

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

In the Matter of the Amendment of: )  
 436-105, Employer-at-Injury Program ) SUMMARY OF  
 436-110, Preferred Worker Program ) TESTIMONY AND  
 436-120, Vocational Assistance to Injured Workers ) 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.

Three people testified at the public rulemaking hearing, recorded below as exhibit 2. The public submitted three written documents as testimony.

**Testimony list:**

<b>Exhibit</b>	<b>Rule divisions</b>	<b>Testifying</b>
<a href="#"><u>1</u></a>	105	Amber McMurry, Multnomah County
<a href="#"><u>2</u></a>	105 110 120	Transcript of public rulemaking hearing of Oct. 24, 2016 a) Amber McMurry, Multnomah County (also testified on div. 060 – see separate response) b) John Jones c) Jaye Fraser, SAIF Corporation
<a href="#"><u>3</u></a>	105 110 120	Jaye Fraser, SAIF Corporation (exhibit #3 includes testimony on div. 060 – see separate responses)
<a href="#"><u>4</u></a>	110	Betsy Earls, Associated Oregon Industries

**Testimony: OAR 436-105-0006**

***Exhibit 2b***

“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.”

**Response:** We appreciate the feedback, and we agree. The rules already allow the use of funds to advertise and promote the program. Our staff actively looks for ways to inform employers about the program, and encourages insurers to make their policyholders aware of the benefits.

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**Testimony: OAR 436-105-0006(2)**

***Exhibit 3***

“(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?”

**Response:** Premium exemption is considered a Preferred Worker Program benefit; it is an incentive for employers to hire injured workers. Because no WBF monies are used for premium exemption, we have not changed the general statement in OAR 436-105-0006 (Workers’ Benefit Fund). We have, however, clarified the end-of-eligibility language in OAR 436-105-0512(6) to explicitly provide that EAIP eligibility ends when premium exemption begins.

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**Testimony: OAR 436-105-0500(5)(e)(C)**

***Exhibit 3***

“(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.”

**Response:** The intent of the new language is to address circumstances when all three conditions are true – no end date or follow-up date, no subsequent release, and no indication the worker followed up – so there is a clear end to wage subsidy in those cases. In addition, the division avoids the use of the phrase “and/or” in the rules, as it is inherently ambiguous. *See SAIF v. Donahue-Birran*, 195 Or App 173, 178 (2004).

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**Testimony: OAR 436-105-0500(6)(d)**

***Exhibit 3***

“(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.”

**Response:** The language requiring payroll records to be compiled in accordance with generally accepted accounting procedures was copied from OAR 436-110-0335(9), with the intent that the wage subsidy provisions in the 105 and 110 rules be consistent. However, based on your feedback and after further discussion, we have removed the language from both sets of rules. Payroll records should be sufficient as long as they contain the more specific information required by new language in OAR 436-105-0500(6)(d)(A).

The new documentation requirements will apply to EAIP programs started on or after Jan. 1, 2017, as provided in OAR 436-105-0003(2)(a).

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**Testimony: OAR 436-105-0512**

***Exhibit 3***

“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.”

**Response:** We proposed removing the language because we thought it was unnecessary. However, based on your comments, we have added it back.

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**Testimony: OAR 436-105-0520(2)**

***Exhibits 1, 2a***

[Extracts from written testimony, exhibit #1, are consistent with oral testimony at hearing, exhibit #2a] “Today, our proposal is to return the reimbursement amount of EAIP percentage of wages to 50%.

“The rules effective 7-1-2013 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:

- At the rules advisory committee meeting on 7-19-16, the Department indicated the deficit in the WBF reserves was 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 to injured workers.
- Historically the EAIP wage reimbursement has been 50 percent. The reduction in 2013 was understood to be a temporary measure.
- A 50 percent wage reimbursement is consistent with the percentage of the wage reimbursement under the Preferred Worker Program.

“Attached is an email from John Shilts and an excerpt below supporting one of the points for returning to the 50% level of reimbursement.

“ "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 and without making changes like these, we would violate that law. If the revenue to the WBF returns sufficiently to allow us to return to or make progress toward our traditional benefit and assessment levels, that is what we will do."

