RULEMAKING ADVISORY COMMITTEE MEETING
Workers’ Compensation Division Rules
OAR 436-060, Claims Administration
Rule 0025, Rate of Temporary Disability Compensation
Oct. 27, 2017, 8:30 a.m., Room F, 350 Winter Street NE, Salem, Oregon

Stakeholders attending were:

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<tr>
<th>Name</th>
<th>Organization</th>
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<tr>
<td>Kevin Billman</td>
<td>United Food and Commercial Workers</td>
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<tr>
<td>Zachary Brunot</td>
<td>Randy M. Elmer, AAL, PC</td>
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<td>Chris Carpenter</td>
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<td>Jennifer Flood</td>
<td>Ombudsman for Injured Workers</td>
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<td>Jaye Fraser</td>
<td>SAIF Corporation</td>
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<td>Tim Frew</td>
<td>Oregon State Building Trades Council</td>
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<td>Chris Frost</td>
<td>Thomas Coon Newton Frost</td>
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<td>Jessica Giannettino Villatoro</td>
<td>AFL-CIO</td>
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<td>Christine Jensen</td>
<td>Moore &amp; Jensen</td>
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<td>Karl Koenig</td>
<td>Oregon State Fire Fighters Council</td>
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<td>Katy McDowell</td>
<td>Tonkon Torp LLP</td>
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<td>Brian Noble</td>
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<td>Brian Ramsey</td>
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<td>Dan Schmelling</td>
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<td>Keith Semple</td>
<td>Johnson Johnson Lucas &amp; Middleton PC</td>
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<td>Diana Winther</td>
<td>IBEW Local 48</td>
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<tr>
<td>Carrie Wipplinger</td>
<td>Law Offices of Kathryn Reynolds Morton</td>
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<td>Kimberly Wood</td>
<td>Perlo Construction</td>
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Department of Consumer and Business Services staff attending:

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<tr>
<td>Adam Breitenstein</td>
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<td>Barbara Belcher</td>
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<td>Cara Filsinger</td>
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<td>Chris Clark</td>
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<td>Fred Bruyns</td>
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<td>Karen Howard</td>
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<td>Troy Painter</td>
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BEFORE THE WORKERS' COMPENSATION [BOARD] Division OF

THE STATE OF OREGON

RULEMAKING ADVISORY COMMITTEE

WORKERS' COMPENSATION DIVISION RULES

The proceedings in the above-entitled matter were held in Salem, Oregon, on the 27th day of October 2017, before Fred Bruyns, Administrative Rules Coordinator for the Workers' Compensation Division.
00:00: Good morning and thank you very much for coming to join us on a Friday. I apologize for picking a Friday, but it just happened to work out for calendars and in general. I'm glad the weather is nice at least and we'll stay as long as we need to this morning until our scheduled time is over, which is 11:30 approximately, but if we don't need the entire time, of course we value your time, and so we'll only keep the meeting going as long as the committee still has input for us.

So my name's Fred Bruyns and I coordinate rulemaking for the Workers' Compensation Division. And the purpose of this meeting, like all advisory committee meetings, is to give us a chance to find out what your thoughts are on any of the--in this case we have draft rules for you, to see what your thoughts are on any of those changes or changes that you don't see there as well, so this is a chance to talk about Rule 25 as much as it needs to be talked--discussed. It's specific to this particular rule, we're not opening all the claims administration rules; we're really focused on how the weekly wage is calculated for the purposes of calculation of temporary disability time loss compensation.

So this is informal, it's not a public hearing, it's just an advisory committee, so it's a conversation, and so feel free to--we need to hear from you. If you see anything in the rules or potential rule changes that entail fiscal, you know, cost to you or the people you represent, please let us know about those so that we can write those into our fiscal impact estimate when we file these with the Secretary of State, and we rely on information from folks like you.

If you're on the telephone with us this morning, please keep in mind
we'll pick up background noises in your office, so if you're keyboarding even close to
the phone, we will--we will hear that, so you can selectively use the mute button.
Please don't put us on hold because we'll get your background music if you happen
to have that, so--but we do want you to participate fully in the meeting if you're on
the telephone to the extent that you want to, so please speak up anytime you have
thoughts, unless someone is, you know, absolutely talking at the time, but otherwise
you won't have the advantage of seeing who has their hand up here or who might be
wanting to speak next, so we want you to be active participants in the meeting.

Since I've introduced myself, I'd like to go around the--actually, before
we go around the table, let's hear from the folks on the telephone. Please let us
know if you're joining us this morning.

02:44: Hi. This is Carrie Wipplinger, I'm a Workers' Compensation
attorney with Liberty Mutual in Portland.
02:50: Welcome, Carrie.
02:53: Good morning, this is Kevin Billman, I'm with United Food and
Commercial Workers and on the MLAC board.
03:00: Welcome, Kevin. Anyone else on the telephone?
03:04: This is--this is Keith Semple with the Oregon Trial Lawyers
Association.
03:09: Welcome, Keith. Anyone else?
03:17: Hi, everyone, my name is Chris Clark, I'm an analyst with the
Division.
03:22: I'm Chris Frost, a claimants attorney at Thomas Coon
Newton & Frost.
03:28: I'm Diana Winther, I'm general counsel for IBEW Local 48, the
electrical workers union in the Portland area, and MLAC member.

03:36: Jessica Giannettino Villatoro with the Oregon AFL-CIO.
03:39: Brian Noble with sheet metal workers, Local 16.
03:42: Chris Carpenter with the District Council of Laborers.
03:45: Tim Frew, executive secretary of Oregon State Building Trades.
03:49: Troy Painter, Workers’ Compensation Division.
03:51: Karen Howard, research section.
03:53: Adam Breitenstein, Workers’ Compensation Division.
03:55: Katy McDowell with Tonkon Torp on behalf of AGC, Associated General Contractors.

04:01: Chris Jensen, I'm a claimants attorney with Moore & Jensen in Eugene.
04:05: Cara Filsinger, Workers’ Compensation Division.
04:07: Dan Schmelling, SAIF Corporation.
04:09: Jaye Fraser, SAIF Corporation.
04:11: Brian Ramsey, SAIF Corporation.
04:12: Jennifer Flood, ombudsman for injured worker, DCBS.
04:15: Okay. Welcome to you all. We have additional copies of the agenda in the back of the room and also I want to let you know that Chris Frost sent in just yesterday afternoon some information from a worker and so I would encourage you to pick that up. It's something that I didn't have a chance to post to our website. If you're on the telephone with us, you won't have the advantage of that and I apologize, I just saw it first thing this morning and didn't have a chance to post it to our website before the meeting, but it does focus on someone whose wages
changed during the year before the injury and how those wage changes were averaged over the course, the actual wage was averaged over the full year as opposed to reflecting the most recent wage, so... With that, I'd like to turn things over to Chris to take us through the draft rules.

05:11: Well, thank you, everyone, again for coming, we really appreciated everybody's feedback during this entire process and are looking forward to a good conversation again today. As you can see, we have a pretty short agenda and then we've attached the proposed rules, as Fred mentioned, including both the language reflected in the temporary rule on union hall--hiring hall workers, wage calculation, and then some housekeeping issues that were previously proposed in an earlier Division 60 rulemaking process. So I'm just going to go through these three items on the first page here and then we'll--should have time for other people to bring any issues they would like to discuss as well.

So the first issue is replacement of the temporary rule that's now in effect for workers employed through a union hiring hall. The temporary rule went into effect on October 1st and was issued after stakeholders reported that workers have been harmed by removal of their hiring hall provision in rules effective January 1, 2017. You can find the proposed language on Page 4 under section (5) of the rule, subsection (d). We--yeah, at this point we just really appreciate any feedback on the language itself or any other issues with this subsection.

06:45: And this is exactly the same as the temporary rule language, isn't it?

06:48: I believe so, yeah.

06:51: And the only change to the previous rule was swapping out call board for union hiring hall?
06:54: Right, and then the second sentence, which kind of describes
the applicability issues.

07:01: Excuse me, Chris, do you have any more copies of the
agenda?

07:09: I do not, but I can--

07:10: Well, yeah--

07:10: --we can share one--

07:11: --no, no, you keep yours, Chris, because you're going to be
going through the stuff, so here.

07:19: I gave mine to Tim.

07:20: Do we need any additional copies around the table?

07:21: (unintelligible)

07:21: We do.


07:28: We should have copies in just a few minutes.

08:03: All right. So I know we've talked about this issue quite a bit
already, so I understand if there's not a lot of new input, but...

08:12: And if there is any (unintelligible) we just thank the Division and
other stakeholders for looking to get this resolved.

08:19: Great. All right. Well, that is perfect, so...

08:39: You did such a good job earlier we have--

08:41: Right, yeah.

08:41: --nothing to talk about.

08:45: So moving on, so in a series of advisory committees in 2015
and 2016 the Division discussed OAR 436, Division 60, Rule 25 with stakeholders
and issued a substantially revised rule effective January 1, 2017. The goal was to have a rule that would simplify calculation of wages and increase accuracy and consistency in determining time loss rates. We requested that committee members describe their experiences with the revised rules. We know there has been a couple concerns raised, so any--yeah, any issues people would like to bring forward are welcome.

