

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA

In the matter of the adoption of NEW) NOTICE OF PUBLIC HEARING ON
RULES I through IX, related to the) PROPOSED ADOPTION
reopening of medical benefits)
automatically closed in certain)
workers' compensation claims)

TO: All Concerned Persons

1. On December 18, 2015, at 10:00 a.m., the Department of Labor and Industry (department) will hold a public hearing in the basement auditorium of the Sanders Building (DPHHS building), 111 North Sanders Street, Helena, Montana, to consider the proposed adoption of the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m., on December 14, 2015, to advise us of the nature of the accommodation that you need. Please contact the Department of Labor and Industry, Attn: Maralyn Lytle, Employment Relations Division, P.O. Box 8011, Helena, MT 59604-8011; telephone (406) 444-6604; fax (406) 444-4140; Montana TTD (406) 444-5549; or e-mail mlytle@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: This general statement of reasonable necessity applies to NEW RULES I through IX. There is reasonable necessity to adopt rules to implement the claims closure and medical reopening provisions of Chapter 167, L. of 2011 (House Bill 334) at this time, in order to have the reopening request review procedure in place prior to the beginning of the reopening request period which starts for certain claims on April 2, 2016. April 2, 2016, is 90 days prior to the 60-month anniversary of the effective date of the automatic medical benefit termination provision found in 39-71-704(1)(f), MCA. Section 39-71-717(5), MCA, specifies that 90 days prior to the medical benefits termination date is the earliest a petition to reopen medical benefits may be filed.

There is no analogous petition for medical review of terminated medical benefits that previously existed within the Montana workers' compensation system, and therefore the reopening process had to be developed "from scratch," based on the statutory requirements set out in 39-71-717, MCA. Rulemaking is reasonably necessary to describe the contents of, and procedure by which, a petition for reopening of terminated medical benefits is filed as those details are not provided by statute. There is reasonable necessity to define various terms used in the process, the various steps in the process, and describe what the various parties must do during the process.

The department's business process is designed to gather records and information from the parties, send the materials to the reviewing physicians, receive the written reviews from the physicians, and have the department's medical director

prepare a final report and recommendation within the allotted 60 days. In cases involving use of the medical review panel, two of the panel members will be physicians who are not employees of the department. The department has determined that prior to sending the medical records and other information to the panel members, the materials need to be placed in a logical, orderly manner, to minimize wasted time spent by the reviewing physician organizing those materials. The department therefore concludes it is reasonably necessary to require that insurers and workers have 14 days to send the department medical records and other information, in order to prepare the required medical director's report and recommendations within the 60 days allowed by law.

The department has also considered and rejected allowing a "good cause" extension of the 14-day limit for delivering medical records or additional information. Because the statutory 60-day period in which to issue a final report and recommendation does not provide for a "good cause" extension of time for completion, the department believes it is not feasible to provide a methodology for a party to request an extension. The department has concluded that the 60-day requirement is too short a period in which to accommodate extension requests and still timely issue the report and recommendation.

There is reasonable necessity to provide a "fast track" procedure for reopening when the worker and the insurer agree to a reopening, which will save time, expense, and effort for the worker, the insurer, and the department, while still complying with the requirement to issue the medical director's report and make recommendations regarding the petition for reopening.

Finally, it is reasonably necessary to adopt rules at this time to address the required periodic review of claims where medical benefits are recommended to be reopened for longer than two years. The periodic review process is integrated with the proposed rules, so that parties have a better understanding and expectations regarding how recommendations for more than two years of medical benefits will affect the claim and the parties' rights and obligations. Not addressing the periodic review process at this time would likely lead to uncertainty for the parties, and increase the probability of disputes and litigation.

The department, prior to formally proposing NEW RULES I through IX, provided a draft of the proposed rule text to various stakeholders, and publicly discussed the proposed rules at the 2015 Governor's Conference on Workers' Compensation. The stakeholders included worker's advocates, insurers, adjusters, attorneys, the labor-management advisory council, medical providers, legislators, and representatives of the Economic Affairs Interim Committee. The department considered the questions, concerns, and objectives informally provided by the various stakeholders before finalizing the proposed new rules for the formal notice and comment period required for administrative rulemaking. In addition, the department provided the primary bill sponsor with a copy of the draft proposed rules, and solicited comments from him concerning the draft. The bill sponsor's comments have been taken into consideration in the proposed new rules.

