



October 28, 2016

Fred Bruyns, Rule Coordinator
Workers' Compensation Division
350 Winter Street NE
Salem, OR 97309-0405

RE: SAIF Corporation testimony for proposed workers' compensation rules:

OAR 436-060, Claims Administration
OAR 436-105, Employer-at-Injury Program (EAIP)
OAR 436-110, Preferred Worker Program (PWP)
OAR 436-120, Vocational Assistance to Injured Workers

Dear Fred:

SAIF Corporation submits the following comments for the Workers' Compensation Division's proposed claims administration rules (OAR 436-060); employer-at-injury program (EAIP) rules (OAR 436-105), preferred worker program (PWP) rules (OAR 436-110); and vocational assistance to injured workers rules (OAR 436-120). As always, SAIF appreciates the opportunity to provide feedback to the Workers' Compensation Division. The significant effort made to clarify and simplify these rules for system users is apparent. We hope our comments will assist the Division in its endeavor.

OAR 436-060, Claims Administration

1. OAR 436-060-0010:

(1)(a) States that an employer must provide the worker an 801 form immediately after receiving notice or knowledge of a potential compensable injury. The proposed revision conflicts with ORS 656.265(6), which expressly requires an employer to supply injury reporting forms "to injured workers *upon request* of the injured worker or some other person on behalf of the worker." The current version of the rule is consistent with the statute. To ensure consistency with the statute and employer compliance, SAIF suggests that the director maintain the original language.

2. OAR 436-060-0017:

(3)(f) Requires the continuation of discovery under the Board's rules (OAR Chapter 438) after a hearing request is withdrawn or the hearing record has closed. The proposed rule is not supported by statute. The Board's authority to make rules of practice and procedure, including for discovery of documents, only extends to those that, "are reasonably required in the performance of its duties, including but not limited to rules of practice and procedure in connection with hearing and review proceedings and exercising its authority under ORS 656.278." ORS 656.726(5)(a). The Board's duties include administration of and responsibility for the Hearings

Division as well as reviewing appealed orders of Administrative Law Judges, exercising own motion jurisdiction, "providing such policy advice as the director may request, and providing such other review functions as may be prescribed by law." ORS 656.726(2) and (3). The Board's duties do not include making rules that govern discovery for claims not in litigation. Making all other rules associated with the administration of Chapter 656 is the director's responsibility. ORS 656.726(4).

The Board's policy on discovery of documents is "to promote the full and complete discovery of all relevant facts and expert opinion bearing on a claim being litigated before the Hearings Division." OAR 4380-007-0015(8). It does not extend to claims no longer being litigated. When a hearing is completed and the order is final, the hearings division loses jurisdiction over the matter.

The effect of the proposed rule change would be to require insurers, once a hearing has been requested, to continue to provide discovery of newly received documents every seven days, indefinitely. This would add significant administrative burden and cost to insurers and self-insured employers, without any known benefit to injured workers. Claimant's attorneys may not want to receive this level of information, and there is no mechanism under the Board's rule to turn it off. Most notices on the claim are already required to be copied to the worker's attorney.

SAIF Corporation's current practice is to follow the Board's discovery rule until a legal order issues, and then to revert to producing documents according to the director's rule. If the director feels that the close of the hearing record is too soon to bring discovery back under OAR 436-060-0017, SAIF would not oppose a rule that is consistent with its current practice. Keeping discovery under the Board's rule when the Board no longer has any jurisdiction over a matter, however, is both legally unsupported and onerous.

3. OAR 436-060-0018

SAIF agrees with the proposed rule changes and agrees that the proposed changes are consistent with the testimony and discussion at the August 23, 2016 advisory meeting with the exception of OAR 436-060-0018(3)(b), which conflicts with ORS 656.277(1)(a).

4. OAR 436-060-0020:

(3)(c) States that "Temporary disability compensation is authorized when: The director determines there is sufficient contemporaneous medical documentation to reasonably reflect the worker's inability to work under ORS 656.268." This proposed rule appears to derive from current OAR 436-060-0020(4), which states in part, "The insurer at claim closure, or the division at reconsideration of the claim closure, may infer authorization from such medical records as a surgery report or hospitalization record that reasonably reflects an inability to work because of the compensable claim, or from a medical report or chart note generated at the time of, and indicating, the worker's inability to work." To be consistent with the current standard, SAIF suggests modifying the proposed rule to state "Temporary disability compensation is authorized when: At reconsideration of the claim closure, the director determines there is sufficient contemporaneous medical documentation to reasonably reflect the worker's inability to work."

(9) Provides for the payment of temporary disability once a denied claim is determined to be compensable. SAIF proposes inserting the word "finally" between "has been" and "determined" because retroactive time loss is due once the order setting aside a denial is final.

