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

In the Matter of the Amendment of OAR: 436-030, Claim Closure and Reconsideration; and 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. 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 January, 2020. On Jan. 16, 2020, a public rulemaking hearing was held as announced at 10 a.m. in the OSHA large training room, 1st floor, 16760 SW Upper Boones Ferry Rd, Portland, Oregon. Fred Bruyns, from the Workers' Compensation Division, acted as hearing officer. The record was held open for written comment through Jan. 22, 2020.

No one testified at the public rulemaking hearing, recorded below as Exhibit 1. The public submitted two written documents as testimony.

Testimony list:

Exhibit	Testifying
1	Transcript of rulemaking hearing of Jan. 16, 2020
2	Jaye Fraser, SAIF Corporation
3	Paloma Sparks, Oregon Business and Industry, and Kirsten Adams, Associated General Contractors – Oregon Columbia Chapter

Testimony: OAR 436-030 ***Exhibits 2 & 3***

Exh. 2 "The division proposed a stylistic change in OAR 436-030 by replacing the word 'must' with 'may'. SAIF urges the division to consider that this change may be viewed by the Workers' Compensation Board and court as substantive and lead to unintended interpretations of the rule. SAIF requests the division avoid this stylistic change to prevent any confusion regarding the interpretation of 'must' and 'may'. A simple dictionary review shows 'may' as 'expressing possibility,' whereas 'must' is defined 'be obliged to.' Alternatively, SAIF requests the division clearly identify the proposed change as stylistic and not substantive."

Exh. 3 "Another concern that we have is the proposed 'stylistic' change from 'must' to 'may.' These two words have fundamentally different meanings and might be interpreted by the Workers' Compensation Board and the courts to be substantive, rather than stylistic, changes. As such, we request that such changes not be made."

Response: Thank you for your testimony. The division will still make these proposed changes

for the following reasons: All of the changes from "must" to "may" are part of the phrase which previously read "must not." We view the phrase "may not" as a mandatory prohibition. This is consistent with ORS 174.100(5), which describes "may not" and "shall not" as equivalent expressions of an absolute prohibition in our statute. The phrase "may not" is used elsewhere within Division 030. As such, changing "must not" to "may not" is a stylistic change made for consistency in this division of rules.

Testimony: OAR 436-030-0020(1)(c) & (d) ***Exhibit 2***

"The proposed language changes the burden of proof from the worker to the insurer to satisfy the criteria for an administrative claim closure when the process for closure results from action or inaction taken by the worker. SAIF proposes removing the 'insurer has satisfied' language and instead state that 'the requirements for claim closure under OAR 436-030-0034 have been met.'"

Response: Thank you for your testimony. The division agrees the suggested language is more appropriate and thus, the rules have been modified to reflect your suggestion.

Testimony: OAR 436-030-0020(2)(b)(B) ***Exhibit 2***

"SAIF suggests rearranging the proposed language will improve clarity. SAIF proposes stating that 'The closing report must include a statement indicating (i) or (ii) of this section unless the worker has no permanent work restrictions and the provider identified in paragraph (A) of this rule already clearly established the following information:' "

Response: Thank you for your testimony. The division does not believe the rule needs revision to improve clarity and thus, the division declines to make this change.

Testimony: OAR 436-030-0035(5) ***Exhibits 2 & 3***

Exh. 2 "The proposed language removes the reference to a closing examination by another physician that was requested by the attending physician. It is not uncommon for an attending physician to refer a worker back to a specialist for a closing examination; for example, an attending physician may refer a worker back to the surgeon who performed a surgical procedure. The rule no longer discusses this situation. SAIF proposes keeping the reference to closing examinations that are performed by another physician at the AP's request."

Exh. 3 "…. the proposed changes to OAR 436-030-0035(5) might cause issues in certain situations where closing examinations might be performed by another physician. Leaving the past reference to this situation intact would ensure that there are not issues when this arises…."

Response: Thank you for your testimony. The division added in a sentence at the beginning of section (5) to make it clear that a request for concurrence or comment can still be sought in these situations. The sentence reads: "The insurer may request that the attending physician or authorized nurse practitioner concur with or comment on the closing examination when the attending physician or authorized nurse practitioner arranges or refers the worker for a closing examination with another physician."

