

**ANNUAL REPORT**

**of the**

**OFFICE OF THE INDEPENDENT ADMINISTRATOR**

**of the**

**KAISER FOUNDATION HEALTH PLAN, INC.  
MANDATORY ARBITRATION SYSTEM**

**for**

**DISPUTES WITH HEALTH PLAN MEMBERS**

**January 1, 2023 - December 31, 2023**

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## REPORT SUMMARY

This is the annual report for the Office of the Independent Administrator (OIA) for 2023. The OIA administers the arbitration system between Kaiser Foundation Health Plan, Inc., or its affiliates (Kaiser) and its members.<sup>1</sup> From the data and analyses in this report, readers may gauge how well the OIA system meets its goals of providing a fair, timely, and low cost arbitration process that protects the privacy of the parties.

### Status of Arbitration Demands

1. **Number of Demands for Arbitration.** The OIA received 619 demands, 149 more than last year. See pages 10 and 41.
2. **Types of Claims.** Ninety-five percent (95%) of the cases involved allegations of medical malpractice. Less than one-half percent (<½%) presented benefit and coverage allegations. The remaining cases (5%) were based on allegations of premises liability and other torts. See page 11.
3. **Twenty-Nine Percent (29%) of Claimants Did Not Have Attorneys.** Claimants in 177 cases, or 29%, were not represented by counsel, 4% less than last year. On average, 26% of claimants are in *pro per*. See pages 12 and 43 – 44.

### How Cases Closed

4. **Fifty-Percent (50%) of Cases Settled.** The parties settled 50% of cases, 3% less than last year. Twenty-four cases (10%) settled at the Mandatory Settlement Meeting (MSM). See pages 24 and 45 – 46.
5. **Five Percent (5%) of Cases Went to Hearing.** Claimants prevailed in 13% of these cases. The average award was \$771,158, and the range was from \$65,000 to \$1,731,647. See pages 25, 45 – 46, and Exhibit I.
6. **All Cases were Heard by a Single Neutral Arbitrator.** All of the hearings involved a single neutral arbitrator. See page 20.
7. **More than Half (51%) of Claimants Received Some Compensation.** Claimants received compensation either when their cases settled (50%) or when they were successful after a hearing (1%). See pages 24, 25, and 45 – 46.

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<sup>1</sup>Kaiser has arbitrated disputes with its California members since 1971. In the 1997 *Engalla* case, the California courts criticized Kaiser's arbitration system, saying that it fostered too much delay in the handling of members' demands and should not be self-administered. The OIA has administered the system since 1999.

8. **Almost One-Quarter (24%) Closed by Decision of the Neutral Arbitrator.** Five percent (5%) of cases closed after an arbitration hearing, 15% were closed through summary judgment, and 4% were dismissed by neutral arbitrators. See pages 24 – 25 and 45 – 46.
9. **More Than One-Quarter (26%) of Cases were Withdrawn.** Claimants withdrew 26% of cases. Thirty-nine percent (39%) of these cases included claimants who were in *pro per*. See pages 24 and 45 – 46.

## Meeting Deadlines

10. **More than Half (59%) of the Neutral Arbitrators were Selected Without any Delay.** The *Rules* give parties the option to postpone the deadline to select a neutral arbitrator, but over half (59%) of the arbitrators were selected without the parties exercising this option. See page 19.
11. **Forty-One Percent (41%) of the Neutral Arbitrators were Selected by Parties Exercising Options for Postponement and/or Disqualification.** In 35% of the cases, parties exercised the option to postpone the deadline to select a neutral arbitrator. Claimants made all but six of the requests for a 90-day postponement. In three percent (3%) of the cases, parties disqualified the neutral arbitrator. In the remaining three percent (3%) of the cases, parties exercised both the postponement and disqualification options. Claimants disqualified 54 neutral arbitrators and Kaiser disqualified 24. See pages 15, 16 – 17 and 19 – 20.
12. **Average Length of Time to Select a Neutral Arbitrator was 60 Days.** The time to select a neutral arbitrator in cases with no delay was 23 days. The time to select a neutral with a 90 day postponement was 109 days. In cases with only a disqualification, it was 62 days. In cases with both a postponement and disqualification it was 202 days. The overall average length of time to select a neutral arbitrator for all cases was 60 days, 3 days less than last year. See pages 20 and 44 – 45.
13. **On Average, Cases Closed in Just over Thirteen Months.** Cases closed, on average, in 399 days, 34 days less than last year. One case closed beyond the deadline required by the *Rules*. Eighty percent (80%) of the cases closed within 18 months (the deadline for “regular” cases)<sup>2</sup> and 52% closed in a year or less. See pages 21, 23 – 24, 26, and 46 – 47.
14. **On Average, Cases With Hearings were Completed in Just over Two Years.** Cases that were decided by a neutral arbitrator making an award after a hearing closed on average in 760 days (25 months). This average includes cases that were

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<sup>2</sup>“Regular” cases must close within 18 months. See Rule 24.a.

designated complex, extraordinary, or that received a Rule 28 extension because they needed extra time. “Regular cases” closed in 494 days (about 16 ½ months). See pages 23, 25, 27, and 47.

### **Panel of Neutral Arbitrators**

- 15. The Neutral Arbitrator Panel.** The OIA had 176 neutral arbitrators on its panel, 1 less than last year. Fifty-five percent (55%) of them, or 96, are retired judges. See pages 6 – 7.
- 16. Neutral Arbitrator Backgrounds.** The applications completed by the members of the OIA panel show that 84 arbitrators, or 48%, spend all of their time acting as neutral arbitrators. The remaining members divide their time by representing plaintiffs and defendants, though not necessarily in medical malpractice litigation. Ninety-one percent (91%) of the neutral arbitrators reported having medical malpractice experience. See pages 7 – 8.
- 17. Sixty-Three Percent (63%) of Arbitrators Served on a Case.** Sixty-three percent (63%) of the neutral arbitrators on the OIA panel served on a case. Arbitrators averaged three assignments each. Nineteen neutral arbitrators, including those not on the OIA panel, decided the 23 awards made. Sixteen arbitrators (84%) wrote a single award. See pages 9 and 42.
- 18. Majority of Neutral Arbitrators Selected by the Parties were Members of the OIA Panel (97%).** Seventy-nine percent (79%) of neutral arbitrators were selected through the strike and rank process. Of the joint selections, 18% were members of the OIA panel, and 2% were not members of the OIA panel.<sup>3</sup> See pages 14 – 15.
- 19. Neutral Arbitrators Selected Again After Making Large Award.** One neutral arbitrator made an award for more than \$750,000. This arbitrator has made two previous large awards and has been selected twice after making the first award. See page 9.

### **Neutral Arbitrator Fees**

- 20. Kaiser Paid the Neutral Arbitrators’ Fees in 94% of Closed Cases that had Fees.** Claimants can choose to have Kaiser pay the entire cost of the neutral arbitrator. Kaiser paid the neutral arbitrators’ fees in 94% of closed cases that had fees. See page 32.

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<sup>3</sup>This year, two cases selected the arbitrator by other methods. See Section V.B.

21. **Cost of Arbitrators.** Hourly rates charged by neutral arbitrators range from \$200/hour to \$1,600/hour, with an average of \$700/hour. For the 448 cases that closed, and for which the OIA has information, the average fee charged by neutral arbitrators was \$8,962. In some cases, neutral arbitrators reported that they charged no fees. Excluding cases where no fees were charged, the average fee was \$9,230. The average fee in cases decided after a hearing was \$49,451. See page 32.

## Evaluations

22. **Evaluations of Neutral Arbitrators by Parties.** When a case closes by neutral arbitrator action, the OIA sends the parties or their attorneys a form to evaluate the neutral arbitrator. Most attorneys who returned completed evaluations expressed satisfaction with the neutral arbitrators and would recommend them to others, with an average of 4.6 on a 5 point scale. *Pro pers* view neutral arbitrators less favorably, with a 2.3 average. This year, the overall average by all parties was 4.3. See pages 33 – 34.
23. **Evaluations of the OIA by Neutral Arbitrators.** When a case closes by neutral arbitrator action, the OIA sends the neutral arbitrator a questionnaire about the OIA system. Ninety-nine percent (99%) of the neutral arbitrators reported that the OIA experience was the same as or better than the court system, and 1% said it was worse. See pages 34 – 36.
24. **Evaluations of the OIA by Parties.** When a case closes, the OIA sends an evaluation to the parties or their attorneys asking them about the OIA system. Eighty-eight percent (88%) of the responding parties and attorneys reported that the OIA system was the same as or better than the court system, and 12% said it was worse. See pages 36 – 39.

## Development and Changes in the System

25. **Changes in Membership of the AOB.** Kennedy Richardson resigned and Matt Weber joined. See pages 3 and 39, and Exhibit D.
26. **AOB Reconvened Rules Sub-Committee.** The AOB reconvened the *Rules* sub-committee to review proposals for changes to Rules 9 and 39. See pages 3-4 and 40.
27. **AOB Approved Rule Changes.** Both proposals to amend Rule 9 and Rule 39 were approved by the AOB. The approved changes took effect January 1, 2024. Both rules have added “email” to the list of options for service of documents, with the caveat that, email service upon a *pro per* party shall comply with the express consent requirement of California Code of Civil Procedure Section 1010.6(c). See pages 3 – 4, 40, and Exhibit B.

28. **Temporary Rule 4 in Response to COVID-19 has Expired.** All 11 temporary rules to address COVID-19 concerns have been lifted. See pages 4, 40, and Exhibit E.
29. **AOB and OIA Continued Commitment to Improve Diversity of the OIA Panel of Neutral Arbitrators.** The AOB and the OIA continued discussions about the ways in which the OIA could improve the diversity of the panel of neutral arbitrators. See pages 4 and 41.
30. **Impact of COVID-19 on Cases Older than 18 Months.** The OIA continues to provide quarterly reports to the AOB comparing open cases older than 18 months with those in prior years, both pre- and post-pandemic. See pages 4 – 5, 40 and Chart 1.
31. **The Number of Arbitrators Who Have Served After Making a \$750,000 Award.** The AOB requested that the OIA begin reporting on arbitrators who have served after making an award of \$750,000, an increase from \$500,000. See pages 6 and 9, and Exhibit I.
32. **AOB to Review its Bylaws.** AOB began discussions about its bylaws and whether modifications are needed with consultation and review of the Blue Ribbon Advisory Panel’s (BRP) recommendations. See page 6 and Exhibit C.

