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

In the Matter of the Amendment of OAR: 436-001, Procedural Rules, Attorney Fees, and General Provisions, and 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 February 2020. On Feb. 18, 2020, a public rulemaking hearing was held as announced at 9 a.m. in Room B of the Labor & Industries Building, 350 Winter Street NE, Salem, Oregon. Fred Bruyns, from the Workers' Compensation Division, was the hearing officer. The record was held open for written comment through Feb. 21, 2020.

Testimony list:

Exhibit	Testifying
1	Hearing transcript: No testimony on OAR 436-001 or 436-060 at the hearing
2	Jaye Fraser, J. D., Assistant General Counsel, SAIF Corporation

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Testimony: OAR 436-060-0010(1)(a) ***Exhibit 2***

[This subsection] "States that an employer must provide the worker an 801 form immediately after receiving notice or knowledge of a potential compensable injury. The 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 former version of the rule was consistent with the statute. To ensure consistency with the statute and employer compliance, SAIF suggests that the director restore the original language."

Response:

Thank you for your testimony. The division reviewed ORS 656.265(6) and does not identify a conflict. More specifically, the proposed rule change modifies an "and" to an "or" by stating that the employer must provide Form 801 to the worker immediately upon request by the worker or worker's attorney under ORS 656.265(6) *or* upon receiving notice or knowledge of an accident that may involve a compensable injury under ORS 656.262(3)(a). The division believes an "or" is appropriate for the following reasons:

According to ORS 656.265(6), the forms promulgated and prescribed by the director to report an injury (i.e. the Form 801) must be supplied upon request of the injured worker or some other person on behalf of the worker. The statute does not require that the employer also have notice or

knowledge of an accident that may involve a compensable injury before being required to provide the form, but one could argue the use of "and" in the former rule created such a requirement.

In looking at the language in ORS 656.265(6), it is also notable that the statute does not require the form *only* be provided upon request by the worker or their representative. The division believes it is also appropriate for employers to provide the Form 801 when they are aware of an accident that may involve a compensable injury. These employers must already provide details of the accident to the insurer under ORS 656.262(3)(a). These details include information that would likely be obtained from the worker and the Form 801, including the date, time, cause and nature of the accident and injuries. In addition, many workers may not be aware of the existence of the Form 801 and thus, they may not know to ask for the form. Requiring employers to provide the form to the worker when they are aware of an accident that may involve a compensable injury prevents a worker from needing to know about the existence of the form. Further, requiring employers to provide the form when they are aware of an accident that may involve a compensable injury is consistent with the policies outlined in ORS 656.012, including providing a fair and just administrative system for the delivery of benefits to injured workers.

Testimony: OAR 436-060-0018(6)(a)(C) ***Exhibit 2***

"SAIF suggests that this proposed rule be simplified and align with ORS 656.005(7)(c), which defines a 'disabling compensable injury'. SAIF suggests that the notice in subsection (6)(a)(C) simply state:

> Notice to worker: Your claim has been reclassified to nondisabling. Generally this means your insurer concluded you are not entitled to temporary disability benefits and there is no reasonable expectation that you will have permanent impairment.
>
> If you think there is a mistake in the classification of your claim as nondisabling, contact the insurer within one year of the date the insurer first accepted your claim and request reclassification.
>
> For assistance, you may call the Workers' Compensation Division at 503-947-7816, or the Ombudsman for Injured Worker4s at 503-378-3351 or 800-9271271 (toll-free).

"SAIF removed the instructions to request review when an insurer refuses to reclassify the claim to avoid confusion as the worker must first request reclassification of their claim. Once reclassification is request and an insurer refuses to reclassify the claim, the refusal notice includes the appeal instructions. OAR 436-060-0018(3)(b)(B). - 0018(7)(a) also refers to 60 days from the date of the notice as the time period to request review. Restating the time for a worker to appeal exists within the rules and providing that information to injured workers is potentially confusing."

Response:
Thank you for your testimony. We appreciate the alternative language offered, but decline to adopt it for the following reasons:

The notice first advises the worker that their claim was reclassified to nondisabling. The testimony above proposes altering the sentence which follows in the notice. The proposed language that was suggested to be modified states:

> Generally, this means your insurer concluded no disability payments are due and all of the following are true:
>
> > You were able to return to work at full wages on or before the fourth calendar day after leaving work or losing wages as a result of your injury.
> >
> > You did not lose time or wages from work as a result of your injury on or after that fourth calendar day.
> >
> > It appears you will not have any permanent disability as a result of your injury.

