

BEFORE THE DIRECTOR OF THE
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
OF THE STATE OF OREGON

In the Matter of the Amendment of:)
436-050, Employer/Insurer Coverage Responsibility) SUMMARY OF
) TESTIMONY AND
) AGENCY RESPONSES

This document summarizes the significant data, views, and arguments contained in the hearing record. The purpose of this summary is to create a record of the agency’s conclusions about the major issues raised. Exact copies of the written testimony are attached to this summary.

The proposed amendment to the rules was announced in the Secretary of State’s *Oregon Bulletin* dated Oct. 1, 2016. On Oct. 24, 2016, a public rulemaking hearing was held as announced at 2 p.m. in Room 260 of the Labor and Industries Building, 350 Winter Street NE, Salem, Oregon. Fred Bruyns, from the Workers’ Compensation Division, acted as hearing officer. The record was held open for written comment through Oct. 28, 2016.

No one testified on division 050 at the public rulemaking hearing, recorded below as exhibit 1. The public submitted one written document as testimony.

Testimony list:

Exhibit	Testifying
<u>1</u>	Transcript of public rulemaking hearing of Oct. 24, 2016 (no testimony provided regarding OAR 436-050)
<u>2</u>	Lowell Fuller, Oregon Operators Self-Insurers Fund

Testimony: OAR 436-050-0260

Exhibit 2

“OROSIF is a group self-insurers fund established April 1, 1995 specific to McDonald’s Owner Operators (franchisees) restaurant operations. * * * The purpose and intent of OROSIF is to provide workers’ compensation coverage to its members substantially at cost while meeting all obligations to claimants under the Oregon work comp statutes. The purpose of the Fund is not to build excess profit & surplus.

“One approach the Fund’s board of directors has taken since day one is to minimize tax liability. Consequently at the conclusion of each operating year the board declares all earnings as payable to policyholders. This removes the tax liability on generated earnings or surplus. * * * The financial statement impact is no Policy Holder Surplus is generated but all the excess profits are classified as Member Distribution Payable.

“Proposed Rules Changes Will Negatively Impact OROSIF: The proposed rules changes do not recognize the advantageous tax strategy engaged by the reclassification of surplus as outlined and would cause OROSIF to score a minimum “0” instead of the current maximum of “6” on the Premium to Surplus Ratio Scale. To put into perspective we estimate OROSIF has saved

approximately \$1.1 million in tax for its 43+/- members through this financial statement and tax strategy. This accounting methodology also reconciles with GAAP accounting which requires an accrual of the estimated excess amounts to ultimately be paid as dividends.

* * *

“Declaration to pay all surplus as policy holder dividend payable reclassifies OROSIF’s surplus from adjusted net worth or policy holder surplus to a balance sheet liability as member distribution payable. The tax differential is approximately 35% savings against surplus. * * * Member Dividend Distribution Payable remain in the possession of the Fund and is fluid. In other words it is not paid to members but held and available to be reclaimed or reclassified as needed. This means that this balance sheet line item titled member distribution payable can and is utilized for adverse loss development, bad debts, investments losses, or assessments etc. It should be recognized as a held liquid resource to meet obligations.

“Suggested Solution: I suggest adding “member distribution payable” and “plus member distribution payable” to 1) (E) (ii) to clarify the inclusion of this member money held by the Fund and not yet distributed which is available for use to pay claims. See below red inserts to applicable paragraph.

Proposed Rules OAR: 436-050, Employer/Insurer Coverage Responsibility

1) Financial strength analysis

(E) **Adjusted net worth** is the net worth reported in the financial statement of the self-insured employer group less disallowed assets;

(i) Disallowed assets are prepaid expenses, inventory, and accounts receivable over 90 days old; and

(ii) Financial statements and reports may otherwise refer to adjusted net worth as member distribution payable, net position, net assets, surplus, owner’s equity, or shareholders’ equity. The adjusted net worth is the total assets minus the sum of the total liabilities and the disallowed assets plus member distribution payable.

“Permitting the adjustment to the proposed rules, either as suggested or in another form, to recognize member distribution payable as a viable measurement of the Fund and member’s assets will more accurately illustrate the financial strength of OROSIF.”

Response:

The division recognizes that the financial objectives of self-insured employer groups differ from those of commercial insurance carriers, and as a result, self-insured employer groups may adjust their financial strategy to best meet their members’ needs. However, the division does not collect taxes or enforce tax law, and does not take a position on any self-insured employer’s or employer group’s tax strategy.

