

# House Bill 2335

Introduced and printed pursuant to House Rule 12.00. Pre-session filed (at the request of Governor Kate Brown for Department of Consumer and Business Services)

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Permits Director of Department of Consumer and Business Services, at request of party to proceeding to close workers' compensation claim, to appoint as many as three members to panel of medical arbiters in accordance with criteria director sets by rule.

## A BILL FOR AN ACT

1  
2 Relating to the authority of the Director of the Department of Consumer and Business Services to  
3 appoint a medical arbiters panel for workers' compensation claims; amending ORS 656.268.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 656.268 is amended to read:

6 656.268. (1) One purpose of this chapter is to restore the injured worker as soon as possible and  
7 as near as possible to a condition of self support and maintenance as an able-bodied worker. The  
8 insurer or self-insured employer shall close the worker's claim, as prescribed by the Director of the  
9 Department of Consumer and Business Services, and determine the extent of the worker's permanent  
10 disability, provided the worker is not enrolled and actively engaged in training according to rules  
11 adopted by the director pursuant to ORS 656.340 and 656.726, when:

12 (a) The worker has become medically stationary and there is sufficient information to determine  
13 permanent disability;

14 (b) The accepted injury is no longer the major contributing cause of the worker's combined or  
15 consequential condition or conditions pursuant to ORS 656.005 (7). When the claim is closed because  
16 the accepted injury is no longer the major contributing cause of the worker's combined or conse-  
17 quential condition or conditions, and there is sufficient information to determine permanent disabil-  
18 ity, the likely permanent disability that would have been due to the current accepted condition shall  
19 be estimated;

20 (c) Without the approval of the attending physician or nurse practitioner authorized to provide  
21 compensable medical services under ORS 656.245, the worker fails to seek medical treatment for a  
22 period of 30 days or the worker fails to attend a closing examination, unless the worker  
23 affirmatively establishes that such failure is attributable to reasons beyond the worker's control; or

24 (d) An insurer or self-insured employer finds that a worker who has been receiving permanent  
25 total disability benefits has materially improved and is capable of regularly performing work at a  
26 gainful and suitable occupation.

27 (2) If the worker is enrolled and actively engaged in training according to rules adopted pursu-  
28 ant to ORS 656.340 and 656.726, the temporary disability compensation shall be proportionately re-  
29 duced by any sums earned during the training.

30 (3) A copy of all medical reports and reports of vocational rehabilitation agencies or counselors

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 shall be furnished to the worker, if requested by the worker.

2 (4) Temporary total disability benefits shall continue until whichever of the following events  
3 first occurs:

4 (a) The worker returns to regular or modified employment;

5 (b) The attending physician or nurse practitioner who has authorized temporary disability ben-  
6 efits for the worker under ORS 656.245 advises the worker and documents in writing that the worker  
7 is released to return to regular employment;

8 (c) The attending physician or nurse practitioner who has authorized temporary disability ben-  
9 efits for the worker under ORS 656.245 advises the worker and documents in writing that the worker  
10 is released to return to modified employment, such employment is offered in writing to the worker  
11 and the worker fails to begin such employment. However, an offer of modified employment may be  
12 refused by the worker without the termination of temporary total disability benefits if the offer:

13 (A) Requires a commute that is beyond the physical capacity of the worker according to the  
14 worker's attending physician or the nurse practitioner who may authorize temporary disability un-  
15 der ORS 656.245;

16 (B) Is at a work site more than 50 miles one way from where the worker was injured unless the  
17 site is less than 50 miles from the worker's residence or the intent of the parties at the time of hire  
18 or as established by the pattern of employment prior to the injury was that the employer had mul-  
19 tiple or mobile work sites and the worker could be assigned to any such site;

20 (C) Is not with the employer at injury;

21 (D) Is not at a work site of the employer at injury;

22 (E) Is not consistent with the existing written shift change policy or is not consistent with  
23 common practice of the employer at injury or aggravation; or

24 (F) Is not consistent with an existing shift change provision of an applicable collective bar-  
25 gaining agreement;

26 (d) Any other event that causes temporary disability benefits to be lawfully suspended, withheld  
27 or terminated under ORS 656.262 (4) or other provisions of this chapter; or

28 (e) Notwithstanding paragraph (c)(C), (D), (E) and (F) of this subsection, the attending physician  
29 or nurse practitioner who has authorized temporary disability benefits under ORS 656.245 for a home  
30 care worker who has been made a subject worker pursuant to ORS 656.039 advises the home care  
31 worker and documents in writing that the home care worker is released to return to modified em-  
32 ployment, appropriate modified employment is offered in writing by the Home Care Commission or  
33 a designee of the commission to the home care worker for any client of the Department of Human  
34 Services who employs a home care worker and the home care worker fails to begin the employment.

