

RULEMAKING ADVISORY COMMITTEE MEETING

Nov. 27, 2017, 1:30 p.m.

Room F, 350 Winter Street NE, Salem, Oregon

WORKERS' COMPENSATION DIVISION RULES

**OAR 436-001, Procedural Rules, Rulemaking,
Hearings, and Attorney Fees**

Committee members attending:

Ted Heus	Preston Bunnell, LP
Jaye Fraser	SAIF Corporation
Diana Winther	IBEW Local 48
Jennifer Flood	Ombudsman for Injured Workers
Kimberly Wood	Perlo Construction MLAC
Elaine Schooler	SAIF Corporation
Dean Spradley	Farmers Insurance

Workers' Compensation Division staff attending:

Angela Sparks
Cara Filsinger
Cathy Ostrand-Ponsioen
Fred Bruyns
Marcus Bratcher
Sara Larson

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BEFORE THE WORKERS' COMPENSATION BOARD 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 November 2017, before Fred Bruyns, Administrative Rules Coordinator for the Workers' Compensation Division.

1 TRANSCRIPT OF PROCEEDINGS

2
3 00:00: So, good afternoon and welcome for com--welcome to the
4 advisory committee meeting on Division 1 rules. My name's Fred Bruyns, I
5 coordinate the rulemaking process, and I think I've been in touch with all of you in
6 one way or another, either directly or indirectly, regarding this meeting. And I hope
7 you all have an agenda; if you don't have an agenda, we have extra copies at the
8 back of the room. The agenda also has included at the back draft rules, so we'll be
9 going over that today.

10 This is an informal process. Unlike a public hearing, it's a place for us
11 to get as much advice from you as possible so that when we go back and talk with
12 our administrator about what we should and shouldn't do with the rules, we have all
13 the information at our disposal, as much as we can get, anyway, including
14 information on fiscal impacts; we especially want to know if something that we might
15 do with the rules will have--will represent a cost to you or the people that you
16 represent or maybe a benefit in some cases, so keep that in mind as we go along
17 because we have to estimate what those impacts are when we file rules with the
18 Secretary of State, so I don't know if we even have anyone on the telephone with us
19 this morn--this afternoon, so I'm not even going to go over the telephone protocol,
20 which I usually spend a little time on, but--because we'll pick up background noises
21 and the like, but I've introduced myself. Let's see if there is anyone on the telephone
22 who would like to introduce themselves to the committee. I guess hearing no one,
23 we'll go around the table.

24 01:40: My name is Cathy Ostrand-Ponsioen, I'm the legal rules
25 coordinator for the Workers' Compensation Division and I'm the one responsible for

1 putting your feedback and the rule changes into the rule language, so...

2 01:51: Dean Spradley, I'm a supervisor with Farmers Insurance.

3 01:55: Elaine Schooler, I'm an attorney with SAIF Corporation.

4 01:57: Jaye Fraser, SAIF Corporation.

5 01:59: Diana Winther, general counsel for IBEW Local 48, electrician's
6 union, and (unintelligible) co-chair of labor.

7 02:06: Angela Sparks, sanctions unit, Workers' Comp Division.

8 02:10: Sara Larson, medical reviewer at MRT.

9 02:14: Ted Heus, claimants attorney with Preston Bunnell.

10 02:17: I'm Monte Marshall, administrative law judge, Workers'
11 Compensation Board.

12 02:20: Cara Filsinger, Workers' Compensation Division.

13 02:24: Kimberly Wood, Perlo Construction.

14 02:27: Marcus Bratcher, policy analyst with WCD.

15 02:30: Again welcome, everyone, and with that we'll go on to our
16 agenda, and I'm going to kind of turn over the conduct of everything to Cathy, who
17 understands these rules much better than I do, so if you have any questions about
18 the process, let us know, but otherwise we'll just launch into the agenda.

19 02:48: When all of these--the Division 1 rules were amended as of
20 January 1, 2016, most recently to implement some changes to attorney fee
21 provisions, and we've identified since then some more changes to make to make
22 them simpler. We're trying to make some changes so that they're more consistent
23 with the procedural rules of the Workers' Compensation Board Hearings Division.
24 The judges are holding hearings on our behalf, and if there's not a real strong reason
25 to have a different process apply, we're just trying to make some consistency there,

1 so we don't have a date certain that we're trying to make these changes effective by,
2 I think we're targeting April 1, but there's no specific event or date that's driving it, so
3 just wanted to let you know a little bit about that.

4 And as some of you may know, if you've been in the system for awhile,
5 what--over time the--our hearing rules have changed significantly. Once--or prior to
6 2000 we had our own hearings, judges in WCD, and then when the hearing office or
7 panel, which was--had a previous name that I can't remember--no, it was the Office
8 of Administrative Hearings, the central hearing panel held our hearings for a period
9 of time and in 2005/2006 we switched over to the Hearings Division, and so some of
10 the changes are also getting rid of some of that older language that just doesn't
11 simply apply anymore now that we're with the Hearings Division, so in the issues
12 document I just listed the issues in the order that they appear in the rules, they're not
13 necessarily order of priority or anything like that, and the draft rules are just some
14 examples of the way that the language could be--I didn't want to fine--we don't want
15 to finalize it until after getting your input, and then there are some changes, we didn't
16 mark any changes in the procedural rules for rulemaking, but there may be a couple
17 things that we do just for consistency, not substantive changes, but making the
18 formatting and whatnot consistent throughout, so...

19 So the first issue, issue number one, and if you don't have the issues
20 or the rules in front of you, I would encour you to get a copy from the back table
21 because it will help, but the rules use the term moot in two different places and
22 there's been a recent, fairly recent court case that discusses the fact that the term
23 moot is a judicial concept that doesn't apply to administrative agencies, and so we
24 have just--I've decided to find a couple of different options as far as not having to
25 use the word to avoid any sort of interpretation issues.

1 And so the two places in the rules, one is in -0019(6), talks about the
2 Division, the Director referring requests for hearing to the Board for hearing and then
3 withdrawing a matter that has been referred and that the current rule says one of the
4 reasons for withdrawing matters if the issues in dispute become moot, and I'm just
5 suggesting that we make that language more general to even avoid having to use
6 the word, and then there's a similar provision having to do with in rule number -0252,
7 the Director staying Director due process if there's other matters that may affect it,
8 so I welcome any suggestions or feedback on that issue or the draft language that
9 we've got so far. And hearing none--yes--

10 06:16: I guess I just don't understand exactly the procedural situation
11 in which this occurs--

12 06:22: Okay.

13 06:23: --if you could give an example of how this would be used now
14 or how it's intended to be used?

15 06:28: In which one? In the referral situation or in the stay?

16 06:31: The referral.

17 06:32: Okay. It hasn't come up recently that I am aware of, but if we
18 receive a Request for Hearing on a matter within the Director's jurisdiction, we refer
19 it over to the Hearings Division for a hearing, there have been times when after the
20 referral but before a hearing has been held, there's some reason why it wouldn't be
21 appropriate anymore, so we have the authority in the rules to withdraw that referral.
22 I'm not aware of it happening in recent times, but--

23 07:01: How is this authority different than just the judge determining
24 that it is moot or is no longer an issue or the parties determining that there's no
25 longer an issue and it's withdrawn?

1 07:13: I don't know that it's--that it is different; it just--the parties could
2 withdraw a Request for Hearing, the ALJ could dismiss if the parties reach
3 agreement, or the Director could withdraw, depending on the circumstances, and
4 (unintelligible) I don't think this one comes up terribly often, but I--it would be similar.
5 Does that help?

6 07:39: Yeah, I mean, I think so, I--

7 07:42: It's--

8 07:42: --(unintelligible) never seen a situation where that precise
9 procedure has occurred.

10 07:48: Yeah, and I don't think it has. I think when we first started
11 having--referring the hearings to the Hearings Division as opposed to the Office of
12 Administrative Hearings, I think we left that in there, but I don't remember a situation
13 where it's come up, but it's not something that it wouldn't--this isn't a change
14 necessarily to the substance as much as to the just the making the language a little
15 more or less specific.

