

**RULEMAKING ADVISORY COMMITTEE MEETING  
WORKERS' COMPENSATION RULES**

August 8, 2018, 8:30 a.m., Room F, Labor & Industries Building, Salem, Oregon

**Subject rules:** OAR 436-050, Employer/Insurer Coverage, and  
OAR 436-080, Noncomplying Employers

**Committee members attending:**

Kevin Anderson	Sather, Byerly, Holloway, LLP
Jaye Fraser	SAIF Corporation
David Waki	Small Business Ombudsman
Kimberly Wood	Perlo Construction; MLAC
Bill Cross	Oregon Self-Insurers Association
Waylon Buchan	Oregon Trucking Associations

**Other attendees from the Department of Consumer and Business Services and  
Workers' Compensation Division:**

Adam Breitenstein
Barbra Hall
Chris Clark
David Dahl
Ed Vawter
Fred Bruyns
Jody Howatt
Louis Savage
Roger McComas
Virgil Osborn

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RULEMAKING ADVISORY COMMITTEE MEETING

August 8, 2018, 8:30 a.m.

Room F, 350 Winter Street NE, Salem, Oregon

WORKERS' COMPENSATION DIVISION RULES

OAR Chapter 436

Divisions 050 and 080

The proceedings in the above-entitled matter were held in Salem, Oregon, on the 8th day of August, 2018, before Fred Bruyns, Administrative Rules Coordinator for the Workers' Compensation Division.

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DISCUSSION AMONG PARTIES

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1 TRANSCRIPT OF PROCEEDINGS

2  
3 0:00: So thank you very much for coming to join us this morning. My  
4 name is Fred Bruyns. I coordinate rulemaking for the Workers' Compensation  
5 Division. This is a Rulemaking Advisory Committee on some rules in Division 50  
6 and 80 of Chapter 436 of the Workers' Compensation Rules. So we appreciate you  
7 coming and taking your time this morning to join us.

8 Chris Clark, in just a moment, is going to take us through the agenda.  
9 But I'm just going to let you know that this is an informal process, and I would  
10 encourage you to speak your minds and let us know if you have any concerns about  
11 the issues or the options that we're going to discuss, and you know, just give your  
12 opinion and your advice on where you'd like--what you'd like us to do, and we'll  
13 certainly do our best to consider that fully.

14 Let us know if you see any potential fiscal impacts for anything we're  
15 going to discuss so that we can estimate those when we file proposed rules with the  
16 secretary of state because we rely on information from folks like you. And with that,  
17 does anybody have any questions about the Advisory Committee process itself?  
18 Okay.

19 I've introduced myself. I'd like to begin with anyone on the telephone  
20 with us. I don't think we have anyone. Is there anyone on the telephone?

21 1:24: Yes, Fred. It's Kevin Anderson of Sather, Byerly.

22 1:27: Oh, okay. Welcome, Kevin. Glad you're--glad you could join us.  
23 Anyone else? Okay. With that, I'll turn it towards Chris and he--we can go around  
24 the table.

25 1:41: I'm Christopher Clark. I'm a policy analyst with the Division.

1 1:44: Good morning. My name is Roger McComas. I'm the employer  
2 compliance unit manager.

3 1:47: Ed Vawter, research analyst with IT&R.

4 1:53: Kimberly Wood. I'm the director of corporate risk management  
5 for Perlo and MLAC.

6 1:58: Good morning. Jody Howatt, Self Insurance, Workers'  
7 Compensation Division.

8 2:03: Adam Breitenstein, performance manager, Workers' Comp.

9 2:07: Barbra Hall, Self Insurance Registration Reimbursements  
10 Manager.

11 2:10: Waylon Buchan here representing Oregon Trucking Association.

12 2:13: Jaye Fraser, SAIF Corporation.

13 2:16: Dave Waki, Small Business Ombudsman, DCBS.

14 2:20: Okay. And not to put you on the spot, though, but you...

15 2:23: Lou Savage, Administrator for Workers' Compensation.

16 2:26: Thank you all very much again for joining us. And with that, I'm  
17 just going to go ahead and turn it over to Chris to take us through the agenda. And  
18 we'll probably go in order unless someone would like to do anything out of order for  
19 a particular reason, I guess.

20 2:42: Thanks, everybody. Yeah, just as a--just to reinforce what Fred  
21 said, if you have any questions or concerns about what's here, or if you have other  
22 alternatives that aren't listed that you'd like us to consider, please bring them up.

23 There's a number of things listed as housekeeping issues. If you see  
24 one and you think it warrants more discussion, please feel free to open that up. But  
25 otherwise, we'll just go through the agenda as proposed.

1                   So the first issue is Number 1514, and that's the Definition of Adult  
2 Foster Home. Under ORS 656.027(19), a person performing foster parent or adult  
3 foster care duties pursuant to ORS 430 or 443 is a nonsubject worker. In our rule,  
4 OAR 436-050-0045, we clarify that a person performing foster--adult foster home  
5 duties means: "Any person operating an adult foster home licensed under ORS  
6 443.705 to 443.825;" or "Any person employed by the operator to perform services  
7 that assist the residents of the adult foster home."

8                   The version of the rule that was in place prior to January 1, 2017 also  
9 defined "adult foster home" as "any family home or facility, licensed under ORS  
10 443.705 to 443.825, in which room, board, and 24-hour care services are provided,  
11 for compensation, to five or fewer adults who are not related to the operator by blood  
12 or marriage." The Division proposes to restore the definition to the rules.

13                   Does anybody have any comments or concerns about putting that  
14 definition back in? No? Okay.

15                   4:33: It makes sense.

16                   4:35: Yeah.