09:31: Chris?

09:32: I came specifically to talk about the calculation that is reflected in the--in the Mr. Pollard's (phonetic) statement here and this says it for these people that are making more money, but let's look at the little guys are the one, we've got a state law that's going to take us every year for the next few years and give an increase in minimum wage, and everybody that's going to get that increase in minimum wage that gets an injury is not going to get that increase in minimum wage, so I think that this rule allows for conflict with the statute that says that they're to get an increase, and that's an issue that I've raised already in four cases that I had and got two decisions from a judge, both by the same judge, I've got two cases up on appeal to challenge this rule just for that reason.

10:29: I'll let others chime in here, but most of our, I believe, contracts get raises every year and still tend to the contract, so if a worker gets hurt, then that's not going to be reflected in their time loss and that's a problem for (unintelligible). And I would just (unintelligible) what Chris said about minimum wage. We kind of take our role as the voice for both our affiliates and also for workers who don't have an advocate all the time and that's a big--that's a big concern for us as well. Those workers are already being left behind and they sure don't need to be left behind after they get hurt.
10:58: Okay. So to clarify, this is really about--

11:01: (unintelligible)

11:03: --removal of the previous exception in the rule that, when there has been a change in the words--wage earning agreement due to only a pay increase or decrease during the 52 weeks prior to the date of injuries, insurers must use the worker's average weekly wage hours worked for the 52-week period or lesser period as required by this rule multiplied by the wage at injury to determine the worker's current average weekly earnings. That's correct, that's what this issue is. Okay.

11:32: We have--we have several contracts that workers that aren't hired through a hiring hall as well, so we have production workers in the sheet metal industry and they get wages increases every single year, and depending on which company it's a different time of the year, so it's not standard. Each one of those shops has their own individual contract and they start and stop at different times, so it--I don't see a worker that would not be affected by that rule change in a negative way. And I have, I do have a couple of our contracts wage sheets where guys can go from--after 180 days, they go from 13.50 to 18.50, you know, and that's a significant change there in a short amount of time because they've proven that they can do the job and so they're moved up and they can move up even more (unintelligible) skills.

12:35: Yeah, it's not an uncommon factor, you know, I'm guessing for you as a probationary period, just--

12:39: Yeah.

12:39: --like it is a lot for our maintenance workers, you know, our standalone contracts outside of the construction world to having, you know,
sometimes dramatically, sometimes, you know, less so period of time, whether it's, you know, six months or three months where they're making less money through no fault of their own, because of the fact that they have these great protections and just-cause, there's that probationary period in which they can be let go without having to go through the whole grievance process, sort of a compromise that we have with the employers, and this rule doesn't reflect that, again that increase that they should, you know, and do deserve.

13:14: Okay. And so when things like that happens, there's no other change in the wage earning agreement, like a change in hours worked or job duties or other reasons; it's--

13:23: It--

13:24: --it's simply bay--

13:24: Basically it gives almost the employer like a trial period to test out the employee that otherwise based on the contract they're going to have a much harder time getting rid of once they pass their probationary period, essentially.

13:35: This is Chris Frost. I am here to address this issue specifically. I testified against the rule change when you all were considering it. I was very disappointed when the rule changed. I think part of the consideration for changing the rule was that you were thinking it would not affect that many workers, but I am here to tell you, and I'm sure Ms. Jensen can tell you because we represent injured workers, that this affects a large number of workers. Most of injured workers are paid on an hourly basis.

I am the person that has to listen to injured workers' problems, I'm here because of Brian Hoskins (phonetic) and the many people like him. Brian was hired on a probationary salar--or hourly rate of $11. He then got his regular rate of 15.80,
but then shortly after that had the misfortune of being injured in Oregon Workers’ Compensation system at work. So instead of having a time loss rate of $429 a week, he got a time loss rate, weekly time loss rate of $365 a week. I don’t know if any of us in this room could live on that. It was a reduction because of this rule of $278 a month.

Brian quickly became housing-insecure and he became food-security-insecure. He could no longer pay his child support. He eventually had to move out of the State of Oregon so that he could live with family members while he was recovering from his injury. This rule effectively saved insurers money, it effectively impacted negatively Mr. Hoskins’ children, Mr. Hoskins, and I am beside myself because he is just one of the workers that I have dealt with since this rule has changed.

I told you this would happen, I appreciate that you all are so polite, I wish I could feel more polite, but I’m the person that has to try to help these people. This rule needs to change back, this is not about math, this is not about a difficult math calculation. The math on these things is actually pretty simple, I’ve been doing it for two decades, my paralegal does it quite quickly, he is available to teach adjusters how to do this math. This is not a question of a difficult math calculation, and if the Division continues to suggest that this is a problem with a difficult math calculation so that injured workers become housing-insecure and food-insecure, I need them to write Mr. Richard Pollard and I need them to write Brian Hoskins and explain to them why this rule changed.

17:38: Thanks, Chris.

17:43: Another thing to consider with this, it’s not just the time loss rate that you’re dealing with, because the permanent partial disability awards are tied
directly to the average weekly wage. It makes a substantial difference, and we may be talking about, you know, a hundred bucks a month or something if we’re talking about the change for the time loss rate and that’s a lot of money for somebody that’s making a little money in the first place, but it is really compounded then when you do some calculations and say what would your permanent disability award be here with your average weekly wage A versus your average weekly wage B, and some of those figures are pretty—very easily get up into the thousands of dollars of difference that you’re treating a worker, and in some cases, and it doesn’t happen very often, but in some cases you’re looking at somebody who either is entitled to or is not entitled to vocational assistance because of that little itty-bitty change, and so it really matters more than just these two-week time loss checks that they’re getting, it’s a huge thing.

19:13: Are there other, any other comments?

19:17: I will just note, this is Chris Frost again, Workers’ Comp premiums have continued going down. The Workers’ Comp system is not a particularly—its insurers are not facing a great deal of difficulty, the law generally is not anti-insurer, I think the system has done a great job recognizing insurers as stakeholders and listening to their issues. Workers’ Comp premiums again are not going up; they’re going down. So again this is not a math problem; this is a money issue. This rule saves insurance companies money by taking it out of injured workers’ pockets at a time when that simply is not appropriate. This should not be looked--this should not be looked at as a math issue.

20:40: Zachary Brunot, claimants attorney here in town. I think that maybe we should just zoom out for a second and remember what the system was created for. It was meant for the party that was better able to bear the risk of an
injury at work to be the one that bears the risk. The legislature picked two-thirds of
an average weekly wage probably because it shouldn't have provided incentive for
people to stay home from work, right, and so we're dealing with this balance
between not incentivizing staying home from work and getting back to work with
being housing- and food-insecure, right? We're shifting a little bit too far towards the
housing- and food-insecure at the risk of incentivizing injured workers from staying
home, and my comments are simply let's evaluate that balance.

21:32: Jaye Fraser for SAIF Corporation. I don't think we were in love
with the prior rule because it is difficult and, with all due respect, Chris, the
calculation can be kind of challenging. SAIF at audit seems to do much better than
a lot of insurers, so we figured out how to do it. It's never our goal to take money
that a deserving worker should get out of their pocket, so if the Department decides
to--you know, to change it, we certainly won't object. We'd love to see the
Department kind of come up with a way that is simpler so that it's easier for us to do
it quicker because that we can--you know, we get money into the pockets of the
injured worker faster, and I think during the last rulemaking process we had some
ideas, I will confess I didn't go back and look at those again, but we certainly--I
mean, this is not, I think, the intent, I'm sure it wasn't the Department's intent when
it--when it did these rules, so...

22:35: I'm just adding on to what you said is I don't want to say I take
offense to say it's saving the insurer money. I think the original discussion was is
there a way to ease the computation that's needed that I won't say benefits
everyone, but is advantageous to everyone? One of the difficulties with the
computation now is when it was if there was a rate change, you averaged the hours
at the rate at the time of injury is we would have to go back to the employer and say,
"It's just not good enough for you to give us the wages earned for a specific payroll period, whether it's a biweekly period, a monthly, a weekly, or an annual total, is we need the actual hours for each week worked," and in some cases that took the employer quite a bit of time to gather all that information, which might be only for a day or two of time loss or it might be that case where time loss is going to be paid out over months because the worker has surgery and is going to be off, so trying to find a balance in that burden on the employer of providing all the payroll records, I'll say that the calculation now is, you know, I won't say easier; it's more streamlined because we can get the gross wages in and say here's the gross wages over the past 52 weeks without needing to look into that and saying was there a rate increase or decrease during that time period that was only because of a pay rate increase? Oh, there was; now I need to get the hours and, employer, please provide more payroll records, so I think missing from this conversation is the employer's perspective and again I'm not going to say burden, but the need for them to provide more information to the insurer, depending upon the complexity of the rules, to make sure you're evaluating now was this a rate increase, was this a job duty change, was this a position change, did they go from part-time to full-time, full-time to part-time, and the more complex the rules get, the more complex and detailed payroll information the insurer needs, the service company needs in order to apply the rules correctly, so I think, you know, trying to find that balance of how do we streamline the administrative rules to make sure we get a fair and accurate average weekly wage, but still, you know, kind of streamlining it so we're not spending, say a lot of time, but a lot of time getting the payroll records in and going back to the employer and saying, "Can you please clarify this, can you please clarify that?" because in many cases it's not just an employer contact we have; we're talking with a payroll
firm or an HR firm that's not even in the State of Oregon because the supervisor that
works with the worker on a daily basis has no clue even what the rate of pay is, so
we're contacting two, three, four people to obtain payroll information to calculate an
average weekly wage, so to the extent that we can find some streamline in the
system and still get an accurate and fair wage for the worker, we're all for it.