16 08:10: I think one example could be an unrepresented worker who
17 appeals a decision by the insurer and then the insurer goes ahead and--

18 08:18: Oh. Uh-huh.

19 08:19: --follows through with either paying a bill or some covering
20 some service that maybe there was some initial pushback, and then so the dispute's
21 no longer really viable because it's been taken care of (unintelligible).

22 08:31: Like a potential situation where the claims adjuster might just
23 with the worker and the Department take care of it before there actually has to be--

24 08:40: So like a--

25 08:41: --any kind of order or legal action.

1 08:42: --a medical service dispute where the unrepresented worker
2 says, hey, pay for this and the insurer either (unintelligible) somehow doesn't
3 communicate that they're going to, they file a request for medical services dispute,
4 and then they end up paying for it or gets sort it out. My concern along that is sort of
5 the situation that I sort of imagine, but there's two differences that I see. One is that
6 that's not a referral to a hearing unless there's, you know, like a relationship issue
7 referred to the Board for determination causation. Also on that issue, that's the
8 parties agreeing and an issue's moot perhaps and then there's been an issue that
9 it's not moot, and unless there's a denial or not a denial, it's still an issue to be
10 determined. If the parties agree there's no problem, then they can, you know,
11 submit their agreement. This is talking about the--as far as I understand, about the
12 WCD's authority to unilaterally withdraw a referral to a hearings--sorry, the Board for
13 a hearing, and so I don't really understand, I guess, still, because I just can't imagine
14 like on that, haven't seen a situation like that and I just don't understand where that
15 would occur. I've run into mootness issues in similar situations that you described
16 where an issue is pending before the Department and they decided that it's moot
17 and dismissed the matter, but this is something, I understand this to be different than
18 that, is that right? But this isn't--

19 10:17: Yeah, and it--

20 10:17: --this isn't a matter determined to be moot or no longer the
21 Department can do anything about it at the Department; this is withdrawing a referral
22 for Request for Hearing to the Board because of some--

23 10:28: I think it's more procedural-type. If-- One example I can think
24 of is if a matter was referred for a hearing, but the unit, it's like in a medical services
25 dispute, for example, if we get a Request for Hearing, but the medical review team

1 hasn't yet reviewed an issue, it might be more appropriate to go to the MRT first
2 before it goes to hearing, although in that situation we probably wouldn't refer it in
3 the first place, but I'm just trying to think, I think it's more of a procedural-type
4 situation or if some--something else I have to (unintelligible).

5 11:03: Yeah, I mean, I understand that, but that would be sort of flip
6 side of this, that would be the Board saying perhaps that this issue's premature, or
7 the review team needs to review it before it goes to the Board so it can dismiss, I
8 guess, on that basis. I just--yeah, I--you know, I don't want--I mean, my only
9 concern would be that, you know, the idea of dismissing something at, you know,
10 WCD level, I--you know, I don't think that the WCD has authority to do that. I think
11 when you bring a dispute and ask them to decide it, they decide it. This doesn't
12 seem to be addressing that, this rule, this rule wasn't cited in any of my situations
13 that I've had.

14 11:52: Uh-huh.

15 11:52: This seems to be like when you refer something, and I'm
16 interpreting it a contested case situation where it's said--like you said, referring to
17 what would have been the Office of Administrative Hearings, but the Board is
18 standing in--

19 12:04: Uh-huh. Right.

20 12:04: --in place of those people, so that doesn't really happen in a
21 medical services dispute because that actually goes to the real Board, whereas
22 maybe a--I'm trying to think of something where you have to file exceptions to a
23 director's order that goes to the hearing or a Director's order--sorry, yes, like a
24 payment dispute--

25 12:29: Uh-huh.

1 12:29: --or a necessary and appropriate dispute, something like that,
2 right?

3 12:33: Right.

4 12:33: Where it goes not a compensability issue--

5 12:35: Right.

6 12:36: --(unintelligible) it goes that, and then they say, well, we're
7 going to withdraw that from the hearings after somebody's requested a hearing on it,
8 like a party--

9 12:45: Uh-huh.

10 12:45: --has to request a hearing, so I unders--I guess what would be
11 the situation in which that would or could occur where the Department is saying,
12 yeah, you requested a hearing on this, but we're going to withdraw that, we're not
13 going to let you go to the hearing because--

14 13:00: Right.

15 13:00: --of some issue.

16 13:01: Right. No, and I think I unders--now let me ask you for a
17 clarification about what your concern is. Is-- You're--I think you're commenting on
18 the language as it exists today, not necessarily on the proposed changes to the
19 language, but--

20 13:14: Well--

21 13:14: --I mean, the rules today have, do have that language in there
22 (unintelligible) withdraw (unintelligible) okay--

23 13:18: I agree.

24 13:19: Okay.

25 13:19: And that's (unintelligible) alternatives--

1 13:20: I just wanted to clarify that--yeah.

2 13:21: The alternatives to the rule, quoted alternatives here are
3 essentially a long way of saying moot.

4 13:27: Yeah, yeah--

5 13:28: Yes.

6 13:29: And so--

7 13:30: Yeah.

8 13:30: --and I understand that. My question is where the second
9 alternative recommends withdraw the matter and refer to the Director determines it's
10 not appropriate--

11 13:40: Uh-huh.

12 13:40: --that seems much more general to me than specific
13 determination of something that's no longer going to affect the rights of the parties or
14 the matter's moot or that an actual essential controversy exists.

15 13:51: Okay.

16 13:53: Because those two are moot, I mean, they mean moot, there's
17 no factual or legal issue to be decided that will affect the party's rights, whereas the
18 other one is just, if the circumstances arise, this is where the, you know, maybe
19 inappropriate referral to the Board for some reason, I don't know, I can't imagine the
20 fact scenario that would, but that's more general, at least the way I read it.

21 14:15: Okay.

22 14:15: That's just saying if the authority to withdraw at the end is
23 improvidently, you know, transferred to the Hearings Division, we'll withdraw that, for
24 any reason. Is that...

25 14:26: I think so--and I think--you know, and may be a situation, too,

1 where if we refer something for hearing in error and we realize, you know, later
2 when...

3 14:33: Exactly.

4 14:33: --oops, we didn't need to do that, we'll take it back, that's--

5 14:35: Okay (unintelligible)--

6 14:35: --what I think--

7 14:36: --not mootness; that's just...

8 14:37: Right.

9 14:37: --procedural situation where the Director would withdraw
10 something that maybe it shouldn't have granted or maybe they think part of the
11 Request for Hearing but didn't or maybe the Request for Hearing was premature,
12 although I think before it was just dismiss it at that point, but (unintelligible) late
13 (unintelligible) I guess, so... And all right--

14 15:01: Okay.

15 15:01: --(unintelligible).

16 15:02: Okay, no--okay (unintelligible). Any other comments or
17 feedback on that? So moving on to issue number two, in the rules we have had
18 language in -0170, let me find it, it's on Page 8 of my rules, section (11), that the
19 administrative law judge may conduct a hearing by telephone if all parties agree and
20 that's one of those rules that's been there for a long, long time, but again we're
21 comfortable having the ALJ handle the situation at the hearing however they would
22 for any other hearing type, if it's on the--if it's by phone, if it's on the written record, if
23 it's in person, and so we just, the proposal is to remove that, not to change anything,
24 but just to allow the ALJ to do what the ALJ would do in any other sorts of sort of
25 case. And we don't want to limit it so that the rule, if you read it word-for-word,

1 means the ALJ can't decide it on the written record, that's what we want to allow in
2 the meantime not require a different process.

3 So issue number three has to do with the reviews and what evidence is
4 admissible. Under statute in a medical service dispute, an MCO dispute that's for
5 substantial evidence, there's no new medical issues, and our--the wording of our rule
6 in the past has caused some confusion. I don't think there is any more confusion,
7 but this is just an attempt to clarify that in a *de novo* review, let me find the language,
8 the ALJ can admit additional evidence, new evidence, that the no new medical
9 evidence or issues limitation is only on the medical services disputes under
10 section (2), and just to clarify, that if it doesn't fall under that, that it's--it is the
11 *de novo*, and then also in the exhibit rule, to clarify that parties may submit additional
12 exhibits if new evidence is admissible, so it's just a clarification, not intended to
13 change anything. So if there's any comments or feedback.