17                   4:35: Yeah. It just--it makes it more clear and accessible.

18                   4:38: I was thinking back to try and remember why we took it out.

19                   4:42: Yeah. I think that it was just a nonsubstantive change to take it  
20 out and put it back in. Okay.

21                   So moving on to Rule 110 and Issue 1532. The rules do not specify  
22 what conditions must be met for a claims processing location to satisfy the  
23 requirements of ORS 731.475 and 656.455.

24                   ORS 731.475 requires an insurer to maintain a place of business in  
25 Oregon where it processes and keeps records of claims for compensation, and

1 makes claims and coverage records available upon request. In lieu of establishing  
2 its own place of business for those purposes, the insurer may use places of  
3 business operated by service companies. Self-insured employers are subject to  
4 similar requirements under ORS 656.455, but may request permission from the  
5 director to keep claim records and process claims from a location outside of the  
6 state.

7 Under Rule 436-050-0110 and 436-050-0210, the place of business  
8 maintained by an insurer or self-insured employer, or the places operated by service  
9 companies for the purposes of ORS 731.475 and 656.455 are referred to as claims  
10 processing locations. Every insurer and self-insured employer is required to register  
11 each of its claims processing locations with the Division. Insurers are limited to eight  
12 claims processing locations, and self-insured employers are limited to three. When  
13 the insurer or self-insured employer uses multiple claims processing locations, it  
14 must also report which claims are located at each.

15 We have interpreted these statutes to require the insurer, self-insured  
16 employer, or service company to maintain a brick and mortar business location, such  
17 as an office, in this state. Recently, some stakeholders have inquired whether or not  
18 the private home of a certified claims examiner could qualify as a claims processing  
19 location. The Division is considering amending the rules to clarify what conditions  
20 must be met for a claims processing location to satisfy the requirements of the  
21 statute. The insurer or self-insured employer would be required to register each  
22 qualifying claims processing location, and each would count towards the limit on  
23 claims processing locations in statute.

24 We've listed some of those potential conditions below in the  
25 "alternatives" section. We'd appreciate any feedback from stakeholders on what, if

1 any, conditions should be included in the rule, and whether or not a private home  
2 should qualify as a claims processing location under the statute.

3 So this is essentially, we're trying to better clarify what our  
4 interpretation of place of business in 731.475 is. I'm assuming this is not a-- SAIF  
5 is...

6 7:30: Well, obviously, for SAIF, it's not an issue--

7 7:32: Yeah.

8 7:32: --because we have a substantial brick and mortar--

9 7:37: Right.

10 7:37: --business. My--you know, thinking back in--back in the day, I  
11 think the idea was that you would have people who actually knew the Oregon  
12 system, and I don't know why that would change. That's not really a SAIF issue  
13 particularly, other than the integrity of the system, so...

14 8:07: Does the Division have a concern over a--just one employee  
15 working from home and having access to their activities and the records?

16 8:21: It is a--I think there's kind of two major concerns we have. So  
17 one is the access. I mean, we need a place to go to to audit, unless they can  
18 provide remote access to all their electronic records. And then there's also kind of a  
19 question about worker access, whether or not they would be able to contact those  
20 people if not, you know, physically meet them in place.

21 And the other is kind of a permanency issue where if it's just the  
22 location that's associated with an employee and not with the actual business entity, it  
23 could change up and it's harder for us to keep track of. There's no--you know, the  
24 Secretary of State wouldn't have--be able to verify where their business location is.

25 9:04: Are there stakeholders that expressed an interest in relaxing that

1 standard?

2 9:08: Yeah.

3 9:08: Yeah.

4 9:10: Are they here?

5 9:11: No. They were invited, though.

6 9:15: I think the concerns that you raised are really valid concerns.

7 Again, SAIF's concern in this is around the integrity of the system. And I think  
8 protecting injured workers and making sure they're getting the benefits they're  
9 entitled to and just having someone alone-- And I guess my question, in addition to  
10 the concerns you raised, Chris, would be whether or not a single person working  
11 alone without access to--you know, to be able to talk to anybody. You know, I know  
12 you can pick up the phone, but it's still not the same as being able to, you know, kind  
13 of look across the hall or walk--get up and walk down the hall and have that kind of  
14 constant camaraderie and conversation that I know goes on in our shop, so that  
15 would be our concern.

16 10:11: This is--so in my day-to-day life, I do deal with remote  
17 underwriting offices. They're not claims offices, but they're underwriting offices, and  
18 so I may be speaking with someone, you know, across on the east coast, for  
19 example, to resolve an issue. And it's just a lot more difficult to do that, you know,  
20 when dealing with a remote office, and I think that could translate into allowing just a  
21 single claims examiner to be allowed to qualify as a Oregon operation.

22 10:47: That would be a reason to or not to?

23 10:49: To not to.

24 10:50: Okay. Yeah. Yeah. That is kind of, I think, the general gist of  
25 what we've asked is if somebody is physically located here but working from a

1 remote office in another state, if that's allowed. And that's why we brought it to you.

2 Any other strong feelings about that? Okay. Well, we will review and  
3 put something forward. And I'm sure there might be additional feedback on the  
4 proposed rules.

5 So the next, continuing with Rule--Division 50 Rule 110, this is Issue  
6 1466. And the issue is that the rule and statute require the Division to review and  
7 approve service agreements, but insurers do not always submit all of the parts of the  
8 agreement needed for review.

9 So before a service company begins processing an insurer's claim in  
10 Oregon, the insurer must submit a service agreement for the director's review and  
11 approval. Sometimes, insurers submit only a part of the agreement, such an  
12 addendum--such as an addendum that provides for Oregon specific requirements, or  
13 a scope of work.

