

BEFORE THE DIRECTOR OF THE
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
OF THE STATE OF OREGON

In the Matter of the Amendment of OAR:)
 436-050, Employer/Insurer Coverage Responsibility) SUMMARY OF
 436-060, Claims Administration*) TESTIMONY AND
) AGENCY RESPONSES

*This hearing also provided the opportunity for testimony on proposed OAR 436-105, “Employer-at-Injury Program.” A separate summary has been prepared for OAR 436-105.

This document summarizes the significant data, views, and arguments contained in the hearing record. The purpose of this summary is to create a record of the agency’s conclusions about the major issues raised.

The proposed amendment to the rules was announced in the Secretary of State’s *Oregon Bulletin* dated Oct. 1, 2021. On Oct. 18, 2021, a public rulemaking hearing was held as announced at 10:30 a.m. via video conference from the Labor & Industries Building, 350 Winter Street NE, Salem, Oregon. Fred Bruyns, from the Workers’ Compensation Division, was the hearing officer. The record was scheduled to be open for written comment through Oct. 25, 2021; however, upon receipt of a request to accept testimony after the closing date, the division extended the due date for testimony until (including) Nov. 24, 2021.

No testimony was presented at the rulemaking hearing. A transcript of the hearing is recorded below as exhibit 1. The public submitted five written documents as testimony.

Testimony list:

Exhibit	Testifying
<u>1</u>	Transcript of hearing (no public testimony)
<u>2</u>	Steven Bennett, American Property Casualty Insurance Association (APCIA)
<u>3</u>	Jaye Fraser, SAIF Corporation
<u>4</u>	Steven Bennett, American Property Casualty Insurance Association
<u>5</u>	Ted Heus, Quinn & Heus, LLC
<u>6</u>	Keith Semple, Injured Worker Policy Group, Oregon Trial Lawyers Association, and Diana Winther, International Brotherhood of Electrical Workers, Local 48

Testimony: OAR 436-050 & 060

Exhibit 2

“.... APCIA supports most of the proposed changes and believes they will help modernize and improve efficiency in the processing of workers’ compensation claims. The legislature enacted HB 2039 to modernize claims processing in workers’ compensation and to make it a

more efficient process. The majority of the proposed rule is consistent with the language and the intent of HB 2039.”

Response: The division appreciates APCIA’s testimony.

Testimony: OAR 436-060-0005(5)

Exhibit 2

“... APCIA has concerns with the proposed definition of “date stamp” in OAR 436-060-0005(5). The proposed rule defines “date stamp” as “to stamp or display the initial receipt date **and the recipient’s name** on a paper or electronic document, regardless of whether the document is printed or displayed electronically” (emphasis supplied). As a practical matter, date stamping claims documents does not include inserting the recipient’s name on the stamp. The majority of insurers receive documents in a mailing center and the insurer automatically scans the documents electronically. The scanner will add the date stamp to the document. However, there is no “person” who receives the documents and the scanning does not include a recipient’s name on the date stamp.

“The legislature enacted HB 2039 to modernize claims processing in workers’ compensation and to make it a more efficient process. The majority of the proposed rule is consistent with the language and the intent of HB 2039. However, the proposed language requiring the insurer to date stamp documents with the name of the recipient is inconsistent with the intent of the legislation and will add unnecessary costs and delays to workers’ compensation claims processing.

“APCIA suggests the following modification to proposed OAR 436-060-0005(5):”

“(5) “Date stamp” means to stamp or display the initial receipt date **and the recipient’s name** on a paper or electronic document, regardless of whether the document is printed or displayed electronically.”

Response: The division appreciates APCIA's testimony. In response, the division would like to clarify that in the context of proposed OAR 436-060-0005(5), 'recipient' means the insurer or service company receiving the document to be date stamped, rather than the employee who receives or scans the document.

Based on this interpretation, and because current OAR 436-060-0017(2)(a) also requires insurers and service companies to display this information on each document they receive, the division does not anticipate proposed OAR 436-060-0005(5) will create additional costs to insurers. Further, proposed OAR 436-060-0005(5) is consistent with current definitions of 'date stamp' under OAR chapters 009 and 010. For these reasons, the division will publish the listed rule as proposed.