35 (5)(a) Findings by the insurer or self-insured employer regarding the extent of the worker's dis-  
36 ability in closure of the claim shall be pursuant to the standards prescribed by the director.

37 (b) The insurer or self-insured employer shall issue a notice of closure of the claim to the  
38 worker, to the worker's attorney if the worker is represented, and to the director. If the worker is  
39 deceased at the time the notice of closure is issued, the insurer or self-insured employer shall mail  
40 the worker's copy of the notice of closure, addressed to the estate of the worker, to the worker's last  
41 known address and may mail copies of the notice of closure to any known or potential beneficiaries  
42 to the estate of the deceased worker.

43 (c) The notice of closure must inform:

44 (A) The parties, in boldfaced type, of the proper manner in which to proceed if they are dissat-  
45 isfied with the terms of the notice of closure;

- 1 (B) The worker of:
- 2 (i) The amount of any further compensation, including permanent disability compensation to be  
3 awarded;
- 4 (ii) The duration of temporary total or temporary partial disability compensation;
- 5 (iii) The right of the worker or beneficiaries of the worker who were mailed a copy of the notice  
6 of closure under paragraph (b) of this subsection to request reconsideration by the director under  
7 this section within 60 days of the date of the notice of closure;
- 8 (iv) The right of beneficiaries who were not mailed a copy of the notice of closure under para-  
9 graph (b) of this subsection to request reconsideration by the director under this section within one  
10 year of the date the notice of closure was mailed to the estate of the worker under paragraph (b)  
11 of this subsection;
- 12 (v) The right of the insurer or self-insured employer to request reconsideration by the director  
13 under this section within seven days of the date of the notice of closure;
- 14 (vi) The aggravation rights; and
- 15 (vii) Any other information as the director may require; and
- 16 (C) Any beneficiaries of death benefits to which they may be entitled pursuant to ORS 656.204  
17 and 656.208.
- 18 (d) If the insurer or self-insured employer has not issued a notice of closure, the worker may  
19 request closure. Within 10 days of receipt of a written request from the worker, the insurer or  
20 self-insured employer shall issue a notice of closure if the requirements of this section have been  
21 met or a notice of refusal to close if the requirements of this section have not been met. A notice  
22 of refusal to close shall advise the worker of:
- 23 (A) The decision not to close;
- 24 (B) The right of the worker to request a hearing pursuant to ORS 656.283 within 60 days of the  
25 date of the notice of refusal to close;
- 26 (C) The right to be represented by an attorney; and
- 27 (D) Any other information as the director may require.
- 28 (e) If a worker, a worker's beneficiary, an insurer or a self-insured employer objects to the no-  
29 tice of closure, the objecting party first must request reconsideration by the director under this  
30 section. A worker's request for reconsideration must be made within 60 days of the date of the no-  
31 tice of closure. If the worker is deceased at the time the notice of closure is issued, a request for  
32 reconsideration by a beneficiary of the worker who was mailed a copy of the notice of closure under  
33 paragraph (b) of this subsection must be made within 60 days of the date of the notice of closure.  
34 A request for reconsideration by a beneficiary to the estate of a deceased worker who was not  
35 mailed a copy of the notice of closure under paragraph (b) of this subsection must be made within  
36 one year of the date the notice of closure was mailed to the estate of the worker under paragraph  
37 (b) of this subsection. A request for reconsideration by an insurer or self-insured employer may be  
38 based only on disagreement with the findings used to rate impairment and must be made within  
39 seven days of the date of the notice of closure.
- 40 (f) If an insurer or self-insured employer has closed a claim or refused to close a claim pursuant  
41 to this section, if the correctness of that notice of closure or refusal to close is at issue in a hearing  
42 on the claim and if a finding is made at the hearing that the notice of closure or refusal to close  
43 was not reasonable, a penalty shall be assessed against the insurer or self-insured employer and paid  
44 to the worker in an amount equal to 25 percent of all compensation determined to be then due the  
45 claimant.

