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

In the Matter of the Amendment of:	)	
	)	SUMMARY OF
OAR 436-120, Vocational Assistance to Injured Workers	)	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 June, 2018. On June 21, 2018, a public rulemaking hearing was held as announced at 10 a.m. in Room 1-C of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon. Fred Bruyns, from the Workers' Compensation Division, acted as hearing officer. The record was held open for written comment through June 26, 2018.

Testimony list*:

Exhibit	Testifying
1	Megan Chrisman, Oregon Business & Industry
2	Transcript of public rulemaking hearing* – a) Daedra Buntin, Portland Public Schools b) Spencer Aldrich, OTLA
3	Jaye Fraser, SAIF Corporation

***This hearing provided opportunity for comment on two divisions of rules, OAR 436-060 and OAR 436-120. This summary includes only comments related to OAR 436-120.**

Testimony: OAR 436-120 ***Exhibit 1***

"On behalf of the members of Oregon Business & Industry, we respectfully request that the Workers' Compensation Division postpone implementing rules pursuant to the Chu decision. This case is on appeal to the Oregon Supreme Court and as of today a decision on reviewing this case has not been made. If the Court does consider this case, having rules implementing the Chu decision could create chaos if the decision is overturned."

Response: Thank you for your testimony. We understand the *Chu v. SAIF* decision has been appealed to the Oregon Supreme Court. The Supreme Court has not yet granted review, and if it does, a decision could take some time. The Court of Appeals decision in *Chu* determined OAR 436-120-0147 is inconsistent with the provisions of ORS 656.340; therefore the rule is invalid. Currently there is no permanent rule in place that would allow insurers to comply with the court's interpretation of the statute. The division will proceed to adopt permanent rules that are

consistent with statute and the Court of Appeals decision in *Chu*.

Testimony: OAR 436-120 ***Exhibit 3***

"SAIF has significant concerns with the proposed rules. SAIF has filed a petition for review with the Oregon Supreme Court on *Chu v. SAIF*."

Response: Thank you for your testimony. We have outlined our response to the concerns you articulated below.

Testimony: OAR 436-120-0003 ***Exhibit 3***

"436-120-0003(2)(b), seems to suggest that an insurer can make an appropriate and legally defensible decision, yet once the decision is appealed, the standard may be different. SAIF urges WCD adjust the rule so the standards are consistent."

Response: Thank you for your testimony. We feel the language is necessary to comply with the court's decision. If a worker was determined ineligible for vocational assistance on February 15, 2018, and had more than one job at the time of injury, the worker would fall under "*Chu v. SAIF*" scenario. The previous rules did not offer a calculation method for these types of cases, so the director would not have a rule to rely on if we only had the rules in effect on the date the insurer issued the notice. We will review the language in this rule the next time division 120 is reviewed to determine whether the added language can be removed.

Testimony: OAR 436-120-0147(1) and (3) ***Exhibit 2 b)***

"* * * Have some concerns with 436-120-0147 * * * where exactly is the burden on the employer to provide wage information to the insurer so they can calculate this for average weekly wage of course. 0147(1)(d) suggests that if the insurer can't get information, the burden is on the worker to provide verifiable documentation. The thought there is why would the burden be on the worker to provide something that the employer should have under other sections of the law, and should be able to provide to the insurer. That section seems to link to section (3) of that same OAR, which indicates there is a burden on the insurer to determine the (quote) "nature of the job," but it doesn't really connect to the wages and verifiable income, so it seems like there's intent there to put those two things together, * * * I'm worried that it didn't quite get there. So the OTLA concern is where exactly is the burden on the employer to take those records they should have and give them to the insurer so that that average weekly wage can be established."

Response: Thank you for your testimony. The employer at injury does have the burden to provide verifiable documentation of the worker's wages to the insurer for the calculation of the average weekly wage and for payment of temporary disability benefits. A secondary employer is not a party to the claim and neither the insurer nor the division has authority to require them to provide wage information. In a situation where the worker has more than one job at the time of injury, the burden will be on the worker to provide verifiable documentation of wages from the secondary employment to the insurer for the calculation of the weekly wage. Upon further consideration of testimony from SAIF Corporation, please see response below to Exhibit 3 reflecting a change in the proposed language.

