

WORKERS' COMPENSATION
MANAGEMENT-LABOR ADVISORY COMMITTEE
Subcommittee on Independent Medical Examinations

May 5, 2016
8:30 a.m. - 10:00 a.m.

Labor and Industries Building, 350 Winter Street NE, Salem, Oregon

Committee Members Present:

Aida Aranda, Oregon and Southern Idaho Labor-Employers Trust
Guy Boileau, Louisiana-Pacific Corporation, Portland
Tammy Bowers, May Trucking
Jim Denham, ATI, Albany
Ben Stange, Polk County Fire District No. 1, Independence
Theresa Van Winkle, MLAC Committee Administrator
Diana Winther, IBEW Local 48

Meeting Participants:

Dan Farrington, IMEA
Hasina Squires, IMEA
Sue Quinones, City of Portland
Linh Vu, City of Portland
David Barenberg, SAIF
Dan Schmelling, SAIF
Jennifer Flood, Ombudsman for Injured Workers
Cara Filsinger, Workers' Compensation Division
Juerg Kunz, Workers' Compensation Division
Lou Savage, Workers' Compensation Division

Agenda Item	Discussion
Opening (00:00:00)	Guy Boileau opened the meeting at 8:35 a.m.
Introductions (00:00:36)	Meeting attendees introduced themselves.
Meeting Minutes (00:01:55)	The January 15 th meeting minutes were approved.
Updates (00:02:20)	<p>Cara Filsinger provided an overview of the materials provided for the meeting.</p> <p><u>IME Data memo</u></p> <ul style="list-style-type: none"> • Close to 8000 IMEs were reported in 2015. • The memo also has data on how many IMEs were conducted in the first 60 days of the claim from the employer knowledge date. The data for the memo is from 2014, other recent years have similar proportions. SAIF: 35%, Private insurers: 13%, Self Insured: 24%. • Insurers are required to report to the division if they have a certain number of claims. Private and self insurers don't report to the

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(00:06:28)	<p>division 100% of the time, so WCD has adjusted figures as a result.</p> <ul style="list-style-type: none"> • Juerg Kunz mentioned that WCD will be investigating the low numbers for the private and self insurers in the next couple of weeks. Since IMEs are self reported, there's a possibility some payers don't think of IMEs as a medical service and that they do not need to report them. • Dan Farrington said that the numbers looked very low. Hasina Squires said that if she were to guess, the number would be 33.3% - 25%.
(00:08:52)	<p><u>IME follow up data memo</u></p> <ul style="list-style-type: none"> • In 2015, WCD received 23 complaints. • From 2011-2015, 64 complaints were unverified or unsubstantiated, and 26 complaints were in regards to education. • The memo also provides information on how many doctors are on the IME provider list, the criteria for IME providers, and why doctors were removed from the provider list. • IME doctors self-select their specialties, and they can pick more than one specialty. • The data on specialties is current as of early March.
(00:12:17)	<p><u>Follow up information memo</u></p> <ul style="list-style-type: none"> • There were 323 IME location disputes in 2015. • If the dispute was dismissed, it means that the appointment was cancelled or rescheduled so the location dispute was no longer an issue. If the dispute was approved, the director agrees that the location is appropriate. • There are 3 criteria for worker requested medical examinations (WRME) <ul style="list-style-type: none"> ○ The worker has a timely hearing request on denied claim. ○ The basis of denial was at least one IME. ○ The attending physician doesn't concur with IME report. • In 2015, there were 139 WRME requests, most of which were approved. • A small share of workers who make WRME requests are unrepresented. • WCD doesn't have data to show what portion of the denied claims were based on an IME. Insurers may have this information. • Appeals rates for denied disabling claims are consistent over time. • Workers have an attorney at 87-88% of hearings, 90-93% of board review cases, and 84-87% of claim disposition agreements (CDA). <p>Lou Savage asked if this includes claims disposition agreements (CDA) that occur very quickly. Cara Filsinger said that she doesn't think that the data is time sensitive; if there was a CDA, they looked at whether there</p>

