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

In the Matter of the Amendment of: OAR 436-060, 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 Dec. 1, 2020. On Jan. 5, 2021, a public rulemaking hearing was held as announced at 9 a.m. via teleconference from 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 Jan. 8, 2021.

Three people testified at the public rulemaking hearing, and the transcript of the hearing is recorded below as Exhibit 1. The public submitted three written documents as testimony.

Testimony list:

Exhibit	Testifying
1	Hearing transcript: a. Elaine Schooler, SAIF Corporation b. Kirsten Adams, Associated General Contractors c. Paloma Sparks, Oregon Business & Industry
2	Elaine Schooler, SAIF Corporation
3	Diana Winther and Kimberly Wood, Co-chairs, Management-Labor Advisory Committee
4	Kirsten Adams, Associated General Contractors, on behalf of business coalition

Testimony: OAR 436-060-0141

Exhibit 1a & 2 (quoted text is from 1a.) "…. These permanent rules are the result of temporary rule changes that were enacted following several months worth of meetings before the Management-Labor Advisory Committee, and involved participation from stakeholders from management and labor and resulted in a temporary rule that was intended to create a claim processing consistency that would ensure insurers are processing Covid-19 claims in a way that's based on a robust claim investigation that would include expert or medical opinions to determine the source of exposure when it was unclear prior to the issuance of a decision. And, compliance with that claim processing requirement was ensured through the creation of mandatory claim audits, and both management and labor stakeholders agreed that this was an important safeguard to ensure that these Covid-19 claims were processed similarly across the board. As a whole the

changes were applauded by all participants in that process. And, what we see now with the proposed permanent rule changes is a shift away from those critical and really foundational pieces of the temporary rule that the parties worked so hard to come to an agreement on. The proposed permanent rules would no longer ensure that robust claim investigation that includes the medical or expert opinion prior to issuing a decision, nor would it ensure that deviations in claim processing are identified early and then resolved timely through the mandatory audit process. SAIF urges the division to reconsider the proposed permanent rule changes and to go back to the changes that were promulgated through the temporary rules for those two critical elements. …."

Exhibit 1b "I'd like to echo what Elaine said and SAIF's comments. We think that the temporary rules better addressed the concerns that were brought forth in the extensive MLAC discussions around this issue. We think it's important to have the claims investigation with the expert opinion and then also to have the mandatory audit process. We think that keeping those elements in the temporary rule will better achieve the goals that these rules are looking to get at."

Exhibit 1c "We were also extensively involved in the MLAC discussions around this. We have some real concerns about the changes in the permanent rules from the temporary rules regarding investigation, and also audits, so I would echo the language around that Elaine and Kirsten both mentioned."

Exhibit 3 "…. MLAC has identified two areas of concern with the proposed final rule. The Department has added 436-060-0141(2)(b) which makes the medical/expert opinion permissive, rather than a requirement. The second concern involves the language proposed for audits. …

"MLAC understands the Department's desire to clarify that a medical/expert opinion should not be required for procedural denials. … However, we believe the Department has changed the language in a way that no longer requires a medical/expert opinion when the denial is based on other than procedural reasons. That was not the intent or recommendation of MLAC. The Department did add language under 436-060-0141(2) which addresses the issue regarding denials for procedural reasons. MLAC feels this additional language addresses the concerns identified during the Rulemaking Advisory Committee Meeting on October 28, 2020. We are unsure if the "may" in 436-060-0141(2)(b) is an oversight or whether the Department has another reason for its use of "may" instead of "shall". However, it was clear in the October 28th meeting that both labor and management stakeholders felt it was important to require the medical/expert opinion unless the denial was for non-medical or procedural reasons. It is our position that it must be required in order for this rule to have the effect MLAC, and its stakeholders, were seeking. MLAC respectfully requests the Department change 436-060-0141(2)(b) as follows:

> "(b) Investigate the source of the worker's exposure to COVID-19 or SARS-CoV-2, which shall ~~may~~ involve obtaining a medical or expert opinion, if, before a compensability denial is issued, the worker tests positive for COVID-19 or a medical service provider diagnoses a presumptive case of COVID-19, the insurer is aware of the test results or presumptive diagnosis, and the source of the exposure is unclear;

"…. It is not the intent of MLAC to limit the Department's auditing abilities for claims that are not related to COVID-19 or exposure to SARS-CoV-2. However, our request of the Department was to require audits related to COVID- 19 or exposure to SARS-CoV-2 for the duration of the pandemic, not just during the temporary rule's duration. …. Stakeholders of both management

and labor expressed similar concerns and asked the Department to reinstate the requirement of the audit. It is MLAC's intent to hold insurers accountable and for these audits to be a priority for the Department so issues are addressed appropriately and quickly. ….