This language comes from the Form 3058, which workers receive when their claim is first accepted. If a worker's claim is initially accepted as disabling, they have no reason to pay attention to the statement in the Form 3058 describing nondisabling claims. But, the division believes it is appropriate to reiterate this information to a worker who has a disabling claim reclassified to nondisabling so they may better understand why their claim may have been reclassified, and whether to request reclassification.

The division also believes the longer explanation is helpful, as it further describes what it means to not be entitled to temporary disability and to not have a reasonable expectation to permanent impairment.

The testimony above also proposes deleting the following statement in the notice:

> If you request reclassification, the insurer must complete its review and send you its decision within 14 days of receiving your request. If you disagree with the insurer's decision, you have the right, within 60 days of the date of the insurer's notice, to request that the Workers' Compensation Division review your claim to determine if it was correctly classified. If the insurer does not respond to your request for reclassification within 14 days of receiving your request, you may ask the Workers' Compensation Division to review your claim as though the insurer refused to reclassify your claim.

If the worker's claim is classified as nondisabling at the time of the Initial Notice of Acceptance, a worker would likely review this information in the Form 3058. A worker whose claim is initially classified as disabling, then reclassified to nondisabling, may not have taken notice of this language, as it would not have applied to them when the Form 3058 was initially received. It seems appropriate to again articulate the process when it matters to the worker who is affected by this notice (i.e. for workers who have their claim reclassified from disabling to nondisabling).

Further, this language includes the process for appeal if the insurer does not respond to the request for reclassification within 14 days. If the division were to eliminate this information, an unrepresented worker may not know about our administrative rules, and they could be unaware of their rights.

Testimony: OAR 436-060-0025(8) ***Exhibit 2***

"The proposed language refines the process for a worker to dispute the average weekly wage calculation; however, the rule does not require a worker to first contact an insurer regarding a wage dispute prior to requesting a hearing. SAIF recommends that the informal process set forth by rule should be a required step before a worker requests a hearing regarding a wage dispute. One objective of the workers' compensation system is to reduce litigation and eliminate the adversarial nature of the compensation proceedings to the greatest extent practicable. ORS 656.012(2)(b). Giving the parties an opportunity to resolve disputes prior to a formal process meets this statutory objective.

"In addition, the director 'by rule, may prescribe methods for establishing the worker's weekly wage' for workers who are not regularly employed, have no remuneration, or 'whose remuneration is not based solely upon daily or weekly wages'. ORS 656.210(2)(e). The director is authorized to '[p]rescribe procedural rules for and conduct hearings, investigations and other proceedings pursuant to' ORS chapter 656 'regarding all matters other than those specifically allocated to the board or the Hearings Division.' The director is charged with 'the duties of administration, regulation and enforcement of' ORS chapter 656 and '[t]o that end,' is authorized to '[m]ake and declare all rules and issue orders which are reasonably required in the performance of the director's duties.' Taken together, the director has the authority to require the parties to engage in informal dispute resolution to resolves wage disputes prior to a worker requesting a hearing.

"SAIF proposes the following:

> (8) If the worker disputes the wage used to calculate the rate of compensation, the worker must, before requesting a hearing, request that the insurer review its records and mathematical calculations, and, if necessary, contact the employer to confirm the correct wages. Within 14 days of its receipt of the claimant's request, the insurer must provide the worker with the results of its review and, if the wage was corrected, provide the worker with the new calculation. If the worker does not then agree with the wage calculated by the insurer, the worker may request a hearing under OAR 436-060-0008."

Response:

Thank you for your testimony. The division declines to adopt changes that would require a worker to first contact an insurer regarding a wage dispute prior to requesting a hearing for the following reasons:

An insurer is in charge of calculating the worker's average weekly wage under the rules. Ideally, the insurer's calculation will be accurate, allowing the worker to obtain accurate benefits starting at the beginning of their claim. If the calculation is not accurate, the worker may experience a delay in benefits, and requiring the worker to first approach the insurer about their error before going to hearing may result in further delay.

In addition, the proposed rule changes still allow for resolution of the dispute prior to hearing. The parties may agree on a corrected wage, and either a stipulated agreement or withdrawal of the hearing request may occur before the hearing date.

Testimony: OAR 436-060-0147(1) ***Exhibit 2***

"The proposed rule states that a worker is entitled to a WRME 'if the evidence at the time of the director's order demonstrates' the following criteria. This proposed change is inconsistent with ORS 656.325(1)(e), which entitles a worker to a WRME when the attending physician or nurse practitioner does not concur with the IME report. The proposed change could be interpreted to mean that the worker remains entitled to a WRME even when an attending physician concurs with the IME report after the director's order, which would violate ORS 656.325(1)(e). SAIF proposes the director remove the proposed change."

