STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION

In the Matter of the Amendment of: OAR 436-120 Vocational Assistance to Injured Workers	)))))	SUMMARY OF TESTIMONY AND AGENCY RESPONSES

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

The proposed amendment to the rules was announced in the Secretary of State's *Oregon Bulletin* dated April 1, 2024. On April 25, 2024, a public rulemaking hearing was held as announced, by teleconference and videoconference at 9 a.m. in Room F of the Labor and Industries Building, 350 Winter Street NE, Salem, Oregon. Daneka Karma was the hearing officer. The record was held open for written comment through May 2, 2024.

Three people testified at the public rulemaking hearing, and the transcript of the hearing is recorded below as Exhibit 2. The public submitted six written documents as testimony.

Testimony list:

Exhibit	Testifying
1	Nargess Shadbeh and Lauren Grace, Oregon Law Center
2	Transcript of public rulemaking hearing of April 25, 2024: a. Lauren Grace, Oregon Law Center b. Jovanna Patrick, Oregon Trial Lawyers Association c. Kate Suisman, Northwest Workers' Justice Project
3	Kate Suisman, Northwest Workers' Justice Project
4	Eva Galvez, MD
5	Elaine Schooler, SAIF Corporation
6	Laurie Hoefer, Legal Aid Services of Oregon
7	Annica Maxfield, Voz Workers' Rights Education Project

Testimony: OAR 436-120-0145, -0175, -0177, and -0511 ***Exhibits 1, 3, 4, 6, 7***

Exhibit 1

"We write to express our strong support for the proposed amendments to the rules relating to eligibility for workers without authorization to work in the United States…

"The purpose of workers' compensation is to "restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable." ORS 656.012(2)(c). In other words, the system is designed to ensure that the costs and consequences of workplace injuries are not born solely by the workers, because it is usually the employer who is in the best position to prevent accidents.

"To achieve that goal, workers whose injuries are severe enough to permanently prevent them from performing their previous responsibilities are entitled to assistance entering new careers. This ensures that they are able to contribute to the economy and support their families after devastating injuries. For too long, however, workers without work authorization have been unfairly excluded from this benefit. All workers injured on the job deserve and are entitled to workers' compensation benefits, regardless of their immigration status. ORS 656.005(28)(a).

"Our economy relies on workers without work authorization to perform some of the most dangerous and physically demanding jobs, including in agriculture, seafood processing, construction, forestry, and firefighting. 18% of Oregon's total economic output can be attributed to undocumented farmworkers.[1] The construction industry has the highest rate of fatal work injuries nationwide,[2] and according to 2020 census data, approximately 23% of construction laborers are undocumented.[3]

"Under the current system, injured workers without work authorization qualify for medical coverage, and with successful treatment may return to the same job they had before. If, however, the injury results in permanent disability that prevents them from returning to the job held when injured, they do not qualify for the vocational rehabilitation services designed to help such workers return to the work force. One scholar has observed that this system creates a "disposable work force," where undocumented workers receive help returning to work only so long as they are able-bodied and are abandoned after catastrophic injury.[4]

"Workers without work authorization particularly struggle to find jobs that do not require hard labor due to a lack of language skills and education. This forces those with disabilities to make an impossible choice. If they follow their physician's instructions, they are left with no earning capacity, a result that harms not only the workers, but also their dependents, many of whom are U.S. citizens. Often, they instead return to the same or similar work--despite constant pain or risk of exacerbating their injury--in order to provide for their families. Excluding workers without work authorization from vocational assistance also hurts those who work alongside them because it partially relieves employers from responsibility for providing unsafe workplaces.

"Although federal immigration law prevents states from providing job placement services to workers without work authorization, nothing prevents them from providing the limited training services proposed here.[5] Indeed, the current system undermines federal immigration policy by

making the injuries of undocumented workers cheaper, thereby encouraging employers to hire them.[6] Unlike Oregon, neither Washington nor California categorically excludes undocumented workers from their analogous programs.7

"For all of the above reasons, we applaud WCD for proposing the amendments to OAR 436-120-0145, 0175, 0177, and 0511, and urge you to adopt them."

Exhibit 3
"I write in strong support of the proposed amendments to OAR 436-120-0145, 0175, 0177 and the proposed new rule, OAR 436-120-0511. I also testified virtually in support on April 25, 2024.

"By removing the current requirement that, "[t]he worker is authorized to work in the United States," from the eligibility requirements for vocational rehabilitation, the Division is leveling the playing field. It should not cost an employer (or the insurance system) less to return an undocumented worker to the workforce than a documented one. There is a perverse incentive if that is allowed to continue.

"By changing this set of rules, the Division is also acknowledging the reality that immigrant workers in low-wage jobs are more likely to be hurt- and to need vocational rehabilitation- than other workers.