The proposed rules and the department-provided forms are designed for ease of use by workers and insurers, although the department recognizes that workers might enlist the assistance of legal counsel to decide whether or not to submit a petition for reopening. The department intends, as noted in NEW RULE I, to provide

more detailed instructions to help guide workers and insurers through the petition process. The instructions are not part of the rules, but will provide guidance to address frequently asked questions and elaborate on the types of documents that might be submitted in support of, or in response to, a petition for reopening. The instructions will provide up-to-date submission information, such as the mailing, physical, and electronic addresses to which materials may be delivered to the department.

The department believes these new rules strike a reasonable balance between providing only the minimal necessary information, and assuming the parties read and understand the relevant statutes, versus giving a detailed explanation of every term and concept already expressed in statute, thus ensuring that anyone unfamiliar with the Workers' Compensation Act will fully understand the process without referring to statute. The department believes that in only a relatively small portion of all workers' compensation claims will a worker need to consider requesting a reopening of medical benefits that are terminated by operation of law.

The department has drafted NEW RULES I through IX to ensure that the department has the option to use the services of a vendor to manage and store the medical records and other information sent to the department during the petition process. A vendor may also be used to provide a ready source of Montana-licensed physicians and medical specialists to review petitions in a timely manner so the department can comply with the statutory 60 days to issue a report and recommendations. The department is using the request for proposal (RFP) process to solicit and evaluate potential vendors. While the RFP process is separate from formal rulemaking, the department has considered as part of the rule-drafting process whether the entire petition handling process could and should be done entirely by department staff, whether to out-source the entire process to a vendor, or by using a combination of in-house staff and vendor support. The department has concluded that to provide timely and accountable procedures, the department should be the direct point of contact for workers and insurers. Through the RFP process, the department will evaluate the effectiveness and relative cost of obtaining certain "behind the scenes" services from one or more vendors. The development of the business process of handling the petition and performing the medical review therefore has influenced the workflow described in the proposed new rules.

4. The rules as proposed to be adopted provide as follows:

NEW RULE I INTRODUCTION - APPLICABILITY - VOLUNTARY

PAYMENTS (1) [This subchapter] addresses the reopening of medical benefits terminated by operation of law for certain claims that occurred on or after July 1, 2011.

(2) [This subchapter] does not apply to claims to which any of the following circumstances apply:

- (a) arising before July 1, 2011;
- (b) in which the medical benefits have expressly been settled by means of a department or Workers' Compensation Court approved settlement or judgment;
- (c) in which the insurer did not fully accept liability for the underlying accident or occupational disease; or

- (d) arising on or after July 1, 2011, where the injury results in:
 - (i) permanent total disability; or
 - (ii) the fitting of a prosthesis which may need to be repaired or replaced.
- (3) The department will apply the provisions of [this subchapter] to claims accepted by the uninsured employers' fund.
- (4) Informational instructions regarding the process for a party to petition to reopen medical benefits terminated by operation of law are available from the Department of Labor and Industry, Employment Relations Division, P.O. Box 8011, Helena, MT 59604-8011, and online at the department's web site. These instructions provide supplemental information about the reopening process and an explanation of how to submit a petition for reopening to the department.
- (5) Nothing in [this subchapter] prohibits an insurer from making voluntary payments for medical benefits that have terminated by operation of law. An insurer that makes a voluntary payment for a medical benefit that has been terminated by operation of law must advise the worker in writing that the payment for a medical benefit is made on a voluntary basis and does not create a legal obligation for the insurer to make payment for any other medical benefits.

AUTH: 39-71-203, MCA

IMP: 39-71-105, 39-71-107, 39-71-704, 39-71-717, MCA

NEW RULE II DEFINITIONS Terms defined in 39-71-116, MCA, are used in [this subchapter] as they are defined by statute. As used in [this subchapter] the following definitions apply unless the context clearly indicates otherwise:

- (1) "Accepted" means the petition has been evaluated by the department and was found to be eligible to be considered for medical review.
- (2) "Additional information" means information other than a medical record, supplied by a worker or an insurer, and tendered as being relevant to the reopening of medical benefits.
- (3) "Approved" means that after the medical review has been performed, medical benefits are reopened, as specified in the medical director's report.
- (4) "Denied" means that after the medical review has been performed, medical benefits are not reopened.
- (5) "Department" means the Department of Labor and Industry.
- (6) "Dismissed" means the petition has been evaluated by the department and was found to be ineligible to be considered for medical review.
- (7) "Filed" means the status of a petition once it has been accepted by the department for medical review.
- (8) "Joint petition" means a petition for reopening that has been signed by both the worker and the insurer, with agreed-to terms concerning the reopening of medical benefits.
- (9) "Medical records" means documents related to the medical condition of the worker, and includes but is not limited to, notes, reports, and letters prepared by health care providers. The term does not include medical billing materials.
- (10) "Medical review panel" means the department's medical director and two additional physicians selected from a pool of available physicians, who can review a petition for the reopening of medical benefits, as provided for in 39-71-717, MCA.

