

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

In the Matter of the Amendment of OAR:)
 436-010, Medical Services) SUMMARY OF
 436-060, Claims Administration) TESTIMONY AND
 436-075, Retroactive Program) 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 Oct. 1, 2017. On Oct. 20, 2017, a public rulemaking hearing was held as announced at 9:30 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 Oct. 26, 2017.

Two people testified about proposed rule changes at the public rulemaking hearing, and a transcript of the hearing is recorded below as Exhibit 2. Written testimony is also listed.

Testimony list:

Exhibit	Testifying
<u>1</u>	Ted Heus, Preston Bunnell, LLP
<u>2</u>	Hearing transcript - a) Kevin Anderson, Sather, Byerly, Holloway, LLP b) Ted Heus, Preston Bunnell, LLP
<u>3</u>	Ted Heus, Preston Bunnell, LLP
<u>4</u>	Jaye Fraser, SAIF Corporation

Testimony: OAR 436-010 and 436-060

Exhibit 4

“SAIF Corporation supports the rules the Workers’ Compensation Division (WCD) proposes to adopt to implement House Bills 2338 and 3363. * * *”

Response: Thank you for your support.

Testimony: OAR 436-060-0147

Exhibits 1, 2 b), and 3

[Proposed revisions will perpetuate confusion about concurrence. The rule should be revised.]

Oregon Administrative Rules, Chapter 436

Public Testimony & Agency Responses

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Exh. 1 – “* * * The proposed changes do not resolve the potential confusion caused by the phrase ‘does not’ concur in the current statute. To the contrary, the proposed rule retains the eligibility requirement that the ‘attending physician or authorized nurse practitioner **does not concur** with the report or reports.’ (Emphasis added). * * * I do not understand why the WCD would perpetuate language that was confusing to it and to the stakeholders, spawned multiple litigations, and delayed numerous WRMEs for months. Retaining the ‘does not concur’ language simply invites more litigation regarding the interpretation and application of that phrase. Instead, I strongly urge the WCD to adopt categorical language less subject to confusion and interpretation. I recommend the following:

“OAR 436-060-0147 – Worker Requested Medical Examination

“(1) Eligibility. The director will determine the worker’s eligibility for a worker requested medical examination under ORS 656.325(1). The worker is eligible for an exam ~~if~~ unless:

“(a) The worker has not made a timely request for a Workers’ Compensation Board hearing on a denial of compensability as required by ORS 656.319(1)(a);

“(b) The denial was not based on one or more independent medical examination reports; ~~and or~~

“(c) The attending physician or authorized nurse practitioner ~~did not concur with~~ agrees in writing with the report or reports no later than 30 days after the date of the worker’s request for hearing.

“* * * this language recognizes that an attending physician may 1) agree, 2) disagree, or 3) express no opinion on an IME report, and clarifies to the extent possible that only agreement with an IME extinguishes the worker’s eligibility for a WRME. It further clarifies that a physician’s disagreement with, or not expressing an opinion on, the IME is not grounds to extinguish a worker’s eligibility for a WRME.”

Exh. 2 b) – “* * * ORS 656.325(1)(e) is designed to allow workers access to a state appointed medical examination unless their attending physician agrees with an IME report, upon which a denial is based. However, the Workers’ Compensation Division has interpreted the law to allow a full WRME only when the attending physician affirmatively disagrees with an IME report. Such an interpretation resulted in denials of WRMEs when the physician neither agrees nor disagrees or is silent on the IME report.”

Exh. 2 b) – “* * * the proposed amendments originally intended to resolve the problem of silence or nonresponse, doesn’t actually solve the problem. Specifically, the proposed rule retains the ‘does not concur’ language that caused all the confusion to begin with. And, the proposed language attempts to resolve the issue with an evidentiary workaround that frankly might exceed the Workers’ Compensation Division’s authority * * * the problem is that the proposed rule doesn’t actually change the phrase ‘does not concur,’ * * * For years * * * the Workers’ Compensation Division has misinterpreted the statutory phrase to mean a physician’s affirmative disagreement with an IME report or an affirmative nonconcurrence. * * * By retaining that language and having no written explanation of its meaning or interpretation, it appears the division continues to hold on to this interpretation, which means that WRMEs can be denied for the same reasons they always have if there is no evidence the attending physician affirmatively disagreed with the report.”