Testimony: OAR 436-050-0120(3)

Exhibit 3

“SAIF does not have any comments on the proposed rules other than a slight disappointment that the rulemaking didn’t address the destruction of claim file by insurers before injured workers have exhausted their rights. The current rules states that “The insurer may destroy claims records when the insurer can verify that all potential for benefits to the worker or the worker’s beneficiaries is gone.” OAR 436-050-0120-(3). SAIF would very much appreciate this issue

being added to the next rulemaking that deals with division 50.”

Response: The division appreciates SAIF’s testimony and will preserve the issue for future rulemaking discussion.

Testimony: OAR 436-060-0017 (1)(a)(F)

Exhibit 4

“... The American Property Casualty Insurance Association (APCIA) ... wishes to call attention to proposed new subsection OAR 436-060-0017(1)(a)(F) regarding the release of investigative statements and investigative summaries. ... [that] adds “Investigative statements and investigative summaries” to the definition of claim documents.

“APCIA objects to the inclusion of investigative statements and investigative summaries to the definition of claim documents. As a preliminary matter, the terms are vague and ambiguous. Investigative statements and investigative summaries are not otherwise defined in the propose rule. It is unclear if the rule intends to cover only investigative statements or summaries that are planned to be introduced at hearing or relate to facts at issue in the claim, or whether the definition is intended to be broader and encompass all statements and summaries developed by a party in the development of its case. If the latter, such investigative summaries and statements are typically considered privileged work product and are not discoverable by the other party.

“APCIA is concerned that retaining “investigative statements and investigative summaries” within the definition of claims documents would authorize the release of protected work product commonly not discoverable in court or administrative proceedings. The release of investigative statements and investigative summaries upon request of a party would also jeopardize the integrity of ongoing investigations into alleged claimant and other types of fraud.

“APCIA suggests the deletion of proposed OAR 436-060-0017(1)(a)(F):

(1) For the purpose of this rule:

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

...

~~(F) Investigative statements and investigative summaries;”~~

Response: The division appreciates APCIA’s testimony.

The division’s intent in amending OAR 436-060-0017(1)(a) was to make the current rule more clear and more consistent with the Workers’ Compensation Board’s rules on disclosure of claims documents under OAR 438-007-0015. The changes were not intended to substantially alter the scope of documents subject to release under the existing rule.

In light of the concerns raised in this testimony, proposed OAR 436-060-0017(1)(a)(F) has been deleted. The division thanks APCIA for bringing this issue to our attention.

Testimony: OAR 436-060-0017(1)(a)

Exhibit 5

“... 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

Oregon Administrative Rules, Chapter 436
Public Testimony & Agency Responses
Page 4

“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 insurers to hide records or treat claim documents as “evidence” before any litigation is conceived. ...

“... 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 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. ...

“In short, the WCB’s rules are evidentiary rules, designed to govern admission of evidence in an adversarial proceeding. 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? 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.”

“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. ...

“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

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.

- (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
- (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.”

Response: The division appreciates Mr. Heus's testimony.

The division's intent in amending OAR 436-060-0017(1)(a) was to make the current rule more clear and more consistent with the Workers' Compensation Board's rules on disclosure of claims documents under OAR 438-007-0015. The changes were not intended to alter the scope of documents an insurer is entitled to withhold under the existing rule.

In light of the concerns raised in this testimony, the division has deleted proposed changes to current OAR 436-060-0017(1)(a)(F) that would have allowed insurers to withhold documents not subject to disclosure under OAR 438-007-0015. The division thanks Mr. Heus for bringing this issue to our attention.

The testimony also recommended changes to proposed OAR 436-060-0017(1)(a)(A) and (B) that would require insurers to release correspondence with medical and vocational experts more broadly, and changes to current OAR 436-060-0017(1)(a)(F) that would require insurers to release certain claims files that are not subject to release under current rule. We appreciate these recommendations, but feel that they warrant further conversation with stakeholders. Accordingly, they have been preserved for future rulemaking discussions.

Testimony: OAR 436-060-0017(1)(a)

Exhibit 6

“The WCD has proposed a rule which would amend the definition of "documents" (including documents that must be produced to the worker in discovery) to align with the Workers' Compensation Board's (WCB) rules on disclosure of documents during litigation.