14 To ensure that the Division receives the information it needs to conduct  
15 its review, the Division proposes to incorporate a definition of "service agreement" in  
16 the rules that explains what is expected, similar to the requirements for an  
17 agreement between an insurer and a third-party administrator under ORS  
18 744.720(3). The Division would appreciate stakeholder input on what common  
19 elements could be required of all service agreements.

20 So we've kind of laid out some--an outline of what we think that would  
21 mean. Like I said, this is based on that statute in Chapter 744 which is between  
22 third-party administrators and insurers in the health line. And so we--these are  
23 pretty broad, but we wanted to say that a "service agreement" means a contract  
24 between an insurer and a service company that: Describes what services will be  
25 provided; clearly explains what claims will be processed and for how long; describes

1 the fee structure and payment mechanisms; provides the condition under which the  
2 agreement may be terminated; does not include services for lines of insurance  
3 besides Workers' Compensation; and grants the power of attorney, which we'll also  
4 discuss more below.

5 Does anybody think requiring all those things would be too  
6 burdensome? I think what the problem is is that we've just been getting, you know,  
7 the addendum that says we grant power of attorney and we don't get any other  
8 information, so it's hard for us to review.

9 No? Okay. Okay. Well, that makes it easy enough. Yeah. We--  
10 yeah, go ahead, Jaye.

11 14:05: I just--I think any number of contracts that I review for other  
12 reasons internally, and sometimes we get people who try to send us pieces of it, and  
13 it's like no,--

14 14:13: Yeah.

15 14:13: --I can't tell what's not there. So I think it's perfectly  
16 reasonable. I want the whole agreement.

17 14:25: Yeah. We don't necessarily need to review. We know that  
18 some of these agreements would cover more lines than just Workers'  
19 Compensation, but we don't necessarily need to review all--the agreement for all the  
20 lines,--

21 14:36: I'll give it...

22 14:36: --but we do want everything relevant.

23 14:38: What I would do.

24 14:39: Yeah. Okay. So hearing no other comments, we'll move on to  
25 Issue 1244. So some service agreements received by the Division for review do not

1 clearly grant the service company a power of attorney as required by law.

2 Before the service company begins processing the insurer or self-  
3 insured claims, we must approve the service agreement, as we mentioned above.  
4 We published an industry notice regarding submission requirements for excess  
5 insurance policies, annual financial statements, and claims processing service  
6 agreements on December 22, 2016, which expands upon this requirement.

7 The industry notice explained, “The service agreement must grant the  
8 service company power of attorney to act for the self-insured employer or employer  
9 group in Workers’ Compensation claims proceedings, effective as of the same date  
10 of the service agreement. The power of attorney must not have unspecified  
11 limitations and must not be revocable before the termination of the agreement. The  
12 service company must use language that clearly and unequivocally grants power of  
13 attorney to the service company, such as the words ‘power of attorney’ or ‘attorney-  
14 in-fact.’”

15 The rule requires the service agreement to grant a power of attorney,  
16 but it doesn’t include the more specific requirements that we put in the bulletin. So  
17 we are proposing to incorporate the requirements into the rule to help clarify our  
18 expectations for service agreements. And we’ve kind of listed those out there.

19 So yeah. They have to be effective the same date. They may not be  
20 revocable before all claims processing services provided under the service  
21 agreement has concluded. We amended that a little bit from what the industry  
22 notice says, just to cover situations where there may be a lack of claim basis for the  
23 service agreement, so claims processing may continue after the termination of the  
24 actual agreement.

25 The power of attorney must be applicable to all claims processed

1 under the agreement, and may not have unspecified limitations; and it must use  
2 language that clearly and unequivocally grants power of attorney to the service  
3 company, such as the words “power of attorney” or “attorney-in-fact.”

4 Any objection to including those things in the rule? Other things that  
5 we should include? Hearing none, we can move on.

6 Okay. This is similar. I don’t think I will read through all this. That  
7 same industry notice also requires that a service company--a service agreement  
8 must not require or allow the service company to destroy claim files, even after a  
9 specified period of time. In addition, we’ve seen some service agreements which  
10 allow a service company to unilaterally transfer or refer a claim to an excess insurer  
11 or another processing location. The Division believes this is not allowed under  
12 current law and is considering clarifying their prohibition by rule.

13 So we would just also, in addition to those things we mentioned above,  
14 amend the rule to prohibit service agreements from requiring or allowing a service  
15 company to destroy claim files or transfer claims.

16 Okay. Okay. And so in addition to those changes, we have a couple  
17 housekeeping issues. One is just to add references to our optional forms, optional  
18 registration forms to the rules. You can see them listed there. We are not required  
19 on making these mandatory at this time, although the information included them, it’s  
20 already included in the rule.

21 The second housekeeping issue, Issue 1353, is that Rule  
22 0110(1)(c)(B), and this should actually be paragraph (B) and (c), and Rule 050-  
23 0210(1)(B)--(c)(B) and (c) require--request a claim referral contact, a coverage  
24 contact, and general email for each location where the insurer’s claims are  
25 processed, but we actually only need one of those contacts for the insurer in

1 general, so we're just clarifying that be restructuring the rules a little bit to separate  
2 out that we only need one set of contacts for the insurer and then just the general  
3 contact information for each location. So if that makes sense, we can move on to  
4 Division 80.

5 And again, we have just two more substantive issues here, and then a  
6 number of housekeeping issues. So our first substantive issue is Issue 1243, and  
7 that is the amount of penalties under 656.735(2). The rule currently requires the  
8 Division to issue the maximum penalty under ORS 656.735(2).