Exh. 2 b) – “The first provision provides that the worker is eligible for a WRME if he or the insurer produces documents to demonstrate the attending physician quote ‘does not concur.’ This is similar to the same requirement that existed prior to the rule provision changes. * * *”

Exh. 2 b) – “So, the division added the second provision: subsection (2)(b)(B) that establishes a default rule that determines the claimant is eligible for an examination if neither party produces evidence that the * * * attending physician * * * does or does not concur with the IME. You know, at first glance, this seems to cover the situations in which there’s no evidence of an affirmative concurrence or nonconcurrence * * * except that, if the division continues to interpret ‘does not concur’ in a binary way, meaning either an affirmative disagreement or affirmative agreement, as the two potential results of an opinion or a response to an IME, then the documentation rules actually shift the burden of production to the employer, which I think exceeds the division’s authority * * *. The way the statute is written, the claimant * * * bears the burden of proving what the statute requires. If the division continues to interpret the statutory phrase ‘does not concur’ as binary, meaning is either met by affirmative disagreement or defeated by affirmative agreement, then it is the claimant’s burden to establish affirmative disagreement to obtain the WRME. In contrast, if ‘does not concur’ means one of three possibilities, like it should, like it’s properly interpreted – either affirmative disagreement, affirmative agreement, or silence, then the claimant wins if he proves one of two possibilities, affirmative disagreement or lack of affirmative agreement. Subsection (2)(b)(B) essentially provides if there is no evidence on the question, then claimant wins. That is backwards if the division still adopts a binary approach to the phrase ‘does not concur.’ It places the burden on the employers to prove an affirmative concurrence. If the division adopts the correct meaning of the phrase ‘does not concur’ means three possibilities, then the burden is not shifted, and only requires the insurer to disprove what is alleged by the claimant, that the AP has neither agreed nor disagreed with the IME. * * *”

Response: The division acknowledges that the term “does not concur” is ambiguous and subject to multiple interpretations. When the division adopted OAR 436-060-0147 following the passage of Senate Bill 485 in 2001, the division interpreted the phrase “does not concur with the report or reports” to mean that a worker’s attending physician or authorized nurse practitioner disagreed with a material aspect of an independent medical examination which was the basis for denial of compensability of the worker’s claim.

The division maintains that it is reasonable to interpret “does not concur” to mean “disagree;” but it is also reasonable to interpret “does not concur” to mean there has not been an affirmative concurrence. We recognize our prior interpretation of the phrase led to undesirable policy outcomes by preventing some workers from accessing a worker requested medical examination when their attending physician or authorized nurse practitioner does not comment on the independent medical examination report. Based on advice from stakeholders and recommendation from the Management-Labor Advisory Committee the division entered into rulemaking to amend the rule to provide that a worker is eligible for a worker requested medical examination when the division has not received documentation of a response from the attending physician or authorized nurse practitioner that demonstrates either agreement or disagreement with the independent medical examination.

We believe that the language provided under the proposed rule is consistent with statute and sufficiently describes the analysis that will be used to determine when a worker is eligible for an exam.

[Revisions provide for an evidentiary workaround and inappropriately shift burden to insurer or

employer.]

Exh. 1 – “Perhaps the WCD will now, on a handshake, correctly interpret the phrase ‘does not concur’ as meaning disagreement or not commenting. But if that’s true, then why does proposed subsection (2)(b)(A), requiring ‘documents that demonstrate’ that the physician ‘does not concur,’ also require subsection (2)(b)(B), which ‘defaults’ to WRME approval if no documentation is provided. That suggests that the WCD is attempting to maintain its interpretation of ‘does not concur’ as ‘disagreed,’ but shifting the ultimate burden of production onto the insurer or employer. I question whether the WCD even has authority to engage in this type of burden shifting. * * *”

Exh. 2 b) – “Instead, the division’s added some provisions regarding what documentation is necessary to find a worker eligible. These are the proposed revisions under 436-060-0147(2) * * * (a) and (b). However, those provisions are nothing more than an evidentiary workaround and they actually support the notion that the division continues to interpret ‘does not concur’ language as meaning affirmative disagreement with an IME.”

Response: Through this rulemaking process, the division is promulgating rules that provide that a worker is eligible for a worker requested medical examination in the absence of agreement between the worker’s attending physician or authorized nurse practitioner and the independent medical examination report or reports that were the basis of a compensability denial. Under the proposed OAR 436-060-0147(2)(b), the director will determine a worker is eligible for a worker requested medical examination if there are no documents demonstrating that the attending physician does or does not concur with the independent medical examination.

