



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

July 11, 2002

John Shilts, Administrator
Workers' Compensation Division
Labor & Industries Building
350 Winter Street NE, #27
Salem, OR 97301-3879

Re: Opinion Request OP-2002-5

Dear Mr. Shilts:

You have asked us to address the following questions arising from statutes requiring the Department of Consumer and Business Services (DCBS) to select and contract with assigned claims agents to process workers' compensation claims against noncomplying employers, and permitting the assigned claims agent to employ legal counsel of its choice so long as the Attorney General authorizes the selected counsel to act as a special assistant attorney general:

1. What is the Department of Justice's role in representing the assigned claims agent to whom a noncomplying employer claim has been assigned?
2. Does that role change if the issue is whether the assigned claims agent should be assessed a penalty?
3. Is it proper for DCBS to both regulate the assigned claims agent and negotiate and enforce the contract with the assigned claims agent?
4. May the assigned claims agent challenge administrative determinations of DCBS with regard to a noncomplying employer claim?

We address your questions after briefly summarizing the statutes defining the relationship between and functions of DCBS and the assigned claims agent and explaining our methodology for interpreting the statutes.

Background

One of the main objectives of the Workers' Compensation Law is "[t]o provide the sole and exclusive source and means by which subject workers,^{1/} their beneficiaries and anyone otherwise entitled to receive benefits on account of injuries or diseases arising out of and in the course of employment shall seek and qualify for remedies for such conditions." ORS

656.012(2)(e). To achieve this objective, all employers of subject workers are required to provide workers' compensation protection. ORS 656.017.

Recognizing that not all employers will comply with that requirement, the legislature has established a process under which an injured worker employed by a "noncomplying employer"^{2/} can make a claim for and receive compensation under the Workers' Compensation Law. ORS 656.054 provides that "[a] compensable injury to a subject worker while in the employ of a noncomplying employer is compensable to the same extent as if the employer had complied with this chapter." ORS 656.054(1). To accomplish this, DCBS is required to refer these claims to "an assigned claims agent," which in turn must process the claims "in the same manner as a claim made by a worker employed by a carrier-insured employer." *Id.*

An "assigned claims agent" is "an insurer, casualty adjuster or a third party administrator *with whom the director contracts* to manage claims of injured workers of noncomplying employers." ORS 656.054(10) (emphasis added). The director, though required to consider "ability to deliver timely and appropriate benefits to injured workers, the ability to control claims cost and administrative cost and such other factors as the director considers appropriate," is given sole, unreviewable authority to select assigned claims agents. ORS 656.054(7), (8).

Though the noncomplying employer is ultimately liable for claim costs, the assigned claims agent is initially reimbursed out of the Workers' Benefit Fund established under ORS 656.605. ORS 656.054(1), (3).^{3/} The precise extent of that reimbursement, including the conditions for granting or denying reimbursement, is governed by the contract between DCBS and the assigned claims agent. ORS 656.054(3), (4). The director must periodically audit the files of the assigned claims agent "to validate the amount reimbursed." ORS 656.054(4). The assigned claims agent may appeal the director's disapproval of reimbursement using the Administrative Procedures Act's contested case provisions, ORS 183.310 to 183.550, and procedural rules prescribed by the director. ORS 656.054(6).

Having sketched the statutory framework for handling claims against noncomplying employers and the relationship between DCBS and the assigned claims agent, we turn our attention to the questions you posed.

In interpreting the relevant statutes, our goal is to discern the intent of the legislature. ORS 174.020; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). We first look at the text and context of the statute, which includes other provisions of the same statute and related statutes. In so doing, we consider dictionary definitions, rules of grammar and statutory and judicially developed rules of construction that bear directly on how to read the text, such as "words of common usage typically should be given their plain, natural, and ordinary meaning." *Id.* at 611. If the legislative intent is clear from the text and context, the search ends there. Only if the legislative intent is not clear from the text and context of the statute, will we look to the legislative history to attempt to discern that intent. *Id.* at 611-612. If, after considering text, context and legislative history, the intent of the legislature remains unclear, we may resort to general maxims of statutory construction to resolve any remaining uncertainty as to the meaning of the statute. *Id.* at 612.

1. Department of Justice's role in representing assigned claims agents

You first ask us to explain the role of the Department of Justice with regard to legal representation of assigned claims agents. ORS 656.054(9) authorizes an assigned claims agent to engage private counsel for representation in relation to its statutory role, subject to one condition. That statute, enacted in 1999,^{4/} provides that “[a]ny assigned claims agent, except for the State Accident Insurance Fund, may employ counsel of its choice for *representation under this section*, provided the counsel selected is *authorized by the Attorney General to act as a special assistant attorney general.*” (Emphasis added.)

