RULEMAKING ADVISORY COMMITTEE MEETING
WORKERS' COMPENSATION RULES

Nov. 5, 2018, 1:30 p.m., Room B, Labor & Industries Building, Salem, Oregon

Subject rules: OAR 436-001, Procedural Rules, Rulemaking, Hearings, and Attorney Fees

Committee members attending:

Dan Schmelling, SAIF Corporation
Diana Winther, IBEW Local 48 | MLAC
Elaine Schooler, SAIF Corporation
Jaye Fraser, SAIF Corporation
Jennifer Flood, Ombudsman for Injured Workers
Jodie Phillips Polich, Attorney
Keith Semple, Johnson Johnson Lucas & Middleton PC | Oregon Trial Lawyers
Paloma Sparks, Oregon Business & Industry
Ronald Atwood, Ronald W. Atwood, PC
Sheri Sundstrom, Hoffman Construction

Workers' Compensation Division staff attending:
Cara Filsinger
Cathy Ostrand-Ponsioen
Daneka Karma
Fred Bruyns
Julie Olivo
Lou Savage
Rob Andersen
Stan Fields
Virgil Osborn

Workers' Compensation Board staff attending:
Monte Marshall

Transcript of meeting

Time stamps show location of dialog on audio recording.

00:00 (Fred) We're on the record. Thank you very much for coming this afternoon. We've allotted I think two hours for this meeting. I don't expect it's going to take that long. We really have one primary issue that Cathy will take us through in just a moment. But, if you've never been involved in these advisory committee meetings before –probably most of you have – but it's an informal process, and it's a conversation, our opportunity to get input from you before we file proposed rules with the Secretary of State, so we can get them as close to their final form as possible. And then of course, after we do file proposed rules, we would welcome your testimony, and it will be open for public testimony for a period of time. But, we'd also like your input on any fiscal impacts of what we're doing today, either to you or to the people that you represent, because we have to take those into account when we file those rules with the Secretary of State. So, we'd appreciate any information you can provide in terms of the fiscal or economic impacts, and other kinds of impacts that might be noneconomic as well, of course, in terms of fairness and justice.

And, so if you're on the telephone with us today, we really appreciate it. We're going to ask you to introduce yourselves in just a moment, but if you are on the phone, please don't put us on hold, because we will get any kind of messages you have on your phone system, unless you don't have those, but you can actually leave and rejoin the conference call as often as you need to. It is very informal, and I encourage everyone to speak up, including the folks on the telephone. You can participate as fully as you're comfortable doing, and you don't have the advantage of seeing who might have their hand up here, so we'll certainly welcome your input even if you need to just kind of chime in at any time, and we would welcome that.

Looks like we could, maybe we could move a couple more chairs up toward the table. There's one up here. There's one up front. I apologize. I got us a fairly small room.

So with that, my name is Fred Bruyns. I coordinate the rulemaking process. I've been in touch with all of you, and I'd like us to go – start with the people on the telephone and have you introduce yourselves to the committee, and then we'll go around the table. So if you are on the phone with us this morning, please introduce yourself.

02:31 This is Jodie Phillips Polich, and I represent injured workers.

02:35 Okay, welcome Jodie. Anyone else?

02:39 My name is Ronald Atwood, and I represent employers.

02:45 Okay, thanks for joining us, Ron. Anyone else? Okay.

02:54 Robert Andersen, I'm with the Workers' Compensation Division.

02:57 Lou Savage with the Workers' Compensation Division

03:00 Paloma Sparks, Oregon Business and Industry

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03:03 I'm Cathy Ostrand-Ponsioen. I'm the legal issues coordinator with Workers' Compensation Division, and part of my responsibilities is to do the division 001 rules, so the feedback here will [unintelligible]

03:14 Cara Filsinger, with the division

03:16 Monte Marshall, with the Workers' Compensation Board

03:18 Jennifer Flood, Ombudsman for Injured Workers, DCBS

03:22 Elaine Schooler, SAIF Corporation

03:24 Jaye Fraser, SAIF Corporation

03:25 Dan Schmelling, SAIF Corporation

03:26 Diana Winther, General Counsel for IBEW Local 48 and MLAC member

03:31 Daneka Karma, with the Workers' Compensation Division

03:34 Virgil Osborn, Workers' Comp Division

03:37 Sheri Sundstrom, Hoffman Construction

03:39 Julie Olivo, WCD

30:41 Keith Semple, Oregon Trial Lawyers

03:43 Stan Fields, Workers' Comp

03:45 (Fred) Okay. Again, thank you very much for coming, and we'll try to make good use of your time this afternoon, but we'll spend as much time on the issues as you all would like. But with that, unless you have any questions – do you have any – about the process, or? Then, I'll ask Cathy to just take it from here.