## Conclusion

The goal of the OIA is to provide a fair, timely, and low-cost arbitration process that protects the privacy of the parties. To summarize:

- Neutral arbitrators are selected expeditiously, and the cases close within the deadlines set by the *Rules*.
- Parties can, and do, disqualify neutral arbitrators they do not like.
- Parties can, and do, shift the costs of the neutral arbitrators to Kaiser.
- OIA arbitrations are confidential, and the OIA does not publish the names of individual claimants or respondents involved in them.
- Neutral arbitrators on the OIA panel have plaintiff, defendant, and judicial backgrounds.
- The OIA provides information on its website about its cases in compliance with California law. In addition, although no longer required by law, the OIA maintains a table about all its cases since January 1, 2003.

- The OIA has published annual reports since 1999 which are all available on the OIA website.

## I. INTRODUCTION & OVERVIEW

The Office of the Independent Administrator (OIA) issues this report for 2023.<sup>1</sup> It describes the arbitration system that handles claims brought by members of Kaiser Foundation Health Plan, Inc. (KFHP) against KFHP or its affiliates, collectively Kaiser.<sup>2</sup> Marcella A. Bell, an attorney, is the Independent Administrator. Under her contract with the Arbitration Oversight Board, the OIA maintains a panel of neutral arbitrators to hear Kaiser cases and independently administers the arbitration system between Kaiser and its members. The contract also requires that Ms. Bell write an annual report describing the goals of the system, the actions being taken to achieve them, and the degree to which they are being met. While this report mainly focuses on what happened in the arbitration system during 2023, the final section compares this year with earlier years.

The Arbitration Oversight Board (AOB), an unincorporated association registered with the California Secretary of State, provides ongoing oversight of the OIA. Its activities are discussed in Section X.

The arbitrations are administered pursuant to the *Rules for Kaiser Permanente Member Arbitrations Administered by the Office of the Independent Administrator Amended as of January 1, 2024 (Rules)*. The *Rules* are available in English, Spanish, and Chinese.<sup>3</sup>

The *Rules* provide procedures for selecting a neutral arbitrator expeditiously and completing most cases within 18 months.<sup>4</sup> The 18-month timeline is displayed on the next page. Details about each step in the process are discussed in the body of this report.

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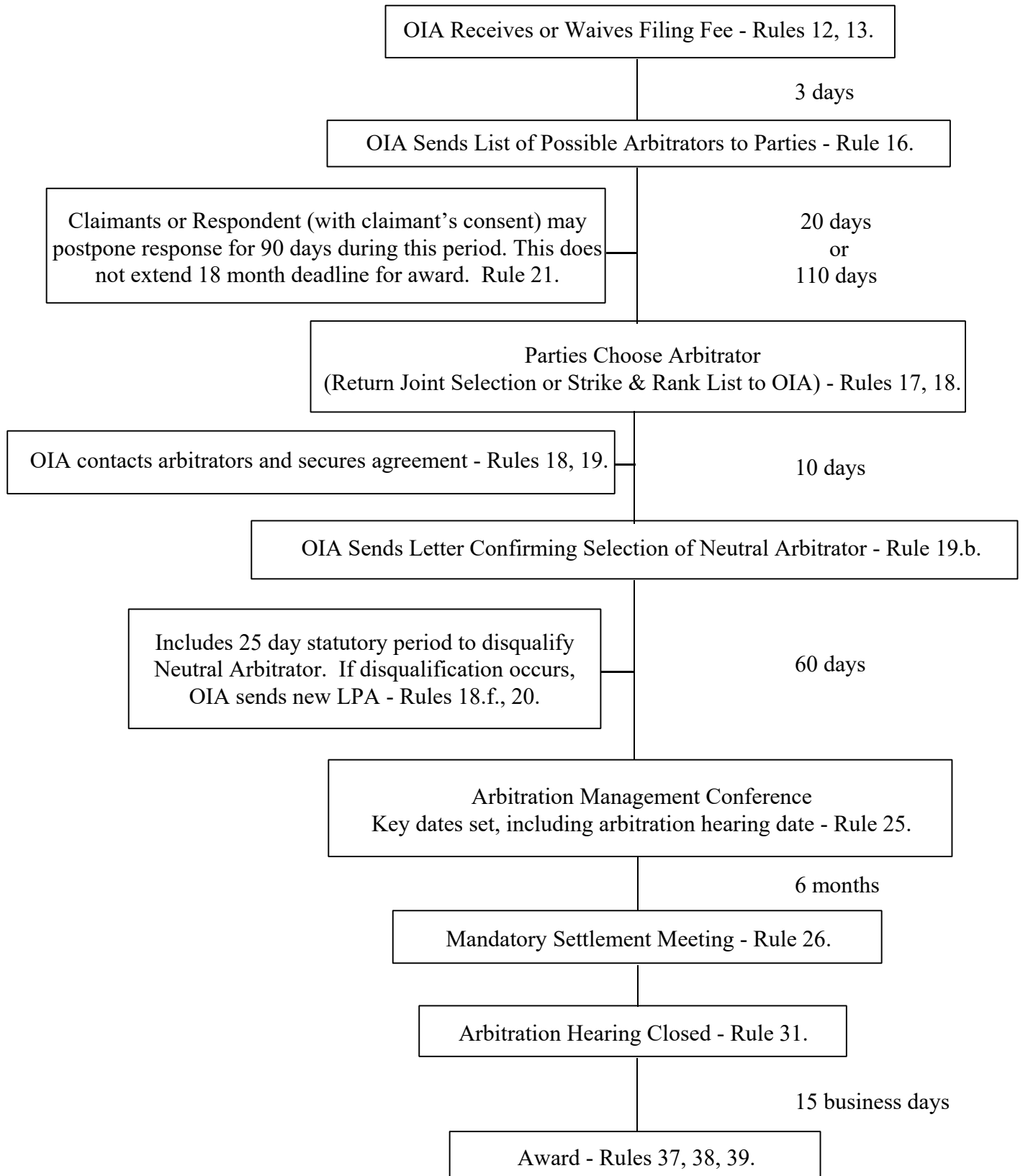
<sup>1</sup>This report, along with the prior annual reports, the *Rules*, various forms, and other information, including OIA disclosures, are available on the OIA website, [www.oia-kaiserarb.com](http://www.oia-kaiserarb.com). The OIA can be reached by calling 213-637-9847, faxing 213-637-8658, or e-mailing [oia@oia-kaiserarb.com](mailto:oia@oia-kaiserarb.com). A description of the OIA's staff is attached as Exhibit A.

<sup>2</sup>Kaiser is a California nonprofit health care service plan that arranges for health care services and other benefits for its enrolled members. Since 1971, it has required that its members use binding arbitration. Kaiser arranges for medical benefits by contracting with The Permanente Medical Group, Inc. (Northern California) and Southern California Permanente Medical Group. Hospital services are provided by contract with Kaiser Foundation Hospitals, a nonprofit corporation. Almost all of the demands for arbitration received by the OIA are based on allegations against these affiliates.

<sup>3</sup>The *Rules* were amended and the changes took effect January 1, 2024. A redlined copy is attached as Exhibit B. See Section II for a discussion of the changes.

<sup>4</sup>See Rule 24.a. The *Rules* also include provisions for cases to be expedited and for cases that need more than 18 months to be completed. See Rules 24.b., 24.c., 28, and 33 – 36.

# Timeline for Arbitrations Using Regular Procedures



MAXIMUM OF 18 MONTHS\*

\*Unless Rule 24.b., 24.c., or 28 applies.



## **A. Goals of the Arbitration System**

The system administered by the OIA is expected to provide a fair, timely, and low-cost arbitration process that respects the privacy of the parties. These goals are set out in Rule 1. The data in this report are collected and published to allow the AOB and the public to determine how well the arbitration system meets these goals.<sup>5</sup>

## **B. Format of This Report**

Section II discusses developments and changes in the system. Sections III and IV look at the OIA's panel of neutral arbitrators, and the number and types of cases the OIA received. The parties' selection of neutral arbitrators is discussed in Section V. Section VI summarizes the methods for monitoring compliance of open cases, and Section VII analyzes how cases are closed and the length of time it takes for cases to close. Section VIII discusses the cost of arbitration. The parties' evaluations of neutral arbitrators and the parties' and neutral arbitrators' evaluations of the OIA system are summarized in Section IX. Section X describes the AOB's membership and activities. Finally, Section XI compares the operation of the system over time.

# **II. DEVELOPMENT AND CHANGES IN THE SYSTEM**

## **A. Change in Membership of the AOB**

Kennedy Richardson, retired Litigation Practice Manager for the Kaiser Foundation Health Plan resigned at the end of 2023. He had been a member of the AOB since 2018, and was an interim member in 2014 brought in to assist with the selection of Ms. Bell as the Independent Administrator after Ms. Oxborough retired. Matt Weber, Deputy General Counsel for TMC HealthCare joined the AOB in October. See Exhibit D for Mr. Weber's resume.

Vice-Chair Donna Yee, has been the acting chair since July while the chair, Richard Spinello, recovers from an accident. Ms. Yee will continue in this capacity.

## **B. AOB Reconvened *Rules* Sub-Committee**

Last year, the OIA presented the AOB with proposals for changes to Rules 9 and 39. After lengthy discussions with the board, the chair referred the proposals to the *Rules* sub-committee for further review. The *Rules* sub-committee and the Independent Administrator continued discussions regarding the changes and jointly submitted proposals to the board.

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<sup>5</sup>The OIA was created in response to the recommendation of a Blue Ribbon Panel (BRP) and began operating March 28, 1999. Ms. Bell has served as the Independent Administrator since March 29, 2015. The OIA met all of the recommendations that pertain to it since its first operating year. A full copy of the BRP report is available on the OIA website. The current status of each recommendation is attached as Exhibit C.

