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

In the Matter of the Amendment of OAR: 436-010, Medical Services 436-030, Claim Closure and Reconsideration 436-035, Disability Rating Standards	))) 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.

The proposed amendment to the rules was announced in the Secretary of State's *Oregon Bulletin* dated July 1, 2017. On July 25, 2017, a public rulemaking hearing was held as announced at 9 a.m. in Room F 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 July 31, 2017.

No one testified at the public rulemaking hearing. A record of the hearing is recorded below as exhibit 3. Written testimony is listed below as exhibits 1 and 2

Testimony list:

Exhibit	Testifying
1	Julia Hier, Workers' Compensation Division
2	Julene M. Quinn LLC
3	Hearing record

Testimony: OAR 436-030-0035 ***Exhibit 1***

"Today it was identified that the temporary rules and proposed permanent rules have changed OAR 436-030-0035(1)(a) to reference "direct medical sequelae" rather than the former reference to "direct medical sequela." Similar language is used in section (b) through (d) of the rule, but the language was not changed to the plural version in these sections. **To correct the grammatical error and to maintain consistency throughout the rules, it is recommended these sections also be changed to reference "direct medical sequelae" rather than the former reference to "direct medical sequela.**" * * *"

Response: The division agrees.

Testimony: OAR 436-010, 436-030, 436-035 ***Exhibit 2***

"I * * * have some concerns about the overbreadth of the reading and interpretation of Brown v. SAIF, 361 Or 241 (2017). The case addressed the definition of "otherwise compensable injury" in the context of a "ceases" denial. The full interpretation of the case indicates that the court considered, not just the definition of "compensable injury," but the statutory authority to issue a "ceases" denial after the claim is accepted. Nothing further was put in front of the court. To read that all benefits for the "compensable injury" are limited to accepted conditions is a reading beyond the issue in the case and the complete analysis of the case.

"* * * to read the definition of "compensable injury" for purposes of providing medical services as limited to accepted conditions is contrary to the express language of Brown."

Response: The division appreciates the comments provided but the division continues to stand by its proposed rule changes, except as outlined elsewhere in this document. Notably, after the Oregon Court of Appeals issued its decision in *Brown v. SAIF*, the division proceeded forward with numerous changes to its rules to create consistency between the rules and its interpretation of the Court of Appeals decision in *Brown v. SAIF*. These rule changes extended beyond the definition of "otherwise compensable injury" in the context of a "ceases" denial. Since the Oregon Supreme Court overturned the Oregon Court of Appeals decision in *Brown v. SAIF*, the division believes it is appropriate to revisit and, as necessary, change the rules which were changed in response to that Court of Appeals decision.

Testimony: OAR 436-010-0290 ***Exhibit 2***

"* * * the palliative care rule proposed changes incorrectly limit services to the accepted condition. The Supreme Court in Brown was very clear that it was not deciding medical services at issue in the Carlos-Macias case. Brown, 361 Or at 282. Furthermore, the caselaw stands that the compensability standard for medical services as a material contributing cause is a standard far easier to prove that for compensable injuries. The case of Mize v. Comcast Corp-AT&T Broadband, 208 Or App 563 (2006), held that the phrase "caused in material part" is not the same as the material contributing cause standard for compensability. Id. at 567. The Court of Appeals has also held that an injured worker does not need to file a new condition claim in order to prove "a condition caused in material part" in order to prove medical services under ORS 656.245. SAIF v. Martinez, 219 Or App 182 (2008) (court expressly rejected SAIF's claim that in order to obtain medical services under ORS 656.245 that the worker had to, first, make a new/omitted medical condition claim).

"Thus, the change to the palliative care rules, or any other medical services rules, to be limited to "accepted condition" as opposed to "conditions caused in material part" is contrary to law."

Response: The division agrees to not change OAR 436-010-0290 at this time.

Testimony: OAR 436-035-0013(2)(a)(C) ***Exhibit 2***

"* * * the department should consider changing the example about "pregnancy" as a basis for apportionment. It is a rare example, and, frankly, demeaning. It may also be medically irrelevant. Not at all stages of pregnancy would a pregnancy impact range of motion or other disability. Further, apportionment is not appropriate, as the doctor is supposed to make findings of permanent disability. If range of motion is limited for a temporary condition, then either the doctor should not be opining the disability is permanent or the injured worker should have the option of obtaining a closing examination at a time when the other temporary condition has

subsided."

Response: The division may change rules in response to testimony only if the changes are within the scope of the proposed amendments. The use of pregnancy as an example has been present in the rules long before *Brown v. SAIF*, and was not added because of the Supreme Court's decision in *Brown v. SAIF*. Therefore, the division will not remove or amend the topic of the example at this time.

Dated this 7th day of September, 2017.