Testimony: OAR 436-120-0147(2) ***Exhibit 2 a)***

"* * * on behalf of my director, Joe Crelier, he also wanted to comment that Portland Public Schools requests that WCD include a definition of verifiable documentation in section (2) of

page 3, under (1)(d), where he indicates in section (2), unless defined elsewhere in the rule, the definition should support insurers in identifying legitimate data and data sources for the wage calculation. * * *"

Response: Thank you for your testimony. We appreciate your input. The division believes the examples given in OAR 436-120-0147(1)(c) provide sufficient guidance as to what may be considered verifiable. We believe this is a case-specific inquiry, and if we were to narrowly define verifiable documentation, it may have unintended consequences. For example, it could limit the insurer's ability to make a reasonable calculation of the worker's weekly wage and our authority to consider information provided during an administrative review.

Testimony: OAR 436-120-0147(2)(d) ***Exhibit 2 a)***

"* * * On page 3 * * * number (2), section (d), where it says the job does not need to be subject employment. So, for clarification purposes, is that intended to mean employer at injury, because when we look in the ORS 656.005, for definitions on subject employer, it states that the subject employer means an employer who is subject to this chapter, and a subject worker is subject to the chapter as well, which generally refers to whether or not the rules apply. So when it says when the job does not need to be subject employment, I'm just curious in regards to the intent of the rule in that respect, if it's intended to mean the employer at injury or the job at injury – so that is my primary question."

Response: Thank you for your testimony. Under ORS 656.210(2)(a)(B), the worker's weekly wage, *for the purpose of temporary disability benefits*, includes all earnings the worker was receiving from all "subject employment" for those workers who are employed in more than one job at the time of injury. When looking at the statute relating to vocational benefits, the stated objective under ORS 656.340(5) is to return the worker to employment which is as close as possible to the worker's regular employment at a wage as close as possible to the weekly wage currently being paid for employment which was the worker's regular employment. Regular employment is defined as the employment the worker held at the time of injury or the claim for aggravation. There is no stated exception related to whether this employment is or is not "subject employment."

In addition, the *Chu v. SAIF* decision reached the conclusion that ORS 656.340 requires consideration of *all* the worker's employments in determining eligibility for vocational assistance. The court did not distinguish between subject and non-subject employment. Based on the language in statute and the decision in *Chu,* we believe the court found that all employment regardless of whether it is "subject employment" must be considered.

Testimony: OAR 436-120-0147(3) ***Exhibit 3***

"436-120-0147(3) *requires* insurers to contact all worker employers for wage information. First, it is unclear how the insurer will know about any employer other than the employer-at-injury. Then, if a worker tells an insurer about a supplemental employer, but does not claim supplemental disability, the current rules still requires the insurer to contact that employer. In so doing, the insurer will be forced to disclose the worker's claim to another employer. The supplemental disability rules place the burden on the worker to decide to seek supplemental disability, and to obtain wage information for that piece of the claim. This allows the worker to determine if he or she wishes to disclose the claim to the supplemental employer. SAIF urges

WCD to mimic the supplemental disability process in the vocational assistance rule. The right to file a claim belongs to the injured worker; the proposed rules put the insurer in the awkward spot of disclosing a worker's claim to an employer who is not the employer-at-injury, who may otherwise, not know about the worker's claim. These rules should give the worker the choice to pursue his second employer's earning in his or her claim. In addition to disclosing the claim to an employer who is not part of the claim, insurers may inadvertently impact an employment relationship.

"In summary, this rule, as written, requires Insurers to contact parties who are not involved in any way in the claim and have no right to any claim information. Then, after contacting these employers, an insurer may or may not get the information it seeks; there is no nexus between the insurer and the secondary employer and not obligation for that employer to provide the information to the insurer."

Response: Thank you for your testimony. In consideration of your testimony, the division has amended the proposed rule to provide:

> The insurer must determine the nature of the job at injury and any other paid jobs held at the time of injury, or the job or jobs at aggravation, and this must include contacting the employer at injury to verify the worker's employment status.

This language should release the insurer from having an obligation to contact secondary employers.

Testimony: OAR 436-120-0147(3)(a)(A) ***Exhibit 3***

"SAIF is unclear why it would calculate anything differently if the secondary jobs were temporary or seasonal?"

Response: Thank you for your testimony. The worker's employment status is obtained in order to determine which type of calculation needs to be performed to determine the weekly wage. If the employment status for any jobs held is temporary or seasonal, the weekly wage will need to be calculated under OAR 436-120-0147(3)(a). We believe this is consistent with language used in ORS 656.340(6)(b)(B)(iii).

