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: 436-010, Medical Services 436-050, Employer/Insurer Coverage Responsibility 436-060, Claims Administration 436-075, Retroactive Program	)))))	TRANSCRIPT OF TESTIMONY

The proposed amendment to the rules was announced in the Secretary of State's Oregon Bulletin dated Oct. 1, 2017. On Oct. 20, 2017, a public rulemaking hearing was held as announced at 9:30 a.m. in Room F of the Labor and Industries Building, 350 Winter Street NE, Salem, Oregon. Fred Bruyns, from the Workers' Compensation Division, acted as hearing officer. The record will be held open for written comment through Oct. 26, 2017.

INDEX OF WITNESSES

Witnesses **Page**

TRANSCRIPT OF PROCEEDINGS

Fred Bruyns: Good morning and welcome. This is a public rulemaking hearing. My name is Fred Bruyns , and I'll be the presiding officer for the hearing. The time is now 9:31 a.m. on Friday October 20, 2017.We are in Room F of the Labor & Industries Building, 350 Winter St. NE, in Salem, Oregon. We are making an audio recording of today's hearing. If you wish to present oral testimony today, please sign in on the "Testimony Sign-In Sheet." It's on the table by the entrance.

The Department of Consumer and Business Services, Workers' Compensation Division proposes to amend chapter 436 of the Oregon Administrative Rules, specifically: division 010, Medical Services; division 050, Employer/Insurer Coverage Responsibility, division 060, Claims Administration, and division 075, Retroactive Program. The department has summarized the proposed rule changes in the Notices of Proposed Rulemaking Hearing. These hearing notices, Statements of Need and Fiscal Impact, and proposed rules with marked changes, are on the table by the entrance. Public testimony is available on the division's website. The Workers' Compensation Division filed the Notices of Proposed Rulemaking and Statements of Need and Fiscal Impact with the Oregon Secretary of State on Sept. 15, 2017, mailed the Notices and Statements to its postal and electronic mailing lists; notified Oregon Legislators as required by ORS chapter 183; and posted public notice and the proposed rules to its website. The Oregon

Secretary of State published the hearing notices in its Oregon Bulletin dated Oct. 1, 2017. 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. 26, 2017, and will make no decisions until all of the testimony is considered. We are ready to receive testimony. If you are reading from written testimony and give the agency a copy of that testimony, we will add it to the rulemaking record.

Kevin Anderson – could you come up and testify?

Kevin Anderson: Thanks Fred. For the record my name's Kevin Anderson. I'm an attorney at Sather Byerly, and Holloway. We represent employers and insurance companies in Oregon and in Washington. My testimony should be pretty brief. It's limited to just the changes to the WRME issue. I know during some of the discussions from MLAC, and kind of getting to the point of drafting these rules, people had kind of made a mental shortcut of saying the rule changes to mean that if the doctor doesn't respond to the IME, it means that they disagree with the IME, and I kind of want to make sure the record is clear on that, and I think these rules are clear. The doctor's failure to respond entitles the worker to a WRME, but it doesn't necessarily have any implication about what that attending physician thinks about that IME report. And I think the rules are clear, but if these go into effect I'd also like the division to kind of think about that when they're crafting the orders saying that the worker can get the WRME, of just saying the doctor did not respond and therefore is entitled, as opposed to - disagreed with the report or failed to respond and therefore we think they disagree, or something like that.

A couple other issues came up in just talking about the WRME process generally with some of my colleagues. Again, there's not a lot of WRME cases each year, so our sample size is a little small. But, we have had some cases where the division finds the worker eligible for a WRME, but either the exam never gets scheduled, it gets scheduled and they fail to appear, or it gets scheduled, they see who the doctor is, and then they kind of give up on the process; and we would like to see some sort of, I don't know, enforcement mechanism to actually, I don't know – compelled is the right word, but to keep the process going, either if the worker has a WRME and fails to show up, either it waves their right for further exams, or like with a missed IME, could result in a, you know, $100 penalty, or something like that.

And, the last point that I wanted to clarify was the – there's already the rule that says the insurer must forward the IME, and I think in these proposed rules it was moving it to a different section as well. I wanted to make sure that the insurer's obligations can be met if their agent, their attorney, or even the IME company themselves forwards the IME report to the attending physician. I could see an argument being made that – yes in fact the IME report was forwarded to the attending physician but it wasn't done by the insurer, and therefore that rule wasn't met – and so I just kind of would like some clarification and make sure that, you know, if I forward it on behalf of my client that meets my client's obligation.

Otherwise, I think the rules meet kind of goals of MLAC to try and change this – put the burden more on the insurance company to follow up with the attending physician, and make the WRME more accessible for workers in the process. Thanks.

Fred Bruyns: Thank you very much Kevin. Ted Heus?

