

**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: 436-060, Claims Administration 436-120, Vocational Assistance to Injured Workers))))))	TRANSCRIPT OF TESTIMONY
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The proposed amendment to the rules was announced in the Secretary of State’s Oregon Bulletin dated June 1, 2018. On June 21, 2018, a public rulemaking hearing was held as announced at 10 a.m. in Room 1-C of the Portland State Office Building, 800 NE Oregon Street, in Portland, Oregon. Fred Bruyns, from the Workers’ Compensation Division, acted as hearing officer. The record will be held open for written comment through and including June 26, 2018.

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TRANSCRIPT OF PROCEEDINGS

Hearing officer:

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 10 a.m. on Thursday, June 21, 2018. We’re in Room 1-C of the Portland State Office Building, 800 NE Oregon St., in Portland, 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” on the table by the entrance. If you plan to testify over the telephone, I will sign in for you.

With me this morning is Julia Hier, a policy analyst with the Workers' Compensation Division with responsibility for the proposed rules.

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

- Division 060, Claims Administration, and
- Division 120, Vocational Assistance to Injured Workers.

The department has summarized the proposed changes and prepared estimates of fiscal and economic impacts in the notices of proposed rulemaking that are on the table by the entrance as well, so I would encourage you to pick up a copy.

The Workers' Compensation Division filed the notices of proposed rulemaking with the Oregon Secretary of State on May 24 and May 25, 2018; mailed the notices 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 June 1, 2018.

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 June 26, 2018, 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.

So again, there's no one signed up to testify currently, but you're – anybody here is welcome to provide testimony this morning. Would you like to testify – anyone? Is there anyone on the telephone who would like to provide testimony? Okay, hearing no one, It's our policy to leave our hearing process open at least a half an hour. But, we'll go ahead and – just basically put the hearing on hold for a little while, and you're welcome to stay or you can – if you want to leave and provide written testimony that's okay too, but I'm going to be here until at least 10:30, and probably since we're at an off site location, and no one would the opportunity to even kind of look us up, I'll probably be here till about 11. So, you are welcome to stay.

Again, you can submit testimony in any written form. I would 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 the Labor & Industries Building, in Salem, Oregon. On the table by the entrance are business cards that include my contact information. I will acknowledge all testimony received.

So, this hearing is recessed at 10:03.

Hearing officer:

This hearing is resumed for testimony at 10:05, and if you can state your name for the record, and go ahead and testify?

Daedra Buntin:

I'm Daedra Buntin. I'm with Portland Public Schools. I wanted to comment on the OAR 436-120 rules on vocational assistance to injured workers. On page 3 – I believe it was page 3 of the proposed rules, there is an area where it speaks to, let's see, number (2), section (d), where it says the job does not need to be subject employment. So, for clarification purposes, is that intended to mean employer at injury, because when we look in the ORS 656.005, for definitions on subject employer, it states that the subject employer means an employer who is subject to this chapter, and a subject worker is subject to the chapter as well, which generally refers to whether or not the rules apply. So when it says when the job does not need to be subject employment, I'm just curious in regards to the intent of the rule in that respect, if it's intended to mean the employer at injury or the job at injury – so that is my primary question.

As well representing Portland Public Schools, on behalf of my director, Joe Crelier, he also wanted to comment that Portland Public Schools requests that WCD include a definition of verifiable documentation in section (2) of page 3, under (1)(d), where he indicates in section (2), unless defined elsewhere in the rule, the definition should support insurers in identifying legitimate data and data sources for the wage calculation. So those were the two areas where I had comment or question.

Hearing officer:

Okay. And typically what we'll do in our – we write a response to testimony, and we will provide any clarification we can in that response, and then we'll decide whether actually to amend the rule to address your particular testimony. So thank you for testifying this morning.

Daedra Buntin:

Thank you very much.

Hearing officer:

A little more time has passed and I think some people have arrived that were not here earlier, so would anyone else like to testify this morning? You're welcome to do so. Anyone on the telephone? Okay. Then, again, this hearing is recessed again at 10:07.

This hearing is resumed at 10:26 for testimony. Go ahead.

Spencer Aldrich:

Yah this is Spencer Aldrich, claimants' attorney with Schoenfeld and Schoenfeld, on behalf of OTLA. Have some concerns with 436-120-0147 – going to be referencing what in the materials is sort of the very top of page 2, going on to the – excuse me, the top of

page 3, going on to sort of the top part of page 4. The concern is where exactly is the burden on the employer to provide wage information to the insurer so they can calculate this for average weekly wage of course. 0147(1)(d) suggests that if the insurer can't get information, the burden is on the worker to provide verifiable documentation. The thought there is why would the burden be on the worker to provide something that the employer should have under other sections of the law, and should be able to provide to the insurer. That section seems to link to section (3) of that same OAR, which indicates there is a burden on the insurer to determine the (quote) "nature of the job," but it doesn't really connect to the wages and verifiable income, so it seems like there's intent there to put those two things together, but I don't necessarily – I'm worried that it didn't quite get there. So the OTLA concern is where exactly is the burden on the employer to take those records they should have and give them to the insurer so that that average weekly wage can be established. Thank you.

Hearing officer:

Thank you very much for your testimony Spencer. And, given that we are back on the record, is there anyone else here or on the telephone who would like to testify? Okay. Thanks. And I apologize but if I could get you to sign in.

Diana Winther:

Of course.

Hearing officer:

Go ahead.

Diana Winther:

I'm Diana Winther, and I'm the labor Co-Chair for MLAC, and also work as the general counsel for the IBEW Local 48. We just wanted to reference back to a memo that had been provided to the division from numerous stakeholders that posed the desire for clarification for section (4) for (b) and (c), the "and" between (b) and (c), just wanted to again clarify that the intent there is not to require simultaneous application of both of those subsections when determining the average weekly wage.

Hearing officer:

Diana, you said there is a memo that we received – do you know the date of the memo, or?

Diana Winther:

It's going to be – I can give you a copy of it.

Hearing officer:

That would be ideal. Okay, perfect. Thank you. Okay we will stamp that in as testimony as well.

Diana Winther:

Thank you.

Hearing officer:

Okay. Thank you for your testimony.

Is there anyone else who would like to testify this morning? Anyone on the telephone? Okay, hearing no one, I'm going to go ahead and adjourn the hearing. The time is now 10:30, and this hearing is adjourned. Thanks very much for coming.

Transcribed from a digital audio recording by Fred Bruyns, June 22, 2018.