

# Senate Bill 991

Sponsored by Senator LINTHICUM; Senators ANDERSON, NASH, ROBINSON, THATCHER, WEBER, Representative WRIGHT

## 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**. The statement includes a measure digest written in compliance with applicable readability standards.

Digest: The Act removes two bases for a worker to say no to a temp modified job without the loss of workers' comp benefits so that more such jobs qualify. (Flesch Readability Score: 60.7).

Deletes two bases for a worker to refuse an offer of modified employment without losing temporary total disability benefits to increase possible modified employment placements.

## A BILL FOR AN ACT

1  
2 Relating to temporary total disability benefits; amending ORS 656.268.

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

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

5 656.268. (1) One purpose of this chapter is to restore the injured worker as soon as possible and  
6 as near as possible to a condition of self support and maintenance as an able-bodied worker. The  
7 insurer or self-insured employer shall close the worker's claim, as prescribed by the Director of the  
8 Department of Consumer and Business Services, and determine the extent of the worker's permanent  
9 disability, provided the worker is not enrolled and actively engaged in training according to rules  
10 adopted by the director pursuant to ORS 656.340 and 656.726, when one of the following conditions  
11 is met:

12 (a) The worker has become medically stationary and there is sufficient information to determine  
13 permanent disability. Notwithstanding any other provision of this chapter, a physician or nurse  
14 practitioner may not retroactively determine a worker to be medically stationary more than 60 days  
15 prior to the date of the determination except in the case of claims that are subject to subsection (13)  
16 of this section. An insurer or self-insured employer must mail or deliver written notice to a worker  
17 and to the worker's attorney, if the worker is represented, within seven days following receipt of  
18 information that the worker is medically stationary.

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

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

29 (d) An insurer or self-insured employer finds that a worker who has been receiving permanent

**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 total disability benefits has materially improved and is capable of regularly performing work at a  
2 gainful and suitable occupation.

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

6 (3) A copy of all medical reports and reports of vocational rehabilitation agencies or counselors  
7 shall be furnished to the worker, if requested by the worker.

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

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

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

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

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

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

26 *[(C) Is not with the employer at injury;]*

27 *[(D) Is not at a work site of the employer at injury;]*

28 *[(E)]* (C) Is not consistent with the existing written shift change policy or is not consistent with  
29 common practice of the employer at injury or aggravation; or

30 *[(F)]* (D) Is not consistent with an existing shift change provision of an applicable collective  
31 bargaining agreement;

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

34 (e) Notwithstanding paragraph (c)(C)*[(D), (E) and (F)]* **and (D)** of this subsection, the attending  
35 physician or nurse practitioner who has authorized temporary disability benefits under ORS 656.245  
36 for a home care worker or a personal support worker who has been made a subject worker pursuant  
37 to ORS 656.039 advises the home care worker or personal support worker and documents in writing  
38 that the home care worker or personal support worker is released to return to modified employment,  
39 appropriate modified employment is offered in writing by the Home Care Commission or a designee  
40 of the commission to the home care worker or personal support worker for any client of the De-  
41 partment of Human Services who employs a home care worker or personal support worker and the  
42 worker fails to begin the employment.

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

45 (b) The insurer or self-insured employer shall issue a notice of closure of the claim to the worker

1 and to the worker's attorney if the worker is represented. The insurer or self-insured employer shall  
2 notify the director of the closure in the manner the director prescribes by rule. If the worker is  
3 deceased at the time the notice of closure is issued, the insurer or self-insured employer shall mail  
4 the worker's copy of the notice of closure, addressed to the estate of the worker, to the worker's last  
5 known address and may mail copies of the notice of closure to any known or potential beneficiaries  
6 to the estate of the deceased worker.

