secondary employment," those are the cases we need to make a
20 determination on, not every single claim that comes in the door.

21 2:55:20: Additional thoughts?

22 2:55:22: Okay, can I point out something? I'm just looking at the 801.
23 And I can see where it says, "Check here if you have more than one job," I can see
24 somebody interpreting that, I think it needs to say, "Check here if you have more
25 than one job/employer," because I could read that and say I have 15 jobs at

1 Hoffman, honestly, and that would not be applicable, but I have to wonder if, you
2 know, one of my--and it would never apply to me, I can't imagine one of my workers
3 having multiple jobs, but--employers, but I have to wonder if there could be some
4 confusion with that box.

5 2:56:05: Yes. This is Dan from SAIF. Again, yes, we do see that and
6 we send out five-day letter and we go through the determination of "Do you have
7 multiple job duties?" It's not as confusing as it might be, but there are instances
8 where a worker could work for one employer and have two distinct and separate
9 jobs--

10 2:56:35: That is true.

11 2:56:36: --and be eligible--

12 2:56:37: Yeah, you could--

13 2:56:37: --for supplemental disability--

14 2:56:38: Okay.

15 2:56:39: --for one of those jobs, so we again, the five-day letter goes
16 out and we start gathering information and we're asking questions of the worker, so,
17 yes, it can be confusing, but that's--

18 2:56:55: The way--

19 2:56:55: --part of the process of that triggering letter is that
20 communication starts.

21 2:57:01: With it saying more than one job, it's maybe confusing, but
22 more workers may check it.

23 2:57:08: Yeah, maybe the more would check it than (unintelligible).

24 2:57:10: And then you go through that whole filter--

25 2:57:12: We don't--

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2:57:12: --of those hundred claims--

2:57:14: Yeah, we don't see that being a big problem. Most workers understand-- Well, they're reading it from "Do I have more than one employer, a secondary job, and I work multiple jobs?" But we do get that "I'm working for a school district and I have two distinct and separate jobs," and in those cases the worker may be eligible for supplemental disability--

2:57:41: Like school teacher and football coach.

2:57:44: Oh, I see, yeah.

2:57:45: We usually see it crossing guard and cafeteria aide; they're hired for two distinct separate jobs independent of each other, and they could be let go from one job or the other and still maintain the other job.

2:58:03: Got it.

2:58:07: I had a worker who was employed by two different you could call them divisions of a single corporate entity, but the way that ferreted out, they had distinct tax ID numbers and she was a bookkeeper earning 300 a week for one of them and 300 a week for the other and we said, yes, you're eligible.

2:58:36: That sounds like the situation that Dan was describing--

2:58:40: Yeah, yeah, just--

2:58:41: Yes, which--

2:58:42: Yeah, similar.

2:58:42: --isn't currently a problem, we're dealing with it; it's the notification.

2:58:45: Yeah, yeah.

2:58:47: Okay, you work it out, in other words.

2:58:49: Yes.

1 2:58:50: Yeah. Okay. Do you have any direction for us on this last
2 paragraph on the alternatives for ways to get notice to the insurance company,
3 which is a statutory requirement that needs to occur somehow. Well, maybe it's
4 easiest to look at page ten if you look at five, six, and seven. Number five has the
5 worker sending the verifiable documentation to the insurer and the assigned claims
6 administrator. Number six requires the worker to send the verifiable documentation
7 to the insurer and then requires the insurer to forward the information on to the
8 assigned processing administrator. There's potential for some delay there. The first
9 one, having the worker do it, that's a burden on the worker. Item seven says--
10 clarifies that the assigned claims processing administrator is responsible for
11 providing the information to the insurer with verifiable documentation provided. Do
12 you have any input on which of those alternatives would be the best one?

13 3:00:02: Seven, absolutely seven; the simplest, straightest possible
14 solution is the one that's already existing.

15 3:00:13: Okay.

16 3:00:14: If an insurer were to receive payroll information from a worker
17 with a second job, it would be their duty to send it to the assigned processing
18 administrator if that insurer were previously opted out.

19 3:00:33: Right.

20 3:00:34: Opt out is an option in the law, .210(5)(a). They have the
21 option to opt out, and now these rules that we're chasing have the presumption in
22 them that the reader of the rule already understands that the law says this could
23 have happened in advance. It's appropriate for the worker to be instructed to send
24 the proof directly to the assigned processing administrator, which right now WCD's
25 APA election is ComPro, if the insurer is opted out.

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3:01:21: Thanks, Tim.

3:01:23: Here's another little predicament. I have seen workers who take the communication to their payroll department at the second employer and it gets lost there, ends up being not provided timely, and then we're stuck in a situation of having to determine a worker ineligible through no fault of their own.

3:01:53: Okay. Thanks, Tim.

3:01:58: And that would be a case where being notified of that determination would be helpful for the worker so they could resolve the issue sooner rather than later.

3:02:07: It would, yes.

3:02:09: Okay. We're just about out of time, but I appreciate any last thoughts you might have on this aspect in particular. We have, what, Tim's thoughts on that, but if you have any direction, if you like one of these alternatives better, then.

3:02:27: We process internally, so--

3:02:28: Okay.

3:02:28: Yeah.

3:02:29: It's not an issue for--

3:02:30: We really don't have--

3:02:31: Not an issue for them.

3:02:31: --an issue on it with the process.

3:02:34: Okay. And you might be the only carrier at the table right now.

3:02:41: I think we're the only one that process.

3:02:43: You're the ones who process your own at least, yeah. Okay.

1 Then with that, I'm going to close the meeting in just a moment. Thank you very
2 much for coming and for all of your great advice. We're going to take it all back and
3 consider, you know, what we need to do with these three important issues.

4 If you do have any additional thoughts that you want to send to us, we
5 need them really as soon as possible because we're looking at trying to file these
6 rules by the middle of September. I know while that may seem a little ways off, we
7 have a lot of drafting and review to do before we actually file with the Secretary of
8 State. You will have another shot at the rules. At that time of course you can
9 provide testimony, we would welcome your testimony, but it's important if you have
10 advice now, it's important not to wait, because it allows us to actually make--put your
11 ideas into the rules now, rather than if we get your good ideas later and it was never
12 there in the first place, it's very hard for us to do it because it's new information that
13 we would be putting into the rules, and no one would have had a chance to weigh in
14 on it, so I would say probably by the--you know, by the end of August, we would
15 need your input. Would that be about right?

16 3:04:11: Yeah.

17 3:04:12: Which I know is very close, it's next week, so with that--

18 3:04:16: Great, thank you.

19 3:04:17: Yeah, I know.

20 3:04:19: What happened to the summer?

21 3:04:20: Yeah. But that's just on these three issues, so hopefully
22 that's enough time for you, but have a safe drive home and thanks again.

23
24 (WHEREUPON, the proceedings were adjourned.)

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