Testimony: OAR 436-030-0155(1)(a) ***Exhibits 2 & 3***

Exh. 2 "The proposed language removes the division's requirement to date stamp all records received. Because a reconsideration order may be appealed and the record at hearing is limited to the records that were submitted prior to reconsideration the date stamp confirms the date the

document was received and whether it was timely submitted. ORS 656.268(8)(h); ORS 656.283(6). SAIF requests that the division maintain its requirement to date stamp all documents received as part of its reconsideration of the closure."

Exh. 3 "…. the removal of the time stamp requirement in OAR 436-030-0155(1)(a) is troublesome. It is important to know whether documents were submitted in a timely manner and the time stamp requirement makes this clear. We request that this requirement is maintained."

Response: Thank you for your testimony. The division has clarified the rule to explain that the record consists of all documents and material "documented as received by the director prior to the issuance of the Order on Reconsideration." The director is continuing to document receipt of materials, but that documentation may take place by way of a fax header, email header, date stamp, or by other means.

Testimony: OAR 436-030-0165(1)(f) ***Exhibit 2***

"The proposed rule clarifies that the insurer must pay costs related to a worker's attendance at an arbiter exam. The proposed language states: 'and an amount equivalent to the worker's net lost wages for the period during which for the worker is absent if the worker does not receive benefits under ORS 656.210(4) during the period of absence.' OAR 436-060-0095(3)(d)(G) requires insurers to pay costs related to a worker's attendance at an IME, The rules reads: 'A statement that an amount will be paid equivalent to net lost wages for the period during which *it is necessary* to be absent from work to attend the medical examination if benefits are not received under ORS 656.210(4) during the absence;' (emphasis added) For clarity SAIF suggests the division add the italicized language in OAR 436-060-0095(3)(d)(G) to avoid any confusion."

Response: Thank you for your testimony. The division has modified the rule to clarify that the costs may include an amount equivalent to the worker's net lost wages for the period during which it is necessary to be absent from work to attend the medical examination if the worker does not receive benefits under ORS 656.210(4) during the period of absence.

Testimony: OAR 436-035 ***Exhibit 3***

"…. While we understand that the *Caren* ruling necessitates rulemaking by the division, we feel that some of these rules go beyond the *Caren* ruling and legislative intent. These rules undermine the fundamental tenet of our workers' compensation system that employers are responsible for injuries or health conditions caused by the workplace. This interpretation means that employer and insurers must either issue immediate denials or must bear the cost of pre-existing conditions that have nothing to do with the workplace."

Response: Thank you for your testimony. The division has not identified any specific rules that are thought to extend beyond the Supreme Court's decision in *Caren* or legislative intent. As a result, the division declines to make additional modifications to the rules based on this testimony.

Testimony: OAR 436-035-0007(1)(b)(B)(i)(II) ***Exhibit 2***

"SAIF requests the division consider whether this subsection remains effective following the court's decision in *Caren v. Providence Health System Oregon*, 365 Or 466 (2019). In *Caren*, the court determined impairment may be apportioned when there is a qualified preexisting condition. The addition of (III) implements the court's reasoning. However, the court focused on whether the worker was aware of a preexisting limitation that would reduce their impairment award.

Subsection (II) potentially conflicts with the court's reasoning when there is a preexisting condition that impairs a worker's function."

Response: Thank you for your testimony. The division believes sub-subparagraph (II) of the rule is consistent with the Supreme Court's decision in *Caren*. The statute and the division 035 rules define pre-existing conditions. Workers will sometimes have conditions that pre-existed the injury, but those conditions do not qualify as a pre-existing condition under statute or rule. In those situations, the division believes the insurer remains responsible for the loss caused by that non-qualifying pre-existing condition, just as they would be responsible for a qualifying pre-existing condition if a combined condition had not been accepted and denied. The division finds this to be consistent with the Supreme Court's decision in *Caren*, where they found the legislature intended injured workers to be *fully* compensated for new impairment if it is due in material part to the compensable injury, except where an employer has made use of the statutory process for reducing liability after issuing a combined condition denial. The division therefore declines to remove sub-subparagraph (II) of the rule.

Testimony: OAR 436-035-0007(1)(b)(B)(i)(III) ***Exhibit 2***
"SAIF agrees with the proposed language and recommends the rule include a citation to ORS 656.005(24), which defines preexisting condition. This would add clarity to the rule."

Response: Thank you for your testimony. Preexisting conditions are defined in the division 035 rules. As a result, the division declines to make reference to the statute in this rule.