9 The--an employer--so for the background, an employer must provide  
10 Workers' Compensation coverage for its subject workers by purchasing Workers'  
11 Compensation insurance or becoming certified as a self-insured employer. If an  
12 employer fails to provide the required coverage, the Division may issue an order  
13 declaring it to be a noncomplying employer and assess a civil penalty.

14 Under 656.735(1), the initial penalty is the greater of \$1,000 or twice  
15 the premium that would have been due for the period of noncompliance, as  
16 determined by the director. ORS 656.735(2) provides, "the director shall assess any  
17 person who continues to violate ORS 656.052(1), after an order issued pursuant to  
18 656.052(2) has become final, a civil penalty, in addition to any penalty assessed  
19 under subsection (1) of this section, of not more than \$250 for each day such  
20 violation continues."

21 The rule establishes that all penalties under that statute will be  
22 assessed at the maximum \$250 a day, with the possibility of reductions if the  
23 employer obtains coverage and agrees to certain other conditions before the penalty  
24 order becomes final.

25 And to clarify, in addition to the civil penalties, the employer may be

1 liable for any claims costs that arise from the compensable claim that occurs during  
2 the period of noncompliance.

3 We--to skip over this next paragraph, essentially, we are considering  
4 amending the rule to provide that a penalty under ORS 436-080-0040(2) may be up  
5 to \$250 per day. We'll develop a set of factors that we will use in determining that.  
6 Those may include the number of employees, the nature of the employer's business,  
7 and the employer's history of compliance.

8 So this would just allow us some flexibility to not always assess the  
9 maximum penalty for a second violation of the--a second noncompliance.

10 22:03: I have a question about that.

11 22:04: Okay. Yeah.

12 22:05: Because it just seems like that often happens anyway. But I  
13 guess my concern is that it's not cheap for the employer to risk not paying premium,  
14 and that the penalty, then, was just kind of a slap on the hand instead of-- You  
15 know, I recognize there are some employers who just don't get it. But there are  
16 some out there who play the game. You know, the ones that call three days after a  
17 claim for insurance, you know, and then we--you know, it's like oh, huh.

18 So that's my only concern. I appreciate the Division's interest in  
19 having flexibility. So from that perspective, you know, I don't think we object to it. I  
20 just--just overall, employers need to have insurance. It just works better for the  
21 whole system. So that's all.

22 23:11: I think one of our--part of our rationale is that some of these  
23 penalties, at \$250 a day, they get up to, you know, several hundred thousand dollars  
24 pretty quickly. And--

25 23:22: Yeah.

1                   23:22: --we've seen sometimes somebody gets that penalty, and  
2 instead of, you know, saying, "Okay. What can I do to fix this?" They put their head  
3 in the sand or go out of business or do whatever. So I think that--we definitely do  
4 not want to let this be--a penalty amount be less than what the premiums would be.  
5 You know, it's not a--it would still be more cost effective to get insurance in any  
6 case. But that's part of the motivation.

7                   23:53: I get it.

8                   23:54: Do you not have discretion now? Are they stuck with \$250 a  
9 day and they get that bill and they're scared, and you say, "Sorry."

10                  24:03: If they come to us, if they get a policy, they--it's...

11                  24:08: If they get a policy and provide payroll, we can reduce the first,  
12 second, or even third penalties as needed. So that's the requirement. It depends--  
13 you know, let's educate, let's outreach, provide your payroll for the period of  
14 noncompliance and have a policy in place. We'll take it from there.

15                  24:28: Yeah. And we would still keep those incentives to get into  
16 compliance after the penalty order and the rule, it's just the initial order, we want it to  
17 not be so frightening that they don't come.

18                  24:42: Okay.

19                  24:45: Jaye, to your point, I think the goal is to make sure that they  
20 don't do it again. So the question is, how big does the ouch have to be--

21                  24:56: Yeah.

22                  24:58: --to have that deterrent but not put people out of business.  
23 That's the balance.

24                  25:03: Yeah. That's balance. I get it.

25                  25:04: Yeah.

1                   25:05: I get it.

2                   25:09: So we would then develop some sort of matrix to guide us as to  
3 whether we do 100 or 50 or--

4                   25:16: Uh-huh (yes).

5                   25:18: --150? Okay. So I guess--

6                   25:18: Yeah.

7                   25:18: --the devil's in the details there.

8                   25:21: Right. Yeah.

9                   25:21: What that is and how to apply it fairly.

10                  25:26: Right. Yeah. And we would definitely develop a way to apply it  
11 consistently. We are still discussing, you know, what should be considered in that  
12 matrix and what the criteria are. And if anybody has any input into that, we would  
13 obviously be very open to hearing that.

14                  25:48: Was there an idea if they were in the assigned risk plans  
15 without any—without any...

16                  25:58: Yeah. Yeah. Actually, that is the next issue on the agenda,  
17 too. We do--for both the first penalty and the reduced penalty amounts for the  
18 second violation, we estimate premium that would have been paid during the period  
19 of noncompliance essentially. And we can discuss that in a second, but we were--  
20 are talking about just using assigned risk rates for that method to make them a little  
21 more accurate.

22                  Okay. So it sounds like there is some concerns but no strong  
23 objections to moving in this direction. Okay. Would anybody else like to raise any  
24 issues before we move on? Okay.

25                  So moving to the next issue. I already covered it a little bit, but yeah,

1 so like I mentioned, the first penalty and the reduced amounts for both the first and  
2 second penalty are based on premium the employer would have paid during the  
3 noncompliant period. And for the rule, we have two ways to calculate what that  
4 amount would be. If payroll records are available, actual premium using the  
5 applicable occupational base rate premium applied to the payroll of the employer  
6 during the period of noncompliance.

