

Hearing
07/07/2021

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PUBLIC HEARING ON PROPOSED ADMINISTRATIVE RULES
STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC OPPORTUNITY
WORKERS' DISABILITY COMPENSATION AGENCY

held at
Room L-150, 3026 W. Grand Boulevard, Cadillac Place
Detroit, Michigan

on
Wednesday, July 7, 2021

at
11:00 a.m.

conducted by
JACK A. NOLISH, DIRECTOR

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1 DIRECTOR NOLISH: Let the record reflect this
2 is a public hearing on proposed administrative rules
3 entitled Department of Labor and Economic Opportunity,
4 Workers' Disability Compensation Agency, Administrative
5 Rules for Workers' Compensation Healthcare Services.

6 I will note that we are entertaining four
7 separate rules hearings today and the first will be the
8 Healthcare Services Rules. This is as they were dually
9 noticed in publications of general distribution.

10 This hearing is being conducted pursuant to
11 provisions of Section 205 and 315 of the Workers'
12 Disability Compensation Act of 1969, also known as 1969
13 PA 317 or MCL 418.205 and 418.315; Section 33 of the
14 Administrative Procedures Act of 1969 known as 1969
15 Public Act 306, MCL 24.233, and Executive Reorganization
16 Order Numbers 1982-2, 1986-3, 1990-1, 1996-2, 2003-1,
17 2011-4, 2019-13, MCL 18.24, 418.1, 418.2, 445.2001;
18 445.2011, 445.2030, and 125.1998.

19 This hearing is being called to order at
20 11:05 a.m. on July 7th, 2021, at Room L-150, Cadillac
21 Place, 3026 W. Grand Boulevard in Detroit, Michigan.
22 This hearing was published in three newspapers of
23 general circulation as well as the Michigan Register,
24 Issue Number 11-2021 published on July 1st, 2021.

25 I am Jack Nolish. I am the Director of the

1 Workers Compensation Agency and I will be facilitating
2 the hearing today.

3 Please note that we are here today to receive
4 your comments on the proposed rules. If you wish to
5 speak please make sure you have signed in and indicating
6 your willingness to speak. We will call on speakers in
7 the order in which names are listed on the sign-in
8 sheet. When you come forward to speak, please identify
9 yourself with your name, the organization you represent
10 and both your mailing and email addresses so this
11 information can be transcribed into the hearing report.

12 There not being a large crowd at this hearing
13 I will not at this point impose any kind of time
14 restrictions on those that might wish to present on the
15 rule sets.

16 If you have any additional comments to submit
17 in writing you may leave them at the registration desk
18 here or submit them to our Department no later than the
19 close of business today.

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1 WORKERS' COMPENSATION HEALTHCARE SERVICES

2 DIRECTOR NOLISH: All right. Is anyone here
3 interested in speaking for/against the Healthcare
4 Services Rules.

5 (No response)

6 Okay. We will wait a few minutes and then we
7 will close the record on the first part of the hearing
8 so feel free to visit amongst yourself.

9 (A short recess was taken)

10 DIRECTOR NOLISH: I need to also mention that
11 in the Healthcare Services Rule, Rule 418.1 -- I'm
12 sorry, Rule 107, which is Rule 418.10107, Source
13 Documents, there is an update in Paragraph H which is on
14 page 3 of the ruleset. There is a cross-reference to
15 official UB-04 Data Specifications Manual. When these
16 rules were drafted we were relying on the 2021 edition.
17 That has now been outdated and by the time these rules
18 are effective we will be relying on the 2022 version,
19 and, similarly, July 1st publication date of 2020 will
20 be updated to July 1st, 2021. And those changes will be
21 incorporated as part of the report to the Joint
22 Committee on Administrative Rules.

23 We're on hold for the time being, then.

24 (A short recess was taken)

25 DIRECTOR NOLISH: It is now 11:20. I have

1 checked the sign-in list. No cards have been submitted.
2 No one has signed in to testify regarding the Healthcare
3 Rules. Therefore, that portion of our hearing today is
4 now closed. We will reconvene at 11:30 to do the Rules
5 for the Board of Magistrate.