1 (g) If, upon reconsideration of a claim closed by an insurer or self-insured employer, the director  
2 orders an increase by 25 percent or more of the amount of compensation to be paid to the worker  
3 for permanent disability and the worker is found upon reconsideration to be at least 20 percent  
4 permanently disabled, a penalty shall be assessed against the insurer or self-insured employer and  
5 paid to the worker in an amount equal to 25 percent of all compensation determined to be then due  
6 the claimant. If the increase in compensation results from information that the insurer or self-  
7 insured employer demonstrates the insurer or self-insured employer could not reasonably have  
8 known at the time of claim closure, from new information obtained through a medical arbiter ex-  
9 amination or from a determination order issued by the director that addresses the extent of the  
10 worker's permanent disability that is not based on the standards adopted pursuant to ORS 656.726  
11 (4)(f), the penalty shall not be assessed.

12 (6)(a) Notwithstanding any other provision of law, only one reconsideration proceeding may be  
13 held on each notice of closure. At the reconsideration proceeding:

14 (A) A deposition arranged by the worker, limited to the testimony and cross-examination of the  
15 worker about the worker's condition at the time of claim closure, shall become part of the recon-  
16 sideration record. The deposition must be conducted subject to the opportunity for cross-examination  
17 by the insurer or self-insured employer and in accordance with rules adopted by the director. The  
18 cost of the court reporter, interpreter services, if necessary, and one original of the transcript of the  
19 deposition for the Department of Consumer and Business Services and one copy of the transcript  
20 of the deposition for each party shall be paid by the insurer or self-insured employer. The recon-  
21 sideration proceeding may not be postponed to receive a deposition taken under this subparagraph.  
22 A deposition taken in accordance with this subparagraph may be received as evidence at a hearing  
23 even if the deposition is not prepared in time for use in the reconsideration proceeding.

24 (B) Pursuant to rules adopted by the director, the worker or the insurer or self-insured employer  
25 may correct information in the record that is erroneous and may submit any medical evidence that  
26 should have been but was not submitted by the attending physician or nurse practitioner authorized  
27 to provide compensable medical services under ORS 656.245 at the time of claim closure.

28 (C) If the director determines that a claim was not closed in accordance with subsection (1) of  
29 this section, the director may rescind the closure.

30 (b) If necessary, the director may require additional medical or other information with respect  
31 to the claims and may postpone the reconsideration for not more than 60 additional calendar days.

32 (c) In any reconsideration proceeding under this section in which the worker was represented  
33 by an attorney, the director shall order the insurer or self-insured employer to pay to the attorney,  
34 out of the additional compensation awarded, an amount equal to 10 percent of any additional com-  
35 pensation awarded to the worker.

36 (d) Except as provided in subsection (7) of this section, the reconsideration proceeding shall be  
37 completed within 18 working days from the date the reconsideration proceeding begins, and shall  
38 be performed by a special evaluation appellate unit within the department. The deadline of 18  
39 working days may be postponed by an additional 60 calendar days if within the 18 working days the  
40 department mails notice of review by a medical arbiter. If an order on reconsideration has not been  
41 mailed on or before 18 working days from the date the reconsideration proceeding begins, or within  
42 18 working days plus the additional 60 calendar days where a notice for medical arbiter review was  
43 timely mailed or the director postponed the reconsideration pursuant to paragraph (b) of this sub-  
44 section, or within such additional time as provided in subsection (8) of this section when reconsid-  
45 eration is postponed further because the worker has failed to cooperate in the medical arbiter

1 examination, reconsideration shall be deemed denied and any further proceedings shall occur as  
2 though an order on reconsideration affirming the notice of closure was mailed on the date the order  
3 was due to issue.

4 (e) The period for completing the reconsideration proceeding described in paragraph (d) of this  
5 subsection begins upon receipt by the director of a worker's or a beneficiary's request for recon-  
6 sideration pursuant to subsection (5)(e) of this section. If the insurer or self-insured employer re-  
7 quests reconsideration, the period for reconsideration begins upon the earlier of the date of the  
8 request for reconsideration by the worker or beneficiary, the date of receipt of a waiver from the  
9 worker or beneficiary of the right to request reconsideration or the date of expiration of the right  
10 of the worker or beneficiary to request reconsideration. If a party elects not to file a separate re-  
11 quest for reconsideration, the party does not waive the right to fully participate in the reconsider-  
12 ation proceeding, including the right to proceed with the reconsideration if the initiating party  
13 withdraws the request for reconsideration.

