

Agenda

Rulemaking Advisory Committee

Workers' Compensation Division Rules
OAR chapter 436, division 030, rule 0165
Implementation of House Bill 2335

Type of meeting:	Rulemaking advisory committee
Date, time, & place:	July 25, 2017, 10:30 a.m. to Noon, Pacific Daylight Time Room F (basement), Labor and Industries Building, 350 Winter Street NE, Salem, Oregon Teleconference: 1-213-787-0529 Access code: 9221262#
Facilitators:	Fred Bruyns and Julia Hier, Workers' Compensation Division
10:30 to 10:40	Welcome and introductions; meeting objectives
10:40 to 11:50	Discussion of issue – see attached .
11:50 to 11:55	Summing up – next steps – thank you!

Attached: [Issue description](#)
[Draft rule, OAR 436-030-0165](#)

OAR 436-030 Claim Closure and Reconsideration
Issues Document
Stakeholder Advisory Committee Meeting

ISSUE #1

Rule: 436-030-0165 – Medical Arbiter Examination Process

Issue: House Bill 2335 requires that the director develop criteria on when it will appoint a panel of two arbiters.

Background: The passage of House Bill 2335 will result in the following changes to ORS 656.268(8)(c), effective January 1, 2018:

At the request of either of the parties, **the director shall appoint** a panel of **as many as** three medical arbiters [*shall be appointed*] **in accordance with criteria that the director sets by rule.**

Alternatives:

- Define a “panel” of physicians and provide criteria on when the director may consider to appoint two rather than three medical arbiters.
- Other

Fiscal Impacts, including cost of compliance for small business:

Recommendation:



Claim Closure and Reconsideration Oregon Administrative Rules Chapter 436, Division 030

DRAFT, Proposed

436-030-0165 Medical Arbiter Examination Process

(1) The director will select a medical arbiter physician or a panel of physicians in accordance with ORS 656.268(8)(~~d~~).

(a) For the purpose of this rule, a "panel" of physicians is defined as two or three medical arbiters.

(b) When a panel medical arbiter examination is requested, the director will generally appoint three medical arbiters. The director may consider the following criteria when determining whether to appoint two medical arbiters instead:

(A) The location of the worker;

(B) The specialties of the doctors needed for the medical arbiter examination; and

(C) The time frame for completing the reconsideration process.

(~~c~~) Any party that objects to a physician on the basis that the physician is not qualified under ORS 656.005(12)(b) must notify the director of the specific objection before the examination. If the director determines that the physician is not qualified to be a medical arbiter on the specific case, an examination will be scheduled with a different physician.

(~~d~~) When the worker resides outside the state of Oregon, a medical arbiter examination may be scheduled out-of-state with a physician who is licensed within that state to provide medical services in the same manner as required by ORS 656.268(8).

(~~e~~) Arbiters or panel members will not include any health care provider whose examination or treatment is the subject of the review.

(~~f~~) The insurer must pay all costs related to the completion of the medical arbiter process in this rule.

(2) If the director determines there are enough appropriate physicians available to create a list of possible arbiters and it is practicable, each party will be given the opportunity to agree on a physician and to remove one physician from the list through the process described below:

(a) The director will send the list to the parties electronically or by overnight mail.

(b) If the parties agree on a physician, every party must send a signed, written notice of that choice to the director.

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

WORKERS' COMPENSATION DIVISION

DRAFT, Proposed CLAIM CLOSURE AND RECONSIDERATION

(c) A party can remove a physician from the list, even when the parties have agreed on a physician to conduct the exam, by submitting a signed, written notice of that choice to the director.

(d) To be effective, the written notice of agreement on or rejection of a physician must be received by the director within three working days of the date the director sent the list.

(3) The worker's disability benefits will be suspended when the director determines the worker failed to attend or cooperate with the medical arbiter examination, unless the worker establishes a "good cause" reason for missing the examination or for not cooperating with the arbiter. The worker must call the director within 24 hours of the missed examination to provide any "good cause" reason.