14 17:26: I got a question.

15 17:27: Uh-huh.

16 17:28: So the rule used to basically break it down into types of
17 disputes that could originate in the Department and then go to the Hearings Division,
18 and I forget one, but somewhere back in 2001 or something, and I was wondering
19 why it was changed from the specific, like, you know, vocational service dispute, this
20 (unintelligible)--

21 17:49: It still, if you look at, do you have the rules? It's on Page--

22 17:52: Yeah, I do.

23 17:52: --9 of the current rules. The way it's laid out, section (1) is kind
24 of the general rule that the ALJ reviews all matters within the Director's jurisdiction
25 *de novo*, and then section (2) talks about medical service and medical treatment

1 disputes and then section (3) talks about vocational assistance, and so is that the...

2 18:16: Yeah, I mean, it just used to be more broken down, maybe
3 something's been added and been worked in--

4 18:22: Okay.

5 18:22: --which rule is that again?

6 18:23: It's -0225, scope of review--scope of review limitations on the
7 record.

8 18:29: Okay.

9 18:37: So (unintelligible) medical services and vocational, and then
10 everything else, I guess, is *de novo*.

11 18:44: Uh-huh.

12 18:46: Right? So I just wondered if you knew why it was changed,
13 because it used to have them all broken down separately into all the different kinds
14 of disputes that you can have, which were only like I think there were five. I don't
15 have my old--

16 19:01: Okay, I'd have to, yeah, I'll have to look back at it very--

17 19:02: You can look back at the rules--

18 19:03: Okay. That was just a question.

19 19:07: Okay. Kimberly, did you--were you going to say something--

20 19:11: I answered it for myself--

21 19:12: Okay.

22 19:12: --sorry.

23 19:24: Okay. So issue number four talks about the timeframe for the
24 Division to be submitting exhibits to the parties and the administrative law judge, and
25 the majority of the disputes we are creating the record for review, and the current

1 rule says that we'll provide the parties and the ALJ with exhibits, with copies of all
2 documents relied upon in the review within 21 days after referral to Request for
3 Hearing, and in our experience 21 days is currently with current resources is not a
4 lot of time for our staffperson to get that material together and the hearing doesn't
5 occur that soon anyways, and so what we're looking at is making the timeframes
6 more consistent with what is in the Chapter 438 rule, and so that would be having
7 the Department submit the documents not less than 28 days before the hearing,
8 which give us a bit more time, and--but we want feedback on that from parties who
9 have been to hearing. Is that--does that provide you with enough time to do what
10 you need to do at hearing?

11 20:25: It's pretty limiting for the defense attorneys typically to put
12 together and then supplement and review that, go over with their client prior to the
13 hearing because these are set three months out, that gives us plenty of time to
14 review the case and--

15 20:43: Uh-huh.

16 20:43: --to really shorten that to this 28 days--

17 20:46: Okay.

18 20:46: --prior to the hearing is pretty limiting in terms of our ability to
19 review the file, talk to the client, set up a strategy, and then prepare for a hearing
20 that's four weeks away and, in addition, this is one of many hearings typically set
21 during a week, so--

22 21:07: Okay.

23 21:08: --it does put quite a crunch on time.

24 21:10: Now, in your experience, is 21 days, would you look at it that
25 soon if you got a 20--within three weeks after the case was first referred? It's my

1 understanding are hearings referred, you said, three months out usually--
2 21:23: Yeah (unintelligible) three months is the turnaround time from
3 within the request is filed to when the hearing is set to occur.
4 21:29: Is there a middle ground that would be not be so limiting but
5 that may still allow more time for us to get everything ready?
6 21:37: Potentially, I think, you know, there could be some flexibility
7 there--
8 21:40: Uh-huh.
9 21:41: --because there is three months, but--
10 21:44: Right.
11 21:44: --the 28 days is really cutting it pretty close.
12 21:47: Okay.
13 21:48: I'm not sure about other practitioners' experiences, but from my
14 experience we do look at it relatively close in time to when the hearing request is
15 filed and the reports come in, they're getting reviewed pretty quickly.
16 22:04: Okay. Okay. Well, thank you for that feedback.
17 22:09: And in general I agree with that, I think that there might be
18 some middle ground there, but--
19 22:13: Uh-huh.
20 22:13: --28 days right before hearing--
21 22:16: Okay.
22 22:16: --it's not enough time for us.
23 22:18: Okay. Thank you, I appreciate that. I may be able to find
24 something in between--
25 22:24: (unintelligible)

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22:26: Okay.

22:27: Are these the same exhibits that were already submitted before the administrative process for that order--

22:32: In--

22:32: --in that these aren't new to folks?

22:34: It should be the same, the primarily the same record that the-- like for the medical resolution team that they relied on, with some additional supplementation, like an order that they issued and Request for Hearing and things like that, so it should--that's a good point, Monte, it should--

22:50: (unintelligible) parties get these is what I'm going, so this isn't anything new after the fact; this is what was in there before the administrative review and final order.

22:58: It should--

22:59: And I don't know the answer, but that's why I'm asking.

23:01: Yeah. When--my understanding is that it should be, the bulk of it should be the information that's already been submitted during the administrative review process--

23:08: It may have been submitted, but I don't think there's actually an index that is provided to the parties prior to the decision issuing; the index is provided once the administrative order is appealed.

23:20: Okay.

23:21: I think--I think what happens is I see the order and then attached behind that is the index, but the documents aren't actually there.

23:30: Right.

23:30: And so then we get the documents under the old rule, or

1 current rule, 21 days after, I think that's--

2 23:34: Okay.

3 23:35: --I think that's how it works.

4 23:42: Okay.

5 23:46: What's the thought behind under the sub (2) if this new
6 evidence is allowed, the--you've reduced the number of days, it can be closer to the
7 time of hearing, then a longer--

8 24:00: Well--

9 24:00: --(unintelligible), so what's the idea--

10 24:01: Okay.

11 24:01: --behind that, because you've now--you've now shortened it by
12 half when they have to produce those, the petitioner has now 14 days before--

13 24:11: Kind of, yeah--

14 24:11: --hearing instead of 28, so you're less time to review it before
15 you go to trial and then it's you went from 14 to 7 on the respondent side
16 (unintelligible)--

17 24:20: Because, yeah, and the thinking is, and I can see--I see what
18 you're--what you're saying. If the Division is submitting the record in the first place
19 and if--and the way that the draft rules has that being not less than 28 days and then
20 if the parties have anything to supplement to add to that, then it would be necessarily
21 a little bit less than that, but I see what you're saying, that it shortens it, and I think
22 we were trying to make it consistent with what's currently in the Hearings Division
23 rules for hearings, but they're a little bit different in that there's not already an
24 existing record. But if we find a middle ground for when the Division submits the
25 initial exhibits, then there's--those timeframes wouldn't have to be so short, so I

1 think--I think that we'll look at again extending them (unintelligible). Any other
2 questions or thoughts on that one?

3 Okay. So the next issue, issue number five, is in the same rule, the
4 exhibits and evidence rule, section (5), and this dates back to some of our older
5 rules, talks about that it allows the ALJ to allow an accurate description or
6 photograph of an object or real evidence as a substitute, and it's just one of those
7 things that we just want ALJs to do what they would do in any other situation, we
8 don't necessarily need to have it a different rule applying to the Director's hearings
9 than what would apply to any other hearing, and so just removing that just so we
10 don't have that risk of inconsistency in process, we don't want to have to do that,
11 so... Not intended to be a change. Any concerns or feedback on that one?

12 26:13: This rule I've never come across before--

13 26:17: Okay.