Testimony: OAR 436-120-0147(3)(a)(C) ***Exhibit 3***

"Earned income can include income from occupations such as on-call work, Uber driving, Avon sales, babysitting, etc. how does an insurer determine how many weeks someone worked as a substitute teacher; for example, when they are always on call but were only called to work three to five times per month. This rule is likewise silent on intent wages. If the secondary job was lost due to the injury, how does an insurer calculate wages? Apparently insurers must consider work beyond subject work, we would consider work under-the-table jobs, jobs available in the gig economy, and other nontraditional types of work. For example, an Avon Lady makes small sales here and there so has monthly "income" but perhaps just $50-200 per month. SAIF is uncertain how that work is "counted." Is it one day of work or as a full month of work? This could reduce earned income, leading to more ineligibilities."

Response: Thank you for your testimony. We decline to make further modification to the proposed rule on this topic at this time.

It is helpful to point out the following language from statute:

> If the worker's regular employment was seasonal or temporary, the worker's wage shall be averaged based on a combination of the worker's earned income and any unemployment insurance payments. Only earned income evidenced by verifiable documentation such as federal or state tax returns shall be used in the calculation. Earned income does not include fringe benefits or reimbursement of the worker's employment expenses.

Our rule goes on to define earned income as specified consideration "from all employers for services performed from *all jobs held at the time of injury or aggravation*." OAR 436-120-0147(2)(c) (emphasis added).

When applying these rules, we combine a worker's 52 weeks of earned income from the jobs held at the time of injury or aggravation, and add that to payments from unemployment insurance. If the worker held other jobs in the 52 weeks before the injury or aggravation, but those jobs were not held *at the time* of the injury or aggravation, neither the income *nor weeks worked* in those positions should be included in the calculation. As such, we believe it is necessary to clarify in the rule that the weeks worked applies to the weeks worked in those jobs that are included in the calculation.

Testimony: OAR 436-120-0147 ***Exhibit 3***

"The rules as written are silent about how a worker who denies secondary work during their initial statement, yet produces secondary income during the vocational eligibility evaluation should be handled."

Response: Thank you for your testimony. If a worker produces verifiable documentation of wages from secondary employment during the vocational eligibility evaluation, that information would need to be included in the evaluation and considered in the vocational eligibility determination. The rules do provide that the worker must provide vocationally relevant information requested by the insurer within a reasonable time set by the insurer under OAR 436-120-0115(6)(b).

Testimony: OAR 436-120-0147 ***Exhibit 3***

"Nor do the rules discuss a worker who works the secondary job through the claims or returns to the secondary job. The proposed rules seem to require that wages from the secondary job be considered in determining vocational eligibility even if the worker is not limited in performing that work."

Response: Thank you for your testimony. Wages from the secondary job should be considered in determining vocational eligibility, even if the worker is not limited in performing that work. The Court of Appeals in *Chu v. SAIF* required consideration of all employment in determining the worker's wage, without addressing whether the worker was or was not limited in performing that work. We believe this part of the rule, as proposed, is consistent with the language in ORS 656.340 and the Court of Appeal's direction in *Chu v. SAIF*.

Testimony: OAR 436-120-0147(4)(a) and (b) ***Exhibit 3***

"The proposed rule requires insurers to adjust the entire weekly wage for COLAs. SAIF suggests wages should be modified individually. For example: a worker works as a machinist for $1000, but was hurt as a bouncer for $80/week for a combined total of $1080/week. If the bar provides a 5% COLA (for example), Increasing the machinist wages by 5% as well is a windfall unless the machinist employer also gave a 5% COLA. This also works both ways. During the most recent economic downturn, many employers decreased wages. In this instance, it be unfair to the worker to reduce his $1080/week by 10% just because the bar gave everyone a 10% reduction in pay."

Response: Thank you for your testimony. Under OAR 436-120-0147(3), the insurer is required to determine the worker's weekly wage based on a few different methods. A worker's weekly wage is calculated based on all wages from all employment. It is then converted into an adjusted weekly wage under OAR 436-120-0147(4). The rules are meant to be performed sequentially, and this method was used under previous permanent rules when multiple jobs were present, such as when there were multiple jobs at aggravation or when the earned income calculation was used. We would be happy to discuss alternative methods for calculation during future rulemaking if you would like to bring this forward as an issue at that time.

