



Oregon

Kate Brown, Governor

Department of Consumer and Business Services

Workers' Compensation Division

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Diana Winther, Co-Chair
Kimberly Wood, Co-Chair
Management-Labor Advisory Committee

Dear Co-Chairs:

The Workers' Compensation Division (WCD) has reviewed SAIF's draft rule and our authority under the statute. There are areas of the draft rule that we believe are beyond our statutory authority. We have consulted with the Department of Justice (DOJ) about these areas. We will not be sharing DOJ's written advice because it is subject to the attorney-client privilege.

While WCD has broad general rulemaking authority, any rule we adopt must be consistent with statute and cannot enlarge or narrow the scope of statute. Rules must also be within the director's authority and not encroach on the Workers' Compensation Board's authority. WCD has authority to enforce portions of ORS chapter 656 that are not under the Board's jurisdiction. We do not have authority under ORS chapter 654, the Oregon Safe Employment Act, which is delegated to Oregon OSHA.

Generally, WCD has authority to:

- Review the reasonableness of an insurer's claim investigation.
- Review an insurer's overall performance and compliance with statutes and rules.
- Penalize an insurer for not following statute, rule, or order of the director.
- Penalize an insurer for unreasonable delay or refusal to pay compensation, or unreasonable delay in acceptance or denial of a claim, as long as there are no other issues pending in the claim (ORS 656.262(11)).
- Make rules retroactive, if reasonable under the circumstances (this is a case-by-case determination).

Specific to the SAIF proposal, WCD has authority to adopt rules, with stakeholder input, in these areas:

- Define terms such as "coronavirus," "coronavirus test," and "quarantine."
- Further refine the definition of "reasonable investigation" for specific types of claims, so long as it is within our statutory authority and does not infringe on the jurisdiction of the board.

- Likely impose a requirement to get a medical opinion before denying specific types of claims.
- Define a process for auditing specific types of claims for a “reasonable investigation,” so long as it is within our statutory authority and does not infringe on the jurisdiction of the board (see additional notes below). We can only look at whether the investigation of the claim was reasonable, not whether the decision to deny a claim was reasonable, which is the board’s authority.

WCD does not have current statutory authority to adopt rules in these areas of the SAIF proposal:

- By statute, only the worker’s attending physician or authorized nurse practitioner or, for a limited amount of time, a chiropractor, physician assistant, naturopath, or emergency room physician, can authorize time loss. While an insurer may voluntarily accept authorization from another type of provider or the employer, WCD cannot require the insurer to do so by rule.
- If the insurer has a reasonable basis to deny the claim without knowing the results of a COVID-19 test, WCD cannot require the insurer to wait a specific amount of time to issue a denial.
- The statute provides a specific process for claims, including giving the insurer 60 days to accept or deny a claim. WCD cannot create a new minimum timeframe that is not in statute.
- WCD can audit overall claims processing performance, but cannot make findings in a specific claim that will potentially go before the board, or require the insurer to take a different action in a specific claim. The board has exclusive authority over matters concerning a claim, unless the statute contains an explicit exception.

Please let us know if you have additional questions.

Sincerely,



Sally Coen
Administrator