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

In the Matter of the Amendment of: OAR 436-060, Claims Administration	))))	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 17, 2024, a public rulemaking hearing was held as announced, by teleconference and videoconference at 3 p.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 April 24, 2024.

Two people testified at the hearing, and the transcript is recorded below as Exhibit 1. The public submitted two written documents as testimony.

Testimony list:

Exhibit	Testifying
1	Transcript of public rulemaking hearing of April 17, 2024: a. Ted Heus, Quinn & Heus, LLC b. Keith Semple, Oregon Trial Lawyers Association
2	Chris Lawrence
3	Elaine Schooler, SAIF Corporation

Testimony: OAR 436-060-0010(1)(c) ***Exhibit 1.b., 2, 3***

Exhibit 1.b.

"I was a little confused about what that rule might add to the current rules because it seemed to me if the worker had to report the injury as a workers' comp claim verbally, and be treated by an onsite medical person, it seemed like additional information should be provided.

"I guess at minimum I think that should be 'or.' That if the worker is treated by onsite medical obviously there's an issue um that that worker should be provided information about their rights. When we had the advisory committee meeting, I expressed a lot of concern and so did another attorney about onsite medical being a de facto um way of controlling care and directing care.

"So I guess I'm a little disappointed that we weren't able to come up with a rule that put a little bit more um information in front of the worker when they're being told by an employer who they've informed of a, of an injury that they need to go see the onsite doctor and they can just kind of do that under the radar directing care, which often has the effect of delaying the claim.

"The worker is just doing what they're told by the employer, I mean it just seems to me that if employer can't direct you to go to occupational medicine without that being improper, why should they be able to direct you with their, to their in-house doctor right down the hall?

"They have even more control over that individual than they do their favorite occupational health clinic.

"So, I would really like the department to kind of consider how that, umm, can chill the claim process for injured workers and at minimum they should be provided some information about their rights as soon as they're being sent down the hall to the employer's doctor.

"So, I'd like to see that be at least an 'or' and I'd like to see some consideration given to how that onsite medical care can discourage a worker from filing the claim to begin with until time passes and opportunities might be missed.

"Then the worker is that much further behind the curve in getting real medical treatment and starting to establish the claim processing requirements for other parts of the claim."

Exhibit 2
"I request that the word And is retained …

"It is clear that all injured employees need to be informed of their right and be given a guide to the worker's compensation process. It seem the right thing to prescribe that when an employee files a claim and seeks medical attention, a Form 3283 should be given. However, if manufacturing companies that have medical personnel on site are required to provide this form in a condition where 'or' applies, then this become overburdensome and unnecessary.

"First, there are many reasons that a supervisor may recommend an employee see the 'on-site nurse.' Many of those reason may be for something a reasonable person would not consider an injury. As an example:

"If a new-hire person has a bit of soreness while learning the work, a supervisor may ask the person to visit the nurse for evaluation where the nurse can then provide training info on warmup exercises for the tasks the person does.

"A supervisor may ask an employee to see an on-site nurse to get a finger bandage where the employee had even the tiniest sliver. Yes, this could be viewed as an injury; however, it is absolutely minor first aid and it hardly warrants the rigid requirement of providing Form 3283, documenting to prove it was given, and establishing a file system for the maintenance of this. The issue would not warrant medical treatment and a first aid trained supervisor would/could hand the bandage exactly the same as the nurse, but the supervisors wouldn't (nor should they be required), to give out the Form 3283.

“A supervisor may ask an employee to visit an on-site nurse for a minor blister on a finger for evaluation. In most cases the employee will voluntarily ask the nurse for a ‘bandaid’ to cover the blister. Again, a supervisor can provide this same care.

“A supervisor may ask an employee to visit the nurse because the employee had a piece of dust in the eye that was rinsed out and the supervisor just want to double ensure the debris is gone and the employees’ eye is fine or if a visit to the clinic would be warranted. If all is well, its just a check, if not it’s a claim. The ‘AND’ supports the need for a Form 3283, if a clinic visit is needed or if the employee wants further treatment at the clinic.

“In discussing these types of absolute very minimal first aid activities with on-site nurses, it is clear that these situations play out with regular routine. There nurses understand the difference between a need for a warmup exercise and a need for refer to a clinic for treatment. They understand the difference of something that may need a claim rather than a simple bandage. They understand that the employer shall not direct care, but many times the employee will simply ask the nurse to have a minor scrape looked and for the right bandage. In the ‘or’ structure, every time an employee was sent to see an onsite nurse, the nurse would have to give the Form 3283, and then have some form of documentation to prove the form was given and then create a tracking system. This should not be warranted in so many of the cases as noted above.
…

“The word ‘and’ after paragraph (1) (C) (A) makes this issue so much more reasonable and manageable. The apparent goal of what these changes are attempting to do are reasonable make sense when ‘and’ is used, but not so with ‘or.’ As well, asking an evaluation for a minor soreness while developing technique, is this defined as a work injury or just a course of new movements that any human would experience? If ‘or’ is used then there is a burden for no apparent reason.”