7           And the second method is if payroll records are not available,  
8 estimated premium based on the number of workers employed during the  
9 noncomplying period times the average weekly wage, using the applicable assigned  
10 risk base rated premium during the period of noncompliance.

11           Subsection (3)(a) calls for use of occupational base rates; however, in  
12 the voluntary market, rates are set by individual insurers based on advisory loss  
13 costs published by NCCI. Lost costs do not include expense provisions, and using  
14 them does not accurately calculate the premium the employer would have paid.

15           As an alternative, the Division is proposing to amend the rule to use  
16 the assigned risk rates published by NCCI for all NCE penalty calculations. The  
17 assigned risk rates already contain provisions for loss costs, administrative costs, as  
18 well as a differential for the higher risks associated with underwriting assigned risk  
19 policies.

20           In addition, stakeholders have suggested that the terminology be--in  
21 the rule be updated. For example, section (3)(a) refers to "actual premium," but the  
22 rule does not use actual payroll--but the rule uses actual payroll to calculate the  
23 amount, but does not produce "actual premium" when calculated--which, when  
24 calculated by an insurer, would include additional factors such as experience rating  
25 modification and premium volume discount.

1                   So this would just essentially simplify the method. We'd still keep two  
2 different calculation methods. One using actual hours, but at the assigned risk rates.  
3 The other using this estimation period using number of workers times the average  
4 weekly wage by the Assigned Risk Rates. And it's pretty in the weeds, but I'm  
5 sure...

6                   29:17: But why hours?

7                   29:20: I'm sorry. Why hours?

8                   29:22: Yeah. I mean, I guess, so we...

9                   29:26: Oh, it...

10                  29:26: You're saying you're doing this if an employer can't produce  
11 their actual payroll?

12                  29:30: Yeah. If they don't have payroll records,--

13                  29:32: Okay.

14                  29:33: --we'll estimate payroll by--

15                  29:35: Yeah. No. I've got it.

16                  29:37: --employing, yeah, workers by the average weekly wage. So  
17 we'll just use that to estimate payroll.

18                  29:42: The average weekly wage may or may not be anywhere near  
19 the premium because if you have--depending on the type of risk, but if you have a  
20 classification that-- Well, let's pretend it's a logger or a roofer.

21                  29:58: Right.

22                  29:59: They are not even going to come close. So it seems like  
23 somewhere in there, you need to be considering the actual lost costs for the  
24 classification.

25                  30:11: Oh, right. So we would be using the assigned risk rates, which

1 are--that would include the risk for the occupation. So this is the occupational class  
2 codes, just at the rates for the assessed risk pool.

3 30:25: It's a tier. It's a tier.

4 30:26: Not for the voluntary market. Yeah.

5 30:28: Okay. All right.

6 30:30: The way that we are estimating payroll by using the average  
7 weekly wage, that may still underestimate a thing if somebody is highly paid. And I  
8 don't know if we have actual hours but not--if we have actual wages but not actual  
9 hours, we have a way to do that. So no, it's basically if they have hours and wages,  
10 we use that. If they don't have one of those two things, we just use a full-time--  
11 Yes, every worker counts as full-time times the average weekly wage.

12 31:06: So you can't figure out what an employer's paying their people?

13 31:10: We...

14 31:11: Like an hourly rate?

15 31:13: Sometimes we can, sometimes we can't. I mean...

16 31:17: No, I mean, the employment department, do they not...

17 31:26: Well, that's just the issue. Sometimes they do and sometimes  
18 they don't. If we--if employment records are there, then they're available and we can  
19 utilize those. If they're not there, then we go to Plan B.

20 31:39: So these also, they both--the reductions are available for both  
21 of these. One of the conditions for reductions is that they get us payroll records--

22 31:46: Right.

23 31:46: --sufficient--

24 31:46: Right.

25 31:47: --to actually do the calculation, so...

1 31:49: Yeah. But you've got to be careful in that.  
2 31:51: Right.  
3 31:51: So that if the actual payroll--  
4 31:53: Yeah, it could actually go up.  
5 31:53: --may actually cost them more.  
6 31:57: Uh-huh (yes).  
7 31:57: I mean, I don't--just off the top of my head, I'm not thinking--  
8 You know, I've got to think about this a little bit more.  
9 32:05: All right.  
10 32:07: But it just seems like maybe there's another option in there on  
11 the calculation.  
12 32:14: The other option might be if you're in this class, this is the  
13 payroll of the general--for this class. That will help you predict an average hour...  
14 32:30: Well, you're going to assume that somebody is working full-  
15 time.  
16 32:34: Right. Right. But I know we do have payroll by class.  
17 32:39: Yeah.  
18 32:39: So I don't know if--what the--if there's another source to get the  
19 hours...  
20 32:47: Yeah.  
21 32:49: It just seems like part of what you want to do is incent the  
22 employer to actually get you the payroll.  
23 32:54: Exactly.  
24 32:54: Right.  
25 32:55: Exactly.

1 32:56: And you're saying in some cases, there should be a...

2 32:57: In some cases, it's not going to.

3 32:58: Yeah. Okay.

4 32:59: Right.

5 33:01: But you're saying may it should be higher than the state

6 average weekly wage.

7 33:03: Yeah.

8 33:03: Make sure that they're not...

9 33:04: Yeah. Some kind of a little surcharge on top of it or something,

10 so...

11 33:08: Like 150 percent?

12 33:09: Yeah.

13 33:11: Just to be sure that...

14 33:12: Yeah. Thank you, David. That was what I was trying to get to.

