



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

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