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	was an attorney. Jennifer Flood affirmed that it would be all CDAs.
(00:17:01)	<p data-bbox="492 285 1390 359"><u>Medical Services Oregon Administrative Rules Chapter 436, Division 010</u></p> <ul data-bbox="492 359 1422 548" style="list-style-type: none"> <li data-bbox="492 359 1365 432">• The document goes through how IMEs are counted, and outlines training requirements to get on the provider list. <li data-bbox="492 432 1422 548">• The department received a petition for rule making from Jerry Keene to change the number of hours required for claims examiner IME certification. We are going through a rule making process now. <p data-bbox="492 548 1422 621">The curriculum requirements and the IME standards are in the Appendix C.</p>
Discussion (00:17:51)	<p data-bbox="492 621 1414 835">Guy Boileau asked for any opening remarks, takeaways, what the issues are, and thoughts on what direction the committee should take. Guy thinks that one of the driving issues to be addressed is the perception of bias. However, he didn't know if the perception of bias could be completely eliminated. Guy asked to what degree the perception of bias should affect the direction of the subcommittee.</p> <p data-bbox="492 877 1395 982">Ben Stange said that the numbers are so overwhelming that he doesn't see a lot of credence in the perception of bias. The data shows that the IME process works pretty well.</p> <p data-bbox="492 1024 1406 1098">Lou Savage asked if there is something about the dynamics at the exam that feeds a perception of bias.</p> <p data-bbox="492 1140 1386 1205">Guy Boileau asked if the person who schedules the exam could be the first point at which the perception of bias might arise.</p>
(00:22:45)	<p data-bbox="492 1205 1419 1570">Dan Farrington noted that many people want to be treated by an IME doctor because they spend more time with the patient than other doctors. Dan's experience is that workers feel that they've been listened to coming out of the exam. Dan also mentioned that education is important so workers know what will happen at the exam. He noted that workers can be nervous going into the exam since they are seeing a different doctor. On exit evaluations, IMEA asks the worker about their experience and how far they travelled. IMEA wants to know that information, it is important feedback. Dan thinks that the results are impressive.</p> <p data-bbox="492 1612 1414 1894">Diana Winther asked if there is an exit questionnaire that the independent examiner does with everyone. Dan Farrington responded that IMEA felt that it was important to give paperwork to workers at the end of the exam. Some people decline filling out the paperwork, but IMEA notes that they declined. Hasina Squires said that if the insurer contracts with one of IMEA's independent medical examination association facilities, then the questionnaire gets handed out. Hasina noted that she doesn't think that the questionnaire gets handed out if the</p>

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(00:26:40)	<p>insurer works with a doctor who does IMEs and doesn't use one of IMEA's independent medical examination association facilities.</p> <p>Jennifer Flood said that from the ombudsman perspective, education of workers on the IME process is important. Some workers think that they can go into the exam and ask treatment questions, but that's not what they are there to do, so making sure workers understand that up front is helpful. The worker who doesn't know may feel that they are getting the cold shoulder from the IME provider, or there may be the perception that the insurance company picks the IME. If the worker already has some disputes going on, that starts suspicion and thinking that they will simply get pushed through the system. Additionally, as IMEs go through the hearing process, there is the perception that the insurer knows what kind of answer will come out of the IME, and that the IMEs are just more documentation that gets stacked up against them. The Ombudsman for Injured Workers (OIW) works with workers that complain about their IME by explaining the process. OIW is able to work with the insurer to informally resolve some IME issues.</p> <p>Lou Savage asked Jennifer Flood about what the issue is when workers complain about their interaction with the physician.</p> <p>Jennifer Flood responded the complaint is that the doctor only spent a short time with the worker in the exam but wrote a 30 page report that had inaccurate information.</p>
(00:30:52)	<p>Ben Stange asked how often the attending physician does not respond to the IME report.</p> <p>Dan Schmelling said that SAIF doesn't track that.</p> <p>Jennifer Flood responded that from the worker perspective (and those that may be helping them through the system), if the default was that non response doesn't equal a concurrence, that may change how a worker may be entitled to more WRMEs. However, the volume of WRMEs is not very high. Jennifer believes that this is for a variety of reasons:</p> <ul style="list-style-type: none"> • The default is that no response is a concurrence; therefore the worker doesn't get a WRME. • It is the same set of doctors, so if a worker is represented, there can be some hesitation. Or they might ask for a WRME, find out what doctor gets assigned, and then decide whether the worker will attend the WRME. <p>Jennifer mentioned that WCD may have an idea of regarding the volume of WRMEs in comparison to the volume of IMEs.</p>