The division’s primary objectives in promulgating these rules are to ensure that self-insured employer groups have sufficient financial ability to make prompt payment of all compensation and other payments due under ORS chapter 656, and to ensure that the amount of security is reasonably sufficient to insure payment of compensation and other payments that may become due. The division applies a conservative approach to financial statement analysis to achieve these objectives and minimize potential exposure of the Self-Insured Employer Adjustment Reserve, Self-Insured Employer Group Adjustment Reserve, and the Workers’ Benefit Fund in the case of

insolvency, default, or decertification of the self-insured employer or employer group.

Policyholder surplus is an important indicator of a self-insured employer group's ability to meet its obligations, because it provides a cushion against adverse development, deficiency in loss reserves, bad debts, investments losses, or other assessments that may become due. The division recognizes that the non-current portion of member distribution payable may be available to meet OROSIF's ongoing self-insured obligations during normal operations, but has general concerns about the availability of any declared liability in the worst-case scenario of insolvency, default or decertification. Accordingly, the division has determined it would not be appropriate to amend OAR 436-050-0260 as suggested.

Dated this 23rd day of November, 2016.

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
OF THE STATE OF OREGON**

PUBLIC RULEMAKING HEARING

In the Matter of the Amendment of OAR:)	TRANSCRIPT OF TESTIMONY
436-050, Employer/Insurer Coverage Responsibility)	
436-060, Claims Administration)	
436-105, Employer-at-Injury Program)	
436-110, Preferred Worker Program)	
436-120, Vocational Assistance to Injured Workers)	

The proposed amendment to the rules was announced in the Secretary of State’s Oregon Bulletin dated Oct. 1, 2016. On Oct. 24, 2016, a public rulemaking hearing was held as announced at 2 p.m. in Room 260 of the Labor and Industries Building, 350 Winter Street NE, Salem, Oregon. Fred Bruyns, from the Workers’ Compensation Division, acted as hearing officer. The record will be held open for written comment through Oct. 28, 2016.

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TRANSCRIPT OF PROCEEDINGS

Hearing officer:

Good afternoon and welcome. This is a public rulemaking hearing. My name is Fred Bruyns, and I’ll be the presiding officer for the hearing. The time now is 2 p.m. on Monday, October 24, 2016. We are in Room 260 of the Labor & Industries Building, 350 Winter St. NE, in Salem, Oregon. We are making an audio recording of today’s hearing.

If you wish to present oral testimony today, please sign in on the “Testimony Sign-In Sheet” on the table by the entrance. If you plan to testify over the telephone, I will sign-in for you.

The Department of Consumer and Business Services, Workers’ Compensation Division proposes to amend chapter 436 of the Oregon Administrative Rules, specifically:

- Division 050, Employer/Insurer Coverage Responsibility,
- Division 060, Claims Administration,
- Division 105, Employer-at-Injury Program,
- Division 110, Preferred Worker Program, and

- Division 120, Vocational Assistance to Injured Workers.

The department has summarized the proposed rule changes in the Notice of Proposed Rulemaking Hearing. This hearing notice, a Statement of Need and Fiscal Impact, and proposed rules with marked changes, are on the table by the entrance. I also have put out some testimony we received before the hearing. It's on the table there.

The Workers' Compensation Division filed the Notice of Proposed Rulemaking Hearing and Statement of Need and Fiscal Impact with the Oregon Secretary of State on Sept. 15, 2016. We mailed the Notice and Statement to the postal and electronic mailing lists, notified Oregon Legislators as required by ORS chapter 183, and posted public notice and the proposed rules to the division's website. The Oregon Secretary of State published the hearing notice in its Oregon Bulletin dated Oct. 1, 2016.

This hearing gives the public the opportunity to provide comment about the proposed rules. In addition, the division will accept written comment through and including Oct. 28, 2016, and will make no decisions until all of the testimony is considered. We are ready to receive testimony. If you are reading from written testimony and give the agency a copy of that testimony, we will add it to the rulemaking record. Could someone bring me the sign-in sheet from the back of the room, maybe one of the WCD people? Thanks. Cathy, could you put back the blanks in case somebody comes in? Thanks.

Could Amber McMurry of Multnomah County come up and testify?

Mike Mischkot, CIS: Fred, I'm sorry. Was that sheet for testimony only or just attendance?

Hearing officer: Ah – sometimes – it's for testimony.

Mike Mischkot: Scratch my name off. Thank you. I'm glad I realized it now.

Amber McMurry:

Hi. I'm Amber McMurry, and I'm with Multnomah County, Oregon. We are part – I am part of a group called employers empowering return to work, or EERTW. We're a group that meets to share ideas, concepts, and promote return to work and the utilization of EAIP and PWP. I'm here to testify about the division 105.

