



Oregon claim closure: things to keep in mind when closing in on the finish line

By Vincci W. Lam and Amy C. Osenar ■ April 4, 2016

So you have successfully processed an Oregon injury claim to a medically stationary point and are ready to issue a Notice of Closure (“NOC”), hurrah! But wait---the attending physician (“AP”) is assigning a great deal of permanent impairment, which seems questionable based on the nature of the work injury.

In this scenario, it’s important to keep in mind that, while the Oregon Administrative Rules require that impairment information used in a NOC come from the attending physician,¹ the attending physician is not the “last word” on the issue of permanent impairment.

The attending physician is not necessarily the “last word” on impairment because an insurer/employer can appeal its own NOC (also called “requesting reconsideration”) in order to obtain an arbiter exam and have the Department weigh in on the issue of permanent disability benefits. The arbiter exam, which can be conducted by a single arbiter physician or a panel of three arbiter physicians, is essentially a “second opinion” on impairment that assists the Department in reviewing a permanent disability award.

The Department will typically adopt the arbiters’ impairment findings to calculate the appropriate permanent disability award, unless a preponderance of the evidence shows the AP’s findings of impairment is actually more accurate than the arbiters.² In other words, an employer/insurer must use an AP’s impairment findings to calculate impairment for the initial Notice of Closure, but the employer/insurer can appeal the NOC to obtain a “second opinion” on impairment from the arbiter. The arbiter exam may cause the Department to adjust the impairment award.

Details to keep in mind when appealing a NOC:

- The employer/insurer only has seven days from the date the NOC is issued to submit an appeal. This is a much shorter timeline than the timeline applicable to appeals by claimants (60 days). An employer/insurer completes and submits Form 2223b to the Department to initiate the reconsideration process.³
- An employer/insurer is only permitted to challenge the NOC’s physical impairment findings. The employer/insurer cannot appeal the durations of temporary disability awarded by the NOC or challenge whether a work

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Vincii Lam is an attorney at Reinisch Wilson Weier PC. She may be reached at 503.452.7259 or VinciiL@rwwcomplaw.com.



Amy C. Osenar is a partner at Reinisch Wilson Weier PC. She may be reached at 503.452.7274 or amyO@rwwcomplaw.com.

Claim closure finish line (continued)

disability award was appropriate. The Department typically reviews every aspect of the NOC when it is appealed, although the Department is not legally required to review every aspect of the NOC.

- The Department selects the arbiter physician(s) randomly from a list of approved physicians, consisting of both treating physicians as well as IME physicians. There is no way to predict the identity of the arbiter physician(s) for your specific claim. Parties are permitted to object to a particular arbiter physician, but there is no guarantee that the objectionable physician will be disqualified from the exam.⁴ The only guarantee is that the arbiter physicians cannot have been involved in the claim previously (i.e. no prior treating physicians or IME physicians that examined claimant previously.)
- An exam with a single arbiter physician costs approximately \$600. A “panel” of three arbiter physicians typically costs around \$1,500. This cost may be worthwhile depending on the amount of permanent disability benefits at issue. Requesting a panel of arbiter physicians is ideal because the entire exam is not based on a single physician’s experience and opinion.
- The uncertainty regarding the experience level or identity of the arbiter physicians also creates the possibility that an arbiter may assign greater impairment than the AP, causing the impairment award to increase at reconsideration. An increase in permanent disability benefits as the result of an arbiter exam is not typical, but can happen.

As you can see, the decision whether to appeal a NOC in order to obtain a “second opinion” on impairment is both strategic and time-sensitive.

Please contact any of the Oregon practice attorneys at Reinisch Wilson Weier PC with any claim-specific questions. ■

¹ OAR 436-035-0007(5)(a) and (6) provide that an attending physician can either: conduct his/her own closing exam to arrive at impairment findings, or concur with another physician’s closing exam (for instance, an independent medical exam or a physical capacity evaluation) for purposes of claim closure.

² OAR 436-035-0007(5)(b): “On reconsideration, when a medical arbiter is used, impairment is established based on objective findings of the medical arbiter, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician are more accurate and should be used.”

³ Form 2223b and instructions for an insurer/employer to request reconsideration of a NOC can be found here: http://www.cbs.state.or.us/external/wcd/policy/bulletins/ab_index.html

⁴ Under 436-030-0165 (2), parties may be given an opportunity to object to a particular arbiter physician if there are enough potential arbiter physicians in the area and “if practicable.” The not-so-firm wording of this rule means the Department is not required to allow parties to object to an arbiter physician.

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