7 (c) The notice of closure must inform:

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

10 (B) The worker of:

11 (i) The amount of any further compensation, including permanent disability compensation to be  
12 awarded;

13 (ii) The duration of temporary total or temporary partial disability compensation;

14 (iii) The right of the worker or beneficiaries of the worker who were mailed a copy of the notice  
15 of closure under paragraph (b) of this subsection to request reconsideration by the director under  
16 this section within 60 days of the date of the notice of closure;

17 (iv) The right of beneficiaries who were not mailed a copy of the notice of closure under para-  
18 graph (b) of this subsection to request reconsideration by the director under this section within one  
19 year of the date the notice of closure was mailed to the estate of the worker under paragraph (b)  
20 of this subsection;

21 (v) The right of the insurer or self-insured employer to request reconsideration by the director  
22 under this section within seven days of the date of the notice of closure;

23 (vi) The aggravation rights; and

24 (vii) Any other information as the director may require; and

25 (C) Any beneficiaries of death benefits to which they may be entitled pursuant to ORS 656.204  
26 and 656.208.

27 (d) If the insurer or self-insured employer has not issued a notice of closure, the worker may  
28 request closure. Within 10 days of receipt of a written request from the worker, the insurer or  
29 self-insured employer shall issue a notice of closure if the requirements of this section have been  
30 met or a notice of refusal to close if the requirements of this section have not been met. A notice  
31 of refusal to close shall advise the worker of:

32 (A) The decision not to close;

33 (B) The right of the worker to request a hearing pursuant to ORS 656.283 within 60 days of the  
34 date of the notice of refusal to close;

35 (C) The right to be represented by an attorney; and

36 (D) Any other information as the director may require.

37 (e) If a worker, a worker's beneficiary, an insurer or a self-insured employer objects to the no-  
38 tice of closure, the objecting party first must request reconsideration by the director under this  
39 section. A worker's request for reconsideration must be made within 60 days of the date of the no-  
40 tice of closure. If the worker is deceased at the time the notice of closure is issued, a request for  
41 reconsideration by a beneficiary of the worker who was mailed a copy of the notice of closure under  
42 paragraph (b) of this subsection must be made within 60 days of the date of the notice of closure.  
43 A request for reconsideration by a beneficiary to the estate of a deceased worker who was not  
44 mailed a copy of the notice of closure under paragraph (b) of this subsection must be made within  
45 one year of the date the notice of closure was mailed to the estate of the worker under paragraph

1 (b) of this subsection. A request for reconsideration by an insurer or self-insured employer may be  
2 based only on disagreement with the findings used to rate impairment and must be made within  
3 seven days of the date of the notice of closure.

4 (f) If an insurer or self-insured employer has closed a claim or refused to close a claim pursuant  
5 to this section, if the correctness of that notice of closure or refusal to close is at issue in a hearing  
6 on the claim and if a finding is made at the hearing that the notice of closure or refusal to close  
7 was not reasonable, a penalty shall be assessed against the insurer or self-insured employer and paid  
8 to the worker in an amount equal to 25 percent of all compensation determined to be then due the  
9 claimant.

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

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

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

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

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

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

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

45 (d) Except as provided in subsection (7) of this section, the reconsideration proceeding shall be

1 completed within 18 working days from the date the reconsideration proceeding begins, and shall  
2 be performed by a special evaluation appellate unit within the department. The deadline of 18  
3 working days may be postponed by an additional 60 calendar days if within the 18 working days the  
4 department mails notice of review by a medical arbiter. If an order on reconsideration has not been  
5 mailed on or before 18 working days from the date the reconsideration proceeding begins, or within  
6 18 working days plus the additional 60 calendar days where a notice for medical arbiter review was  
7 timely mailed or the director postponed the reconsideration pursuant to paragraph (b) of this sub-  
8 section, or within such additional time as provided in subsection (8) of this section when reconsi-  
9 deration is postponed further because the worker has failed to cooperate in the medical arbiter  
10 examination, reconsideration shall be deemed denied and any further proceedings shall occur as  
11 though an order on reconsideration affirming the notice of closure was mailed on the date the order  
12 was due to issue.

13 (e) The period for completing the reconsideration proceeding described in paragraph (d) of this  
14 subsection begins upon receipt by the director of a worker's or a beneficiary's request for recon-  
15 sideration pursuant to subsection (5)(e) of this section. If the insurer or self-insured employer re-  
16 quests reconsideration, the period for reconsideration begins upon the earlier of the date of the  
17 request for reconsideration by the worker or beneficiary, the date of receipt of a waiver from the  
18 worker or beneficiary of the right to request reconsideration or the date of expiration of the right  
19 of the worker or beneficiary to request reconsideration. If a party elects not to file a separate re-  
20 quest for reconsideration, the party does not waive the right to fully participate in the reconsi-  
21 deration proceeding, including the right to proceed with the reconsideration if the initiating party  
22 withdraws the request for reconsideration.