Today, our proposal is to return the reimbursement amount of EAIP percentage of wages back to 50 percent from the current 45 percent. The rules effective July 1st 2013 had reduced the percentage of the wage subsidy from 50 percent to 45 percent in order to resolve a deficit in the WBF reserves. Here are the reasons that we would like to propose this:

- At the rules advisory committee on 7-19-16, the department had indicated the deficit in the WBF reserves had been resolved, and the advisory committee participants requested the percentage of the wage subsidy reimbursement be restored to 50 percent.
- The EAIP is a significant incentive to help offset the costs associated with providing transitional duty or light duty to injured workers.

Oct. 24, 2016

- Historically EAIP wage reimbursement has been 50 percent. This reduction in 2013 was understood to be a temporary measure.
- A 50 percent reimbursement is consistent with the percentage of wage reimbursement allowed under the Preferred Worker Program.

Attached is an email from John Shilts and an excerpt below, which I'll read in a moment, supporting one of the points that returns this to the 50 percent level of reimbursement. This is the excerpt:

"These changes come about in order to meet the legal requirement to maintain a WBF balance of approximately 12 months of expenditures. We are currently at that level; without making any changes like these, we would violate the law. If the revenue to the WBF returns sufficiently to allow us to return or make progress toward our traditional benefit and assessment levels, that is what we will do." That was from John Shilts in 2014.

Some examples of the significance to employers can be demonstrated by these following numbers:

- Tri-Met's total EAIP reimbursements for 2013 to 2015 equaled \$510,895. The additional five percent would have provided another \$25,545.
- Multnomah County's total reimbursements from EAIP for 2013 through 2015 totaled \$313,891. That five percent would have added another \$15,695. You can see this is a significant amount to employers who are returning people to work.

Again we would like to request that the reimbursement of these wages be re-adjusted to the 50 percent level. Members of our committee include Multnomah County, Portland Public Schools, CIS, SDAO, City of Portland, Tri-Met, Davis and Associates – I believe that's all of them.

Thank you.

Hearing officer:

Thank you very much Amber. And, Amber also provided written testimony just before the hearing, which we will post to our website, probably this afternoon, but certainly by tomorrow. So, you may want to look on our website to see what testimony comes in, because we will try to keep up with it.

Ah, I think Rob – you said you're not going to testify this morning. Ah, John Jones?

John Jones:

Thank you. My name is John Jones. I'm actually just here privately. I formerly worked with an employer that utilized the EAIP program, and I actually stumbled upon the hearing just the other day when I was trying to look up some information, so I figured it was important that I attend.

I think the program is an awesome program. You know, I've gotten to work with quite a few people that otherwise would not be returned to light duty without the EAIP program. Being a former employer I wish I'd known a little bit more about it when I owned my own business, for when I encountered the injuries. So I definitely think it could be a little heavier advertised. But,

more specifically why I came in today was to talk about a little more clarity on the program as far as abuse, and when there is abuse with the program, who does it get reported to. You know, as a former employee from a company that utilized the program, I have struggled to try and report abuse of the program and actual fraud in utilizing the EAIP program. I've contacted the Workers' Comp Division, and they said, well, you need to contact the insurer. I contacted the insurer, and they said, well, it's not really our program. I contacted the Department of Revenue because it is actually a tax on the public, on the employee, that it's coming out of their paycheck for every hour worked, through the Workers' Benefit Fund, as well as other employers. So I contacted the Department of Revenue, and they told me to contact the IRS. I explained to them that the IRS – I actually replied to the email and explained that it's a state program. I was a little baffled that I had to tell the Department of Revenue that, but I think that there needs to be a little more clear reporting on something like this, if it was wage withholding, you know, or an employer with tax evasion, we know where to report it. I'm still struggling to report it, and I've reached out now to the Department of Justice and the Attorney General's Office, because thousands of dollars that could have increased reimbursement for wages up to 50 percent have been illegally obtained by an employer, and there's really nowhere to report it to or nobody to, well, listen to it. So, I think that needs to definitely be added to division 105.

Hearing officer:

Thank you very much John. Appreciate it.

And, Roger, you must have just signed in when you came in, right?

Jaye Fraser, SAIF Corporation?

Jaye Fraser:

Good afternoon. Jaye Fraser, SAIF Corporation. First of all I would like to thank the division for all of its hard work on these rules. I know that there were many, many hours spent. We appreciate the opportunity to participate in the process and to have our voice heard on behalf of Oregon insurers and Oregon policy holders and Oregon injured workers.