14 26:17: --never had a party utilize it, so I would be curious if anybody
15 else has used it. I haven't seen this come into play before, so--

16 26:28: And I think it's--

17 26:28: --it's helpful even hearing your description because I read it and
18 I thought when did we--when would this happen or when would somebody utilize
19 this--

20 26:33: I think it dates back to when we had our own hearing rules way
21 back when and it just never was taken out, but at this point, like I--there's no--there's
22 no reason to have anything inconsistent potentially, so that's good to know that it
23 doesn't--it doesn't come up, so--

24 26:47: I did have is this going to be reviewed by the Department of
25 Justice at all before you change this, these sections--

1 26:53: We'll have--we'll have our assigned AG take a look at them.

2 26:58: Because this, I mean, I've never come across this or ever seen
3 anything like this even in any circumstance in Workers' Compensation, but this
4 smells like something that would come from either a specific instance where either
5 the Court of Appeals or Supreme Court decides something--

6 27:12: Oh.

7 27:12: --or when the WCD was covered still by the APA, and so it's
8 some sort of due process requirement--

9 27:18: Uh-huh.

10 27:19: --but it might be interesting to find out exactly why that was in
11 there, but otherwise I agree that--

12 27:26: Okay.

13 27:26: --I've never seen it used.

14 27:43: Okay. So issue number six, go back, so in the--in the process,
15 so we get a Request for Hearing in, you--mostly medical issues, sometimes a
16 vocational assistance and fee, we refer it over to the Hearings Division, an ALJ holds
17 a hearing and issues a proposed and final order, and then if the parties want to
18 appeal that, they can file what we call exceptions with the WCD again and then we
19 go through the final order process. And sometimes we get requests for--from parties
20 to extend the timeframes for filing the exception to the response and the reply, and a
21 lot of times the attorneys have been in contact, it's not a big deal, but we have gotten
22 some requests after the timeframes have already run, and so this issue is just
23 clarifying that if you're going to request the timeframes be extended, do it before the
24 timeframe's actually expired. We don't I think--we have limited authority to extend
25 them after they've already run, so... So that's just intended to be a clarification.

1 28:49: I got a question.

2 28:50; Uh-huh.

3 28:53: This is--this isn't a statutory limit on either filing exceptions or
4 responses or replies, right, there's no statute; this is a rule-based timeline?

5 29:01: It's--double-check. The--yeah, I think the time-- the timeframe,
6 the 30 days is not--is in rule, it's not in the statute. I know the statute--

7 29:12: So the Department would have authority to grant an extension
8 for a late party for submission of any late-filed exceptions. So should there be some
9 sort of good cause exception in there or would this--would this automatically keep--
10 missed your deadline to respond, so it's automatically stricken?

11 29:35: Well, in the--elsewhere in the rules it provides that if no
12 exceptions are filed within 30 days, the order becomes final.

13 29:40: Right.

14 29:41: And so I think that's the concern is that once the order
15 becomes final, we wouldn't...

16 29:45: Right.

17 29:46: We wouldn't want to...

18 29:48: So--

19 29:48: But if we get that request before, then there's something we
20 could...

21 29:52: Well, so my ques--

22 29:54: Okay.

23 29:54: My point is if you had authority to extend any of these timelines,
24 whether it's to file exceptions, to respond to them, or to reply to them, then shouldn't
25 there be some sort of ability for the Workers' Compensation Division to cite

1 discretion in granting a late one?

2 30:10: Uh-huh.

3 30:10: I mean, what happens now when they file one after the
4 deadline? Say they file exceptions and I'm an employer and so I'm going to file my
5 response and I docketed it one day wrong or it's holiday, it's not, and I file it late, and
6 then do they have discretion to consider that or not right now?

7 30:26: The response or the exceptions?

8 30:27: The response.

9 30:27: The response, so... I've seen it both ways, if the other party
10 does not have any problem with them being, but I've also seen it where because it
11 was filed late it's not considered, but the case is otherwise considered based on the
12 information that is in the record.

13 30:44: Right, my question is just on whether the WCD has authority to
14 consider it or not. Whether they think that this is good reason or not. Like I said,
15 they don't--

16 30:51: Right.

17 30:51: --think there's good reason and they don't want to consider it,
18 then they don't. If they do think there's good reason, can they consider it?

19 30:58: I would think so, but I don't think it count, I don't know how
20 often that comes up.

21 31:01: Okay. Well, if it changes the rule to where they expire, it
22 seems like--

23 31:04: Yeah.

24 31:04: --it's starting it's like making a bright line, saying if you don't
25 request an extension before, you're out of luck and we're not going to consider any

1 reason why.

2 31:13: Right, okay. And I think that is why--I think that is what it's
3 saying now, that's--but so your feedback is that?

4 31:20: I think there should be at least some sort of good cause
5 exception for "may" or, you know, discretionary language used for something like
6 that for the specifics--I mean, there are valid instances for (unintelligible) late
7 (unintelligible) happen very often.

8 31:34: Would the rule that provides for general procedural waivers,
9 could it be brought into play in a situation like this for a missed timeframe?

10 31:43: It could be, and that's in the beginning of the rules, there's a
11 way of a general rule, it's in 436-001-0003(4), that the Director may waive procedural
12 rules as justice requires--

13 31:55: Yep.

14 31:56: --unless otherwise obligated by statute, so I think the situation
15 you're talking about might fall under that more general exception process or...
16 Yeah.

17 32:05: But not necessarily.

18 32:09: Okay. So just to make sure I understand, you're--so you're
19 saying good cause for requesting an extension after it expires, but still having the
20 Division consider granting it.

21 32:22: In terms of goes to the hospital emergency room (unintelligible)
22 three days and the deadline expires, it's usually considered good cause for filing
23 something late.

24 32:30: Okay.

25 32:35: And if you wanted to utilize the rule (unintelligible) referred to

1 rather than having to write new language--

2 32:40: Right--

3 32:40: Right--

4 32:40: --and I understand the concern (unintelligible)--

5 32:42: Yeah.

6 32:43: --especially if the Division has sort of been--I don't want to use
7 the word inconsistent, but certainly has considered--

8 32:46: Uh-huh.

9 32:46: --in the past and I would hate for there to be a bright line rule--

10 32:50: Uh-huh.

11 32:50: --created that changes that dynamic that some people may
12 have become accustomed to.

13 32:54: Yeah, that makes sense.

14 32:59: I would have some concern, too, as to when a proposed and
15 final order then actually becomes final if there is a good cause exception written into
16 it, if it--if we're just relying on this reference to waiving procedural rules, that's
17 already been there, but if there's now a good cause basis for a party who is untimely
18 suddenly become timely, that seems to create a final order that's maybe not final or
19 would need some time, some additional time periods placed on it as to when it would
20 become truly final.

21 33:42: Well, I think it makes sense to have the--and this is just have
22 the good cause applied to maybe the response and the--I mean, the except--if the
23 exceptions aren't filed, I think when 30 days comes it's final, but if there's some sort
24 of notification that we intend to file exceptions or something that happens before that
25 30 days, but I think you're right, the order becomes final, but then if there's a

1 response or reply and some good reason for that--Jaye, you're thinking of
2 something--

3 34:10: Well, I mean, I was just thinking once something becomes final,
4 it is hard in another place to say unless--

5 34:15: Right, no, I know, I know, and I don't want to do that, I don't
6 want to get into the situation where we're creating exceptions to that, but if
7 procedurally along the way if there's been some indication expressed that there will
8 be exceptions coming or if the parties have been in contact about the response and
9 the reply, those sorts of things, is that?

10 34:36: I'm thinking so like in the Court of Appeals, you can appeal a
11 Court of Appeals decision to the Supreme Court and ask for extensions to extend
12 petition for review, but that's before--

13 34:47: Right.

14 34:47: --the time period extends, I assume that you can do the same
15 thing then in filing exceptions; if I ask before, I can get that additional 14 days or
16 something to do that, and I guess I don't have, you know, I'm splitting--filing
17 exceptions is somewhat different than filing response or a reply, which is more of
18 considered just, you know, assistance to the fact finder, decision finder--

19 35:13: Right.

20 35:15: --so I understand that concern for when something becomes
21 final. But you can still extend the 30 days, you can request an extension before and
22 it's done currently?