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

25 (g) If any party objects to the reconsideration order, the party may request a hearing under ORS  
26 656.283 within 30 days from the date of the reconsideration order.

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

29 (A) A request for reconsideration of a notice of closure has been made to the director within  
30 60 days of the date of the notice of closure;

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

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

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

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

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

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

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

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

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

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

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

7 (b) If the director determines that insufficient medical information is available to determine  
8 disability, the director may appoint, and refer the claim to, a medical arbiter.

9 (c) At the request of either of the parties, the director shall appoint a panel of as many as three  
10 medical arbiters in accordance with criteria that the director sets by rule.

11 (d) The arbiter, or panel of medical arbiters, must be chosen from among a list of physicians  
12 qualified to be attending physicians referred to in ORS 656.005 (12)(b)(A) whom the director selected  
13 in consultation with the Oregon Medical Board and the committee referred to in ORS 656.790.

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

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

23 (C) At the conclusion of the 60-day postponement period, if the worker has not attended and  
24 cooperated with a medical arbiter examination or established good cause, the worker may not attend  
25 a medical arbiter examination for this claim closure. The reconsideration record must be closed, and  
26 the director shall issue an order on reconsideration based upon the existing record.

27 (D) All disability benefits suspended under this subsection, including all disability benefits  
28 awarded in the order on reconsideration, or by an Administrative Law Judge, the Workers' Com-  
29 pensation Board or upon court review, are not due and payable to the worker.

30 (f) The insurer or self-insured employer shall pay the costs of examination and review by the  
31 medical arbiter or panel of medical arbiters.

32 (g) The findings of the medical arbiter or panel of medical arbiters must be submitted to the  
33 director for reconsideration of the notice of closure.

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

37 (i)(A) If the basis for objection to a notice of closure issued under this section is a disagreement  
38 with the impairment used in rating the worker's disability, and the director determines that the  
39 worker is not medically stationary at the time of the reconsideration or that the closure was not  
40 made pursuant to this section, the director is not required to appoint a medical arbiter before  
41 completing the reconsideration proceeding.

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

45 (9) No hearing shall be held on any issue that was not raised and preserved before the director

1 at reconsideration. However, issues arising out of the reconsideration order may be addressed and  
2 resolved at hearing.

3 (10) If, after the notice of closure issued pursuant to this section, the worker becomes enrolled  
4 and actively engaged in training according to rules adopted pursuant to ORS 656.340 and 656.726,  
5 any permanent disability payments due for work disability under the closure shall be suspended, and  
6 the worker shall receive temporary disability compensation and any permanent disability payments  
7 due for impairment while the worker is enrolled and actively engaged in the training. When the  
8 worker ceases to be enrolled and actively engaged in the training, the insurer or self-insured em-  
9 ployer shall again close the claim pursuant to this section if the worker is medically stationary or  
10 if the worker's accepted injury is no longer the major contributing cause of the worker's combined  
11 or consequential condition or conditions pursuant to ORS 656.005 (7). The closure shall include the  
12 duration of temporary total or temporary partial disability compensation. Permanent disability  
13 compensation shall be redetermined for work disability only. If the worker has returned to work or  
14 the worker's attending physician has released the worker to return to regular or modified employ-  
15 ment, the insurer or self-insured employer shall again close the claim. This notice of closure may  
16 be appealed only in the same manner as are other notices of closure under this section.

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

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

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

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

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

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

1           (16)(a) Except as provided under subsection (13) of this section, an insurer or self-insured em-  
2 ployer may not recover an overpayment from a worker's permanent partial disability compensation  
3 for overpayments, offsets or credits of wage loss in an amount that exceeds 50 percent of the total  
4 compensation awarded to the worker.

5           (b) An insurer or self-insured employer may not declare an overpayment of any compensation  
6 that was paid more than two years prior to the date of the declaration.

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