### **C. AOB Approved Rule Changes**

The *Rules* sub-committee, which consisted of three members of the AOB, and the Independent Administrator, presented the AOB with proposals to amend Rule 9 and Rule 39. Both proposals were approved by the AOB. The approved changes took effect January 1, 2024. Rule 9 (Serving Other Documents) and Rule 39 (Delivery of the Award) have added “email” to the list of options for service of documents, with the caveat that email service upon a *pro per* party shall comply with the express consent requirement of California Code of Civil Procedure Section 1010.6(c).<sup>6</sup>

### **D. Temporary Rule 4 in Response to COVID-19 has Expired**

On March 20, 2020, the OIA, in concurrence with the Chair of the AOB, enacted 11 temporary rules to address COVID-19 concerns.<sup>7</sup> All of the temporary rules except Temporary Rule 4 had been lifted in 2021 and 2022. Temporary Rule 4 providing neutral arbitrators with the authority to serve decisions and/or orders electronically, rather than by mail, remained in effect pending approval of Rule 39.

Rule 39 (Delivery of the Award) has been modified. The change took effect January 1, 2024 and Temporary Rule 4 expired. See Section II.C.

### **E. Continued Commitment to Improve Diversity of the OIA Panel of Neutral Arbitrators**

The AOB and the OIA continued discussions about the ways in which the OIA could improve the diversity of the panel of neutral arbitrators. The OIA is actively seeking to recruit women and individuals of color and has seen improved results. The OIA continues to participate in virtual events focused on diversity, access, and inclusion.

### **F. Impact of COVID-19 on Cases Older than 18 Months<sup>8</sup>**

The OIA provides quarterly reports to the AOB comparing open cases older than 18 months with those in prior years, both pre- and post-pandemic. As shown in Chart 1, in 2020, the first year of the pandemic, the OIA had the highest number of these cases with Rule 28

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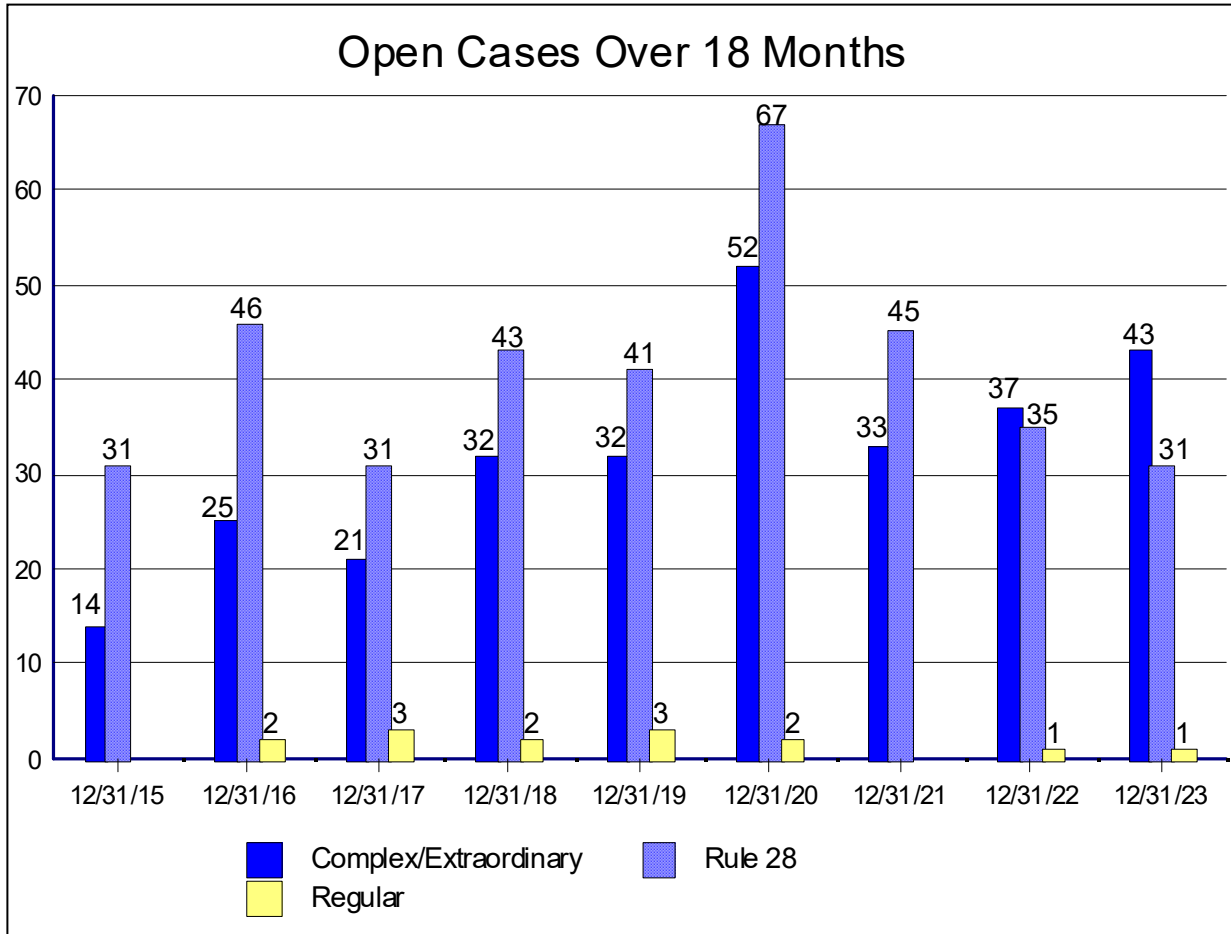
<sup>6</sup>See Exhibit B for a redlined version of the *Rules*.

<sup>7</sup>See Exhibit E for a list of the temporary rules.

<sup>8</sup>The AOB was interested in comparing open cases older than 18 months with those in prior years, both pre and post COVID-19.

extensions (67 cases), and complex and extraordinary designations (52 cases).<sup>9</sup> The second and third years (2021 and 2022) of the pandemic, the number of cases with extensions began to decrease. In 2023, 31 cases open more than 18 months had Rule 28 extensions and 43 cases were designated complex or extraordinary.<sup>10</sup>

**Chart 1**



<sup>9</sup>A neutral arbitrator may extend the deadline to close a case for good cause under Rule 28 or by designating the matter complex or extraordinary under Rule 24. See Section VII.B. for further information.

<sup>10</sup>The graph now includes statistics from 2015 - 2023, consistent with Section XI.

### **G. Number of Arbitrators Who Have Served After Making a \$750,000 Award**

Since 2000, the OIA has reported on the number of arbitrators who have served after making an award of \$500,000 or more.<sup>11</sup> Since the passage of the modernized MICRA,<sup>12</sup> the AOB requested that the OIA begin reporting on arbitrators who have served after making an award of \$750,000. The OIA began this reporting in 2023.<sup>13</sup>

### **H. AOB to Review its Bylaws**

AOB began discussions about its bylaws and whether modifications are needed with consultation and review of the Blue Ribbon Advisory Panel's (BRP) recommendations. The bylaws and the BPP call for periodic review to assure compliance. Action by the AOB will be taken in 2024.

## **III. PANEL OF NEUTRAL ARBITRATORS**

### **A. Turnover and Size of the Panel**

At the end of the year, there were 176 neutral arbitrators on the OIA panel. Of those, 96 were former judges, or 55% of the total.

The neutral arbitrators are distributed into three geographic panels: Northern California, Southern California, and San Diego. See Table 1. Neutral arbitrators who agree to travel without charge may be listed on more than one panel. Exhibit F contains the qualifications for neutral arbitrators, and Exhibit G contains the names of the neutral arbitrators on each panel.

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<sup>11</sup>The OIA received its first award over \$500,000 in 2000.

<sup>12</sup>MICRA, the Medical Injury Compensation Reform Act, was passed by the California State Legislature in 1975 and had remained unchanged until January 1, 2023. See California Civil Code §3333.2 for all amendments.

<sup>13</sup> See Section III.C.4.

**Table 1 - Number of Neutral Arbitrators by Region**

<b>Total Number of Arbitrators on the OIA Panel:</b>	<b>176</b>
<b>Northern California Total:</b>	<b>95</b>
<b>Southern California Total:</b>	<b>103</b>
<b>San Diego Total:</b>	<b>65</b>
<b>The three regions total 263 because 60 arbitrators are on more than one panel; 27 on all three panels, 3 on No. Cal &amp; So. Cal, and 30 on So. Cal &amp; San Diego.</b>	

During the year, 21 arbitrators voluntarily left the panel<sup>14</sup> and 5 additional arbitrators were removed. Four were removed for failing to update their applications,<sup>15</sup> and one no longer met the required qualifications.<sup>16</sup> Twenty-two neutral arbitrators joined the panel. One applicant was rejected.<sup>17</sup>

#### **B. Practice Background of Neutral Arbitrators**

The neutral arbitrator application requires applicants to estimate the percentage of their practice spent in various professional endeavors. On average, OIA neutral arbitrators spend their time as follows: 65% of the time acting as a neutral arbitrator, 6% as a claimant (or plaintiff) attorney, 6% as a respondent (or defense) attorney, 22% in other forms of employment (most working as mediators), and less than half a percent acting as a respondent's party arbitrator, a claimant's party arbitrator, or an expert.

Less than half (48%) of the panel, 84 members, report that they spend 100% of their practice acting as neutral arbitrators. The full distribution is shown in Table 2.

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<sup>14</sup>For the arbitrators who provided reasons, the most common reason given for resigning was for health reasons (or death).

<sup>15</sup>Neutral arbitrators are required to update their applications every two years.

<sup>16</sup>See Exhibit F.

<sup>17</sup>If the OIA rejects an application, we inform the applicant of the qualification(s) he or she failed to meet.

**Table 2 - Percentage of Practice Spent as a Neutral Arbitrator**

<b>Percent of Time</b>	<b>0%</b>	<b>1 – 25%</b>	<b>26 – 50%</b>	<b>51 – 75%</b>	<b>76 – 99%</b>	<b>100%</b>
<b>Number of NAs</b>	6	45	20	10	11	84

On average, the neutral arbitrators on the OIA panel spend 12% of their time as litigators. See Table 3 for the full distribution.

**Table 3 - Percentage of Practice Spent as an Advocate**

<b>Percent of Practice</b>	<b>Number of NAs Reporting Claimant Counsel Practice</b>	<b>Number of NAs Reporting Respondent Counsel Practice</b>
0%	157	154
1 – 25%	3	6
26 – 50%	8	8
51 – 75%	2	2
76 – 100%	6	6

Finally, while not required by the qualifications, 91% of the neutral arbitrators on the OIA panel have medical malpractice experience. At the time that they filled out or updated their applications, 161 reported that they had medical malpractice experience, while 15 did not. Of the 15 who reported no medical malpractice experience, 9 of them have since served as a neutral arbitrator in an OIA case, and may now have acquired medical some malpractice experience.