Dated this 17th day of July, 2018.

Exhibit
"1"

BRUYNS Fred H * DCBS

From: Megan Chrisman <meganchrisman@oregonbusinessindustry.com>
Sent: Wednesday, June 20, 2018 2:19 PM
To: BRUYNS Fred H * DCBS
Subject: RE: Proposed Changes to OAR 436-120, Vocational Assistance to Injured Workers
Attachments: OAR 436-120.pdf

Dear Mr. Bruyns:

On behalf of the members of Oregon Business & Industry, we respectfully request that the Workers' Compensation Division postpone implementing rules pursuant to the Chu decision. This case is on appeal to the Oregon Supreme Court and as of today a decision on reviewing this case has not been made. If the Court does consider this case, having rules implementing the Chu decision could create chaos if the decision is overturned.

We have no objection going forward with the rules for calculating the weekly wage.

Respectfully,

Megan Chrisman | Senior Associate, Legislative Affairs
Oregon Business & Industry
P: 503.576.4879 | **C** 503.267.8578 | **E:** meganchrisman@oregonbusinessindustry.com
1149 Court Street NE | Salem, OR 97301 | www.oregonbuisinessindustry.com

OREGON BUSINESS & INDUSTRY OBI

1149 Court Street
Salem, OR 97301

T: 503.588.0050
F: 503.588.0052

Statewide: 800.452.7862
oregonbusinessindustry.com

June 20, 2018

Via Email

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

Re: Proposed Changes to OAR 436-120, Vocational Assistance to Injured Workers

Dear Mr. Bruyns:

On behalf of the members of Oregon Business & Industry, we respectfully request that the Workers' Compensation Division postpone implementing rules pursuant to the Chu decision. This case is on appeal to the Oregon Supreme Court and as of today a decision on reviewing this case has not been made. If the Court does consider this case, having rules implementing the Chu decision could create chaos if the decision is overturned.

We have no objection going forward with the rules for calculating the weekly wage.

Respectfully,

Megan Chrisman
Senior Associate, Legislative Affairs
Oregon Business & Industry

Exhibit
"2"

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 436-120, Vocational Assistance to Injured Workers	)))))	TRANSCRIPT OF TESTIMONY

The proposed amendment to the rules was announced in the Secretary of State's Oregon Bulletin dated June 1, 2018. On June 21, 2018, a public rulemaking hearing was held as announced at 10 a.m. in Room 1-C of the Portland State Office Building, 800 NE Oregon Street, in Portland, Oregon. Fred Bruyns, from the Workers' Compensation Division, acted as hearing officer. The record will be held open for written comment through and including June 26, 2018.

INDEX OF WITNESSES

Witnesses **Page**

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 now 10 a.m. on Thursday, June 21, 2018. We're in Room 1-C of the Portland State Office Building, 800 NE Oregon St., 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" on the table by the entrance. If you plan to testify over the telephone, I will sign in for you.

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

The Department of Consumer and Business Services, Workers' Compensation Division proposes to amend chapter 436 of the Oregon Administrative Rules, specifically:

- Division 060, Claims Administration, and
- Division 120, Vocational Assistance to Injured Workers.

The department has summarized the proposed changes and prepared estimates of fiscal and economic impacts in the notices of proposed rulemaking that are on the table by the entrance as well, so I would encourage you to pick up a copy.

The Workers' Compensation Division filed the notices of proposed rulemaking with the Oregon Secretary of State on May 24 and May 25, 2018; mailed the notices 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 notices in its Oregon Bulletin dated June 1, 2018.

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 June 26, 2018, 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.

So again, there's no one signed up to testify currently, but you're – anybody here is welcome to provide testimony this morning. Would you like to testify – anyone? Is there anyone on the telephone who would like to provide testimony? Okay, hearing no one, It's our policy to leave our hearing process open at least a half an hour. But, we'll go ahead and – just basically put the hearing on hold for a little while, and you're welcome to stay or you can – if you want to leave and provide written testimony that's okay too, but I'm going to be here until at least 10:30, and probably since we're at an off site location, and no one would the opportunity to even kind of look us up, I'll probably be here till about 11. So, you are welcome to stay.

Again, you can submit testimony in any written form. I would 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 my contact information. I will acknowledge all testimony received.

So, this hearing is recessed at 10:03.

Hearing officer:

This hearing is resumed for testimony at 10:05, and if you can state your name for the record, and go ahead and testify?