Determining the extent and character of the Department of Justice's role requires us to consider two issues: the scope of representation that private counsel may provide, and the consequences of the requirement that the Attorney General authorize counsel selected by the assigned claims agent to act as special assistant attorneys general.

a. Scope of representation

With regard to the first issue, the statute provides that an assigned claims agent may employ counsel “for representation under [ORS 656.054].” ORS 656.054(9). As noted above, ORS 656.054(1) requires that a worker's claim against a noncomplying employer “be processed by the assigned claims agent in the same manner as a claim made by a worker employed by a carrier-insured employer.” ORS 656.262(1) provides that the “[p]rocessing of claims and providing compensation shall be the responsibility of the insurer or self-insured employer.” For purposes of this requirement, the term “insurer” includes an assigned claims agent. *See* ORS 656.005(14) for definition of “insurer.” Therefore, we conclude that the representation authorized by subsection (9) extends to all aspects of claims handling by the assigned claims agent for which an insurer would seek or require legal representation.

In addition to claims-related issues, ORS 656.054 provides for the audit of amounts reimbursed to the assigned claims agent and gives the assigned claims agent the right to request a hearing to appeal disapproval of reimbursements. ORS 656.054(3), (4), (5). “Representation under this section” therefore extends to issues involving the assigned claims agent's requests for reimbursement, to the associated audits and to hearings on the assigned claims agent's appeal of the director's disapproval of reimbursement.

b. Special Assistant Attorneys General

ORS 656.054(6) does not define “special assistant attorney general.” But ORS 180.140 authorizes the Attorney General to appoint “assistants the Attorney General deems necessary to transact the business of the office, each to serve at the pleasure of the Attorney General and perform such duties as the Attorney General may designate and for whose acts the Attorney General shall be responsible.” Moreover, “[e]ach assistant shall have full authority *under the direction of the Attorney General* to perform any duty required by law to be performed by the Attorney General.” *Id* (emphasis added).

In the context of ORS 656.054, the qualifier “special” suggests a limitation on the scope of the assistant’s authority. The germane definition of “special” is “confined to a definite field of action: designed or selected for a particular purpose, occasion, or other end: limited in range <a ~ act of Congress> <a ~ branch of study> <a ~ student in college is not enrolled for the usual degree>.” WEBSTER’S THIRD NEW INT’L DICTIONARY, 2189 (unabridged ed 1993). This is consistent with use of the word in such phrases as “special administrator” (“an administrator appointed to administer only a designated part of a decedent’s estate”), “special agent” (“an agent authorized by his principal to act in one undertaking or to act in a number of transactions not involving continuous service to the principal: an agent following particular instructions in a particular matter whose authority is limited to doing what is reasonable to fulfill those instructions”), and “special deputy” (“a deputy authorized to exercise some special function on behalf of another official”). *Id.*

Consequently, the requirement that private counsel be designated as a “special assistant attorney general” (SAAG) prior to representing an assigned claims agent subjects the attorney to the Attorney General’s authority to establish legal policy and direct the provision of legal services regarding matters within the scope and purpose of the designation. In this context, the Attorney General’s authority over the SAAG would extend to all matters within the scope of representation discussed in subsection a. above. The result of the SAAG designation is that private counsel, while representing the assigned claims agent on a claims processing or reimbursement issue, is subject to the Attorney General’s direction and required to comply with the Attorney General’s decisions regarding legal policy.⁵

Though it is not necessary to resort to the legislative history to construe this provision, we observe that our reading of the statute appears to be consistent with the legislative purpose that history reveals. The legislative history suggests that the purpose for requiring that the private attorneys be authorized to act as SAAGs subject to approval by the Attorney General was “to make sure that if there’s any policy or law enforcement issues that relate to this work that [the Department of Justice] have, in effect, command and control over what the attorney does.” Representative Kevin Mannix testifying before the House Rules, Elections and Public Affairs Committee, June 24, 1999.

In sum, considering the specific language of the statute, we conclude that under ORS 656.054(9), the Attorney General possesses ultimate authority to determine and direct legal policy with regard to all issues arising from or involving an assigned claims agent’s processing of noncomplying employer claims. An assigned claims agent (other than SAIF) may employ any private attorney whom the Attorney General authorizes to act as a SAAG to represent it regarding matters involving the processing of claims or audit and reimbursement issues, but within the context of that representation the attorney must comply with the Attorney General’s decisions regarding legal policy and with such specific directions as the Attorney General elects to provide.^{6/}

2. Department of Justice role in cases involving penalty assessment against assigned claims agent.

You next ask whether the Department of Justice's role changes in any way if the claims processing issue involves a proposed penalty against the assigned claims agent. Under the Workers' Compensation Law, an insurer may be penalized for various types of conduct pertaining to its processing of a claim.⁷ For example, "[i]f the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due." ORS 656.262(11)(a). A twenty-five percent penalty must also be assessed when the insurer has closed or refused to close a claim, "if the correctness of that notice of closure or refusal to close is at issue in a hearing on the claim and if a finding is made at the hearing that the notice of closure or refusal to close was not reasonable." ORS 656.268(5)(d). Another twenty-five percent penalty is automatically imposed if, on reconsideration of a claim closure, the director orders an increase of twenty-five percent or more of the amount of compensation to be paid and the worker is found to be at least twenty percent permanently disabled. ORS 656.268(5)(e). In the latter case, the "reasonableness" of the insurer's conduct is not at issue.