Response:

Thank you for your testimony. The division believes ORS 656.325(1)(e) describes when the worker may make the *request* for a worker requested medical examination (WRME). Certain criteria is needed to file the request and then the director issues an order determining whether a worker is eligible. That order can then be appealed to the Workers' Compensation Board for a hearing.

The issue is whether the division's rule can limit the evidence about entitlement to a WRME to the evidence at the time of the director's order. In further analyzing this testimony, it appears it is reasonable to interpret the "does not concur" statement in ORS 656.325(1)(e) in one of two ways: either that the attending physician (AP) or authorized nurse practitioner (ANP) "does not concur" at the time the request for the WRME is filed, or that the AP or ANP "does not concur," which does not result in an interpretation with an ending time limitation. As a result, the division has removed the proposed phrase in the WRME rule that would have limited the evidence to the evidence at the time of the director's order.

Testimony: OAR 436-060-0155(3) ***Exhibit 2***

"The proposed rules reduces the time period for the insurer to respond to WCD explaining a reason for a delay, to provide additional information or documentation to the director from 21 days to 14 days. While 14 days may be sufficient in most situations, for larger or more complex claims where a large volume of documentation and research is necessary, 14 days may not be sufficient time to respond. SAIF requests WCD reconsider this proposed change."

Response:

Thank you for your testimony. We reconsidered the proposed change and continue to stand by our decision to modify the timeframe from 21 days to 14 days. Although the division understands your concerns about complex or voluminous claims causing delays in responding, the issues that are addressed with this rule are very specific to a certain date of service or payment. Changing the response time to 14 days will allow the division to complete our reviews more efficiently allowing for a more swift resolution to these disputes. Flexibility on the timeframe is provided on more complex claims when insurers timely communicate their need for additional time.

Dated this 13th day of March, 2020.

Exhibit
"1"

**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: 436-001, Procedural Rules, Attorney Fees, and General Provisions, 436-009, Oregon Medical Fee and Payment, and 436-060, Claims Administration	)))))	TRANSCRIPT OF TESTIMONY

The proposed amendment to the rules was announced in the Secretary of State's Oregon Bulletin dated February 2020. On Feb. 18, 2020, a public rulemaking hearing was held as announced at 9 a.m., in Room B of the Labor & Industries Building, 350 Winter Street NE, Salem, Oregon. Fred Bruyns from the Workers' Compensation Division was the hearing officer. The record will be held open for written comment through Feb. 21, 2019.

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TRANSCRIPT OF PROCEEDINGS

Fred Bruyns:

So, good morning 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 is 9 a.m. on Tuesday, February 18, 2020. We are in Room B 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 001, Procedural Rules, Attorney Fees, and General Provisions,
- Division 009, Oregon Medical Fee and Payment Rules, and
- Division 060, Claims Administration.

The department has summarized the proposed rule changes and prepared estimates of fiscal and economic impacts in the notices of proposed rulemaking. These notices and proposed rules with marked changes are on the table by the entrance.

The Workers' Compensation Division: Filed the notices of proposed rulemaking with the Oregon Secretary of State on Jan. 22 and 24, 2020; mailed the notices to its postal and electronic mailing lists; notified Oregon legislators as required by ORS chapter 183; and posted public notice and the proposed rules to its website.

The Oregon Secretary of State published the hearing notices in its Oregon Bulletin dated February 2020.

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 Feb. 21, 2020, and will make no decisions until all of the testimony is considered.

We are ready to receive testimony. Would someone in the back of the room check to see – the last I checked there was no one signed up. Someone might have signed in for testimony. [No one signed the roster to testify.]

Okay. I know that on the telephone there is someone who is waiting to provide testimony for us, and I have already signed you in. Lisa Anne, could you go ahead and provide your testimony now?

Lisa Anne Bickford:

Absolutely. Good morning. This is Lisa Anne Bickford with Coventry, and my remarks will be very brief this morning. I just wanted to thank the division for the wonderful stakeholder input opportunities and the interactive discussions that the state has had and encouraged with all the various stakeholders with respect to the proposed telemedicine rules. Coventry appreciates that the division is recognizing this emerging technology has the ability to assist injured workers in Oregon, and I would just like to offer our support on behalf of Coventry for this proposal of the additional telemedicine rules as proposed in the draft. Thank you.

Fred Bruyns:

Thank you Lisa Anne. We were having some difficulty with the audio. However, I could understand all of your testimony, and I will commit it to a transcript, which should be available later today and posted to our website. So, for the quality of the audio I apologize. I'm not sure what gave rise to that, but again, I understood it all we will commit it to a transcript shortly. So, thank you very much for your testimony.

Lisa Anne:

Great – thank you.

