2022 Washington Department of Labor and Industries: IME Rulemaking Review

The state of Washington, largely due to the lobbying efforts of the claimant's bar, has recently taken efforts to limit the Department of Labor and Industries and self-insured employers in obtaining independent medical examinations (IME). This effort came to fruition most recently when the Washington legislature enacted Engrossed Substitute Senate Bill 6440, which became effective January 1, 2021.

Under this bill, "New medical issue" is now defined to mean "medical issue not covered by a previous medical examination requested by the department or the self-insurer such as an issue regarding medical causation, medical treatment, work restrictions, or evaluating permanent partial disability." RCW 51.08.121.

ESSB 6440 then amended RCW 51.36.070(1) to allow for an IME when the self-insurer deems it necessary to:

1. Make a decision regarding claim allowance;
2. Make a decision regarding reopening of a claim;
3. Resolve a new medical issue as defined above;
4. Resolve an appeal;
5. Resolve case progress;
6. Evaluate permanent disability; **or**
7. Evaluate work restrictions.

Although the bill did not put specific limits on the number of IMEs that could be performed, ESSB 6440 authorized the Department of Labor and Industries (LNI) to adopt rules to implement the amendments to RCW 51.36.070(1).

Pursuant to this statutory authority, LNI adopted the following rules that became effective April 23, 2022.

WAC 296-15-440 (IME Disputes)

This new rule governs disputes that may arise from a self-insurer's notification of an IME to the worker. Under this rule, the Department will review the following when a dispute is filed:

1. Did the IME notification letter include the basis under RCW 51.36.070(1) for why the IME is necessary?
2. Was the IME notification letter mailed to the worker and the workers' representative no later than 28 days prior to the IME?

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Confusingly, the section (1)(b) of the rule states: “Except for an IME scheduled to make a decision regarding claim allowance.” In other words, **the rule indicates that a claim allowance IME does not have to provide the worker 28 days notice.** The rule does not prescribe the amount of notice required for a claim allowance IME. As a result, the old rule of thumb of 14 days-notice for a claim allowance IME is reasonable. What is unclear is whether less notice will be valid.

The rule only allows the worker or the attending provider to dispute the IME process at anytime. The rule is silent on whether the worker’s representative can dispute the process, which is interesting since the rule specifically requires the notice to go to the worker’s representative. The rule does not allow any other medical provider to dispute the IME process.

If a self-insurer or its TPA receive a dispute, they are required to submit the dispute to LNI within five working days.

The rule prevents LNI from postponing an IME unless it receives the dispute 15 calendar days prior to the IME.

The dispute should, but does not have to, include the reason for the dispute and a copy of the IME notification.

LNI is required to make a factual determination whether RCW 51.32.070 or LNI rules were violated once a proper dispute is filed. In making the determination, LNI will review the IME notification, facts supplied by the worker, and facts provided by the attending provider. Subsection 3 is again silent on whether LNI can determine the facts submitted by the worker’s representative. Again, it does not allow any other medical provider to provide facts in the dispute.

LNI is allowed under these rules to order the cancellation of the IME pending its investigation of the dispute. If such an order is issued, LNI may also require the self-insurer to notify the IME examiner, the worker, and the attending provider of the cancellation. Again, the rule does not require the worker’s representative be notified, nor does it require any other medical provider be notified of the ordered cancellation.

As a reminder, the rule seems to allow the IME to be disputed at any time. This is important to note as the new rule also says that if the worker attends a disputed IME, LNI can still determine a violation occurred. If such an order is issued, the IME report may not be considered in the administration of the claim. It is unclear from this rule if it attempts to limit the ability of the Board to consider the IME report in a Board of Industrial Insurance Appeals proceeding, but certainly claimant attorneys will make that argument.

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WAC 296-23-302 (Case Progress IME defined)

This new rule sets forth a number of new definitions related to the IME process. The main definition of note is "Case progress examination." A "Case progress examination" is defined as an IME for an accepted condition because one of the following exists:

1. A proper and necessary treatment plan is not in place; **or**
2. The treatment plan has stalled or has been completed without resulting in objective or functional improvement for physical conditions, or clinically meaningful signs of improvement for mental health conditions.