23 35:30: We've had situations where a party has said I--basically
24 expressing their intent to file exceptions, but not having the time to submit the written
25 arguments supporting their exceptions, so they actually have appealed it or has

1 implied there are exceptions, but then asked for more time to submit the argument--

2 35:50: Okay, there's (unintelligible) two then basically.

3 35:52: Because, I mean, generally we would want the exception and
4 the argument to be submitted at the same time, but if there's--if the exceptions
5 without argument are submitted before the 30 days, I think that then the order hasn't
6 become final, but then in that point there can be more time extensions allowed.

7 Does that--I mean, does that make sense to you, that--I may even just want to make
8 sure--okay.

9 36:17: I mean, I guess I'm just curious, too, like what this would look
10 like. It's hard to--

11 36:21: Yeah, and a lot--

12 36:22: --(unintelligible) how it would interact with the other rules--

13 36:24: Right.

14 36:24: --as well procedurally.

15 36:26: And what I--having--what I would encourage you to do, after, so
16 after today we're going to go back and we're going to consider the feedback that we
17 received and put it into proposed rule language, and so when that does come out, I
18 think we're talking about, I think we're looking at December, it'll be in the next--in the
19 next little while, I would just encourage you to look at that language and make sure it
20 works or doesn't, I-- The idea is that we want to be clearer and not make it worse or
21 make the situation where there's going to be more room for interpretation, so...

22 Okay. So are we ready to move on to issue number seven?

23 So again this goes back to we have language in the rule, fairly detailed
24 language in Rule Number -0252 about when the Director may stay review if--
25 section (1) talks about a party may request that Director review be stayed if

1 exceptions are timely filed and there's a pending matter concerning a claim that may
2 make the matter within the jurisdiction--Director's jurisdiction moot, and then
3 sections (2) and (3) go into if the ALJ has consolidated matters, these are provisions
4 that I'm not aware have ever been actually used in the specific detail that they're laid
5 out, and so the idea is just to make it more general that if there--if there is something
6 else going on, if there's a pending matter concerning a claim that may affect the
7 outcome of the matter that's in the Director's jurisdiction, that we may stay review; it
8 may be that if there's a Board review pending on something that's going to affect
9 whether or not our review is necessary, we may decide to put our review on hold is
10 the proposal, just the specific language is very detailed, like I said, I don't think it
11 needs to be that specific. Does that make sense? Okay. Okay.

12 So the next couple of issues, we're getting into switching gears from
13 the process to attorney fees. In Rule Number -0400(2), it says that the attorney
14 should submit a statement of the number of hours spent on the case. That's not
15 required, but we--I've gotten a few back from our reviewers that in some cases they
16 would like additional information or what they gave is not enough to help them
17 determine the amount, and so the suggestion is to add some language that if--
18 allowing the Director or the reviewer to ask for more information if necessary to
19 determine the amount of the fee. I don't know that the language in the draft rules is
20 the--is the way to do that, but it is just to kind of say what we're talking about I think
21 is that right now you're not required to either--you're--the worker's attorney is not
22 required to itemize, but if the reviewer, if what the reviewer has isn't enough, I guess,
23 allowing them to ask for more information. And Ted, you're probably the only one in
24 the room. Hi, Jennifer, you came in. Any feedback on that?

25 39:48: Yeah, so I've been--I've been trapped by this. I guess I don't

1 exactly know when that rule was adopted, but I spend a lot of time looking at
2 attorney fee statutes and rules, and this one cited by me in reclassification
3 proceeding that, you know, I didn't submit a timesheet or anything like that. This
4 apparently is the only situation that's truly portends to be sort of lodestar, which is
5 timed by reasonable hourly rate analysis that's not, you know, forcing some sort of
6 matrix or subject to those factors that the Board uses, and so I didn't submit
7 something, and so they didn't stiff me on a fee, but dang close, and so then I had to,
8 you know, basically request reconsideration, in which case I submitted a bunch of
9 stuff, including an affidavit and some other stuff about how much time I spent and
10 then they just decided to ignore it, so I had to request a hearing and then of course
11 we settled it because the insurer is a reasonable person and, you know, was
12 somewhat taken aback at the rate that they had come up with or not that they would
13 come up with on their own.

14 So something that needs to be changed and, you know, I personally
15 don't have any kind of, you know, I kind of like the lodestar method, it just sort of
16 caught me off guard because this is the only circumstance that I know of in the entire
17 system in which they're going to require some sort of statement of time and an
18 hourly rate. So, yes, I don't know, I mean, I think it--you know, the person reviewing
19 it, then if they need more information on those factors that, you know, are going to
20 determine the amount of fee, then they should be, you know, I think they should be
21 allowed to ask for it and the attorney can provide whatever information they have on
22 that. You know, we--many attorneys in both the Workers' Compensation Board and
23 the Workers' Compensation Division don't submit anything as far as timesheet, I
24 know they submit a short couple paragraph--

25 41:50: Uh-huh.

1 41:50: --argument, this was a way to say look at the record, look at the
2 arguments, you know, give me my fee, and they--

3 41:55: Right.

4 41:56: --you know, for better or worse, sometimes they get higher
5 fees, sometimes they get lower fees, but the person seem to reviewing it seems to
6 actually try to figure out, you know, how complicated the case was, how much time
7 was spent, and this just was appeared to be some sort of resistance to that, so this
8 probably doesn't go far enough, I guess, is my recommendation.

9 42:24: Well, and there's I--because I think you were talking--you're
10 also talking about an issue that's a couple issues down the issues document, the
11 hourly rate as well, yeah, so this first issue is just talking about, you know, if the
12 reviewer needs more information, giving them the discretion to ask for it, so that's...

13 42:42: Now, do you--

14 42:42: --and I understand--yeah--

15 42:44: That could be the first step.

16 42:45: Okay. And then the next issue is talk--get into the factors--

17 42:53: Before you go--

18 42:53: Oh, sure.

19 42:53: --I just have a question, so, I mean, you say that the attorneys
20 should submit it; why don't you just change that to shall--

21 42:58: Shall.

22 42:58: --submit it? I mean, why are we making this harder and
23 somebody has to request something, why--I mean, I have to get a bill from the
24 attorney that I hire and he better know how many hours, I would hope, and I should
25 know whether that's a reasonable amount, I don't know why that would be--I'm not

1 sure why this is we have to ask for it; why is it not just simply you submit it?

2 43:22: And this--yeah, that language, the language the attorney
3 should submit has been in there since, I think since the matrix was first adopted, it
4 was quite a few years ago--

5 43:29: (unintelligible) make this easier if it just, if you change it to shall,
6 then the problem's solved.

7 43:34: Well, I mean, I think that it might be possible to still to give the
8 discretion (unintelligible) and it is not clear enough, (unintelligible) that, I mean, might
9 reduce the problem, but (unintelligible) might make sense--I guess I understand that
10 Ted's idea is a little (unintelligible) try to make a determination how much I should
11 get, because they're not sure, I'd like them to have the power to ask rather than
12 making an assumption that's maybe not in my favor.

13 43:59: Yeah, but if you don't--if they don't submit it, then they do get,
14 they already tell you, if you choose not to submit it, it already tells you what it's going
15 to do, they're going to presume it's one or two hours, I mean, it's not like it's not right
16 there telling you--you can take the gamble. I mean, for me I think the language is
17 pretty clear, I don't even know that any--that it's necessary, but it seems like it would
18 just, you just change to shall and then it--and then they don't have to worry that
19 they're going to get shorted by two hours, one hour or two hours. Just trying to be...

20 44:32: Yeah, I mean--

21 44:32: --seems logical to me--

22 44:33: --I respon--personally I can respond sort of what I understand
23 generally, so generally claimants attorneys are not used to keeping their times, and
24 so because in all of the circumstances they're basically requesting a certain amount
25 and they have these factors, which are not mathematical factors like an hourly rate

1 and a time-based or (unintelligible), the importance of the case, the skill of attorney,
2 et cetera, et cetera, so a lot of firms or individual attorneys are not set up to do that;
3 they just work, I mean, you know, to try to do this for this one case, they know that
4 this is going to be the case, you know, you're taking a client is, you know,
5 procedurally a little bit managerial, a little difficult for some people that don't keep
6 that. I tend to keep time on most of the stuff I do.

