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Rules Coordinator Workers' Compensation Division

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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
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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.