14 (f) Any medical arbiter report may be received as evidence at a hearing even if the report is  
15 not prepared in time for use in the reconsideration proceeding.

16 (g) If any party objects to the reconsideration order, the party may request a hearing under ORS  
17 656.283 within 30 days from the date of the reconsideration order.

18 (7)(a) The director may delay the reconsideration proceeding and toll the reconsideration  
19 timeline established under subsection (6) of this section for up to 45 calendar days if:

20 (A) A request for reconsideration of a notice of closure has been made to the director within  
21 60 days of the date of the notice of closure;

22 (B) The parties are actively engaged in settlement negotiations that include issues in dispute  
23 at reconsideration;

24 (C) The parties agree to the delay; and

25 (D) Both parties notify the director before the 18th working day after the reconsideration pro-  
26 ceeding has begun that they request a delay under this subsection.

27 (b) A delay of the reconsideration proceeding granted by the director under this subsection ex-  
28 pires:

29 (A) If a party requests the director to resume the reconsideration proceeding before the expi-  
30 ration of the delay period;

31 (B) If the parties reach a settlement and the director receives a copy of the approved settlement  
32 documents before the expiration of the delay period; or

33 (C) On the next calendar day following the expiration of the delay period authorized by the di-  
34 rector.

35 (c) Upon expiration of a delay granted under this subsection, the timeline for the completion of  
36 the reconsideration proceeding shall resume as if the delay had never been granted.

37 (d) Compensation due the worker shall continue to be paid during the period of delay authorized  
38 under this subsection.

39 (e) The director may authorize only one delay period for each reconsideration proceeding.

40 (8)(a) If the basis for objection to a notice of closure issued under this section is disagreement  
41 with the impairment used in rating of the worker's disability, the director shall refer the claim to  
42 a medical arbiter appointed by the director.

43 (b) If [*neither party requests a medical arbiter and*] the director determines that insufficient  
44 medical information is available to determine disability, the director may **appoint, and** refer the  
45 claim to, a medical arbiter [*appointed by the director*].

1 (c) At the request of either of the parties, **the director shall appoint** a panel of **as many as**  
 2 three medical arbiters [*shall be appointed*] **in accordance with criteria that the director sets by**  
 3 **rule.**

4 (d) The arbiter, or panel of medical arbiters, [*shall*] **must** be chosen from among a list of phy-  
 5 sicians qualified to be attending physicians referred to in ORS 656.005 (12)(b)(A) [*who were selected*  
 6 *by*] **whom** the director **selected** in consultation with the Oregon Medical Board and the committee  
 7 referred to in ORS 656.790.

8 (e)(A) The medical arbiter or panel of medical arbiters may examine the worker and perform  
 9 such tests as may be reasonable and necessary to establish the worker's impairment.

10 (B) If the director determines that the worker failed to attend the examination without good  
 11 cause or failed to cooperate with the medical arbiter, or panel of medical arbiters, the director shall  
 12 postpone the reconsideration proceedings for up to 60 days from the date of the determination that  
 13 the worker failed to attend or cooperate, and shall suspend all disability benefits resulting from this  
 14 or any prior opening of the claim until such time as the worker attends and cooperates with the  
 15 examination or the request for reconsideration is withdrawn. Any additional evidence regarding  
 16 good cause must be submitted prior to the conclusion of the 60-day postponement period.

17 (C) At the conclusion of the 60-day postponement period, if the worker has not attended and  
 18 cooperated with a medical arbiter examination or established good cause, [*there shall be no further*  
 19 *opportunity for*] the worker [*to*] **may not** attend a medical arbiter examination for this claim closure.  
 20 The reconsideration record [*shall*] **must** be closed, and the director shall issue an order on recon-  
 21 sideration based upon the existing record.

22 (D) All disability benefits suspended [*pursuant to*] **under** this subsection, including all disability  
 23 benefits awarded in the order on reconsideration, or by an Administrative Law Judge, the Workers'  
 24 Compensation Board or upon court review, [*shall not be*] **are not** due and payable to the worker.

25 (f) The **insurer or self-insured employer shall pay the** costs of examination and review by the  
 26 medical arbiter or panel of medical arbiters [*shall be paid by the insurer or self-insured employer*].

27 (g) The findings of the medical arbiter or panel of medical arbiters [*shall*] **must** be submitted  
 28 to the director for reconsideration of the notice of closure.

