

## **D.C. OFFICE OF ADMINISTRATIVE HEARINGS**

### **NOTICE OF PROPOSED RULEMAKING**

The Chief Administrative Law Judge (CALJ) of the Office of Administrative Hearings (OAH), pursuant to the authority set forth in Sections 8(a)(7) and 8(b)(7) of the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002, (D.C. Law 14-76; D.C. Official Code § 2-1831.05(a)(7) and (b)(7)) hereby gives notice of the intent to adopt the following proposed amendments to Chapter 29 (Office of Administrative Hearings: Rules for DCPS, Rental Housing, Public Benefits, and Unemployment Insurance Cases) of Title 1 (Mayor and Executive Agencies) of the District of Columbia Municipal Regulations (DCMR).

OAH is the administrative forum with primary jurisdiction over public sector workers' compensation duties. Responsibility for hearing public sector workers' compensation cases was transferred to OAH from the Department of Employment Services' Administrative Hearings Division in 2016. D. C. Code § 2-1831.03(b)(1). The proposed rulemaking amends the procedures that govern the public sector workers' compensation cases referred to OAH by the District of Columbia Office of Risk Management (ORM) and those filed by individual claimants seeking to exercise their rights under the applicable laws.

The proposed rulemaking is necessary because OAH is actively adjudicating public sector workers' compensation cases and continues to receive new filings. There are currently 142 public sector workers' compensation cases pending at OAH and new filings are received monthly, if not weekly. The adoption of these rules is necessary to efficiently adjudicate the pending and anticipated cases in conformity with evolving procedures, regulations and precedent, as advanced by ORM, OAH, individual litigants, the District of Columbia Compensation Review Board (CRB), and the District of Columbia Court of Appeals.

Rule 2950 has been amended to conform with ORM's repeal of 7 DCMR §155.1(b) to recognize that the District of Columbia Government Comprehensive Merit Personnel Act (CMPA) (specifically, D.C. Code §1-623.23(a-2)(4)) provides that appeals of utilization-review should be heard by the Superior Court of the District of Columbia rather than by an Administrative Law Judge.

Rule 2951 has been amended to reflect the appropriate and updated filing requirements for claimants who seek an OAH hearing on the issue of whether a claimant is entitled to permanent disability scheduled awards pursuant to D.C. Code § 1-623.07(c) requested in accordance with D.C. Code § 1-623.06a.

Rule 2955 has been amended to remove OAH's reference to any burden of proof established in the Public Sector Workers' Compensation Rule found in Title 7 of the DCMR (Employment Benefits) in observation of legal precedent established by the District's Compensation Review Board and Court of Appeals. *See Ross v. Dep't of Emp't Servs.*, 125 A. 3d 698 (D.C. 2015) (holding the burden-shifting framework established by the Compensation Review Board, placing initial burden of persuasion on agency employer seeking to terminate or modify a claimant's workers' compensation benefits based upon a change of circumstances, and then shifting burden to claimant

while keeping the burden of persuasion at all times with the agency-employer, is a reasonable interpretation of the Comprehensive Merit Personnel Act).

The CALJ of OAH also gives notice of the intent to take final rulemaking action to adopt these rules not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*. Directions for submitting comments may be found at the end of this notice.

**Section 2950 (Public Sectors Workers Compensation Cases – Scope) of Chapter 29 (Office of Administrative Hearings: Rules for DCPS, Rental Housing, Public Benefits, and Unemployment Insurance Cases), of Title 1 (Mayor and Executive Agencies) of the DCMR is amended as follows:**

**2950 PUBLIC SECTOR WORKERS COMPENSATION CASES – SCOPE**

- 2950.1 Sections 2950 through 2969 contain the Rules for OAH hearings of appeals of certain Public Sector Workers Compensation decisions of the District of Columbia Office of Risk Management (ORM).
- 2950.2 If Sections 2950 through 2969 do not address a procedural issue, the Rules in Chapter 28 (Office of Administrative Hearings: Rules of Practice and Procedure) of this title apply.
- 2950.3 Beginning October 31, 2016, OAH shall hear the following appeals from ORM.
- (a) Initial awards for or against compensation benefits pursuant to D.C. Official Code § 1-623.24(b);
  - (b) Modifications of awarded benefits pursuant to D.C. Official Code § 1-623.24(d); and
  - (c) Requests for determinations of whether a claimant has a permanent disability pursuant to D.C. Official Code § 1-623.06a.

