Written testimony of
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To the House Committee on Business and Labor
Regarding HB 3022

SAIF is Oregon's not-for-profit workers' compensation insurance company. For more than 100 years, we've been taking care of injured workers, helping people get back to work, and keeping rates low by focusing on workplace safety.

SAIF insures more than 53 percent of the businesses in Oregon, 75 percent of which have ten or fewer employees. SAIF also insures the state of Oregon and all its agencies as well as 90 percent of the school districts and many cities, counties, and special districts.

We are here today regarding proposed changes to Oregon's workers' compensation system. SAIF respectfully urges the Committee to allow the Management Labor Advisory Committee to dive into the issues raised by this bill, as has been the standard operating procedure for the legislature since it adopted the Mahonia Hall reforms and established MLAC in 1990.

As drafted, this bill rolls back many of the key elements of the landmark deal that was struck by business and labor in 1990. Since the reforms, Oregon's system has become one of the most successful, and claims rates and premium have both declined approximately 70 percent since the reforms were adopted.

In the 1980s, Oregon's workers' compensation system was in crisis. We had the sixth highest rates in the country as business costs had almost doubled in ten years. We had the highest frequency of claims, and the highest frequency of claims with permanent partial disability. We were the third highest in total medical cost per claim. In addition, we had a poor rate of returning injured workers back to the workforce.

In 1990, the governor brought business and labor together at Mahonia Hall, and charged them with creating a system that worked for both workers and business. Their work was adopted in a one-day session. The group focused on safety, return to work, and managing medical costs. The report to the governor resulting from the meeting can be found here—the first two pages outline the major benefits for business and labor alike.

Chief among the reforms was the establishment of MLAC. Made up of five representatives from management and five from labor, the group continued the partnership started at Mahonia Hall.

Not only did the Mahonia Hall reforms increase benefits for injured workers; it also included:

- Disabilities rated by the worker's own attending physician, with a non-adversarial appeal process
- Reinstatement rights
- Settlement rights for indemnity issues while retaining the right for continued medical treatment

- Improved return to work benefits
- Less litigation

This is not an exhaustive list. The report also recognized that safety is a critical component to a successful workers' compensation system; among the reforms adopted during the 1990 special session was the establishment of mandatory safety committees.

Since the Mahonia Hall reforms, Oregon's workers' comp system is considered one of the best in the nation. \During this time, Oregon has increased benefits to workers, including linking benefits to average weekly wage, raising the maximum benefit level, doubling payments for funerals, and increasing benefits for permanently total disabled workers.

SAIF has been and remains a proponent of MLAC and the process that brings labor and management together to review and consider changes to the system to which they are both beneficiaries. SAIF acknowledges and agrees that measured changes to improve the system are appropriate and it has supported those changes over the years. This proposed legislation impacts the current system more significantly than any proposed changes to the system in the past 29 years.

HB 3022 makes sweeping changes and SAIF is currently analyzing both the what it proposes changing and the extent of the proposed changes. SAIF has heard suggestions that Brown v. SAIF, decided in 2017 by the Oregon Supreme Court, "reversed course;" Brown v. SAIF reinstated established case law that had been overturned in Brown v. SAIF at the Oregon Court of Appeals in 2014. In response to OTLA's top four changes as described in its presentation to MLAC on February 8:

1. Entitlement to diagnostic services

OTLA proposes changing the definition of "compensable injury" to encompass the "accidental injury and all results requiring medical services". The "compensable injury" would not be limited to the conditions listed in the notice of acceptance. Changing the definition of a phrase that is a term of art in workers' compensation law brings about unintended consequences.

In ORS Chapter 656, the phrase "compensable injury" is used more than forty times. By changing the definition of compensable injury, a ripple effect will occur in other areas of workers' compensation.

For example, ORS 656.005(7)(a)(B) states that if a compensable injury combines with a preexisting condition, the combined condition is not compensable unless the compensable injury is the major contributing cause of the disability and need to treat the combined condition. Employers and insurers would be required to show that the "injury event"—and not the work-related condition—was not (or no longer was) the major contributing cause of the need to treat the combined condition. This is a reversal of the Supreme Court's decision in *Brown v. SAIF*, where it concluded that the insurer had to show that the work-related condition was no longer the major contributing cause of the need to treat the accepted and subsequently denied combined condition.

"Compensable injury" also appears in the temporary disability provisions (i.e. time loss provisions) where a worker may receive temporary disability if they are required to leave

work for four or more hours to receive medical treatment regarding the "compensable injury" according to ORS 656.210(4). It creates a challenge for an adjuster to determine whether temporary disability benefits are due when they are looking at an injury event as opposed to an accepted condition.

Under ORS 656.214(2), permanent disability benefits shall be awarded when the disability "results from a compensable injury." Following the Court of Appeals first decision in *Brown* where it interpreted "compensable injury" to mean the injury event, employers and insurers observed the ripple effect of that decision in determining permanent impairment. On March 1, 2015, the department amended the rules regarding permanent disability. Permanent disability was no longer awarded only for the accepted conditions. Instead, under OAR 436-035-0007(1)(a), a worker was eligible for an award if the permanent loss was caused in any part by the compensable injury. Prior to the Court of Appeals *Brown* decision in 2014, the rule stated that a worker was eligible for an impairment award if the loss was caused by the accepted compensable condition and direct medical sequela. The result of this rule change was that impairment was rated for the injury event and not for the accepted conditions, leading to increased impairment awards.

