

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

In the Matter of the Amendment of:)
OAR 436-001, Procedural Rules, Rulemaking, Hearings,) SUMMARY OF
and Attorney Fees) 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 Feb. 1, 2018. On Feb. 21, 2018, a public rulemaking hearing was held as announced at 10 a.m. in Room F of the Labor and Industries Building, 350 Winter Street NE, Salem, Oregon. Fred Bruyns, from the Workers’ Compensation Division, acted as hearing officer. The record was held open for written comment through Feb. 26, 2018.

One person testified at the public rulemaking hearing. A transcript of the rulemaking hearing is recorded below as exhibit 1. The public submitted one written document as testimony.

Testimony list:

Exhibit	Testifying
<u>1</u>	Transcript of hearing: Testimony of Keith Semple, Johnson Johnson Lucas & Middleton PC
<u>2</u>	Jaye Fraser, SAIF Corporation

Testimony: OAR 436-001-0170, -0240

Exhibit 1

“I was just looking at a couple of the rules that talk about some things that are within the administrative law judge’s discretion, the ability to conduct hearing by telephone is one example; the discretion to substitute an accurate description for an object of evidence. I guess my preference would be to leave those in the rules, just because it helps, you know, if a person is unrepresented, and they may not know all of the things that an administrative law judge has discretion to do, but they could find some of these in the rules that currently are there. And, I just think those things are helpful for clarity. I don’t see a good reason to get rid of them, so I guess my opinion would be to just leave those. I don’t see a reason to remove those.”

Response: Thank you for your input. The rules will be adopted as proposed, with the language removed. Removing these provisions from OAR chapter 436 does not affect the ALJ’s discretion in any way. OAR 436-001-0170(1) continues to provide that the ALJ may conduct the hearing in any manner consistent with the rules that will achieve substantial justice. While we appreciate the concern that some parties may not know what an ALJ has discretion to do, hearings in matters within the director’s jurisdiction should be conducted, as much as possible, in a manner

consistent with other hearings held by the Hearings Division. In addition, the Hearings Division provides a Notice of Rights and Procedures in Workers' Compensation Division Hearings for parties who are unfamiliar with the process.

Testimony: OAR 436-001-0240

Exhibit 2

“SAIF Corporation is concerned that the revised timeframe in the proposed rule is too close to the hearing date to permit meaningful review by the parties prior to the hearing. Attorneys for injured workers and employers carry a robust caseload. Because hearings are set three months in advance, delaying the transmittal of the records and index until 28 days prior to the hearing hinders the attorney’s ability to assess their clients’ exposure and to prepare for hearing while also preparing other cases for litigation at the same time.”

Response: Thank you for your input. The rules will be adopted as proposed. The current “21 days after referral of the request for hearing” has not been enough time for WCD staff to prepare and send the exhibits. We chose 28 days before the hearing because this timeframe is consistent with the board’s rule regarding exchange of exhibits in other matters, OAR 438-007-0018(1). The majority of cases WCD refers for hearing are medical disputes; the bulk of the documents in WCD’s exhibits were originally submitted by the insurer during administrative review before MRT, so the parties should already have most of the documents. In vocational assistance disputes, the record can be more time-consuming to prepare. However, WCD will strive to get the exhibits out sooner than 28 days before the hearing whenever possible.

Dated this 14th day of March, 2018.

**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:)	TRANSCRIPT OF TESTIMONY
436-001, Procedural Rules, Rulemaking, Hearings, and Attorney Fees)	
436-009, Oregon Medical Fee and Payment)	
436-010, Medical Services)	
436-015, Managed Care Organizations)	

The proposed amendment to the rules was announced in the Secretary of State’s Oregon Bulletin dated Feb. 1, 2018. On Feb. 21, 2018, a public rulemaking hearing was held as announced at 10 a.m. in Room F of the Labor and Industries Building, 350 Winter Street NE, Salem, Oregon. Fred Bruyns, from the Workers’ Compensation Division, acted as hearing officer. The record will be held open for written comment through Feb. 26, 2018.

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TRANSCRIPT OF PROCEEDINGS

Fred Bruyns (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 10 a.m. on Wednesday, Feb. 21, 2018. We are in Room F of the Labor & Industries Building, 350 Winter St. NE, in Salem, 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.

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

- Division 1, Procedural Rules, Rulemaking, Hearings, and Attorney Fees,
- Division 9, Oregon Medical Fee and Payment Rules,
- Division 10, Medical Services, and
- Division 15, Managed Care Organizations.

Transcript of public rulemaking hearing
Feb. 21, 2018

The department has summarized the proposed rule changes in the Notices of Proposed Rulemaking Hearing. These hearing notices, Statements of Need and Fiscal Impact, and proposed rules with marked changes, are on the table by the entrance. Public testimony is posted to the division's website as it arrives.

