

Draft Minutes
Workers' Compensation Management Labor Advisory Committee
IME Subcommittee
Friday, January 14, 2005
Conference Room 260
Labor and Industries Building, Salem, OR 97304

Members Present

Brad Witt
Ken Hector
Lon Holston
Sheri Sundstrom

Staff Present

Lou Savage, Director's Office
Myrna Curzon, Director's Office
John Shilts, Workers' Compensation Division
Jerry Managhan, Workers' Compensation Division
Cara Filsinger, Workers' Compensation Division
Jan Miller, Workers' Compensation Division
Travis Wall, Injured Worker Ombudsman
Edith Hayden, Office of Injured Worker Ombudsman

Meeting Agenda

Public Testimony

Chair Witt entered into the record two pieces of written testimony. One from the Workers' Compensation Claims Association and one from David Glass.

Brad Garber, Workers' Compensation Attorney

Mr. Garber addressed the topic of undue pressure from Insurers on IME physicians, specifically ex parte communications. Mr. Garber presented written testimony and it was read into the record.

Committee Comment: The subcommittee has not recommended that the department write the cover letter. There is a recommendation for better education of the claims adjusters on the art of writing a cover letter to address concerns about some writers of the cover letters who may include prejudicial statements.

George Goodman and Hacina Squires, IMEA Association

The association met on January 12 and reviewed the draft proposal that was presented to the committee from WCD. The following items from the recommendations were discussed: witnesses at the exam, Mr Goodman addressed potential problems with making witnesses at the exams mandatory; training of IME physicians, the association is supportive of additional training; travel, the subcommittee still does not have the history

of why “and place” has been removed, the subcommittee needs to have the history of problems that existed in the system because of that language, the problem is the financial issue and could be addressed by rule; medical director, the subcommittee needs to look at the history of why the medical director was removed, this could be addressed by consulting doctors who have specialties in the area being addressed in a particular case; perception on undue pressure from insurers on IME physicians, the agreements summary does not address specific recommendations from the subcommittee, suggested that the perception be addressed by training and if there is a feeling that actual bias exists that additional study be done; larger pool of IME doctors, IMEA is in favor of this but it is a difficult thing to do, IMEA feels that a fee schedule that increases fees will not increase the pool of doctors and getting the specialists will require a larger fee than any fee schedule, there is strong opposition from IMEA to a fee schedule, if part of the requirement is to travel to remote areas of the state you will not get more physicians in the system; complaint process, IMEA is in favor of a complaint process and an exit survey process with the exit survey and complaints going to WCD, suggested changes to the timeframe proposed, requested that the process also include WCD sending the comments back to the IME facility.

Judy Johnson, Liberty Northwest

Commented on the following subcommittee recommendations:

Proposal for certification of IME physicians, suggested a process that is not too burdensome to encourage new doctors to become certified, perhaps have a trial period for a new doctor to try IMES for a limited period of time and then do the certification; travel, look at how much of the issues relating to travel have to do with education of the worker that they did not know that they had the right to request for reimbursement in advance of the exam, look at the reimbursement schedule to see if there is adequate compensation, consider the required timeframes for the claim.

Committee Comment: The recommendation is to have a training that would be a choice that would meet the requirements of their continuing education requirements for their licensing requirements.

David Lavine, Attorney

Mr. Lavine has represented primarily insurers. He addresses the following issues: Bias of IME physicians towards insurers, suggested that the bias is a bias of science based on their medical experience and training, letters from the insurer that may be tainted are addressed in the process of litigation; travel, it is less expensive to ask the worker to travel than to ask the physician to travel.

Committee Comment: Recognize that the cost is less for the worker to travel but there is a cost to the worker in terms of discomfort to the worker.

Barb Jones, PWC

Ms. Jones presented written to the testimony to the committee that addressed the topic of management of workers' compensation claims. Ms Jones also commented on the following committee recommendations: training, those affected by IME reports be

included in the process of designing the required training for IME physicians; exit survey and complaint process, require that the feedback be immediately following the IME; travel, suggest that the solution is advance payment of travel expenses.

Teresa Westmoreland, Injured Worker

Ms. Westmoreland gave written exhibits to the committee. Ms. Westmoreland gave the subcommittee background on her workers' compensation claim. Her comments included comments on the following issues: physician selection, Ms. Westmoreland's testimony focused on the insurer selection of IME physicians that are biased toward the insurer, agreed that a list of certified doctors would help; appropriateness of some types of comments in the IME physicians report; travel, back to back appointments can be burdensome to an injured worker.

