

WSR 22-01-202
PROPOSED RULES
DEPARTMENT OF
LABOR AND INDUSTRIES
[Filed December 21, 2021, 10:53 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 21-11-086.

Title of Rule and Other Identifying Information: Independent medical examinations (IME)—Case progress. Chapter 296-23 WAC, Radiology, radiation therapy, nuclear medicine, pathology, hospital, chiropractic, physical therapy, drugless therapeutics and nursing—Drugless therapeutics, etc.: WAC 296-23-302 Definitions, 296-23-308 When can a case progress examination be scheduled?, 296-23-309 How many examinations may be requested?, 296-23-403 IME-Department data reporting, 296-23-307 Why are independent medical examinations requested? Chapter 296-15 WAC, Workers' compensation self-insurance rules and regulations: WAC 296-15-440 Use of independent medical examinations.

Hearing Location(s): On January 25, 2022, at 9:00 a.m. Virtual and telephonic hearing only. Join electronically <https://lni-wa-gov.zoom.us/j/9361655337>, Meeting ID 936 165 5337; or join by phone: Dial by your location +1 253 215 8782 US (Tacoma). Find your local number <https://lni-wa-gov.zoom.us/j/9361655337>. The virtual/telephonic hearing starts at 9:00 a.m. and will continue until all oral comments are received.

Date of Intended Adoption: February 15, 2022.

Submit Written Comments to: Suzy Campbell, P.O. Box 44270, Olympia, WA 98504-4270, email suzanne.campbell@lni.wa.gov, fax 360-902-5029, by January 25, 2022, by 5:00 p.m.

Assistance for Persons with Disabilities: Contact Ashley Oberst, phone 360-902-4252, fax 360-902-6509, TTY 360-902-4252, email ashley.oberst@lni.wa.gov, by January 18, 2022.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department of labor and industries (L&I) is creating new rules and updating existing rules in chapters 296-23 and 296-15 WAC to define or outline criteria for "case progress" in relation to independent medical examinations (IMEs) requested by L&I and self-insured employers. The rules include whether the results of IMEs requested are inconsistent with the list of reasons outlined in Title 51 RCW. WAC 296-23-307 is being repealed as the rule is obsolete.

Reasons Supporting Proposal: ESSB 6440 was adopted into law by the legislature in 2020 requiring rules to be updated to reflect changes made to RCW 51.36.070. Additionally, an IME workgroup consisting of members from business, labor, the legislature, and L&I met in 2020 to discuss ways to improve IMEs. The proposed rules are needed to provide clear guidance to inform stakeholders and assist claim managers in determining when an IME is allowed by law and when one is not. Clarifying the phrase "case progress" may also prevent the ordering of multiple IMEs solely to gain a preponderance of evidence, which is widely perceived as currently happening. Stakeholders also need to know how or if IME reports can be used in claim decisions when the request was outside the reasons allowed by law and rule. IME data will also be shared regularly with interested parties.

Statutory Authority for Adoption: RCW 51.04.020, 51.04.030.

Statute Being Implemented: RCW 51.36.070.

Rule is not necessitated by federal law, federal or state court decision.

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: Not applicable.

Name of Proponent: L&I, governmental.

Name of Agency Personnel Responsible for Drafting: Suzy Campbell, Tumwater, Washington, 360-902-5003; Implementation: Debra Hatzialexiou, Tumwater, Washington, 360-902-6695; and Enforcement: Vickie Kennedy, Tumwater, Washington, 360-902-4997.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Suzy Campbell, P.O. Box 44270, Olympia, WA 98504-4270, phone 360-902-5003, fax 360-902-5029, email suzanne.campbell@Lni.wa.gov.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated. L&I looked at the estimated cost of complying with the new provisions of proposed rule and excluded the cost of any compliance with current standards. Upon review, L&I determined there are no new costs associated with the rule, because the proposal improves efficiency and consistency in the IME case progress process, sets criteria for when an IME can be requested, has deadlines for submission of material disputing the need for an IME, and states what dispute materials must include. A small business economic impact statement is not needed because there are no costs of compliance.