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(00:32:32)	<p data-bbox="492 233 1373 338">Guy Boileau asked if the perception of fairness would be fostered by making WRMEs more available (at the expense of the insurer or self insured employer as a claim expense)</p> <p data-bbox="492 380 1357 449">Ben Stange said that the more WRME could be expanded, the more workers will feel that the system is fair and equitable.</p> <p data-bbox="492 491 1427 632">Jennifer Flood mentioned that she wasn't sure about what attorney reactions would be to increasing WRME availability. Jennifer said that if the worker saw a doctor that does both IMEs and WRMEs, they may feel that the exam is more objective than some make it seem.</p> <p data-bbox="492 674 1430 961">Dan Schmelling noted workers get to choose their medical provider, and if they do not like their initial choice they have two more opportunities to pick a new doctor. If the worker's doctor concurs with the IME, that is two medical providers that are saying that the condition is not work related. When the worker's doctor says that they disagree with the IME report, the worker has the opportunity to get a WRME. There's no need to expand the WRME process when the worker's doctor is saying that the condition is not work related and that they agree with the IME.</p> <p data-bbox="492 1003 1398 1102">Lou Savage responded to Dan Schmelling by asking if we focus on the concurrence issue, should we stop relying on the worker's doctor to respond.</p>
(00:38:10)	<p data-bbox="492 1115 1414 1289">Dan Schmelling responded that in 2015, 14 WRME requests were denied. He assumes that non concurrences (whether lacking in concurrence at all) are going to be the ones where the WRME was denied. There doesn't seem to be a large number of non concurrences or lack of concurrence.</p> <p data-bbox="492 1331 1411 1549">Jennifer Flood said that she thinks that what Dan Schmelling mentioned is due to the fact that if a decision is based on an IME and it indicates that the worker's doctor didn't respond, the worker isn't going to go further without talking to the doctor to see if they concur or not. However, it can be viewed that that the insurer doesn't actively seek the response from the attending physician.</p> <p data-bbox="492 1591 1422 1690">Linh Vu asked if there is any data available on complaints about medical arbiter exams. Cara Filsinger said that she doesn't know, but she can check on this.</p> <p data-bbox="492 1732 1425 1831">Guy Boileau asked if there are other situations in which a WRME would be beneficial and would give the committee reason to say that the criteria should be expanded.</p>

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(00:42:15)	<p>Dan Schmelling noted that the medical provider is the worker's choice. If there is a lack of concurrence, the worker can ask the doctor about their failure to respond.</p> <p>Jennifer Flood responded that an example would be a worker who is tired of using opioids, but their doctor will only treat with opioids. The worker may think that they need a surgery, but the attending physician doesn't agree. An issue that Jennifer hears is the worker being told that they have to treat with certain providers under an MCO, but having an adjuster who doesn't agree with the MCO and is scheduling the worker for IMEs. Jennifer said that can be hard to explain.</p> <p>Dan Schmelling thinks that what can make things complicated with MCOs is the underlying compensability of the condition. If a doctor is treating a condition that is not part of the work injury in the initial injury claim, the insurer may say that condition is not compensable. This brings up issues of whether you are addressing the medical appropriateness of the treatment or if you are addressing the compensability. One issue goes to the department, while the other goes to the Workers' Compensation Board (WCB). There is already a process set up for MCO treatment disputes and other disputes that can come to the department regarding medical treatment.</p>
(00:46:21)	<p>Diana Winther explained her thoughts on the worker's perspective. There is not typically much conversation about choices you have as an injured worker. Once you see someone, you feel kind of locked in, overwhelmed, and can't work. Insurers know what the worker's rights are. However, workers may or may not find out that information in a way that they are receptive to while they're dealing with stress and pain. Diana sees it as a benefit to expand WRME. By the time they have a chance to get through the system, talk to attorney, and understand the process, a late stage opportunity to make a challenge may be helpful.</p> <p>Guy Boileau asked if anyone wanted to take a guess at whether the number of WRMEs requested would change if criteria were expanded.</p> <p>Diana Winther responded that this would depend on how the process was explained to the worker.</p> <p>Lou Savage said that it doesn't look like it would raise the number of WRMEs that much. If the number of WRMEs does increase, that means that there actually may be some need for it. Lou asked if there would there be a downside to making WRMEs more available.</p> <p>Dan Schmelling clarified that when he said initial compensability earlier, he should have said any compensability decision. If the insurer accepts a</p>