As explained above, a SAAG provides legal representation to an assigned claims agent with regard to all aspects of claims processing and management. The broad scope of this representation includes allegations that the assigned claims agent acted "unreasonably" or otherwise improperly in some aspect of its processing or management of a claim. Consequently, the assigned claims agent's counsel is acting in his or her capacity as a SAAG – subject to the Attorney General's direction – when representing the assigned claims agent on a penalty issue.

3. DCBS role in contracting with and regulating the assigned claims agent.

Your third question arises from the dual role DCBS appears to play with regard to assigned claims agents – as the entity responsible for selecting and contracting with the assigned claims agent, and as the entity responsible for regulating the assigned claims agent in its capacity as an "insurer" under the Workers' Compensation Law. As discussed above, ORS 656.054 requires the director to select and contract with an assigned claims agent to manage and process workers' compensation claims involving noncomplying employers. The statute requires the contract to address certain matters – most particularly pertaining to payment of administrative and claims processing costs and grounds for granting or denying reimbursement for those costs out of the Workers' Benefit Fund. ORS 656.054(3), (4). And the contract must include certain specified grounds for denial of reimbursement. ORS 656.054(4)(a)-(e). Beyond that, the parties appear to have significant latitude in negotiating contract terms.

At the same time, the director is charged with "duties of administration, regulation and enforcement of ORS 654.001 to 654.295, 654.750 to 654.780 and this chapter." ORS 656.726(4). To discharge these duties, the director may promulgate rules "which are reasonably required in the performance of the director's duties," issue subpoenas and prescribe procedural rules for conducting hearings, investigations and other proceedings. ORS 656.726(4)(a), (d), (g).

We have observed that under ORS 656.726(4), “[t]he director has broad regulatory oversight of claims processing.” Letter of Advice dated January 18, 1994, to Kerry Barnett, Director, Department of Consumer and Business Services (OP-6482) at 4. Because assigned claims agents are “insurers” for purposes of ORS chapter 656, DCBS’ regulatory authority and responsibility extends to them.

Nothing in ORS 656.054 or in the statutes defining DCBS’ regulatory authority suggests that the director’s role in selecting and contracting with the assigned claims agent is intended to diminish or modify his duty and authority to regulate the assigned claims agent as a workers’ compensation “insurer.” For example, no statute exempts assigned claims agents from rules and orders the director issues under ORS 656.726(4).

Nor is the authority to select and contract with the assigned claims agent incompatible with the director’s regulatory authority. The assigned claims agent must process claims against noncomplying employers in the same manner as claims against complying employers are processed. ORS 656.054 does not require – or expressly authorize – DCBS to direct the assigned claims agent’s handling of individual claims. The statute appears to contemplate that the assigned claims agent generally will act autonomously and exercise its professional judgment when processing NCE claims. The terms of the contract with the assigned claims agent should, of course, be consistent with that statutory mandate, offering neither a disincentive to comply with it nor an incentive to disobey it. The director’s authority to enforce the terms of the contract in that context merely augments the regulatory authority conferred by statute.

4. Assigned claims agent’s authority to challenge DCBS administrative determinations.

DCBS makes administrative determinations concerning workers’ entitlement to benefits through various units of its Workers’ Compensation Division. These administrative determinations might involve such matters as entitlement to vocational benefits, entitlement to medical benefits and entitlement to – and the amount of – disability benefits. A party adversely affected by such an administrative determination is generally entitled to either a contested case hearing before the Hearings Officer Panel or an administrative hearing before the Workers’ Compensation Board.

Generally, “any party” – as well as the director – “may at any time request a hearing on any matter concerning a claim, except matters for which a procedure for resolving the dispute is provided in another statute.” ORS 656.283(1). “Party” is defined to include “a claimant for compensation, the employer of the injured worker at the time of injury *and the insurer*, if any, of such employer.” ORS 656.005(21) (emphasis added). As we have noted, an assigned claims agent is an “insurer” for purposes of the Workers Compensation Law. ORS 656.005(14). Consequently, an assigned claims agent, like any other “insurer,” is a “party” entitled to request a hearing on “any matter concerning a claim.”