25:56: One of the things that I believe, correct me if I'm wrong, the
adjusters also need to be looking at before they determine the wage is not just the
payroll, even currently; they need to be able to look at it and say whether or not
there's an extended gap, they need to be able to look at it and say has there been a
change? So if they're looking for an extended gap period, I know that it takes some
time, but it shouldn't be too hard to figure out what those hours are. Folks should
have been doing it for many, many years and they weren't in compliance with the
rule. To me it's--I know that I always deal with it on a small basis, but--and I know
workload is an issue sometimes, but it shouldn't come at the expense of the injured
worker.

26:44: Well, and, Jennifer, I think we agree with that. I think all we're
saying is, frankly, after hearing this testimony, I'd rather go back to the rule the way it
was than be taking the money out of the pocket, because we can figure we can work
our way around it and we have, but what I guess we're asking is, is there another
way to make sure that workers get a fair--you know, that their time loss is a fair
representation of their wage without as much detail? Because some of our
employers are small, too, some of them are, you know, we have--we have our
challenges with some of our employers, so--and that's no excuse, I'm not trying to
make any excuse, so we're just asking the Department to, please, as you are really
looking at this again, to see if there's a way to--
27:37: Zachary Brunot. Jake, I thank you for that what SAIF's trying to go after a fair wage for the employee, I really do appreciate that. The--I run into cases all the time trying to set a rate, and the problem is that the employer has the payroll records. They're not paying extra money to these employees if they don't have to, they know how much they have to pay these guys, right? And so when I think the rate's wrong and I have to challenge the rate and the employee says, "Well, I don't have a checking account, I get paid in cash," it's like, you know, (unintelligible) do with your money, but the problem is, is the system has to work for those people that maybe conduct their finances (unintelligible), too--

28:12: Yeah, I think--

28:13: --and so when we have to prove the extent of disability, which I understand is the claimant's burden under the system, we don't have the information necessary in order to actually do that because the other party is holding the cards, and I realize the insurance company's dealing with the same bad actors on the--on the policyholder side, but I think that we need to address that, too, I mean, there has to be something that put--that addresses the employer's need, I mean, honestly to the extent that I would suggest, this may be a little bit obvious, there is a presumption of what the rate is based on the employee's statements and then the employer needs to come forward and say, "No, that is way too high," and until then because that would incentivize the bad-actor employers to provide better records, and it doesn't happen all the time, granted, none of us in this room are going to have that problem, I have a checking account, I keep my pay stubs in a nice little folder on a desk, but people aren't like us, you know, these are blue-collar guys that get mangled at work, they might not speak English, they might not even speak Spanish as a second language, you know, they're not as sophisticated as we are, and the
system is built upon the presumption of sophistication of the parties in order to be
able to present these pieces of information, so the rule has to take into consideration
(unintelligible).

29:25: I will--this is Chris Frost again. I’ve dealt with insurers, a wide
range of insurers over the years, and by and large I will say that SAIF knows how to
calculate a wage, I don’t have the problems. Under the old rule where you had to
take the average hours times the rate at injury, I didn’t have a problem with SAIF
doing that, they seemed to be able to do it without much problem. Other insurance
companies or third-party administrators? I--it was such a problem that it almost
became apparent to me that they simply didn't bother with the rule; they just
averaged the hours and--

30:26: Averaged the wages.

30:26: Averaged the wages, paid the time loss, and the repercussions
for the few workers that actually were able to get an attorney to look at the wage
rate, the penalties for getting it fixed were so low that it was still worth the price of
disregarding the rule.

I remember one year, my first year as an attorney for injured workers, I
had the--I had three workers in a span of about six months who each had the same
adjuster; time loss wrong the first time, we--I challenged it, time loss wrong on the
second, I challenged it. The third one, once she got my retain--once the adjuster got
my retainer, by the time the guy got to my office, she’d already sent him a check for
what she owed him. She knows, she knew how to calculate under the rule, she--and
I’m-- She chose not to.

This rule change coming at the time when after our Access to Justice
bill that made it easier for injured workers to find representation to help them with
their wage loss, this rule change comes uncomfortably close to that Access to
Justice bill. In other words, it may be that it is not merely as financially beneficial
now for injured--for adjusters to ignore the old rule. Now if they--if they--if we still
have this rule in effect and they were still ignoring it, there was more financial
penalty for disregarding that, so--

32:45: Or on the flip side of it, more incentive to do it right.

32:47: More incentive to do it right, there you go, so--

32:52: I think Zach was kind of on the right track there, I think that you
have--companies are the professionals with their payroll and all of that, right? A
worker that gets hurt doesn't know anything about the system, doesn't know
anything about Workers' Comp, so if you give that worker the benefit of the doubt on
the wages and give the employer a time limit to prove that it's different than that,
then that's going to incentivize them to get it figured out and prove it, right, and get
you guys information to figure the wages out if they had wage changes throughout
that time because, you know, they're the professionals dealing with that type of
paperwork. The worker really doesn't know, they're taking everybody's word for it.

33:37: You're right, but I think, Brian, that unfortunately the real truth is
that most employers provide us with what they need and so I hate to set it up with
the potential of conflict from the very beginning so we're having to constantly say,
"Oh, no, yes," because I have to ask, I couldn't tell you what my hourly rate is, I don't
know, I only know what comes in my paycheck--

34:05: You're not an hourly worker, Jenn.

34:07: But I have an hourly rate, I have an hourly rate--

34:09: Yeah, we all do--

34:10: And--
34:10: --(unintelligible) hourly wage--
34:11: I mean, you're right, you're right, but I think that it's not uncommon for people to not know that down there, so--
34:17: And I'll say just I appreciate the simplicity of it, but to throw out an example. You have a construction worker that works both, yes, a regular standard rate job and then a prevailing rate. If they're injured on the prevailing rate, they're going to tell you, "I'm making 35 bucks an hour working 40 hours a week," but they only worked prevailing rate two or three weeks out of the year, they normally were making 15, 20 dollars an hour and working 30, 40 hours a week because there are seasonal fluctuations in that, so based on that presumption, are we at 35 and 40 or we're at 15 and 30 hours? There's a big disparity there.
And I know that you're probably representing workers or seeing workers where they're working union jobs with prevailing all the time. A lot of the smaller construction companies that we're insuring, the worker's working prevailing rate two or three weeks out of the year and the current rule takes into consideration that and takes that high and takes the low and finds an average, even under the old administrative rule we would still do that, we would average out the hours at the various rates. If they were irregular and not necessarily a rate increase, but it was a rate increase, we would take the highest rate for all of those different throughout, so for every solution we come up with, there's things we need to consider that--
35:51: Absolutely, and I would say that if you're wrong, if I make 150 bucks an hour at rate, sure, and they started getting paid for the first couple weeks based on that (unintelligible) because obviously for maybe, you know, for a plumber, not that unreasonable. But then after two weeks you get the audit information, you do it, SAIF, every insurance company has a way to recoup those
losses through overpayments from future compensation. The point again back to my original point is who's best able to bear that risk of the unknown? And on the front end it is going to be the insurance company because what if that worker's right, right? They--just because I'm making 150 bucks an hour doesn't mean I'm not living paycheck to paycheck. Everyone (unintelligible) economy is a (unintelligible), and so that's where that benefit has to come back into, the tools are available to the insurance company to recoup any overpayments made, so--

36:39: And I would--I mean, we blew up the system. I would love to be able to say, "Look, the insurer gets 30 days, 45 days, whatever from the filing of the claim to calculate an average weekly wage and no hearing requests during that time," but in the current environment we're in, I see hearing requests within a week of the claim being filed saying your average weekly wage is wrong. We haven't even paid a first payment yet. We make the first payment on the 14th day based on what we're being told by the worker and the employer, "This is what we think this person's making," we get the payroll in, calculate an average weekly wage for $50 off to the employer's benefit, the insurer's benefit if you want to look at it that way, so we make up the difference with the underpayment to the worker. We already have a hearing request in the file. We paid a $3500 attorney fee on that to make it go away. We didn't even have the opportunity to calculate the average weekly wage based on payroll because we had not received it before the first pay was due within 14 days and we were already penalized $3500 in attorney fees because the hearing request came in that quick.

37:59: Who was that and does that happen all the time?