This change in policy shifts the incentives and costs associated with obtaining an attending physician or authorized nurse practitioner’s response to an independent medical examination report. The division received input from stakeholders that because insurers would be incentivized to obtain a response from the worker’s attending physician or authorized nurse practitioner after every independent medical exam, including when the subsequent denial was uncontested, a waiting period was needed to reduce inappropriate contact between the insurers and medical providers. In practice this means that the division will not make an eligibility determination until the division receives documentation confirming that the attending physician or authorized nurse practitioner does not concur with the independent medical examination, or at least 30 days after the worker’s request for hearing have passed.

[Revise the rule or provide other written assurance of intent.]

Exh. 1 – “* * * Given the history, I simply ask for written assurance—perhaps in the form of a rule—that the tense-shift from ‘did’ to ‘does’ means that the WCD has changed its interpretation of that statutory phrase that has caused so much difficulty for workers.”

Exh. 2 b) – “* * * I ask that the division revise its language to make clear that only an affirmative agreement with the IME acts as a bar to a WRME. * * * Alternatively, there needs to be some written record of the division’s intent in changing the rule. Since it appears nowhere in the rule, I request the administrator go on the record or issue an industry notice that spells out the intent of the rule, and that the division no longer interprets ‘does not concur’ as meaning only affirmative disagreement, and it means the attending physician does anything other than affirmatively agree in writing with the IME report.”

Exh. 3 – “* * * The WCD intends to change the phrase ‘**did** not concur’ in subsection (l)(c) to the phrase ‘**does** not concur.’ I can only assume this is a substantive change, unlike the prior change from ‘disagreed’ in January 2017. However, to make the record and intent of the change clear, I ask that you, in your capacity as the Workers’ Compensation Division’s Administrator, to confirm in writing – for the express purpose of developing rulemaking history – that the change of ‘did’ to ‘does’ is indeed substantive, and that it is intended to change the WCD’s interpretation of the statutory phrase ‘does not concur,’ as used in ORS 656.325(l)(e), to mean anything that a physician does or does not do with respect to an IME report other than expressly agree with the IME report.”

Response: The division shifted the “did not concur” language in the rule from past to present tense (i.e. “does not concur”) to clarify that eligibility will be determined based on the facts at the time of the order responding to the request for a worker requested medical examination; and to bring the rule language in line with the language used in the statute. Changing “did” to “does” is not intended to change the division’s interpretation of the statutory phrase “does not concur” in and of itself; however, with the additional changes to OAR 436-060-0140 and OAR 436-060-0147, the division is amending its policy to provide that a worker is eligible for a worker requested medical examination when the division has documentation that a worker’s attending physician or authorized nurse practitioner disagrees with or does not respond to the independent medical examination report or reports that were the basis of a compensability denial.

Testimony: OAR 436-060-0147

Exhibit 2 a)

“* * * I know during some of the discussions from MLAC, and kind of getting to the point of drafting these rules, people had kind of made a mental shortcut of saying the rule changes to mean that if the doctor doesn’t respond to the IME, it means that they disagree with the IME * * * The doctor’s failure to respond entitles the worker to a WRME, but it doesn’t necessarily have any implication about what that attending physician thinks about that IME report. And I think the rules are clear, but if these go into effect I’d also like the division to kind of think about that when they’re crafting the orders saying that the worker can get the WRME, of just saying the doctor did not respond and therefore is entitled, as opposed to – disagreed with the report or failed to respond and therefore we think they disagree, or something like that.”

Response: The division agrees that when the division does not receive documentation that demonstrates that an attending physician or authorized nurse practitioner does or does not concur with an independent medical examination report, our review is limited to the issue of eligibility for a worker requested exam and not the opinion of the attending physician or authorized nurse practitioner. The division will take your testimony under consideration when drafting language for orders.

Testimony: OAR 436-060-0147

Exhibit 2 a)

“* * * we have had some cases where the division finds the worker eligible for a WRME, but either the exam never gets scheduled, it gets scheduled and they fail to appear, or it gets scheduled, they see who the doctor is, and then they kind of give up on the process; and we would like to see some sort of * * * enforcement mechanism to * * * keep the process going, * * * it waves their right for further exams, or like with a missed IME, could result in a, you know, \$100 penalty, or something like that.”

Response: Establishing additional penalties for missed worker requested medical examinations is beyond the scope of the current rulemaking; however, the division will document your testimony for review during future rulemaking.

Testimony: OAR 436-060-0095

Exhibit 2 a)

“* * * there’s already the rule that says the insurer must forward the IME, and I think in these proposed rules it was moving it to a different section as well. I wanted to make sure that the insurer’s obligations can be met if their agent, their attorney, or even the IME company themselves forwards the IME report to the attending physician. I could see an argument being made that – yes in fact the IME report was forwarded to the attending physician but it wasn’t done by the insurer, and therefore that rule wasn’t met – and so I just kind of would like some clarification and make sure that, you know, if I forward it on behalf of my client that meets my client’s obligation.”