Exhibit 3
“The proposed change would require an employer to provide a worker with Form 3283 when the worker files a claim and is evaluated by an onsite provider to assess the nature and extent of the worker’s injury. As written, an employer would not have to provide Form 3283 to a worker who filed a claim for workers’ compensation benefits but was not evaluated by an onsite provider. SAIF’s understanding at the time of the advisory meeting was to add another situation in which the employer is required to provide Form 3283 to a worker. SAIF suggests WCD amend the rule by replacing ‘and’ with ‘or’ in OAR 426-060-0010(1)(c)(A).”

Response:

Thank you for your testimony.

The division agrees that using “and” between OAR 436-060-0010(c)(A) and (B) could be interpreted as meaning the Form 3283, “A Guide for Workers Recently Hurt on the Job” would only be provided if the worker filed a claim and was evaluated on-site. This was not our intent. The division's intent was to require employers to provide the form any time the nature or extent of the injury is evaluated at an on-site medical service facility, in addition to any time the worker files a claim. We have revised the rule to clarify this intent.

We also noted that other concerns were raised in the testimony regarding direction of care, and providing Form 3283 for minor injuries. The division agrees that if used inappropriately, an on-site evaluation may lead to direction of care. However, the division cannot prohibit an employer's use of an on-site facility to assess the nature or extent of a worker's injury. Employers may use these facilities under ORS 656.260(21)(b)(B). Additionally, during the rulemaking advisory committee meeting, while some stakeholders expressed concern about the use of an on-site medical facility, others noted that having on-site medical care can be beneficial. The division is adding a requirement to provide Form 3283 when the worker is evaluated at an on-site medical service facility to ensure workers are informed of their rights without creating barriers for workers who voluntarily choose to use an on-site facility. As noted in the January 25, 2024 rules advisory committee meeting, there is already a provision for assessing a penalty for direction of care. Direction of care issues should be reported to the division, so that division staff can investigate further.

Regarding minor injuries, the division is aware there are circumstances where a worker is evaluated for minor injuries that only require first aid. However, in some cases, minor injuries become worse the next day or over the following weeks. If an employer continues to direct a worker's care after an on-site evaluation, and the worker is not aware of their rights, it can cause delay in the worker filing the claim and seeking medical treatment. Providing the worker Form 3283 only when a claim is filed or the injury requires more than first aid will not ensure workers whose injuries worsen over time receive information about their rights. Even if the worker ultimately never files a claim, the division believes that the worker should be informed of their rights before they need to exercise them, rather than after the fact.

The division recognizes that the revised rule imposes an additional requirement on employers. Employers will be responsible for determining how they will comply with this requirement, and if a complaint is raised, employers may need to show how they have complied with the rule. However, the rule does not impose specific recordkeeping requirements. Employers have flexibility in how they adjust their business practices and procedures to comply with the rule.

Testimony: OAR 436-060-0010(1)(c)(B) ***Exhibit 3***

"…, OAR 436-060-0010(1)(c)(B) refers to an evaluation by an on-site provider. It is unclear who may qualify as an on-site provider as the term is undefined and ambiguous. This may lead to confusion by employers as to whether they are required to provide Form 3283 if a worker is evaluated by an individual who is not a licensed medical provider such as an employee with basic first aid/CPR training. SAIF suggests clarifying the rule by changing on-site provider to on-site licensed medical provider.

"OAR 436-060-0010(1)(c)(B) also requires the worker to inform the employer that the worker was injured while working in addition to an evaluation by an onsite provider. SAIF suggests modifying the language to be consistent with other rules that address the employer's duties when they have notice or knowledge of a work injury. SAIF proposes the following language:

> 'The worker is evaluated by an onsite licensed medical provider to assess the nature or extent of a work injury and the employer has notice or knowledge of a work injury.'"

Response:

Thank you for your testimony.

The division agrees that referring to "on-site provider" is ambiguous. We did not incorporate the exact language suggested, but clarified rule language to "on-site medical service facility," consistent with ORS 656.260(21)(b)(B). We also incorporated the suggested language of "notice or knowledge." Even if the employer does not specifically require the worker to use the on-site medical service facility, we believe it is important the worker is provided Form 3283 when the employer has notice or knowledge of a work injury. This will ensure more workers are informed of their rights.