"We know that immigrant, Latine workers do some of the most dangerous jobs, and are injured and die at work at higher rates, than other groups of workers. Foreign-born, Latine workers made up 8.2 percent of the employed U.S. workforce, but 14.0 percent of work-related deaths in 2021, 25% higher than the overall job fatality rate. The fatality rate for Latinx workers increased dramatically- 42%- between 2011 and 2021, according to the BLS. The majority of the Latinx workers that lost their lives were foreign born. Fatalities are of course not the same as serious injuries in which a worker can return to work someday, but they are an indicator of the disparity between Latine immigrant workers and others.

"All of this makes sense because the most dangerous jobs often have a high density of immigrant workers. NWJP's clients tend to work in a few main industries: construction, farming and forestry, food processing and manufacturing. For example, BLS data confirms that these jobs have high rates of workers identifying as Latine (or Hispanic): 39.9% of food processing workers, 49.6% of tree trimmers and pruners, and 44.6% of farming, fishing, and forestry occupations.

"These same industries also have high rates of workplace injuries. Dairy manufacturing and animal slaughtering, for example, have high rates of workplace injuries, according to BLS data, as do seafood preparation and packaging and food manufacturing overall."

Exhibit 4
"I write to express my strong support for the proposed amendments to the rules relating to eligibility for workers without authorization to work in the United States…

"I am very aware of the poor health outcomes for so many farmworkers and the short- and long-term work-related injuries and diseases related to occupational health and safety. These include musculoskeletal injuries from repetitive work and work accidents, under diagnosed and under treated chronic medical conditions such as diabetes and hypertension, high rate of mental health conditions such as depression and anxiety influenced by the cumulative effect of physical and psychological stress. I also know the strong work ethic of agricultural workers. Many farmworkers continue to work with injuries even against the advice of their healthcare provider because they have no other choice."

Exhibit 6
"I write to express our strong support for the proposed amendments to the rules relating to eligibility for vocational assistance for those injured workers who do not have authorization to work in the United States…

"While many Oregon agricultural workers have work authorization, there are others who do not have work authorization. Many of the workers who do not have work authorization have worked and lived in Oregon or in other places in the United States for decades. Often, at the time of injury, workers without work authorization have worked for many years for their respective employers. For all these workers, they are entitled to workers' compensation benefits, regardless of their immigration status. ORS 656.005(28)(a). These protections are critical to achieve the purposes of workers' compensation, namely to "restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable." ORS 656.012(2)(c). If all workers are not protected, employers may feel freer to ignore or deprioritize safety and health conditions in the workplace, endangering all workers. If all workers are not protected, employers may prefer workers who lack access to full protections, weakening labor protections for all.

"Vocational assistance is a key component of the continuum of care needed to achieve the goal of returning injured workers to self-sufficient status. Vocational assistance is especially important for those workers who have been seriously injured or suffered from debilitating occupational disease. Being denied this assistance thwarts the goals of the program and further harms injured workers and their families by adding to the emotional distress of being injured. Giving workers without work authorization access to certain vocational assistance will help many workers gain skills and capacity to remain self-sufficient."

Exhibit 7
"We are writing to express our strong support for the proposed amendments to the rules relating to eligibility for workers without authorization to work in the United States."

Response: Thank you for your testimony. Aside from some minor changes, the revisions relating to workers without authorization will be adopted as proposed.

Testimony: OAR 436-120-0145, -0175, -0177, and -0511 ***Exhibit 2.a., b., & c.***

Note: The written testimony in Exhibits 1 and 3 summarizes the oral testimony provided by Lauren Grace and Kate Suisman at the April 25th public hearing. Please see the full text of Exhibits 2a and 2c for the transcript of the oral testimony.

Exhibit 2a
"My name is Lauren Grace. I'm a staff attorney at the Oregon Law Center in the farm worker program."

"I'm speaking today to express our strong support for the proposed amendments to the rules regarding eligibility for workers without work authorization."

Exhibit 2b
"I'm Jovanna Patrick here with, representing OTLA, Oregon Trial Lawyers Association. I represent injured workers. I'm also bilingual in English, Spanish. So, I represent a lot of workers who are Spanish speaking, some of whom are undocumented at the time that they're eligible for vocational benefits. I would just want to echo everything that Ms. Grace said. That OTLA is in agreement that and urging the passage of these changes, that's gonna make some really good changes in people's lives."

"I just wanted to also note that a lot of our workers here have changing status. They come on a visa and when they're eligible and authorized to work and then they get injured and sometimes they can't get better in the time it takes for that visa to expire. So then, by the time that they're that's to be found eligible, they're found ineligible even though they were here working following all the rules. And those are the sort of workers that we want to be able to get back to regular status because then they can come back and be, you know, properly visaed workers again and help Oregon employers."

"And I also wanted to just point out that these rules are gonna be really great versus the current rules, which do live, leave just a little window for undocumented workers. The current rules allow an undocumented worker to apply for documentation and then wait to be authorized to then come back and be found re-eligible.

"I recently had someone go through that process and he was found eligible and he's starting his vocational program now. And, he suffered a serious injury at work. He required back surgery, had permanent impairment. He waited 13 years to become authorized. So, he followed all the rules, but he waited 13 years to get his training program. And, I just think about all the productive stuff he could have done in his life for Oregonians, for Oregon businesses in the last 13 years that he was made to wait. So, I sincerely hope that future workers who are also following all the rules don't have to wait like he did, and urge passage of this change to help workers like him and all the ones who are in his position."