Response: OAR 436-060-0095(5) and OAR 436-010-0265(10)(b) require the insurer to forward a copy of the independent medical examiner’s signed report to the attending physician or authorized nurse practitioner within three days, excluding weekends and legal holidays, of the insurer’s receipt of the report. Generally, if an independent medical examination report is forwarded to the worker’s attending physician or authorized nurse practitioner within the required timeframes, the division considers the rule to be satisfied. If the division receives a complaint, we would make a determination about the appropriateness of the person forwarding the report at that time. In addition, the insurer continues to be responsible for assuring all of the requirements of the rule are met when the report is sent by another person. If the report is not sent timely, or another aspect of the rule is not satisfied, the insurer is liable for any penalties or other sanctions that may result.

Testimony: OAR 436-060-0147

Exhibit 2 a)

“Otherwise, I think the rules meet kind of goals of MLAC to try and change this – put the burden more on the insurance company to follow up with the attending physician, and make the WRME more accessible for workers in the process.”

Response: Thank you for your testimony.

Testimony: OAR 436-060-0147

Exhibit 4

“* * * SAIF supports WCD’s proposed changes to the WRME eligibility requirements. SAIF believes WCD’s proposed amendments to OAR 436-060-0147 implement MLAC’s recommendation and properly interpret ORS 656.325(1)(e).

“SAIF respectfully suggests that if WCD determines a worker is eligible for a WRME based on the attending physician's lack of response that the eligibility order WCD issues will differentiate between the attending physician who affirmatively does not concur and the attending physician who does not respond to the request for concurrence.”

Oregon Administrative Rules, Chapter 436

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Response: Thank you for your support. The division agrees that when an attending physician or authorized nurse practitioner does not respond to a request for concurrence, our review is limited to the issue of eligibility for a worker requested exam and not the opinion of the attending physician or authorized nurse practitioner. The division will take your testimony under consideration when drafting language for orders.

Dated this 14th day of December, 2017.

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October 19, 2017

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RE: Written Comments Regarding Proposed Changes to
Chapter 436 Division 060 Regarding WRME Eligibility

Dear Mr. Bruyns,

Thank you for inviting comment regarding the proposed changes to Chapter 436 Division 060. I write with concern about the proposed language in OAR 436-060-0147, concerning eligibility for worker requested medical examinations.

The proposed changes do not resolve the potential confusion caused by the phrase "does not" concur in the current statute. To the contrary, the proposed rule retains the eligibility requirement that the "attending physician or authorized nurse practitioner **does not concur** with the report or reports." (Emphasis added).

The "does not concur" language is precisely the language that WCD refused to interpret correctly and whose incorrect interpretation formed, at least partially, the impetus for MLAC's concern and the basis for this very change. I do not understand why the WCD would perpetuate language that was confusing to it and to the stakeholders, spawned multiple litigations, and delayed numerous WRMEs for months. Retaining the "does not concur" language simply invites more litigation regarding the interpretation and application of that phrase.

Instead, I strongly urge the WCD to adopt categorical language less subject to confusion and interpretation. I recommend the following:

OAR 436-060-0147 – Worker Requested Medical Examination

(1) Eligibility. The director will determine the worker's eligibility for a worker requested medical examination under ORS 656.325(1). The worker is eligible for an exam if unless:

(a) The worker has not made a timely request for a Workers' Compensation Board hearing on a denial of compensability as required by ORS 656.319(1)(a);

(b) The denial was not based on one or more independent medical examination reports; ~~and or~~

(c) The attending physician or authorized nurse practitioner ~~did not concur with~~ agrees in writing with the report or reports no later than 30 days after the date of the worker's request for hearing.

As discussed at WCD meetings, in writing, and in arguments before administrative law judges, this language recognizes that an attending physician may 1) agree, 2) disagree, or 3) express no opinion on an IME report, and clarifies to the extent possible that only *agreement* with an IME extinguishes the worker's eligibility for a WRME. It further clarifies that a physician's disagreement with, or not expressing an opinion on, the IME is *not* grounds to extinguish a worker's eligibility for a WRME.