6 I will note, however, that there was an error
7 in one of the published notices that appeared in the Ann
8 Arbor newspaper and it listed all the rules to be heard
9 at 12:30. So if someone might have some interest in the
10 Healthcare Rules that shows up here at 12:30 I will
11 entertain discussion at that time. I don't know if
12 anybody is interested in monitoring all of that, but
13 that's how we're going to proceed. That will also apply
14 to the other rulesets that will be called before the
15 General Agency set at that time.

16 So having said that, we are now in recess
17 until 11:30.

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1 WORKERS' DISABILITY COMPENSATION APPEALS COMMISSION

2 DIRECTOR NOLISH: Good morning. I'm Jack
3 Nolish, Director of the Workers' Compensation Agency.
4 The record is now open in the public hearing on the
5 proposed Administrative Rules entitled Department of
6 Labor and Economic Opportunity, Workers' Disability
7 Compensation Appeals Commission General Ruleset (WDCAC).
8 This hearing is being conducted pursuant to provisions
9 of Section 274 of 1969 PA 317, MCL 418.274, and
10 Executive Reorganization Order Numbers 1996-2, 1993 --
11 excuse me, 1999-3, 2002-1, 2003-1 and 2019-13, MCL
12 445.2001, 418.3, 445.2004, 445.2011 and 125.1998.

13 This hearing is being called to order at
14 11:30 a.m. on July 7th in Room L-150, Cadillac Place,
15 3026 W. Grand Boulevard, Detroit. This hearing was
16 published in three newspapers of general circulation, as
17 well as the Michigan Register, Issue Number 11-2021,
18 published on July 1st, 2021.

19 At this point I'm calling for any public
20 comment relative to the ruleset for the Appeals
21 Commission. I do not have any cards signed in nor has
22 anybody signed in expressing a desire to speak, but if
23 there is someone that wishes to do so please come
24 forward.

25 And, again, as before, we will hold the record

1 open. And at this point you're free to wander around
2 for a few minutes.

3 (A short recess was taken)

4 DIRECTOR NOLISH: Recalling the matter of the
5 Workers Compensation Appeals Commission Rules. Anybody
6 interested in speaking or making any presentations?

7 Having checked the sign-in list and there's no
8 name appearing there, we will consider the record closed
9 on this matter.

10 We will reconvene at 12:00 o'clock to do the
11 magistrate's rules, and we are in recess.

12 (A short recess was taken)

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1 WORKERS' COMPENSATION BOARD OF MAGISTRATES

2 DIRECTOR NOLISH: This is a public hearing on
3 proposed Administrative Rules entitled Department of
4 Labor and Economic Opportunity, Workers' Disability
5 Compensation, Workers' Board of Magistrates General
6 Ruleset, also referred to as BOM.

7 This hearing is being conducted pursuant to
8 the provisions of Section 205 and 213 of the Workers'
9 Disability Compensation Act of 1969, 1969 Public Act
10 317, and MCL 418.205 and 418.213, as well as Section 33
11 of the Administrative Procedures Act of 1969 being 1969
12 Public Act 306, MCL 24.233, and Executive Reorganization
13 Order Numbers 1996-2, 1999-3, 2002-1, 2003-1 and 2019-3
14 also known as MCL 445.2001, 418.3445 -- excuse me,
15 418.3, 445.2004, 445.2011 and 125.1998.

16 This hearing is being called to order at
17 12:00 p.m. on July 7th held at Room L-150, Cadillac
18 Place, 3026 W. Grand Boulevard, Detroit. This hearing
19 was published in three newspapers of general circulation
20 as well as the Michigan Register, Issue 11-2021
21 published on July 1st, 2021.

22 As I indicated at the prior hearing we will
23 also entertain discussions or comments on this ruleset
24 starting with the 12:30 hearing as well.

25 I have at this point two cards expressing an

1 interest in speaking and in the order that they were
2 submitted to me, first is Jayson Chizick indicated as
3 speaking in support.