04:03 (Cathy) Well as Fred said, we really have one issue that we're going to talk about today, and that has to do with the process for preparing the exhibit packet in hearings within the director's jurisdiction. And these are under 656.704(2), and it's primarily medical disputes, vocational assistance, penalties under .262(11). But, the majority of them I believe are medical disputes. Currently under our rules, the director – WCD prepares an exhibit index and numbers the exhibits and sends them to the parties, and then sometimes people will, attorneys will submit their own exhibit index, and it's not consistent with the way the Board currently does the hearings on the other types of cases. So, our goal was to make some consistency here, and reduce some confusion. As it turns out, we've gotten some feedback from some of you, the way that we've written it up is not necessarily the same as what the Board does. The Board's rule to my understanding, and Monte please correct me if I'm wrong, the insurer submits, prepares the index and exhibits, and the worker or other parties can supplement. That's not the way that our draft rule is written up. However, we've had further discussion, and I kind of would like to start from that process – what's – is there any reason not to follow the Board's process. The way that we've written it up in the proposed rule – it's not proposed rule, it's a draft – for purposes of the discussion, is that the party that requested the hearing would request it, and there is some concerns

that that gives rise to, so I guess my starting point would be, if we were to make our process consistent with the Board's, so that instead of the division sending out the index, have the insurance company send out the index, and then the worker or other parties can supplement that. The division still does have a statutory obligation to prepare the record, and so we would still have a record that we would send out, but the parties may or may not want to pick out all of that documentation, and it's a lot of paper right now. So, particularly from those of you who are representing insurance companies and employers, I'd like your feedback on – if we went forward with making it consistent with the Board, so that the insurance company is the one responsible for putting together the exhibits and the index. Anything to add - no?

06:21 (Jaye) Obviously, it creates additional costs to employers and to insurers, but I don't think there are that many hearings.

06:34 (Cathy) I think relative – I don't have the numbers, I'm sorry. I think relative to the other cases that are heard by the Hearings Division, I think it's a small percentage.

06:56 (Jaye) I think that Elaine was just saying to me that we came in prepared for a different conversation.

07:04 (Cathy) I apologize for that. I know [unintelligible] more discussion.

07:07 (Jaye) So, I think we kind of would need to go back and talk to our folks who actually would be doing a lot of this work.

07:29 (Fred) Ron Atwood, if you're on the phone with us, not to put you on the spot, but do you have any thoughts on if it would change any aspect of your advice if this process was to make it just like the Workers' Compensation Board's process, and the insurer-employer would prepare the package, exhibits.

07:51 (Ronald) Well, as I sent the email to you, probably over the weekend, I don't see – I think it makes a lot of sense to use the same process as we use at the Workers' Compensation Board, or at the Hearings Division. I'm not, you know one of the reasons that the insurer puts the packet together is to, in a sense, is an access to justice kind of an issue, particularly if you have an unrepresented claimant, it seems a little bit unfair to require the claimant to file exhibits. And I think in the past it was a cost issue. You know, everybody who handles claims knows how to put the exhibits together. It's a pretty simple process, and so having it one way for one set of cases and another way for the other, doesn't make a whole lot of sense. And, given this relatively small number of medical issues, I'm not sure that it really adds a lot of cost. So, I like the idea of some uniformity.

09:02 (Fred) Thank you.

09:02 (Jaye) I don't think SAIF disagrees with that. It's just, again, it wasn't the conversation we were prepared for, and we just need to double check and see how big we think the problem is. I will absolutely agree with Ron on

the access to justice issue for workers. I think we were totally prepared to say that workers shouldn't be – pro se workers shouldn't be requested – asked to put together an exhibit list; that made no sense to us.