“\* \* \*”

**Response:** You are correct that in 2013, the division was open to returning to an EAIP wage subsidy reimbursement rate of 50% in the future. However, at this time the reimbursement rate will remain at 45%.

A reimbursement rate of 45% still provides a significant incentive for employers to retain injured workers. Since the rate was reduced from 50% in 2013, the department has not seen a decrease in program use.

Wage subsidy under the EAIP is one of many benefits to workers and employers that are paid

out of the Workers' Benefit Fund. While we are not increasing the reimbursement rate, we are increasing benefits in other areas (*see, e.g.*, Preferred Worker Program changes to OAR 436-110-0345 and 436-110-0350, eff. Jan. 1, 2017), and the amount that workers and employers pay into the fund will go down effective Jan. 1, 2017. *See* OAR 436-070, Workers' Benefit Fund Assessment rules, eff. Jan. 1, 2017.

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**Testimony: OAR 436-105-0550 (or new)**

***Exhibit 2b***

“\* \* \* 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 \* \* \* and they told me to contact the IRS. \* \* \* 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.”

**Response:** We appreciate your feedback. We are concerned about the issues you have raised, and we are investigating them outside of the rulemaking process. If, as a result of our investigation, we determine that rule changes are needed, we will consider them for future rulemaking.

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**Testimony: OAR 436-110-0006(2)**

***Exhibit 3***

“(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?”

**Response:** Premium exemption is considered a Preferred Worker Program benefit; it is an incentive for employers to hire injured workers. Because no WBF monies are used to provide premium, we have not changed the general statement in OAR 436-110-0006 (Workers' Benefit Fund). We have, however, clarified the end-of-eligibility language in OAR 436-105-0512(6) to explicitly provide that EAIP eligibility ends when premium exemption begins.

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**Testimony: OAR 436-110-0240(4)(c)**

***Exhibit 2c, 3***

**Exhibit 2c:** “\* \* \* 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. \* \* \*”

**Exhibit 3:** “(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 can not 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.*”

**Response:** It is not the division's intention to interfere with or delay the claim settlement process. But, because a worker is a preferred worker for life, a worker who is eligible should be aware of the benefits available to him or her without having to elect in writing to pursue them. There have been cases in which the division has paid for a work capacity evaluation in order to determine the worker's permanent restrictions for purposes of the Preferred Worker Program. Our intent with this rule change is to make it clear that it is the insurer's responsibility.

We have revised the language to state the insurer's responsibility to continue to process the claim to medically stationary.

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**Testimony: OAR 436-110-0325(4)(a)**

***Exhibit 2c, 3, 4***

**Exhibit 2c:** “\* \* \* 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.”

**Exhibit 3:** “(4)(a) \* \* \*. 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 \* \* \*. 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.”

**Exhibit 4:** “\* \* \* Currently the rules require the employer to notify their insurer within 90 days from eligibility or hire of a preferred worker. The insurance company then has the authority to approve a premium exemption. The proposed amendment requires the employer to instead notify the division of the hiring, and gives the Director responsibility to either approve or deny premium exemption.

“Employers in Oregon rely on their insurance company to help them navigate the complexities of our workers’ compensation system and to take care of injured workers’ and the employer’s interests appropriately. This is especially important to the small business owner that has little time or resources to devote to managing workers’ compensation claims.

“When an employee is faced with the potential of not being able to return to their job, it is even more important that the employer stay in close contact with their insurance company so that they understand their options and obligations. One of these options is to continue to employ the injured employee through the Preferred Worker Program (PWP).

“\* \* \* We believe that it is vital for employers to be able to continue to rely on their insurance company’s expertise to ensure that PWP program benefits will be available not only to them, but to their injured employees as well.

“The proposal to require employers to work with the Workers’ Compensation Division directly, and not allow our insurance representatives to work on our behalf, puts a burden on the employer that could result in reduced utilization of this valuable program. We respectfully request that the proposed amendment be withdrawn and that, by rule, employers can continue to work directly with their insurance company regarding PWP benefits.”