(11) "Periodic review" means the every-two-years consideration by the medical review panel or the medical director as to whether the recommendations previously made should be continued or changed.

(12) "Petition" means the department-provided form upon which a party requests that medical benefits which have been terminated by the operation of 39-71-704, MCA, be reopened.

(13) "Physician" means a health care provider who takes part in a medical review panel under [this subchapter]. A physician must be licensed in Montana in one or more of the following categories:

- (a) medical doctor;
- (b) osteopath;
- (c) dentist;
- (d) chiropractor;
- (e) physician assistant; or
- (f) advanced practice registered nurse.

(14) "Received " means a petition which has been delivered to the department, but has not yet been accepted and filed by the department.

(15) "Reopened" means medical benefits which had terminated by operation of law, and which are now to be furnished by the insurer as recommended by the medical report.

(16) "Report" means the written recommendations of the medical director or medical review panel concerning whether or not medical benefits should be reopened, and if reopened, to what extent those benefits should be furnished.

(17) "Returned" means the petition has been evaluated by the department and has been found to be incomplete.

(18) "Submission," as used in 39-71-717(8), MCA, means the same as being filed with the department.

(19) "Submit," as used in 39-71-717(6), MCA, means to deliver medical records or additional information to the department.

(20) "Work" means supplying labor or services for remuneration, although not necessarily in employment by another.

(21) "Worker" means the individual who suffered the workplace injury or occupational disease upon which basis a claim for benefits was made to the insurer.

(22) "Year" means 12 calendar months.

AUTH: 39-71-203, MCA

IMP: 39-71-116, 39-71-717, MCA

NEW RULE III TIMELINES AND EXPLANATION OF STATUS

CLASSIFICATIONS OF A PETITION (1) The time in which a petition can be delivered to the department and considered filed is the period 90 days prior to the termination of medical benefits through the ten-year anniversary of the date of the injury.

(2) A petition which has been delivered to the department undergoes a preliminary evaluation to determine which of following three initial status conditions is appropriate:

- (a) the petition is accepted if it is eligible for medical review;

(b) the petition is dismissed if it is ineligible for medical review because:
(i) the petition concerns a claim that is not subject to the medical benefits reopening process; or

(ii) the petition concerns a claim for which a previous petition has been accepted; or

(c) the petition is returned if it is eligible for medical review, but the petition form is incomplete.

(3) Upon a petition being accepted, it is considered filed with the department. A petition that is dismissed or returned is considered not to have been filed with the department.

(4) The 60-day period for medical review to occur and the medical director to issue a report begins on the date the petition is considered filed.

(5) Once filed, the parties have 14 days to submit medical records and additional information to be considered during the medical review. Once the medical review is completed and the report is issued by the medical director, the petition will have one of the two following status conditions:

(a) the petition is approved, with a recommendation in the report as to the nature and extent of the medical benefits that should be provided by the insurer; or

(b) the petition is denied, with a recommendation in the report that no further medical benefits should be provided by the insurer.

(6) There is a rebuttable presumption that the petition relates to a claim which the insurer acknowledges is compensable. An insurer may dispute that presumption in writing by delivering to the department and the petitioner notice of the dispute regarding compensability within 14 days of the department's acceptance of the petition.

(a) Upon receiving the insurer's notice disputing compensability of the claim, the acceptance of the petition is suspended until:

(i) the compensability dispute is resolved by agreement of the parties;

(ii) the compensability dispute is resolved by the final judgment of the courts;

or

(iii) the time in which to bring the compensability dispute to the workers' compensation court expires, without a party bringing that dispute to the workers' compensation court for adjudication.

(b) A petition that has had its acceptance status suspended is considered to be timely made for the purposes of the filing time limits provided by 39-71-717, MCA. While the acceptance status is suspended, the timelines for medical review and submission of documents do not begin to run. If the claim is deemed compensable, the department will notify the parties of the beginning of the 60-day review period, and that there are 14 days in which to submit medical records and additional information. If the claim is deemed not compensable, the status of the petition will be changed to dismissed.