5. OAR 436-060-0025:

(4) Provides the wage calculation for workers who are not "regularly employed." Missing from the proposed changes is language that limits the calculation to earnings from the job at injury. This limitation is present in ORS 656.210(2)(d), which states, "The benefits of a worker who incurs an injury shall be based on the wage of the worker at the time of injury." Proposed 436-060-0020(3) mirrors this provision. ORS 656.210(2)(e) grants the director discretion to prescribe methods for establishing a worker's weekly wage for workers not "regularly employed". To maintain consistency and avoid ambiguity, SAIF suggests adding the phrase "with the employer at injury" between "average of the worker's total earnings" and "for the period up to 52 weeks."

(4)(a) To maintain consistency as noted above, SAIF suggests adding the phrase "with the employer at injury" to the end of this proposed rule for the same reasons.

(4)(a)(B) Excludes payment for expenses incurred due to the job and paid for by the employer. SAIF proposes adding "or advanced" between "reimbursed" and "by the employer" to capture those employer-related payments paid in advance to the worker to cover anticipated expenses incurred due to the job.

(4)(b)(A) Simplifies whether a gap in employment qualifies as an extended gap that is excluded from the temporary disability rate calculation. SAIF suggests increasing the number of days considered to be a gap in employment to 60 days. SAIF reasons that due to the seasonal nature of many industries including construction, firefighting and logging, a gap of 60 days captures those employment relationships that are seasonal and cyclical. In addition, SAIF suggests adding "reasonably" between "not" and "anticipated" to create a standard of reasonableness. For employers and workers who have been in the same industry for several years, there typically are anticipated gaps in employment that were not specifically discussed as part of the wage earning agreement because such gaps are already anticipated by both parties, based on their experience within that particular field, at the time of hiring.

(5) Removes current OAR 436-060-0025(5)(b) and -0025(5)(l), which provide specific temporary disability rate calculations for workers employed through a temporary service provider and school teachers or workers paid in a like manner. SAIF suggests retaining these rules to maintain the accurate calculation of the temporary disability rate in these unique employment situations. The proposed rules streamline and simplify the calculation of the temporary disability rate for most injured workers but may not capture the unique employment situation of school teachers and temporary workers.

6. OAR 436-060-0030:

(6)(a) Removes the phrase "includes but are not". SAIF suggests striking out the words "limited to" so that "includes but are not limited to" is removed.

7. OAR 436-060-0035:

(4) Removes the provision that precludes a penalty under ORS 656.262(11) if a delay in payment of a higher disability rate is due to the worker's failure to provide verifiable documentation of secondary employment. The revised rules moved the penalty provision to OAR 436-060-0035(11), which states, in part, "Any delay in the payment of a higher disability rate because of the worker's failure to provide verifiable documentation requested under this rule will not result in the assessment of a civil penalty." A civil penalty and a penalty under ORS 656.262(11) are not interchangeable: a civil penalty is payable to the director whereas an ORS 656.262(11) penalty is payable to the worker with a penalty-related fee to the worker's attorney.

SAIF suggests either retaining the last sentence of current OAR 436-060-0035(4) and re-numbering it as OAR 436-060-0035(4)(D) or replacing the phrase "civil penalty" under OAR 436-060-0035(11) with "ORS 656.262(11) penalty," and renumbering the last sentence of proposed rule OAR 436-060-0035(11) as OAR 436-060-0035(4)(D).

(7) SAIF suggests adding the words "eligible for supplemental temporary disability" between "When the worker" and "has post-injury" to avoid the impression that the insurer must calculate the temporary partial disability rate using wages from all jobs in cases in which the worker has not been determined eligible for this benefit.

OAR 436-105, Employer-at-Injury Program (EAIP)

1. OAR 436-105-0006

(2) States that EAIP and PWP benefits may not overlap. SAIF agrees with this amendment, however, SAIF suggests that the rules describe what situation or factors constitute the end of EAIP and PWP eligibility. For example, is premium exemption considered a PWP benefit and thus discontinues EAIP benefits?

2. OAR 436-105-0500

(5)(e)(C) Describes the appropriate action to take when a medical release does not have an end date. SAIF supports this amendment, however respectfully requests the addition of "/or" in the second line after the word "and". Adding this language would allow the insurer to continue current practice and end benefits if the worker has ceased treating or has given no indication that they will continue to treat.

(6)(d) Requires payroll records be "compiled in accordance with generally accepted accounting procedures." SAIF is concerned that the proposed rules do not define "generally accepted accounting procedures." Of greater concern, however, is the imposition of bookkeeping procedures on small employers who may not have the resources or business need to follow complicated accounting rules. SAIF suggests that the information required in (6)(d)(A) is sufficient to protect the workers benefit fund without imposing onerous requirements on small businesses.

