



# You are an Oregon claims adjuster and you've just received a subpoena to testify at hearing! Oh joy!

By Kelly J. Niemeyer and Dave E. Wilson ■ July 17, 2018

You are a happy claims adjuster who has been diligently working on your claims: processing payments, making compensability decisions, authorizing appropriate treatment and engaging in the numerous other activities that make up your busy week. You've just finished processing your final time loss payment of the day and updated your diary list. You are on top of it! Things are going great! But... wait, what's this? A subpoena *duces tecum* demanding your attendance at an upcoming hearing? Heart palpitations, cold sweat, nausea ... what do you do?!

First, take a breath. You'll be fine.

A subpoena *duces tecum* is a writ ordering a person to attend a court proceeding and bring relevant documents. If you have not yet noticed the uptick in claimants' counsel issuing subpoenas for adjusters to appear at hearing, do not be surprised to see a subpoena cross your desk at some point. Claimants' counsel are employing this tactic at an increased rate in Oregon. One might argue this new approach is being used with zeal to "get to the truth," as claimants' counsel will assert, but also, in some cases, as a means of harassment.

"What unjust accusation is this?! We would never utilize such tactics to try and leverage a case in our favor," cries claimants' counsel. Certainly, while no one intends to impugn the integrity of the claimants' bar (there are fantastic claimants' attorneys out there who put their clients first and act with professional courtesy and integrity; however, it is naïve to think there is not occasionally some element of harassing undertones or strategic maneuvering in these situations. This is particularly true when counsel on the other side refuses to stipulate to certain simple facts that would eliminate the need for your attendance when the litigated issue is very clearly one that is not influenced by your testimony.

Regardless of the motivation behind a subpoena *duces tecum*, it is not something to be taken lightly and certainly not something to ignore. You must comply with the subpoena. You must attend the hearing. You must bring all of your claim materials and that means everything. Claimants' counsel will often ask for the most mundane or seemingly irrelevant information at hearing and if you do not have it, they will melodramatically declare that you are trying to pull

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## SHORT HEADLINE (continued)

a fast one. Do not put yourself in this situation. Bring your entire file.

Presumably, at this point in the case, you will already have defense counsel assigned. Your defense counsel should be reviewing the subpoena with a highly critical eye to make sure it is in compliance with the Board's Administrative Rules. The attorneys at Reinisch Wilson Weier PC have successfully pushed claimants' counsel to withdraw subpoenas based on technicalities or for tactical reasons raised with the other side. Do not hesitate to contact us if you are seeking assistance in this regard.

While an Administrative Law Judge is not required to act in conformance with common law, statutory rules of evidence or by technical or formal rules of civil procedure when conducting a hearing, ALJs are expected to conduct the hearing in a manner that will achieve substantial justice.<sup>1</sup> Although not bound by them, the Oregon Rules of Evidence and Rules of Civil Procedure ("ORCP"), can provide some guidance, in particular ORCP 55, when assessing the appropriateness of a subpoena for personal appearance at a hearing. Under OAR 438-007-0020(4) subpoenas shall be served upon a party far enough in advance of appearance to allow reasonable time to either comply with the subpoena or file an objection. This Administrative Rule also provides relevant mandatory language to render the subpoena enforceable or provide defense counsel a basis to object on your behalf.

Ultimately, if you are required to attend a hearing and testify, remember that you can only answer questions truthfully, to the best of your knowledge and to the extent your memory permits. While claimants' counsel may attempt to make your experience uncomfortable, your defense attorney should prepare you for direct and cross-examination. During your testimony, your defense attorney should relentlessly work to keep claimants' counsel in check by avoiding asked-and-answered questions, harassing questions, requests for duplicative information or irrelevant tangents.

While being subpoenaed to testify is not the most enjoyable experience a claims adjuster will endure in her or his career, coming prepared with all relevant documentation, accepting that you are constrained by the limits of your knowledge and memory, and having a strong advocate as defense counsel on hand will get you through the experience and perhaps give you an entertaining war story to share with others at the end of the day. ■

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<sup>1</sup> ORS 656.283.

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