Written testimony of
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To the Senate Committee on Workforce
regarding SB 507

I'm David Barenberg and with me are Annette Sjullie, a senior technical adjuster, and Elaine Schooler, a trial attorney. We are here today to discuss Senate Bill 507. We will attempt to explain the current process for workers' comp claims and provide our analysis of the impact the amendment will have.

First, however, we want to acknowledge the critical and stressful work performed by Oregon workers covered by this proposed legislation. We agree that these workers are entitled to the benefits of Oregon's workers' compensation law. We process and accept mental health claims from workers who serve in these jobs.

As you know, SAIF is Oregon's state-chartered workers' compensation insurer. As a not-for-profit public entity, SAIF exists to serve and protect the Oregon workforce, meeting both the needs of workers and employers.

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.

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. Since those 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.

One of the primary elements to the Mahonia Hall changes was a focus on safety. The workers' compensation system is most successful when it keeps workers from being injured in the first place. Since 1990, claims have dropped 70 percent and are on average lest severe. During this same time, rates have dropped 70 percent. We believe a comprehensive solution addressing these issues needs to address the issues at the front end of the work as well, including wellness and mental health.

To date, public policy in Oregon says Oregon employers should pay for claims when the worker's condition was caused by their work. This proposed bill is a change from that longstanding policy.

While it may seem insensitive to review a person's history and medical records, it is necessary to establish the link between work and the condition. It is also necessary for medical providers to understand the person's history to provide the most effective treatments.

SAIF has been and remains a proponent of the Management Labor Advisory Committee (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 respectfully urges the Committee to allow MLAC 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.

Below is a discussion of the proposed changes.

Currently, under ORS 656.802(3), mental stress claims for all subject workers are not compensable unless the worker can prove the following:

1. The employment conditions producing the disorder exist in a real and objective sense
2. The employment conditions producing the disorder are not generally inherent in every working situation, reasonable disciplinary or job corrective action, cessation of employment or employment decisions based on ordinary business or financial cycles
3. The worker has a diagnosed mental or emotional disorder which is generally recognized in the medical or psychological community.
4. There is clear and convincing evidence that the disorder arose out of and in the course of employment.

The proposed amendments to Senate Bill 507 (SB 507-3) would create a rebuttable presumption that mental stress disorders for fire service professionals and public safety personnel are compensably related to their job duties. The change would carve out an exception for those workers who would otherwise have to establish compensability of their mental stress disorder under ORS 656.802(3).

- The scope of covered workers disproportionately impacts public entities and is vague as to who is covered.

Under SB 507-3 the presumption would apply to firefighters employed by a political subdivision of the state or special government body or public fire protection agency that engages in specific enumerated duties. It also includes public safety personnel, which includes police officers, correction officers, parole and probation officers, emergency operator, dispatcher or emergency medical services. The scope of covered workers is narrower under the amendments but would likely have a disproportionate effect on state and local governments who employ a larger number of these workers. The amended language is unclear as to who would be considered "public safety personnel" as that term is undefined.

In addition, SB 507-3 refers to firefighters and public safety personnel who are "employed". It is unknown whether "employed" limits the scope of covered workers to

those who are paid and excludes volunteers. Additionally, it is unclear whether "employed" includes both part-time and full-time workers. If it includes part-time workers then it creates a situation where a worker may only work for a subject employer for a small portion of their work week and have other occupational exposures that contribute to a mental stress condition. Given the lack of clarity regarding the scope of covered workers, extensive litigation will ensue to determine whether a worker falls within the presumption.

- SB 507-3 fails to define the covered conditions with sufficient specificity and is tied to medical criteria that may become outdated.

For covered workers, the presumption would apply to any mental disorder that is recognized and specified as a trauma-related disorder or stress related disorder under the Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) and includes, but is not limited to PTSD, acute stress disorder, adjustment disorder, reactive attachment disorder and disinhibited social engagement disorder. The amendment does not limit the diagnoses that may be subject to the presumption and only requires that the condition be recognized as a trauma or stress related disorder. By using expansive language and stating the list of diagnoses is not all-inclusive, the intent is to include other diagnoses from the DSM guide. This creates uncertainty as to what conditions are subject to the presumption and would require litigation to determine whether a disorder is "trauma-related" or "stress-related".

Furthermore, under the amendment, the DSM-5 is used to determine whether a mental stress condition is a "trauma-related" or "stress-related" and therefore subject to the presumption. This is problematic because the DSM-V has gone through multiple revisions as evidenced by the fact it is in its fifth edition. It is reasonable to expect future revisions to the DSM-5. By linking the diagnostic criteria to the fifth edition, the amendment would require mental health professionals to apply criteria and standards that may no longer be followed and applied by mental health providers. This rigidity fails to account for the evolving nature of the mental health profession.

- The presumption is not rebuttable and does not consider preexisting conditions.

The burden on the employer is so great that it would be nearly impossible for an employer to rebut the presumption that the mental stress condition is work-related. The employer would have to establish by clear and convincing medical evidence that there was no material relationship between the work activities and the mental stress condition. Whether the work activities contributed in material part is a very low standard that has recently been interpreted as meaning no contribution. Under the presumption, even if the work exposure only contributed 1% to the mental stress condition, the condition is compensable. The presumption also does not exclude preexisting mental stress conditions. Under the presumption an employer would be responsible for a worker's PTSD condition even if the condition was diagnosed and treated before their employment started so long as there was some contribution to the condition from the work activities. Because no preemployment psychological evaluation is required so a worker may bring a preexisting PTSD diagnosis with them without the employer's knowledge and if the employer contributes to the condition then they are responsible for the entire condition. As a result, an employer would be responsible for the entire mental stress condition even though the work activities minimally contributed to the condition.

In addition, all employment conditions can contribute except those that are generally inherent in every working situation, not reasonable disciplinary, correction or job performance evaluation actions and not employment decisions including termination. However, even with this exclusion, all other work activities need only contribute in material part and the presumption applies. Thus, a worker may be under disciplinary action and develop an acute stress disorder. Even if the majority of the stress disorder is due to the disciplinary action, the condition is presumed to be related to the covered work activities and the employer would have to prove by clear and convincing medical evidence that work activity did contribute in material part to the mental stress condition. This would again be very difficult to prove.

- A two year employment period for micro-traumas is easily circumvented by a single traumatic event.

The amendment also creates a time period in which the presumption would apply. The presumption may be triggered by a single work event provided the event exists in a real and objective sense or it may be triggered by a series of events that occur over the course of more than two years. The requirement of two years of employment creates an artificial employment period that in reality would be subverted by the single stressful event. Because first responders and firefighters job duties are unique, involving stressors that are not present for other workers, it is expected that many of their job duties would trigger the single traumatic event requirement and would not require two years of service. Thus, a minimum two year employment history would be largely ineffective in reducing the number of potential claims that would be subject to the presumption because the responder could rely on a single stressful event to avoid the two year requirement.

- The presumption should only apply to future claims.

The presumption applies to all pending claims for benefits and all claims for benefits that occur after the effective date of the act. The presumption should be limited to claims or injuries that occur after the effective date of the act. To apply it to all pending claims pulls creates uncertainty for insurers or employers who have processed a claim based on the law in effect at the time of the initial claim and issued a decision that may be in litigation when the act goes into effect.

Thank you for your time.