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October 19, 2017

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Lou Savage - Administrator  
Workers' Compensation Division  
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PO Box 14480  
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RE: Workers' Compensation Division Proposed Changes to  
OAR 436-060-0147 – WRME Eligibility

Dear Mr. Savage,

On January 27, 2016, I wrote to you expressing frustration about the changes to OAR 436-060-0147. At that time, the WCD had recently amended the former rule, which previously required that a physician "disagreed" with an IME report, to requiring that the physician "did not concur" with the IME report. I assumed that the change was substantive, and that workers would be granted WRME requests unless the attending physician agreed with the IME; a physician's silence or failure to comment would no longer be a bar to a WRME examination. I was wrong.

On February 27, 2017, you wrote to me explaining that the change to OAR 436-060-0147(1) was substantively meaningless, and that the WCD changed the rule merely "to be more consistent with the language" of the statute. You defended the WCD's continued misinterpretation of the statutory phrase "does not concur" to mean that affirmative disagreement was required to be "documented" before a WRME would be granted.

After further litigation and after MLAC weighed in on the issue, the WCD has now proposed another change to OAR 436-060-0147(1). The WCD intends to change the phrase "**did** not concur" in subsection (1)(c) to the phrase "**does** not concur." I can only assume this is a substantive change, unlike the prior change from "disagreed" in January 2017.<sup>1</sup>

However, to make the record and intent of the change clear, I ask that you, in your capacity as the Workers' Compensation Division's Administrator, to confirm in writing—for the express purpose of developing rulemaking history—that the change of "did" to "does" is indeed substantive, and that it is intended to change the WCD's interpretation of the statutory phrase "does not concur,"

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<sup>1</sup> I understand that subsections (2)(b)(A) and (B) are also being amended, but for reasons that I will not get into here, they are not sufficient to effect a change in the WCD's interpretation of statutory phrase "does not concur."

Lou Savage - Administrator  
Workers' Compensation Division  
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as used in ORS 656.325(1)(e), to mean anything that a physician does or does not do with respect to an IME report *other than* expressly agree with the IME report.

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