38:03: It happens with some--

38:05: And did a judge order that?
38:05: --large metropolitan areas--
38:06: Did a judge order that?
38:07: Yes.
38:09: I would like to see that.
38:11: So I would (unintelligible) our goal is, if the worker questions
the average weekly wage, the employer--if anyone questions it is, okay, let's have a
meeting of the minds. I appreciate it when worker's representative calls up and
says, "Hey, I think you got it wrong here," because chances are we did miss
something, you know, whether or not there was a gap in the payroll that we weren't
aware of because the payroll that we received from the employer is just broken out
monthly, and so we don't see that two- to three-week gap within because it's not
reflected in the irregular earnings, so those types of things when we're all working
together, we get that wage calculated for the worker quicker than--and I'll say we get
the hearing request, average weekly wage dispute, what's your issue? "We'll tell
you at hearing." We would like to fix this now if we knew what the issue was; what's
the issue? "We'll tell you at hearing. Give us the payroll records first." I--we're
wanting to work with all parties to get an accurate average weekly wage, but
sometimes the system's not set up for it.
39:22: And every system has (unintelligible) and there's going to be
unscrupulous parties on both sides, and I'm not talking about SAIF. SAIF does a
pretty good job, you know, but there are--not all the insurance companies and not all
the (unintelligible), and so we can't build a system based off of a few bad actors--
39:42: Outliers.
39:44: And, no, my frustration, I supervise the folks that do the
average weekly wage calculations and they're in my office saying, "I have this one
piece of paper from the employer with a date range and a gross amount on it.” I’m like, hm, what story does it tell? And I have them tell me the story. And a lot of times the story is about two seconds long and this is the average weekly wage, and over time the story gets longer and longer and longer and the average weekly wage gets more and more accurate, and how quickly can we get the story together so we can look at the administrative rules and say this is a calc--or an accurate average weekly wage?

40:27: I want to know who these attorneys are that are getting clients a week after an injury.

40:31: Yeah--

40:31: And is walking in at the time (unintelligible).

40:38: I just have a more formal question, I guess, is in looking at 656.210, it talks about actually the wage is supposed to be calculated based on the time of injury. I’m a little confused and I’ve kind of asked this and maybe I haven’t asked the right way before as to how we got to a point where we’re having (unintelligible) compensating calculation when--you know, I’m a lawyer, I’m a lawyer because I don’t do math, but, you know, in my mind it’s the statute says time of injury, I look at my most recent pay stub, so for the week in which I got hurt, because legally all employers are supposed to be providing those in some fashion or another, you know, and look and say this is my hourly rate, that should be the amount. And I understand sort of the complication with irregular pay and stuff like that with the prevailing wage and that sort of thing, but, you know, hey, my union prevails, so that’s not an issue for my workers, but I kind of have to view it as the employer’s burden, they’re choosing to bid that work, they’re choosing to put themselves in that position knowing that at the time of injury when that person gets hurt that this is the
wage I may be facing when I'm doing Workers' Compensation because I'm choosing
to do this--to do prevailing wage work.

41:52: I'm not an attorney, but statute .210's about this long.

41:57: Uh-huh.

41:57: And at the end it says that the Director will promulgate rules

(unintelligible)--

42:03: It's (unintelligible) how we got that far.

42:05: Yeah.

42:06: You know?

42:06: And we have four pages, five pages, however many pages of
rules that if this, then do this, but for this, then do that, then you layer case law on
top of that and--

42:17: I'm sure I guess it's (unintelligible)--

42:21: That's a very good question, and when we talked about this

with advisory committees in the past, we talked about that very thing, what does at
the time of injury--

42:27: Right.

42:27: --mean? And it was the downside would be if someone really
had a few kind of slow weeks and they were working very limited hours for a couple
of weeks before they were injured, they would be stuck with that very low rate if we
stuck to it exactly the time of injury, so it may be a matter of what they call the
Director's discretion in rulemaking to define what, you know, at the time of injury
means. There's only been, I think someone forwarded a Hearings Division, a
Workers' Comp Board Hearings Division case, an Opinion and Order, where I think
an ALJ found that that was the case, they thought that the Director had that
discretion, but I don’t know if it’s been challenged or how it would come out if it went up to the Court of Appeals or Supreme Court in terms of someone arguing that it should have been at the time of injury and that our rule would therefore be invalid, but--

43:19: And I guess also to go in that, I think part of the reason why the Director is granted the discretion to promulgate rules is because there’s more variables than just kind of a set wage and then variable hours, so some workers may have multiple jobs, so they may have multiple different wages even like simultaneously, some workers may receive different kinds of pay that needs to be incorporated, some of that may be temporarily based, so they may get a holiday bonus that should be included, but if they’re hurt in July, you know, do you--do you include that as their wage at injury because it’s July, it’s not December? So there’s just a lot of other factors that require this kind of averaging method. And, yeah, we’re obviously here to discuss what’s the best averaging method, but that is, I think, why just saying your wage rate at the time you’re injured so is not a reasonable approximation of what your annual earnings might be.

44:20: I guess maybe then my thought is, you know, maybe I can understand the need to average if you’re trying to calculate all these different things, but I don’t think it should be less than the hourly dollar amount that you got when you got hurt, so, you know, even if there is no less-than language in there, you know, I don’t think workers should have to take a step backwards, whether it’s the people who have been desperately waiting for increases in minimum wage or, in my case, we’re looking at a substantial increase hopefully for our next contract because my union brothers and sisters (unintelligible) and we’re working really hard to get that fixed and it’s not fair if they get hurt on January 2nd to not get that benefit.
44:55: Sure. No, and no--no, we appreciate that. I think one of the
things that the rule is intended to address, and I'm just going to ask probably the
committee, is we're seeing more and more people with wage differentials and things
like that, and so part of what we were trying to get at is, is addressing making better
outcomes for them so when you, you know, maybe work one day at--not good at
coming up with reasonable hypothetical numbers, but say you work one day at $20
an hour, the next day you get some differential pay for $25 an hour and then you go
back to 20 and you're hurt on that day, you know, what should you get paid? $20 or
$25 an hour? So in that case you were--you would be getting a reduction because
of the time that you got hurt and it's not a fair representation of what your actual
earnings are with that employer. And so I think that's kind of what we're--that was
part of the intent of what we got to, going back into the rule record, that was the
primary driver of our internal decision-making.

46:00: How common is that situation? Because I have not run across
that.

46:05: I can't say how common it is, I know we're seeing it more and
more, but maybe if somebody--

46:10: I would say it's very (unintelligible) Workers' Compensation
Division, the audit manager, I personally have looked at a lot of wage records, and
differentials in pays is many in one single day for lots of people, it's actually fairly
common way people get paid these days.

46:27: I did a wage differential for the day or the situation which we're
talking about where someone was getting paid one dollar amount one day, a
different dollar amount the next day, and then back to the original dollar amount and
was getting hurt on that day--
It's all of that.

Okay.

I can understand like our--a lot of workers will have a shift differential if they're working a swing shift or a graveyard shift to help incentivize people to do that and I can easily see taking the wage rate of that day and averaging it together, but--

We've seen wage rates change up to eight times in a single day.

There should be limitations under the law how many times (unintelligible)--

Well, in prevailing wage, depending on who's actually doing it, you could get paid several different wages during the day, so--

And we've seen 28 pages of wage records that were hard to read and calculate, we've had situations where we've had auditors looking at the same 28 pages of wage records with different rates of pay throughout the day and changing back and forth high-low and it's nearly impossible to--well, we have to select one rule, and by doing that the way the rule was before, you'd be in violation of another rule.

The State healthcare industry--

Exactly.

--is a nightmare--

Yeah.

Truckers--

Public entities quite often will have different rates of pay depending upon what job they're doing, school districts will have folks that are hired
for two or three distinct jobs but only be employed once, you know, they go from
being on the playground to doing a crossing guard to being a teacher aide
throughout the day, and it's one employment but it's three rates of pays, yeah, we
see workers with 30 different differentials in healthcare.

I'll throw the State of Oregon under the bus. Their payroll is an
absolute nightmare to try to calculate because they'll pay a monthly amount and then
they do a mid-month adjustment to adjust the prior months if there's leave without
pay or overtime that wasn't reported in the last few days of a payroll period because
you're on an annual reporting process and so we're adding and taking away just to
come up with an average weekly wage, and is it the norm? No. Actually a lot of the
service company accounts that we have because their folks make about 12 bucks
an hour and they never work overtime and here's the wages. It's usually the more
sophisticated employers that have more sophisticated methods to pay their
employees and more sophisticated payroll records that you ask for payroll and you
get 52 pages of payroll and you're like "What is going on?"

49:17: It does seem that just as WCD has rules about odd like
commission, salaries, and other things, that that seems like it could be addressed
with a rule that requires averaging, but to lump Mr. Hoskins, Mr. Poland (phonetic),
and other hourly-rate workers who, and particularly like Ms. Jensen said, low-wage
workers in with those folks, those differential-shift folks, is--

49:57: Those are the hourlies.

49:58: Yeah.