"Labor representatives on the Committee also would like it noted for this record that they and worker representatives expressed a concern about the method by which medical or expert opinions may be obtained during the October 28th meeting, specifically opinions obtained exclusively through a record review. Considering the novel nature of this process, there was suggestion of requiring at least a tele-medicine examination, and the understanding that such a medical examination would trigger access to a WRME."

Exhibit 4 "… Those signed on to this letter strongly supported the adoption of the temporary administrative rule, on which this permanent rule is based. …. The proposed permanent rule shifts away from requiring insurers to obtain an expert or medical opinion as part of a reasonable investigation. To ensure that all work-related claims that should be accepted are accepted, there need to be more investigations that include an expert or medical opinion, not fewer. We are concerned that changing the denial criteria will result in fewer investigations, and therefore less control over problematic denials for workers who do have legitimate COVID-19 workers' compensation claims. In addition, the draft permanent rule gives discretion to the department about whether to investigate certain denials whereas the temporary rule required WCD to audit all COVID-19 claims. A required audit ensures that deviations from the processing requirements are identified quickly so that workers' claims are appropriately processed. We urge you to adopt the language of the temporary rule, instead of the proposed permanent rule language that has been released. …"

Response:

The division would like to thank stakeholders for providing testimony regarding the proposed rule, and for their participation throughout this process.

1. Medical/expert opinion.

The division has changed the language in the permanent rule to make obtaining a medical or expert opinion mandatory under the conditions specified in subsection (2)(b) (if the worker tests positive or has a presumptive diagnosis, the insurer is aware of the test results or presumptive diagnosis, and the source of the worker's exposure is unclear). The language that was in the proposed rule, providing that the claim investigation "may" involve obtaining a medical or expert opinion, was presented as an option at the Oct. 28, 2020, Rulemaking Advisory Committee meeting (Issue 2) to address, in part, concerns raised by some stakeholders regarding the worker's inability to obtain a worker-requested medical exam (WRME) if the medical/expert opinion is based on a record review rather than an in-person exam. The division's intent was to shift the focus of the rule requirement to investigating the source of the worker's exposure, rather than to obtaining a medical or expert opinion. However, based on the overwhelming testimony that a medical or expert opinion should be required as part of the claim investigation, the permanent rule makes it mandatory, under the conditions specified in the rule.

The division acknowledges the suggestion made at the Oct. 28, 2020, Rulemaking Advisory Committee meeting that the rule provide that a medical opinion could be based on a telemedicine

exam, with the understanding that a telemedicine exam would trigger the worker's access to a WRME if the claim is denied based on the report of that exam, and the other criteria are met. The division did consider this suggestion before filing the proposed rule, but was concerned about unintended consequences of adopting a different standard for medical exams in COVID-19 claims than in other types of claims.

2. Audits.

The division acknowledges that throughout the rulemaking process, stakeholders have made it clear that audits of denied COVID-19 claims should be mandatory. The division agrees that audits are essential to ensure that insurers are consistently conducting reasonable investigations before denying claims. However, the division must approach its audit function and the rule from its perspective as a regulatory agency. Being too specific in rule regarding when and what the division will audit can have significant and negative unintended consequences, especially if circumstances change in unanticipated ways. For example, the language in section (3) of the temporary rule was not sustainable long-term because it only subjected those companies that had reported five or more claims as of Oct. 1, 2020 – 12 specific companies – to audit.

The division commits to conducting further audits. Any insurer or self-insured employer that denies a claim for COVID-19 or exposure to SARS-CoV-2 is subject to audit. The details of when the division will conduct its next audit, and which insurers and claims will be audited, will be determined after the current audit is completed. What we learn from the current audit will guide the next audit; what we learn from the next audit will guide future audits.

The division commits to providing updates to the Management-Labor Advisory Committee (MLAC) regarding its audit activities for as long as the pandemic continues, and will notify the industry as soon as next steps are determined.

The division has changed the language in the permanent rule to make it clear that future audits are mandatory, without specifying details.

Dated this 21st day of January, 2021

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: 436-060, Claims Administration	))))	TRANSCRIPT OF TESTIMONY

The proposed amendment to the rules was announced in the Secretary of State's Oregon Bulletin dated Dec. 1, 2020. On Jan. 5, 2021, a public rulemaking hearing was held as announced at 9 a.m. via teleconference from 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 Jan. 8, 2021.