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(00:52:20)	<p>lumbar strain but denies a herniated disc and that decision was based on an IME and non concurrence from the attending physician, that situation would be eligible for a WRME too.</p> <p>Jennifer Flood said that part of the criteria is that a request for hearing has to have been made. At this point, the doctor has to have either not responded or responded saying that they do not concur, and worker had to have requested a hearing on the denial based off an IME.</p> <p>Tammy Bowers said that if the worker doesn't request a WRME, it is usually because their attorney doesn't want one. Tammy doesn't see big bias against the worker, and noted that the insurer feels that things are stacked in favor of the worker. The perception of bias is on both sides of the street. In Appendix C regarding standards for IME physicians, Tammy wondered if maybe number one or nine should be redone. If we get complaints about bias, the doctor could be taken off the list. Tammy thought that more education of IME physicians may be a good solution.</p> <p>Juerg Kunz said that bias often comes down to the medical opinion. Difference in the medical opinions could be interpreted as bias. When there is dispute, the administrative law judge (ALJ) has to make a determination about which medical opinion is more persuasive. The standards and violation of standards is something that WCD looks at, not WCB. If we mix those two things together, that could create some potential problems.</p>
(00:58:41)	<p>Jennifer Flood said that she personally believes that the perception is not as bad as it used to be. Based off what she hears, the perception is that the IME is a "hired gun" for the insurer and that the worker doesn't have the ability to challenge reports. If the worker tries to get their own IME, they can't pay what the insurer could pay. There is also a perception that the reports are canned and that if the insurer sends the worker to a doctor, that the result will be predictable. Jennifer pointed out that claims adjusters do not like paying for inaccurate work, and she has heard from adjusters that they want to know when they have gotten a bad IME report. When speaking with workers, the staff at the OIW tries to break down the negative perceptions of IMEs. If a worker has an attitude going into an exam, that could have a negative impact on them.</p> <p>Tammy Bowers said that if the attending physician and IME doctor disagree, the attending physician's opinion always has more weight and the denial will get overturned. Jennifer Flood noted in that case, the insurer can ask for a second IME.</p> <p>Lou Savage asked if the concurrence issue was addressed, would it give workers more opportunities to get a WRME.</p>

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(01:03:51)	<p>Jennifer Flood suggested flipping the default the other way around so a non response is not a concurrence, therefore, the worker will get the WRME. In Jennifer's opinion, this would incentivize the insurer to do due diligence in getting the attending physician's response. Right now, the burden is on the worker to get the physician's response. If the non response falls to a worker getting a WRME, she thinks that it could be helpful.</p> <p>Jim Denham asked why physicians wouldn't always issue a response.</p> <p>Dan Schmelling said that the insurer may not ask the attending physician to concur. Sue Quinones said that sometimes the attending physician does not want to be the attending physician. Tammy Bowers said she's had physicians call and say that they concur with the IME but don't want to go on the record and sign their name on concurrence.</p> <p>Jim Denham said that he believes that physicians should be responding, if they don't, they aren't doing their job. Jennifer Flood responded that she agrees that attending physicians should step up to the plate. However, she noted that there are times the physicians think that they don't have to sign off on the IME report, because if they don't, it will default to them concurring. Jennifer suspects that insurers don't put a lot of resources into getting a response.</p>
(01:07:10)	<p>Dan Schmelling mentioned that the insurer would rather know where the attending physician stands before a hearing.</p> <p>Tammy Bowers mentioned that May Trucking will send a second request to the attending physician if they don't initially respond.</p> <p>Dan Schmelling noted that there is nothing restricting workers from going to the attending physician to get their concurrence. However, this could be an expense to the worker since the physician may demand payment for their opinion on the IME. Workers can tell the physician that their lack of response is preventing them from getting a WRME.</p> <p>In response to Dan Schmelling's comment, Guy Boileau said that seems to hand off responsibility to the worker. Perhaps there may be merit in having the default be non concurrence. Guy asked if the default were flipped, to what degree would that create a hardship for the insurer.</p> <p>Diana Winther noted that following up on the attending physician's response would be one more thing for the worker to do. That burden is much more easily shifted to the insurer or doctor because it is part of what they do on a daily basis.</p> <p>Tammy Bowers pointed out that employers want workers back to work,</p>