### **C. Participation of All Neutral Arbitrators<sup>18</sup>**

The first four parts of this section consider the number of neutral arbitrators named on the List of Possible Arbitrators; the number who served; the number who wrote awards; and the number who have served after making a large award. The final section compares cases closed by neutral arbitrators selected ten or more times with cases closed by remaining neutral arbitrators.

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<sup>18</sup>This section includes statistics for all neutral arbitrators selected, including those arbitrators who are not members of the OIA panel.

## **1. Number of Arbitrators Named on a List of Possible Arbitrators**

All of the neutral arbitrators were named on at least one List of Possible Arbitrators (LPA) sent to the parties.<sup>19</sup> The average number of times Northern California arbitrators appeared on an LPA was 39. The range of appearances was 1 – 66 times. In Southern California, the average number of appearances was 30. The range was 1 – 54. In San Diego, the average number of appearances was ten. The range was 0 – 22.<sup>20</sup>

## **2. Number of Arbitrators Who Served**

This year, 119 different neutral arbitrators were selected to serve in 581 cases. The majority (110) were members of the OIA panel (63%). The number of times an arbitrator on the OIA panel was selected ranges from 0 – 35. The neutral arbitrator with 35 selections was jointly selected 13 of those times.<sup>21</sup> The average number of assignments was three.

## **3. Number of Arbitrators Who Wrote Awards**

Nineteen neutral arbitrators wrote 23 awards. Sixteen arbitrators (84%) wrote a single award, while two arbitrators wrote two each. One arbitrator wrote three awards, two awards in favor of Kaiser and one in favor of claimants.

## **4. Number Who Have Served After Making a Large Award**

Concerns have been raised as to whether Kaiser will allow neutral arbitrators who have made large awards to claimants to serve in subsequent arbitrations, since its attorneys could strike them from LPAs or disqualify them if selected. The OIA's annual report describes what has happened to neutral arbitrators after making an award of \$750,000 or more.

This year, one arbitrator made an award for more than \$750,000. The award was \$1,731,647. This arbitrator has awarded \$1,343,079 and \$11,832,831 in prior years, and was selected twice after making the first award.

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<sup>19</sup>In addition to chance, the number of times a neutral arbitrator is listed is affected by how long in a given year the arbitrator has been on the panel, the number of members on each panel, and the number of demands for arbitration submitted in the geographical area for that panel. The number of times an arbitrator is selected also depends on whether the individual will hear *pro per* cases. Forty percent (40%) of the panel will not hear *pro per* cases.

<sup>20</sup>There were two neutral arbitrators not listed on a San Diego LPA but both were listed on an LPA in another region. They were admitted this year in March 2023 and December 2023.

<sup>21</sup>For joint selections, see Section V.B.

## 5. Comparison of Cases Closed by Neutral Arbitrators Selected Ten or More Times with Cases Closed by Remaining Neutral Arbitrators

Each year, the OIA compares how cases closed by neutral arbitrators selected ten or more times with cases closed by other neutral arbitrators. There were nineteen neutral arbitrators who were selected ten or more times this year. Table 4 shows the comparison of cases closed with these nineteen neutral arbitrators versus cases closed with the remaining neutral arbitrators.

**Table 4 - Comparison of Cases Closed with Neutral Arbitrators Selected Ten or More Times vs. Cases Closed with Remaining Neutral Arbitrators<sup>22</sup>**

Cases Closed 2022 – 2023	Cases with Neutral Arbitrators Selected 10 or More Times in 2023		Cases with Other Neutral Arbitrators	
Settled	174	53%	259	52%
Withdrawn	79	24%	117	23%
Summary Judgment	45	14%	72	14%
Awarded to Respondent	14	4%	20	4%
Awarded to Claimant	2	<1%	13	3%
Dismissed	16	5%	21	4%
Remanded to State Court	1	<1%		
Total	331 <sup>23</sup>		502	

## IV. DEMANDS FOR ARBITRATION

Kaiser submitted 619 demands for arbitration. Geographically, 311 came from Northern California, 259 came from Southern California, and 49 came from San Diego.<sup>24</sup>

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<sup>22</sup>Unless otherwise noted, the percentages in the tables and charts throughout the report may not add up to 100% due to rounding up or down.

<sup>23</sup>One case was consolidated with another case and is not included in these numbers.

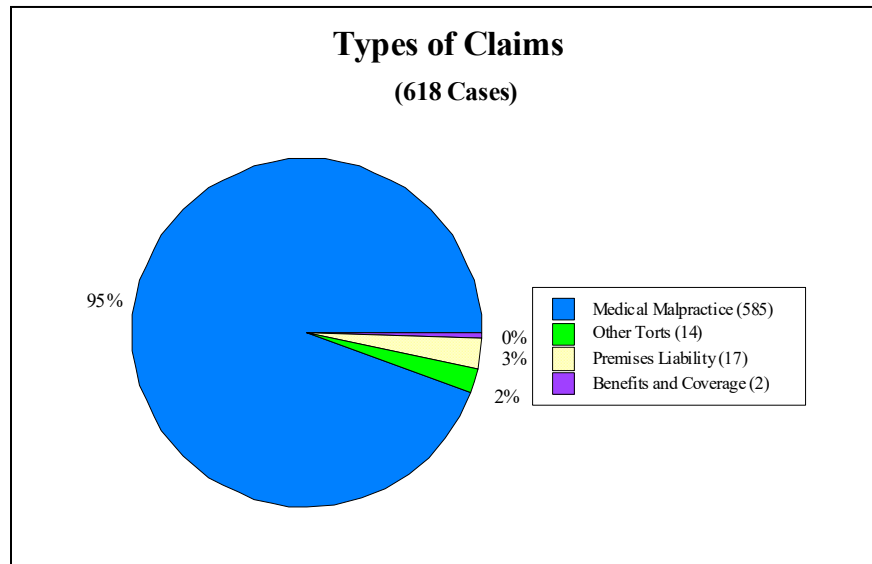
<sup>24</sup>The allocation between Northern and Southern California is based upon Kaiser's corporate division. Roughly, demands based upon care given in Fresno or north are in Northern California, while demands based upon care given in Bakersfield or south are in Southern California or San Diego. Rule 8 specifies where to serve demands for Northern and Southern California, including San Diego.



## A. Types of Claims

The OIA administered 618 new cases.<sup>25</sup> The OIA categorizes cases by the subject of their claim which appear in Chart 2: medical malpractice (585 cases), premises liability (17 cases), other tort (14 cases), or benefits and coverage (2 cases). Medical malpractice cases make up 95% of the total. Benefits and coverage cases represent less than half of one-percent.<sup>26</sup>

**Chart 2**



## B. Length of Time Kaiser Takes to Submit Demands to the OIA

Rule 11 requires Kaiser to submit demands for arbitration to the OIA within ten days of receipt. The average length of time that Kaiser took to submit demands to the OIA was six days.<sup>27</sup> The range was 0 – 645 days.<sup>28</sup>

There were 60 cases in which Kaiser took more than 10 days to submit the demand. The average in these cases was 33 days, and the range was 11 – 645 days.

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<sup>25</sup>A few demands submitted by Kaiser are “opt in” cases – based on a contract that required arbitration but not the use of the OIA. There were three “opt in” cases. Two claimants chose to have the OIA administer their claims and one was pending at the end of the year.

<sup>26</sup>The percentage in Chart 2 appears as 0% due to rounding.

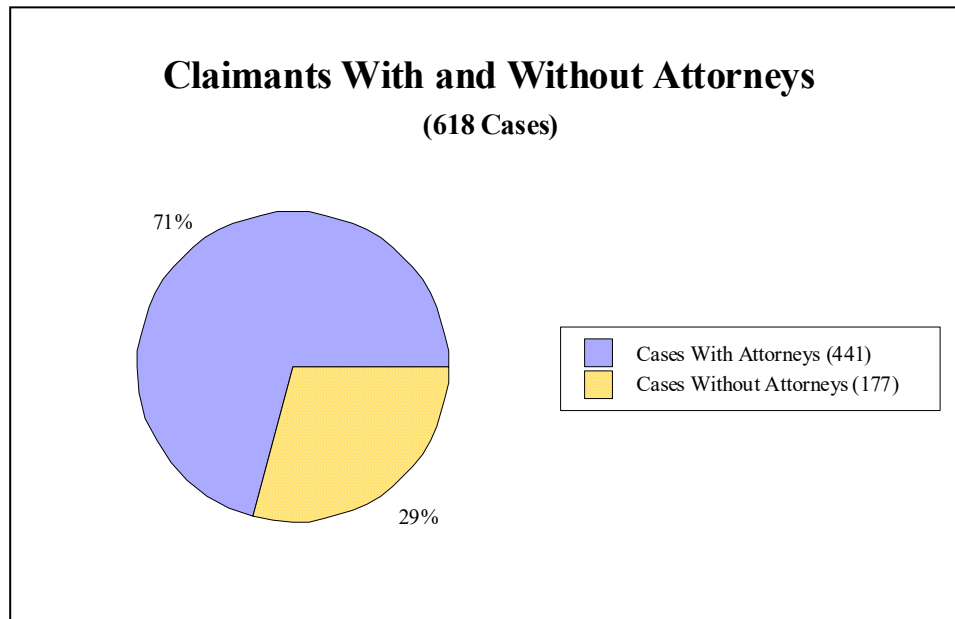
<sup>27</sup>The median was 3 days and the mode was 1 day.

<sup>28</sup>In the case that took 645 days, the claimant filed the demand for arbitration in August 2021 but was misplaced by Kaiser. The demand was located and forwarded to the OIA in May 2023.

### C. Claimants With and Without Attorneys

Claimants were represented by counsel in 71% of new cases (441 of 618). In 29% of cases, claimants represented themselves.

**Chart 3**



### V. SELECTION OF THE NEUTRAL ARBITRATORS

The most important step of the arbitration process is the selection of the neutral arbitrator. Section A describes the selection process in general. The next four sections discuss different aspects of the selection process in detail. They outline: whether the parties selected the neutral arbitrator by joint selection or by striking and ranking the names on their LPA; the cases in which the parties decided to postpone the selection of the neutral arbitrator; the cases in which the parties disqualified a neutral arbitrator; and the amount of time it took the parties to select the neutral arbitrator. Finally, the report examines cases in which parties have selected party arbitrators.