Testimony: OAR 436-060-0150(4)(b) ***Exhibit 3***

"As written, SAIF understands that any 'written documentation' of the worker's payroll schedule would satisfy this requirement including documentation of the payroll schedule by email, payroll records, and/or memorializing a conversation with the employer regarding the payroll schedule. Flexibility in what is required as 'written documentation' would allow insurers to better support policyholders who may need additional assistance in obtaining and providing their payroll records. In addition, if there is a delay in receiving the payroll records, SAIF prefers to issue time loss payments on the employer's payroll schedule from the outset rather than change the payment schedule once the payroll records are received. This would ensure a consistent pay schedule for workers and the insurer and avoid confusion due to changes in the time loss payment schedule."

Response:

Thank you for your testimony.

SAIF's understanding of any "written documentation" is correct. The proposed rule does not prescribe a specific written format for documenting the worker's payroll schedule.

The division recognizes that paying on the employer's payroll schedule from the outset would help avoid confusion. However, the division cannot change the timeframe for the first payment of temporary disability to match the employer's payroll schedule. ORS 656.262(4)(a) allows for alternative payment schedules, but only in regards to payments that occur after the first payment of temporary disability. To comply with ORS 656.262(4)(a), the first payment of temporary disability must be paid no later the 14th day after the subject employer has notice or knowledge of the claim and of the worker's disability, if the attending physician authorizes the payment of temporary disability compensation. Under revised OAR 436-060-0150, only the subsequent payments may be issued on the employer's payroll schedule.

Testimony: OAR 436-060-0155(4) ***Exhibit 1.a.***

"Um, it seems like they are changing the language to become uh… from mandatory transferring of jurisdiction from the director to the W... er, to the to the Workers Compensation Board and changing, you know, some 'will refer' to 'may transfer' using what is understood from a legal perspective to be discretionary language and jurisdiction is of course not a discretionary thing. "There's nothing in the statutes that allow either the board or the director to assume or deny jurisdiction based on its discretion.

"The statutory requirements are the statutory requirements, and if those are met, then jurisdiction lies either with the director or the board.

"So, I would request that the WCD take a look at that language and make a decision on what criteria it wants to apply in interpreting the statute to transfer jurisdiction either from the board or to the board, um but it cannot be up to the discretion of either the board or the director.

"It has to be in compliance with the facts as they are and under the statutory requirements as they are, and that's all the comments I have on that."

Response:

Thank you for your testimony.

As noted above, the division is revising rule language in OAR 436-060-0155(4) regarding mandatory transfer of penalty issues to the Workers' Compensation Board.

Though ORS 656.262(11) provides when the director has exclusive jurisdiction, it does not impose any requirements on when precisely an issue will be transferred to the Board. The law does not provide that the division loses jurisdiction if there are other issues at the Board, or that the division does not have discretion to determine when to transfer a request to the Board. Revising the rule to be discretionary, rather than mandatory, ensures the rule is not stricter than ORS 656.262(11)(a).

Although the statute is silent in regards to when issues should be transferred, the revised rule reflects factors the division will consider to provide some insight as to what factors will inform the determination that an issue should be transferred. Creating a rule that only allows or requires transfer of the penalty issue in specific circumstances would not allow the division to consider whether transfer is appropriate on a case-by-case basis.

Testimony: OAR 436-060-0180(7) ***Exhibit 3***

"SAIF urges WCD to reconsider the reduction of the time period for an insurer to provide written clarification to the director regarding the status of a claim or intent of a denial. Due to varying complexity of the claim and, at times, the limited information available to the insurer, the current rule provides a reasonable time period for insurers to respond. During the advisory meeting, there were cases noted where the insurer's response time was greater than the 14 day average.

Reducing the response period to align with the average, removes the insurer's flexibility to timely respond in complicated cases where the insurer requires more than 14 days to gather additional information and respond to the request."

Response:

Thank you for your testimony.

We carefully considered your comments, however, upon review, the division decided to retain the proposed change to reduce the timeframe from 21 days to 14 days. The division understands the concern about complex claims causing delays in responding. However, when a paying agent designation is requested, the worker is likely waiting to receive benefits and may not receive any benefits until a paying agent is designated. Having a timeframe that is longer than the average response time builds in an unnecessary delay in the process. The division is changing the response time to ensure that workers receive benefits as expeditiously as possible while the responsibility dispute is being resolved.

Dated this 4th day of June, 2024.