Workers’ Compensation Rule Changes – Disability Rating Standards

To: Oregon workers, employers, insurers, and additional interested parties

From: Oregon Department of Consumer and Business Services, Workers’ Compensation Division

Subject: Proposed amendment of OAR 436-035, Disability Rating Standards

The Workers’ Compensation Division has posted proposed OAR 436-035, “Disability Rating Standards,” to its Web site:

http://www.cbs.state.or.us/external/wcd/policy/rules/rules.html#proprules

Public hearing date and time: March 22, 2010, 2:00 p.m.

Public hearing location: Room F (basement), Labor & Industries Building, 350 Winter Street NE, Salem, Oregon

Written testimony: Written testimony may be submitted through March 26, 2010. Send written testimony by e-mail to fred.h.bruyns@state.or.us or send to: Fred Bruyns, rules coordinator, Workers’ Compensation Division, 350 Winter Street NE (for courier or in-person delivery), PO Box 14480, Salem, OR 97309-0405, or fax to: 503-947-7514.

Rule caption: Proposed changes to the rules for determining permanent disability of workers injured on the job

Rule summary:

NOTE: “Insurer” in this summary includes self-insured employers.

The agency proposes to amend OAR chapter 436, division 035, “Disability Rating Standards,” to improve organization, clarity and consistency, and to eliminate redundancy. More specifically, these proposed rules:

- Describe procedures for redetermining the extent of permanent disability when newly accepted or omitted conditions have been added to the accepted conditions since the last arrangement of compensation.
- Explain that “giveaway weakness” caused by pain due to an accepted condition is an example of measurable impairment.
- Eliminate references to the AMA Guides to the Evaluation of Permanent Impairment, 3rd Ed., Rev. 1990 and generally refer the reader to the administrative rules and Workers’ Compensation Division Bulletin 239.
- Explain how to measure ranges of motion using a goniometer and inclinometer.
- Clarify requirements and limitations affecting apportionment and offset of permanent disability.
- Clarify procedures to follow when the worker fails to complete a residual functional capacity evaluation.
- Include chest among the parts of the body that may qualify for a chronic condition impairment value.
- Explain how to measure sensation in the extremities using the two-point discrimination method.
• Clarify that both sensation loss and hypersensitivity (in the same body part) must be rated.
• Clarify that loss of strength due to an injury in a single finger, thumb, or toe receives a value of zero, unless the strength loss is due to a compensable condition that is proximal to the digit.
• Provide that instability in the ankle or knee may be rated even if the ligament demonstrating the laxity has not been injured.
• Clarify when to rate a meniscectomy as a complete loss.
• Provide that if a worker cannot remain on his or her feet for more than two consecutive hours, the worker will receive the same impairment rating whether the cause is injury to the knee/leg or ankle/foot, and further provide that this rating is not reduced by degenerative joint disease, arthritis or chondromalacia, or precluded by dermatological or vascular impairment.
• Provide a standard for rating hemipelvectomy.
• Replace the flat 5% rating for abdominal wall injury with three classes of impairment.
• Clarify that each trigeminal nerve receives a value of 5% when there is a loss of motor function.
• Define social functioning and deterioration or decompensation in work or work-like settings for the purpose of rating disability due to mental illness.
• Clarify that an allergy is an immunologic state.

Statutory authority: ORS 656.726(4)

Statutes implemented: ORS chapter 656, primarily ORS 656.214, 656.268, and 656.726

Need for the Rules: The proposed changes are needed to carry out the director’s responsibilities under ORS 656.726(4)(f), to: “Provide standards for the evaluation of disabilities.” The proposed rules should make these standards more effective, by clarifying standards that have been subject to misinterpretation, by providing rating standards for medical conditions that are not addressed by current rules, and by providing fairer compensation for certain conditions.