Testimony: OAR 436-035-0019(1) ***Exhibit 2***
"SAIF agrees with the proposed language and recommends the division include the alternative interpretation provided in its December 9, 2019 notice that 'the worker is only able to repetitively use the body part for less than one-third of a period of time.' This addition provides more clarity when determining whether the limitation is significant."

Response: Thank you for your testimony. The division declines to offer this alternative statement for the following reasons: Providing two statements about what it means to be significantly limited in the rule can cause confusion. In addition, the rules typically refer to the *loss* of use of function, whereas this proposed statement refers to what the worker is capable of doing. It is therefore inconsistent with other statements about disability.

Dated this 7th day of February, 2020.

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: 436-030, Claim Closure and Reconsideration; and 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 January of 2020. On Jan. 16, 2020, a public rulemaking hearing was held as announced at 10 a.m. in the OSHA large training room, 1st floor, 16760 SW Upper Boones Ferry Rd, Portland, Oregon. Fred Bruyns, from the Workers' Compensation Division, acted as hearing officer. The record will be held open for written comment through Jan. 22, 2020.

INDEX OF WITNESSES

No testimony

TRANSCRIPT OF PROCEEDINGS

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 10 a.m. on Thursday, January 16, 2020.

We are in the OSHA Conference Room, 16760 SW Upper Boones Ferry Rd, in Portland, 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." It's on the table by the entrance. If you plan to testify over the telephone, I will sign-in for you.

With me today is Julia Hier, a policy analyst with the Workers' Compensation Division with responsibilities for our subject rules today.

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

The department has summarized the proposed rule changes and prepared an estimate of fiscal and economic impacts in the notice of proposed rulemaking. This notice and proposed rules with marked changes are on the table by the entrance. If you are listening by telephone, we have those rules posted to the Workers' Compensation Division's website.

The Workers' Compensation Division filed the notice of proposed rulemaking with the Oregon Secretary of State on December 20, 2019; mailed the notice 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.

Transcript of public rulemaking hearing
Jan. 16, 2020

The Oregon Secretary of State published the hearing notice in its Oregon Bulletin dated January of 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 January the 22nd, 2020, and will make no decisions until all of the testimony is considered.

We are ready to receive testimony. Would anyone here like to testify this morning. [Pause] Is there anyone on the telephone who would like to testify? [Pause]

Hearing no one, it is our policy to leave the hearing open, or at least to remain available for testimony, for a minimum of one-half hour. So, we will remain here. If you choose to remain with us you're welcome to stay. Otherwise, I will just give you a reminder that 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 the Labor & Industries Building, in Salem, Oregon. On the table by the entrance are business cards that include agency contact information. We will acknowledge all testimony received.

The hearing is recessed at 10:04 a.m.

Welcome back. This hearing is resumed at10:30 a.m. Again, is there anyone who would like to testify, either here present or on the telephone? [Pause]

Okay. The time is now 10:31 a.m. Thank you for coming! This hearing is adjourned.

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Transcribed from a digital audio recording by Fred Bruyns, Jan. 16, 2020

Exhibit
"2"

saif Work. Life. Oregon.

January 22, 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 436-030 and -035

Dear Fred:

SAIF Corporation (SAIF) has considered WCD's revised recommendations to amend OAR 436-030 and -035 which provides the procedure for claim closure and rating permanent impairment. SAIF, as always, appreciates the opportunity to provide input on the proposed rules 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.

The division proposed a *stylistic* change in OAR 436-030 by replacing the word "must" with "may". SAIF urges the division to consider that this change may be viewed by the Workers' Compensation Board and court as substantive and lead to unintended interpretations of the rule. SAIF requests the division avoid this stylistic change to prevent any confusion regarding the interpretation of "must" and "may". A simple dictionary review shows "may" as "expressing possibility," whereas "must" is defined "be obliged to." Alternatively, SAIF requests the division clearly identify the proposed change as stylistic and not substantive.

OAR 436-030-0020(1)(c) & (d): The proposed language changes the burden of proof from the worker to the insurer to satisfy the criteria for an administrative claim closure when the process for closure results from action or inaction taken by the worker. SAIF proposes removing the "insurer has satisfied" language and instead state that "the requirements for claim closure under OAR 436-030-0034 have been met."