December 21, 2021
Joel Sacks
Director

OTS-3273.4

NEW SECTION

WAC 296-15-440 Use of independent medical examinations. What will the department consider when resolving a dispute to a scheduled independent medical exam (IME) in a self-insured claim?

(1) The department will consider whether:

(a) The notification letter included the self-insured employer's need for the IME consistent with RCW 51.36.070 and how this may be disputed by the worker.

(b) Notice of the IME was mailed to the injured worker and the worker's representative no later than 28 calendar days prior to the IME. Except for an IME scheduled to make a decision regarding claim allowance.

(c) The worker agreed to waive the 28 day notice for initial IME scheduling or reschedules.

(2) When a written dispute is filed:

(a) A worker, their representative, or their attending provider may file a dispute at any time during the IME process. Disputes re-

ceived by the self-insurer or third-party administrator must be submitted to the department within five working days of receipt.

(b) The department will only consider postponing an IME if the dispute is received by the department at least 15 calendar days prior to the IME.

(c) The dispute should include the specific reason(s) why the IME is out of compliance with RCW 51.36.070 and a copy of the notification letter from the self-insured employer.

(3) **The department will take action as follows:**

(a) Where the dispute presents a factual case that the examination was scheduled in violation of RCW 51.36.070 or these rules, pending a further investigation, the department may order the self-insurer to cancel the IME, and to notify the examiner, worker, and attending provider. The facts the employer provides in the IME notification letter, and the facts supplied by the worker, their representative, or their attending provider will be used in this determination.

(b) The department will issue an order to resolve the dispute in accordance with RCW 51.52.050.

(c) Should a worker attend a disputed IME and, after a report is rendered, the department determines the IME was scheduled in violation of RCW 51.36.070, the report may not be considered in the administration of the claim.

[]

OTS-3259.4

AMENDATORY SECTION (Amending WSR 13-03-129, filed 1/22/13, effective 2/25/13)

WAC 296-23-302 Definitions. Approved independent medical examination (IME) provider - A licensed doctor or firm whose credentials are approved to conduct an independent medical examination, rating evaluation, or provide IME associated services including but not limited to file preparation, scheduling of examinations and processing billing. An approved IME provider is assigned a unique provider number.

Case progress examination - An examination requested for an accepted condition because:

(a) A proper and necessary treatment plan is not in place;

(b) Treatment appears palliative, the treatment plan has stalled, or treatment is not in accordance with the medical treatment guidelines; or

(c) The treatment plan has been completed without resulting in objective or functional improvement for physical conditions, or clinically meaningful signs of improvement for mental health conditions.

Department - For the purpose of this section, department means the department of labor and industries industrial insurance workers' compensation state fund and self-insured programs.

Direct patient care - For the purpose of meeting the qualifications of an independent medical examination (IME) provider, direct patient care means face-to-face contact with the patient for the purpose

of evaluation and management of care that includes, but is not limited to:

- History taking and review of systems;
- Physical examination;
- Medical decision making;
- Coordination of care with other providers and agencies.

This does not include time spent in independent medical examinations.

Impairment rating examination - An examination to determine whether or not the injured/ill worker has any permanent impairment(s) as a result of the industrial injury or illness after the worker has reached maximum medical improvement. An impairment rating may be conducted by a qualified attending provider, a medical consultant, or an approved examiner. An impairment rating may be a component of an IME.

Independent medical examination (IME) - An objective medical-legal examination requested (by the department or self-insurer) to establish medical findings, opinions, and conclusions about a worker's physical condition. These examinations may only be conducted by department-approved examiners.

Independent medical examination (IME) provider - A firm, partnership, corporation, or individual licensed doctor (examiner) who has been approved and given an independent medical examination (IME) provider number by the department to perform IMEs.

Medical director - A licensed doctor and approved IME examiner in the firm, partnership, corporation or other legal entity responsible to provide oversight on quality of independent medical examinations, impairment ratings and reports.

Medical Examiners' Handbook - A handbook developed by the department containing department policy and information to assist providers who perform independent medical examinations and impairment rating examinations.