## A. How Neutral Arbitrators are Selected

The process for selecting the neutral arbitrator begins after the OIA receives a claimant's demand for arbitration and the \$150 arbitration filing fee or a waiver of the filing fee. The OIA then sends both parties an LPA. The LPA contains 12 randomly computer-generated names of neutral arbitrators from the appropriate geographic panel, including whether the arbitrator accepts *pro per* cases.<sup>29</sup>

Along with the LPA, the OIA provides the parties with password-protected access to information about the arbitrators named on the LPA.<sup>30</sup> The information includes each neutral arbitrator's application and fee schedule, and subsequent updates to the application, if any.<sup>31</sup>

The information also includes copies of any evaluations that have been submitted about the arbitrator by previous parties within the last five years, and any redacted awards or decisions the neutral arbitrator has written within the last five years.

The parties have 20 days to respond to the LPA.<sup>32</sup> Parties can respond in one of two ways. First, both sides can jointly select a neutral arbitrator. Provided the arbitrator agrees to follow the *Rules* and completes the OIA Demographic Form,<sup>33</sup> the parties may jointly select anyone they want to serve as neutral arbitrator. The arbitrator does not have to be named on the LPA, be on the OIA panel, or meet the OIA qualifications.<sup>34</sup>

Second, if the parties do not jointly select a neutral arbitrator, each side returns the LPA, striking up to four names and ranking the remaining eight names in order of preference, with "1"

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<sup>29</sup>Forty percent (40%) of arbitrators on the panel will not hear *pro per* cases.

<sup>30</sup>The OIA accommodates parties who request to receive the information by U.S. mail.

<sup>31</sup>Neutral arbitrators are required to update their applications every two years. Arbitrators were required to update this year. If an arbitrator has not served on the panel for at least two years, he/she may not have an update.

<sup>32</sup>A member of the OIA staff contacts the parties before their responses to the LPA are due to remind them of the deadline.

<sup>33</sup>The AOB requested collection of demographic data from jointly selected neutral arbitrators not on the OIA panel. This data is included in the aggregate on the OIA website. See Exhibit H for the form and report.

<sup>34</sup>Neutral arbitrators who do not meet the OIA qualifications may serve as jointly selected neutral arbitrators so long as they agree to follow the *Rules*. There is, however, one exception: If, pursuant to California's Ethics Standards, a neutral arbitrator has promised not to take another case with the parties while the first remains open and the OIA knows the case is still open, the OIA would not allow the person to serve as a neutral arbitrator in a subsequent case.

being the top choice.<sup>35</sup> When the OIA receives the LPAs, the OIA eliminates any names that have been stricken by either side and then totals the scores of the names that remain. The arbitrator with the best score<sup>36</sup> is asked to serve. This is referred to as the “strike and rank” process.

## **B. Joint Selections vs. Strike and Rank Selections<sup>37</sup>**

Of the 581 neutral arbitrators selected, 120, or 21%, were jointly selected by the parties and 459, or 79%, were selected by the strike and rank process. Two neutral arbitrators were selected by other methods. One by court order<sup>38</sup> and the other by arbitrator order in a related companion case.<sup>39</sup> These cases account for less than half of one-percent of arbitrator selections.<sup>40</sup> Of the neutral arbitrators jointly selected by the parties, 107, or 18%, were members of the OIA panel, though not necessarily on the LPA sent to the parties. In 13 cases, or 2%, the parties selected a neutral arbitrator who was not a member of the panel. See Chart 4. One neutral arbitrator who is not on the OIA panel accounts for 11 joint selections.

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<sup>35</sup>The selection is based on returned LPAs. If a party does not return the LPA by the deadline, all names are deemed acceptable.

<sup>36</sup>For example, a person who was ranked “1” by both sides – for a combined score of “2” – would have the best score. If there is a tie, the OIA selects the arbitrator that appears first on the randomly generated list.

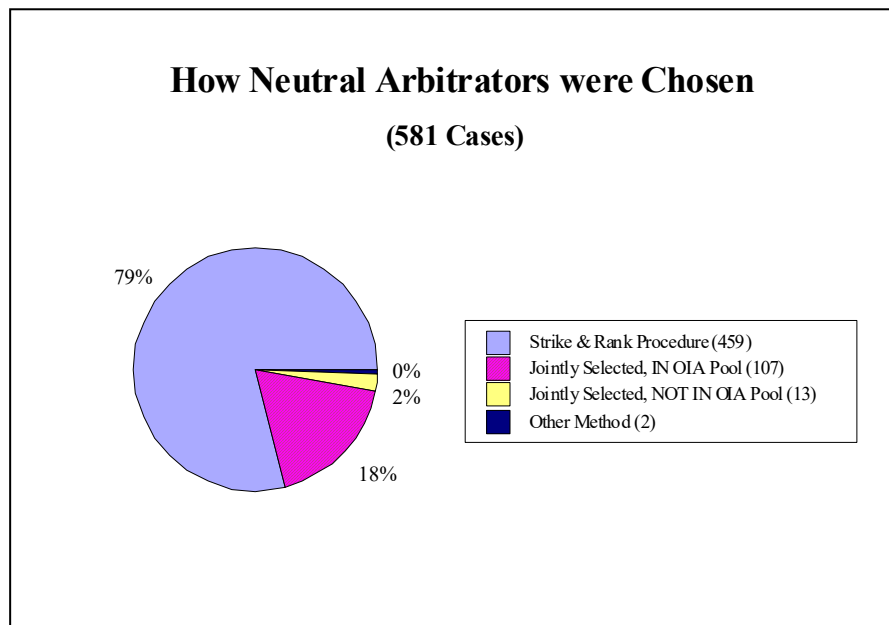
<sup>37</sup>A number of cases close before a neutral arbitrator is selected. Twenty-six cases either settled (11) or were withdrawn (15) without a neutral arbitrator in place. This includes cases with attorneys and cases where the claimant was in *pro per*. For *pro per* cases, three settled and ten were withdrawn. For represented cases, eight settled and five were withdrawn.

<sup>38</sup>In rare cases, when the parties cannot select a neutral arbitrator, generally because of disqualifications of neutral arbitrators, either party can petition the state court to do so.

<sup>39</sup>The case that was deemed “related” to another matter is described in footnote 65.

<sup>40</sup>The percentage in Chart 4 appears as 0% due to rounding.

**Chart 4**



**C. Status of Cases with Postponements**

Under Rule 21, a claimant has a unilateral right to request a one-time 90-day postponement of the deadline in which to respond to the LPA. If a claimant has not requested one, the respondent may do so, but only if the claimant agrees in writing. The parties can request a one-time postponement of up to 90 days. They cannot, for example, get a 30-day postponement at one point and a 60-day postponement later. There are times when parties request a postponement of less than 90 days.

Rule 28 allows the OIA, in cases where the neutral arbitrator has not been selected, to extend deadlines for good cause. The OIA has used this authority periodically to extend the deadline in which to respond to the LPA based upon the parties' stipulation to jointly select a neutral arbitrator or upon the claimant's medical condition.<sup>41</sup>

There were 273 cases where the parties obtained either a Rule 21 postponement, a Rule 28 extension of the time to return their LPAs, or both. In 245 of these cases, the parties obtained a Rule 21 postponement. The claimants made all but six of these requests. There were 17 cases that received Rule 21 postponements and Rule 28 extensions.<sup>42</sup> There were ten cases that

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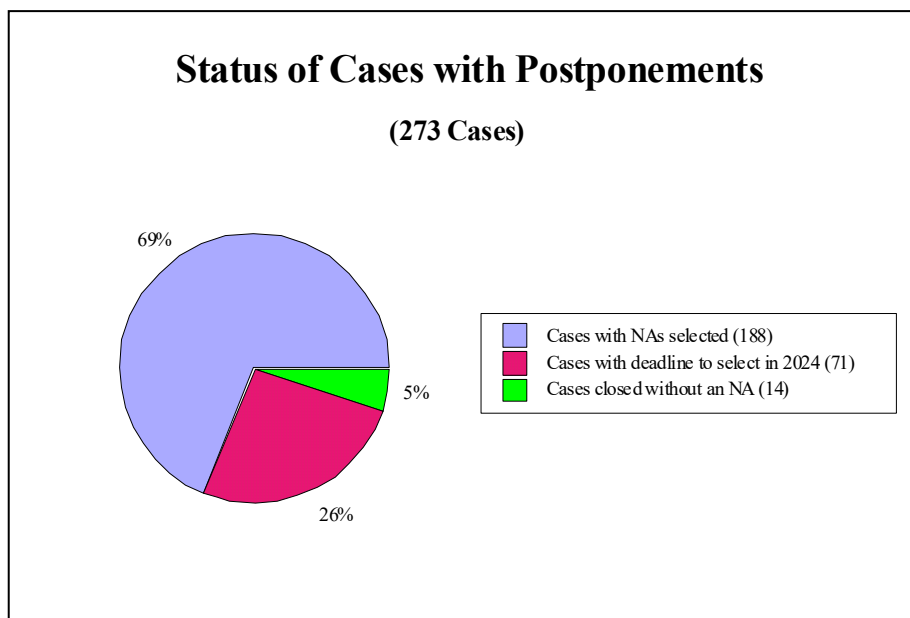
<sup>41</sup>The parties have also used this extension to send written notice of settlement or withdrawal without a neutral arbitrator being selected, which generally reduces expenses.

<sup>42</sup>Claimants made all of the requests for Rule 21 postponement. The majority of Rule 28 extensions were made by parties stipulation.

received a Rule 21 postponement in prior years but received a Rule 28 extension this year. One case received a Rule 28 extension without a prior Rule 21 postponement.<sup>43</sup>

Chart 5 shows the outcome of those 273 cases where the parties obtained a postponement of the deadline to return their LPA. In 188 cases (69%), a neutral arbitrator has been selected. Fourteen cases closed before a neutral arbitrator was selected but after a request for postponement was made. For the remaining 71 cases, the deadline to select a neutral arbitrator was after December 31, 2023.