(a) Notice of the examination will be considered adequate notice if the appointment letter is mailed to the last known address of the worker and to the worker's attorney, if the worker is represented.

(b) For the purposes of this rule, non-cooperation includes, but is not limited to, refusal to complete any reasonable action necessary to evaluate the worker's impairment. However, it does not include circumstances such as a worker's inability to carry out any part of the examination due to excessive pain or when the physician reports the findings as medically invalid.

(c) Failure of the worker to respond within the time frames outlined in statute for completion of the reconsideration proceeding may be considered a failure to establish "good cause."

(4) If a worker misses the medical arbiter examination, the director will determine whether or not there was a "good cause" reason for missing the examination.

(5) Upon determination that there was not a "good cause" reason for missing the examination, or that the worker failed to cooperate with the arbiter, the worker's disability benefits will be suspended and the reconsideration proceeding postponed for up to an additional 60 days.

(6) The suspension will be lifted if any of the following occur during the additional 60-day postponement period:

(a) The worker establishes a "good cause" reason for missing or failing to cooperate with the examination;

(b) The worker withdraws the request for reconsideration; or

(c) The worker attends and cooperates with a rescheduled arbiter examination.

(7) If none of the events that end the suspension under section (6) of this rule occur before the expiration of the 60-day additional postponement, the suspension of benefits will remain in effect.

(8) The medical arbiter or panel of medical arbiters must perform a record review or examine the worker as requested by the director and perform such tests as may be reasonable and necessary to establish the worker's impairment.

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
DRAFT, Proposed CLAIM CLOSURE AND RECONSIDERATION

(a) The parties must submit to the director any issues they wish the medical arbiter or panel of medical arbiters to address within 14 days of the date of the director's notice of the start of the reconsideration proceeding. The parties must not submit issues directly to the medical arbiter or panel of medical arbiters. The medical arbiter or panel of medical arbiters will only consider issues appropriate to the reconsideration proceeding.

(b) The report of the medical arbiter or panel of medical arbiters must address all questions raised by the director.

(c) The medical arbiter will provide copies of the arbiter report to the director, the worker or the worker's attorney, and the insurer within five working days after completion of the arbiter review. The cost of providing copies of such additional reports must be reimbursed according to OAR 436-009-0060 and must be paid by the insurer.

(9) When a worker's medical condition prevents the worker from fully participating in a medical arbiter examination that must be conducted to determine findings of impairment, the director may send a letter to the parties requesting consent to defer the reconsideration proceeding. The medical condition that prevents the worker from participating in the medical arbiter examination does not need to be related to the work injury.

(a) If the parties agree to the deferral, the reconsideration proceeding will be deferred until the medical record reflects the worker's condition has stabilized sufficiently to allow for examination to obtain the impairment findings. The parties must notify the director when it is appropriate to schedule the medical arbiter examination and provide the necessary medical records when requested. Interim medical information that may be helpful to the director and the medical arbiter in assessing and describing the worker's impairment may be submitted at the time the parties notify the director that the medical arbiter examination can be scheduled. The director will determine whether the interim medical information is consistent with the provisions of ORS 656.268(6) and (8).

(b) If deferral is not appropriate, at the director's discretion either a medical arbiter examination or a medical arbiter record review may be obtained, or the director may issue an Order on Reconsideration based on the record available at claim closure and other evidence submitted in accordance with ORS 656.268(6).

(10) All costs related to record review, examinations, tests, and reports of the medical arbiter must be billed and paid under OAR 436-009-0010, 436-009-0030, 436-009-0040, and 436-009-0060.

(11) When requested by the Hearings Division, the director may schedule a medical arbiter examination for a worker who has appealed a Notice of Closure rescinding permanent total disability benefits under ORS 656.206.

Statutory authority: ORS 656.726

Statutes implemented: ORS 656.268

Hist: Amended 1/29/15 as Admin. Order 15-052, eff. 3/1/15

Amended 10/12/15 as Admin. Order 15-061, eff. 11/17/15

[Amended xx/xx/xx as WCD Admin. Order 17-XXX, eff. 1/1/18](#)

See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.