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TRANSCRIPT OF PROCEEDINGS

Fred Bruyns:

Good morning and welcome. This is a public rulemaking hearing.

The filing caption for this rulemaking is: Processing workers' compensation claims for COVID-19 or SARS-CoV-2 exposure.

My name is Fred Bruyns, and I'll be the presiding officer for the hearing. The time is 9 AM on Tuesday, Jan. 5, 2021. We are conducting this hearing by telephone from the Labor & Industries Building, 350 Winter St. NE, in Salem, Oregon. We are making an audio recording of today's hearing.

The Department of Consumer and Business Services, Workers' Compensation Division proposes to amend chapter 436 of the Oregon Administrative Rules, specifically division 60, Claims Administration, with the adoption of rule 141, "Claims for COVID-19 or Exposure to SARS-CoV-2." 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 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 Nov. 18, 2020; 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.

The Oregon Secretary of State published the hearing notice in its *Oregon Bulletin* dated Dec. 1, 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 Jan. 8, 2021, and will make no decisions until all of the testimony is considered.

We are ready to receive testimony, and I have one person recorded as wanting to testify this morning. Elaine Schooler, SAIF Corporation.

Elaine Schooler: Yes, good morning, and thank you Fred, and happy new year to you and everyone else on the phone participating in this rulemaking hearing. This is Elaine Schooler, testifying on behalf of SAIF Corporation, and we appreciate the opportunity to provide input on the division's proposed rule changes to OAR 436-060-0141. These permanent rules are the result of temporary rule changes that were enacted following several months worth of meetings before the Management-Labor Advisory Committee, and involved participation from stakeholders from management and labor and resulted in a temporary rule that was intended to create a claim processing consistency that would ensure insurers are processing Covid-19 claims in a way that's based on a robust claim investigation that would include expert or medical opinions to determine the source of exposure when it was unclear prior to the issuance of a decision. And, compliance with that claim processing requirement was ensured through the creation of mandatory claim audits, and both management and labor stakeholders agreed that this was an important safeguard to ensure that these Covid-19 claims were processed similarly across the board. As a whole the changes were applauded by all participants in that process. And, what we see now with the proposed permanent rule changes is a shift away from those critical and really foundational pieces of the temporary rule that the parties worked so hard to come to an agreement on. The proposed permanent rules would no longer ensure that robust claim investigation that includes the medical or expert opinion prior to issuing a decision, nor would it ensure that deviations in claim processing are identified early and then resolved timely through the mandatory audit process. SAIF urges the division to reconsider the proposed permanent rule changes and to go back to the changes that were promulgated through the temporary rules for those two critical elements. And, appreciate the opportunity to look at this and maintain that consistency that stakeholders agreed was necessary, as well as the compliance piece. I appreciate the opportunity to speak this morning, and thank you for the time.

Fred Bruyns: Thank you very much for your testimony, Elaine. Does anyone else wish to testify?

Kirsten Adams: This is Kirsten Adams with AGC. I'd like to testify.

Fred Bruyns: Certainly. Go ahead, Kirsten.

Kirsten Adams: Thank you so much for the opportunity. This is Kirsten Adams. I'm the public affairs counsel for Associated General Contractors. We represent commercial construction throughout the state. I'd like to echo what Elaine said and SAIF's comments. We think that the temporary rules better addressed the concerns that were brought forth in the extensive MLAC discussions around this issue. We think it's important to have the claims investigation with the expert opinion and then also to have the mandatory audit process. We think that keeping those elements in the temporary rule will better achieve the goals that these rules are looking to get at. So thank you so much for the opportunity.

Fred Bruyns: Thank you, Kirsten, for your testimony. Would anyone else like to testify at this time?

Paloma Sparks: Yah, this is Paloma Sparks from Oregon Business & Industry.

Fred Bruyns: Welcome, Paloma. Go ahead

Paloma Sparks: Thanks. Again, Paloma Sparks, Oregon Business & Industry. We are the state's largest and most comprehensive business association, representing over 1,600 businesses employing over 250,000 people. We were also extensively involved in the MLAC discussions around this. We have some real concerns about the changes in the permanent rules from the temporary rules regarding investigation, and also audits, so I would echo the language around that Elaine and Kirsten both mentioned.

Fred Bruyns:

Thank you, Paloma. Would anyone else like to testify at this time? Hearing no one, in a moment I will recess the hearing, but we will resume for additional testimony, if anyone wishes to testify before 10 A M.

