

The following advice from Jerry Keene will be stamped in as testimony. Refer to Mr. Keene's testimony at the public hearing of Aug. 23, 2016.

Fred Bruyns, rules coordinator
Workers' Compensation Division
8/23/16

From: Jerry Keene <jerryk@oregoncomp.com>
Sent: Thursday, July 07, 2016 12:54 PM
To: CLARK Christopher M * DCBS
Cc: BRUYNS Fred H * DCBS; 'Jaye Fraser'
Subject: RE: Division 055 Rules

Christopher –

Thank you for the opportunity to review the proposed changes. My IME issue was certainly covered in a way that adequately addressed my concern. I also note that you increased the required “legal update” credits but now describe them as generic “law” credits. That’s a good compromise and also meshes with the original history. The “legal update” requirement was originated at a time when the legislature (and therefore the Department and litigation tribunals) were constantly changing the workers' compensation statutes in major ways. Such major do not happen so frequently these days, so the previous rule that required examiners to focus 4 (now 6) hours on recent “changes” in the law and rules is no longer apt.

I offer these questions or concerns regarding some of the other proposals.

First, I suggest some further clarification on how proposed OAR 436-055-0070(4) will work.

(4) Expired certification.

An insurer may renew a claims examiner’s certification that expired within the past 12 months if they meet the requirements of section (3) of this rule. An insurer may recertify an claims examiner who has not held current certification in the past 12 months under section (2) of this rule.

This appears to create a new 12-month grace period for the renewal of certified examiners who allow their certification to expire, but it is unclear about the time period during which the examiner is to have obtained the necessary credits. Under the proposal, such renewals are allowed within 12 months after the examiner’s certification lapses if the examiner meets “the requirements of section (3)” but section (3) requires all hours to be obtained within a three-year period. Was this change intended to effectively stretch the original 3-year period to 4 years – or does it instead contemplate that the insurer will limit its review to the hours obtained during the 3 years *immediately preceding* the date that it reviews the expired examiners documents for the hours? For example, assume an examiner obtains some, but not all of the needed credits during the first few months of their 3-year period but then fails to obtain the rest before the end of the three years. If that examiner then satisfies the rest of their hours during the 4th year and seeks a renewal by a subsequent insurer, does that insurer review all of the credits during the four years (which would lead to a renewal) or just the credits obtained within the three-period prior to the renewal (in which case there would be no renewal)?

Second, I am looking at proposed OAR 436-055-0070(5).

(5) Acknowledgement of certification issued by another insurer.

An insurer may acknowledge certification issued by another insurer by verifying that the requirements for initial certification or renewal have been met using documentation provided by the claims examiner.

I recommend a provision that conforms and coordinates this provision with OAR 436-055-0100(5), which only requires to insurers to retain certification/renewal documentation records for a period of six years. This might be accomplished by adding a second sentence to OAR 436-055-0070(5) that states something to this effect:

A previous insurer's determination or acknowledgment that an examiner's documentation met such requirements shall be deemed presumptively valid if (1) more than six years has elapsed since the determination, (2) the examiner relied upon such determination, and (3) there is no evidence that the determination was procured through misrepresentation or bad faith.

Absent such a provision the proposed rule still does not address the situation where one insurer accepts and renews an examiner's documentation of an original certification and/or one of his/her early renewals, and then that examiner continues on for years obtaining multiple renewals along the way. Under the new rule, some subsequent insurer (with a different subjective view of what the statute or rules require) may conclude that the original certification or renewal was based on documentation or classes that were actually deficient (for example, a questionable IME credit or a math error by the earlier insurer in adding up the credits). In that event, the rule would allow for the subsequent insurer's disagreement or belated discovery of error to retroactively invalidate the original certification or early renewal - and that lapse or break in the chain would also invalidate all of the subsequent renewals (because the examiner would have been required to take the exam again). An analogous problem can arise where an examiner can establish that previous insurer/employers accepted their documentation for renewal purposes, but the original documentation has long since been discarded or lost. (Again, I note that proposed OAR 436-055-0100(5)(d) only requires an insurer to retain such records for 6 years. The worker's obligation to retain such records should match it.) My suggestion addresses both scenarios.

Third, and finally, the proposed rules still lack provisions addressing folks who satisfy the initial certification requirement (exam) and/or can document sufficient credits for renewals while they are not actually working for an insurer. What happens if they subsequently begin or return to work as a claims examiner? There will have been no previous "insurer" to "accept" or "acknowledge" their documentation - even though it met all of the requirements. To that end, I suggest that OAR 436-055-0070 be supplemented with a subsection (6) as follows:

"(6) Retrospective acknowledgment of certification eligibility.

Notwithstanding OAR 436-055-0070(4), an insurer may acknowledge an examiner's eligibility for current certification by retrospectively verifying that the requirements for initial certification or renewal have been met using documentation provided by the claims examiner."

You will note that I did not include such examiners in my "good faith" exception above. It continues to require a person who never worked for an insurer (or stopped doing so for a while) to maintain and provide their *actual records* for retrospective review no matter how long ago they took the original test or documented intervening renewal credit hours.

Please feel free to contact me with concerns, responses or questions about my ideas. I sincerely appreciated the opportunity to weigh in.

Jerry Keene



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From: CLARK Christopher M * DCBS [<mailto:Christopher.M.Clark@oregon.gov>]

Sent: Wednesday, July 6, 2016 11:43 AM

To: 'Jerry Keene'

Cc: BRUYNS Fred H * DCBS

Subject: Division 055 Rules

Jerry,

WCD is preparing to file our proposed revisions to the division 055 rules next week. Because the rules were opened in response to your petition, we wanted to give you a chance to review the draft rules to see if your concerns were adequately addressed before we file. Please note that some additional changes were made to OAR 436-055-0070 and OAR 436-055-0100 in response to the discussion on your second issue, regarding the two subsections that were omitted from OAR 436-055-0100(3) during the 2005 revision of that rule. In particular, we hope that the changes address the issue of a claims examiner's certification expiring during a period where they are not associated with an insurer who can renew their certification.

We would greatly appreciate any feedback you may have on these changes, and the other revisions by next **Monday, July 11**. I am also attaching an updated version of the issues document for your reference, but don't hesitate to contact me or Fred Bruyns with any questions.

Thank you,

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community
Workers' Compensation