“We urge the WCD to reject the proposed changes to OAR 436-060-0017(1)(a), because the proposed rule conflates pre-litigation disclosure requirements with the more restrictive definition of documents that must be disclosed during active litigation. This change would allow insurers to hide records or treat claim documents as "evidence" before any litigation is conceived. We

understand that the intent of WCD is to streamline the process of data collection, but the unintended consequences of this significant change must not be ignored.

“Adopting the language and concepts in OAR 438-007-0015 is not appropriate in the context of claims that are not yet disputed.

“.... The WCB's rules are designed to govern pre-hearing disclosure of evidence that will be used in an adversarial proceeding. If the rules were to be aligned, WCD would be treating the insurer and the worker as adverse parties before a justiciable controversy even exists. This is contrary to the WCD's goal of resolving disputes in a non-adversarial fashion.

“If the proposed rule were to be adopted, additional rules must also be adopted to adjudicate disputes over whether specific documents are subject to disclosure. The WCD proposes no method for identifying and reviewing documents that are withheld under the proposed provision to determine what documents are excluded from disclosure and no method for resolution of disputes over excluded documents.

“To address this problem, WCD would need to require that insurers and self-insured employers 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 worker's request, the WCD would need to conduct an *in camera* review of all withheld documents 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.

“By incorporating a WCB administrative rule into a WCD administrative rule, WCD would also create the possibility that WCB could change the rule in a manner that would alter the WCD rule without appropriate notice to stakeholders.

“In order to facilitate oversight and adjudicate issues fairly in a non-adversarial posture, the WCD 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.

“To the extent that additional clarity is needed in the rules, we propose the WCD adopt 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

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 and is required to be disclosed under WCB rules.

- (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;
- ~~(F)~~(G) Insurer generated records, including a claims examiner's generated file notes or claim management strategy;
- ~~(G)~~(H) _____ All forms and notices on the claim required by ORS chapter 656 or OAR chapter 436;
- ~~(H)~~(I) Notices of closure; and
- ~~(I)~~(J) Electronic transmissions and correspondence between the insurer, service providers, worker, director, or board.

“We are happy to discuss this proposal in future stakeholder meetings that are needed before any new rules on this issue are adopted.”

Response: The division appreciates Mr. Semple's and Ms. Winther's testimony.

The division's intent in amending OAR 436-060-0017(1)(a) was to make the current rule more clear and more consistent with the Workers' Compensation Board's rules on disclosure of claims documents under OAR 438-007-0015. The changes were not intended to alter the scope of documents an insurer is entitled to withhold under the existing rule.

In light of the concerns raised in this testimony, the division has deleted proposed changes to current OAR 436-060-0017(1)(a)(F) that would have allowed insurers to withhold documents not subject to disclosure under OAR 438-007-0015. The division thanks Mr. Semple and Ms. Winther for bringing this issue to our attention.

The testimony also recommended changes to proposed OAR 436-060-0017(1)(a)(A) and (B) that would require insurers to release correspondence with medical and vocational experts more broadly, and changes to current OAR 436-060-0017(1)(a)(F) that would require insurers to release certain claims files that are not subject to release under current rule. We appreciate these recommendations, but feel that they warrant further conversation with stakeholders. Accordingly, they have been preserved for future rulemaking discussions.

Lastly, we appreciate Mr. Semple and Ms. Winther's willingness to discuss this proposal in future stakeholder meetings.

Dated this 13th day of December, 2021.
--

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
OF THE STATE OF OREGON**

PUBLIC RULEMAKING HEARING

In the Matter of the Amendment of OAR: 436-050, Employer/Insurer Coverage Responsibility, 436-060, Claims Administration, and 436-105, Employer-at-Injury Program.))))))	TRANSCRIPT OF TESTIMONY
---	----------------------------	----------------------------

The proposed amendment to the rules was announced in the Secretary of State's *Oregon Bulletin* dated Oct. 1, 2021. On Oct. 18, 2021, a public rulemaking hearing was held as announced at 10:30 a.m. via video conference from the Labor & Industries Building, 350 Winter Street NE, Salem, Oregon. Fred Bruyns, from the Workers' Compensation Division, was the hearing officer. The record will be held open for written comment through Oct. 25, 2021.

