

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
CLAIMS EVALUATION, DETERMINATION AND RECONSIDERATION

OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 030

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436-30-115 Reconsideration of Determination Orders or Notices of Closure

(1) A Determination Order shall be reconsidered by the Department upon receipt by the Department of a written request for reconsideration by the worker, the worker's representative, or the insurer. A Notice of Closure shall be reconsidered by the Department upon receipt by the Department of a written request for reconsideration by the worker or the worker's representative. If the medically stationary date for the closure is prior to June 7, 1995, the request must be mailed within 180 days from the mailing date of the Determination Order or Notice of Closure. If the medically stationary date for the closure is June 7, 1995 or after, the request must be mailed within 60 days of the mailing date of the Determination Order or Notice of Closure.

(2) For the purpose of these rules, "reconsideration proceeding" means the procedure established to reconsider a Notice of Closure or Determination Order and does not include personal appearances by any of the parties to the claim or their representatives, unless requested by the Department. All information to correct or clarify the record and any medical evidence regarding the claimant's condition as of the time of claim closure that should have been but was not submitted by the physician serving as the attending physician at the time of claim closure and all supporting documentation must be presented during the reconsideration proceeding.

(3) Only one reconsideration proceeding may be completed on each Determination Order or Notice of Closure and the Department will do a complete review of that closure; however, pursuant to OAR 436-30-008(1), at the Director's discretion, an Order on Reconsideration can be abated, withdrawn and/or amended.

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436-30-165 Medical Arbitrator Examination Process

(1) When a basis for the Request for Reconsideration is a disagreement with the impairment findings used in rating the worker's disability at the time of claim closure, the Director shall refer the claim to a medical arbitrator or panel of arbitrators.

(a) When additional medical information is required pursuant to ORS 656.268(6), the Director may refer the claim to a medical arbitrator or panel of arbitrators.

(b) The Department will notify the parties within 18 working days from the date the reconsideration request was received that a medical arbitrator review will be scheduled.

(c) The parties may not be granted their request for an arbitrator examination or a change from a single arbitrator to a panel of arbitrators if the request is received after the sixth working day from receipt of the reconsideration request by the Director.

(d) When the Director requests clarification, a party's failure to provide an explanation may preclude a medical arbitrator review if a preponderance of medical evidence at the time of claim closure does not raise an issue regarding the validity of the closing examination.

(e) The costs related to record review, examinations and reports of the medical arbitrator shall be paid pursuant to OAR 436-10-047.

(2) The Director shall select a medical arbitrator physician or a panel of physicians from a list of physicians qualified to be attending physicians who are licensed pursuant to ORS 656.005(12)(b)(A). Arbitrators or panel members shall not include any providers whose examination or treatment is the subject of the review.

(a) Any party that objects to a physician on the basis that the physician does not qualify in one of the areas described in subsection (2) of this rule, must notify the Director prior to the examination of the specific objection. If the Director determines that the physician is not qualified to be a medical arbitrator on the specific case, an examination will be scheduled with a different physician. All costs related to the completion of the medical arbitrator process in this subsection shall be paid by the insurer.

(b) When the worker resides outside the state of Oregon, a medical arbitrator 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(7).

(3) The department shall notify the parties of the time and place of the medical arbitrator examination. This notice shall also inform the worker that failure to attend the medical arbitrator examination or to cooperate with the medical arbitrator will result in suspension of disability benefits effective on the date of the examination. The appointment letter shall notify the worker to call the department within 24 hours to provide any "good cause" reason for missing the exam.

(4) The medical arbitrator or panel of medical arbitrators shall 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. The Director shall provide notice of the examination of the worker to all parties.

(a) Any issues the parties wish the medical arbitrator or panel of medical arbitrators to address must be submitted to the Department within six (6) working days after the date the

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reconsideration request is received by the Director. No issues should be submitted to the medical arbiter or panel of medical arbiters directly by the parties. Only issues appropriate to the reconsideration proceeding will be submitted by the Department to the medical arbiter or panel of medical arbiters.

(b) The medical arbiter or panel of medical arbiters shall address all questions raised by the Department in the report. Issues raised directly to the medical arbiter by the parties shall not be addressed in the medical arbiter report.

(c) The Department shall instruct the medical arbiter to provide copies of the arbiter report to the Department, the worker or the worker's representative, and the insurer within five (5) working days after completion of the arbiter review. The cost of providing copies of such additional reports shall be reimbursed according to OAR 436-10-090 and shall be paid by the insurer.

(5) When the director refers the claim to a medical arbiter or panel of arbiters and the worker fails to appear for the medical arbiter exam without good cause, or fails to cooperate with the medical arbiter, the director shall suspend benefits.

