



OREGON HOUSE BILL 4138

NCCI estimates that Oregon House Bill (HB) 4138, effective January 1, 2024, will result in an indeterminate increase in overall Oregon workers compensation (WC) system costs.

Summary and Actuarial Analysis

Enacted HB 4138 impacts temporary disability benefit payments, the requirement for insurers to provide notice to workers when ending benefits and the recovery of overpayments for certain benefits. The magnitude of the impact of the amendments is not quantifiable but may result in upward pressure on system costs. Details of the amendments, along with NCCI analysis, are summarized below.

Since HB 4138 would apply to all claims that exist on, or arise on or after, January 1, 2024, regardless of the date of injury or the date on which the claim is filed (as long as a final determination has not been made prior to January 1, 2024), this bill could also have a retroactive impact. This analysis is prospective only and therefore does not contemplate any such potential retroactive impacts.

Changes to Payments of Temporary Disability Benefits (ORS 656.262)

Currently, temporary disability benefits may be suspended under any of the following conditions:

- Worker fails to appear at an appointment with their practitioner and subsequently fails to appear at the rescheduled appointment;
- Insurer fails to receive verification of the worker's inability to work from the worker's practitioner;
- Period of time authorized by the practitioner for the worker to receive temporary disability benefits has expired; or
- Worker enrolled in a managed care organization seeks unauthorized care.

In addition, under ORS 656.262 (4)(g), reinstated temporary disability benefits following a suspension may be paid retroactively no more than 14 days prior to authorization by the worker's attending physician or nurse practitioner.

Enacted HB 4138 replaces this 14-day limit with a period for retroactively authorized payments of no more than 45 days prior to the worker receiving written notice of suspension of temporary disability compensation (pursuant to added section ORS 656.262 (4)(j)). However, per new language in (4)(g), the 45-day limit does not apply:



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- i. During periods in which there is a denial under the jurisdiction of the Workers' Compensation Board that affects the worker's ability to obtain authorization of temporary disability;
- ii. During periods in which there is a dispute over the identity of, or treatment by, an attending physician or nurse practitioner that affects the worker's ability to obtain authorization of temporary disability; or
- iii. When notice has not been given pursuant to paragraph (j) of this subsection.

Retroactive benefit payments that may be authorized for a period of 45 days prior to the worker receiving notice of suspension of compensation, may put upward pressure on system costs. Temporary disability benefits represent approximately 49.8%¹ of indemnity benefits and 24.4%² of total benefits in Oregon. Temporary total disability claims in Oregon are estimated to have an average weekly benefit payment of approximately \$595.³ The number of additional weeks potentially payable for affected claims is unknown, particularly given the reference to the worker receiving a notice of suspension of their compensation (as opposed to the date the physician authorizes the compensation). However, for illustrative purposes only, if an extra 31 days of benefits are allowed to be paid retroactively, the additional cost could be as much as \$2,635 per instance.⁴ Note that the average weekly benefit amount quoted above may vary significantly for an individual claimant based on their level of pre-injury wages.

Changes to Notice to Workers

Suspension of Temporary Disability Benefits (ORS 656.262 (4)(j))

Enacted HB 4138 adds a new subparagraph (A) that requires the carrier or employer to send a written notice to the worker, and their attorney if they are represented, that temporary disability benefits will be ended, along with the reason for ending such benefit payments. There are two other new provisions relating to the written notice to the worker:

¹ Proportions within indemnity based on losses for policies becoming effective during the 24-month period ending 12/31/2018 brought to the current benefit level and developed to an ultimate basis by type of injury. In Oregon, the Temporary Total Disability (TTD) injury type represents 24.4% of indemnity costs. Permanent partial disability (PPD) claims are divided into "healing period" benefits and permanent disability awards. The healing period represents temporary disability benefits paid on PPD claims prior to the award for permanent disability. NCCI estimates that the PPD injury type represents 64.2% of indemnity costs. Meanwhile, 39.6% of indemnity benefits for PPD injuries are estimated to be paid during the healing period, and thus would be affected by this provision. The total estimated percentage of indemnity benefits represented by temporary benefits is thus 24.4% + (64.2%)(39.6%) = 49.8%.

² Based on a projected indemnity/medical benefit split of 49%/51%. Source: NCCI Financial Call data for Oregon for Policy Years 2018 and 2019 projected to January 1, 2023.

³ Based on a countrywide distribution of workers and their wages indexed to Oregon's average injured weekly wage level and utilizing the Oregon State Average Weekly Wage effective 7/1/2021 of \$1,247.13.

⁴ \$2,635 = [(45-14) / 7] x \$595.



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- New subparagraph (B) indicates that the worker's attending physician or nurse practitioner may retroactively authorize temporary disability for up to 45 days prior to the date of the notice.
- New subparagraph (C) states that if the notice required under subparagraph (A) is given more than 45 days after the worker was no longer eligible for benefits, the attending physician or nurse practitioner may retroactively authorize temporary disability back to the date on which benefits were no longer due and payable, provided the authorization is made within 30 days following the earlier of the date of mailing or delivery of the written notice that the eligibility ended to the worker and the worker's attorney, if the worker is represented.

Closing Claims Based on Medical Status (ORS 656.268)

Currently under ORS 656.268, the carrier or employer can close a worker's claim and determine the extent of the worker's permanent disability when the worker has become medically stationary⁵ and there is sufficient information to determine permanent disability. Enacted HB 4138 does not allow a physician or nurse practitioner to retroactively establish medically stationary status more than 60 days before the worker is notified about his or her medically stationary status (except in cases of worker fraud). An insurer or self-insured employer must mail or deliver written notice to a worker and to the worker's attorney, if the worker is represented, within seven days following receipt of information that the worker is medically stationary.

These changes may increase the time for which disability benefits would be payable, also resulting in upward pressure on system costs.

Changes to the Recovery of Overpayments (ORS 656.268)

Enacted HB 4138 limits the carrier's or self-insured employer's recovery amount in the case of overpayment from a worker's permanent disability compensation to 50 percent of the claimant's total award, except in instances of worker fraud. Also, an insurer or self-insured employer may not declare an overpayment of any compensation that was paid more than two years prior to the date of the declaration. The effect of this provision would limit the amount recoverable by the carrier or self-insured employer for overpayments due to miscalculations, miscommunications or other errors not related to fraud and will likely result in upward pressure on system costs.

⁵ The Oregon Workers' Compensation Division defines 'medically stationary' as the point in time when the worker's physician determines no further significant improvement is reasonably expected from medical treatment or the passage of time.



Other Considerations

Retroactive Application

Since enacted HB 4138 would apply to all claims that exist on, or arise on or after, January 1, 2024, regardless of the date of injury or the date on which the claim is filed (as long as a final determination has not been made), the proposed changes could potentially extend to injuries occurring prior to the date the bill becomes effective, resulting in possible retroactive cost impacts. Such a retroactive application could result in an unfunded liability to the extent that these additional costs were not contemplated in the premiums charged for policies written prior to the effective date of the bill.

Any potential system cost impact resulting from enacted HB 4138 will be realized through future loss experience and reflected in subsequent NCCI loss cost filings in Oregon, as appropriate.

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