49:59: Those are the hourlies that are getting shift differentials and
have--

50:03: But--
50:03: --various rates of pay that go from $12 to--
50:06: You can have a rule for people who have shift differentials or, you know, rather than--
50:15: Well, let's remember that the statute .210 only says the benefit to the worker who incurs an injury shall be based on the wage of the worker at the time of the injury, that's all you guys have to work with. Average weekly wage is defined in statute, but that actually refers to a state average weekly wage, which doesn't--it's not even relevant to this other than setting maxes and minimums. So what--how do we figure out the wage of the worker at the time of injury? I mean, average weekly wage came up at some point, which was used, and it's clearly a sort of equitable measure, but where does 52 weeks come from, where does 104 weeks come from? I mean, I know this is the old rules, but we have discretion to get to fair without violating a statute. And the wage of the worker at the time of injury could be the wage of the worker on that day of the injury multiplied by the number of days they work in a week, you know.
51:09: This is Chris Jensen. I think that that serendipitous assignment of av--of wage to somebody depending upon whether they get hurt on a day when they work--when they're working 12 hours, so they're getting four hours of overtime that day, versus somebody who got sent home early for some reason because they're working out in the woods and they got a shutdown for a fire or whatever is that would be a crazy way to go because, yes, there'd be some who would benefit extremely by that, but there would be others who would be just excessively hurt by it, and to do that, when you think of the families that are involved in this, I think that would be crazy.
51:51: Where we were before the rule change was if a worker had a
rate increase in the prior 52 weeks or a rate decrease, we would take the rate on the
time of injury, and there could be multiple rates and multiple shift differentials, and
we would average out all the hours worked in those various categories for the prior
52--well, up to the prior 52 weeks, depending upon if there was other wage-earning
agreement changes within that, and take those averages of the hours, so it'd be the
average regular hours, the average overtime hours, the averages of all the shift
differentials and premiums at the rate at the time of injury and then divide by the
weeks worked up to the prior 52 weeks.

This rule simply took that away and said don't average the hours; just
take those gross amounts for each category in the prior 52 and divide by 52, so a
worker that's injured on the first day of their rate increase under the old rules would
benefit because their average hours was brought up to the new rate. In the current
methodology, that worker would still benefit because they would have one day at the
higher rate, but the other 364 days of the past 52-week calendar period was at the
lower rates, so depending upon when the worker's injured in relation to their pay rate
increase, if they were injured 51 weeks after their pay rate increase, 51/52\textsuperscript{nd}s of their
average weekly wage would be based on the higher rate. If they were injured six
months after their rate increase, half their wages would be at the higher rate, half
their wages would be at the lower rate because it really depends upon where you're
injured in relation to the rate increase.

So I guess the question is from a simplicity standpoint was let's take
out the averaging of the hours and say to the worker, "Look, if you're injured two
weeks after your date of injury, not that you weren't making $36 an hour there and
30 hours--dollars an hour there, but you'd only been making $36 an hour for two
weeks." Now I'm not going to argue the merits of that whether it's right, wrong, or
indifferent, but I think the purpose of the rule change was to say not that it comes out in the wash, but that worker had been only working under that wage-earning agreement for a short period of time or a longer period of time, so it would balance out. Now, I have no problem with going back to the prior methodology where we averaged the hours at the rate, I mean, that's the way we'd been doing it for years, but to the extent that we can make it, say easier, but more consistent to get an accurate payment out to the worker, and I've thrown this out before and I don't know if it's really -0025 or -0035, but we're required to pay time loss every 14 days. But who gets paid every 14 days?

55:08: I get paid every seven.

55:09: Okay. So I'm calling up your employer when you get injured every 14 days and say, "Hey, give me Brian's payroll for the last two weeks." Well, what if you get paid Monday through Sunday, but I'm paying my time loss payment on Wednesday, and I say, "No, no, I need half of Brian's payroll from last week and the other half for this week," and they say, "Well, we haven't even reported it yet, it's not with our payroll," my suggestion, and I don't know if it's in -0025 or -0035 or where it is or -0020, is give insurers the option to pay temporary disability payments after the initial payment's made on the 14th day consecutive or along with the employer's payroll, and I think that would help out the accuracy of payments, especially on temporary partial disability payments, because we could call up the employer and say, "We need to pay this period of time," whether it's a week, whether it's two weeks, whether it's semi-monthly, but it coincides with the payroll that they paid the worker when they're on modified work, so when we're paying those TPD payments. Now, it doesn't get to the rate of time loss for the average weekly wage, but it helps that TPD payment, we're saying, hey, worker, you're back to modified
work, not doing your full hours and wages, here's your check from the insurer for the
time that you missed and here's the check from the employer for the time that you
worked, and they're synched up. So no one's having to explain, well, your payroll
period for your employer and your temporary disability from the insurer don't match
and we're not quite sure, but it'll come out in the wash at the end.

56:59: Yeah, Dan, while I can appreciate your view as far as saying
that a worker isn't getting hurt by averaging those before because maybe they didn't
deserve it, but my view on Workers' Compensation is that when you get injured, if
you would have been working, you would have been making this amount of money,
and that's what that insurance should be covering, in my opinion, is what you would
have been making because you're not working now, not what you would have been
making six months ago.

57:31: I'm not saying they're not harmed. What I'm saying is when
you take a step back and look at it from an objective outside view, I think that was
some of the reason for the change was, hey, the system's not perfect. If we try to
have a rule for each worker and each situation, which the rules cut down on the
amount of exceptions that we had and I think tried to classify wages as regular
wages or irregular wages, if you're being--receiving regular wages and regular
monthly salary or regular weekly salary that's predictable, let's use that amount for
your average weekly wage. If you have irregular earnings due to fluctuations in rate
or hours worked, let's average those out over 52 weeks. So--and if you have a
combination of both, you take a combination, you'd average this and you average
that, you don't average the regular, but you take the regular, convert it to a weekly,
so I'm just saying I think that was the purpose in, say streamlining, but trying to make
it easier and more predictable that if you had five people look at the same payroll, all
five would come up with the same answer, instead of some situations where,
depending upon how you looked at it, you could come up with different amounts,
and then you would have this (unintelligible) is wrong because you should have
applied this administrative rule.

59:02: I would like to add something to what Dan was saying. Those
of you that weren't involved in the conversations that we had with the advisory
committee when we made this rule change, those discussions started with "Hey, we
did this audit and the performance in the industry is really bad, workers are only
getting accurate benefits 65 percent of the time and that is not okay," so we
recognized the rules were complicated and hard to apply, and what one of our
original conversations was what can we do so that workers receive fair, predictable,
and regular wages, more timely and more accurately? Because the way that they
were being paid before was not accurate and complicated to calculate.

59:48: So (unintelligible) since you brought up the last rules advisory.
Bob Livingston (phonetic), who represents firefighters, and Chris Frost both spoke
out against the rules as not on our radar; had we known, we would have. Yet there's
a lot in what you said. I guess what I will respond to is that the nature of
employment is that your last wage is your highest wage, regardless of if you--if
you've been with your employer for six years or if you started a new job, the new
employer will look back at your previous wage and try to incentivize you to leave that
job to get a new one. And back to what Brian said, like we're not--we're not talking
about thinking back about what a worker could have made average; when they got
hurt, they were most likely making the highest wage. And it is fair and accurate to
pay them that wage. And it's unfair to make them get two-thirds of their wage, which
is in statute, it is what it is for (unintelligible), but--
1:00:45: It's not taxed.

1:00:46: It's not taxed, right? But it's not fair to say that you should get less than you would have if you were working at the time of injury, and I think that we could have really long discussions about the rules that could be and the rules that should be, but right now workers are getting less than they would have prior to this rule change and that's concerning for us.

1:01:05: Question. Chris Jensen. For Dan, and a couple of different times you say we're having to pick up the phone and call the employer and get this information. Does SAIF have anything in place that says you have a disabling injury, employer, you must send us your payroll records and you must have, and in case so is there--I mean, you guys have all the cards, let's face it, you know, so--

1:01:27: We're making a three-point contact with the employer, the worker, the medical provider, we've identified this disabling claim, our first conversation with the employer at the adjuster level is, "Hey, the guy's off of work. What are his wages?" And when we hear that, "Oh, well, I don't know because his hours vary," a payroll request goes out saying, "Please provide us payroll for the prior 52 weeks. What is it right now? You know, is there variability, you know, is it in the summer season when, you know, you're a roofer, you're working a lot, is it in the winter where you're not working as much?" and we try to get as much of the story upfront so that we can establish an average weekly wage for the worker for that initial payment 14 days that is relatively accurate because we don't want his next check to be an overpayment where we're collecting or an underpayment where we're paying, but then we're following up with the employer "Where's the payroll, where's the payroll? Here's a second request. Where's the payroll? We've paid four weeks of time loss, we really need the payroll," because we know that any
problem is being compounded positive or negative, we’re having a conversation with
the worker, you know, "What do you work on average? Are you working 30 hours a
week, are you working 40 hours a week, do you have overtime?" If we’re seeing a
big difference between what the employer says and what the worker says, we’re
weighing who’s probably more accurate and hedging our bet one way or the other. If
we have concerns that what the employer’s telling us is accurate, we’re going to
hedge towards the worker because our goal is to get an accurate payment out to the
worker that we don’t have to adjust.