15 33:15: Yeah.

16 33:17: So you're sure that--

17 33:18: Yeah.

18 33:18: --got it--advantage to get payroll?

19 33:20: Yeah.

20 33:21: How often do we estimate the payroll based on this average

21 weekly wage?

22 33:27: Not all that terribly much on-- I can't provide a definitive

23 answer to that question. As guesswork, maybe 30, 30 percent of the time. Maybe

24 one out of every three.

25 33:41: That's a lot.

1 33:42: Well, it is. It is. But in the bigger scheme of things...

2 33:45: That's terribly a lot.

3 33:47: That seems like a lot to me. That's, you know, more than 30

4 percent. That's...

5 33:51: It is. I--like I said, I'm just guessing. That would be the high

6 part. That would be the high figure. The low part would probably be one out of

7 every five. So anywhere from 20 to 30 percent would be a guesstimate for me.

8 34:11: And these would likely be very small employers?

9 34:13: Very, very small employers.

10 34:15: Yeah.

11 34:19: And just a claim has been filed and for the first time, we have

12 knowledge of them, basically. That's what it is. They're not large companies. Very

13 small, two man, maybe four person tops, a half a dozen at the most.

14 34:33: And when we use the term lost costs, we're talking about

15 voluntary lost costs. Right?

16 34:38: Right. Yeah. We've been using the--yeah, the NCCI advisory

17 lost costs that are published, the NCCI...

18 34:44: And it's like doubling it, and that brings it above the assigned

19 risk rate.

20 34:52: Right.

21 34:54: The lost cause multiplier is 2 percent...

22 34:57: Yeah.

23 34:59: Okay.

24 35:00: Yeah. It's 2.11.

25 35:02: Okay. So then we may be below what the assigned risk rate

1 would be by using the voluntary lost costs against the basis, and then...

2 35:12: And that's likely.

3 35:14: And then on top of that, we have the experience modification.

4 And if you're in the assigned risk plan, you also have an ARAP factor--

5 35:21: Yeah.

6 35:21: --which goes up to an additional 49 percent increase. So we're  
7 getting really, I mean...

8 35:28: You're really...

9 35:30: Right.

10 35:30: I guess the question is, I mean, it's just what's your goal? And  
11 if you have the flexibility if somebody shows up and is doing--you know, acting in  
12 good faith. And you know there are employers who just really think, well, I have my,  
13 you know, unemployment insurance or...

14 35:46: Uh-huh (yes).

15 35:46: And they think they have comp insurance.

16 35:48: Right.

17 35:48: And you can tell--

18 35:50: Uh-huh (yes).

19 35:50: --the folks who really just didn't understand versus the people  
20 who were really trying to play games.

21 35:58: And you're absolutely correct. Those that provide payroll and  
22 want to get in compliance, they do so rather quickly. It's the ones that are perpetual  
23 and ongoing that receive the second and third penalties, are the ones that are--  
24 Yeah.

25 36:09: Then maybe we should be above the state average weekly

1 wage. It's the minimum.

2 36:16: Okay.

3 36:19: There may be people that play.

4 36:24: So did you say during the rate-setting process, they--there is an  
5 average wage for each classification that's calculated?

6 36:31: Well, there's an average--

7 36:32: Right.

8 36:33: --amount of payroll for...

9 36:34: Okay. Average...

10 36:34: I mean, there's an amount of payroll that comes with each  
11 classification.

12 36:37: Yeah. Okay.

13 36:39: But...

14 36:41: But that's not aggregated down to an individual worker level.  
15 Yeah. And I think the goal generally of the way that we--of whatever our  
16 methodology should be is to produce an amount that's at least as much as premium  
17 they would have paid, if not more, because we want to make sure that they're-- It's  
18 not cheaper to pay a penalty than it is to write out a policy.

19 37:07: And certainly that, you know, I'm not going to say that the first  
20 time someone's not complying, they would have been in the pool because we  
21 ensure a lot of small, first-time employing in folks. But that second and third time,--

22 37:20: Exactly.

23 37:20: --because that's one of the things that we do look for, it's like  
24 hey, you've been noncomplying for six months.

25 37:25: Uh-huh (yes).

1                   37:25: You know, we recommend you go to the pool. And then when  
2 you show that you can actually pay your premiums, then we'll--you know, we'll  
3 consider writing you. But yeah, the second and third time is...

4                   37:43: Okay. So I'm hearing that using the assigned risk rates may be  
5 appropriate, but we should also look at our methodology for estimating payroll when  
6 we don't have payroll records, to make that a little more accurate. And we will do  
7 that and look forward to more feedback. If anybody thinks of anything, please feel  
8 free to email Fred or myself or contact us, and we'll probably be talking with...

9                   38:14: Well, there's--payroll in the NCCI with miscellaneous values  
10 page.

11                   38:22: Oh, yeah. That's a good suggestion.

12                   38:32: And there's that min and max and...

13                   38:34: Yeah.

14                   38:36: Yes.

15                   38:40: Chris, I recommend that you speak with Mr. Dahl.

16                   38:43: Yeah. I've got his name down here. I have your name down  
17 three times.

18                   38:47: Yeah. And David did give a lot of input into developing the  
19 issues that we're-- And we'll definitely seek more advice.

20                   Okay. Those were the--really the two substantive issues for Division  
21 80. We do have a number of housekeeping issues to discuss. As I mentioned  
22 before, if you think any of these warrants discussions, or if you have questions or  
23 concerns, raise them. Otherwise, I'm just going to go through them.