In contrast, the WCD's proposed language is not clear. Proposed subsection (1)(c) requires that a physician "does not concur." What does that mean? Does it mean disagree? Because the WCD previously interpreted that specific phrase as meaning "disagrees." See former OAR 436-060-0147(1) (2016). The WCD then changed the rule back to "**did** not concur," but *continued* to interpret it as requiring documentation of written disagreement. See Admin Ord. No. 16-055, eff. 1/1/17 (amending OAR 436-060-0147(1)); Correspondence, Lou Savage, February 22, 2017. Should I not worry that the WCD will continue its past interpretation of the phrase "**does** not concur?" Given the history, I simply ask for written assurance—perhaps in the form of a rule—that the tense-shift from "did" to "does" means that the WCD has changed its interpretation of that statutory phrase that has caused so much difficulty for workers.

Perhaps the WCD will now, on a handshake, correctly interpret the phrase "does not concur" as meaning disagreement or not commenting. But if that's true, then why does proposed subsection (2)(b)(A), requiring "documents that demonstrate" that the physician "does not concur," also require subsection (2)(b)(B), which "defaults" to WRME approval if no documentation is provided. That suggests that the WCD is attempting to maintain its interpretation of "does not concur" as "disagreed," but shifting the ultimate burden of production onto the insurer or employer. I question whether the WCD even has authority to engage in this type of burden shifting.

Based on the above, the proposed rule should explicitly resolve the problem raised: that the phrase "does not concur" means that a physician does anything but agree with the IME report. That is not born out in the rule. Please revise the proposed language of OAR 436-060-0147 so that no future misinterpretations will occur and workers will be given timely access to WRMEs.

Sincerely,

PRESTON BUNNELL, LLP

Theodore P. Heus
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**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: 436-010, Medical Services 436-050, Employer/Insurer Coverage Responsibility 436-060, Claims Administration 436-075, Retroactive Program)))))	TRANSCRIPT OF TESTIMONY
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The proposed amendment to the rules was announced in the Secretary of State’s Oregon Bulletin dated Oct. 1, 2017. On Oct. 20, 2017, a public rulemaking hearing was held as announced at 9:30 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 Oct. 26, 2017.

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TRANSCRIPT OF PROCEEDINGS

Fred Bruyns: 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 9:31 a.m. on Friday October 20, 2017. 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.

The Department of Consumer and Business Services, Workers’ Compensation Division proposes to amend chapter 436 of the Oregon Administrative Rules, specifically: division 010, Medical Services; division 050, Employer/Insurer Coverage Responsibility, division 060, Claims Administration, and division 075, Retroactive Program. 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 available on the division’s website. The Workers’ Compensation Division filed the Notices of Proposed Rulemaking and Statements of Need and Fiscal Impact with the Oregon Secretary of State on Sept. 15, 2017, 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 the proposed rules to its website. The Oregon

Secretary of State published the hearing notices in its Oregon Bulletin dated Oct. 1, 2017. 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 Oct. 26, 2017, 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.

Kevin Anderson – could you come up and testify?

Kevin Anderson: Thanks Fred. For the record my name's Kevin Anderson. I'm an attorney at Sather Byerly, and Holloway. We represent employers and insurance companies in Oregon and in Washington. My testimony should be pretty brief. It's limited to just the changes to the WRME issue. I know during some of the discussions from MLAC, and kind of getting to the point of drafting these rules, people had kind of made a mental shortcut of saying the rule changes to mean that if the doctor doesn't respond to the IME, it means that they disagree with the IME, and I kind of want to make sure the record is clear on that, and I think these rules are clear. The doctor's failure to respond entitles the worker to a WRME, but it doesn't necessarily have any implication about what that attending physician thinks about that IME report. And I think the rules are clear, but if these go into effect I'd also like the division to kind of think about that when they're crafting the orders saying that the worker can get the WRME, of just saying the doctor did not respond and therefore is entitled, as opposed to - disagreed with the report or failed to respond and therefore we think they disagree, or something like that.

A couple other issues came up in just talking about the WRME process generally with some of my colleagues. Again, there's not a lot of WRME cases each year, so our sample size is a little small. But, we have had some cases where the division finds the worker eligible for a WRME, but either the exam never gets scheduled, it gets scheduled and they fail to appear, or it gets scheduled, they see who the doctor is, and then they kind of give up on the process; and we would like to see some sort of, I don't know, enforcement mechanism to actually, I don't know – compelled is the right word, but to keep the process going, either if the worker has a WRME and fails to show up, either it waves their right for further exams, or like with a missed IME, could result in a, you know, \$100 penalty, or something like that.

And, the last point that I wanted to clarify was the – there's already the rule that says the insurer must forward the IME, and I think in these proposed rules it was moving it to a different section as well. I wanted to make sure that the insurer's obligations can be met if their agent, their attorney, or even the IME company themselves forwards the IME report to the attending physician. I could see an argument being made that – yes in fact the IME report was forwarded to the attending physician but it wasn't done by the insurer, and therefore that rule wasn't met – and so I just kind of would like some clarification and make sure that, you know, if I forward it on behalf of my client that meets my client's obligation.