7 Personally, I requested a fee amount in that, in, you know, my case,
8 which was promptly just ignored, and so while I didn't necessarily submit any
9 evidence on time the first time around, but the time spent or an hourly rate, you
10 know, I did request a fee amount for, you know, prevailing in that circumstance, and
11 there was never any explanation as to why (unintelligible) adopted or anything like
12 that, so I understand, you know, that they can presume something, but, you know, it
13 need to be the option to say, well, he's asking for this much, but there's no evidence
14 on it, and so I'm going to automatically ignore that and I'm going to go to this default
15 one to two hours, which, you know, I suppose there are some cases that probably
16 take one or two hours, I would not say most of them do, at least not for me. That
17 seems--there's a very wide disconnect between those two options, and so giving this
18 person a little ground to at least with say, all right, well, there's obviously a big
19 discrepancy here, let's figure out what this fee should be, because I don't have
20 enough information, I can't tell by just looking at the record, you know, and the stuff
21 submitted by the parties to determine what a reasonable fee would be.

22 46:35: Yeah, but the--yeah, it just says that the Director can ask, they
23 don't have to, they're not required to. If this says you should do it and you don't, the
24 Director doesn't have to ask you to submit additional information; it just says that
25 they may. And so if you don't submit it because you did the should and you decided

1 not to, you still have this exact same scenario, you didn't solve what you want to
2 solve--

3 46:58: Well, I didn't submit it because I didn't know about the rule.

4 47:01: I didn't either.

5 47:03: I mean, and I know a lot about a lot of rules regarding attorney
6 fees, I mean, I can (unintelligible) these spreadsheets, and so it wasn't my intention
7 to just--

8 47:12: No.

9 47:13: --not submit it--

10 47:13: Right.

11 47:13: --so then the question is, is that the Director's authority to say,
12 all right, well, this person didn't do it for whatever reason, and so I'm just going to
13 default--

14 47:22: But they have that, I'm just saying with the lang--

15 47:23: --you're saying they have the authority to ask already?

16 47:24: No, I'm just saying that this just says they may ask, it doesn't
17 require the Director, if you don't submit your hours, this doesn't require the Director
18 to ask you for anything else, the rest of this--

19 47:33: Oh, the new language.

20 47:34: Yeah, but it still, it doesn't--the scenario that you want to stop, I
21 think what you want is that it forces them to act, and I think that's throwing--I don't
22 like that idea; you should submit if you want to submit, but I think your scenario still
23 occurs with this language because they may, they're not required to.

24 47:55: Sure.

25 47:55: So you don't submit it, they decide I'm not going to, and they

1 still get to go back to the they can, now instead of will, it's may presume the
2 attorney's fee one to two hours, but there still doesn't solve the problem of them
3 asking for more.

4 48:09: I guess my question, they have the authority to request more
5 information currently under the rules or not?

6 48:18: I think we--you know, the reviewers, going back to when we
7 first started assessing fees way back, I don't remember even the bill number, but
8 when we first to adopt the matrix, which is before the reclassification situation that
9 you're talking about, I think at that time it was if--you know, if the attorney, if the
10 attorney wants to get a reasonable fee, then the attorney should submit information
11 supporting that fee. Otherwise, the reviewers are not necessarily experts in
12 attorneys' time and so, you know, making it as simple as for them, and so I think if
13 they need more information, they probably could have asked, but as a matter of
14 practice, went to the default, that we didn't get anything, so we're just going to
15 default back. I think it just makes it more clear that if, even if you submit something,
16 if we--if it's still not enough for us to make a decision, we need to ask you for more,
17 and if you don't submit it, then--

18 49:13: Can I give an aside here, as I am a medical reviewer and so I'm
19 one of these who finds, you know, we try to determine these fees. I think one of the
20 problems that we have had in the past is, when we've asked for clarification, we've
21 gotten attorneys feedback and they're not--they're not typically happy about it,
22 they're not happy that we're asking for clarification, and so partially we would like it
23 to say we can ask for clarification just saying, you know, we need more information,
24 we're not trying to say that you don't spend that many hours, we're not trying to say
25 that it wasn't this level of difficulty; all we're trying to say is we're trying to figure out a

1 reasonable fee for you and we want you to be prepared that we may ask for that
2 information. That's how I see it.

3 50:06: So you want authority to ask for information. What Ted's
4 asking for is, if I submit more information, I want it considered.

5 50:17: You want the opportunity to know that you can submit
6 something in the first place.

7 50:20: Well, that means (unintelligible) the rules and--

8 50:21: Yeah, that's--

9 50:22: --that's (unintelligible).

10 50:26: But I think--I think it is a reasonable thing for an attorney to be
11 able to, if they're asked, you know, if they're asked for more information, to provide
12 it, and if they are thinking the fee wasn't enough, to say, hey, I've got more I want
13 you to look at for it to be reviewed.

14 50:46: Kind of how this process usually works, so...

15 50:54: Any other feedback on that?

16 50:56: So with... So where it says the Director may request the
17 attorney to submit additional information that provider shall consider, because then it
18 does require them to actually throw that into the mix, that's all to your question; if
19 they--if you are asked, you're assured that that's part of what she's saying--

20 51:19: Well--

21 51:19: --they wouldn't have asked for it if they didn't want to consider
22 it, but I get what you're saying--

23 51:23: Well, that's we (unintelligible)--

24 51:23: --is that they didn't feel like that's what happened.

25 51:25: Ask for it, (unintelligible) consider it, but, I mean, I like--I like the

1 way that Jaye wrote it down is that there's two issues. One is this; what she's saying
2 is that I would like the authority to ask for more information if I want more information
3 and then I want to add onto that and say, well, if I'm submitting something or if I
4 disagree with it initially, then I want an opportunity to say, hey, you messed up,
5 (unintelligible) this issue, so here's why you should reconsider it and then consider it
6 and you (unintelligible) whether or not to, you know, change your opinion or
7 (unintelligible) say that, no, I don't think this (unintelligible) because such-and-such,
8 which is, you know, sort of how it works in other--in other areas.

9 52:07: Well, one situation is, is the Director asking for more
10 information before the fee is awarded in order to help determine--and in your
11 situation I think you're talking about is the fee was awarded and you're submitting
12 additional, it sounds like submitting different additional information--

13 52:21: In my, in that case--my sample case, yes, that's correct--

14 52:24: Yeah.

15 52:24: --and that's (unintelligible)--

16 52:25: So there's a different (unintelligible).

17 52:26: I mean, I assume they have the authority to do that still
18 (unintelligible) rule, but if you need to write in something like shall consider it after
19 they choose to ask for more information in the review unit, I would assume that
20 reviewers would consider the information that they asked for.

21 52:56: Okay. Anything else on that? So the next--so the next issue,
22 number nine, goes into the list of factors that we have in -0400(3), talks about in a
23 case--in cases in which a reasonable fee is to be assessed, the Director may
24 consider the following factors. And then for the most part, this list of factors mirrors
25 the factors that are in the Board's rule in Chapter 438, but the wording is slightly

1 different, so this issue is just to make the lists worded the same so that we're
2 considering the same factors that the ALJ might consider, so that's that issue. Is
3 there any discussion or objections to doing? Okay. Okay.

4 So this next issue, number 10, is talking about the situation I think Ted
5 is talking about in that the relatively new fee for reclassification, so the way that the
6 rule was adopted, and this is in Rule Number -0435, it's on my Page 15 of rules, in
7 section (2), so effective January 1, 2016, it says the Director will determine--well, I'll
8 back up one step. So the way that the formula was worked out is that the fee would
9 be based on a reasonable hourly rate multiplied by the time devoted by the attorney
10 to obtain the reclassification order, and then in section (2) the Director will determine
11 the reasonable hourly rate of no less than \$150 per hour and no more than \$400 per
12 hour. And the feedback we received is that \$150 per hour is pretty low, and so this
13 particular issue is suggesting that we kick that up. In the draft rules it's 275 as a
14 minimum up to 400 per hour, and 275 is the amount that the Board came up with for
15 the hourly rate for an attorney to participate in interviews and depositions, so that's
16 just where that number comes from, you know, it's different... It's a different type of
17 representation, but that's just--that's just where that number came in is that that
18 would be the minimum, so if--there wouldn't be any reason to go as low as 150 if this
19 change were made. So feedback on that? This is a relatively new change.