Exhibit
"1"

DEPARTMENT OF CONSUMER & BUSINESS SERVICES
Workers' Compensation Division

MEMORANDUM

June 20, 2017

To: Fred Bruyns

From: Julia Hier

Subject: OAR 436-030-0035 and *Brown* Rule Changes

Today it was identified that the temporary rules and proposed permanent rules have changed OAR 436-030-0035(1)(a) to reference "direct medical sequelae" rather than the former reference to "direct medical sequela." Similar language is used in section (b) through (d) of the rule, but the language was not changed to the plural version in these sections. **To correct the grammatical error and to maintain consistency throughout the rules, it is recommended these sections also be changed to reference "direct medical sequelae" rather than the former reference to "direct medical sequela."** Details are below. The highlights are only to draw the readers attention to the relevant parts of the rule.

Current Temporary Rule and Current Proposed Permanent Rule (without the recommended changes noted above)

(1) A worker is medically stationary in the following circumstances:
(a) **In initial injury claims.** In an initial injury claim, a worker is medically stationary when the attending physician, authorized nurse practitioner, or a preponderance of medical opinion declares that all accepted conditions, and direct medical sequelae of accepted conditions~~, and conditions directly resulting from the work injury~~ are either "medically stationary" or "medically stable" or when the provider uses other language meaning the same thing.
(b) **In new or omitted condition claims.** In a new or omitted condition claim, a worker is medically stationary when the attending physician, authorized nurse practitioner, or a preponderance of medical opinion declares that all accepted new or omitted conditions and direct medical sequela of accepted new or omitted conditions are either "medically stationary" or "medically stable" or when the provider uses other language meaning the same thing.
(c) **In aggravation claims.** In an aggravation claim, a worker is medically stationary when the attending physician, authorized nurse practitioner, or a preponderance of medical opinion declares that all accepted worsened conditions and direct medical

sequela of accepted worsened conditions are either "medically stationary" or "medically stable" or when the provider uses other language meaning the same thing.
(d) **In occupational disease claims.** In an occupational disease claim, a worker is medically stationary when the attending physician, authorized nurse practitioner, or a preponderance of medical opinion declares that all accepted occupational diseases and direct medical sequela of accepted occupational diseases are either "medically stationary" or "medically stable" or when the provider uses other language meaning the same thing.

Implementing Recommendation above for Proposed Permanent Rule

(1) A worker is medically stationary in the following circumstances:
(a) **In initial injury claims.** In an initial injury claim, a worker is medically stationary when the attending physician, authorized nurse practitioner, or a preponderance of medical opinion declares that all accepted conditions, and direct medical sequelae of accepted conditions~~, and conditions directly resulting from the work injury~~ are either "medically stationary" or "medically stable" or when the provider uses other language meaning the same thing.
(b) **In new or omitted condition claims.** In a new or omitted condition claim, a worker is medically stationary when the attending physician, authorized nurse practitioner, or a preponderance of medical opinion declares that all accepted new or omitted conditions and direct medical sequelae of accepted new or omitted conditions are either "medically stationary" or "medically stable" or when the provider uses other language meaning the same thing.
(c) **In aggravation claims.** In an aggravation claim, a worker is medically stationary when the attending physician, authorized nurse practitioner, or a preponderance of medical opinion declares that all accepted worsened conditions and direct medical sequelae of accepted worsened conditions are either "medically stationary" or "medically stable" or when the provider uses other language meaning the same thing.
(d) **In occupational disease claims.** In an occupational disease claim, a worker is medically stationary when the attending physician, authorized nurse practitioner, or a preponderance of medical opinion declares that all accepted occupational diseases and direct medical sequelae of accepted occupational diseases are either "medically stationary" or "medically stable" or when the provider uses other language meaning the same thing.

Exhibit "2"

July 24, 2017

Fred H. Bruyns, Policy Analyst/Rules Coordinator
DCBS/WCD
fred.h.bruyns@oregon.com

Re: Proposed Rules Hearing
July 25, 2017
OAR 436-010, Medical Services
OAR 436-030, Claims Closure and Reconsideration
OAR 436-035, Disability Rating Standards

Dear Mr. Bruyns,

I am not able to make the meeting tomorrow, but have some concerns about the overbreadth of the reading and interpretation of *Brown v. SAIF,* 361 Or 241 (2017). The case addressed the definition of "otherwise compensable injury" in the context of a "ceases" denial. The full interpretation of the case indicates that the court considered, not just the definition of "compensable injury," but the statutory authority to issue a "ceases" denial after the claim is accepted. Nothing further was put in front of the court. To read that all benefits for the "compensable injury" are limited to accepted conditions is a reading beyond the issue in the case and the complete analysis of the case.