And instead of what I’m saying, I’ve worked for the regulator, I worked
in a position where I advocated for workers, I worked for insurers, I’ve worked for
service companies. I haven’t worked for an--well, I guess I work for an employer
(unintelligible) so I don't have that, but I guess I'm trying to take these different
perspectives and not say, "This is the insurer's perspective" or "This is the
regulator's," but say from the overall system is can we make sense that it works for
everybody and that you don't have the client in there saying, "They're not paying me
right," and you're not having to make a phone call or send a letter saying, "What are
you doing here?" because we can all look at the administrative rules and say you
know what? It’s not exactly how I would want it to be, but it’s fair to the system, it’s
fair to the worker, and it’s predictable and we can all come up, whether it’s you
calculating the average weekly wage or me calculating it, I don't know if the
employer can calculate it right, but the regulator’s out, we all come out with the same
average weekly wage. I mean, my preference was that I wouldn't have anyone in
my office saying, "Hey, Dan, what do I do with this?"

1:04:40: And Chris, I just (unintelligible). Unfortunately, we only have
so much of a hammer with the employer because from statutorily we can't just say,
"You don't give us this stuff, then your policy's canceled," because we have requirements about notice and all of those kinds of things, so do we have a process in place to make demands of the employer as part of the insurance contract that they cooperate? Most do, most do their very best to get us what we ask for. Unfortunately, I think what we're really talking about when we're--and beyond the original reason that we got here are the--are the problem people, and they're out there. And we--they need insurance, in fact the system requires that they have insurance, so sometimes we have to put up with employers who really take us a little more time and energy to insure them and they pay us back.

1:05:42: So--Chris Frost. It does not make sense that injured workers who had a rate change should suffer a reduction in their time loss benefits so that we can deal with the problem of some bad employers not furnishing correct information. It's not the kind of system, no.

1:06:13: And there's a mechanism in the statute that allows SAIF to recoup from those employers. If those employers aren't sending you their information and that's how come you get stuck with an attorney fee or a penalty to the Claimant, you guys get to get the money directly from the employer, I think that's a pretty big stick.

1:06:31: You're right about that, but they're not providing that information, that if your--that if the insurance company incurs penalties or fees that you can recoup it from me because insure obviously 70 percent of Oregon, so there's a reason that people pick SAIF. You're not going to lose business because you have to kind of pile it back to employee once in awhile--employer once in awhile.

1:06:52: Yeah, we educate people on their responsibilities, and I think for the most part our employers get us the information timely, so...
1:07:01: And I would say for the most part insurers don’t exercise that authority to go after the employers on those penalties, for the most part, for whatever business reason there is.

1:07:18: I will just say that the State of Oregon has made a commitment to low-wage workers, they’ve made--that the State of Oregon has decided they want to help low-wage workers, they want to increase the minimum wage, they understand the plight of people who don’t earn enough money. This rule inadvertently runs counter to that principle. It needs to be changed.

1:07:58: Do we have any other examples of other states that have figured out a better solution? I don't know if your research group has investigated what other states do that--obviously we're not necessarily succeeding in this room today figuring out a way to bridge the gap between what, you know, we're hearing from the insurers and what those of us who represent workers are desperately concerned about. I'm just wondering, rather than reinventing the wheel on our own, if there's some other model out there that we can at least present to this group before we make any changes and have a conversation about.

1:08:32: I can't--I can't really speak to that. All I can say is that the method that we adopted is a common approach with other states. And that was part of the calculus in our decision-making. I know specifically North Carolina has a 52-week averaging method--

1:08:49: Can we not pick (unintelligible)--

1:08:51: Sure, that’s fair. Yeah.

1:08:53: (unintelligible) better than that.

1:08:54: Okay. Well, I guess (unintelligible) for awhile, I like it, but I do understand not the model for (unintelligible) us, but--
1:08:59: (unintelligible) but I'm saying, yeah, not the best place for workers.

1:09:04: But, yeah, so this 52-week averaging method, which is--was kind of our standard method, too, is a common method for calculating an average weekly wage. I cannot speak to other methods out there, we will certainly look more into it.

1:09:23: Our research (unintelligible).

1:09:28: Yeah, and if you (unintelligible)--

1:09:29: This is Carl.

1:09:29: --appreciate it.

1:09:31: Go ahead.

1:09:33: Hi, this is Carl Koenig, Oregon State Firefighters. I think--I think there's been some good comments regarding averaging and stuff and I hear administrative ease. I would have to agree that we should--the worker should never be--should not be, I'll use the term, compromised, victimized, you pick, but inherently to make an administrative ease should not be a penalty phase for in this case firefighters who have gone all over the West Coast out of their area. For example, the Beaver Creek fire we--or, I'm sorry, Eagle Creek fire, we have 47,000 man hours with no time loss, but we have workers from all over the country working in Oregon. It's--I think our concern would be we can't make an administrative rule just to make it easier to administer the problem and sacrifice the worker's ability, right, it's based on a two-thirds wage, we shouldn't average the two-thirds, the look-back, it is agreed we're not going to go backwards, that's not the intent I was working today for X amount of money and working forward, I'm not going to--I'm not going to--I don't want to suffer on an already-less amount of money, and intuitively we shouldn't
make rules to make it administratively easier at anyone's sacrifice and I think our largest Workmen's Comp carrier is giving refunds of hundreds of thousands of dollars to my specific employer is a great example of there's not a ton of financial extremis in the Workers' Compensation section in Oregon right now that we're not talking about huge refunds back to employers and then trying to devise a system that allows for absolute clarity every time, that's an administrative burden of being an employer and a regulator agency, so let's not--let's not inadvertently penalize or put the burden on our employees. And remember, they're hurt, they're not at work, or they're doing a diminished role in what they're doing and it just intuitively feels wrong. Thanks for the opportunity to comment.

1:12:14: Thanks for your--for your comment.
1:12:26: Any last comments on this topic?
1:12:32: Can I just ask (unintelligible), since we have so many parties in the room, if we were to just go back the way we did things before, obviously you've managed to do it, it wasn't desirable, you know, and there--I mean, the claimant--
1:12:45: (unintelligible) no objection to that.
1:12:47: --folks are okay with that, you know, in terms of--again it's not a desirable way, maybe there's ways we can continue to work more towards fair, but as again sort of temporary solution to the current obvious harm that's occurring to workers, is that at least the immediate best option?
1:13:07: And Diana, are you--are you only speaking of the rule regarding the averaging of the hours versus the hour--average of the wages?
1:13:18: Just the one we've been talking about, just the wage, just the
wage we've been talking about for like the last hour, I (unintelligible). We haven't
even gotten to anything else, I'm good with the union call board one, you know, I not
to speak about anything else--

1:13:29: (unintelligible)
1:13:30: But, yeah.
1:13:30: You mean hiring hall?
1:13:32: Yes.
1:13:35: But I had to retrain myself to say call board--
1:13:36: I know, me, too.
1:13:38: Oh, I have to do (unintelligible)--
1:13:41: Just because you have these people in here, you know, I get
the general sense is that's what we--they want, but, you know, I figure it's best to
ask.

1:13:50: Tim Frew, Oregon State Building Trades. As you know, the
Oregon State Building Trades are made up of approximately 30,000 construction
workers. The majority of those construction worker, they want to go home safe
every night. I appreciate everybody being here and I think everybody being here is
here for the intent for the good of the worker. I think this calculation, though, is
flawed, and what I'd like to know is where are we at? I mean, is our--is the Division,
will the Division consider going back to the old calculation? Granted, you know,
there are issues with it, but we can improve that, but--so where is the Division at?

1:14:28: I personally, I'm not the decision maker. I mean, we will
consider everything that is said here and we really do take it seriously, but I can't tell
you what the final outcome will be.

1:14:41: When will we know?
1:14:44: Soon. Part of the reason we do need these rules to be effective January 1, I think we have a little wiggle room, but particularly to replace the temporary rule, we do need to have this on somewhat of an expedited process, so there will be proposed rules and then there'll be another opportunity for testimony and, yeah, unfortunately in my role as a policy analyst, that's the best answer I can give you, but--

1:15:12: We typically--we--


1:15:13: --we take everything back to our administrator--

1:15:13: But the union hall (unintelligible) is that, I think what Tim is asking about is the other one--

1:15:18: Yeah.

1:15:18: --is it's your understanding that we're (unintelligible)--

1:15:20: But we're starting out as a temporary rule and we do need permanent rules to replace it before the temporary rule expires--

1:15:25: Right.

1:15:25: --so we have to--

1:15:26: But we were already told that the temporary--that we would move forward with the permanent rule on the call board rule.

1:15:32: Yeah, so that is definitely, that decision, I think, has been made.

1:15:37: Okay.

1:15:37: As far as timing goes, we have to get out proposed rules that include a permanent hiring hall call rule pretty soon to ensure that it goes effective before--
1:15:47: Right.