(7) A petitioner disagreeing with the department's classification of a petition as either dismissed or returned may bring the dispute to the Workers' Compensation Court after following the mediation requirements provided by law.

AUTH: 39-71-203, MCA

IMP: 39-71-717, MCA

NEW RULE IV PETITION FOR REOPENING (1) A party wishing to reopen medical benefits terminated by operation of law must submit a petition for reopening to the department on the form provided by the department. Petition forms are available online at the department's web site, or upon request from the department's Employment Relations Division, P.O. Box 8011, Helena, MT 59604-8011.

(2) A petition cannot be accepted unless all of the fields in the form, other than those identified as being "optional," have been filled out.

AUTH: 39-71-203, MCA

IMP: 39-71-717, MCA

NEW RULE V SUBMISSION OF MEDICAL RECORDS AND ADDITIONAL INFORMATION - EFFECT OF FAILURE TO SUBMIT MEDICAL RECORDS OR

ADDITIONAL INFORMATION (1) Section 39-71-717(8), MCA, requires the department to issue the report of the medical director within 60 days of when the petition is considered filed. Due to this 60-day requirement, the parties have 14 days from the date the petition is considered filed in which to deliver to the department the medical records and any additional information the party wants considered in the medical review.

(a) The medical records and additional information must be delivered to the department in the manner and to an address as specified by the instructions.

(b) Any medical records or other information submitted by a party which have not previously been provided to the other party, must be sent to that other party at the same time the records or other information are delivered to the department.

(2) Medical records or additional information that are not timely delivered to the department will not be considered during the medical review. The medical review will be conducted considering only the materials that have been timely received by the department.

(3) When the petition is considered filed, the department will direct the insurer to deliver to the department the medical records contained in the insurer's claim file. In addition to sending the medical records in the claims file as required, the insurer is allowed to deliver to the department other medical records and any additional information the insurer wants considered in the medical review.

(4) Once the petition is considered filed, the worker is allowed to deliver to the department medical records and any additional information the worker wants considered in the medical review.

AUTH: 39-71-203, MCA

IMP: 39-71-717, MCA

NEW RULE VI JOINT PETITION FOR REOPENING (1) If the worker and the insurer agree on the nature and duration of the medical benefits to be reopened, the worker and the insurer may file a joint petition for reopening. A joint petition for reopening must be made on the department's joint petition form. Joint petition forms are available from the department in the manner described in [NEW RULE IV].

(2) All portions of the joint petition for reopening must be completed when it is delivered to the department, and the medical records and other information the parties believe are important to the issue of reopening must be provided at that time.

(3) Because the parties agree on the need for reopening medical benefits, the department's medical director will summarily review and approve the petition.

(4) In recognition that following the filing of the worker's petition, the parties may come to a voluntary agreement as to the nature and scope of medical benefits to be reopened, the department will treat the filing of a joint petition for reopening as a request for withdrawal of the worker's petition.

AUTH: 39-71-203, MCA

IMP: 39-71-717, MCA

NEW RULE VII REVIEW BY MEDICAL DIRECTOR - CONSENT OF BOTH PARTIES

(1) The worker and the insurer may consent to have a petition for reopening reviewed only by the department's medical director, and not by the medical review panel. An agreement to have the petition reviewed only by the department's medical director cannot be revoked. To be effective, the consent of each party to a review by only the medical director must be received by the department not later than the deadline for submission of medical records and additional information.

(2) The medical director may consult with nonphysician medical providers if the medical issues presented for review make it appropriate to do so.

(3) The medical director shall apply the standard of review, burden of proof, and other evaluation factors described in [NEW RULE VIII] that apply to review by the medical review panel.

(4) Following the medical director's review, the medical director shall issue a report and make recommendations with respect to the reopening of medical benefits.

(5) A party disagreeing with the medical director's report and recommendations may bring the dispute to the Workers' Compensation Court after following the mediation requirements provided by law.

AUTH: 39-71-203, MCA

IMP: 39-71-717, MCA

NEW RULE VIII REVIEW BY MEDICAL REVIEW PANEL - REPORT AND RECOMMENDATIONS

(1) Unless both the worker and the insurer agree to have a petition for reopening reviewed solely by the department's medical director, the petition will be reviewed by a three-member panel of physicians. The members of the medical review panel may consult with nonphysician medical providers if the medical issues presented for review make it appropriate to do so.

(2) The medical review panel may recommend that medical benefits be reopened only if:

(a) the worker's medical condition is a direct result of the compensable injury or occupational disease; and

(b) the worker needs additional medical benefits in order to:

- (i) continue to work; or
- (ii) return to work.