**Chart 5**



#### **D. Status of Cases with Disqualifications**

Neutral arbitrators have a statutory obligation to make various disclosures within ten days of their selection.<sup>44</sup> After they make these disclosures, the parties have 15 days to

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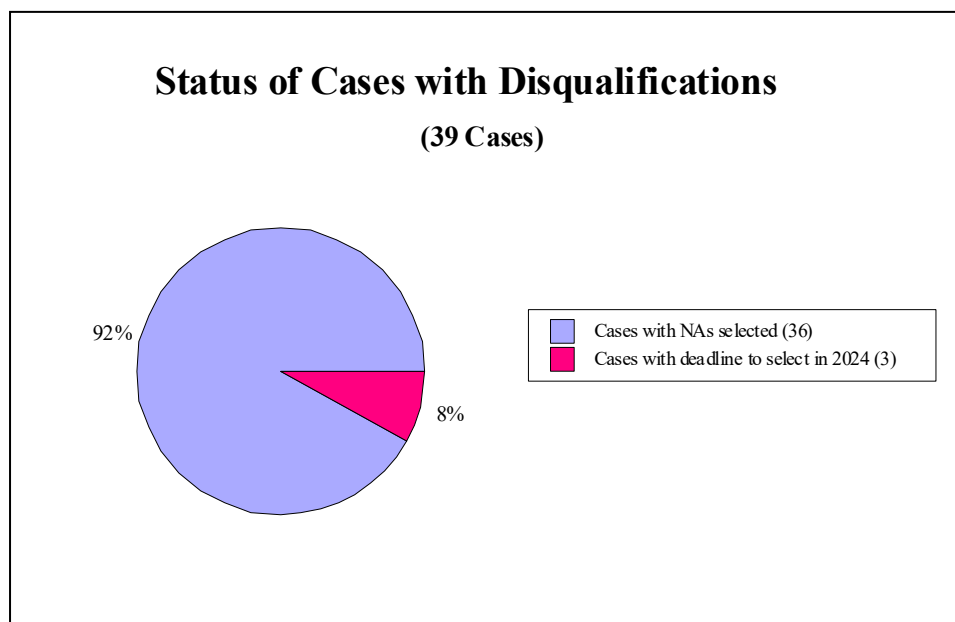
<sup>43</sup>Generally, parties must use a 90-day postponement under Rule 21 before the OIA will extend the deadline under Rule 28. In this case, claimant requested a one-day extension to return the LPA and Kaiser agreed.

<sup>44</sup>See Rule 20 and California Code of Civil Procedure §1281.9, especially §1281.9(b). In the OIA system, the ten days are counted from the date of the letter confirming service. After the neutral arbitrator agrees to serve, the OIA sends this letter to the neutral arbitrator and copies the parties.

disqualify the neutral arbitrator.<sup>45</sup> Absent court action, there is no limit to the number of times a party can timely disqualify neutral arbitrators in a given case. After the first disqualification, the OIA sends the parties a supplemental LPA. After two disqualifications, the OIA randomly selects subsequent neutral arbitrators who have not been named on prior LPAs.<sup>46</sup>

Neutral arbitrators were disqualified in 39 cases. Claimants disqualified 54 neutral arbitrators and Kaiser disqualified 24. Twenty-seven cases had a single disqualification. Two cases had two disqualifications, four cases had three disqualifications, and three cases had four disqualifications. Three cases had six, seven and ten disqualifications, respectively.<sup>47</sup> In 36 of the cases with disqualifications, a neutral arbitrator had been selected. In three of the cases, the deadline to select a neutral arbitrator was after December 31, 2023.

**Chart 6**



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<sup>45</sup>See Rule 20 and California Code of Civil Procedure §1281.91. Additionally, if the neutral arbitrator fails to serve the disclosures, the parties have 15 days after the deadline to serve disclosures to disqualify the neutral arbitrator.

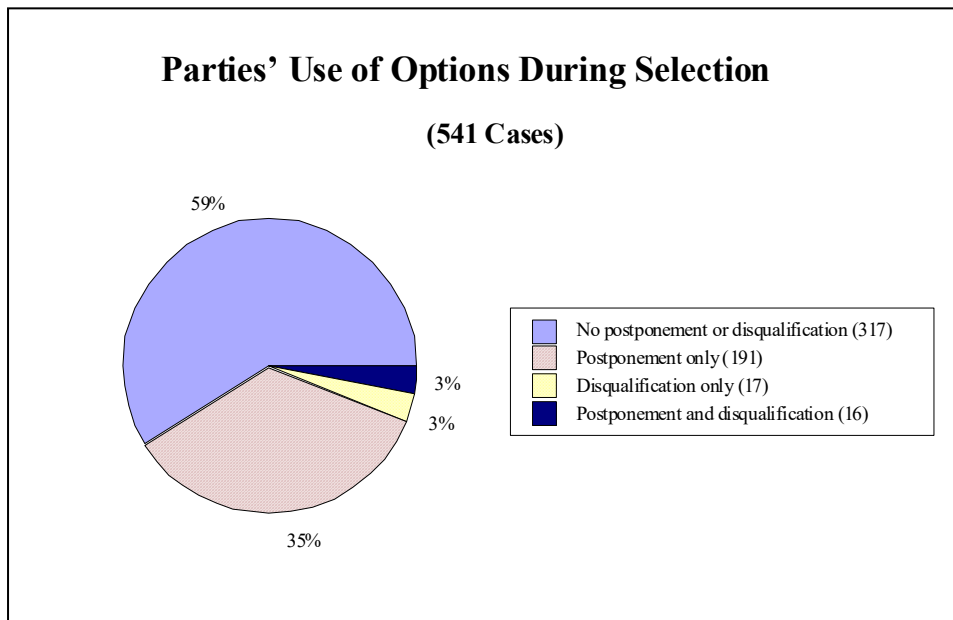
<sup>46</sup>See Rule 18.f.

<sup>47</sup>In cases with multiple disqualifications, one of the parties may petition the Superior Court to select a neutral arbitrator. If the court grants the petition, a party is only permitted to disqualify one neutral arbitrator without cause; subsequent disqualifications must be based on cause. See California Code of Civil Procedure §1281.91(2). See footnote 54 for the case with 10 disqualifications.

### E. Length of Time to Select a Neutral Arbitrator

This section considers 541 cases in which a neutral arbitrator was selected<sup>48</sup> and divides the selections into four categories. The first category consists of cases in which there was no delay in selecting the neutral arbitrator. The second category lists those cases in which the deadline for responding to the LPA was postponed. The third category summarizes those cases in which a neutral arbitrator was disqualified by a party and another neutral arbitrator was subsequently selected. The fourth category describes those cases in which there was both a postponement of the LPA deadline and a disqualification of a neutral arbitrator. The last three categories may include cases where the request for postponement and/or the disqualification was made in prior years, but the neutral arbitrator was selected this year. Finally, the fifth section provides the overall average length of time to select a neutral arbitrator for all four categories. Chart 7 displays the categories.

**Chart 7**



<sup>48</sup>Forty cases in which a neutral arbitrator was selected are not included in this section. In these cases, neutral arbitrators had previously been appointed, had begun acting as neutral arbitrators, and later recused themselves. These include 20 cases where a neutral arbitrator died or left because of illness. The remainder retired or left for some other reason, including change in employment. Because time is counted from the first day that the arbitration process was initiated, these cases are not included in these computations of length of time to select a neutral arbitrator.



## **1. Cases with No Delays**

There were 317 cases where a neutral arbitrator was selected without delay. Under the *Rules*, the maximum number of days to select a neutral arbitrator when there is no delay is 33 days. The average number of days to select a neutral arbitrator in these cases was 23 days, and the range was 1 – 50 days.<sup>49</sup> This category represents 59% of cases in which a neutral arbitrator was selected.

## **2. Cases with Postponements**

There were 191 cases where a neutral arbitrator was selected and the only delay was a 90-day postponement and/or an OIA extension of the deadline under Rule 28.<sup>50</sup> Under the *Rules*, the maximum number of days to select a neutral arbitrator when there is a 90-day postponement is 123 days. The average number of days to select a neutral arbitrator in these cases was 109 days, and the range was 17 – 266 days.<sup>51</sup> This category represents 35% of all cases in which a neutral arbitrator was selected.

## **3. Cases with Disqualifications**

There were 17 cases (3%) where a neutral arbitrator was selected and the only delay was one or more disqualification(s). Under the *Rules*, the maximum number of days to select a neutral arbitrator if there is only one disqualification is 96.<sup>52</sup> The average number of days to select a neutral arbitrator was 62 days, and the range was 37 – 118 days.<sup>53</sup>

## **4. Cases with Postponements and Disqualifications**

There were 16 cases (3%) where a neutral arbitrator was selected after a postponement and a disqualification. Under the *Rules*, the maximum number of days to select a neutral

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<sup>49</sup>In the case that took 50 days to select a neutral arbitrator, the OIA mistakenly missed the deadline to send the parties the LPA for 22 days.

<sup>50</sup>Under Rule 28, there is no maximum number of days.

<sup>51</sup>In the case that took 266 days to select a neutral arbitrator, the claimant attorney first obtained a 90-day postponement. The parties then stipulated to four additional postponements extending the deadline an additional five months.

<sup>52</sup>The 96 days is comprised of the 33 days to select the first neutral arbitrator under the *Rules*; the 30 days for the statutory periods for disclosure, disqualification, and service under the California Code of Civil Procedure; and then 33 days to select the second neutral arbitrator. The amount of time increases if there is more than one disqualification.

<sup>53</sup>In the case that took 118 days to select a neutral arbitrator, the attorneys disqualified 7 neutral arbitrators (6 by claimant's attorney and 1 by Kaiser's attorney) before the eighth arbitrator was appointed.

arbitrator, if there is both a 90-day postponement and a single disqualification, is 186 days. The average number of days to select a neutral arbitrator in these cases was 202, and the range was 117 – 500 days.<sup>54</sup>

## 5. Average Time for All Cases

The average number of days it took to select a neutral arbitrator in all of these cases was 60 days. For purposes of comparison, the California Supreme Court stated in *Engalla vs. Permanente Medical Group*<sup>55</sup> that the pre-OIA Kaiser system averaged 674 days in which to select a neutral arbitrator.