SAIF also would appreciate instruction on the effective date of this rule. SAIF suggests that the EAIP period start date should be used for rules that change documentation standards.

3. OAR 436-105-0512

Removes old subsection (4) that allows an insurer to end the employer at injury program at any time while the workers' claim is open. There are any number of reasons an insurer may need to terminate the program. SAIF urges WCD to retain current subsection 4, allowing the insurer to manage the program and claims.

OAR 436-110, Preferred Worker Program (PWP)

1. OAR 436-110-0006

(2) Clarifies that EAIP and PWP benefits may not overlap. SAIF agrees with this amendment, however, SAIF suggests that the rules describe what situation or factors constitute the end of EAIP and PWP eligibility. For example, is premium exemption considered a PWP benefit and thus discontinues EAIP benefits?

2. OAR 436-110-0240

(4)(c) Requires the insurer to obtain permanent restrictions for claim disposition agreements (CDA) even when the CDA is approved before the worker is medically stationary.

If the injured worker is not medically stationary permanent restrictions likely cannot be determined. SAIF cannot force the injured worker to seek further treatment or to determine permanent restrictions after a CDA is approved if the worker chooses not to do so. SAIF agrees and supports the need for permanent restriction determination once an injured worker seeks preferred worker benefits. Insurers must provide this assistance to the worker. At this point an injured worker is willing to be assessed, whereas they may not be willing to submit to a medical exam during the CDA approval process.

SAIF suggests the addition of the italicized language below to provide a solution to WCD's concern that insurers provide injured workers with permanent restrictions when they wish to utilize preferred worker benefits, but allows an insurer and a worker to settle a claim before an injured worker's condition is medically stationary.

(c) Approval of a claim disposition agreement, if documented medical evidence indicates permanent restrictions exist as a result of the injury or disease, and the worker is unable to return to regular work. If the claim disposition agreement is approved before the claim has been closed under ORS 656.268, the insurer must obtain medical information to determine the worker's permanent restrictions for purposes of the Preferred Worker Program upon the following:

- (i) *medical information indicates the worker's condition is medically stationary,*
 - (ii) *the insurer notifies the worker in writing of the worker's eligibility for the Preferred Worker Program within ten days of receipt of the information in (i),*
- and*

(iii) *the worker elects in writing to pursue Preferred Worker Program benefits.*

4. OAR 436-110-0325

(4)(a) Changes the notification and approval process for premium exemption. Currently the rules require the employer to notify its insurer within 90 days from eligibility or hire of a preferred worker. The amendment requires the employer to notify the division of the hiring and gives the director the responsibility to either approve or deny premium exemption.

SAIF is unaware of problems that give rise to this proposed change. The PWP process can be lengthy and confusing to employers, particularly those who have no prior experience and limited understanding of the program. Some employers may be reluctant to contact WCD or otherwise engage in the process without assistance from the insurer. The result may reduce utilization of this valuable benefit which could harm both the injured workers and their employers.

Removing the insurer from approving premium exemption puts the burden on the employer to notify the division, and removes the insurer from the process. Applying premium exemption to a policy can be complicated by multiple entities and business locations, and class code exposure. The current rules allow the insurer to work directly with the employer to determine appropriate placement for premium exemption. Delays in implementing this benefit and confusion are reduced as much as possible with direct employer and insurer interaction.

SAIF urges WCD to reconsider this proposed rule. If WCD does adopt this proposed provision, SAIF respectfully requests that WCD clarify the process it will use so employers can provide WCD timely and accurate information. Additionally, SAIF requests WCD clarify for employers and insurers WCD's intended notification process and its proposed timeframes for notice to employers and insurers that premium exemption has been approved.

5. OAR 436-110-0330

(1)(e) Requires insurers be able to prove through *loss reports* that PWP claim data is not used to determine the employer's rates or dividend. SAIF's systems are automated to insure that claim data for preferred worker claims are not reported to NCCI for experience rating purposes and general ratemaking. SAIF concurs that, when requested, insurers should be able to provide adequate proof that it has not used this data for these purposes. We are uncertain, however, what WCD means by the term "loss reports." SAIF suggests that it may be appropriate to define "loss reports." SAIF likewise suggests that WCD consider adding language that states "or by other means acceptable to the Director" to (1)(e).

OAR 436-120, Vocational Assistance to Injured Workers

1. 436-120-0003

(3)(b) Gives the Director "the right" to verify whether employment is suitable. The amendment does not specify under what circumstances the Director would exercise

this right. SAIF suggests the department clarify whether the rule extends the Director's authority beyond the dispute resolution process.

2. 436-120-0005

(10) Removes the definition of "likely eligible" even though "likely eligible" is used throughout Division 120 and Oregon Revised Statutes.