09:36 (Cathy) There are a small number of cases, very, very few, and probably not in the last several years, where there is an insurer – because the director's hearings are so broad, there's kind of a catch-all in the statute for anything that's not a matter concerning a claim – so there are some types of cases that we get where there's not – no, never mind. I was going to say, are there cases where it wouldn't make sense to have the insurer do it, but now that I'm – now that I'm saying that out loud, I don't – I think they are so few and far between that I'm not sure – what if there were a case, vocational assistance case, let's say, where we issued an attorney fee, and the only issue at the hearing would be attorney fees – would that still make sense to follow the same process? I'm looking at you, Keith, because you represent workers but.

10:23 (Keith) I agree with Ron that uniformity is helpful in these rules, since, you know, the dual jurisdiction is complicated enough without having one more wrinkle to that discussion.

10:34 (Cathy) [unintelligible] are there other types of cases or issues where there would have to be some other process, but off the top of my head I can't think of any, especially any more. One of the concerns that was in the issues document was – there's a rule in divisions 010 and 009 that require the insurer to put together the exhibits that go to the Medical Resolution Team in medical service and medical treatment disputes – correct?

11:03 (Robert) Treatment and MCOs.

11:04 (Cathy) And MCO disputes. And we have had a request from a stakeholder to remove that requirement from those rules, so that one of the concerns was – does the cumulative effect of both of those changes have a bigger impact, but that was, again if the person requesting the hearing was the one who was going to have to put that together. But, we want to make – we just want to make sure you are aware that there is a kind of related issue that will be discussed in a couple of weeks at that stakeholder committee meeting.

11:31 (Fred) On November 19.

11:32 (Cathy) Nineteen.

11:46 (Jennifer) Is that the one that's in Durham?

11:48 (Fred, others) Yes.

11:50 (Jaye) So I presume then we'll revisit the conversation at that -

11:53 (Cathy) We're not going to do anything until after that meeting, and the idea is to come back together, at least internally, and find out what the feedback was and then go from there. We're not going to have – we'll probably propose the rules at the same time, so it's not going to be a staggered process.

12:19 (Lou) So Jaye, you're – SAIF's at the position of – It sounds okay but we need to check – on Cathy's proposal.

12:24 (Jaye) Yah, and I think that – I think what we need to do is just to make sure that – from our legal ops folks – that this doesn't create a burden that somehow we're not understanding. I don't think it's going to be a problem, but just there are people who do the work and that we need to check with.

12:49 (Lou) Sure.

12:46 (Fred) Well, I can just chime in and let you know that the division 001 rules are open for another reason as well, the multi-language help page – was a separate advisory committee that met and discussed that. It looks like everybody was uniform in wanting us to go forward. However, the Workers' Compensation Board has another process that they're going through at the same time parallel – sort of parallel to ours – that has that issue on it and one other substantive issue. And, so, well, we might have to file some different changes to division 001 at different times, or we may be able to put them all together. It depends on – I'm going to reach out to some folks at the Board, probably this week, and just see if they would like us to proceed with rulemaking or – we're basically at a point where we could file proposed rules fairly soon, but we don't want to get ahead of the Board in what they're doing, and the Board – there's no scheduled meeting for the Board members at this point. So, we will try to keep everybody informed, but just in case you see a filing for division 001, and you wonder, well that had nothing to do with what we talked about, that's what it would be, if anything, but more likely this one is likely to move faster than that one, so –

14:14 (Cathy) In the draft rules that we sent out, you have some other, like structural-type changes if/when we get to the point we're ready to propose that rule, we're going to have a new section for just general provisions in division 001, because right now it's primarily hearings, rulemaking, and attorney fees. And, if we're going to add other things to it, it needs to be expanded. And, so some of the other changes that are in the draft are that, but they – if our timing is not the same, we may just move ahead with the one issue initially, and then do a few other changes, but they're not intended to be substantive.

14:48 (Jaye) Just from a process standpoint though Cathy, having rulemaking and rulemaking – it's just – I'm just curious about how critical these changes that we're talking about are, depending upon where the Board is. I think that there was a draft report that's come out.

15:09 (Fred) The advisory committee that worked with the Board has made a recommendation to the Workers' Compensation Board. Jennifer is actually a member of that advisory committee.