Otherwise, I think the rules meet kind of goals of MLAC to try and change this – put the burden more on the insurance company to follow up with the attending physician, and make the WRME more accessible for workers in the process. Thanks.

Fred Bruyns: Thank you very much Kevin. Ted Heus?

Ted Heus: Alright, for the record, my name is Ted Heus. I am an attorney with Preston Bunnell. We represent injured workers, and represent injured workers before the agency and the Workers' Compensation Board and the Oregon Courts.

So I've reviewed the proposed changes to OAR 436-060-0147, the rules covering the eligibility criteria for approval of a worker-requested medical examination or WRMEs. I have several concerns about the language that the department chose. But two of them really stand out and need to be addressed by revision to the proposed rule language.

ORS 656.325(1)(e) is designed to allow workers access to a state appointed medical examination unless their attending physician agrees with an IME report, upon which a denial is based. However, the Workers' Compensation Division has interpreted the law to allow a full WRME only when the attending physician affirmatively disagrees with an IME report. Such an interpretation resulted in denials of WRMEs when the physician neither agrees nor disagrees or is silent on the IME report. There's a range of issues as to why an attending physician may fail to comment on an IME. Some of them, but not all of them, just the ones I've personally encountered, are that: insurers don't send IME reports to the attending physician; insurers send the report but don't ask for a comment, so the IME report ends up in the doctor's record but is never brought to the attending physician's attention; the attending physician might not be familiar with workers' compensation issues – causation or specific conditions – and desires not to get directly involved in the issue; the attending physician may feel that she or he lacks the medical expertise required to the IME, which is usually conducted by a medical specialist; the attending physician might charge to review records or comment on the report, and workers might not have the means to pay out of pocket fees for those comments and reviews and those are not generally covered by insurance; there may be other legal barriers to the attending physician commenting, such as federal laws prohibiting federally employed physicians, such as Veteran's Affairs' physicians, from getting involved in state workers' compensation litigation; finally, the attending physician may simply be unavailable for comment within the period that comment is sought.

After several litigations and bringing the issue to the attention of Management-Labor Advisory Committee, the Workers' Compensation Division agreed to act by amending the rule regarding WRME eligibility. However, the proposed amendments originally intended to resolve the problem of silence or nonresponse, doesn't actually solve the problem. Specifically, the proposed rule retains the "does not concur" language that caused all the confusion to begin with. And, the proposed language attempts to resolve the issue with an evidentiary workaround that frankly might exceed the Workers' Compensation Division's authority, depending on how that issue becomes litigated. Alright, so first and foremost, the problem is that the proposed rule doesn't actually change the phrase "does not concur," which is the statutory phrase, or phrase used in the statute. For years, and I don't know how many years, but as long as I've been litigating the issue, the Workers' Compensation Division has misinterpreted the statutory phrase to mean a physician's affirmative disagreement with an IME report or an affirmative nonconurrence. This is shown both in its rulemaking, its decision making, its resistance to change the policy in the face of judge orders interpreting the statute differently, and has never actually formally recanted