Again, the record remains open for written testimony through and including Jan. 8, 2021. 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 or USPS mail. I will acknowledge all testimony received.

This hearing is recessed at: 9:08 AM.
Okay, this hearing is resumed at: 9:58 AM.

Is there anyone else that would like to testify this morning? Hearing no one, the time is still 9:58 AM. Thank you for coming. This hearing is adjourned.

Transcribed from a digital audio recording by Fred Bruyns, Jan 5, 2021.

Exhibit "2"

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January 5, 2021

FRED BRUYNS, RULES COORDINATOR
WORKERS' COMPENSATION DIVISION
PO BOX 14480
SALEM, OR 97309

Re: Proposed permanent rules for processing workers' compensation claims for COVID-19 or SARS-CoV-2 exposure

Dear Fred,

SAIF Corporation (SAIF) has considered the Workers' Compensation Division's (WCD) proposed permanent amendments to OAR 436-060-0141. SAIF, as always, appreciates the opportunity to provide input on the proposed rule changes and urges WCD to reconsider the proposed changes to the temporary rule currently in place.

WCD's proposed permanent rule dismantles critical elements of the temporary rule by eliminating the requirement that insurers' reasonable investigation include obtaining a medical or expert opinion prior to issuing a decision and ending mandatory audits of COVID-19 claims for compliance with the rule. WCD initially promulgated temporary administrative rules following months of meetings by stakeholders, WCD and the Management Labor Advisory Committee (MLAC).

Promulgated at the urging of stakeholders, WCD's temporary rule was intended to create COVID-19 claim processing consistency amongst insurers to ensure that COVID-19 claims that were due to work-related exposure were accepted and to ensure denials issued only after a thorough and robust claim investigation where determining the source of exposure included an expert or medical opinion. Compliance with the claim processing rule was ensured by mandatory claim audits, which stakeholders agreed was an important safeguard. As a whole, the changes enacted by the temporary rule were applauded by labor and management stakeholders.

WCD's proposed permanent rule moves away from the foundational pieces of the temporary rule. The rules would no longer ensure a robust claim investigation nor would it ensure that deviations in claim processing are identified early and resolved timely through mandatory audits. SAIF urges WCD to maintain the balance that was struck by management and labor stakeholders by preserving the standard for a reasonable investigation and requiring audits of COVID-19 claims as set forth in the temporary rule.

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Sincerely,

/s/ Elaine Schooler
Attorney
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elasch@saif.com

Oregon
Kate Brown, Governor

Department of Consumer and Business Services
MLAC | Management-Labor Advisory Committee
350 Winter Street NE, Rm 200, Salem, OR 97309-0405
Phone: 503-947-7867
Fax: 503-378-6444
Email: theresa.a.vanwinkle@oregon.gov

Exhibit "3"

January 8, 2021

Fred Bruyns
Department of Consumer and Business Services
350 Winter Street NE, Suite 200
Salem, OR 97309

Re: Permanent Rulemaking on OAR 436-060-0141

Dear Mr. Bruyns:

The Management Labor Advisory Committee (MLAC) appreciates the opportunity to submit comments on the final rule for OAR 436-060-0141 and wants to thank the Department for its hard work in finalizing this important rule.

MLAC has identified two areas of concern with the proposed final rule. The Department has added 436-060-0141(2)(b) which makes the medical/expert opinion permissive, rather than a requirement. The second concern involves the language proposed for audits.

MEDICAL/EXPERT OPINION SHOULD BE REQUIRED[1]

MLAC understands the Department's desire to clarify that a medical/expert opinion should not be required for procedural denials. The Committee did not intend to require a medical or expert opinion for a non-medical or other procedural denial. However, we believe the Department has changed the language in a way that no longer requires a medical/expert opinion when the denial is based on other than procedural reasons. That was not the intent or recommendation of MLAC.

[1] Labor representatives on the Committee also would like it noted for this record that they and worker representatives expressed a concern about the method by which medical or expert opinions may be obtained during the October 28th meeting, specifically opinions obtained exclusively through a record review. Considering the novel nature of this process, there was suggestion of requiring at least a tele-medicine examination, and the understanding that such a medical examination would trigger access to a WRME.

The Department did add language under 436-060-0141(2) which addresses the issue regarding denials for procedural reasons. MLAC feels this additional language addresses the concerns identified during the Rulemaking Advisory Committee Meeting on October 28, 2020. We are unsure if the "may" in 436-060-0141(2)(b) is an oversight or whether the Department has another reason for its use of "may" instead of "shall". However, it was clear in the October 28th meeting that both labor and management stakeholders felt it was important to require the medical/expert opinion unless the denial was for non-medical or procedural reasons. It is our position that it must be required in order for this rule to have the effect MLAC, and its stakeholders, were seeking.