### F. Cases with Party Arbitrators

In medical malpractice cases, if the amount of damages exceeds \$200,000, a California statute gives parties a right to proceed with three arbitrators: one neutral arbitrator, and two party arbitrators.<sup>56</sup> However, the parties may waive this right. The Blue Ribbon Panel (BRP) that gave rise to the OIA questioned whether the value added by party arbitrators justified their expense and the delay associated with adding two more participants to the arbitration process. To that end, the BRP suggested that the system create incentives for cases to proceed with a single neutral arbitrator.

Rules 14 and 15 provide the above stated incentive. Kaiser pays the full cost of the neutral arbitrator if claimant waives the statutory right to a party arbitrator, as well as any court challenge to the arbitrator on the basis that Kaiser paid said arbitrator. If both claimant and Kaiser waive party arbitrators, the case proceeds with a single neutral arbitrator.

All the cases that went to hearing were decided by a single neutral arbitrator. Of the cases that remained open at the end of the year, parties have designated party arbitrators in nine cases.

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<sup>54</sup>Kaiser petitioned the court to select a neutral arbitrator in the case that took 500 days. The *pro per* disqualified 10 arbitrators this year and 4 were disqualified last year. On the eve of the court's selection, the *pro per* accepted the fifteenth arbitrator nearly four months later. The court petition was withdrawn.

<sup>55</sup>15 Cal. 4<sup>th</sup> 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903. The California Supreme Court's criticism of the then self-administered Kaiser arbitration system led to the creation of the Blue Ribbon Panel.

<sup>56</sup>California Health & Safety Code §1373.19.

## **VI. MAINTAINING THE CASE TIMETABLE**

This section summarizes the methods for monitoring compliance with deadlines, as well as the actual compliance at various points during the arbitration process. The OIA monitors its cases in two different ways.

First, through its software, the OIA tracks whether key events set out in the *Rules* occur on time. If arbitrators fail to notify the OIA that a key event has taken place by its deadline, the OIA contacts them and asks for confirmation that it has occurred. In most cases, the events have occurred and arbitrators confirm this in writing. When it has not occurred, it is scheduled immediately. In instances where the event has not occurred and/or confirmation is not received, the OIA suspends the neutral arbitrator from receiving new cases until confirmation is received, and the OIA determines whether the case is in compliance with the *Rules*.<sup>57</sup>

Second, the OIA looks at cases overall and their progress toward closing on time. When a case enters the system, the OIA calendars a status reminder for 12 months. As discussed in Section VII, most cases close in just over 13 months. For those that remain open, the OIA contacts the neutral arbitrators to ensure that the hearing is still on calendar and the case is on track to be closed in compliance with the *Rules*. In addition, the Independent Administrator holds monthly meetings to discuss the status of all cases open more than 15 months.

### **A. Neutral Arbitrator's Disclosure Statement**

Once neutral arbitrators have been selected, California law requires that they make written disclosures to the parties within ten days. The *Rules* require neutral arbitrators to serve the OIA with a copy of these disclosures. The OIA monitors all cases to ensure that disclosures are timely served, and that they include statutory disclosure reports provided by the OIA. No arbitrator was suspended for failing to timely serve disclosures.

### **B. Arbitration Management Conference**

Rule 25 requires neutral arbitrators to hold an Arbitration Management Conference (AMC) within 60 days of their selection. Neutral arbitrators are also required to return an AMC form to the OIA within five days of the conference. The schedule set forth on the form establishes the deadlines for the case. It also allows the OIA to see that the hearing has been scheduled within the time allowed by the *Rules*. No arbitrator was suspended for failing to return the AMC form.

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<sup>57</sup>When neutral arbitrators are suspended, the OIA removes the neutral arbitrators' names from the OIA panel until they take the necessary action. Suspended arbitrators are not listed on any LPA and cannot be jointly selected by the parties.

### **C. Mandatory Settlement Meeting**

Rule 26 instructs the parties to hold a Mandatory Settlement Meeting (MSM) within six months of the AMC. It states that the neutral arbitrator should not be present at this meeting. The OIA provides the parties with an MSM form to complete and return, stating that the meeting took place and its result. The OIA received notice from parties in 296 cases indicating that they held an MSM. Twenty-four of them reported that the case had settled at the MSM. In 17 cases, neither party returned the MSM form by the end of the year.<sup>58</sup>

### **D. Hearing and Award**

The neutral arbitrator is responsible for ensuring that the hearing occurs and an award is served within the time limits set out in the *Rules*. No arbitrator was suspended for failing to schedule the hearing or timely serve an award.

### **E. Neutral Arbitrator Fees and Questionnaire**

Under California Code of Civil Procedure §1281.96, neutral arbitrators are required to provide the amount of their fee and the allocation of that fee. Under Rule 48, neutral arbitrators are also required to return a questionnaire regarding their experience. Two neutral arbitrators were suspended for failing to provide the amount of their fee and the fee allocation. Both arbitrators have since complied. No arbitrator was suspended for failing to return the questionnaire.

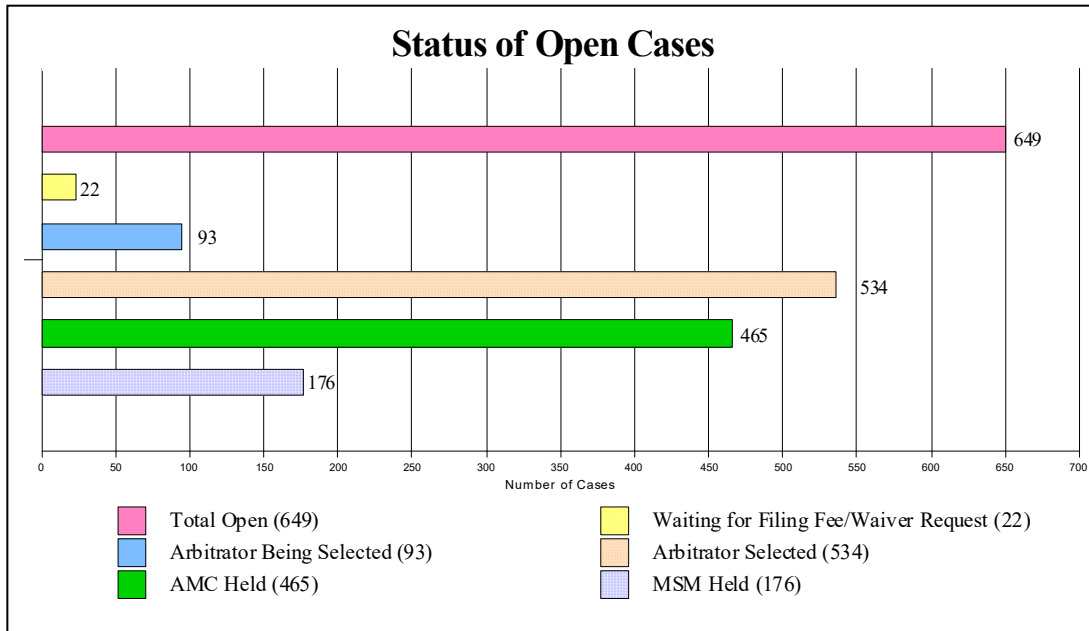
### **F. Status of Open Cases**

There were 649 open cases at the end of the year. In 22 cases, the LPA had not been sent because the filing fee had not yet been paid or waived. In 93 cases, the parties were in the process of selecting a neutral arbitrator. In 534 cases, a neutral arbitrator had been selected. An AMC was held in 465 of these cases. In 176 cases, the parties held the MSM. Chart 8 illustrates the status of open cases.

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<sup>58</sup>While the OIA contacts the parties requesting the MSM form, it has no power to compel them to report or to meet. A neutral arbitrator, on the other hand, can order the parties to meet if a party complains that the other side refuses to do so.

**Chart 8**



## VII. CASES THAT CLOSED

This section looks at how the cases closed, how many closed, and how long it took. It also discusses the number of hearings conducted by video and/or in-person and the results of those hearings. See Charts 9 and 10.

Twenty-eight (28) cases closed after a demand for arbitration was served but before the filing fee was paid or waived. These cases included 20 that were abandoned,<sup>59</sup> 6 that were settled and 2 that were withdrawn. These cases account for six percent (6%) of the total number of closed cases, but are excluded from this section because the OIA does not begin measuring time until the fee is paid or waived.

The second half of this section discusses cases that applied rules to either have the cases expedited or extended. Under the *Rules*, “regular” cases must ordinarily be closed within 18 months.<sup>60</sup> Eighty percent (80%) of the cases are closed within this period. Fifty-two percent (52%) closed in a year or less. If a claimant needs a case decided in less time, the case can be

<sup>59</sup>Before cases are deemed abandoned for non-payment of the filing fee, claimants receive three notices from the OIA and each time are offered the opportunity to apply for fee waivers.

<sup>60</sup>Seven of them are considered “regular” cases and closed on average in 494 days (over 16 months). The deadline for “regular” cases is 18 months. See Rule 24.a.

expedited.<sup>61</sup> If the case needs more than 18 months, the neutral arbitrator can classify the case as complex or extraordinary under Rule 24. The neutral arbitrator may also extend the deadline under Rule 28 for good cause.<sup>62</sup> See Chart 11.

## **A. How Cases Closed**

### **1. Settlements – 50% of Closures**

Settlements occurred in 239 cases. This represents 50% of closed cases. The average time to settle was 447 days. The range was 15 – 1,659 days.<sup>63</sup> In 19 settled cases, or 8%, the claimant was in *pro per*. Twenty-four cases settled at the mandatory settlement meeting.

### **2. Withdrawn Cases – 26% of Closures**

Withdrawal notices were received in 122 cases. This represents 26% of closed cases. In 47 of these cases, or 39%, the claimant was in *pro per*. The OIA categorizes a case as withdrawn when a claimant executes a notice of withdrawal, writes a letter or sends an email withdrawing the claim, or signs a dismissal without prejudice. When the OIA receives a dismissal with prejudice, the parties are contacted to ask whether the case was withdrawn, meaning it was voluntarily dismissed.

The average time it took for a party to withdraw a claim was 263 days. The range was 15 – 972 days.<sup>64</sup>

### **3. Dismissed Cases – 4% of Closures**

Neutral arbitrators dismissed 17 cases. Neutral arbitrators dismiss cases if the claimant fails to comply with arbitration orders or otherwise conform to the *Rules* or applicable statutes.

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<sup>61</sup>See Rules 33-35.