**Section 2951 (Public Sectors Workers Compensation Cases – Beginning a Case) of Chapter 29 (Office of Administrative Hearings: Rules for DCPS, Rental Housing, Public Benefits, and Unemployment Insurance Cases), of Title 1 (Mayor and Executive Agencies) of the DCMR is amended as follows:**

**2951 PUBLIC SECTOR WORKERS COMPENSATION – BEGINNING A CASE**

- 2951.1 Appeals shall be initiated by filing a written hearing request at OAH. The request shall be made on a form supplied by the Public Sector Workers' Compensation Program (the Program) and approved by OAH. A hearing request must contain:
- (a) The name, address, and email address of the claimant and of the claimant's representative, if any;

- (b) The type of claim;
- (c) Claimant's employing agency when the injury occurred;
- (d) A statement that the person signing the hearing request has read it and attests that the contents are true and accurate to the best of his or her knowledge;
- (e) The signature of the claimant or the claimant's representative, if any;
- (f) If the hearing request is an appeal of a decision made by the Program in accordance with D.C. Official Code §§ 1-623.24(b) or 1-623.24(d), the request must also contain:
  - i. A statement identifying the date and nature of the decision being appealed;
  - ii. The reason(s) why the claimant considers the decision to be incorrect;
  - iii. A detailed statement of facts in support of each reason; and
  - iv. The specific nature and extent of the relief sought.
- (g) If the hearing request is to determine whether the claimant is entitled to permanent disability scheduled awards under D.C. Official Code §1-623.07(c), requested in accordance with D.C. Official Code §1-623.06a, the request must contain:
  - i. A claimant's request for the Program to schedule a physician evaluation of claimant's Maximum Medical Improvement (MMI) status; or
  - ii. A physician's medical report that identifies the clinical diagnosis, diagnosis code, current clinical symptoms, current examination findings, MMI date, diagnostic test results, medical records reviewed, and explains how the physician arrived at the impairment rating, citing to the specific page number paragraph, and table relied upon within the AMA guides applied; or
  - iii. If supporting medical evidence, records, or reports are not available at the time of filing a hearing request, the request should include a physician's certification of that fact.

2951.2

A hearing request must be accompanied by a copy of the decision being appealed or a copy of the Notice of Benefits Expiration if one has been issued.

- 2951.3 The claimant or claimant's representative shall sign the request for hearing and file it with OAH within 30 days of service of the decision or within the last 52 weeks of a Claimant's receipt of 500-weeks of TTD benefits for permanent disability hearing requests. OAH Rule 2809 prescribes procedures for filing.
- 2951.4 No hearing request shall exceed 40 pages, exclusive of the cover page. The Clerk may reject hearing requests that do not conform to these rules.
- 2951.5 The presiding Administrative Law Judge may excuse a Claimant's failure to comply with the specific requirements of this section.

**Section 2955 (Public Sectors Workers Compensation – Hearings) of Chapter 29 (Office of Administrative Hearings: Rules for DCPS, Rental Housing, Public Benefits, and Unemployment Insurance Cases), of Title 1 (Mayor and Executive Agencies) of the DCMR is amended as follows:**

- 2955.1 The rules for hearings and evidence set forth in OAH Rule 2821 shall apply to Public Sector Workers Compensation hearings except as modified in this chapter.
- 2955.2 All hearings will be recorded. Any party may obtain a copy of the recording at the party's expense. Except where OAH is required by law to prepare a transcript, parties who want written transcripts must prepare them at their own expense in accord with OAH Rule 2827.3.

All persons desiring to comment on the subject matter of this proposed rulemaking should submit comments in writing no later than thirty (30) days after the date of publication of this notice in the *D.C. Register*, via e-mail to [louis.neal@dc.gov](mailto:louis.neal@dc.gov) and [jovena.walton1@dc.gov](mailto:jovena.walton1@dc.gov), or to the Office of Administrative Hearings, 441 Fourth Street N.W., Suite 450N, Washington, D.C. 20001, Attn: Louis Neal, General Counsel, and Jovena Walton, Attorney Advisor. Copies of this proposed rulemaking may be obtained from [www.oah.dc.gov](http://www.oah.dc.gov) or from the address listed above.