WAC 296-20-01002 defines "Proper and necessary" for purposes of this rule. Under this definition, proper and necessary includes health care services which are:

1. Reflective of accepted standards of good practice, within the scope of practice of the provider's license and certification;
2. Curative care that cures the effects of a work-related injury or illness, and produces permanent changes that eliminate or lessen the clinical effects of an accepted condition;
3. Rehabilitative treatment that allows an injured worker to regain functional activity in the presence of the interfering accepted conditions; and
4. Care that is not delivered for the convenience of the worker or medical provider.

WAC 296-23-308 (Case Progress IME Requirements)

Understanding the above definition of "Case progress examinations" is important as this rule outlines when such an examination can be scheduled.

This rule allows an attending provider to request a case progress examination when deemed necessary.

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This rule also allows a self-insurer to request a case progress examination under the following limited circumstances:

1. The examination is scheduled 120 days after receipt of the claim, or 120 after the last case progress examination report and additional treatment, if any requested, has been authorized; and
2. A request was previously made to the attending provider concerning the status of treatment plan, or a referral was made to a consulting provider with the correct specialty within 15 business days of the request; and
    a. The attending provider did not respond to the above request in 15 business days to the request, or the consultation could not be completed in 90 days of the request; *or*
    b. The attending in provider or consultant omitted requested information; or
    c. The attending provider or consultant did not have further treatment recommendations; *or*
    d. The attending provider or consultant recommended a treatment plan that was not proper and necessary, or does not meet LNI's medical treatment guidelines; *or*
    e. The attending provider wrote a report that does not comply with WAC 296-20-06101.

WAC 296-20-06101 is very specific on the requirements for the various chart notes. The rule requires legible copies of all chart notes, diagnoses and their relationship to the claim, an outlined treatment program and estimate of its conclusion, an estimate of physical capacities if the worker is not returning to work, and a detailed examination (to name just a few things).

This is a very complicated rule, and it will be difficult to manage. However, keep in mind that RCW 51.32.070(1) allows for an IME for other reasons besides a case progress examination. Nonetheless, if managed properly, the rule does allow for a case progress examination every four months, which is less than LNI's prior unofficial six-month rule.

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WAC 296-23-309 (Other IME Limits)

This rule purports to limit the number of examinations a self-insurer may request, even though the limits were not outlined in RCW 51.32.070(1). The limits are as follows:

1. Prior to an allowance and/or denial order: **1 prior to the initial allowance or denial order**, *unless* otherwise authorized by LNI.
2. Impairment rating for closure: **1 from all appropriate specialties** (*i.e.*, orthopedic, neurological, psychiatric, etc.), *unless* a prior rating examination found the rating was premature and/or additional treatment was needed, and that treatment was authorized.
3. Reopening a claim: **1 from all appropriate specialties prior to a final order allowing or denying reopening**, *unless* otherwise authorized by LNI.
4. Impairment rating after reopening: "**additional** impairment rating **examinations** are allowed following each time a claim is reopened…." The use of "examinations" does not put a limit on the number.

a. Any new medical issue: **1 for each new medical issue is contended prior to a final order accepting or denying responsibility of the condition**, *unless* otherwise authorized by LNI.
b. Case progress: as allowed by WAC 296-23-308 (see above)
c. Resolve appeal: as allowed by WAC 296-23-401 (see below).

This rule contains some confusing language. For example, the rule states the number is limited to a "complete examination." It does not define what a "complete examination" entails.

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WAC 296-23-401 (IMEs while at BIIA)

This rule allows LNI to reassume jurisdiction of a BIIA appeal by either party, and order the self-insurer to schedule an IME. As a reminder, LNI has 30 days to reassume jurisdiction after receiving notice of an appeal. RCW 51.52.060.

