

Senate Bill 917

Sponsored by Senator G GEORGE; Senators AVAKIAN, METSGER, MONROE, STARR, WALKER, Representatives JENSON, KRIEGER, KRUMMEL, NELSON, THATCHER (at the request of Ed Johnston)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Requires insurers, self-insured employers, claims administrators and third party administrators to provide certain injured workers inventory of workers' compensation claims records in their possession. Establishes documentation requirements for items on inventory. Makes claims records available to injured worker at no cost. Requires Director of Department of Consumer and Business Services to investigate when claims records are lost, destroyed or made unusable while in possession of certain parties and to impose civil penalty in certain circumstances. Addresses evidentiary effect of lost, destroyed or unusable claims records in workers' compensation legal proceedings.

A BILL FOR AN ACT

1
2 Relating to workers' compensation claims records of injured workers; creating new provisions; and
3 amending ORS 656.310.

4 Whereas the destruction of medical records in active workers' compensation claims creates
5 significant problems for workers, medical service providers and insurers and leaves the injured
6 worker and the injured worker's health care providers without access to original diagnostic tests
7 such as X-rays and MRI scans that are vital to the ongoing treatment of the worker's condition and
8 to the adjudication of the worker's claim for workers' compensation benefits and of the worker's
9 rights; and

10 Whereas the medical records of a worker are frequently in the possession of the insurer re-
11 sponsible for processing the worker's claim; and

12 Whereas the Workers' Compensation Division of the Department of Consumer and Business
13 Services is moving to make insurers the full custodians of workers' claims files in order to reduce
14 costs and to streamline the processing of claims; now, therefore,

15 **Be It Enacted by the People of the State of Oregon:**

16 **SECTION 1. Section 2 of this 2007 Act is added to and made a part of ORS chapter 656.**

17 **SECTION 2. (1) As used in this section, "medical record" or "record" means a chart note,**
18 **document, report, computed tomography scan (CT scan), magnetic resonance imaging scan**
19 **(MRI), X-ray sheet or similar tangible documentation of a medical examination or test, and**
20 **video or audio recordings related to a workers' compensation claim.**

21 **(2)(a) Within 10 working days of receipt of a medical record related to the claim of an**
22 **injured worker, an insurer, self-insured employer, claims administrator or third party ad-**
23 **ministrator shall provide to the injured worker or to the injured worker's attorney an in-**
24 **ventory of the records received. The original of the inventory shall be provided to the**
25 **injured worker and a copy shall be provided to the injured worker's attorney. A copy of the**
26 **inventory shall be retained in the injured worker's claim file by the insurer, self-insured**
27 **employer, claims administrator or third party administrator.**

28 **(b) Each page of the inventory shall be identified at the top by the name of the injured**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 worker, the name and claim number of the insurer, self-insured employer, claims adminis-
2 trator or third party administrator in possession of the records and any identification num-
3 bers assigned to the claim by the Department of Consumer and Business Services.

4 (c) The name and position of the person providing the information to the injured worker
5 shall be clearly printed at the end of the inventory and that person shall sign and date the
6 inventory.

7 (d) The inventory required under this subsection shall be a numbered list of all records
8 received that includes for each record:

9 (A) A description of the nature of the record;

10 (B) The date the record was created; and

11 (C) The name of the author of the record or the medical provider who performed the test.

12 (3)(a) All records related to an injured worker's claim in the possession of an insurer,
13 self-insured employer, claims administrator or third party administrator shall be available
14 to the injured worker, the injured worker's representative, the injured worker's attorney and
15 the ombudsman for injured workers for review and copying during regular business hours
16 without prior notification.

17 (b) The cost of copying records as authorized under paragraph (a) of this subsection shall
18 be paid by the insurer, self-insured employer, claims administrator or third party adminis-
19 trator who has possession of the records.

20 (c) A statement of the injured worker's right to inspect and copy the records in the
21 possession of the insurer, self-insured employer, claims administrator or third party admin-
22 istrator shall be clearly printed on the inventory provided to the injured worker.

23 (4)(a) If a record in the possession of an insurer, self-insured employer, claims adminis-
24 trator or third party administrator is lost, destroyed or otherwise made unusable, the party
25 that had possession of the lost, destroyed or unusable record shall immediately obtain a du-
26 plicate of the record. If the lost, destroyed or unusable record is the original record of a di-
27 agnostic medical test, the injured worker or injured worker's attorney may request
28 replacement diagnostic testing. Costs for obtaining a replacement record or replacement di-
29 agnostic test shall be paid by the party that had possession of the record that was lost, de-
30 stroyed or made unusable.

31 (b) The Director of the Department of Consumer and Business Services shall conduct an
32 investigation of each occurrence of a lost, destroyed or unusable record when requested to
33 do so by the injured worker or the injured worker's attorney. The director may assess a civil
34 penalty of up to \$5,000 against the party who had possession of a record that was lost, de-
35 stroyed or made unusable for each occurrence of a lost, destroyed or unusable record. If the
36 director finds that a record was lost, destroyed or made unusable as the result of the gross
37 negligence of the party that had possession of the record, the director shall assess a civil
38 penalty of \$10,000 against the party. If the director finds that a record was lost, destroyed
39 or made unusable as the result of a deliberate act of the party that had possession of the
40 record, the director shall assess a civil penalty of \$15,000 against the party.

41 (c) Penalties assessed under paragraph (b) of this subsection shall be paid to the injured
42 worker whose claim records have been lost, destroyed or made unusable. If the injured
43 worker's attorney participates in securing the worker's rights under this subsection, the di-
44 rector shall award a reasonable attorney fee to the attorney. Attorney fees awarded by the
45 director shall be paid by the party against which a penalty was assessed under this sub-

1 **section in addition to, and not from, the penalty.**

2 **SECTION 3.** ORS 656.310 is amended to read:

3 656.310. (1) In any proceeding for the enforcement of a claim for compensation under this
4 chapter, there is a rebuttable presumption that:

5 (a) Sufficient notice of injury was given and timely filed; and

6 (b) The injury was not occasioned by the willful intention of the injured worker to commit
7 self-injury or suicide.

8 (2) The contents of medical, surgical and hospital reports presented by claimants for compen-
9 sation shall constitute prima facie evidence as to the matter contained therein; so, also, shall such
10 reports presented by the insurer or self-insured employer, provided that the doctor rendering med-
11 ical and surgical reports consents to submit to cross-examination. This subsection shall also apply
12 to medical or surgical reports from any treating or examining doctor who is not a resident of
13 Oregon, provided that the claimant, self-insured employer or the insurer shall have a reasonable
14 time, but no less than 30 days after receipt of notice that the report will be offered in evidence at
15 a hearing, to cross-examine such doctor by deposition or by written interrogatories to be settled by
16 the Administrative Law Judge.

17 **(3) The contents of medical, diagnostic, surgical or hospital reports that would have been**
18 **presented by the claimant but that cannot be introduced into the record of the proceeding**
19 **for the enforcement of a claim under this chapter because they have been lost, destroyed**
20 **or otherwise made unusable while in the possession of an insurer, self-insured employer,**
21 **claims administrator or third party administrator and that cannot be replaced or, if reports**
22 **of diagnostic testing, can be replaced only with reports that are not of equivalent certainty**
23 **or reliability due to the passage of time, shall constitute prima facie evidence as to the**
24 **matter that is the subject of the report as testified to by the author of the report, or if the**
25 **author is not available, the claimant.**