We plan to submit written testimony. We're still working on it, but I had a couple of points that we wanted to highlight, emphasize as areas of a little bit more concern than just passing.

Specifically, in the preferred worker program, there was a change to, it would be section 240, subsection (4), sub (c), regarding obtaining permanent restrictions for pre-closure CDAs. SAIF Corporation understands that permanent restrictions are needed when a worker decides they want to access preferred worker benefits, but we were concerned that this would slow the claim settlement process down, that it actually could end up hurting injured workers who have the desire to close their claim, even pre-closure, even before their restrictions are known. It's up to the worker; it's the worker's right to do that. I have a little bit more significant testimony on that, but I just wanted to raise that issue.

And then, in division 110, 035, sub (4), sub (a), we were kind of confused by the change here. This requires the department, apparently, to determine whether or not premium exemption can be put on to a policy for an employer who has hired preferred worker. Up to this point that has been

a conversation between the policy holder and the insurer. And, it's fine if the department has decided that they want to do this, but what we're concerned about is, policy holders, particularly small policy holders who maybe haven't accessed the program before, hired a preferred worker, may be put off by the fact that then they then have to call the regulator to say hey, I think I'm hiring a preferred worker. And then, the preferred worker program would be the one to tell us to put premium exemption on. And I guess part of what we're concerned about is that we are requiring another step of employers, and we would hate to see that step end up with us having preferred workers who maybe lost a job opportunity.

And then, a couple of minor things in the – not minor but I did want to highlight them in the voc. rules. It would be in 0005(13)(b) – there's a change in the definition of suitable wage to be not less than 80 percent. And I think that that's – of the average weekly wage – and our concern in that instance is it doesn't give us any flexibility and latitude that we believe is present in the statute. When a worker, for the worker's own reasons, wants to take a job that is at a wage that is less than the 80 percent of the average weekly wage. We think that the worker should be entitled to make that decision. When a program manager mentioned to me that there are instances where the worker could have a better job if they moved, but they would rather not move. So we just think that that flexibility should be there. It doesn't happen that often, but we'd like to see that maintained.

And then, also in division 120, 0115, sub (7), up to this point we've had the ability if we don't have sufficient information on determining eligibility, to let the worker know that we are going to extend the time out, because we're still waiting, for example, for additional medical reports. This seems to suggest that we won't be able to do that any longer. And again, it would put the insurer in the position of potentially having to make a decision about eligibility without all of the information that we need, which could end up in a worker being determined not to be eligible, because we don't have that information, and we're bumping up against a time frame. So, that's a concern, and frankly, again that is another one of those instances where it is – it just doesn't happen that often. So we would hate to see a rule put in place for those occasions that it does happen and end up – end up hurting the worker.

Oh, and then on again division 120, 0177, sub (1), sub (b), this has a provision that would allow us to start a worker at less than the 80 percent of average weekly wage, but then the insurer would be in the position of making some determinations on whether or not the worker would attain a greater wage. And that's one of those things that – first of all we feel that we're not experts in that area, and there are also many, many things that would go into the worker's ability to actually reach a higher wage, for example their performance, whether the employer – I mean, it's just whether the employer continues to be able to employ them. Anyway, we just think that that is potentially problematic, for workers especially.

Thank you. We will, SAIF will be submitting additional testimony, but we did want to highlight those particular provisions.

Hearing officer:

Thank you very much, Jaye. Would anyone else like to testify this afternoon? Is there anyone on the telephone who would like to testify?

It's our policy to leave the hearing open a minimum of one-half an hour just in case someone arrives late or dials in late. We were actually expecting one other person on the telephone to provide some testimony, so they may actually reach us soon. But before, if you decide to not stay with us for the half hour, I'll understand, although you are welcome to remain. I just wanted to remind you that the record remains open for written testimony through and including October 28. You may submit testimony in any written form, whether hard copy or electronic. I encourage you to submit your testimony by email or as attachments to email. However, you may also use fax, USPS, courier, or you may hand deliver testimony to the Workers' Compensation Division central reception on this floor. On the table by the entrance are business cards that include my contact information, and I will acknowledge all testimony received.

This hearing is recessed at 2:19.

And, we're back on the record. So, the hearing is resumed at 2:25, and Amber, you may go ahead and testify now.