4 MR. CHIZICK: Thank you very much, Mr. Nolish.
5 I appreciate the opportunity to speak.

6 I am the Acting Section Chair for the Workers'
7 Compensation Law Section of the State Bar of Michigan.
8 Our former chairperson and three council members were
9 invited to participate in assisting with the drafting of
10 these rules and were reporting back over a period of
11 many months in support of the rule foundation process as
12 well as the proposals that we ended up with here today.

13 Council was involved in commentary, fortunate
14 to have the director consult, and update the progress
15 during the drafting process. The council has in a
16 bipartisan fashion endorsed the rules. We believe that
17 they are critical to the streamlining of the exchange of
18 information, evidence and practice management. The
19 result of these rules I believe and I believe speaking
20 on behalf of the Workers' Compensation Law Section
21 Council will increase efficiency, reduce costs for
22 business and injured workers and their counsel.

23 In the circumstance where the State Bar is
24 consulted and involved in putting together the rules we
25 are fortunate to be able to say that we have been heard

1 and, therefore, we do endorse the rules.

2 I would also note on a personal note that I
3 I've reviewed the changes that were proposed by the MAJ
4 and the self-insured representatives, and, again, on a
5 personal note believe that these compromises represent
6 the reasonable effort to deal with certain matters in
7 the proposed rules.

8 And thank you for the consideration.

9 DIRECTOR NOLISH: Mr. Chizick, you indicated
10 that you wish to also speak to the general rules? Do
11 you want this to be considered a comment on those as
12 well or do you want to address them separately?

13 MR. CHIZICK: Director Nolish, I would be
14 happy if my comments were echoed in all respects for the
15 second set of rules.

16 DIRECTOR NOLISH: So noted.

17 Miss Drobnych.

18 MS. DROBNICH: Good morning. Dawn Drobnych on
19 behalf of the Michigan Self-Insured Association.

20 MR. MacDONALD: Good morning. Robert
21 MacDonald, past president for the Michigan Association
22 for Justice.

23 MR. WARSH: Good morning. Richard Warsh on
24 behalf of Michigan Association of Justice.

25 MS. DROBNICH: Director Nolish, we'd like to

1 -- we have submitted a 5-page letter that is in support
2 of changes to the proposed Board of Administrative
3 Rules. We are in support of the agency rules with these
4 proposed changes outlined in the letter that has been
5 provided to the Agency.

6 DIRECTOR NOLISH: And would you like those
7 made as part of the record?

8 MS. DROBNICH: Yes, please.

9 DIRECTOR NOLISH: Mr. MacDonald?

10 MR. MacDONALD: Thank you, your Honor.

11 DIRECTOR NOLISH: Do you concur?

12 MR. MacDONALD: We concur, yes.

13 DIRECTOR NOLISH: Mr. Warsh?

14 MR. WARSH: Yes. I would want to say that
15 these changes are supported by both sides of the Bar,
16 were done thoughtfully, and we are happy to announce
17 that we have all signed off on them.

18 DIRECTOR NOLISH: Thank you. I appreciate all
19 the effort that's gone into that. And do you wish these
20 remarks to be considered for both the Board of
21 Magistrates and the Agency Rules?

22 MS. DROBNICH: Yes, I do. This is Dawn
23 Droblich on behalf of Michigan Self-Insured. Also note
24 the letters in support of those rules with the changes
25 as suggested in a 4-page letter, it's a different

1 document.

2 DIRECTOR NOLISH: So there are two documents?

3 MS. DROBNICH: Yes, there is. The first one
4 is the Board of Magistrates document. It's 5 pages
5 signed by four parties. Dan Cannon also signed it.
6 He's a defense attorney, and also an associate member of
7 the Michigan Self-Insured Association, could not be here
8 today. He signed off also on this as well. So the
9 Board of Magistrate letter is 5 pages and the General
10 Agency Rules is a 4-page document.

11 DIRECTOR NOLISH: So noted. We will make
12 those part of the record.

13 Mr. MacDonald? Do you want to add anything?

14 MR. MacDONALD: I concur with what Dawn said.
15 Thank you.

16 DIRECTOR NOLISH: Mr. Warsh?

17 MR. WARSH: I concur as well.

18 DIRECTOR NOLISH: Any additional comments that
19 I might not have cards for?

20 Thank you for your comments. They are so
21 noted. We will now leave the record open for a period
22 of time and we are in temporary recess.