Ted Heus: Alright, for the record, my name is Ted Heus. I am an attorney with Preston Bunnell. We represent injured workers, and represent injured workers before the agency and the Workers' Compensation Board and the Oregon Courts.

So I've reviewed the proposed changes to OAR 436-060-0147, the rules covering the eligibility criteria for approval of a worker-requested medical examination or WRMEs. I have several concerns about the language that the department chose. But two of them really stand out and need to be addressed by revision to the proposed rule language.

ORS 656.325(1)(e) is designed to allow workers access to a state appointed medical examination unless their attending physician agrees with an IME report, upon which a denial is based. However, the Workers' Compensation Division has interpreted the law to allow a full WRME only when the attending physician affirmatively disagrees with an IME report. Such an interpretation resulted in denials of WRMEs when the physician neither agrees nor disagrees or is silent on the IME report. There's a range of issues as to why an attending physician may fail to comment on an IME. Some of them, but not all of them, just the ones I've personally encountered, are that: insurers don't send IME reports to the attending physician; insurers send the report but don' ask for a comment, so the IME report ends up in the doctor's record but is never brought to the attending physician's attention; the attending physician might not be familiar with workers' compensation issues – causation or specific conditions – and desires not to get directly involved in the issue; the attending physician may feel that she or he lacks the medical expertise required to the IME, which is usually conducted by a medical specialist; the attending physician might charge to review records or comment on the report, and workers might not have the means to pay out of pocket fees for those comments and reviews and those are not generally covered by insurance; there may be other legal barriers to the attending physician commenting, such as federal laws prohibiting federally employed physicians, such as Veteran's Affairs' physicians, from getting involved in state workers' compensation litigation; finally, the attending physician may simply be unavailable for comment within the period that comment is sought.

After several litigations and bringing the issue to the attention of Management-Labor Advisory Committee, the Workers' Compensation Division agreed to act by amending the rule regarding WRME eligibility. However, the proposed amendments originally intended to resolve the problem of silence or nonresponse, doesn't actually solve the problem. Specifically, the proposed rule retains the "does not concur" language that caused all the confusion to begin with. And, the proposed language attempts to resolve the issue with an evidentiary workaround that frankly might exceed the Workers' Compensation Division's authority, depending on how that issue becomes litigated. Alright, so first and foremost, the problem is that the proposed rule doesn't actually change the phrase "does not concur," which is the statutory phrase, or phrase used in the statute. For years, and I don't know how many years, but as long as I've been litigating the issue, the Workers' Compensation Division has misinterpreted the statutory phrase to mean a physician's affirmative disagreement with an IME report or an affirmative nonconcurrence. This is shown both in its rulemaking, its decision making, its resistance to change the policy in the face of judge orders interpreting the statute differently, and has never actually formally recanted

its prior interpretation despite MLAC's recommendation for it to change the rule to fit the correct statutory interpretation. By retaining that language and having no written explanation of its meaning or interpretation, it appears the division continues to hold on to this interpretation, which means that WRMEs can be denied for the same reasons they always have if there is no evidence the attending physician affirmatively disagreed with the report. Instead, the division's added some provisions regarding what documentation is necessary to find a worker eligible. These are the proposed revisions under 436-060-0147(2)(b) – ah (a) and (b). However, those provisions are nothing more than an evidentiary workaround and they actually support the notion that the division continues to interpret "does not concur" language as meaning affirmative disagreement with an IME. The first provision provides that the worker is eligible for a WRME if he or the insurer produces documents to demonstrate the attending physician quote "does not concur." This is similar to the same requirement that existed prior to the rule provision changes. The WCD has previously held the position that it is impossible to produce [inaudible] documents demonstrating the physician's silence or refusal to comment [inaudible] you can't document silence. Prior to the changes, the division attempted to use this documentation requirement as an affirmative method to disapprove WRMEs in which there was no affirmative disagreement, proof of affirmative disagreement with a WRME. So, the division added the second provision: subsection (2)(b)(B) that establishes a default rule that determines the claimant is eligible for an examination if neither party produces evidence that the AP, sorry, attending physician does not concur with the IME – sorry – does or does not concur with the IME. You know, at first glance, this seems to cover the situations in which there's no evidence of an affirmative concurrence or nonconcurrence, affirmative disagreement or non – or affirmative disagreement – except that, if the division continues to interpret "does not concur" in a binary way, meaning either an affirmative disagreement or affirmative agreement, as the two potential results of an opinion or a response to an IME, then the documentation rules actually shift the burden of production to the employer, which I think exceeds the division's authority to do so the way. The way the statute is written, the claimant is the one who requested the IME and usually is the proponent of the IME and therefore bears the burden of proving what the statute requires. If the division continues to interpret the statutory phrase "does not concur" as binary, meaning is either met by affirmative disagreement or defeated by affirmative agreement, then it is the claimant's burden to establish affirmative disagreement to obtain the WRME. In contrast, if "does not concur" means one of three possibilities, like it should, like it's properly interpreted – either affirmative disagreement, affirmative agreement, or silence, then the claimant wins if he proves one of two possibilities, affirmative disagreement or lack of affirmative agreement. Subsection (2)(b)(B) essentially provides if there is no evidence on the question, then claimant wins. That is backwards if the division still adopts a binary approach to the phrase "does not concur." It places the burden on the employers to prove an affirmative concurrence. If the division adopts the correct meaning of the phrase "does not concur" means three possibilities, then the burden is not shifted, and only requires the insurer to disprove what is alleged by the claimant, that the AP has neither agreed nor disagreed with the IME. The problem is that the division has consistently and historically adopted the binary interpretation, and nothing in this rule or elsewhere suggests that it has changed its historical position on its interpretation of the phrase "does not concur."