Another unintended effect of the Court of Appeals decision in *Brown* was the evaluation of vocational benefits. As with the permanent impairment determination, the rules regarding entitlement to vocational services were rewritten to reflect the new definition of "compensable injury" whereas previously vocational benefits were determined based on the physical limitations due to the accepted conditions.

Furthermore, here is an excerpt from the department's March 1, 2015 summary of its proposed rule changes to OAR 436-120.

"The division has amended OAR 436-009, Oregon Medical Fee and Payment Rules, 436-010, Medical Services, 436-030, Claim Closure and Reconsideration, 436-035, Disability Rating Standards, 436-105, Employer-at-Injury Program, 436-110 Preferred Worker Program, and 436-120, Vocational Assistance to Injured Workers, to reflect the decision of the Oregon Court of Appeals in *Brown v. SAIF* (262 Or. App. 640 (2014)). The court found that the legislative history established that an insurer's obligation to specify the accepted conditions for a claim was not intended to have a negative impact on the injured worker's right to benefits resulting from the compensable injury; specifically, the legislature did not mean to equate "compensable injury" with an "accepted condition." Revised rules distinguish definitions and actions that are relevant to compensable injuries from those definitions and actions that are relevant to accepted conditions."
https://wcd.oregon.gov/Rules/div_120/120_15056ub_2.pdf

Workers' compensation is a merge of law and medicine. Benefits are determined based on a statutory scheme that injured workers, employers, medical providers, and insurers function under. By shifting the standard from the accepted conditions, the system is eroded as the basis for the benefits moves from evidence-based medicine to forensic science where workers, employers and doctors are expected to determine benefits based on an injurious event or series of events. This is problematic for all and creates uncertainty.

SAIF is concerned that, by changing the statutory definition of "compensable injury," the system will be impacted beyond diagnostic services. The redefinition of compensable injury is overbroad if it is just supposed to make diagnostic services compensable in more circumstances. It will make everything tangentially related or possibly related compensable for medical services.

2. Burden of Proof in Combined Condition Denials

First, OTLA's proposed changes eliminate ORS 656.005(7)(a)(B), which allows an insurer to deny an initial combined condition claim and ORS 656.262(6)(c) and (7)(a), which allows an insurer to deny an accepted combined condition. Thus, the argument that a change in the definition is needed to clarify the combined condition statutes is misleading because the proposal eliminates the existing combined condition statutes.

In addition, there is no reason to redefine a combined condition after *Brown* to be consistent between a combining in the initial compensability context and that in the ceases denial context. There is a distinction because the worker need not establish a specific diagnosis to meet their burden of proving an otherwise compensable injury. A worker need only show that the injury was a material contributing cause of their disability and need for treatment. If a worker meets their burden of proof then an insurer has the burden of proving there is a combined condition with a preexisting condition and the preexisting condition is more than fifty percent the cause of the condition. For an accepted combined condition, there is the compensable injury, which insurers typically define as a specific condition, and there is a preexisting condition. The Supreme Court in *Brown* found that the comparison is between the compensable injury, in that case a lumbar strain, and preexisting arthritis. The courts and Workers' Compensation Board have been able to apply these standards rather consistently except for the Court of Appeal's decision in Brown, which was subsequently reversed. More recently the board reaffirmed this interpretation of the combined condition statutes in *Margarret Y. Interiano*, 71 Van Natta 111 (2019) and *Mario Carillo*, 70 Van Natta 1815 (2018).

3. Preexisting conditions

The purpose of workers' compensation is to cover work-related conditions, and when an injury combines with a preexisting condition, only cover that which is attributable in major part to the work injury. In essence, OTLA is asking employers to become responsible for much more than what was work related. That is not fair to the employers who often hire individuals who have preexisting conditions that they bring forward to the job. It would be bad policy to transfer that much liability to Oregon employers.

Eliminating the preexisting condition provision of the 1990 reforms will cause employers and insurers to be liable for some very expensive conditions and treatment when their contribution to those situations was minor. The fact that some workers are unaware of the presence of arthritis doesn't mean that a minor work injury caused a major disability and need for treatment. The result would be medical services and other benefits for the non-work-related conditions, likely resulting in increased reserves and costs to policyholders.

4. Specificity of Claims for New or Omitted Conditions

New or omitted condition claims need to be specific so that all parties understand what was requested and must be processed. Changing the standard to one of "reasonably apprises" is an invitation to litigation, which is against the policy of the chapter. By having workers clearly request acceptance of a condition, ambiguity and uncertainty in interpreting the new condition claim is almost eliminated. By moving to a "reasonably apprises" standard, insurers are left to interpret any correspondence from a worker or their representative and determine whether there is any language that may "reasonably apprise" the insurer of a possible new claim. This would not only increase litigation but also increase requests for attorney fees and penalties for alleged unreasonable claims processing when it is unclear whether a request "reasonably apprised" the insurer of a new condition claim.

This proposed legislation impacts the current system more significantly than any proposed changes to the system in the past 29 years. SAIF urges the Committee to allow MLAC the opportunity to bring stakeholders together and spend the necessary time to consider and evaluate the issues.