23 (A short recess was taken)

24 DIRECTOR NOLISH: Recall the matter of the
25 Workers' Compensation Appeals Commission Board of

1 Magistrate Rules. There being no additional public
2 comment requested the record is closed.

3 Okay. We will be recessed at 12:30 at which
4 time we'll take up the Agency Rules.

5 Thank you.

6 (A short recess was taken)

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1 WORKERS' DISABILITY COMPENSATION AGENCY GENERAL RULES

2 DIRECTOR NOLISH: Good morning. This is the
3 public hearing on proposed Administrative Rules entitled
4 Department of Labor and Economic Opportunity, Workers'
5 Disability Compensation General Ruleset also referred to
6 as WCA.

7 I am Jack Nolish, the Director of the Workers'
8 Compensation Agency and I am the one conducting this
9 hearing. This hearing is being conducted pursuant to
10 the provisions of Section 205 of the Workers' Disability
11 Compensation Act of 1969, also known as the 1969 Public
12 Act 317 and MCL 418.205 and Executive Reorganization
13 Order Number 1996-2, 1999-3, 2002-1, 2003-1 and 2019-3,
14 MCL 445.2001, 418.3, MCL 445.2001, 4.813, 445.2004,
15 445.2011 and 125.998.

16 This hearing is being called to order at
17 12:30 p.m. on July 7th, 2021 at Room L-150, Cadillac
18 Place, 3026 W. Grand Boulevard, Detroit, Michigan. This
19 hearing was published in three newspapers in general
20 circulation as well as the Michigan Register, Issue
21 Number 11-2021 published on July 1st, 2021.

22 We will be taking comments on the General
23 Ruleset and also due to an error in the publication in
24 the Ann Arbor paper we will also take comments on all
25 four of the rulesets, that being the Healthcare Services

1 Rules, the Appeals Commission Rules, Board of Magistrate
2 Rules and these General Agency Rules.

3 I have received no indication that anyone
4 wishes to speak to these rules. We did at the prior
5 hearing receive for the record some written comments
6 from the Michigan Association of Justice in concurrence
7 with the Self-Insurance Association as well as support
8 of the section council of the Workers' Compensation
9 Section of the Michigan State Bar supporting the rules
10 in a document outlining some proposed changes that were
11 also supported by those organizations. We will, of
12 course, take those into consideration and incorporate
13 them where possible.

14 Is there anyone that wishes to speak regarding
15 any of the ruleset?

16 Hearing none, we will hold the record open
17 until 12:45.

18 (A short recess was taken)

19 DIRECTOR NOLISH: We're going to reopen the
20 record on the General Rules and any other comments.
21 I've been advised that Alicia Birach, or Birach -- how
22 do I pronounce this?

23 MS. BIRACH: Birach.

24 DIRECTOR NOLISH: Okay. Would like to testify
25 in support.

1 MS. BIRACH: Hello, is this -- am I supposed
2 to come up here?

3 MR. NOLISH: That's fine. You have to come a
4 little closer to the microphone.

5 MS. BIRACH: See how I do with this.

6 DIRECTOR NOLISH: That's perfect.

7 MS. BIRACH: Okay. So overall we're
8 testifying in support. There were just a few issues of
9 clarification or concern, rather.

10 Under the Workers' Compensation Board of
11 Magistrate proposed rules, Rule 418.86(2)(b): "A
12 magistrate is disqualified when the magistrate cannot
13 impartially hear a case. Circumstances that warrant
14 disqualification include but are not limited to
15 circumstances where the magistrate is personally biased
16 or prejudiced for or against a party or attorney."

17 There is some concern that this is overly
18 broad and subjective and it should be narrowed and
19 provide some objective criteria to prevent from form in
20 judge shopping.

21 Moving on to the Workers' Compensation Board
22 of Magistrate Rule 418.91(1)(d)(ii) and (iii),
23 Vocational Consultant Reports: Any information in the
24 report regarding remunerative employment must include
25 all of the following: (ii) a job description outlining

1 all the functional requirements of the job; and, (iii),
2 any other pertinent information necessary to apply for
3 the employment.