Amber McMurry:

I notice another concern, and this is with division 060, 0010, and number (6). This has to do with the new language being proposed to be added to the 801. In the worker's section, above their signature line it says in bold, "I understand I have a right to choose a healthcare provider of my choice, subject to certain restrictions." In the employer's section, above the employer's signature line, is also a bold statement, "I understand I may not restrict the worker's choice of access to a health care provider. If I do it could result in civil penalties under ORS 656.260." The concern I have with this is nowhere on this form does it indicate to the worker or the employer where they can receive or review that information that may restrict them, or what those restrictions may be. So I propose that if that statement is to stay on the 801, that it is added in to that statement for them to reference 436-060-0010, subsection (6). Thank you.

Hearing officer:

Thank you very much Amber. And, while I still have the record open, would anyone else like to testify?

I'm going to go ahead and recess again at 2:27.

This hearing is resumed at 2:30.

I'll ask again, would anyone else like to testify this afternoon? You would? Oh – okay.

Again, thank you for coming. This hearing is adjourned. It's about 2:31. Have a safe drive, and that's the end of the hearing.

Transcribed from a digital audio recording by Fred Bruyns, Oct. 25, 2016.

Memo

Date: October 27th 2016
To: Fred Bruyns, DCBS
From: Lowell Fuller, OROSIF Administrator
Subject: Written comments to proposed Rule OAR 436-050-0260

OROSIF appreciates the opportunity to submit written testimony regarding proposed Rule OAR 436-050-0260.

Background: OROSIF is a group self-insurers fund established April 1, 1995 specific to McDonald's Owner Operators (franchisees) restaurant operations. There are currently 43 members who coop many business expenses such as advertising, supply distribution, food and supply purchasing. Establishing OROSIF and "sharing" in the WC risk is a natural relationship which fits into the McDonald's community business model. OROSIF was formed with the same intention as other McDonald's coop ventures, to provide the product or service, in this case Workers' Compensation, in the most cost efficient manner. For the Fund the mandate includes returning to members as dividend any and all excess monies after total claim liability has been met. The purpose and intent of OROSIF is to provide workers' compensation coverage to its members substantially at cost while meeting all obligations to claimants under the Oregon work comp statutes. The purpose of the Fund is not to build excess profit & surplus.

Financial Statement History: One approach the Fund's board of directors has taken since day one is to minimize tax liability. Consequently at the conclusion of each operating year the board declares all earnings as payable to policyholders. This removes the tax liability on generated earnings or surplus. This strategy has been tested and accepted by the IRS. The financial statement impact is no Policy Holder Surplus is generated but all the excess profits are classified as Member Distribution Payable.

Proposed Rules Changes Will Negatively Impact OROSIF: The proposed rules changes do not recognize the advantageous tax strategy engaged by the reclassification of surplus as outlined and would cause OROSIF to score a minimum "0" instead of the current maximum of "6" on the Premium to Surplus Ratio Scale. To put into perspective we estimate OROSIF has saved approximately \$1.1 million in tax for its 43+/- members through this financial statement and tax strategy. This accounting methodology also reconciles with GAAP accounting which requires an accrual of the estimated excess amounts to ultimately be paid as dividends.

To summarize:

- 1- It is the intent of the Board to ultimately return all excess funds (surplus) to the members. Nothing else will be done with it.
- 2- A declaration confirming the above of this intent is made annually at the yearend board meeting.
- 3- This treatment of earnings (surplus) postures OROSIF for a favorable tax position used by many (approximately 75+) similar funds across the country.

Oregon O S I F

OPERATORS SELF-INSURERS FUND

Lowell D. Fuller, ARM
Administrator

4. Declaration to pay all surplus as policy holder dividend payable reclassifies OROSIF's surplus from adjusted net worth or policy holder surplus to a balance sheet liability as member distribution payable. The tax differential is approximately 35% savings against surplus.
5. Member Dividend Distribution Payable remain in the possession of the Fund and is fluid. In other words it is not paid to members but held and available to be reclaimed or reclassified as needed. This means that this balance sheet line item titled member distribution payable can and is utilized for adverse loss development, bad debts, investments losses, or assessments etc. It should be recognized as a held liquid resource to meet obligations.

Suggested Solution: I suggest adding "member distribution payable" and "plus member distribution payable" to 1) (E) (ii) to clarify the inclusion of this member money held by the Fund and not yet distributed which is available for use to pay claims. See below red inserts to applicable paragraph.

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Permitting the adjustment to the proposed rules, either as suggested or in another form, to recognize member distribution payable as a viable measurement of the Fund and member's assets will more accurately illustrate the financial strength of OROSIF.

Thank You

CC: OROSIF Board of Directors
Ben Johnson, AJG
Larry Shores, Shores CPA
Adam Breitenstein, DCBS
Christopher Clark, DCBS
Angie Sousa, DCBS