its prior interpretation despite MLAC's recommendation for it to change the rule to fit the correct statutory interpretation. By retaining that language and having no written explanation of its meaning or interpretation, it appears the division continues to hold on to this interpretation, which means that WRMEs can be denied for the same reasons they always have if there is no evidence the attending physician affirmatively disagreed with the report. Instead, the division's added some provisions regarding what documentation is necessary to find a worker eligible. These are the proposed revisions under 436-060-0147(2)(b) – ah (a) and (b). However, those provisions are nothing more than an evidentiary workaround and they actually support the notion that the division continues to interpret “does not concur” language as meaning affirmative disagreement with an IME. The first provision provides that the worker is eligible for a WRME if he or the insurer produces documents to demonstrate the attending physician quote “does not concur.” This is similar to the same requirement that existed prior to the rule provision changes. The WCD has previously held the position that it is impossible to produce [inaudible] documents demonstrating the physician's silence or refusal to comment [inaudible] you can't document silence. Prior to the changes, the division attempted to use this documentation requirement as an affirmative method to disapprove WRMEs in which there was no affirmative disagreement, proof of affirmative disagreement with a WRME. So, the division added the second provision: subsection (2)(b)(B) that establishes a default rule that determines the claimant is eligible for an examination if neither party produces evidence that the AP, sorry, attending physician does not concur with the IME – sorry – does or does not concur with the IME. You know, at first glance, this seems to cover the situations in which there's no evidence of an affirmative concurrence or nonconcurrence, affirmative disagreement or non – or affirmative disagreement – except that, if the division continues to interpret “does not concur” in a binary way, meaning either an affirmative disagreement or affirmative agreement, as the two potential results of an opinion or a response to an IME, then the documentation rules actually shift the burden of production to the employer, which I think exceeds the division's authority to do so the way. The way the statute is written, the claimant is the one who requested the IME and usually is the proponent of the IME and therefore bears the burden of proving what the statute requires. If the division continues to interpret the statutory phrase “does not concur” as binary, meaning is either met by affirmative disagreement or defeated by affirmative agreement, then it is the claimant's burden to establish affirmative disagreement to obtain the WRME. In contrast, if “does not concur” means one of three possibilities, like it should, like it's properly interpreted – either affirmative disagreement, affirmative agreement, or silence, then the claimant wins if he proves one of two possibilities, affirmative disagreement or lack of affirmative agreement. Subsection (2)(b)(B) essentially provides if there is no evidence on the question, then claimant wins. That is backwards if the division still adopts a binary approach to the phrase “does not concur.” It places the burden on the employers to prove an affirmative concurrence. If the division adopts the correct meaning of the phrase “does not concur” means three possibilities, then the burden is not shifted, and only requires the insurer to disprove what is alleged by the claimant, that the AP has neither agreed nor disagreed with the IME. The problem is that the division has consistently and historically adopted the binary interpretation, and nothing in this rule or elsewhere suggests that it has changed its historical position on its interpretation of the phrase “does not concur.”

Based on the above, I ask that the division revise its language to make clear that only an affirmative agreement with the IME acts as a bar to a WRME. The written comments that I've submitted to the division provide some suggested language to make that happen. Alternatively,

there needs to be some written record of the division's intent in changing the rule. Since it appears nowhere in the rule, I request the administrator go on the record or issue an industry notice that spells out the intent of the rule, and that the division no longer interprets "does not concur" as meaning only affirmative disagreement, and it means the attending physician does anything other than affirmatively agree in writing with the IME report. Thank you.

Fred Bruyns: Thank you Ted. Would you like us to enter that into the record as well. It's up to you entirely.

Ted Heus: It's just on outline.

Fred Bruyns: Okay. Is there anyone else present who'd like to testify this morning? Is there anyone on the telephone who'd like to testify?

Claire Hertz: Yes, this is Claire Hertz, chief financial officer with Beaverton School District.

Fred Bruyns: Oh, welcome Claire. I'll go ahead and enter you onto our testimony log. You may go ahead.

Claire Hertz: We have submitted a memo with feedback to the proposed rules, and when we look at it in the way that school districts operate in the state, there are some concerns about some of the language in the proposed rule. For instance, not all school districts submit a comprehensive annual financial report. Some of them do annual financial statements. So, we are concerned about, number one that having that language and that requirement is outside of the scope of the smaller school districts. The other is, when you look at the Moody's and S&P ratings that are included as part of the financial criteria – for instance, North Clackamas and Beaverton have both Standard and Poor's and Moody's, and we would qualify under one of the ratings and not qualify under the other rating, so we're not sure if it just has to be one of the two, and the other concern there is not all of the school districts have ratings because not all school districts issue bonds, so just making sure that its not a requirement to have those ratings.

The other is that we're – we would really like to propose language that takes into account the PERS unfunded actuarial liability as well as future OPEB, other post employment benefit liabilities, from GASB rules that require us to post long term liability for things that we pay as we go basis, and the, having that, we would like to exclude that in the calculation of the financial rating of school districts. So, just wanted to re-cover what we included in a memo that hopefully you already have at hand, and if not please contact me and I'd be happy to get that submitted properly if that's not already been done.

Fred Bruyns: Thank you very much, Claire, and this might be a good time to say that that testimony, along with Ted Heus' testimony, and then a little bit of testimony from the department in terms of some housekeeping changes, has been posted to our website, and there's a handout at the back of the room that shows you kind of how to get to that website. It's got the URL. So I would encourage you to go and look at the testimony, and additional testimony that's received after this hearing through the deadline of the 26th will also be posted to that website. All our testimony is now put online for all to see.

Is there anyone else on the telephone or here present who would like to testify? Hearing no one, I just want to remind you again that indeed the 26th is the deadline for written testimony, and that includes the 26th itself, the close of the business day, basically, or actually it could come in as late as 11:59 p.m., but you may submit testimony 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, the Labor & Industries Building. On the table by the entrance are business cards that include my contact information. I will acknowledge all testimony received.