SAIF suggests the department retain the definition for "likely eligible" to maintain a consistent interpretation of "likely eligible." SAIF proposes the following definition:

"Likely eligible means that a worker is expected to be awarded work disability, has objective or permanent or projected injury caused restrictions, and is not currently suitably employed."

3. 436-120-0005

(13)(b) Changes the definition of suitable wage to one that is as close as possible to the average weekly wage (AWW), but not less than 80% of the adjusted weekly wage. This amendment appears to be in conflict with ORS 656.340 (5) which states that the objective of vocational assistance is to get a worker to a wage as close as possible to the worker's AWW, even if this is less than 80%. With limits in the length, cost, and types of training, it can be impossible for training to result in employment within 80% of the AWW. In addition, workers may agree to a wage less than 80% in order to secure a position that meets certain personal requirements (e.g. location). Lastly, all parties agree to the wage prior to training.

Because the proposed rule could limit options for suitable employment currently provided in the rules to the detriment of the injured worker, SAIF suggests retaining the current definition of "suitable wage."

4. 436-120-0115

(7) Limits the number of days that a determination of eligibility may be extended beyond the initial 30 days from medically stationary status, to an additional 30 days. Current rules allow the insurer to notify the worker when the initial 30 day timeframe will not be met, the required additional information, and the expectation of when the eligibility determination will be made. Further, the insurer then has 30 days from receipt of the additional information to determine eligibility.

Often the eligibility determination depends on the insurer's ability to obtain permanent restrictions from the treating doctor, which may or may not accompany a determination of medically stationary status. Obtaining permanent restrictions may require an IME/WCE which can take several weeks to complete. Under the proposed rule, insurers may need to determine eligibility prior to obtaining all the necessary information in order to meet the additional 30 day timeframe.. Consequently, the evaluation may not fully reflect the workers' actual condition and/or eligibility.

SAIF suggests the director retain the current timeframe for determining eligibility as outlined in OAR 436-120-0125(2), (3) and OAR 436-120-0135(5).

5. OAR 436-120-0145

(2)(B); (C). Removes the requirement that the worker be available in Oregon for vocational assistance. This amendment appears to conflict with the several Oregon revised statutes stating that an Oregon certification is required to provide vocational assistance, and that the worker be returned to work that is as close to regular work and wage at injury as possible. ORS 656.340 In addition, it could allow the worker to choose vocational goals that have no market in Oregon, requiring out-of-state relocation for both training and employment.

SAIF suggests the department retain the current eligibility criteria under OAR 436-0120-0145(2).

6. OAR 436-120-0165

(3) Requires insurers to send form 2800 to DCBS when eligibility is ended. Currently insurers are allowed 30 days from the end of eligibility to file form 2800, which allows time for final costs to be included in the report. Without allowing an insurer 30 days to obtain additional information the form may be incomplete. Missing information may include payment for final services, worker mileage, and tuition costs (some institutions provide the education invoice at the end of the quarter/semester/training period).

To ensure that the form may be complete at the time of submission, SAIF suggests that that insurers continue to have 30 days from the end of eligibility to file form 2800.

7. OAR436-120-0433

(14)(c) Adds justification for extending a training plan to include the capacity for the worker's income to increase to 100 percent or more of the workers' adjusted weekly wage with time as a result of the training. Existing rules require proving a 10% wage increase to qualify for more than a 16 month training program. While adding language that speaks to the capacity of increased earnings over time potentially increases the approval of extended training plans, determining wage increases over time is problematic for the insurer. Employee wage increases are determined by worker performance, financial capacity of the employer, and overall economic factors over which the insurer cannot predict and has little control.

SAIF suggests the department retain the current rule.

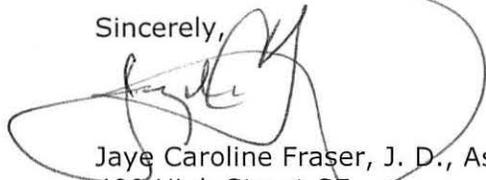
8. OAR436-120-0445

(4). Increases the number of allowable months for formal training from 16 to 18.

The proposed rule conflicts with ORS 656.340(12), (14)(a), and (14)(c), which state that training is limited to 16 months. To maintain consistency with the statute, SAIF suggests keeping the current rule.

Once again, SAIF appreciates the opportunity to provide input into these administrative rules. We are hopeful that our input will be of assistance. As always, SAIF is available to answer any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Jaye Fraser", is written over a large, light-colored circular scribble or stamp.

Jaye Caroline Fraser, J. D., Assistant Counsel
400 High Street SE
Salem, Oregon 97312
P: 503.373.8026 or 800.285.8525 ext. 8026
jayfra@saif.com