4 We feel this is an undue burden on the
5 employer and impossible in most situations to obtain
6 this information. It's not customary practice for job
7 postings to include all functional requirements of the
8 job. Requiring the employer to obtain this information
9 unduly shifts the burden of looking for work from the
10 claimant to the employer, and the same with (iii), it is
11 overly broad and again shifts the burden from the
12 claimant to the employer.

13 Also, our other question is vocational
14 consultants used in this rule, so 91(1)(d)(ii), the same
15 individual who performs a forensic vocational evaluation
16 as defined under the general rules. If so, we were
17 hoping to have some consistency in linking these two and
18 kind of clarifying that because I think from the
19 terminology when it comes to vocational consultant and
20 vocational forensic evaluation and who performs what
21 could use a little bit of clarification.

22 Moving on to the General Rules, under the
23 Definition Section Rule 1(j), Forensic Vocational
24 Evaluation, just a point of clarification, something to
25 consider. Is this the equivalent of Stokes for purposes

1 of determining residual wage earning capacity in a
2 litigated case for proofs at trial? I think that's
3 where we were going with this rule, but I didn't find it
4 entirely clear. So just a little clarification with
5 that.

6 Rule 1(m), Vocational evaluation means the
7 first step in the vocational rehabilitation process. To
8 clarify, this is not the Stokes evaluation done for
9 litigation purposes, that's only an evaluation that
10 occurs when vocational rehabilitation is being
11 performed. So, again, just kind of clarification of
12 some of that terminology I think is a little confusing
13 there.

14 And then individualized written rehabilitation
15 plan, those are only required under the new rules in a
16 vocational rehabilitation setting and not for purposes
17 of individual residual wage earning capacity at trial,
18 just kind of -- I think that's pretty clear because it
19 talks about how it only applies under the certain, you
20 know, rule, I think section 318 or 319, but just a
21 little bit of clarification there. I think when reading
22 it there was some gray area that leaved a little bit of
23 want for interpretation.

24 Then Rule 408.41b, and I guess this is the
25 most substantive one. Notice of election to be excluded

1 as an employees under the Act.

2 It talks about, (1), a notice of election to
3 be excluded under Section 161, and it says (4); and then
4 the next parentheses (5) of the Act shall be reported to
5 the agency on the WC-337. Is it (4) and (5)? And if it
6 is (4) and (5) I think this is incorrect and it should
7 be just (5) and (4) should be removed. Including (4) is
8 inconsistent with the Act and the practices of the
9 Agency.

10 The same applies to 161(4) in Rule 408.41c.
11 And there was actually a case that Magistrate Housefield
12 recently decided by the name of Reuber that kind of
13 addresses this issue at length. I can go over some of
14 it if anyone cares to hear me drone on.

15 But basically I have an entire write-up which
16 I'll just email you about why, but Section 161(4) is
17 exempting certain individuals who are officers of a
18 small corporation who have certain percentages of
19 shareholding from a policy, and requiring them to
20 fill out this form to meet the requirements of (2) and
21 (3) would render 161(4) meaningless. So it's entirely
22 inconsistent with the Act.

23 And in the Reuber case Magistrate Housefield
24 gives a very eloquent summary why and also goes over how
25 you can tell from the legislative history when the Act

1 was amended the rules just were amended to keep up with
2 the amendment to the Act. And, so, when the initial
3 rule is put into place the language there at the time
4 just got to accept what is now Section 161(5) for
5 purposes of having to fill out the Form 337. And we'll
6 type up a comment with a little explanation.

7 DIRECTOR NOLISH: You're ahead of my ability
8 to take notes. I will admit that.

9 MS. BIRACH: Okay. So I will type that one up
10 for you. But that's the most substantive one of the
11 things I want to address here today.