**Response:** The department administers the Preferred Worker Program, and we approved premium exemption before 2009 rule changes. Returning the approval process back to the department will enable us to better track active benefits under both the EAIP and the PWP. Insurers are still expected to be active participants in providing assistance, informing their policyholders about the benefits that are available to them, and facilitating the process.

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**Testimony: OAR 436-110-0330(1)(e)**

***Exhibit 3***

“(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 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).”

**Response:** Based on your comments and after further discussion, we have decided not to make the proposed change and to retain the current rule language.

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**Testimony: OAR 436-120-0003(3)(b)**

***Exhibit 3***

“(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.”

**Response:** We want to make it clear to insurers and employers that the department may verify whether employment is suitable. This authority is stated in OAR 436-120-0003 rather than OAR 436-120-0008 because it is not limited to the dispute resolution process. This is not something we expect to do very often, but we don't want to limit our authority by specifying circumstances in which we will exercise it. After the rule has been in effect for a period of time and based on our experience in specific cases, we may be better able to identify more specific criteria that may be added to the rule in future rulemaking.

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**Testimony: OAR 436-120-0005**

***Exhibit 3***

“(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.”*

**Response:** There is only one reference to “likely eligibility” in the statute, at ORS 656.340(1)(b)(A). After the rule changes become effective Jan. 1, 2017, there will be only one reference to “likely eligibility” in the rules, in OAR 436-120-0115(3)(a). Because the term will only be used once, it does not need to be separately defined. And because the proposed changes to OAR 436-120-0115(3) clarify that the concept of “likely eligibility” only applies before the worker is medically stationary, we expect the term will be interpreted more consistently.

**Testimony: OAR 436-120-0005(13)(b)**

*Exhibit 2c, 3*

**Exhibit 2c:** “\* \* \* 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. \* \* \* So we just think that that flexibility should be there. It doesn’t happen that often, but we’d like to see that maintained.”

**Exhibit 3:** “(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." ”

**Response:** Based on your comments and after further discussion, we have decided not to make the proposed change to the rule and to retain the current language.

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**Testimony: OAR 436-120-0115(7)**

*Exhibit 2c, 3*

**Exhibit 2c:** “\* \* \* 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 \* \* \* 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.”

**Exhibit 3:** “(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).”

**Response:** One of the division’s goals in this rulemaking was to tighten the timeframes in the vocational assistance process, to keep the process moving forward. ORS 656.340(4) requires the eligibility determination to be made within 30 days. Under the current rule that allows postponements, some insurers postponed the eligibility determination indefinitely. The new rule creates a definite end date by which the determination must be made. The counselor may extend the time period one time, for a maximum of 30 days, if the counselor needs additional information from the worker, the employer, or the medical provider. We expect that most of the information needed to determine eligibility would be available at claim closure, so the need to delay the process shouldn’t arise often. The rules still allow eligibility to be ended based on new information that could not have been obtained with reasonable effort at the time the worker was determined to be eligible. If counselors have difficulty obtaining needed information from medical providers, they are encouraged to let our staff know.

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**Testimony: OAR 436-120-0145(2)(b)(B) & (C)**

***Exhibit 3***

[Proposed rule] “\* \* \* 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).”

**Response:** One of the division’s goals in revising the rules is to facilitate access to benefits for workers who are eligible for assistance, with the ultimate goal of the worker returning to work. The general rule that the worker be available in Oregon or within commuting distance of Oregon has not changed. We have added some narrow exceptions to address those cases in which the rule has been a barrier to a worker receiving the benefits for which the worker is otherwise eligible under the statute. We do not expect the exceptions to apply in many cases. An Oregon-certified counselor must still provide assistance.

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**Testimony: OAR 436-120-0165(3)**

***Exhibit 3***

“(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 \* \* \* insurers continue to have 30 days from the end of eligibility to file form 2800.”

**Response:** We agree, and have added back the 30-day timeframe for submitting the closure report.

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**Testimony: OAR 436-120-0177(1)(b)**

***Exhibit 2c***

“\* \* \* 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. \* \* \* 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 \* \* \*. Anyway, we just think that that is potentially problematic, for workers especially.”

**Response:** This provision in the rule is not new, but was renumbered from OAR 436-120-0400(1)(b), and applies to the determination of which category of vocational assistance – direct employment services or training – is most appropriate for the worker.