15:17 (Jennifer) Yes.

15:18 (Fred) So you were

15:19 (Jennifer) I did get the email. I forwarded it to you.

15:25 (Fred) Yah, you did. But, so there committee has made a recommendation to the Board. I just don't know when the Board is going to meet and consider those recommendations.

15:35 (Monte) I'm down stairs. I don't know these things.

15:38 (Jennifer) I'm not sure it's even before the end of the year.

15:44 (Fred) Yah, if they were going to have a meeting before the end of the year, it would probably be on the calendar by now, and it's not as of a few days ago it wasn't on.

15:48 It would already be on the calendar, right. Sorry, I can get the information.

15:55 (Cathy) We'll find out more about what the plans are.

16:06 (Keith) This is Keith. I guess I would echo what kind of what Jaye's getting at, is not having – having fewer meetings and covering more topics per meeting would be extraordinarily helpful. I mean I'm looking around the table at, you know, a lot of people that are away from what they do back at the office to kind of come, so it would be great if we could kind of keep it all together, but I understand the importance of the issue has to kind of weigh into that as well for the department.

16:31 (Fred) One thing that may relieve a little stress in that regard is that our rulemaking is really winding down. There isn't – if you were to look at our rulemaking calendar now, it all fits on a single page, which it didn't for years. So, and we're coming up toward the Legislative Session, where we typically do not open rules during Session unless there is some kind of an emergency. We will do our usual annual rulemaking on the medical fee schedule, for instance. We don't really have too much of a choice; we're supposed to look at those once a year, and that will be on its usual track. But, there isn't really much pending.

17:07 (Keith) That's a beautiful thing.

17:08 (Jaye) Yes. I agree, Keith. I agree.

17:21 (Cathy) Anybody else have any – That was primarily the issue. And, again, we received some feedback and had more discussion after the materials went out [unintelligible].

17:35 (Fred) So there is time for people to think about this and get back to us?

17:38 (Cathy) I think so. We're not going to do anything until after we get the feedback from the division 009 and 010 stakeholder advisory committee, and if there are significant changes or a change in plan we'll let everyone know, but, I think that effective date for those rules would be April 1, so that we were thinking of kind of piggy-backing onto that schedule, but it might depend on what we find out from the Board too, as far as the other issue. So yes, there is time, if you want to go back think about it and get back to us.

Transcript of meeting

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18:11 (Diana) Thank you, I guess. You know, I think we were all expecting to have a different conversation, but I appreciate the fact that you guys have taken into consideration that early feedback. I mean that's the main reason I was here as co-chair of the labor side of MLAC and had concern about access to justice, you know, for workers who – I don't like putting exhibit lists together, and I do that and get paid for it. So, I can't imagine a worker who's already frustrated by the process they're experiencing and trying to recover – that would be a lot to ask.

18:42 (Cathy) And, I'm sorry for bringing you all down here for a very short meeting.

18:45 (Fred) There were some housekeeping issues?

18:47 (Cathy) There are some housekeeping issues. They're more related to if we move ahead, if and when we go ahead with the multi-language insert, they have to do with changing the division title, perhaps, to make it more – to include – general provisions, instead of just rulemaking hearings and attorney fees, and then adding the new section titles. [unintelligible] I'm not sure.

19:11 (Fred) There isn't really very much there. We think they're truly housekeeping, but then sometimes people can look at them and perhaps there's something substantive there, so we would welcome your feedback.

19:28 (Cathy) The division 001 rules generally don't get a lot of attention and feedback, and so I really appreciate you all coming. And, if you do have a chance to take a look at some of the other changes, if you have concerns please let us know.

19:50 (Fred) Well, with that we'll just close. And you do have, I think, plenty of time, but if you could get us additional thoughts on the process, especially the slightly changed process, within two to three weeks would be very helpful. That way we can put it in proposed rules. I'm not exactly sure when we'll file now, but it would then give us the option of filing in December – proposed rules, but I don't know if that's what we're going to do, but it's possible. Thank you very much and have a safe drive. I hope you didn't have to drive a long distance to get here.

Transcribed from an audio recording, Nov. 7, 2018, by Fred Bruyns.