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(01:11:07)	<p>and don't want workers to have to wait for treatment. She agreed that the physician needs to say yes or no so the process can move forward. Tammy believes that default should only mean that the physician has not responded.</p> <p>Jennifer Flood asked Tammy Bowers if the worker would be eligible for a WRME. Right now, the worker's eligibility is based on concurrence.</p> <p>Jim Denham suggested that the attending physician should be required to respond.</p> <p>Lou Savage asked what can be done to make attending physicians respond.</p> <p>Dan Schmelling mentioned that WRMEs started in the mid 1990s. It might be interesting to see the testimony at that time about concurrence.</p> <p>Cara Filsinger said that the record is not robust on this topic. Theresa Van Winkle said that we could look at the record.</p>
(01:14:21)	<p>Jim Denham asked if MCOs have a standard for physicians on this issue. Sue Quinones said that she believes they do.</p> <p>Guy Boileau expressed concern about creating a holding pattern if WCD doesn't have the authority to make physicians respond.</p> <p>Lou Savage mentioned that it would be interesting to have the Oregon Medical Association (OMA) to see what they would be willing to accept.</p> <p>David Barenberg said that if the issue is education and responsiveness, flipping the standard could result in confusion.</p> <p>Linh Vu said that she thinks that City of Portland's letter has a choice as to whether the physician concurs or not. The attending physician generally can bill the employer or insurer for their response. Linh didn't know whether there is a way to provide an incentive to the attending physician to respond.</p> <p>Lou Savage noted that something you might hear from physicians is that they have a lot of paperwork to do, and that the IME report is at the bottom of the pile.</p> <p>Jennifer Flood asked why the burden of the response and expense of the response should fall on the worker.</p>

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(01:18:43)	<p>Guy Boileau asked that the committee continue to think about this issue, and said that he would like it if the OMA or trail lawyers were included in this discussion. Guy mentioned that there is some proposed legislation that has triggered some of his concerns and questions. He asked what the committee thought about limiting IME availability to one exam. One aspect of the proposed legislation is being limited to only one IME. To his understanding, insurers were given three IMEs since the worker can pick three different doctors.</p> <p>Sue Quinones said that limiting the IMEs is not fair to the employer or insurer. In some instances, she could see that a claim would never close. Employers need to be able to monitor the length of medical treatment and use of opioids and other prescription medication.</p> <p>Guy Boileau identified the issues for the committee to focus on:</p> <ul style="list-style-type: none"> • The number of IMEs. • The perception of bias and the degree to which the committee should act to address it. • Merits or lack of merits in switching the default on concurrence for IME reports. • Whether the committee wants to hold physicians accountable for responding to IME reports.
(01:23:03)	<p>Dan Farrington said that he believes that there isn't much of an issue with IMEs, but that the real issue is the WRMEs.</p> <p>Theresa Van Winkle asked if it would be helpful for WCD to provide some ideas to make the process smoother for all parties involved. (Guy Boileau: Yes)</p> <p>Dan Schmelling said that SAIF has previously provided data about the number of IMEs SAIF schedules per claim. The number of claims where more than one IME was scheduled was very small compared to the volume of claims. Based off that information, he doesn't think there is a problem of insurers pushing IMEs at claims because they don't know what to do. It is bad claims management to manage through IMEs. Dan asked why the committee should create a solution for a problem that may not exist.</p> <p>Guy Boileau responded that this is being addressed because of the proposed legislation.</p> <p>Jennifer Flood noted that with director approval, the insurer can get more than 3 IMEs. Jennifer's concern is if there was only one IME, director approval for additional IMEs would increase and cause more delays for the worker. If there was only one IME, there would be a lot of delay in</p>

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(01:26:22)	<p>treatment for workers. To Jennifer, the following items are important:</p> <ul style="list-style-type: none"> • Making sure we have IMEs • How can we change perception of IMEs • How can we ensure that IMEs are objective • Making sure that the IME is a quick process. <p>Cara Filsinger and Theresa Van Winkle will work on bringing in stakeholders to participate in the discussion.</p> <p>Guy Boileau thanked participants and adjourned the meeting at 10:04 a.m.</p>

*These minutes include time stamps from the meeting audio found here:

<http://www.oregon.gov/DCBS/mlac/Pages/exam-subcommittee.aspx>

**Referenced documents can be found on the MLAC Meeting Information page here:

<http://www.oregon.gov/DCBS/mlac/Pages/2016.aspx>