Committee Comments: Committee members discussed with Ms. Westmoreland whether a form that would allow the worker to request advance payment for travel reimbursement, information about when overnight accommodations would be allowed, and whether a complaint process that goes to the Workers' Compensation Division would have helped in addressing her complaints. Ms. Westmoreland's concern is that the complaints be received by an impartial party. The subcommittee also asked whether Ms. Westmoreland had utilized the Worker Requested Medical Exam (WRME). The education to the worker needs to include better education to the worker about the right to request a WRME. Ms. Westmoreland was not informed by her attorney that she had a right to a WRME. The department commented that Ms. Westmoreland's complaint was denied before the effective date of the law that allows the worker to request an IME. The subcommittee also asked Ms. Westmoreland for her opinion on when an exit survey would be the most impartial from the worker. Ms. Westmoreland felt that a response immediately after the exam would be the most appropriate. The committee also asked Ms. Westmoreland if a certification process for the IME physicians would help the process. Ms. Westmoreland is supportive of a process that raises the criteria for physician doing IME exams.

Ernest Delmazzo, Injured Workers' Alliance

Mr. Delmazzo gave written testimony to the committee that extracted comments from the IME study and addressed the following issues with the committee: IME physician bias towards the insurer, recommended selection of the IME physician by the department; unreasonable travel, some IME facilities have said that they have offered to fly a worker to an exam; Mr. Delmazzo stated that he had not heard of any worker being flown to the exam; witness at an exam, recommended that allowing witnesses be mandatory and workers be allowed to videotape an exam.

Committee Comments: Committee asked if Mr. Delmazzo if the committee recommendation will make progress in solving the issues. Mr. Delmazzo commented that he feels it is not possible to teach ethics, that the only way to solve the problem is allow an independent party to select the physician. Regarding mileage, Mr. Delmazzo felt that there must be a limitation on miles traveled with exceptions. Regarding allowing witnesses, Mr. Delmazzo felt that in addition to witnesses, there must also be video and audio taping allowed. Mr. Delmazzo is opposed to the BME being wholly in charge of

maintaining the list of certified doctors, feels that the complaint process and investigation process needs to stay with WCD.

Committee Response: The MLAC committee has made significant changes to benefit the worker. Additionally, the IME study contains data that goes both ways. The data as a whole needs to be looked at and not just the data that supports one side. You cannot take the comments or data that support one side and call that the facts. The data does not show that there is fraud in the system in Oregon; it does show that there is a perception of fraud in the system.

John Snarskis, Hartford Insurance

Mr. Snarskis commented on the following recommendations: physician bias, commented that medical opinion based on the state of current medical literature is not bias; travel, commented that there will be complaints by some regardless of the number of miles asked to travel and encouraged the committee to follow the request made by Ms. Sundstrom to look at the history of removing “and place” from statute. Mr. Snarskis also commented on the comment made about SAIF identifying two physicians as potential witnesses before the exam had occurred, he commented that the identification could have been because of a legal requirement by the Board to identify witnesses in advance.

Break

Work Session:

The subcommittee discussed the proposal recommendations and made the following recommendations:

Certification Process for IME Physicians

Recommend that WCD develop a certification process. WCD will work with physicians, Oregon Medical Association (OMA), the Insurer Medical Exam Association (IMEA), and the Medical Advisory Committee (MAC) in developing the process. WCD will maintain a list of physicians certified to perform IMEs. Set a reasonable implementation date so that the process can be implemented over time and the IME process is not disrupted. Require WCD to report back to MLAC regarding implementation of certification process.

- Would require statutory change and rulemaking. Currently physicians are required to be licensed in Oregon but there is no further training requirements to perform IMEs.

Additional Direction on Decisions for a Certification Process:

- Ethical/impartiality standards– WCD will look at models from other states for establishing ethical and impartiality standards specific to IMEs for inclusion in the certification process and report back to the subcommittee.
- Training requirements should be considered an option that would fulfill physicians' current requirements for continuing education for licensure and fit in the same timelines.
- Removal and appeals process from certified IME list. WCD will develop a removal and appeals process. Complaints for anything that is egregious enough to affect the physician's license will be referred to the Board of Medical Examiners. Initial complaints would be investigated by WCD. Valid Complaints will be considered in the re-certification process.

WCD will develop a sanctions matrix which would include a process of intermediate sanctions before removal from certification list and a process for re-certification after removal.

- Would require clear statutory authority for WCD. Details would be developed through a rulemaking process with input from OMA, BME, IMEA, Injured Worker Support groups, etc.
- WCD, working with physicians, OMA, IMEA and the Medical Advisory Committee will develop a list of quality assurance measures.
- Require a statement at the end of the IME report that the physician performed the exam, dictated the report and acknowledges liability for false statements. (e.g. under penalty of perjury). Require the same statement from all doctors participating in the exam if the exam is performed by a panel of physicians.
- The subcommittee has asked WCD, working with OMA, IMEA, and other associations, to work on recruitment to increase the pool of practicing physicians participating in IMEs.
- The subcommittee agreed that there should not be a fee schedule for IME physicians. Public testimony indicated that a fee schedule would not solve the problem and may actually create additional problems.
- To address the perception of undue pressure by insurers on IME physicians, include in education to the parties types of communication that are appropriate and inappropriate.