Fred Bruyns:

Is there anyone else on the telephone who would like to testify this morning? Is there anyone here present who would like to testify this morning? [No response.]

It is our policy to remain available for testimony for a minimum of one-half hour. With our new training calendar system we have to provide both a start time and an end time, so this one says that the end time is 10 a.m.. So, I will remain here until 10 a.m. You are all welcome to remain if you would like, however, you're not required to and, again, a transcript of today's proceedings will be available, probably by the end of the day on our website.

So, I want to thank you all for joining us, and I want to remind you again the record remains open for written testimony through and including Feb. 21, 2020. You may submit testimony in any written form. I encourage you to submit your testimony by email or as attachments to email. However, you may also use fax, USPS mail, courier, or you may hand deliver testimony to the Workers' Compensation Division Central Reception on the second floor of this building. On the table by the entrance are business cards that include my contact information. I will acknowledge all testimony received.

This hearing is recessed at: 9:05 a.m.

This hearing is resumed at: 9:31 a.m.

Is there anyone here who would like to testify or anyone on the telephone who would like to testify?

Hearing no one, this hearing is closed – adjourned. The time now is still 9:31.

Thank you for coming!

Transcribed from a digital audio recording by Fred Bruyns, Feb. 18, 2020.

Exhibit "2"

saif Work. Life. Oregon.

February 21, 2020

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

RE: SAIF Corporation testimony for proposed changes to OAR 436-060

Dear Fred:

SAIF Corporation (SAIF) has considered WCD's proposed amendments to OAR 436-060. SAIF, as always, appreciates the opportunity to provide input on the proposed rule changes and supports WCD's effort to clarify and improve these rules. SAIF hopes the division will consider the following comments before finalizing the revised rules.

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 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 former version of the rule was consistent with the statute. To ensure consistency with the statute and employer compliance, SAIF suggests that the director restore the original language.

OAR 436-060-0018(6)(a)(C): SAIF suggests that this proposed rule be simplified and align with ORS 656.005(7)(c), which defines a "disabling compensable injury". SAIF suggests that the notice in subsection (6)(a)(C) simply state:

> "Notice to worker: Your claim has been reclassified to nondisabling. Generally this means your insurer concluded you are not entitled to temporary disability benefits and there is no reasonable expectation that you will have permanent impairment.
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SAIF removed the instructions to request review when an insurer refuses to reclassify the claim to avoid confusion as the worker must first request reclassification of their

claim. Once reclassification is request and an insurer refuses to reclassify the claim, the refusal notice includes the appeal instructions. OAR 436-060-0018(3)(b)(B). -0018(7)(a) also refers to 60 days from the date of the notice as the time period to request review. Restating the time for a worker to appeal exists within the rules and providing that information to injured workers is potentially confusing.

OAR 436-060-0025(8): The proposed language refines the process for a worker to dispute the average weekly wage calculation; however, the rule does not require a worker to first contact an insurer regarding a wage dispute prior to requesting a hearing. SAIF recommends that the informal process set forth by rule should be a required step before a worker requests a hearing regarding a wage dispute. One objective of the workers' compensation system is to reduce litigation and eliminate the adversarial nature of the compensation proceedings to the greatest extent practicable. ORS 656.012(2)(b). Giving the parties an opportunity to resolve disputes prior to a formal process meets this statutory objective.

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SAIF proposes the following:

> (8) If the worker disputes the wage used to calculate the rate of compensation, the worker must, before requesting a hearing, request that the insurer review its records and mathematical calculations, and, if necessary, contact the employer to confirm the correct wages. Within 14 days of its receipt of the claimant's request, the insurer must provide the worker with the results of its review and, if the wage was corrected, provide the worker with the new calculation. If the worker does not then agree with the wage calculated by the insurer, the worker may request a hearing under OAR 436-060-0008.

OAR 436-060-0147(1): The proposed rule states that a worker is entitled to a WRME "if the evidence at the time of the director's order demonstrates" the following criteria. This proposed change is inconsistent with ORS 656.325(1)(e), which entitles a worker to a WRME when the attending physician or nurse practitioner does not concur with the IME report. The proposed change could be interpreted to mean that the worker remains entitled to a WRME even when an attending physician concurs with the IME report after the director's order, which would violate ORS 656.325(1)(e).SAIF proposes the director remove the proposed change.

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documentation and research is necessary, 14 days may not be sufficient time to respond. SAIF requests WCD reconsider this proposed change.

SAIF again thanks the division for the opportunity to provide feedback on these proposed rules and is happy to answer any questions you might have.

Sincerely,

Jaye Caroline Fraser, J. D., Assistant General Counsel
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Salem, Oregon 97312
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