(3) The worker has the burden of proof to demonstrate the nature and duration of the medical benefits that should be reopened. Medical benefits will not be reopened unless the worker shows, based on a preponderance of evidence, that the criteria of (2) have been satisfied.

(4) Each member of the medical review panel shall prepare a report as to the panel member's evaluation of the medical records submitted for review and any additional information that has been submitted. The panel member must determine whether the evidence submitted demonstrates that further medical benefits meet the criteria of (2). The panel member's report must state the reason(s) and rationale for the recommendation.

(5) If a panel member concludes that additional medical benefits are necessary, the panel member shall identify the nature and extent of the medical benefits that should be provided. The analysis must include the reasons and rationale that explain:

(a) the nature or type of medical benefits recommended to be furnished, whether identified by specific procedure or by general description;

(b) the extent of the duration (whether by time or number of treatments) of the benefits expected to be needed; and

(c) whether and how the recommendations are consistent with the department's current utilization and treatment guidelines.

(6) Following the medical review panel members' individual reviews, the medical director shall issue a report and make recommendations on behalf of the panel with respect to the reopening of medical benefits that reflect the views of the majority of the panel members.

(7) A party disagreeing with the medical director's report and recommendations may bring the dispute to the Workers' Compensation Court after following the mediation requirements provided by law.

AUTH: 39-71-203, MCA

IMP: 39-71-717, MCA

NEW RULE IX PERIODIC REVIEW OF CERTAIN REOPENED MEDICAL

BENEFITS (1) The department's medical director shall biennially review claims where medical benefits have been reopened and the recommended duration of the reopening is more than two years, in order to determine whether the previous recommendations should be changed.

(2) The department shall request that the worker and the insurer deliver to the department medical records created since the prior medical review, as well as any additional information the party wants considered.

(a) The department's request shall specify a deadline by which those records and additional information must be received by the department.

(b) Any medical records or other information submitted by a party which have not previously been provided to the other party must be sent to that other party at the same time the records or other information are delivered to the department.

(3) The biennial review will be based on the materials previously submitted by the parties at the time the original petition for reopening was considered, and the records and information sent pursuant to (2). If a party does not timely send updated medical records or additional information, the medical director shall base the review on the materials available.

(4) The prior report and recommendation regarding medical benefits is presumed to be correct. A previous recommendation may be changed only if it is based on the updated medical records and information sent to the department.

(5) Following the medical director's review, if the medical director believes there is reason to change the prior recommendation, the medical director shall:

(a) in cases where the original review was made by a medical review panel, convene a new medical review panel to review the updated medical records and information; or

(b) in cases where the original review was made solely by the medical director, issue a report and make recommendations as provided by (6).

(6) Following completion of the periodic review, the medical director shall issue a report and make recommendations with respect to continuing the reopening of medical benefits.

(7) A party disagreeing with the medical director's report and recommendations may bring the dispute to the Workers' Compensation Court after following the mediation requirements provided by law.

AUTH: 39-71-203, MCA

IMP: 39-71-717, MCA

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Maralyn Lytle, Employment Relations Division, P.O. Box 8011, Helena, MT 59604-8011; telephone (406) 444-6604; fax (406) 444-4140; Montana TTD (406) 444-5549; or e-mail mlytle@mt.gov, and must be received no later than 5:00 p.m., on December 28, 2015.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices, and specifies the particular subject matter or matters regarding which the person wishes to receive notices. Such written request may be mailed or delivered to the Department of Labor and Industry, attention: Mark Cadwallader, 1315 Lockey Avenue, P.O. Box 1728, Helena, Montana 59624-1728, faxed to the department at (406) 444-1394, e-mailed to mcadwallader@mt.gov, or may be made by completing a request form at any rules hearing held by the agency.

7. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been complied with. The primary bill sponsor was contacted by various e-mails starting on April 3, 2015, by letter on July 22, 2015, and again on September 16, 2015, by telephone.

8. Pursuant to 2-4-111, MCA, the department has determined that NEW RULES I through IX proposed in this notice do not have a significant and direct impact upon small businesses.

9. The department intends to adopt NEW RULES I through IX to be effective February 5, 2016. The department reserves the right to adopt some or all of the proposed new rules at a later date, or not at all.

10. The department's Office of Administrative Hearings has been designated to preside over and conduct this hearing.

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

/s/ PAM BUCY
Pam Bucy, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State November 16, 2015.