1:15:47: --the temporary rule expires, it's an Administrative Procedures Act compliance thing, but yeah--

1:15:52: I understand that, I think that--

1:15:53: --sorry, sorry if I said the wrong thing, I--

1:15:55: What's the deadline for filing to make the rule, the permanent rule effective 1/1?

1:16:00: Fifteen--well, November.

1:16:03: It's November, which is next week.

1:16:06: Well, the middle--

1:16:07: The 15th, yeah--

1:16:07: Yeah--

1:16:08: --the middle, it used to be the 15th, they changed the Secretary of State rules on that a little bit, so we have a little flexibility, but--

1:16:14: Oh, okay.

1:16:15: And I don't think our temporary rule expires--

1:16:18: Not on January 1--


1:16:19: We have a little--we have a lit--if worst comes to worst, we can actually make the rules effective a little later than that, but because Rule 25 was--has been moved out of the current proposed rule process and we’re moving that into this process, so none of those changes that went to hearing on Rule 25 on the 20th last a week ago will actually go forward, because they would have been two Division Rule 25s would have been changing for different reasons at the same time, it would have confused us and everyone, and so January 1 is what we’re shooting.
1:17:00: So as an employer, (unintelligible) I don't know how many of
us are in the room, but from my perspective, Kimberly Wood for the record, I don't
care how it plays out, but it needs to be clear enough for the employer, the old rule
was not, I need to know the average weekly wage the day my guy gets injured
because I'm going to give him a letter asking him to come back to work and I need to
figure out how much I have to pay him because for a union it makes a difference, I
have to pay a particular wage, which means I have to adjust the hours to match up
to the wage that I actually have to pay, so it's not as simple as they decide that he's
making $36 an hour and I'm actually paying for $34 an hour and I'm paying 36, I still
have to pay 36, so I can adjust the hours if I--if I can to get the average weekly wage
so that we have some equalness there.

But I need to know that right away, and the old system was not--I can
tell you that probably eight times out of ten I had to have my gal go back to SAIF to
say, "Look, we think we did it this way; how did you get your number? Because we
tried to figure it out the best we can." We always have to go back, it's that places us
in a position of either we have underpaid somebody and now we've got an exposure
of time loss that we're trying to manage and trying to do the best we can so that
we're not exposed to that, so we want to get the worker the right amount of money
and the right number of hours.

It's very difficult for the employer's side of it to figure that out, and so all
I'm-- I'm not saying I agree with you, I'm not saying that I agree with you; I'm just
saying whatever we land on, the employer has to be able to figure it out because
right now it's not fair to the employers to say, "We can all figure it out, but they can't,
and so they get to, you know, roll the dice to see whether they hit the number right,"
that's not fair to us because I can tell you that unless we ask for the average weekly
wage, we have to go back and ask SAIF to confirm our average weekly wage, we
don't just get it given to us, so it could be we could wait three, six weeks and now
we're time loss because we didn't realize they calculated some extra hours in there
that we didn't think were there or there was some two weeks or three weeks of time
that somebody didn't work but they gave them credit for it, and it was just too difficult
the old way, so all I--I want everybody to be, I want them to be made whole, but I
also don't want the employers to be penalized because we can't figure it out. And I
think we're pretty savvy, so if we can't figure it out, I worry about the little bitty guys
who there's no way.

1:19:45: And I just want to make sure that I understand where you're
coming from, Jennifer Flood, ombudsman for injured workers, as well as to help
explain where that issue may--where I see that issue for the employer is that if an
employer--if a worker has been injured and they have restrictions, the employer can
bring the worker back. If they bring them back at their average wage, whatever that
wage is, then that claim stays a non-disabling claim--

1:20:08: Correct.

1:20:08: --they don't have to pay time loss. So I think what you're
saying, Kimberly, is I want to know because my guy just went to the doctor, he's
hurt, but I think I can have some modified work that I can bring him back to, but if I
pay him a dollar less than the average that the insurance company has come up
with, I end up with a disabling claim if that lasts more than three days, so is that
correct for--

1:20:33: It is correct, yes (unintelligible)--

1:20:34: It's about bringing that worker back and making sure they're
getting that highest wage.
1:20:37: Yes (unintelligible)--
1:20:38: My concern is still for the guy that's off because they get to take--they pay him that and I assume they're doing--
1:20:43: Right.
1:20:43: --that correctly, but when I have to do it for a modified job because I've got modified work, which is almost all the time--
1:20:51: Uh-huh.
1:20:52: --I want to make sure I'm getting it correct, so I think the issue's a little bit bigger than just the guy who's off work, because for us that's a rarity. We have much more--in fact I think it's a very rare thing for us, and I'm in the construction industry, but we just don't have a lot of guys who are off or gals who are off entirely. We always offer modified work and that's where the problem comes in for us is we have a very real need to be able to manage our claims so that we are making sure that our--you know, we're not inflating our insurance costs unnecessarily all because we can't figure out how to--how to pay somebody correctly.
1:21:31: I echo Ms. Wood's comments. When I have an injured worker who's been considered a non-disabling worker, generally I found that the insurer doesn't try to figure out what their average weekly wage is. That puts us again at a disadvantage, much like the employer, but it's also what Mr. Brunot was saying because we don't have access to those records, we don't know if they are getting the right modified duty rate. That's in the purview of the insurer and it does--it would be helpful if the insurer did calculate that.
1:22:16: Well, and, Kimberly, I don't mean to be blunt, but do you know the amount of hours your employees work?
1:22:23: Yes. But it's not that easy because the number of hours, they could be off for three or four weeks or five weeks or six weeks in the preceding 52 weeks and so--

1:22:34: And that's what--that's all part of that calculation--

1:22:35: That is (unintelligible) --

1:22:35: --because even currently you have to figure that out.

1:22:38: Well, we try our best, it's just--because I can tell you we've been on the phone and it's like, well, sometimes that's under a certain amount, so it's not as simple as--


1:22:47: --just, gosh, just add up. I've--it would be great if you could just add up the work--weeks that they worked and divide it by the number of hours and, by gosh, that's a simple calculation for me and I'm not good at math. So, I mean, that's certainly, but that's not--it's not that clear, it's not that clean, because I can tell you that we rarely come up with the same number and then I can call and say, "How'd you get to that number?" Well, there's this huge calculation and they won't share the calculation with me, so I can't actually see it to even go "You got your math wrong"; all I can do is say, "I don't see that, can you?" you know, and then I have to adjust it, but I don't like being in that position; I'd like to have it right the first time, so for me I'd like it to be clear enough that we--we're just all on the same page.

1:23:36: Uh-huh. So I just have a question. You said that you were union, right? So you probably actually fall under the (unintelligible) hiring hall rule and not these calculations.

1:23:44: I am a union, we are a union, we also have non-union, so I represent multiple employers, so it isn't always just one thing.
1:23:55: I guess I just thought you were union, so…
1:23:58: Well, our construction workers are, but that isn’t everybody that we employ. Other people in construction work unfortunately get hurt, too, so…
1:24:11: (unintelligible) partial disability (unintelligible)
1:24:15: Just so you—you said you use SAIF as—that’s your insurer?
1:24:21: SAIF is our insurer, yes—
1:24:22: I was just curious, is there a reason that you guys don’t share your calculations?
1:24:26: I just asked Dan that, I’ll let him answer.
1:24:28: Okay.
1:24:29: (unintelligible) when we do an average weekly wage calculation, our business practice is we send a letter out to the worker saying if we change—we made an adjustment to the average weekly wage based on what the initial calculation was on a phone conversation, we’ll say, “We had calculated based on $300, we’re increasing or decreasing it to this amount based on the payroll that we received, attached is our calculation,” and it’s a summary sheet of all the wages that we receive and either, you know, you’ve been overpaid by $25 or you’ve been underpaid by $25, I don’t believe the employer’s copied on that, it would go directly to the worker and the worker’s representative if they’re represented, and so probably—
1:25:19: If it doesn’t appear like it’s going to be a time loss, like they can do light-duty, do you guys calculate what it would be if it wasn’t time loss?
1:25:25: It really depends upon the claim. If it’s a cut finger and they have a regular work release, we’re not going to go to the employer and say, “We want payroll,” but if it’s a back strain and they have modified work restrictions and it
looks like those are going to be extended and the employer is saying, "Well, we're offering modified work at their regular wages," we're going to ask for payroll because we don't want to put you the employer in that situation of "Oh, we thought he only worked 40 hours a week and there's overtime and now we owe temporary partial disability," so hopefully we're working with you to make sure you're offering full wages, even above and beyond if there's overtime there, so that we're not putting the employer in that situation.

1:26:13: And to be fair on--if I go into the claims on mine, at some point the average weekly wage is populated on our--on our--in that claim note, in the claim screen--

1:26:27: So you--

1:26:27: --but it takes a bit for that to happen--

1:26:28: So you have that, you don't, yeah.

1:26:30: I can't--I can just see what they think the amount is at some point if I waited long enough. We don't wait, because we want to know, right away we want to offer modified duty--

1:26:39: The modified--

1:26:39: --(unintelligible) amount--

1:26:40: Yeah.