MLAC respectfully requests the Department change 436-060-0141(2)(b) as follows:

> (b) Investigate the source of the worker's exposure to COVID-19 or SARS-CoV-2, which shall ~~may~~ involve obtaining a medical or expert opinion, if, before a compensability denial is issued, the worker tests positive for COVID-19 or a medical service provider diagnoses a presumptive case of COVID-19, the insurer is aware of the test results or presumptive diagnosis, and the source of the exposure is unclear;

COVID-19 AUDITS SHOULD BE REQUIRED OF DEPARTMENT

MLAC understands the concerns expressed by the Department during the October 28th Rulemaking Advisory Committee Meeting. It is not the intent of MLAC to limit the Department's auditing abilities for claims that are not related to COVID-19 or exposure to SARS-CoV-2. However, our request of the Department was to require audits related to COVID-19 or exposure to SARS-CoV-2 for the duration of the pandemic, not just during the temporary rule's duration.

Elaine Schooler said it succinctly in her October 28 testimony:". . . the audit was part of a specific agreement amongst the parties to ensure compliance and a uniform review of claim decisions to ensure reasonable investigations for these types of claims. Removing it is problematic for the concerns that were expressed prior to adoption of this temporary rule."

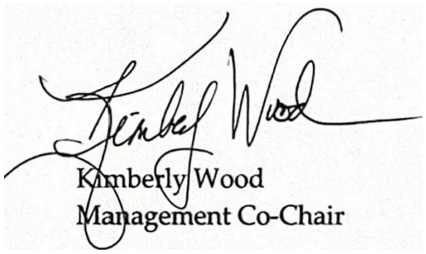
Stakeholders of both management and labor expressed similar concerns and asked the Department to reinstate the requirement of the audit. It is MLAC's intent to hold insurers accountable and for these audits to be a priority for the Department so issues are addressed appropriately and quickly. MLAC heard from the Department during our meetings that the Department had authority to conduct audits and would prefer not to add the requirement. MLAC felt differently as did the management and labor stakeholders who attended MLAC's meetings as well as the Department's Advisory Meeting on this rule.

Department revise this section to req
exposure to SARS-CoV-2 claims in addition to its other auditing authority.

We thank you for the opportunity to submit our concerns on this very important rule.

Sincerely,

Diana Winther
Labor Co-Chair



Kimberly Wood
Management Co-Chair

Exhibit "4"

January 8, 2021

Fred Bruyns
Rules Coordinator
Oregon Workers' Compensation Division
fred.h.bruyns@oregon.gov

Re: Proposed permanent rules for processing workers' compensation claims for COVID-19 or SARS-CoV-2 exposure

Dear Mr. Bruyns:

Thank you for the opportunity to comment on the proposed permanent administrative rules regarding COVID-19 claim processing. Those signed on to this letter strongly supported the adoption of the temporary administrative rule, on which this permanent rule is based. We believe that workers across Oregon who contract COVID-19 in their workplace should be covered under the workers' compensation system.

Following an extensive review and discussion at MLAC, temporary rules were enacted to ensure a uniform investigative process for COVID-19 claims. The goal was to create a solution that would assist workers in work-related conditions accepted, while not detrimentally impacting the workers' compensation system as a whole. The initial temporary rule threaded that needle: it made sure that insurance companies were appropriately investigating claims for COVID-19 including obtaining a medical or expert opinion, without upending Oregon's successful workers' compensation system.

The proposed permanent rule shifts away from requiring insurers to obtain an expert or medical opinion as part of a reasonable investigation. To ensure that all work-related claims that should be accepted are accepted, there need to be more investigations that include an expert or medical opinion, not fewer. We are concerned that changing the denial criteria will result in fewer investigations, and therefore less control over problematic denials for workers who do have legitimate COVID-19 workers' compensation claims.

In addition, the draft permanent rule gives discretion to the department about whether to investigate certain denials whereas the temporary rule required WCD to audit all COVID-19 claims. A required audit ensures that deviations from the processing requirements are identified quickly so that workers' claims are appropriately processed.

We urge you to adopt the language of the temporary rule, instead of the proposed permanent rule language that has been released. This approach is the best way to ensure that workers who are entitled to workers' compensation are receiving the treatment they need.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