INDEX OF WITNESSES

Witnesses	Page
No testimony was given at the hearing	NA

TRANSCRIPT OF PROCEEDINGS

Fred Bruyns:

Good morning and welcome. This is a public rulemaking hearing. (Can you hear me okay? Confirmed. Great. Okay) My name is Fred Bruyns, and I'll be the presiding officer for the hearing.

The time is now 10:31 on Monday, Oct. 18, 2021. We are streaming this hearing from the Labor & Industries Building, 350 Winter St. NE, in Salem, Oregon. We are making an audio recording of today's hearing and will create a transcript.

If you wish to present oral testimony today, I will add your name to the roster, and I will call for your names just a little later on.

The Department of Consumer and Business Services, Workers' Compensation Division proposes to amend chapter 436 of the Oregon Administrative Rules, specifically:

- Division 050, Employer/Insurer Coverage Responsibility,
- Division 060, Claims Administration, and
- Division 105, Employer-at-Injury Program.

Transcript of public rulemaking hearing
Oct. 18, 2021

The department has summarized the proposed rule changes and prepared estimates of fiscal and economic impacts in the notices of proposed rulemaking. These notices and proposed rules with marked changes are posted to the division's website at: WCD.Oregon.gov, under "Laws and rules," and then "Proposed rules and testimony."

The Workers' Compensation Division: filed the notices of proposed rulemaking with the Oregon Secretary of State on Sept. 22 and Sept. 29, 2021; mailed the notices to its postal and electronic mailing lists; notified Oregon legislators as required by ORS chapter 183; and posted public notices and the proposed rules to its website.

The Oregon Secretary of State published the hearing notices in its *Oregon Bulletin* dated Oct. 1, 2021.

This hearing gives the public the opportunity to provide comment about the proposed rules. In addition, the division will accept written comment through and including Oct. 25, 2021, and will make no decisions until all of the testimony is considered.

We are now ready to receive public testimony. When I read your name, please go ahead and testify. Actually, we don't have anybody on our roster yet, but I am going to actually ask for anybody's name who would like to testify at this time. Is there anyone?

Okay, hearing no one, in a moment I'm going to recess the hearing, and we will resume for additional testimony if anyone arrives before 11:30 a.m. this morning and wishes to testify. Unless testimony is in progress, we will close the hearing at 11:30.

So again, the record remains open for written testimony through and including Oct. 25, 2021. You may submit testimony in any written form. I encourage you to submit your testimony by email or as attachments to email. However, you may also use fax or U.S. mail. My contact information is in the Notices of Proposed Rulemaking posted to our website. I will acknowledge all testimony received.

This hearing is recessed at 10:34 a.m.

This hearing is resumed at 11:29 a.m.

Does anyone wish to testify today?

Hearing no one, this hearing is adjourned at 11:30 a.m.

Thank you for joining us today. Goodbye.

Transcribed from a digital audio recording by Fred Bruyns, Oct. 18, 2021.



Mr. Fred Bruyns
Policy Analyst/Rules Coordinator
Department of Consumer and Business Services
Workers' Compensation Division
350 Winter St. NE
Salem, OR 97309-0405

Via Electronic Mail: WCD.Policy@dcbs.oregon.gov

Re: Proposed Amendments to Workers' Compensation Rules on Claims Processing Location and Claims Recordkeeping

Dear Mr. Bruyns:

The American Property Casualty Insurance Association (APCIA)¹ appreciates the opportunity to comment on the Department of Consumer and Business Services' proposed changes to the rules governing claims processing location and claims recordkeeping. APCIA supports most of the proposed changes and believes they will help modernize and improve efficiency in the processing of workers' compensation claims.

APCIA has concerns with the proposed definition of "date stamp" in OAR 436-060-0005(5). The proposed rule defines "date stamp" as "to stamp or display the initial receipt date **and the recipient's name** on a paper or electronic document, regardless of whether the document is printed or displayed electronically" (emphasis supplied). As a practical matter, date stamping claims documents does not include inserting the recipient's name on the stamp. The majority of insurers receive documents in a mailing center and the insurer automatically scans the documents electronically. The scanner will add the date stamp to the document. However, there is no "person" who receives the documents and the scanning does not include a recipient's name on the date stamp.

The legislature enacted HB 2039 to modernize claims processing in workers' compensation and to make it a more efficient process. The majority of the proposed rule is consistent with the language and the intent of HB 2039. However, the proposed language requiring the insurer to date stamp documents with the name of the recipient is inconsistent with the intent of the legislation and will add unnecessary costs and delays to workers' compensation claims processing.