24                   So Issue 1170 on the procedural rules for lay representative, we're  
25 proposing to delete 080-0030(3) and (4), related to the Division role in hearings

1 under ORS 656.740, and add the following: "OAR 436-001-0030(2) through (5)  
2 apply to hearings requested under this section."

3 Basically, the definition of-- I can't even remember what it is. A legal  
4 issue and the description of how we--our authority to have a lay representative  
5 participate in those hearings has all been moved into Division 1, and so we're just  
6 duplicating some--or removing some duplicate provisions.

7 Issue 1172, consistent terminology. We're proposing to make a  
8 number of nonsubstantive changes throughout the rules to be consistent with other  
9 recent revisions to other divisions of rules. These include, but may not be limited to,  
10 changing all references to "the Division," and "the Department," and "FABS", and  
11 other parts of DCBS to "the director," unless the rule instructs stakeholders to  
12 contact a specific person or unit. Changing all references to "claimant," "injured  
13 worker," and other terms to "worker." And changing references to the "Hearings  
14 Division" to the "Board." So pretty administrative stuff.

15 We are proposing to combine Rules 436-080-0001, -0002, -0003, and  
16 -0006 into a single purpose and applicability rule consistent with what we've been  
17 doing in other divisions.

18 We're proposing to incorporate a procedural waiver provision in the  
19 rule, similar to what is contained in other divisions of OAR Chapter 436: That  
20 language that we've been using is there.

21 We are proposing to incorporate the definitions of ORS Chapter 656  
22 into Division 80 using this terminology that we've also been incorporating into other  
23 Division's rules.

24 We are proposing Issue 1525, to streamline our procedural rules, so  
25 OAR 436-080-0010 to -0030 provides the procedural process for issuing the order,

1 requesting a hearing on the order, issuing the penalty order and other requests. We  
2 are proposing to combine these into a single streamlined rule, describing all the  
3 relevant procedures and processes for issuance, appeal, and enforcement of  
4 NCE Orders.

5 Under 1527, penalty discretion, to be consistent with the language in  
6 ORS 656.052(2), the Division proposes to amend Rule 0010 to provide that a  
7 Proposed and Final Order declaring the employer to be a noncomplying employer  
8 will indicate the amount of penalty to be assessed under Rule 0040, if any. And this  
9 is in part because sometimes we assess an order against a contractor that contracts  
10 with an uninsured subcontractor. That does not contain a penalty against the prime  
11 contractor. Is that right, Roger?

12 42:54: Uh-huh (yes). Yes.

13 42:56: Yeah. We very rarely have a situation where there is a  
14 coverage violation but not a--but not one that we assess the penalty for.

15 43:08: Two, three times a year, I mean?

16 43:11: No. Very rarely.

17 43:18: Under 656.052(1), it provides that the penalty shall be-- I'm  
18 sorry. I'll just read this all. OAR 436-080-0040(2) provides that the amount of  
19 penalty under 656.735(2) shall be \$250 for each calendar day the employer has  
20 continued to violate ORS 656.052(1). To be consistent with the statutory language,  
21 we're proposing to amend the rule to state that the penalty will be assessed when  
22 the employer continues to violate 656.052(1).

23 I think we may have discussed that in 2014. If anybody has any  
24 questions? It's not a-- Okay.

25 And then to incorporate advice provided during the incomplete

1 rulemaking in 2014, we're proposing the--to amend the rule to provide that  
2 reimbursable costs under Rule 080-0070(1) include, but are not limited to the listed  
3 items, the items listed in that rule.

4 And then under 1168, we're proposing to delete Rule 436-080-0080(2),  
5 which is about referring, I think, collectible amounts from WCD to our assessments  
6 or collections folks just because that's an internal process that does not substantially  
7 affect the interests of the public. And that is it. That's our agenda.

8 Does anybody have any other issues relevant to either Division 050,  
9 that first part, so 040 through 0110, or Division 080? Anything to do with insurer  
10 registration or noncompliant employers?

11 45:26: I do have one.

12 45:26: Do you?

13 45:30: And this is just a recent constituent that I am working with with  
14 Roger. And so in this situation, the employer was deemed to be non complying.  
15 And they were non complying because their agent did not follow through with their  
16 request for an application. So therefore, the--there was an E&O claim, and the E&O  
17 carrier accepted the claim on behalf of the agent saying yeah, the agent was  
18 irresponsible and didn't follow through with the request for application and is now a  
19 party that is paying the Division for penalties and--well, they should be, anyway.

20 So in that situation, do we always penalize the employer in that  
21 situation? Or is that something that we can then replace the employer with the E&O  
22 carrier as the party that would be penalizing...

23 46:42: That's a good question. And for me, uncharted territory. We  
24 just--I've just started discussions with Adam, frankly, about it and we--we're going to  
25 be working through that. I don't have a definitive answer for you on that at this time,

1 Dave.

2 46:55: I thought there was a lot of smart people here.

3 46:57: Well, yeah.

4 46:57: That can weigh in.

5 46:59: I will say I think this may be--and I think we've had similar  
6 issues in the past, and part of changing the amount of penalty to if any may help  
7 clarify our discretion to-- With penalties in certain circumstances, I don't know if this  
8 would be appropriate or not. I don't know if we can waive claims liability, which is  
9 probably a bigger problem.

10 47:24: And there was claim in this particular case.

11 47:26: Yes.

12 47:28 It just--I think what you're talking about is whether you can  
13 substitute the responsible party. And to me, it's a little bit-- I'm thinking that the  
14 lawyers and your lawyer...

15 47:41: I'm talking about the...

16 47:43: Well, but it's like general indemnity, because what you've got is  
17 the E&O carrier stepping in to kind of indemnify the employer.

18 47:52: Uh-huh (yes).