20 55:21: Is there an average that hourly rate that the Department has
21 used? I don't--we don't see too many of these orders--

22 55:33: Yeah.

23 55:34: --when an attorney fee is being awarded or an attorney is being
24 awarded their fee, is there an hourly rate that's sort of like a...

25 55:41: I don't--

1 55:41: --the number most commonly used and what that average
2 would or what an average would be if they went back and looked at the attorney fee
3 awards?

4 55:51: I don't--I don't know. I can go back and ask the reviewer, I
5 don't know at this point, but--and I don't--I don't think this is an issue that we've
6 heard a lot about. My understanding or my assumption is that this particular fee is
7 not a very big fee compared to other fees that attorneys are being awarded in other
8 aspects of their claim, but...

9 56:15: There was a lot of testimony the Board adopted--

10 56:19: Uh-huh.

11 56:19: --at 275 and it was in my (unintelligible) case a well-considered
12 discussion with lots of different parties participating, so it makes sense to have
13 similar--

14 56:37: To have the 275. And that--I mean, that would be--if we were
15 to make that change, that would be the minimum hourly rate for the reclassification.
16 It could be more, depending on factors in the case, but that... Yeah, that was our
17 thinking in part, too, is that that was--the Board went through some discussion to get
18 to that rate, yeah.

19 56:59: But that isn't a floor or that is--I mean, that's not--

20 57:02: On the--on the--

21 57:03: The Board (unintelligible)--

22 57:03: --in the Board's rules, that is the rate--

23 57:04: Rate--

24 57:04: Right.

25 57:05: --that is the rate.

1 57:07: So simply 275, not--
2 57:08: Yeah.
3 57:08: --not the--not the range--
4 57:09: Yeah, the flooring--
5 57:09: --that this one has--
6 57:10: --the rate.
7 57:13: And wouldn't the factors then impact the hours--
8 57:16: Uh-huh, it would.
9 57:16: --involved in the case then, so if it was a flat rate, the hours
10 involved would increase, then applying the rate toward that.
11 57:28: Right.
12 57:28: You see what I'm saying--
13 57:29: Uh-huh.
14 57:29: --versus you get increased hours and increased rates
15 (unintelligible)--
16 57:33: So are you--are you suggesting just a flat, just sticking with a
17 flat rate as opposed to the range or--
18 57:37: I'm just offering some consideration--
19 57:38: Right, right.
20 57:38: --to you at this point in time--
21 57:40: Well, now, the--
22 57:40: --and I don't--like I said, I haven't seen, I don't see a ton of
23 reconsideration orders, because generally they don't get appealed once they've
24 issued, in my experience, that it's pretty clear from the record whether time loss was
25 due and payable or there's a reasonable expectation of permanent impairment, so if

1 there is an amount that the Department typically is awarding based on the
2 complexity of these cases when they're issuing their orders, that would be helpful to
3 know in--

4 58:13: Uh-huh.

5 58:13: --determining whether, you know, maybe the Department's
6 already awarding on average--

7 58:17: Yeah, yeah.

8 58:17: --\$275 in a case--

9 58:19: Yes, I think (unintelligible)--

10 58:20: --just because it's the floor doesn't mean the default is always
11 \$150, there may already be--

12 58:27: Right.

13 58:27: --these considerations taking place and we're just unaware of it.

14 58:29: Right, okay. Well, I can go back and find out more about that.

15 58:37: Do you know how the director determines the reasonable
16 hourly rate? And how do--I mean, I understand a little bit of how they count the
17 range, but I don't understand how in an individual case the reviewer determines
18 where, you know, the wheel stops.

19 58:55: Right. Again I'm not prepared to say today what they go
20 through, I'm... Just may depend on the facts of the case and the what went into the
21 representation, kind of the similar factors that are listed there, the time devoted and
22 the complexity and those types of things, but I'm--

23 59:17: Do you want an answer?

24 59:19: Well, this is for the reclassification, it's a little bit different than
25 your situation, I mean, if you want to share what you would consider, but--

1 59:23: Yeah, no, you were just asking what the Director and when
2 we're deciding on, like MRT disputes when we're deciding an attorney fee how we
3 decide that, or are you deciding on a request reclassification?

4 59:33: Well, my understanding is in a reclassification you now have a
5 special rule where you are determining reasonable hourly rate between 150 and 400
6 and that you don't that, you know, medical service disputes, that's not a decision you
7 would make where the breaks (unintelligible) is; you consider either the matrix or
8 general factors to (unintelligible) similar (unintelligible) factors.

9 59:55: Yeah, we (unintelligible) both of those, we just do our matrix
10 and then, if you ask, if you're saying the complexity of the case, we can consider that
11 as well and then up the attorney fee depending on that.

12 1:00:06: Right, but that's not determining where--what the hourly rate,
13 reasonable hourly rate is between 150 and 400, and so I'm wondering what the
14 methodology is used to determine that.

15 1:00:26: Well, and it may be... Maybe going with a flat rate would
16 make it more clear.

17 1:00:40: Yeah, I mean, I don't really want to make a comment on what
18 the rate should be (unintelligible) range of skill on the claimants side is very broad
19 and so, you know, you're going to anger half of one side or the other--

20 1:00:53: Yeah.

21 1:00:53: --if you set the rate as a flat rate anywhere.

22 1:00:56: Yeah. Well, and the way it is now, we--it allows the
23 discretion, but in those, where the factors are different in any given case, there
24 would be more, it could be less.

25 1:01:04: Right, I mean, I guess is there a methodology for determining

1 that or not?

2 1:01:15: Yeah, and I--because I don't do the reclassification orders, I
3 don't--I don't know, but I can find out what, go talk, back and talk to them about what
4 they do consider--

5 1:01:23: How long has 150 been out?

6 1:01:26: This--

7 1:01:26: (unintelligible) attorney fee was (unintelligible).

8 1:01:29: For reclassification, it was just this most recent attorney fee
9 bill, so it's been--it's been, I guess, almost two years.

10 1:01:37: Can I retract my prior statement? This rule was put in at the
11 same time then that the 275 was put in as a flat, it's right in the same timeframe--

12 1:01:50: Right, would have been.

13 1:01:51: --as the same attorney fee bill, and so we've got a series of
14 subsection (3) there that the fee is determined on these things and I suspect that the
15 150 started there for the very simple matters as a reasonable place to start. I don't
16 know.

17 1:02:12: So, I mean, so I'd like--I'd like--

18 1:02:15: Lacks flexibility.

19 1:02:17: I'd like to try and do a lodestar method here, this is, you
20 know, a foot in the door and I'm a big fan of the lodestar method personally because
21 of the way I, you know, run my ship. But if you do that, and the factors in the Board
22 are still sort of applicable, I think Jaye was saying, but they're divided up, and so the
23 simplicity of the case isn't really a factor, at least in like other jurisdictions that apply
24 the lodestar method and have a lot of long history of case law, you know, explains
25 what it means and how you--how you work it out, the complexity of the case goes

1 more toward how many hours you spent doing it, right, not necessarily the hourly
2 rate. That's more, you know, the experience of the attorney, the quality of the work,
3 you know, those kinds of--kinds of things, and they can be, you know, separated
4 under these two little columns in the lodestar (unintelligible), but again I'm--you
5 know, I just--I just wonder why, you know, what method is used in range, because
6 there is no guidance here that I see about how to determine the hourly rate. You
7 know, and I think a few people that would, you know, warrant each, but I'm not sure,
8 I mean, that's not a personal opinion--

9 1:03:40: Right.

10 1:03:41: --and, you know, based on just, you know, sort of anecdotal
11 evidence, which is probably not something that should, you know, you know,
12 someone is reviewing this, decision-maker shouldn't consider--

13 1:03:50: Right.