1:26:41: Why isn't there uniformity among payroll software to enter the data that you need at the time that it's generated?

1:26:50: You guys would like (unintelligible)--

1:26:51: Yeah, there we go--

1:26:51: --and say everybody has to use--

1:26:53: There's some, there's an idea--
1:26:53: (unintelligible) this would--
1:26:55: (unintelligible) do it.
1:26:56: --not be a problem (unintelligible)--
1:26:57: Let's do it (unintelligible)--
1:26:58: Shoot myself in the foot, but let's do it (unintelligible)--
1:27:02: (unintelligible) a mission.
1:27:04: I don't think that--
1:27:05: And though it fell outside of the averaging the rate,
Mr. Schmelling did have a good suggestion about synching up TPD payments with payroll. I don't see that that would simplify matters in our office as well, and--but it does fall outside this, but if you can tuck it away?
1:27:31: You--the other thing that I'm wondering is one of the things that Dan mentioned was that he's got 14 days and all of that, whoa, we have to pay, but our cutoff date is this date and the check is issued on this date. There should be something similar like that for you guys because having to pay the 14 days, you're never going to be able to pay the 14 days because it's like you can't pay the same day, so it seems like you would have a cutoff date--
1:27:57: Well, and so--
1:27:57: --where you would say can you give me your, okay, it's, you know, it's Tuesday and I've got to issue a payment by Thursday, your cutoff date, you know, can I have the payroll through this date from an employer's (unintelligible)--
1:28:07: And that's--
1:28:07: --easier--
1:28:08: --kind of to the TTD/TPD after the initial payment is if we
could synch it up, I think the 14 days is statute, so--but then beyond that, subsequent payments, again relying on my times working for a service company with a self-insured is we synched all of our payments to go out every other Friday, which was the employer's payroll payday, and we sent them a fax Thursday morning saying, "Here's 40 workers that we need wages for," and it went to their payroll, and they said, "Here’s the gross amount for the payroll area," and so it made it very easy, it made it very accurate also because we were getting the accurate gross wages that were paid for the TPD period (unintelligible). But, yeah, we do that to you, we probably call you up off payroll cycle to say--

1:29:03: We just--we just, we fudge a little bit both ways if we can to just give you more than you need and let you figure it out.

1:29:09: Yeah, and to that (unintelligible).

1:29:23: I know that one of our employers that we dealt with, they were all for making sure that that employee isn't going to get less than what they make now with the current rule the way it is where they could get less because they got (unintelligible) from last year because we--you know, we reached out to them yesterday to get a little bit of info from them and one employer’s like "Hold on, what’s this about?" and we explained, and they’re like "No, that doesn't seem right, they should be getting what they would have got going forward, not an average of what they got the last year."

1:30:00: The non-hiring all employer (unintelligible)--

1:30:02: Yeah, the non-hiring (unintelligible) employers. But I understand your concerns and I agree that maybe there’s a way to make it simpler or not, but we just want to make sure the workers aren’t going to be harmed.

1:30:27: When’s the next meeting?
1:30:30: I do not believe there is another (unintelligible)---

1:30:32: There's not one scheduled, there will be a public---

1:30:32: --for this issue, yeah---

1:30:33: There will be a public--there'll be a public hearing on these rules of course and that would be probably in December, around the 20th of December, unfortunately rather close to Christmas, but if we file in November, the earliest we can hold a public rulemaking hearing is maybe around the 15th of December we could have the hearing.

1:30:53: And so that hearing will be a presentation of sort of what you've decided to do or people can comment on what (unintelligible)---

1:31:01: Formally propose, yes, the rules and then with marked changes and then there'd be a public comment period, both folks could come to the hearing and testify or send written testimony.

1:31:14: Were you all wanting a conversation before those proposed rules?

1:31:20: We always like more conversation, but it probably is dependent on what (unintelligible) say. We don't want to (unintelligible) enough time.

1:31:29: That conversation would have to come within like the next one to two weeks just based on our filing. If we're going in fact to file in November, it would have to be very soon.

1:31:39: Well, who wants to have a follow-up conversation with us (unintelligible) get ahold of (unintelligible) contingent of folks, but we want to exclude anyone else out of the--

1:31:49: We'd be happy to keep talking.
1:31:51: I talk for a living.

1:31:56: Well, it looks like people are getting ready, so we do--we did also include some housekeeping changes in here. They were discussed at a previous advisory committee meeting, but now that they're actually in the rule, we--if anybody has comments on those, I can point them out. Specifically it is a definition of what a new wage earning agreement is under section (4) on Page 3, that was just mainly to make it clear that when a new--a new wage earning agreement starting or commencing applies to the whole section because before there was some confusion that it did not apply to section (c) or subsection (c), and then the other changes was just clarifying kind of a typographical error that the insurer may not include any gap in earnings instead of gap in employment of more than 14 days that was not anticipated in the wage earning agreement under section--this is (4)(b)(B)–(A) on Page 4. So any comments on those changes? Pretty minor, we're hoping they're not substantive.

1:33:20: Other than this is totally antithetical to your guys' approach. A raise should be a new wage earning agreement, right? Moving forward as a prospective on the date of injury, that's how--if I get paid on this date, I don't get averaged in my (unintelligible)–

1:33:33: Yeah, I think this is now related to what we just spent so much time discussing, so there is--there is a tie-in, so it's not housekeeping to that extent, I think, but it is--

1:33:44: Oh. Yeah.

1:33:45: Because it does say other than a change in the rate--

1:33:50: Right, so including other than only a change in rate of pay, which is--
1:33:54: So this is when we’re discussing someone’s shifted positions with the same employer or something along those--

1:34:01: Right, yeah, a change of hours, a change of job duties, a change of--yeah, those are the (unintelligible) I surmise--

1:34:09: So why--I guess--I guess why do the people who change jobs get to get the benefit of their new job moving forward, but people who stay in their same position not get that?

1:34:22: Oh, okay--

1:34:23: Thinking I’ll tie off of what Zach said, but with the wage earning agreement, in the prior administrative rules, I got it--if I recall correct, there were three different situations. If you had a change in wage earning agreement other than simply your rate change, so they specifically changed jobs, they went from part-time to full-time, full-time to part-time, et cetera, you would use a shorter time period, you’d only use the wage earning agreement in effect for that specific job or change in hours. If it was a change in rate only, without some type of change in the job, then I think it was little italics (1)(i) and it would be you would average out the hours over the entire time period at the rate at the time of injury, so the worker's actually getting the benefit of--

1:35:15: Higher.

1:35:15: --that entire time--

1:35:16: Oh, to the extent, yeah, but--

1:35:17: So, yeah, I would say--

1:35:18: Seasonal-type--

1:35:18: If you looked at the new capital (A), (B), and (C), if you removed for reasons other than change in the rate of pay only and left capital (B) to
deal with wage earning agreements other than a rate change only, then you're
dealing with those situations where you might be looking at a shorter time period,
depending upon what you decide to do, I think we would suggest that if it's a rate
change only for doing the same job, no change in hours and that, but that needs to
be dealt with separately in its own little section so that again when we're looking at it
we know, oh, there was a rate change, we're going to be, if we changed, averaging
the hours out over their employment period up to 52 weeks, differentiating that
between a change in, hey, the guy was a laborer, now he's a supervisor, he went
from full-time to part-time or she went from this to that, which is in a different type of
wage earning agreement, which is essentially what we used to have under the (3)(i)
(unintelligible).

1:36:37: And if the rule was written to where just a rate change meant
a new wage earning agreement, we would be in that boat of let's say there was a
rate change eight weeks ago, but it's the slow time of year, they'd only be averaging
those eight weeks versus doing the 52 hours times the new rate--

1:36:59: Give them the benefit of that rate--

1:37:00: They went from the prevailing job to a non-prevailing job, oh,
that's a rate change, we're going to use this eight weeks.

1:37:08: And that's particularly important with seasonal work.

1:37:11: Yes.

1:37:21: Okay. Well…

1:37:29: I promise to keep you all completely informed for whatever
we're going to do as soon as we know more and then as soon as we--certainly when
we file proposed rules, you'll all be copied. If any of you are here and I don't have
your email address, if you could leave me a business card or just call me after the
meeting, 503-947-7717, or somehow get in touch with us so that we can get you on our contact list and keep you informed, because I don't want anybody to be in the dark from this point forward and say, "Whatever happened to that rule?" so with that, unless there's anything else that folks have, we'll let you go. If you have thoughts after the meeting on any of the subjects that we talked about today, please get them to us, your thoughts to us as soon as possible, and enjoy the rest of your Friday and have a nice weekend and drive safe.

(WHEREUPON, the proceedings were adjourned.)

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CERTIFICATION OF TRANSCRIPT

I, Stephen Wright, as the transcriber of the oral proceedings at the October 27, 2017 hearing before Administrative Rules Coordinator Bruyns, certify this transcript to be true, accurate, and complete.

Dated this 9th day of November, 2017.

Stephen Wright, Transcriber