Daedra Buntin:

I'm Daedra Buntin. I'm with Portland Public Schools. I wanted to comment on the OAR 436-120 rules on vocational assistance to injured workers. On page 3 – I believe it was page 3 of the proposed rules, there is an area where it speaks to, lets see, number (2), section (d), where it says the job does not need to be subject employment. So, for clarification purposes, is that intended to mean employer at injury, because when we look in the ORS 656.005, for definitions on subject employer, it states that the subject employer means an employer who is subject to this chapter, and a subject worker is subject to the chapter as well, which generally refers to whether or not the rules apply. So when it says when the job does not need to be subject employment, I'm just curious in regards to the intent of the rule in that respect, if it's intended to mean the employer at injury or the job at injury – so that is my primary question.

As well representing Portland Public Schools, on behalf of my director, Joe Crelier, he also wanted to comment that Portland Public Schools requests that WCD include a definition of verifiable documentation in section (2) of page 3, under (1)(d), where he indicates in section (2), unless defined elsewhere in the rule, the definition should support insurers in identifying legitimate data and data sources for the wage calculation. So those were the two areas where I had comment or question.

Hearing officer:

Okay. And typically what we'll do in our – we write a response to testimony, and we will provide any clarification we can in that response, and then we'll decide whether actually to amend the rule to address your particular testimony. So thank you for testifying this morning.

Daedra Buntin:

Thank you very much.

Hearing officer:

A little more time has passed and I think some people have arrived that were not here earlier, so would anyone else like to testify this morning? You're welcome to do so. Anyone on the telephone? Okay. Then, again, this hearing is recessed again at 10:07.

This hearing is resumed at 10:26 for testimony. Go ahead.

Spencer Aldrich:

Yah this is Spencer Aldrich, claimants' attorney with Schoenfeld and Schoenfeld, on behalf of OTLA. Have some concerns with 436-120-0147 – going to be referencing what in the materials is sort of the very top of page 2, going on to the – excuse me, the top of

page 3, going on to sort of the top part of page 4. The concern is where exactly is the burden on the employer to provide wage information to the insurer so they can calculate this for average weekly wage of course. 0147(1)(d) suggests that if the insurer can't get information, the burden is on the worker to provide verifiable documentation. The thought there is why would the burden be on the worker to provide something that the employer should have under other sections of the law, and should be able to provide to the insurer. That section seems to link to section (3) of that same OAR, which indicates there is a burden on the insurer to determine the (quote) "nature of the job," but it doesn't really connect to the wages and verifiable income, so it seems like there's intent there to put those two things together, but I don't necessarily – I'm worried that it didn't quite get there. So the OTLA concern is where exactly is the burden on the employer to take those records they should have and give them to the insurer so that that average weekly wage can be established. Thank you.

Hearing officer:

Thank you very much for your testimony Spencer. And, given that we are back on the record, is there anyone else here or on the telephone who would like to testify? Okay. Thanks. And I apologize but if I could get you to sign in.

Diana Winther:

Of course.

Hearing officer:

Go ahead.

Diana Winther:

I'm Diana Winther, and I'm the labor Co-Chair for MLAC, and also work as the general counsel for the IBEW Local 48. We just wanted to reference back to a memo that had been provided to the division from numerous stakeholders that posed the desire for clarification for section (4) for (b) and (c), the "and" between (b) and (c), just wanted to again clarify that the intent there is not to require simultaneous application of both of those subsections when determining the average weekly wage.

Hearing officer:

Diana, you said there is a memo that we received – do you know the date of the memo, or?

Diana Winther:

It's going to be – I can give you a copy of it.

Hearing officer:

That would be ideal. Okay, perfect. Thank you. Okay we will stamp that in as testimony as well.

Diana Winther:

Thank you.

Hearing officer:

Okay. Thank you for your testimony.

Is there anyone else who would like to testify this morning? Anyone on the telephone? Okay, hearing no one, I'm going to go ahead and adjourn the hearing. The time is now 10:30, and this hearing is adjourned. Thanks very much for coming.

Transcribed from a digital audio recording by Fred Bruyns, June 22, 2018.

Exhibit "3"

saif Work. Life. Oregon.