Exhibit 2c
"My name is Kate Suisman, and I'm with the Northwest Workers' Justice Project…

So, we're strongly strongly in support of these proposed amendments and the new rule, …

"So, we're in strong support of what the division is considering and I just really want to thank you for the time you've put into this."

Response: Thank you for your testimony. Aside from some minor changes, the revisions relating to workers without authorization will be adopted as proposed.

Testimony: OAR 436-120-0165(1) ***Exhibit 5***

"The proposed change creates an additional type of limited training available for workers who are not authorized to work in the United States. The limited training category expands some vocational benefits to this group of workers. Because a new type of training was created, there should be a mechanism for a worker's training and eligibility to end once they have received limited training services and are not entitled to other categories of vocational assistance. To that effect, SAIF suggests promulgation of a rule under OAR 436-120-0165 that mirrors the language for ending eligibility when a worker has received maximum services. SAIF suggests adding the following:

> OAR 436-120-0165(1)(r) The worker received maximum limited training services and is not entitled to other categories of vocational assistance."

Response:

Thank you for your testimony. The division agrees that it would be beneficial to clarify that eligibility ends once the worker has completed a limited training plan and is not entitled to other categories of vocational assistance. The existing language in OAR 436-060-0165(1)(q) has been revised to incorporate this recommendation, as follows:

> "The worker received **maximum direct employment services or maximum limited training services** and is not entitled to other categories of vocational assistance."

Testimony: OAR 436-120-0527 and 0720 ***Exhibit 5***

"In addition, SAIF understands that the reasons to end a training plan as listed under OAR 436-120-0527 would also apply to end limited training that was provided under OAR 436- 120-0511. Similarly, SAIF assumes that the same fee schedule would apply to limited training under OAR 436-120-0720(3). To avoid potential stakeholder confusion, the division may consider clarifying that the reasons to end training also apply to limited training as well as including limited training within the current fee schedule."

Response:

Thank you for your testimony. SAIF's understanding that OAR 436-120-0527 and 0720 are intended to apply to limited training is correct. For clarity, language has been added to OAR 436-120-0511 that states OAR 436-120-0527 and 0720 apply to limited training plans. The new language also clarifies that OAR 436-120-0520 and 0523 apply. OAR 436-120-0520 and 0523 relate to training plans, specifically the responsibilities of the worker and counselor, and re-evaluating a training plan. These provisions should be applied to limited training plans as well.

Testimony: OAR 436-120-0165 ***Exhibit 5***

"Lastly, the rules are unclear as to the insurer's obligations if a worker who is receiving limited training independently obtains employment. For example, it is unclear whether OAR 436-120-0165(1)(b) would apply and require the insurer to determine whether an injured worker was suitably employed. Alternatively, SAIF questions whether an insurer would end eligibility under OAR 436-120-0165(h) in the above situation. WCD may consider addressing how eligibility for limited training would end if the situations listed under OAR 436-120-0165 were to occur in order to avoid confusion."

Response:

Thank you for your testimony. We carefully considered your suggestion to further clarify the conditions that end vocational assistance eligibility listed under OAR 436-120-0165, but have decided that the rule should remain as proposed.

Since workers in limited training are not authorized to work in the United States, we believe it is less likely that they will be offered employment, compared to authorized workers. Additionally, conditions that end eligibility due to activation of the Preferred Worker Program (PWP) should not be applicable, since workers must be authorized to work in the United States to be eligible for PWP. Thus, we believe the reasons for ending eligibility that relate to suitable employment are less likely to apply to workers in a limited training.

However, if an end of eligibility condition listed in OAR 436-120-0165(1) involves suitable employment, and applies to a worker in limited training, the insurer should verify whether the job is suitable. This is consistent with how eligibility can be ended for workers in a training plan or direct employment plan, and with the eligibility criteria for vocational assistance under OAR 436-120-0145. Under OAR 436-120-0145(2)(c), a worker is only eligible for vocational assistance if limitations caused by the injury or aggravation prevent the worker from returning to regular employment or suitable and available work. If injury related limitations do not prevent the worker from returning to regular employment or suitable work, the worker should not be eligible.

In regards to OAR 436-120-0145(1)(h), although that subsection does not specifically relate to workers in limited training that obtain employment, it could apply. As noted in the rule, insurers who end the worker's eligibility based on (1)(h) must to determine if the worker's reasons for declining or being unavailable for vocational assistance are for reasonable or unreasonable cause. A worker's employment may be a factor that informs that determination.

In general, the division believes that the conditions for ending eligibility should be reviewed and applied on a case-by-case basis. Obtaining suitable employment could be a factor for ending eligibility for any type of training plan, but it may not occur in all cases. We believe that the rule should remain as proposed to ensure that it can be applied flexibly, dependent on the facts of the claim.

Dated this 4th day of June, 2024.