¹ APCIA represents nearly 60 percent of the U.S. property casualty insurance market and the broadest cross-section of home, auto, and business insurers of any national trade association. APCIA members represent all sizes, structures, and regions, protecting families, communities, and businesses in the U.S. and across the globe.

APCIA suggests the following modification to proposed OAR 436-060-0005(5):

“(5) “Date stamp” means to stamp or display the initial receipt date ~~and the recipient’s name~~ on a paper or electronic document, regardless of whether the document is printed or displayed electronically.”

APCIA thanks you for your consideration of these issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. A. Bennett', with a long horizontal flourish extending to the right.

Steven A. Bennett
Assistant Vice President, Workers Compensation Programs & Counsel
American Property Casualty Insurance Association

BRUYNS Fred H * DCBS

From: Jaye Fraser <JAYFRA@saif.com>
Sent: Monday, October 25, 2021 4:13 PM
To: BRUYNS Fred H * DCBS
Subject: Div. 50 and 60 rulemaking

Good afternoon Fred. Just a quick note to let you know that SAIF does not have any comments on the proposed rules other than a slight disappointment that the rulemaking didn't address the destruction of claim file by insurers before injured workers have exhausted their rights. The current rules states that "The insurer may destroy claims records when the insurer can verify that all potential for benefits to the worker or the worker's beneficiaries is gone." OAR 436-050-0120-(3). SAIF would very much appreciate this issue being added to the next rulemaking that deals with division 50.

Thank you.

Jaye Caroline Fraser, J.D.

SAIF Assistant General Counsel for Legal Services
503.373.8026 | F: 503.584.8026 | 800.285.8525 ext. 8026
400 High St SE, Salem, OR 97312
Pronouns: she, her, hers

Confidentiality Notice: This email may contain information that is privileged, confidential, or otherwise exempt from disclosure under applicable law. If you are not the addressee or it appears from the context or otherwise that you have received this email in error, please advise us immediately at itservicedesk@saif.com, keep the contents confidential, and immediately delete the message and any attachments from your system.



November 2, 2021

Mr. Fred Bruyns
Policy Analyst/Rules Coordinator
Department of Consumer and Business Services
Workers' Compensation Division
350 Winter St. NE
Salem, OR 97309-0405

Via Electronic Mail: WCD.Policy@dcbs.oregon.gov

Re: Proposed Amendments to Workers' Compensation Rules on Claims Processing Location and Claims Recordkeeping

Dear Mr. Bruyns:

The American Property Casualty Insurance Association (APCIA)¹ files this supplemental comment to the Department of Consumer and Business Services' proposed amendments to the rules governing claims processing location and claims recordkeeping. In addition to our comments filed on October 25, 2021, APCIA wishes to call attention to proposed new subsection OAR 436-060-0017(1)(a)(F) regarding the release of investigative statements and investigative summaries.

Current rule OAR 426-060-0017 governs the release of claim documents. Claim documents are defined as set forth in the enumerated subsections. New subsection OAR 436-060-0017(1)(a)(F) adds "Investigative statements and investigative summaries" to the definition of claim documents.

APCIA objects to the inclusion of investigative statements and investigative summaries to the definition of claim documents. As a preliminary matter, the terms are vague and ambiguous. Investigative statements and investigative summaries are not otherwise defined in the propose rule. It is unclear if the rule intends to cover only investigative statements or summaries that are planned to be introduced at hearing or relate to facts at issue in the claim, or whether the definition is intended to be broader and encompass all statements and summaries developed by a party in the development of its case. If the latter, such investigative summaries and statements are typically considered privileged work product and are not discoverable by the other party.

¹ APCIA represents nearly 60 percent of the U.S. property casualty insurance market and the broadest cross-section of home, auto, and business insurers of any national trade association. APCIA members represent all sizes, structures, and regions, protecting families, communities, and businesses in the U.S. and across the globe.

APCIA is concerned that retaining "investigative statements and investigative summaries" within the definition of claims documents would authorize the release of protected work product commonly not discoverable in court or administrative proceedings. The release of investigative statements and investigative summaries upon request of a party would also jeopardize the integrity of ongoing investigations into alleged claimant and other types of fraud.