June 25, 2018

Fred Bruyns, Rules Coordinator
Workers' Compensation Division
P.O. Box 14480
Salem, OR 97309-0405

RE: SAIF Corporation Testimony on proposed rules:
OAR 436-060, Claims Administration
OAR 436-120, Vocational Assistance to Injured Workers

Dear Fred:

SAIF Corporation thanks the Workers' Compensation Division for the opportunity to provide advice and testimony on the administrative rules mentioned above. SAIF reiterates it advice provide during the administrative advisory process. In addition, SAIF would like to emphasize a couple of points.

1) OAR 436-060, (Average Weekly Wage) Though SAIF would have WCD adopted changes it suggested when the temporary rule was being considered, SAIF is comfortable with the proposed rule. SAIF appreciates WCD's decision to convene a technical advisory group to assist it with an industry bulletin on the rule.

2) OAR 436-120, (Vocational Assistance to Injured Workers) SAIF has significant concerns with the proposed rules. SAIF has filed a petition for review with the Oregon Supreme Court on *Chu v. SAIF*. SAIF expressed multiple concerns during the advisory committee for the Division 120 rules, but will focus on a few especially troubling concerns:

   (a) 436-120-0003(2)(b), seems to suggest that an insurer can make an appropriate and legally defensible decision, yet once the decision is appealed, the standard may be different. SAIF urges WCD adjust the rule so the standards are consistent.
   (b) 436-120-0147(3) *requires* insurers to contact all worker employers for wage information. First, it is unclear how the insurer will know about any employer other than the employer-at-injury. Then, if a worker tells an insurer about a supplemental employer, but does not claim supplemental disability, the current rules still requires the insurer to contact that employer. In so doing, the insurer will be forced to disclose the worker's claim to another employer. The supplemental disability rules place the burden on the worker to decide to seek supplemental disability, and to obtain wage information for that piece of the claim. This allows the worker to determine if he or she wishes to disclose the claim to the supplemental employer. SAIF urges WCD to mimic the supplemental disability process in the vocational assistance rule. The right to file a claim belongs to the injured worker; the proposed rules put the insurer in the awkward spot of disclosing a worker's claim to an employer who is not the employer-at-injury, who may otherwise, not know about the worker's claim. These rules should give the worker the choice to pursue his second employer's earning in his

or her claim. In addition to disclosing the claim to an employer who is not part of the claim, insurers may inadvertently impact an employment relationship.

In summary, this rule, as written, requires insurers to contact parties who are not involved in any way in the claim and have no right to any claim information. Then, after contacting these employers, an insurer may or may not get the information it seeks; there is no nexus between the insurer and the secondary employer and not obligation for that employer to provide the information to the insurer.

(c) 436-120-0147(3)(a)(A): SAIF is unclear why it would calculate anything differently if the secondary jobs were temporary or seasonal?

(d) 436-120-0147 (3)(a)(C): Earned income can include income from occupations such as on-call work, Uber driving, Avon sales, babysitting, etc. How does an insurer determine how many weeks someone worked as a substitute teacher, for example, when they are always on call but were only called to work three to five times per month. This rule is likewise silent on intent wages. If the secondary job was lost due to the injury, how does an insurer calculate wages? Apparently insurers must consider work beyond subject work, we would consider work under-the-table jobs, jobs available in the gig economy, and other non-traditional types of work. For example, an Avon Lady makes small sales here and there so has monthly "income" but perhaps just $50-200 per month. SAIF is uncertain how that work is "counted." Is it one day of work or as a full month of work? This could reduce earned income, leading to more ineligibilities.

(e) The rules as written are silent about how a worker who denies secondary work during their initial statement, yet produces secondary income during the vocational eligibility evaluation should be handled.

(f) Nor do the rules discuss a worker who works the secondary job through the claims or returns to the secondary job. The proposed rules seem to require that wages from the secondary job be considered in determining vocational eligibility even if the worker is not limited in performing that work.

(g) 436-120-0147(4) (a) and (b): The proposed rule requires insurers to adjust the entire weekly wage for COLAs. SAIF suggests wages should be modified individually. For example: a worker works as a machinist for $1000, but was hurt as a bouncer for $80/week for a combined total of $1080/week. If the bar provides a 5% COLA (for example), increasing the machinist wages by 5% as well is a windfall unless the machinist employer also gave a 5% COLA. This also works both ways. During the most recent economic downturn, many employers decreased wages. In this instance, it be unfair to the worker to reduce his $1080/week by 10% just because the bar gave everyone a 10% reduction in pay.

Please let me know if you have questions about SAIF's testimony.

Sincerely,

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