12 Rule 408.44, Attorney Fees, we think this is
13 long overdue. An increase in the attorney fees
14 provision is necessary because plaintiffs' counsel are
15 doing five to ten times as much work on their claims in
16 order to get them to the value the claims should have as
17 they were doing a number of years ago. There's been
18 changes in the definition of disability and what
19 constitutes personal injury and it has created more work
20 in establishing these proofs. There hasn't been an
21 increase in the attorney fees in a very long, long time
22 so we support this.

23 Rule 408.45a, Rule 408.45a, Vocational
24 Rehabilitation, Paragraph 4: Agency-approved vocational
25 rehabilitation providers. We just want to clarify that

1 agency-approved vocational rehabilitation providers are
2 only required when performing vocational rehabilitation
3 under Rule 45a and not required for forensic vocational
4 evaluations. So that's a point of clarification that I
5 think needs to be addressed. We're fine with it if it's
6 for purposes of just vocational evaluation, but what
7 we're saying is that we need an agency-approved
8 vocational rehabilitation counselor to perform -- the
9 evaluations for purposes of litigation and trial in
10 proving residual wage earning capacity, then we're
11 talking a different story there. And, so, that's
12 something we would like to see clarified and obviously
13 would maintain a potential objection to it if that was
14 the case.

15 But, again, going back to the language there I
16 just think we need to clarify these rules what we're
17 calling the vocational evaluations that we do for
18 purposes of residual wage earning capacity at trial to
19 make these a little clearer.

20 And, finally, I know you guys would like to
21 hear me talk more but I'm coming to the end of the
22 road --

23 DIRECTOR NOLISH: Happy to hear you out as
24 long as you want to go.

25 MS. BIRACH: I know, I know.

1 The requirement under 45a(4) that the
2 vocational evaluation by the agency-approved provider
3 take place no later than 119 days from the employee's
4 last day of work or last day of employment or MMI,
5 whichever is later, we just wanted to make sure and I
6 think it reads this way but I think it should be a
7 little clearer that only applies in cases where the
8 employee has been referred by the director to vocational
9 rehabilitation and is not mandatory in all cases,
10 specifically those in dispute.

11 That's it.

12 DIRECTOR NOLISH: Okay. Are you going to
13 provide those --

14 MS. BIRACH: I would gladly give you an email
15 before 5:00 p.m. today.

16 DIRECTOR NOLISH: That would be fine. Also
17 you might want to refer to Messrs. MacDonald and Warsh,
18 too, they have done some work on this.

19 MS. BIRACH: Okay. Sounds good. Thanks,
20 Director.

21 DIRECTOR NOLISH: Well, we'll hold the record
22 open for a few more minutes.

23 (A short recess was taken)

24 DIRECTOR NOLISH: Calling the rulesets for
25 today's hearing. Are there any additional comments?

1 Anybody wish to add anything to the record at this time?

2 Hearing none and there being no additional
3 sign-ins at the front desk the records for these
4 hearings today are closed. It's now, 1:02 p.m.

5 If there's any additional comments regarding
6 any proposed rules that you may wish to share, it can be
7 done in writing addressed to Dave Campbell at
8 Campbelld5@Michigan.gov, by mail to the Workers'
9 Disability Compensation Agency, 2501 Woodlake Circle,
10 Okemos, Michigan 48864, and the record for receipt of
11 documents in that regard will remain open until 5:00
12 p.m. today.

13 Thank you all for attending and the record is
14 closed.

15 (The hearing concluded at 1:03 p.m.)

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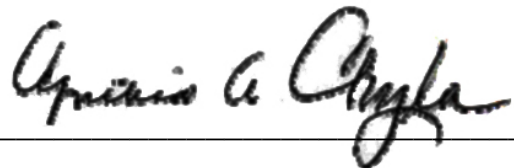
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CERTIFICATE OF REPORTER

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STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

I, Cynthia Ann Chyla, hereby certify that I reported stenographically the foregoing proceedings and testimony under oath at the time and place hereinbefore set forth; that thereafter the same was reduced to computer transcription under my supervision; and that this is a full, true, complete and correct transcription of said proceedings.



Cynthia Ann Chyla, CSR 0092
Notary Public
Oakland County, Michigan

My Commission expires: May 12, 2023

Hearing
07/07/2021

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