The rule also suggests the self-insurer may also schedule an IME regarding an appeal if approved by LNI. It is unclear how this rule will create disputes before BIIA, and bypass CR 35 requirements for a judge order to compel an examination. However, LNI has indicated it may not allow such an IME, unless they have reassumed jurisdiction.

WAC 296-23-403 (IME Data Collection)

This rule allows interested parties to request IME data from LNI concerning "emerging trends." The rule suggests, but does not require, LNI to differentiate the data between State Fund and self-insured claims.

Although the above rules purport to eliminate the "preponderance IME" to close claims, if managed correctly, the preponderance evidence should come through the process of managing the claim. The rules also allow the self-insurer to get a preponderance around the time of claim closure, as long as the case progress rules are followed.

Please contact us at Wallace, Klor, Mann, Capener and Bishop, P.C. if you have any questions on how to best navigate these new rules. We have already developed strategies at our firm as to how to use these rules in a way to not limit our ability to obtain the necessary evidence needed to close claims and limit exposure.

Attached you will find a table summarizing the new IME rules and a checklist for future disputes.

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Reason	Number of IMEs	Timing of IME	Notice	Can I Request More?
Compensability (denial/allowance)	**1**	Prior to first allow/deny order	Not defined	Yes, need LNI order
New medical issue	**1** for each contended new issue	Prior to final (appealable only) order of responsibility of the condition	Mailed **28** days	Yes, need LNI order
Work restrictions	Unlimited	Any time prior to closure	Mailed **28** days	Yes, no LNI order needed
PPD rating initial closure	**1** per each specialty	Any time prior to closure	Mailed **28** days	Yes, if prior IME requested treatment and it was authorized, or rating was premature, then no LNI order needed.
Case Progress	**1**	**120** days after claim receipt- send request to AP re: no treatment plan, stalled plan or plan completed w/out improvement, and one of the following: ☐ No reply from AP w/in 15 business days or consultation not possible in 90 days of request; ☐ AP/consultant omitted requested information; ☐ AP/consultant had no treatment recommendations ☐ AP/consultant's plan not proper and necessary (look to Medical Treatment Guidelines) ☐ AP report not consistent w/ WAC 296-20-06101	Mailed **28** days	Yes. **120** days after last IME and requested treatment authorized, if any; or AP deems it necessary.
Appeal	**1**	After LNI reassumes jurisdiction of BIIA appeal and orders IME	Mailed **28** days	Perhaps, "employer may also schedule" IME re: an appeal if LNI ordered
Reopening	**1** per each specialty	Prior to final (appealable only) reopening order	Mailed **28** days	Yes, need LNI order if after final (appealable only) reopening order
PPD rating after reopening	Unlimited	Any time after reopening and prior to closure	Mailed **28** days	Yes, no LNI order needed

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IME DISPUTE CHECK LIST (RCW 51.32.070; WAC 296-15-440; WAC 296-15-001; LNI Policy 13.05)

- ☐ Was proper notice (days and language) given to the worker and the workers' representative? If not, did the worker and/or workers' representative waive the notice requirement?
- ☐ Did the IME notification letter include the reason/basis for the IME?
- ☐ Was the IME scheduled at a time and place reasonably convenient to the worker?
- ☐ Was the IME notice substantially similar to LNI form F207-238-000?
- ☐ Did the IME reason/basis comply with the new rules?
- ☐ Was a dispute filed by the worker and/or the attending provider?
- ☐ Did the dispute include the reason for the dispute and a copy of the IME notification?
- ☐ Was the dispute sent to LNI within 5 working days of receipt?
- ☐ Did LNI receive the dispute within 15 calendar days before the IME? (If so, LNI can postpone; if no, IME goes forward pending review)
- ☐ Was LNI provided a written explanation for why the IME was necessary and compliant with the rules?
- ☐ If the IME was postponed or cancelled, was the IME provider, worker, and attending provider given notice of the postponement or cancellation?

NOTE: The IME dispute can be filed ANYTIME!

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