OAR 436-030-0020(2)(b)(B): SAIF suggests rearranging the proposed language will improve clarity. SAIF proposes stating that "The closing report must include a statement indicating (i) or (ii) of this section unless the worker has no permanent work restrictions and the provider identified in paragraph (A) of this rule already clearly established the following information:"

OAR 436-030-0035(5): The proposed language removes the reference to a closing examination by another physician that was requested by the attending physician. It is not uncommon for an attending physician to refer a worker back to a specialist for a closing examination; for example, an attending physician may refer a worker back to the surgeon who performed a surgical procedure. The rule no longer discusses this situation. SAIF proposes keeping the reference to closing examinations that are performed by another physician at the AP's request.

OAR 436-030-0165(1)(f): The proposed rule clarifies that the insurer must pay costs related to a worker's attendance at an arbiter exam. The proposed language states: "and an amount equivalent to the worker's net lost wages for the period during which for the worker is absent if the worker does not receive benefits under ORS 656.210(4) during the period of absence." OAR 436-060-0095(3)(d)(G) requires insurers to pay costs related to a worker's attendance at an IME, The rules reads: "A statement that an amount will be paid equivalent to net lost wages for the period during which *it is necessary* to be absent from work to attend the medical examination if benefits are not received under ORS 656.210(4) during the absence;" (emphasis added) For clarity SAIF suggests the division add the italicized language in OAR 436-060-0095(3)(d)(G) to avoid any confusion.

OAR 436-030-0155(1)(a): The proposed language removes the division's requirement to date stamp all records received. Because a reconsideration order may be appealed and the record at hearing is limited to the records that were submitted prior to reconsideration the date stamp confirms the date the document was received and whether it was timely submitted. ORS 656.268(8)(h); ORS 656.283(6). SAIF requests that the division maintain its requirement to date stamp all documents received as part of its reconsideration of the closure.

OAR 436-0035-0007(II): SAIF requests the division consider whether this subsection remains effective following the court's decision in *Caren v. Providence Health System Oregon*, 365 Or 466 (2019). In *Caren*, the court determined impairment may be apportioned when there is a qualified preexisting condition. The addition of (III) implements the court's reasoning. However, the court focused on whether the worker was aware of a preexisting limitation that would reduce their impairment award. Subsection (II) potentially conflicts with the court's reasoning when there is a preexisting condition that impairs a worker's function.

OAR 436-035-0007(III): SAIF agrees with the proposed language and recommends the rule include a citation to ORS 656.005(24), which defines preexisting condition. This would add clarity to the rule.

OAR 436-035-0019(1): SAIF agrees with the proposed language and recommends the division include the alternative interpretation provided in its December 9, 2019 notice that "the worker is only able to repetitively use the body part for less than one-third of a period of time." This addition provides more clarity when determining whether the limitation is significant.

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

Jaye Caroline Fraser, J. D., Assistant General Counsel
400 High Street SE
Salem, Oregon 97312
P: 503.373.8026 or 800.285.8525 ext. 8026
jayfra@saif.com

Exhibit "3"

January 22, 2020

Fred Bruyns, Rule Coordinator
Workers' Compensation Division
Department of Consumer and Business Services
350 Winter Street NE
Salem, Oregon 97309-0405

Re: Division 436 rulemaking

Dear Fred:

We are writing to you to express our concerns about the proposed rules amending 436-035. While we understand that the *Caren* ruling necessitates rulemaking by the division, we feel that some of these rules go beyond the *Caren* ruling and legislative intent. These rules undermine the fundamental tenet of our workers' compensation system that employers are responsible for injuries or health conditions caused by the workplace. This interpretation means that employer and insurers must either issue immediate denials or must bear the cost of pre-existing conditions that have nothing to do with the workplace.

Another concern that we have is the proposed "stylistic" change from "must" to "may." These two words have fundamentally different meanings and might be interpreted by the Workers' Compensation Board and the courts to be substantive, rather than stylistic, changes. As such, we request that such changes not be made.

We have two additional concerns with the proposed rules. First, the proposed changes to OAR 436-030-0035(5) might cause issues in certain situations where closing examinations might be performed by another physician. Leaving the past reference to this situation intact would ensure that there are not issues when this arises. Second, the removal of the time stamp requirement in OAR 436-030-0155(1)(a) is troublesome. It is important to know whether documents were submitted in a timely manner and the time stamp requirement makes this clear. We request that this requirement is maintained.

Thank you for your time and for the opportunity to offer comments.

Best Regards,

Paloma Sparks, Oregon Business and Industry
Kirsten Adams, Associated General Contractors – Oregon Columbia Chapter

AGC Oregon Columbia Chapter
ASSOCIATED GENERAL CONTRACTORS

OREGON BUSINESS & INDUSTRY OBI