Furthermore, to read the definition of "compensable injury" for purposes of providing medical services as limited to accepted conditions is contrary to the express language of *Brown.*

In particular, the palliative care rule proposed changes incorrectly limit services to the accepted condition. The Supreme Court in *Brown* was very clear that it was not deciding medical services at issue in the *Carlos-Macias* case. *Brown,* 361 Or at 282. Furthermore, the caselaw stands that the compensability standard for medical services as a material contributing cause is a standard far easier to prove that for compensable injuries. The case of *Mize v. Comcast Corp-AT&T Broadband,* 208 Or App 563 (2006), held that the phrase "caused in material part" is not the same as the material contributing cause standard for compensability. *Id.* at 567. The Court of Appeals has also held that an injured worker does not need to file a new condition claim in order to prove "a condition caused in material part" in order to prove medical services under ORS 656.245. *SAIF v. Martinez,* 219 Or App 182 (2008) (court expressly rejected SAIF's claim that in order to obtain medical services under ORS 656.245 that the worker had to, first, make a new/omitted medical condition claim).

Julene M Quinn LLC
Attorney at Law
julene.m.quinn@gmail.com
julenequinn.com
Mailing address: P.O. Box 820087, Portland, OR 97282-1087
f: 971.925.8611
971.259.8141

Thus, the change to the palliative care rules, or any other medical services rules, to be limited to "accepted condition" as opposed to "conditions caused in material part" is contrary to law.

Regarding amendments to ORS 436-035-00-13(2)(a)(C), the department should consider changing the example about "pregnancy" as a basis for apportionment. It is a rare example, and, frankly, demeaning. It may also be medically irrelevant. Not at all stages of pregnancy would a pregnancy impact range of motion or other disability. Further, apportionment is not appropriate, as the doctor is supposed to make findings of *permanent* disability. If range of motion is limited for a temporary condition, then either the doctor should not be opining the disability is permanent or the injured worker should have the option of obtaining a closing examination at a time when the other *temporary* condition has subsided.

My final objection is to *Brown* itself. Regardless of that being a precedential case, on behalf of my clients and injured workers, generally, I object to injured workers having to obtain benefits one condition and one Band-Aid at a time. I suspect that workers' compensation will hit even lower levels before some sense is brought back into this system. In the meantime, I exercise this opportunity to say how injured workers are being so badly treated by the law in this State.

Sincerely,

/s/ Julene M. Quinn

Julene M. Quinn, Attorney at Law

cc: Keith Semple, Attorney at Law
Lou Savage, Director, WCD
Jennifer Flood, Ombudsman for Injured Workers
Art Towers, OTLA

Exhibit "3"

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: 436-010, Medical Services 436-030, Claim Closure and Reconsideration 436-035, Disability Rating Standards	)))))	TRANSCRIPT OF TESTIMONY

The proposed amendment to the rules was announced in the Secretary of State's Oregon Bulletin dated July 1, 2017. On July 25, 2017, a public rulemaking hearing was held as announced at 9 a.m. in Room F 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 July 31, 2017.

INDEX OF WITNESSES

Witnesses

No testimony given

TRANSCRIPT OF PROCEEDINGS

Hearing officer:

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, July 25, 2017. We are in Room F of the Labor & Industries Building, 350 Winter St. NE, in Salem, Oregon. We are making an audio recording of today's hearing.

With me this morning is Julia Hier, a policy analyst with the Workers' Compensation Division.

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 & Business Services, Workers' Compensation Division proposes to amend chapter 436 of the Oregon Administrative Rules, specifically division 10, Medical Services, division 30, Claim Closure and Reconsideration, division 35, Disability Rating Standards.

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.

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 June 15, 2017; mailed the Notice and Statement 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 notice in its Oregon Bulletin dated July 1, 2017.

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 July 31, 2017, 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.

Would someone be so kind as to bring me, or let me know if anyone has signed in on the sign-in sheet in the back? No one. Okay, would anyone here like to testify this morning? Anyone on the telephone like to testify? Hearing no one, it's our policy to leave hearings open, or I should say, I'm going to recess but I'm going to be here for a half an hour, and we'll resume the hearing if need be.

But, just a reminder that we'll take, we will accept 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 are also welcome to use fax, USPS mail, courier, or you may hand deliver testimony to 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, and I will acknowledge all testimony received.

This hearing is recessed at 9:03 a.m.

Okay, this hearing is resumed at 9:30.

Is there anyone else who would like to testify, either here in person or on the telephone? Hearing no one, we'll go ahead and adjourn the hearing, but again, you may submit testimony in any written form, whether electronic or on paper. My business cards are at the back of the room. I would encourage you to testify if you like, and this hearing is adjourned. Thank you for coming.

Transcribed from a digital audio recording by Fred Bruyns, July 26, 2017.