29 (h) After reconsideration, no subsequent medical evidence of the worker's impairment is admis-  
 30 sible before the director, the Workers' Compensation Board or the courts for purposes of making  
 31 findings of impairment on the claim closure.

32 (i)(A) [*When*] **If** the basis for objection to a notice of closure issued under this section is a dis-  
 33 agreement with the impairment used in rating the worker's disability, and the director determines  
 34 that the worker is not medically stationary at the time of the reconsideration or that the closure  
 35 was not made pursuant to this section, the director is not required to appoint a medical arbiter  
 36 [*prior to the completion of*] **before completing** the reconsideration proceeding.

37 (B) If the worker's condition has substantially changed since the notice of closure, upon the  
 38 consent of all the parties to the claim, the director shall postpone the proceeding until the worker's  
 39 condition is appropriate for claim closure under subsection (1) of this section.

40 (9) No hearing shall be held on any issue that was not raised and preserved before the director  
 41 at reconsideration. However, issues arising out of the reconsideration order may be addressed and  
 42 resolved at hearing.

43 (10) If, after the notice of closure issued pursuant to this section, the worker becomes enrolled  
 44 and actively engaged in training according to rules adopted pursuant to ORS 656.340 and 656.726,  
 45 any permanent disability payments due for work disability under the closure shall be suspended, and

1 the worker shall receive temporary disability compensation and any permanent disability payments  
 2 due for impairment while the worker is enrolled and actively engaged in the training. When the  
 3 worker ceases to be enrolled and actively engaged in the training, the insurer or self-insured em-  
 4 ployer shall again close the claim pursuant to this section if the worker is medically stationary or  
 5 if the worker's accepted injury is no longer the major contributing cause of the worker's combined  
 6 or consequential condition or conditions pursuant to ORS 656.005 (7). The closure shall include the  
 7 duration of temporary total or temporary partial disability compensation. Permanent disability  
 8 compensation shall be redetermined for work disability only. If the worker has returned to work or  
 9 the worker's attending physician has released the worker to return to regular or modified employ-  
 10 ment, the insurer or self-insured employer shall again close the claim. This notice of closure may  
 11 be appealed only in the same manner as are other notices of closure under this section.

12 (11) If the attending physician or nurse practitioner authorized to provide compensable medical  
 13 services under ORS 656.245 has approved the worker's return to work and there is a labor dispute  
 14 in progress at the place of employment, the worker may refuse to return to that employment without  
 15 loss of reemployment rights or any vocational assistance provided by this chapter.

16 (12) Any notice of closure made under this section may include necessary adjustments in com-  
 17 pensation paid or payable prior to the notice of closure, including disallowance of permanent disa-  
 18 bility payments prematurely made, crediting temporary disability payments against current or future  
 19 permanent or temporary disability awards or payments and requiring the payment of temporary  
 20 disability payments which were payable but not paid.

21 (13) An insurer or self-insured employer may take a credit or offset of previously paid workers'  
 22 compensation benefits or payments against any further workers' compensation benefits or payments  
 23 due a worker from that insurer or self-insured employer when the worker admits to having obtained  
 24 the previously paid benefits or payments through fraud, or a civil judgment or criminal conviction  
 25 is entered against the worker for having obtained the previously paid benefits through fraud. Bene-  
 26 fits or payments obtained through fraud by a worker [*shall*] **may** not be included in any data used  
 27 for ratemaking or individual employer rating or dividend calculations by an insurer, a rating or-  
 28 ganization licensed pursuant to ORS chapter 737, the State Accident Insurance Fund Corporation  
 29 or the director.

30 (14)(a) An insurer or self-insured employer may offset any compensation payable to the worker  
 31 to recover an overpayment from a claim with the same insurer or self-insured employer. When  
 32 overpayments are recovered from temporary disability or permanent total disability benefits, the  
 33 amount recovered from each payment shall not exceed 25 percent of the payment, without prior  
 34 authorization from the worker.

35 (b) An insurer or self-insured employer may suspend and offset any compensation payable to the  
 36 beneficiary of the worker, and recover an overpayment of permanent total disability benefits caused  
 37 by the failure of the worker's beneficiaries to notify the insurer or self-insured employer about the  
 38 death of the worker.

39 (15) Conditions that are direct medical sequelae to the original accepted condition shall be in-  
 40 cluded in rating permanent disability of the claim unless they have been specifically denied.