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**Testimony: OAR 436-120-0443(14)(c)**

***Exhibit 3***

“(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.”

**Response:** Upon further review and discussion, we have removed the reference to the worker’s potential income, but clarified the current rule to state that the relevant time period is at the time the worker completes the program.

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**Testimony: OAR 436-120-0445(4)**

***Exhibit 3***

“(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.”

**Response:** The sections of the statute you reference do not limit the length of a training plan. ORS 656.340(12) limits the payment of time loss during training. There is a new requirement in OAR 436-120-0510(2)(l) that the training plan notify the worker that temporary disability benefits may end before training ends.

<b>Dated this 23<sup>rd</sup> day of November, 2016.</b>
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10/24/16

EXHIBIT

1

Greetings,

We are EERTW, Employers Empowering Return to Work, a group who meets to discuss and share ideas, concepts and promote return to work and the utilization of EAIP and PWP.

Today, our proposal is to return the reimbursement amount of EAIP percentage of wages to 50%.

The rules effective 7-1-2013 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:

- At the rules advisory committee meeting on 7-19-16, the Department indicated the deficit in the WBF reserves was 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 to injured workers.
- Historically the EAIP wage reimbursement has been 50 percent. The reduction in 2013 was understood to be a temporary measure.
- A 50 percent wage reimbursement is consistent with the percentage of the wage reimbursement under the Preferred Worker Program.

Attached is an email from John Shilts and an excerpt below supporting one of the points for returning to the 50% level of reimbursement. Other reasons are also noted below.

“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 and without making changes like these, we would violate that law. If the revenue to the WBF returns sufficiently to allow us to return to or make progress toward our traditional benefit and assessment levels, that is what we will do.”

Examples of the significance to employers can be demonstrated by the following numbers:

Tri-Met total reimbursements 2013-2015 = \$510,895, a 5% increase would have provided an additional \$25,545.

Multnomah County total reimbursements 2013-2015 = \$313,891, a 5% increase would provide \$15,695.

As demonstrated by these figures, even 5% can make a dramatic difference to an employer.

Again we request that the reimbursement of wages be re-adjusted to the 50% level.

Thank you for your consideration.

EERTW

Members include-

Amber McMurry- Multnomah County

Kristen Weiler- Portland Public Schools

Melissa Schnell- City of Portland

Eden Davis- Davis and Associates

Moira Przybylowski- CIS

SDAO

City of Salem

**From:** Shilts John L [mailto:[john.l.shilts@state.or.us](mailto:john.l.shilts@state.or.us)]  
**Sent:** Friday, September 14, 2012 4:25 PM  
**To:** Bruyins Fred H; Schnell, Melissa; 'Howe Rae'  
**Cc:** 'Amber McMURRY'; 'Aubrey Sakaguchi'; 'Candy Snell'; Eden Davis; Straight Jean M; Willingham Kevin; Allen Patrick; Bledsoe Teri L; Garcia Victor A  
**Subject:** RE: EAIP days reduced

Ms. Schnell: Thanks for your question. I received a similar question from Ms. Susan Cline and sent her the same response as below.

The reason we are planning to make changes to the length of wage subsidies under the Employer-at-Injury-Program (EAIP) have to do with the financial condition of the Workers' Benefit Fund (WBF). This is one of a few changes we are planning and I'll provide you some more information below. Please note, this announcement was made yesterday along with a series of workers' compensation rates we annually announce at about this time. Here is a link to the department's press release regarding all the rate issues:

[http://www.oregon.gov/DCBS/docs/news\\_releases/2012/nr\\_wc\\_rates\\_9\\_13\\_2012.pdf](http://www.oregon.gov/DCBS/docs/news_releases/2012/nr_wc_rates_9_13_2012.pdf)

At the current rate of revenue and expenditure for the WBF, the WBF would be out of all funds sometime in 2017. This isn't caused by increased expenditures (costs), as the program costs covered by the WBF have remained rather flat over the last several years. The recession is resulting in less people working and less overall hours worked, causing a steep decline in the revenue collected that finances the WBF. Thus, like any other fund administrator which is paying out more money than is being collected to finance the fund, we are left with the difficult choices of raising the assessment rate in order to raise revenues or cut benefits to reduce expenditures.