The Workers' Compensation Division: filed the Notices of Proposed Rulemaking Hearing and Statements of Need and Fiscal Impact with the Oregon Secretary of State on Jan. 19, 2018; mailed the Notices and Statements to its postal and electronic mailing lists; notified Oregon Legislators as required by ORS chapter 183; and posted public notice and proposed rules to its website.

The Oregon Secretary of State published the hearing notices in its Oregon Bulletin dated Feb. 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 Feb. 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.

Is there anyone here who would like to testify this morning? Is there anyone on the telephone who would like to testify?

[No response]

Okay, it is our policy to keep the hearing open, or at least, the opportunity for testimony, for a half an hour at a minimum. So, we will remain here and accept testimony if someone happens to arrive late. In a moment I will recess the hearing, and we will resume for additional testimony, if there is any. For the record, no additional people wish to testify at this time. Keep in mind that you may submit... Hello ...

Keith Semple: Actually, Fred. Fred, this is Keith Semple. I was just looking at a couple of the rules that talk about some things that are within the administrative law judge's discretion, the ability to conduct hearing by telephone is one example; the discretion to substitute an accurate description for an object of evidence. I guess my preference would be to leave those in the rules, just because it helps, you know, if a person is unrepresented, and they may not know all of the things that an administrative law judge has discretion to do, but they could find some of these in the rules that currently are there. And, I just think those things are helpful for clarity. I don't see a good reason to get rid of them, so I guess my opinion would be to just leave those. I don't see a reason to remove those.

Fred Bruyns: Okay. Well, thank you, Keith.

Keith Semple: That's all. Thank you.

Fred Bruyns: Thank you for testifying this morning.

Would anyone else like to testify?

[No response]

Okay. I'll just remind you, in terms of the ways you may submit testimony, you may submit it in any written form, whether hard copy or electronic. 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 this building. On the table by the entrance are business cards that include my contact information, and I will acknowledge all testimony received.

As a reminder the record remains open for written testimony through, and including, Feb. 26, 2018.

And, with that, this hearing is recessed at 10:04 a.m.

The hearing is resumed at 10:30 a.m.

Is there anyone here present or on the telephone who would like to testify?

Hearing no one, I want to thank you for attending. This hearing is adjourned. It's still 10:30.

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

Amended, Feb. 26, 2018 - added name of Mr. Semple's law firm, page 1. Fred Bruyns



February 23, 2018

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

RE: SAIF Corporation Testimony
OAR 436-001 Procedural Rules, Rulemaking, Hearings, and Attorney Fees
OAR 436-009 Oregon Medical Fee and Payment
OAR 436-010 Medical Services
OAR 436-015 Managed Care Organizations

Dear Fred:

SAIF respectfully offers the following comments on the above proposed rules:

1. **OAR 436-001**, Procedural Rules, Rulemaking, Hearings, and Attorney Fees
 - **OAR 436-001-0240** SAIF Corporation is concerned that the revised timeframe in the proposed rule is too close to the hearing date to permit meaningful review by the parties prior to the hearing. Attorneys for injured workers and employers carry a robust caseload. Because hearings are set three months in advance, delaying the transmittal of the records and index until 28 days prior to the hearing hinders the attorney's ability to assess their clients' exposure and to prepare for hearing while also preparing other cases for litigation at the same time.
2. **OAR 436-009**, Oregon Medical Fee and Payment
 - **OAR 436-009-0025(2)(b)**: There is a redundancy in the proposed 0025(2)(b); the opening and closing clauses are identical. "*If the worker requests reimbursement after two years as listed in subsection (a), the insurer may disapprove the reimbursement request if the worker requests reimbursement after two years as listed in subsection (a).*"
 - **OAR 436-009-0110(1)**: SAIF requests that WCD clarify that the interpreters must be *currently* certified interpreters. SAIF has observed that there are many interpreters on the list that have lapsed certifications.
3. **OAR 436-010**, Medical Services
 - **OAR 436-010-0225(2)**: Consistent with its comments above, SAIF requests that WCD also clarify that interpreters must be *currently* certified interpreters.

SAIF has observed that there are many interpreters on the list that have lapsed certifications.

4. **OAR 436-015** Managed Care Organizations

- **OAR 436-015-0008(1)** SAIF is concerned the new language in 0008(1) describing when the 30-day appeal time frame begins, is somewhat vague. SAIF suggests the proposed language be amended to add "at the time the MCO decision is issued,":
 - "When the aggrieved party is a represented worker at the time the MCO decision is issued, and the worker's attorney has given written notice of representation to the insurer, the 30-day time frame begins when the attorney receives written notice or has actual knowledge of the MCO decision."

SAIF believes this additional language is consistent with the testimony and discussion from the advisory committee.

As always, SAIF appreciates the ability to participate in the rulemaking process and provide its input. Please feel free to contact me if there are questions on this testimony.

Sincerely,



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