Patient related services - Patient related services are defined as one or more of the following professional activities:

- Direct patient care;
- Locum tenens;
- Clinical consultations for treating/attending doctors;
- Clinical instruction of medical, osteopathic, dental, podiatry, or chiropractic students and/or residents;
- On-call emergency services;
- Volunteer clinician providing direct patient care services in his or her specialty.

Provider number - A unique number(s) assigned to a provider by the department of labor and industries. The number identifies the provider and is linked to a tax identification number that has been designated by the provider for payment purposes. A provider may have more than one provider number assigned by the department.

Suspension - A department action during which the provider is approved by the department but not available to accept referrals.

Temporarily unavailable - Provider is approved by the department but is temporarily unavailable to accept referrals. Temporarily unavailable applies at the provider's request for personal reasons or by the department as part of an administrative action. Provider remains unavailable until the issue is resolved.

Termination - The permanent removal of a provider from the list of approved IME examiners. All IME provider numbers assigned to the examiner are inactivated.

[Statutory Authority: RCW 51.04.020, 51.04.030, 51.32.112, 51.32.114, 51.32.055, 51.36.060, 51.36.070. WSR 13-03-129, § 296-23-302, filed 1/22/13, effective 2/25/13. Statutory Authority: RCW 51.32.055, 51.32.112 [51.32.112], 51.32.114, 51.36.060, and 51.36.070. WSR 09-24-085, § 296-23-302, filed 11/30/09, effective 3/1/10; WSR 04-04-029, § 296-23-302, filed 1/27/04, effective 3/1/04.]

OTS-3385.1

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 296-23-307 Why are independent medical examinations requested?

OTS-3272.4

NEW SECTION

WAC 296-23-308 Scheduling case progress examinations. (1) Unless a case progress examination is requested by the attending provider, no case progress examination may be scheduled until 120 days have passed since the later of:

(a) The department or self-insurer's receipt of the claim; or
(b) The department or self-insurer's receipt of the last case progress examination report and additional treatment of the condition has been authorized.

(2) Subject to subsection (1) of this section, the department or self-insurer may schedule a case progress examination of an injured worker after:

(a) Requesting an explanation from the medical provider regarding status of the treatment plan per WAC 296-23-302, definition of case progress examination, and the medical provider does not respond within 15 days;

(b) Requesting the medical provider refer the injured worker to a consultation with the appropriate specialty(ies) per WAC 296-20-051 and the referral is not made within 15 days and completed within 90 days; or

(c) Completing (a) or (b) of this subsection and the medical provider or consultant:

(i) Omitted requested information;
(ii) Did not have further treatment recommendations;
(iii) Recommended a treatment plan that does not meet the department's medical treatment guidelines; or

(iv) Wrote a report that does not comply with the provisions of WAC 296-20-06101.

[]

NEW SECTION

WAC 296-23-309 How many examinations may be requested? Unless explicitly required by statute, the total number of examinations per claim is limited as follows:

(1) One examination prior to an order under RCW 51.52.050 or 51.52.060 allowing or denying a new claim unless an additional examination is authorized by the department in state fund or self-insured cases;

(2) One examination for an impairment rating unless the examiner determines a rating was premature and/or further treatment was needed and is authorized by the self-insured employer or department;

(3) One examination to adjudicate any application to reopen a claim under RCW 51.32.160 prior to a final order under RCW 51.52.050 or 51.52.060 allowing or denying reopening of the claim, unless the department authorizes an additional examination in state fund and self-insured cases;

(4) Additional impairment rating examinations are allowed following each time a claim is reopened under RCW 51.32.160;

(5) One examination may be performed after any new medical issue is contended; and

(6) Additional examinations per case progress rules and to resolve appeals as outlined in WAC 296-23-308 and 296-23-401.

[]

NEW SECTION

WAC 296-23-403 Independent medical examinations—Department data reporting. The department will regularly provide independent medical examination data to interested parties that includes emerging trends.

As much as possible, the data should include and differentiate between examinations for claims insured by the department and those covered by self-insured employers.

[]