Selection of IME Physician

- Employer and insurer maintain the choice of IME physician.
- WCD will over the next two years monitor the IME process and report back to MLAC annually regarding effectiveness of changes and recommend additional study or changes if needed.
- MLAC will review reports from WCD review for additional changes, if necessary, for the 2007 legislative session.
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Witnesses in examinations

- Allow workers to have witness without physician approval, with the exception of psychological exams. The witness would have to sign a notice that says they can't participate in the exam, that they are only an observer, and that obstruction of the exam by the witness may jeopardize the worker's benefits. Require physician's approval to have a witness at a psychological exam.
- Require the worker to notify the IME physician in advance that they are bringing a witness.
- WCD will include in the education process to the worker a notification of their right to have a witness, cite rules, and include information about reimbursement. Require insurers and self-insured employers to send out with appointment notice to the worker.
- Require physician approval to video or audiotape an exam. (status quo – no change to current rules)
- Add education tool to the WCD website to educate the worker on their rights to have a witness.
- WCD will include a question on an exit survey that goes to WCD asking if they knew they had the right to have a witness present, did the worker ask for it, was it granted.
- Requires rulemaking change to OAR 436-010-0265(10) to allow witnesses without physician approval. Language relating to videotaping and audio remains the same.
- Maintain the language in OAR 426-010-0265 that states "any action of a friend or family member which obstructs the examination shall be considered an obstruction of the examination by the worker for the purpose of this rule." An obstruction may lead to suspended compensation.

Travel Distance

- There was consensus that there should not be a flat distance limitation on miles a worker can be requested to travel to an IME.
- WCD has been asked to contact past legislators to determine the history of why "and place" was removed from statute. Subcommittee will wait to make further recommendation on any other recommendations under travel until they hear back from WCD to know legislative intent on removing "and place".
- Disputes about the location of IMES would be subject to attorney fees, unless specifically exempted (probably in statute).

Notice to the Worker

- Require insurers to add to the IME appointment letter to the worker more specific information about the nature and purpose of the exam.
- Require the insurer to send to the worker an information packet prepared by WCD. Information packet to include information about the right to have a witness, preparation for the IME exam, Toll Free numbers for WCD and IWO, information about requesting a video or accessing additional information on the internet.
- Require the insurer to send a reimbursement form for requesting reimbursement of travel expenses. Sample form to be developed by WCD.
- Would require rule change.

Education for Workers

- Educate workers on IME process: Develop an educational tool (brochure/video) to provide to worker prior to IME. Add area on Website with FAQs. Include information about reimbursement for travel expenses, the importance of attending exam, and the importance of notifying insurer/IME facility if they cannot attend an exam. Provide a checklist of "things to do" (e.g., bring medical history, list of prescriptions, etc.) Provide information about attending physician review of the IME report and that the worker can request a copy of the report from their AP.
- Require insurers to send brochure with appointment letter.

Diagnostics to the IME Physicians

- Require that diagnostics be sent to the insurer (or to IME facility?) no later than five days before the scheduled IME exam.
- Impose a monetary sanction on the provider for not providing the diagnostics, or not providing them within the time required.
- Will likely require statute change to authorize WCD to implement a penalty on doctors that don't send diagnostics timely. Specific timelines would be developed with advisory committee input in a rulemaking process.

Education for the Claims Examiners

- WCD work with stakeholders in developing standards for training of claims examiners, WCD to approve training programs, coordinate and approve curriculum of claims examiners. Will be worked into the current certification timelines.
- Requires statute change to ORS 656.780(1)

Feedback on IME Process

- WCD will create an exit survey that should be given to the worker no later than 3-4 days after the exam

- Worker must return the exit survey to WCD. Must be postmarked within 10 calendar days of the exam. There should be an option to fill out the survey online.
- Complaint about IME process and IME physicians to be sent to WCD.
- WCD will report back to MLAC on the results of the survey on an ongoing basis..

Monetary Penalty for Injured Workers not Showing Up for Exam

- Assess a monetary penalty on a worker that does not show for a scheduled IME exam without calling to cancel or explain valid reason within a specified time before the exam.
- Retain current law that says that injured workers not showing up for their IME without reason will be deemed non-cooperative in their claim investigation, and can have their benefits suspended by the department until they cooperate.
- Require that a worker objectin to the IME must do so within a specified time frame.

Attending Physician to Review Report with Patient

- Require attending physician to review the IME report either at their next appointment or by telephone. Provide exception for psychiatric examinations.
- Require the insurer to send second copy of the report to the attending physician.
- Worker can request a copy of the report from the attending physician after the physician has reviewed the report with the patient.
- Add area on AP concurrence letter to indicate the report was reviewed with the patient.
- WCD to work with OMA and IMEA on specifics of requirement and timelines.
- May require a statute change depending on sanctions implemented if the attending physician fails to review the report with their patient.

Effective Dates

Effective dates and applicability dates will be discussed for each individual recommendation after the committee has seen draft language from Legislative Counsel.

Fiscal Impact

The division will provide estimates of fiscal impact after the committee has seen draft language from Legislative Counsel.

Meeting adjourned at 12:50 p.m.