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Fred Bruyns - Rules Coordinator
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Workers' Compensation Division
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Via Email Only: fred.h.bruyns@oregon.gov

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,

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