19 47:53: So ultimately, I think the employer is responsible.

20 47:57: Right.

21 48:00: But you can seek--but the Department could seek the penalties  
22 from the E&O carrier. Maybe clarifying that in the rule, that I don't see just how you  
23 can-- I don't know that the statute is broad enough to allow otherwise, to just--you  
24 know, to put them in that.

25 48:19: And whether or not that sort of tort insurance, that errors and

1 omissions-- Whether or not that insurance performs might be outside of our  
2 regulatory--

3 48:27: Jurisdiction. Yeah.

4 48:27: --jurisdiction.

5 48:29: Yeah. Definitely.

6 48:30: Are you concerned, David, about it being a black mark on the  
7 employer, or just--it's just about the payment mechanism of it coming directly from  
8 the E&O? Is that what--

9 48:39: Yeah.

10 48:39: --the concern is?

11 48:40: Yeah. I think...

12 48:40: Because then...

13 48:41: So then the employer has the responsibility of then going back  
14 to the E&O carrier and saying, "Hey, here's the bill." And I think we just increase our  
15 effectiveness by billing the E&O carrier directly and have a higher likelihood that we  
16 would be paid timely.

17 49:02: I think you can probably bill them.

18 49:05: I think you can send them a notice.

19 49:06: But I think ultimately, the question is, I mean, who's responsible  
20 ultimately? And I know you want to change that.

21 49:11: And you know, there could be limits on it, you know.

22 49:13: Yeah. And you get a carrier to actually accept it.

23 49:18: Yeah. There was a lot of documentation--

24 49:18: Wow.

25 49:20: --to support the employer...

1 49:21: That's too bad.

2 49:25: Well, they might not be...

3 49:28: Probably not.

4 49:32: The agent, not the carrier. The carrier said that.

5 49:34: Might need to...

6 49:38: It's a pretty big agent, too.

7 49:40: I don't think they can say...

8 49:45: Thank you. Yeah. Big challenge every day.

9 49:53: Yeah. That's the great thing about working from home.

10 There's always something new.

11 49:56: Yeah. Just when you thought you've seen it all.

12 49:59: Uh-huh (yes). It's terrible, but it's absolutely...

13 50:10: Yeah. We'll look into that more. I'm not sure where the rules--

14 That might be an internal process that we can clarify--

15 50:18: Yeah.

16 50:19: --better about how our collections proceeds against people who

17 have a third-party payer to pay some of their liabilities. But I'll also think more about

18 it, if the rules can clarify that process a little bit more.

19 50:34: Okay. Thanks.

20 50:40: Okay. Any other burning, burning issues? No? Well, thank

21 you again for your time, everyone. We do appreciate obtaining an interest, even if

22 it's a quick discussion today. We are working on getting proposed rules out,

23 although we do not have a-- Do we have an estimated timeline?

24 51:05: I think we are planning to get the rules wrapped up before the

25 end of the year.

1 51:09: Yeah. Yeah.

2 51:09: Oh.

3 51:10: We are shooting for a January 1 effective date. So hopefully,

4 the proposed rules will be out relative...

5 51:18: And maybe file in September, maybe a hearing in October?

6 51:19: Yeah.

7 51:21: That's approximate.

8 51:21: Well, and I just--just for the record, want to say that one of the

9 things I've noticed was, to the Department, that consistency of language and

10 consistency with statute, they have been working on for the last couple years, Chris?

11 51:33: Yeah.

12 51:33: Thank you.

13 51:34: You're welcome.

14 51:35: I mean, it's frustrating, but it's nice to see, you know, the red

15 line on the rules and I'm going oh my God, I can't tell where the substance is.

16 51:42: Right.

17 51:42: Just I think ultimately it will make the rules clearer and much

18 easier for you all to administer, and for those of us that play in the rules all the time

19 to understand, so thank you.

20 51:55: Excellent. You're welcome. And we're trying to pace things

21 out a little bit better to ease up the burden on you all, but...

22 52:03: Yes. I saw the--next November are the next rules?

23 52:07: Yeah. That's quite a ways off.

24 52:07: Yeah. Thank you.

25 52:08: There's a little bit of a breather here, I think, coming up, so...

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52:12: Stop laughing at me.

52:14: We're taking this back up in November? Is that what I'm hearing?

52:17: Not the rules.

52:17: Yeah. No. So we will--we're--we'll probably publish something sometime in September, most likely.

52:25: For public comment.

52:26: Yeah. For public comment.

52:28: Yeah. Thank you.

52:29: And a public hearing. So there are business cards on the table by the door, if you want to pick one up on your way out. Although I think most of you have been in touch with me by email. So if you do have any thoughts, additional thoughts about the agenda after the meeting, feel free to let me know, and I'll forward it immediately to Chris so he has it as well.

So any last thoughts today? Thank you all very much for coming and have a safe drive.

53:05: Thank you, Chris.

53:06: And if you're still with us, Kevin, thank you for joining us by telephone.

53:11: Thank you, Fred.

53:12: Okay. Thank you.

(WHEREUPON, the proceedings were adjourned.)

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**CERTIFICATION OF TRANSCRIPT**

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I, Amanda Knapp, as the transcriber of the oral proceedings at the 8/8/2018 meeting, certify this transcript to be true, accurate, and complete.

Dated this 21st day of August, 2018.



Transcriber

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I, Jamie Edwards, as the proofreader of the oral proceedings at the 8/8/2018 meeting, certify this transcript to be true, accurate, and complete.

Dated this 21st day of August, 2018.

A handwritten signature in cursive script that reads "Jamie Edwards". The signature is written in black ink on a light-colored, slightly textured background.

Proofreader