Based on the above, I ask that the division revise its language to make clear that only an affirmative agreement with the IME acts as a bar to a WRME. The written comments that I've submitted to the division provide some suggested language to make that happen. Alternatively,

there needs to be some written record of the division's intent in changing the rule. Since it appears nowhere in the rule, I request the administrator go on the record or issue an industry notice that spells out the intent of the rule, and that the division no longer interprets "does not concur" as meaning only affirmative disagreement, and it means the attending physician does anything other than affirmatively agree in writing with the IME report. Thank you.

Fred Bruyns: Thank you Ted. Would you like us to enter that into the record as well. It's up to you entirely.

Ted Heus: It's just on outline.

Fred Bruyns: Okay. Is there anyone else present who'd like to testify this morning? Is there anyone on the telephone who'd like to testify?

Claire Hertz: Yes, this is Claire Hertz, chief financial officer with Beaverton School District.

Fred Bruyns: Oh, welcome Claire. I'll go ahead and enter you onto our testimony log. You may go ahead.

Claire Hertz: We have submitted a memo with feedback to the proposed rules, and when we look at it in the way that school districts operate in the state, there are some concerns about some of the language in the proposed rule. For instance, not all school districts submit a comprehensive annual financial report. Some of them do annual financial statements. So, we are concerned about, number one that having that language and that requirement is outside of the scope of the smaller school districts. The other is, when you look at the Moody's and S&P ratings that are included as part of the financial criteria – for instance, North Clackamas and Beaverton have both Standard and Poor's and Moody's, and we would qualify under one of the ratings and not qualify under the other rating, so we're not sure if it just has to be one of the two, and the other concern there is not all of the school districts have ratings because not all school districts issue bonds, so just making sure that its not a requirement to have those ratings.

The other is that we're – we would really like to propose language that takes into account the PERS unfunded actuarial liability as well as future OPEB, other post employment benefit liabilities, from GASB rules that require us to post long term liability for things that we pay as we go basis, and the, having that, we would like to exclude that in the calculation of the financial rating of school districts. So, just wanted to re-cover what we included in a memo that hopefully you already have at hand, and if not please contact me and I'd be happy to get that submitted properly if that's not already been done.

Fred Bruyns: Thank you very much, Claire, and this might be a good time to say that that testimony, along with Ted Heus' testimony, and then a little bit of testimony from the department in terms of some housekeeping changes, has been posted to our website, and there's a handout at the back of the room that shows you kind of how to get to that website. It's got the URL. So I would encourage you to go and look at the testimony, and additional testimony that's received after this hearing through the deadline of the 26th will also be posted to that website. All our testimony is now put online for all to see.

Is there anyone else on the telephone or here present who would like to testify? Hearing no one, I just want to remind you again that indeed the 26th is the deadline for written testimony, and that includes the 26th itself, the close of the business day, basically, or actually it could come in as late as 11:59 p.m., but you may submit testimony in any written form, whether hard copy or electronic. I encourage you to submit your testimony by email or as attachments to email. However, you may also use fax, USPS mail, courier, or you may hand deliver testimony to the Workers' Compensation Division Central Reception on the second floor of this building, the Labor & Industries Building. On the table by the entrance are business cards that include my contact information. I will acknowledge all testimony received.

It's our policy to leave hearings, at least the hearing room, open for a minimum of one-half hour, so I will remain here, and you are welcome to remain as well, or you may go. And this, a recording of this hearing and actually a typed transcript will be posted to our website as well, so you can find out if anybody arrives late. But otherwise, I'm going to recess the hearing. It is now 9:50, so this hearing is recessed.

This hearing is resumed at 10 a.m. Is there anyone here who'd like to testify, or on the telephone? Hearing no one, the time is still 10 a.m. This hearing is adjourned. Thank you for coming.

Transcribed from a digital audio recording by Fred Bruyns, Oct. 24, 2017.