**Exhibit "5"**


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Rules Coordinator
Workers' Compensation Division
350 Winter St. NE
PO Box 14480
Salem, OR 97309
**Via Email Only: WCD.Policy@dcbs.oregon.gov**

RE: Proposed Changes to Chapter 436 Division 060 Rule Regarding Disclosure of Claim Documents

Dear Rules Coordinator:

I am a licensed Oregon attorney and have practiced workers' compensation law in Oregon since 2004. I have represented self-insured employers, insurers, and workers during my career. By all accounts, I understand the system very well.

The WCD is considering amending the definition of "documents" to better align with the Workers' Compensation Board's (WCB) rules on disclosure of documents under OAR 438-007-0015. The certificate of filing states that the rule is needed to provide "clear direction" and "enhance clarity." I see no such benefits and I strongly urge the WCD to reject the proposed changes to OAR 436-060-0017(1)(a).

The rule conflates pre-litigation disclosure requirements with discovery-like procedures applied to disputes in litigation. That is not appropriate in the context of the initial disclosure of records, and I am deeply curious what policy concerns spurred the WCD to consider such changes and what policy goals are met by allowing insures to hide records or treat claim documents as "evidence" before any litigation is conceived.

ORS 656.726(4)(a) provides that the director may "make and declare all rules and issue orders which are reasonably required in the performance of the director's duties." The statute gives broad authority to the director to promulgate rules governing the processing of workers' compensation claims, including rules requiring insurers and self-insured employers to disclose claim-related documents. Insurers and self-employers are created by statute solely to administer workers' compensation benefits. They have no privacy interest in claim documents or in preventing disclosure of documents to workers in furtherance of processing a worker's claim.

The WCD has proposed adopting the following version of OAR 436-060-0017(1)(a)(G):

> (a) "Documents" means the written records making up, or relating to, the worker's claim, including but not limited to:
>
> (G) Insurer generated records, excluding a claims examiner's generated file notes, such as documentation or justification concerning setting or adjusting reserves, claims management strategy, or any documents not subject to discovery under OAR 438-007-0015.

The rule attempts to apply discovery-like procedures to initial claim disclosures and to delegate authority to determine the scope of such procedures. That is both illegal and improper.

As a jurisdictional matter, the WCD lacks authority to delegate the scope of initial disclosures to the WCB. The WCD may certainly adopt concepts found in WCB rules, but to refer directly to a rule gives plenary authority to the WCB to change the scope of initial disclosures without any action by the WCD itself. It is, essentially, an improper delegation of rule-making authority.

Further, adopting the language and concepts in OAR 438-007-0015 makes little sense in the context of claims that are not yet disputed. For example, the proposed rule would exclude from initial disclosure, "Material protected from disclosure under OAR 438-007-0017." OAR 438-007-0015(7)(e). Such material, known as "impeachment evidence," is material that:

(a) Attacks the capacity of the witness to perceive, recall or recount;
(b) Tends to establish that the witness has a character for untruthfulness;
(c) Establishes prior convictions for felonies or crimes involving false statement or dishonesty;
(d) Tends to establish bias;
(e) Reveals a prior material inconsistent statement;
(f) Reveals material contradictions in statements made by the witness;
(g) Attacks the expertise of a witness through learned treatises.

I question whether any of this material can even exist before the initiation of a dispute. Could an insurer withhold an accident report if it believes the worker *might* latter mischaracterize the incident? How about a statement from a supervisor that *might* later contradict a witness?

In short, the WCB's rules are evidentiary rules, designed to govern admission of *evidence* in an adversarial proceeding. Indeed, the legal concept of "evidence" itself does not even apply to non-adversarial proceedings; that is, a document must be evidence of *something*—a conclusion of law or ultimate fact—before it may be considered evidence of *anything*. By adopting this rule, the WCD is assuming that the insurer and the worker are adverse parties *before* a justiciable controversy even exists. If that is the WCD's intent, it should be stated explicitly and it needs to revise most of OAR Chapter 436 accordingly.

Further, the WCD may misapprehend the fiscal impact of such a change. Who will decide what qualifies as "documents" subject to disclosure? In litigation, a tribunal is tasked with resolving discovery disputes. Before the WCB, ALJs rule on evidentiary disputes via objections, motions to compel, motions to quash, and *in camera* review of certain records. In civil litigation, parties are required to produce privilege logs of withheld materials in addition to the motion practice before the court. The proposed rule provides no method, clear direction, or enhanced clarity in deciding what documents are actually excluded from disclosure.

In this vein, if the WCD chooses to adopt the proposed rule, it must also adopt a procedure for resolving disclosure disputes quickly and efficiently. I propose the WCD require insurers and self-insured employers to submit to the WCD and the worker and workers' attorney a log of any documents withheld from disclosure, including the date, author, recipient, a general description of each document withheld, and the reason the document is being withheld. Failure to do so, should constitute waiver of all potential reasons to withhold the document from disclosure and subject the insurer to penalties if withholding the document is deemed unreasonable.

Further, upon the workers' request, the WCD should conduct an *in camera* review of all withheld documents within five working days of the request to determine if the documents are properly withheld. Documents determined to be improperly withheld should be immediately disclosed by the WCD to the worker and the WCD should impose a civil penalty for any documents withheld unreasonably.

The above is how a tribunal must approach evidentiary issues in an adversarial proceeding. Indeed, due process *requires* such procedures in adversarial proceedings. Is this the process that the WCD envisions? The WCD cannot simply ignore the issue and any procedure adopted will not be free and will use valuable resources.

I do not see how the cost-benefit to allowing insurers to choose, without any oversight whatsoever, which records they disclose weighs in favor of workers or the WCD. Perhaps the WCD could explain how this rule benefits workers, adds transparency to the system, or otherwise resolves an existing systemic problem.

Based on the above, I propose the WCD *expand* the disclosure rule to ensure correct claims processing, minimize the adversarial nature of the process, and to discover and correct processing errors as quickly as possible. Thus, I propose the following changes to OAR 436-060-060-0017(1)(a):

(a) "Documents" means the written records making up, or relating to, the worker's claim, including but not limited to:

(A) Medical records, including any correspondence to and from medical experts;[1]
(B) Vocational records, including any correspondence to and from vocational experts;
(C) Records of all compensation paid;
(D) Payroll records;
(E) Recorded statements;
(F) Investigative statements and investigative summaries;
(G) Insurer generated records, including a claims examiner's generated file notes or claim management strategy;
(H) All forms and notices on the claim required by ORS chapter 656 or OAR chapter 436;
(I) Notices of closure; and

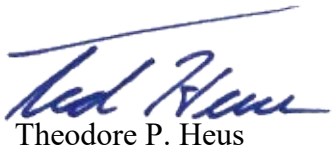
[1] The WCD's proposed rule limits disclosure to correspondence to and from medical and vocational experts who "provide reports." There is no reason for this limitation. Correspondence to and from a medical or vocational expert of any kind should be disclosed.

(J) Electronic transmissions and correspondence between the insurer, service providers, worker, director, or board.

The above proposal increases transparency in the claims process. The WCD, if it insists on changing the rule governing disclosures, should make claim processing more transparent, not less. The WCD should respectfully decline any invitation to narrow the rule to treat disclosures more like evidence submitted in litigation.

Thank you again for the opportunity to comment and I would be happy to answer any questions the WCD may have.

Sincerely,



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