It's our policy to leave hearings, at least the hearing room, open for a minimum of one-half hour, so I will remain here, and you are welcome to remain as well, or you may go. And this, a recording of this hearing and actually a typed transcript will be posted to our website as well, so you can find out if anybody arrives late. But otherwise, I'm going to recess the hearing. It is now 9:50, so this hearing is recessed.

This hearing is resumed at 10 a.m. Is there anyone here who'd like to testify, or on the telephone? Hearing no one, the time is still 10 a.m. This hearing is adjourned. Thank you for coming.

Transcribed from a digital audio recording by Fred Bruyns, Oct. 24, 2017.

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October 19, 2017

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RE: Workers' Compensation Division Proposed Changes to
OAR 436-060-0147 – WRME Eligibility

Dear Mr. Savage,

On January 27, 2016, I wrote to you expressing frustration about the changes to OAR 436-060-0147. At that time, the WCD had recently amended the former rule, which previously required that a physician "disagreed" with an IME report, to requiring that the physician "did not concur" with the IME report. I assumed that the change was substantive, and that workers would be granted WRME requests unless the attending physician agreed with the IME; a physician's silence or failure to comment would no longer be a bar to a WRME examination. I was wrong.

On February 27, 2017, you wrote to me explaining that the change to OAR 436-060-0147(1) was substantively meaningless, and that the WCD changed the rule merely "to be more consistent with the language" of the statute. You defended the WCD's continued misinterpretation of the statutory phrase "does not concur" to mean that affirmative disagreement was required to be "documented" before a WRME would be granted.

After further litigation and after MLAC weighed in on the issue, the WCD has now proposed another change to OAR 436-060-0147(1). The WCD intends to change the phrase "**did** not concur" in subsection (1)(c) to the phrase "**does** not concur." I can only assume this is a substantive change, unlike the prior change from "disagreed" in January 2017.¹

However, to make the record and intent of the change clear, I ask that you, in your capacity as the Workers' Compensation Division's Administrator, to confirm in writing—for the express purpose of developing rulemaking history—that the change of "did" to "does" is indeed substantive, and that it is intended to change the WCD's interpretation of the statutory phrase "does not concur,"

¹ I understand that subsections (2)(b)(A) and (B) are also being amended, but for reasons that I will not get into here, they are not sufficient to effect a change in the WCD's interpretation of statutory phrase "does not concur."

Lou Savage - Administrator
Workers' Compensation Division
October 19, 2017

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as used in ORS 656.325(1)(e), to mean anything that a physician does or does not do with respect to an IME report *other than* expressly agree with the IME report.

PRESTON BUNNELL, LLP



Theodore P. Heus
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October 26, 2017

Fred Bruyns, Rules Coordinator
Workers' Compensation Division
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Salem, OR 97309-0405

RE: SAIF Corporation testimony regarding WCD's proposed rules to
implement House Bills 2338 and 3363 (2017)

Dear Fred:

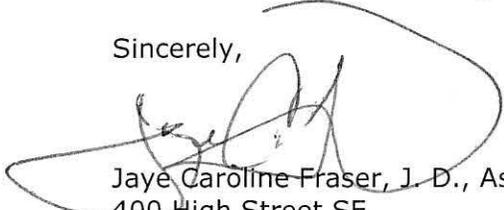
SAIF Corporation supports the rules the Workers' Compensation Division (WCD) proposes to adopt to implement House Bills 2338 and 3363. SAIF appreciates the opportunity to participate in the process and provide its perspective to WCD.

SAIF particularly appreciates the significant time and effort expended by the Management Labor Advisory Committee (MLAC) as it considered stakeholder recommendations for worker requested medical examination (WRME) eligibility when an attending physician has not concurred with an independent medical exam (IME) report. MLAC heard testimony regarding worker eligibility for WRMEs during multiple subcommittee and full committee meetings. MLAC thoughtfully discussed options to provide a remedy when attending physicians do not respond to a request to concur with an IME's conclusions. SAIF supports WCD's proposed changes to the WRME eligibility requirements. SAIF believes WCD's proposed amendments to OAR 436-060-0147 implement MLAC's recommendation and properly interpret ORS 656.325(1)(e).

SAIF respectfully suggests that if WCD determines a worker is eligible for a WRME based on the attending physician's lack of response that the eligibility order WCD issues will differentiate between the attending physician who affirmatively does not concur and the attending physician who does not respond to the request for concurrence.

Please let me know should you have any questions regarding SAIF's testimony.

Sincerely,



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