APCIA suggests the deletion of proposed OAR 436-060-0017(1)(a)(F):

(1) For the purpose of this rule:

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

...

~~(F) Investigative statements and investigative summaries;~~

APCIA thanks you for your consideration of this issue.

Sincerely,

A handwritten signature in black ink, appearing to read "S. A. Bennett", with a long horizontal flourish extending to the right.

Steven A. Bennett
Assistant Vice President, Workers Compensation Programs & Counsel
American Property Casualty Insurance Association

Quinn & Heus, LLC

Law Offices
www.quinnheus.com

Attorneys:
Julene M. Quinn
Theodore P. Heus

Mailing Address:
9450 SW Gemini Dr.
PMB 22366
Beaverton, OR 97008

Paralegal:
Hannah Griffin

November 4, 2021

Phone: (503) 575-1253
Fax: (971) 925-1288

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 insurers 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* later 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,



Theodore P. Heus
heus@quinnheus.com

OREGON TRIAL LAWYERS ASSOCIATION

812 SW Washington Street, #900

Portland, OR 97205

www.oregontriallawyers.org

503-799-1017

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:

Please accept the attached comments relating to the proposed changes to Chapter 436 Division 060 Rule Regarding Disclosure of Claim Documents.

Thank you in advance for your assistance.

Sincerely,

Keith Semple
Injured Worker Policy Group
OTLA

Diana Winther
IBEW Local 48

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:

The WCD has proposed a rule which would amend the definition of "documents" (including documents that must be produced to the worker in discovery) to align with the Workers' Compensation Board's (WCB) rules on disclosure of documents during litigation.

We urge the WCD to reject the proposed changes to OAR 436-060-0017(1)(a), because the proposed rule conflates pre-litigation disclosure requirements with the more restrictive definition of documents that must be disclosed during active litigation. This change would allow insurers to hide records or treat claim documents as "evidence" before any litigation is conceived. We understand that the intent of WCD is to streamline the process of data collection, but the unintended consequences of this significant change must not be ignored.

Adopting the language and concepts in OAR 438-007-0015 is not appropriate 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.

This means an insurer could withhold an accident report if it believes the worker *might* later mischaracterize the incident or a statement from a supervisor that *might* later contradict a witness, before any litigation has begun.

The WCB's rules are designed to govern pre-hearing disclosure of evidence that will be used in an adversarial proceeding. If the rules were to be aligned, WCD would be treating the insurer and the worker as adverse parties before a justiciable controversy even exists. This is contrary to the WCD's goal of resolving disputes in a non-adversarial fashion.

If the proposed rule were to be adopted, additional rules must also be adopted to adjudicate disputes over whether specific documents are subject to disclosure. During litigation at 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. The WCD proposes no method for identifying and reviewing documents that are withheld under the proposed provision to determine what documents are excluded from disclosure and no method for resolution of disputes over excluded documents.

To address this problem, WCD would need to require that insurers and self-insured employers 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 worker's request, the WCD would need to conduct an *in camera* review of all withheld documents 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.

This is how a tribunal must approach evidentiary issues in an adversarial proceeding because the oversight is necessary to provide due process, substantial justice, and fundamental fairness to the litigants. Any procedure adopted by the WCD to address this problem will use up valuable resources that could be better used elsewhere.

By incorporating a WCB administrative rule into a WCD administrative rule, WCD would also create the possibility that WCB could change the rule in a manner that would alter the WCD rule without appropriate notice to stakeholders.

In order to facilitate oversight and adjudicate issues fairly in a non-adversarial posture, the WCD 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.

To the extent that additional clarity is needed in the rules, we propose the WCD adopt 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

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 and is required to be disclosed under WCB rules.

- (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](#);
- ~~(F)~~(G) Insurer generated records, [including](#) a claims examiner's generated file notes [or](#) claim management strategy;
- ~~(G)~~(H) _____ All forms [and notices](#) on the claim [required by ORS chapter 656 or OAR chapter 436](#);
- ~~(H)~~(I) Notices of closure; and
- ~~(I)~~(J) Electronic transmissions and correspondence between the insurer, service providers, worker, director, or board.

We are happy to discuss this proposal in future stakeholder meetings that are needed before any new rules on this issue are adopted.

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