Apart from this general authority to request a hearing on claim matters, several statutes provide specific authority to request administrative review by the Director of certain types of

determination, particularly with regard to issues involving medical services. For example, “if a *claim for medical services* is disapproved, the injured worker, *insurer* or self-insured employer may request administrative review by the director pursuant to ORS 656.260 or 656.327.” ORS 656.245(6) (emphasis added). Similarly, “[w]hen a dispute exists between an injured worker, *insurer* or self-insured employer and a medical service provider regarding either the amount of the fee or nonpayment of bills for compensable medical services, notwithstanding any other provision of this chapter, the injured worker, insurer, self-insured employer or medical service provider *shall request administrative review by the director.*” ORS 656.248(12). ORS 656.260(14) authorizes an “insurer,” among other parties, to request the director’s administrative review of “an action of a managed care organization regarding the provision of medical services pursuant to this chapter, peer review, service utilization review or quality assurance activities.”

The director’s decisions on administrative review are themselves subject to further appeal, either through the general right to request a hearing under ORS 656.283(1) or by statutes specifically applicable to the particular determination made. In the latter category, for example, “[d]ecisions by the director regarding medical disputes are subject to review under ORS 183.310 to 183.550.” ORS 656.260(14). Similarly, the director’s decisions with regard to “the amount of the fee or nonpayment of bills for compensable medical services” are “subject to review as provided in ORS 183.310 to 183.550.” ORS 656.248(12).

Nothing in ORS 656.054 or in the various statutes authorizing appeals from or review of the director’s administrative determinations suggests that an assigned claims agent does not stand on equal footing with other “insurers” with regard to its authority to challenge those determinations. Again, the assigned claims agent’s authority to assess a claim and to defend that assessment in the face of adverse administrative determinations is consistent with its statutory obligation to process the claim “in the same manner as a claim made by a worker employed by a carrier-insured employer.”^{8/} For those reasons, we conclude that an assigned claims agent may generally challenge adverse DCBS administrative determinations.⁹

Sincerely,

Donald C. Arnold
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General Counsel Division

DCA:DNH:SAW:naw/GENB0461

^{1/} “Subject workers” are those who are subject to the Workers’ Compensation Law, ORS 656.005(28), a group that includes all workers except those specifically excepted under ORS 656.027.

^{2/} “Noncomplying employer” means a subject employer who has failed to comply with ORS 656.017.” ORS 656.005(18).

^{3/} The director is responsible for recovering these costs from the noncomplying employer. ORS 656.054(3).

^{4/} Oregon Laws 1999, chapter 1020, section 1.

^{5/} By “decisions regarding legal policy,” we mean decisions regarding legal issues pertaining generally to a SAAG’s representation of an assigned claims agent. For example, where more than one good-faith interpretation of a statute or other rule of law is possible, the Attorney General has ultimate authority to determine which interpretation AAGs and SAAGs will apply or advocate in all cases, not just in a particular case.

^{6/} We further note that because the assigned claims agent is authorized to employ “counsel of its choice,” the Attorney General cannot require the assigned claims agent to use particular counsel or to refer claims to the Department of Justice for representation. However, we also note that, although ORS 656.054(9) authorizes the assigned claims agent to “employ counsel of its choice,” that choice is subject to the qualification that the counsel selected must also be appointed as a special assistant attorney general by the Attorney General. This effectively imposes a requirement that the Attorney General consent to the assigned claims agent’s choice of counsel.

^{7/} Because an assigned claims agent is an “insurer” for purposes of the Workers Compensation Law, ORS 656.005(14), the agent is subject to the assessment of these penalties.

^{8/} The fact that DCBS has previously held the position, based on advice from this office, that assigned claims agents could *not* challenge its administrative determinations did not deny the assigned claims agents due process of law. A party’s right to “due process” arises only where government action will deprive that party of an interest in life, liberty or property. US Const Amend XIV, § 1; *see Noble v. Board of Parole*, 327 Or 485, 493, 964 P2d 990 (1998) (to succeed on due process claim, petitioner must show that challenged government action deprived him of an interest in “liberty” or “property”). The assigned claims agent has no such interest in workers’ compensation benefits paid to claimants – and reimbursed from the Workers’ Benefit Fund – pursuant to DCBS’s administrative determinations.

^{9/} There is one potential difference between an assigned claims agent's ability to challenge DCBS determinations and that of other insurers. An assigned claims agent's lawyer is a SAAG. As described above, every SAAG's authority with respect to legal policy is bounded by the discretion of the Attorney General. The Attorney General also represents DCBS. If, in a particular matter arising under ORS 656.054, an assigned claims agent's proposed position were based on a legal theory at odds with the Attorney General's analysis of the issue, then the legal issue could be resolved by the Attorney General. The Attorney General might decide to exercise his or her authority to determine the state's legal policy by instructing the SAAG not to advance the legally infirm position.