(a) It is the worker's responsibility to notify the department immediately of any good cause reason for missing a scheduled medical arbiter examination. The director shall reschedule the examination after determining the worker had good cause reasons for missing the examination. For the purposes of this rule, "good cause" includes but is not limited to, events or circumstances beyond the worker's control. Failure to attend the examination without prior notice or failure to notify the department within 24 hours of a missed examination is a failure to cooperate with the medical arbiter process and may result in dismissal of the reconsideration proceeding. If the worker or worker's representative does not contact the department within 24 hours, the department will attempt to contact the worker by phone to determine if there is a "good cause" reason for the missed appointment. If no phone contact can be made, and there remains time within the time frame for completing the reconsideration proceeding, a letter will be sent to the worker requesting that the worker submit any "good cause" reason for the missed exam within 5 working days. If no time remains within the time frame for the reconsideration proceeding, a suspension of disability benefits will be ordered effective on the date of the missed examination.

(b) The physician shall notify the department immediately when the worker does not cooperate with the examination. For purposes of this section "does not cooperate with the examination" includes but is not limited to, refusal to complete any action the physician deems 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) Upon finding that the worker failed to attend the medical arbiter examination without good cause or that the worker did not cooperate with the medical arbiter, the director shall issue an order suspending disability benefits. These benefits shall be suspended until the director receives the medical arbiter report verifying that the worker did attend and cooperate with the examination.

(d) The suspension order may be reconsidered any time prior to a hearing before the

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director if either party presents evidence to show a "good cause" reason for not attending the exam or cooperating with the medical arbiter. The reconsideration proceeding is deferred during the time a worker's disability benefits are suspended and shall not be counted in the time allowed to complete a reconsideration.

(e) When the suspension order is issued and the reconsideration proceeding is deferred, the medical arbiter process must be completed within 90 days. Completion of the medical arbiter process includes attending an examination, cooperating with a medical arbiter, and receipt by the department, of the medical arbiter report. If the medical arbiter process is not completed within 90 days, the director shall:

(A) if the reconsideration proceeding was requested by the worker, determine that by not completing the medical arbiter exam, the worker has effectively withdrawn the reconsideration request, and shall dismiss the reconsideration proceeding with prejudice.

(B) if the reconsideration proceeding was requested by the insurer, determine if the insurer intends to withdraw the reconsideration request. If the insurer does not withdraw the reconsideration request, a medical arbiter record review may be obtained to complete the reconsideration proceeding.

(f) If either party disagrees with the suspension order, a request for contested case hearing must be made in writing to the administrator of the Workers' Compensation Division within 30 days from the issuance of the suspension order. If at the contested case hearing the suspension order is affirmed, the medical arbiter process as described in subsection (e) must be completed within 90 days of the director's order.

(6) When a medical arbiter examination is not medically appropriate because the worker's medical condition is not stationary and impairment cannot be accurately evaluated by the physician, the director will send a letter to the parties requesting consent to postpone the reconsideration proceeding pursuant to ORS 656.268(7)(h).

(a) If the parties agree to the postponement, the reconsideration proceeding will be postponed until the worker's condition has medically resolved to allow for examination. The parties must notify the director when it is appropriate to schedule the medical arbiter examination.

(b) If the parties do not agree to the postponement, at the director's discretion either a medical arbiter examination or a medical arbiter record review may be obtained.

(c) If no medical arbiter exam or review is obtained, the closure will be reconsidered based on the record available at claim closure including information obtained pursuant to ORS 656.268 (6)(a) and (b).

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436-30-175 Fees and Penalties within the Reconsideration Proceeding

(1) An insurer failing to provide information or documentation as set forth in OAR 436-30-135, 145 and 165 may be assessed civil penalties pursuant to OAR 436-30-580. Failure to comply with the requirements set forth in OAR 436-30-135, 145 and 165 may also be grounds for extending the reconsideration proceeding pursuant to ORS 656.268(6).

(2) If upon reconsideration of a Notice of Closure there is an increase of 25 percent or more in the amount of permanent disability compensation from that awarded by the Notice of Closure, and the worker is found to be at least 20 percent permanently disabled, the insurer shall be ordered to pay the worker a penalty equal to 25 percent of the increased amount of permanent disability compensation. If an increase in compensation results from the promulgation of a temporary emergency rule, penalties will not be assessed. For claims with medical stationary dates on or after June 7, 1995, if the increase in compensation results from new information obtained through a medical arbiter examination, the penalty may not be assessed.

(3) For the purpose of section (2) of this rule, a worker who receives a total sum of 64 degrees of scheduled or unscheduled disability or a combination thereof, shall be found to be at least 20% disabled. As an illustration, a worker who receives 20 percent disability of a great toe (3.6 degrees) is not considered 20 percent permanently disabled because the great toe is only a portion of the whole person. A worker who is 100 percent permanently disabled is entitled to 320 degrees of disability. A worker who receives 64 degrees (20 percent of 320 degrees), whether scheduled, unscheduled or a combination thereof, shall be considered the equivalent of at least 20 percent permanently disabled for the purposes of this rule.

(4) Attorney fees may only be authorized when a Request for Reconsideration is submitted by an attorney representing a worker or the attorney provides documentation of representation, and a valid signed retainer agreement has been filed with the Department. The reconsideration order shall order the insurer to pay the attorney 10 percent out of any additional compensation awarded but not more than the maximum attorney fee allowed in OAR 438-15-040(1) and (2) and OAR 438-15-045.

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