Documents Relied Upon, and where they are available: Advisory committee records and written advice. These records are available for public inspection in the Workers’ Compensation Division of the Department of Consumer and Business Services, 350 Winter Street NE, Salem, Oregon 97301-3879, upon request and between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday. Please call 503-947-7717 to request copies.

Fiscal and Economic Impact: The agency projects fiscal/economic impacts as follows:


The agency projects that proposed clarifications to and simplification of the rules would have no net positive or negative overall impact on the amount of PPD awarded, though proper application of the rules could affect insurers or workers positively or negatively relative to misapplication of existing rules. Clearer rules may reduce litigation and the associated costs to insurers, workers, and the agency. Overall, proposed rule changes would slightly increase insurers’ PPD costs, with corresponding economic benefits to affected workers. However, due to the relative infrequency of conditions addressed by proposed rule changes, and the potential benefits of clarity, the agency projects the impact on overall system costs would be very small or possibly zero.
Include chest among the parts of the body that may qualify for a chronic condition impairment value.

- The agency does not have data upon which to project a specific cost for this change, but does anticipate that application of this rule would be infrequent and therefore the economic impact on insurers should be minor, with a corresponding benefit for affected workers.

Provide that if a worker cannot remain on his or her feet for more than two consecutive hours, the worker will receive the same impairment rating whether the cause is injury to the knee/leg or ankle/foot, and further provide that this rating is not reduced by degenerative joint disease, arthritis or chondromalacia, or precluded by dermatological or vascular impairment.

- The agency’s available data for ankle and leg injuries is not sufficiently detailed to project a specific cost for this change. Under the current rule, a severe injury to the ankle/foot represents a loss of 6% to the whole person, while an injury to the knee/leg is a 7% loss to the whole person, a difference of approximately $800. Under the proposed rule, awards would be based on the outcome of the stand-walk limitation, regardless of cause, and insurers would experience some increased costs, with a corresponding benefit for affected workers.

Replace the flat 5% rating for abdominal wall injury with three classes of impairment.

- The agency’s available data for abdominal injuries does not provide a basis to determine which of the three classes would have been applied to historical PPD awards. However, these injuries are infrequent and the impact to insurers is expected to be minor, with a corresponding benefit to affected workers.

Provide a standard for rating hemipelvectomy.

- The agency has not compiled data on hemipelvectomies. However, this is an extremely rare procedure and the agency projects a very minor economic impact to insurers. Because the current rules do not provide a rating standard for hemipelvectomy, the director would likely create a rating standard in an order on reconsideration applicable to the specific claim under OAR 436-035-0500, and order the insurer to award permanent disability.

Additional proposed rule changes should have no significant economic impact on any party. However, the agency welcomes public input on potential fiscal impacts of any of the proposed rule changes.

Statement of Cost of Compliance:

1. **Impact on state agencies, units of local government, and the public (ORS 183.335(2)(b)(E)):**
   The impact on this agency, the Department of Consumer and Business Services, should be slightly positive, due to greater rule clarity and, potentially therefore, reduced appeals of claim closures. Otherwise, proposed changes should not have any significant effect on other state agencies or local governments, and should not affect the general public at all except as described under “Fiscal and Economic Impact” above.

2. **Cost of compliance effect on small business (ORS 183.336):**
   a. **Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:** Workers’ compensation insurers and self-insured employers are the businesses most affected by proposed rule changes, and most or all these organizations do not meet the definition of small business in ORS 183.310.
The agency has record of four small businesses that close claims and rate PPD, but the proposed rule changes should not have any economic impact on these businesses.

b. **Projected reporting, record-keeping and other administrative activities required for compliance, including costs of professional services:** The agency projects no impact to small businesses.

c. **Equipment, supplies, labor, and increased administration required for compliance:** The agency projects no impact to small businesses.

**Request for public comment:** The Workers’ Compensation Division requests public comment on whether other options should be considered for achieving the rules’ substantive goals while reducing the negative economic impact of the rules on business.

Please contact me if you have questions. Thank you!

Sincerely,

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Workers’ Compensation Division
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