14 1:03:50: --in (unintelligible). And I got stuck with the lower end of that
15 and, you know, I was furious, thinking, all right, well, how long have I been doing it?
16 And then I'm thinking, well, they don't know how long I've been doing it, right, they
17 don't know--

18 1:04:02: Right.

19 1:04:03: --you know, whether I'm (unintelligible), so, you know, so I'm
20 not really faulting them for that, but it would be nice to know how they arrived at that.

21 1:04:18: Okay. Well, we can--we can work on some proposals to
22 make it a little more...

23 1:04:26: And can I ask a question, too--

24 1:04:27: --a little more guidance. Uh-huh.

25 1:04:29: The subsection (3), I know, is not really-- not really talking

1 about that, but is that a limiting description or a general description or some sort of
2 what they consider would be considered sort of an expansive description, what can
3 we consider in determining the time?

4 1:04:47: The time as far as the time devoted to requesting
5 reclassification from the insurer? My--is that the section you're talking about?

6 1:04:55: Yeah.

7 1:04:55: My--no, and I wasn't--I was not in this position when that rule
8 was adopted two years ago, but my understanding from going back to the advisory
9 committee discussion at the time was there was some discussion about the scope of
10 time that could be considered, are we--is the fee for the time that the attorney takes
11 to write the letter to WCD requesting the reclassification review or if the attorney has
12 spent, you know, hours and hours going back and forth with the adjuster about
13 payroll and all sorts of things like that, is that time that we can consider? And my
14 understanding is this was saying we couldn't consider that as time for the fee
15 because that kind of pre-bringing it to the Division time. Is that--is that--is that how
16 you're reading it or do you read it as differently--

17 1:05:44: Yeah, no, I didn't know, I mean, I read, I guess, it's somewhat
18 limiting or it can be read expansively in terms of that. I mean, I suppose, you know,
19 you know, what the reviewers don't know, you know, if you have a client walk in and
20 that's really (unintelligible) issues and you need to get their claim reclassified before
21 anything else can happen, you know, then all of the time you've spent from the time
22 he walked in your door until you get that claim reclassified is (unintelligible)
23 reclassification of the claim because there's no compensability issues or time loss
24 issues, you know, that could be--that you can raise until that step is taken, versus,
25 you know, I got all these other things going on, but I'm just going to throw this

1 reclassification issue on top of these--

2 1:06:28: Right.

3 1:06:29: --because, you know, because it's there...

4 1:06:31: Well, that's where they--

5 1:06:32: --that's a very different amount of time spent, you know, doing
6 that work--

7 1:06:35: And that's where the information that's in the record and in
8 the materials that the attorney provides is important for the reviewer, because if
9 we're getting a two-sentence letter saying please reclassify this claim but no
10 indication that the attorney has done any sort of work, well, that's going to be on the
11 lower end of the--of the scale, but if there's documentation showing that the attorney
12 had taken time to build the case before bringing it, then that's--that would be
13 considered. Definitely--

14 1:06:58: And that's what I wondered whether (3), why it was there,
15 it's--

16 1:07:01: Okay.

17 1:07:02: Because I assume you'd consider that as well, I mean, you
18 know...

19 1:07:06: Okay.

20 1:07:06: --in the file or in the letter.

21 1:07:13: Okay. Well, I think that's some good feedback on that. Any
22 other feedback on that, that particular issue, the hourly rate? I think we've got some
23 good stuff to consider.

24 So the next issue has to do with the timeframe. Our rule has for a
25 number of years provided that attorney fees assessed must be paid within 30 days

1 of the date the order awarding the fees becomes final, and the Board has recently
2 within the last couple of years changed their rule to say 14 days, and so again no
3 reason to have a different rule if that's what the Board is doing, so it's just proposing
4 to make it consistent with that.

5 So those are the issues that we've kind of identified and heard about
6 internally, but there may be others, either other issues that attorneys have run into
7 when they've represented clients in hearings or that maybe that have come up, and
8 so is there any other issues that we haven't touched on that you may have
9 suggestions for us to consider?

10 1:08:27: Maybe I would say from SAIF, due to the short turnaround
11 time from when these were published to today--

12 1:08:35: Uh-huh.

13 1:08:35: --we're still reviewing them--

14 1:08:36: Okay.

15 1:08:36: --so (unintelligible) another problem--

16 1:08:39: Okay.

17 1:08:40: --or issue out there, I'm not aware of any--

18 1:08:42: Right, okay.

19 1:08:43: --but if there are, we'll be sure to bring them forward.

20 1:08:45: Yeah, and we welcome any feedback, and even if it's after
21 this process is over with, as issues come up, we appreciate hearing about them so
22 that we can do what we need to do to address them, if we don't know about them
23 until--

24 1:08:59: Sure.

25 1:09:00: --the rules come out, so... So the remaining issues are kind

1 of placeholders, they're not necessarily specific. We have a bulletin, Bulletin 285,
2 that publishes the Request for Hearing form and so, you know, any changes in the
3 rules that are going to affect that, we will go through and just make sure that the
4 bulletin and the form are consistent. One of the things like we've identified is that the
5 web address for the web form since we had our website updated has not worked,
6 and so we have to update things like that. And same thing with the attorney fee
7 bulletin. And so there's other materials that we're going to be reviewing and
8 providing updates at the same time. In addition, the appeal rights that appear on the
9 proposed and final orders as well as on the orders that come out of MRT and other
10 units, we'll--I--my understanding is that they are not necessarily consistent, they've
11 been updated at different times by different people who have worked here, but we
12 want to make those consistent as well. Did you have something you were going to--I
13 thought you--okay--

14 1:10:08: Well, sometimes toward the end of the meeting we talk about
15 timeframes, and I think you already--

16 1:10:12: Okay.

17 1:10:12: --touched upon those. We're not, as Cathy said, driven by
18 any hard-and-fast timeframes; in other words, there's no legislative change or court
19 decision that we have to implement immediately. But we could file proposed rules
20 as soon as December or in January for a hearing; whenever we file, the hearing
21 would be the following month typically. And then probably effective by Jan--by
22 April 1, but Cathy's right, if you have additional advice to provide to us, that would be
23 very helpful, if you could get it to us within the next week or two--

24 1:10:52: I would think by the end of next week, December is...

25 1:10:57: Right, this Friday--

1 1:10:57: December is this Friday, yeah--

2 1:10:59: Yeah, yeah. Within the next week would be ideal, but if you

3 need more time, that's--

4 1:11:04: Yeah.

5 1:11:05: I was going to say, you know, this today is the day after a

6 long--

7 1:11:10: Yeah.

8 1:11:11: And I guess I kind of respectfully, since I don't have a really

9 hard need for this, if we could maybe push dropping those into January so that it

10 gives us a chance to fully vet the issues--

11 1:11:25: Uh-huh.

12 1:11:25: --or any other additional issues. Holidays are tough for

13 grabbing people.

14 1:11:33: Well, yeah, now we're coming into, yes, more of it, so--

15 1:11:36: Yes (unintelligible).

16 1:11:37: Yeah, the entire week last week was a very quiet one around

17 here. It was a busy one, but it was quiet.

18 1:11:48: Okay. In the meantime, if you have, if you do have more

19 issues, please let us know, you know, as soon as you're able so we can get them--

20 1:11:55: Yes.

21 1:11:55: --going. Anything else that we didn't touch on ? I know these

22 rules aren't as exciting as some of the other rules that we... They can be this time

23 around.

24 1:12:09: Thanks, everybody, for coming and I think--I think you

25 probably all have been touch with me, so, yeah, you have, so if you have written

1 advice, you can send it to me. You can also pick up the phone and just call and I'll
2 document whatever you'd like me to and give it to Cathy of course and others here.
3 But I don't think we have anything else, if that's--

4 1:12:34: I don't.

5 1:12:35: --all you have.

6 1:12:36: No.

7 1:12:37: So--

8 1:12:38: Thank you for your time, I appreciate your feedback--

9 1:12:39: Yeah, and have a nice drive while it's still light, I guess, and
10 everything. Good bye. Anybody on the phone? I don't think there ever was.

11

12 (WHEREUPON, the proceedings were adjourned.)

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