After a significant amount of vetting of options with business and labor groups, we made the following decisions:

- 1) Raise the assessment from 2.8 cents per hour worked (paid half by the employer and half by the employee) to 3.3 cents for every hour worked. This increase will go into effect on April 1, 2013.
  - 2) Reduce administrative expense for operation of the fund by \$500,000 per fiscal year. This amounts to about a 10% reduction in the expense of administering this fund by the department. This takes effect during this current fiscal year. These expenditure cuts are internal to DCBS and will not effect the fee provided for administration of EAIP by employers, for example.
  - 3) Reduce the allowable days upon which wage subsidy can be paid in the EAIP from 66 days to 56 days. This amounts to a reduction of approximately 3 months to a little over two and a half months of available wage subsidy for modified or light duty employment. This change will require an administrative rule change and we expect to implement this change on July 1, 2013.
- However, we plan to start the administrative rule process, including external advisory committees and the administrative hearing that Fred will chair, shortly.

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 and without making changes like these, we would violate that law. If the revenue to the WBF returns sufficiently to allow us to return to or make progress toward our traditional benefit and assessment levels, that is what we will do.

I hope this provides an answer to your question. If you want further information or have suggestions for us, please don't hesitate to contact me. Thank you for your question.

John Shilts, Administrator  
Workers' Compensation Division/Department of Consumer and Business Services  
(503) 947-7551 [john.l.shilts@state.or.us](mailto:john.l.shilts@state.or.us)

**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: 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	) ) ) ) ) )	<b>TRANSCRIPT OF TESTIMONY</b>
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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 1<sup>st</sup> 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,

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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.**



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.

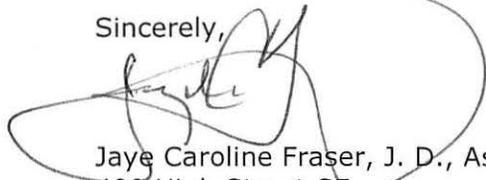
**8. OAR436-120-0445**

(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.

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October 28, 2016

Mr. Fred Bruyns  
Rules Coordinator  
Workers' Compensation Division  
PO Box 14480  
Salem, OR 97309

Subject: OAR 436-110-0325(4)(a)

Dear Mr. Bruyns:

Thank you for the opportunity to submit written comments on proposed changes to OAR 436-110-0325(4)(a).

Associated Oregon Industries is concerned about changes the proposed amendment would make to the notification and approval process for premium exemption. Currently the rules require the employer to notify their insurer within 90 days from eligibility or hire of a preferred worker. The insurance company then has the authority to approve a premium exemption. The proposed amendment requires the employer to instead notify the division of the hiring, and gives the Director responsibility to either approve or deny premium exemption.

Employers in Oregon rely on their insurance company to help them navigate the complexities of our workers' compensation system and to take care of injured workers' and the employer's interests appropriately. This is especially important to the small business owner that has little time or resources to devote to managing workers' compensation claims.

When an employee is faced with the potential of not being able to return to their job, it is even more important that the employer stay in close contact with their insurance company so that they understand their options and obligations. One of these options is to continue to employ the injured employee through the Preferred Worker Program (PWP).

The PWP offers great benefits to both the employer and their injured employee; however, the program benefits have different components with individual requirements and deadlines. Employers are not PWP experts, nor do we believe they should be expected to become experts. We believe that it is vital for employers to be able to continue to rely on their insurance company's expertise to ensure that PWP program benefits will be available not only to them, but to their injured employees as well.

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The proposal to require employers to work with the Workers' Compensation Division directly, and not allow our insurance representatives to work on our behalf, puts a burden on the employer that could result in reduced utilization of this valuable program. We respectfully request that the proposed amendment be withdrawn and that, by rule, employers can continue to work directly with their insurance company regarding PWP benefits.

Sincerely,

A handwritten signature in blue ink that reads "Betsy Earls". The signature is written in a cursive style.

Betsy Earls  
Vice President and Counsel

A handwritten signature in blue ink that reads "Betsy Earls". The signature is written in a cursive style.