<sup>62</sup>A complex case can also be the subject of a Rule 28 extension if it turns out the case requires more than 30 months to close. Fourteen cases that closed were both complex and had a Rule 28 extension.

<sup>63</sup>The deadline in the case that took 1,659 days to settle was originally extended by Rule 28 at the AMC. The parties continued the arbitration hearing five times when Kaiser substituted in a new attorney. The hearing was rescheduled one final time with new counsel. Seven months later, the case settled, four and a half years after the arbitration process began.

<sup>64</sup>The case that took 972 days to close was initiated by a *pro per* claimant. Three months later, an attorney who had made a prior appearance at the AMC substituted in as the attorney of record. At the parties request, the neutral arbitrator extended the deadline to close this case under Rule 28 for good cause. Subsequently, the case was designated complex when the claimant died and later designated extraordinary before the case was withdrawn in lieu of a new filing for wrongful death.

Thirteen (13) of these closed cases involved *pro pers*. The average number of days to close a case dismissed by a neutral arbitrator was 236 days. The range was 59 – 926 days.<sup>65</sup>

#### **4. Summary Judgment – 15% of Closures**

Summary judgment was granted in Kaiser's favor in 72 cases. In 52 cases, or 72%, the claimant was in *pro per*. The reasons given by neutral arbitrators for granting motions for summary judgment were: failure to file an opposition (32 cases), failure to have an expert witness (24 cases), no triable issue of fact (10 cases), no causation (1 case), and statute of limitations issues (5 cases).

The average number of days to close a case by summary judgment was 401 days. The range was 103 – 1,030 days.<sup>66</sup>

#### **5. Cases Decided After Hearing – 5% of Closures**

##### **a. Who Won**

Twenty-three cases (5%) proceeded through an arbitration hearing to an award. Judgment was for Kaiser in 20 of these cases, or 87%. The claimant prevailed in 3 cases, or 13%. No *pro per* claimant proceeded to a hearing.

##### **b. Amounts Awarded to Claimants**

Three cases resulted in awards to claimants. The range was \$65,000 – \$1,731,647. The average amount awarded was \$771,158. A list of the awards made is attached as Exhibit I.

##### **c. How Long it Took**

The 23 cases that proceeded to a hearing closed on average in 760 days. The range was 434 – 2,397 days.<sup>67</sup>

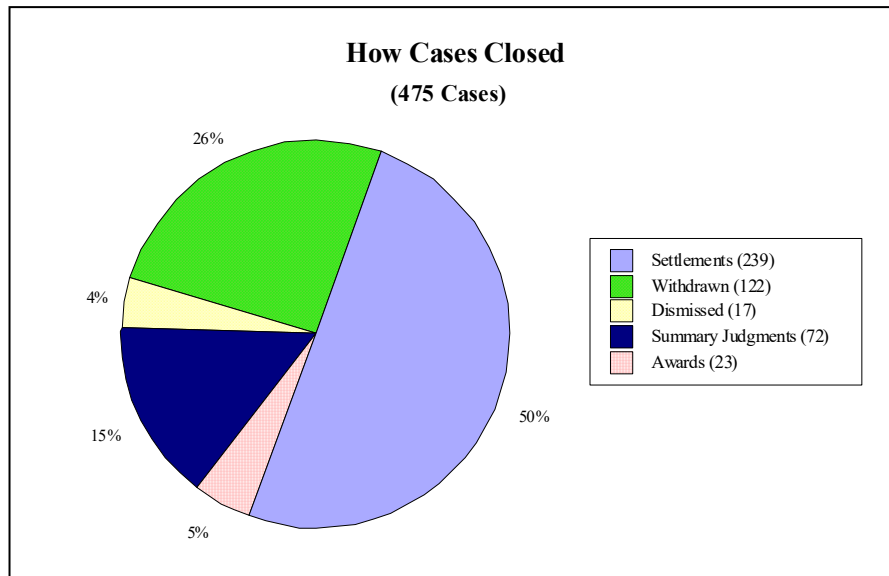
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<sup>65</sup>In the case that closed in 926 days, the arbitrator designated the case complex at the AMC. Nine months later, the claimant died and the attorney filed a new case in court. The parties tried to resolve many issues with both cases, when Kaiser substituted in a new attorney. The arbitrator subsequently changed the designation to extraordinary and ordered the court case as a related case, and granted a motion for judgment on the pleadings in the original case.

<sup>66</sup>In the case that took 1,030 days to close, the arbitrator extended the deadline 4 times to accommodate the parties request to continue the arbitration hearing. The arbitrator eventually granted summary judgment more than two and a half years after the arbitration process began.

<sup>67</sup>The case that took 2,397 days to close was designated complex. The arbitration hearing was continued 8 times over the course of 6 ½ years under Rule 28 for good cause. The hearing went forward resulting in a judgment in Kaiser's favor.

**Chart 9**



## 6. How Hearings were Held

Of the 23 arbitration hearings, 6 were held by video,<sup>68</sup> and 4 were held partially in-person and partially by video (43%). The remaining 13 hearings were held in-person.

Of the 72 summary judgments, 50 were held telephonically. Four were held by submission of documents, one was held in person, and the remaining 17 were held by video (24%).

Of the 17 cases dismissed by neutral arbitrators, 15 were held telephonically. One was held by video, and one by submission of documents.

## 7. Average Days to Close

As shown on Chart 10, cases closed on average in 399 days, just over 13 months. The median was 354 days. The range was 15 – 2,397 days.<sup>69</sup> One case closed after its deadline.<sup>70</sup>

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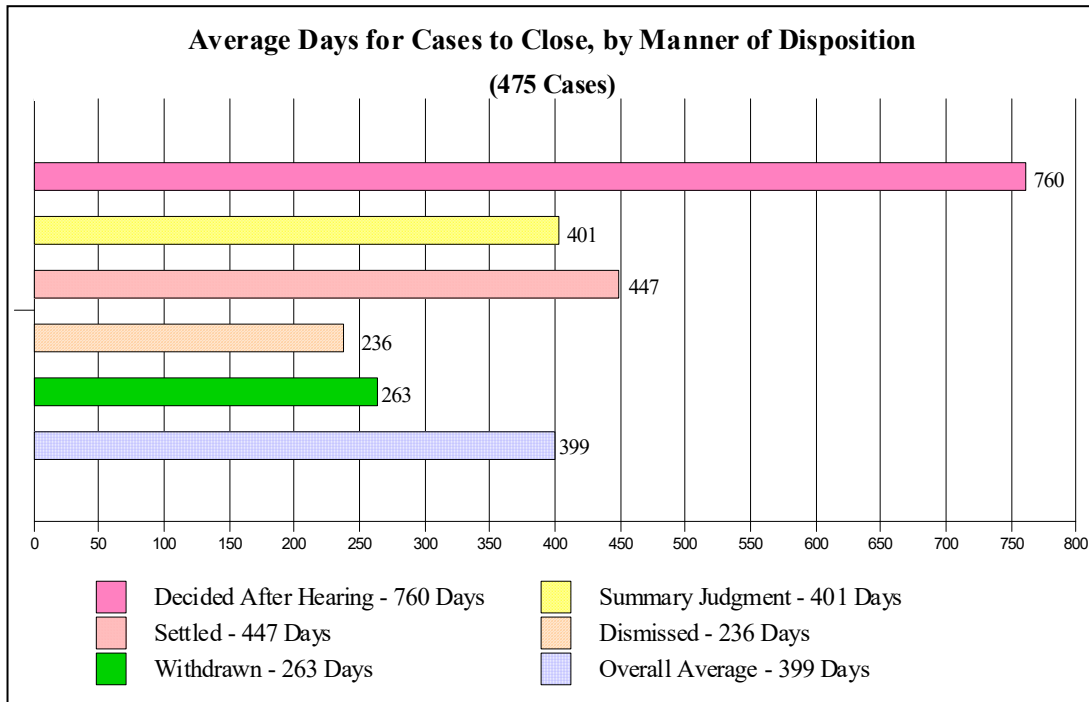
<sup>68</sup>The first case that reported a hearing (motion for summary judgment) held by video was on July 24, 2020. This year, neutral arbitrators reported conducting hearings by video or a combination of in-person and video in 28 cases.

<sup>69</sup>The case that took 2,397 days to close is described in footnote 67.

<sup>70</sup>Under Rule 37, the award must be served no later than 15 business days after the close of hearing. The award in this case was served one day late.



**Chart 10**



**B. Procedures to Expedite or Extend “Regular” Cases**

**1. Expedited Procedures**

Rules 33 – 36 include provisions for cases which need to be expedited. Grounds for expediting a case include a claimant’s illness or condition raising substantial medical doubt of survival, a claimant’s need for a drug or medical procedure, or other good cause.

Claimants made four requests for expedited procedures to the OIA. Kaiser objected to one request. The OIA granted three and denied one.<sup>71</sup> One case is pending and three have closed. One case settled and two were withdrawn.

Seven requests for expedited procedures were made to the neutral arbitrator. Kaiser objected to one request. Five requests were granted and two were denied. One case closed as settled.

The OIA had three expedited cases pending from 2022, and all three have closed as settled.

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<sup>71</sup>The request was denied without prejudice to make the request to the neutral arbitrator who had been recently selected. The case was subsequently withdrawn.

The expedited cases closed on average in 136 days, about 4 ½ months. At the end of the year, there were five open expedited cases.

Although originally designed to decide benefit claims quickly, none of the expedited cases involved benefit or coverage issues.

## **2. Complex Procedures**

Rule 24.b. includes provisions for cases that need 24 – 30 months to be completed. There were 95 cases designated complex. Fifty-four complex cases (11%) closed.<sup>72</sup> The average length of time for complex matters to close was 568 days. The range was 238 – 890 days (30 months).<sup>73</sup>

## **3. Extraordinary Procedures**

Rule 24.c. includes provisions for cases that need more than 30 months for resolution. Fifteen cases were designated extraordinary, and 18 cases (4%) closed. The average time to close an extraordinary case was 973 days. The range was 465 – 1,544 days (over 4 years).<sup>74</sup>

## **4. Rule 28 Extensions**

Rule 28 allows neutral arbitrators to extend the deadline to close the case. This year, neutral arbitrators made Rule 28 extensions in 79 cases, and there were also 79 cases with a Rule 28 extension that closed. The average time to close cases with a Rule 28 extension was 685 days. The range was 205 – 2,397 days.<sup>75</sup>

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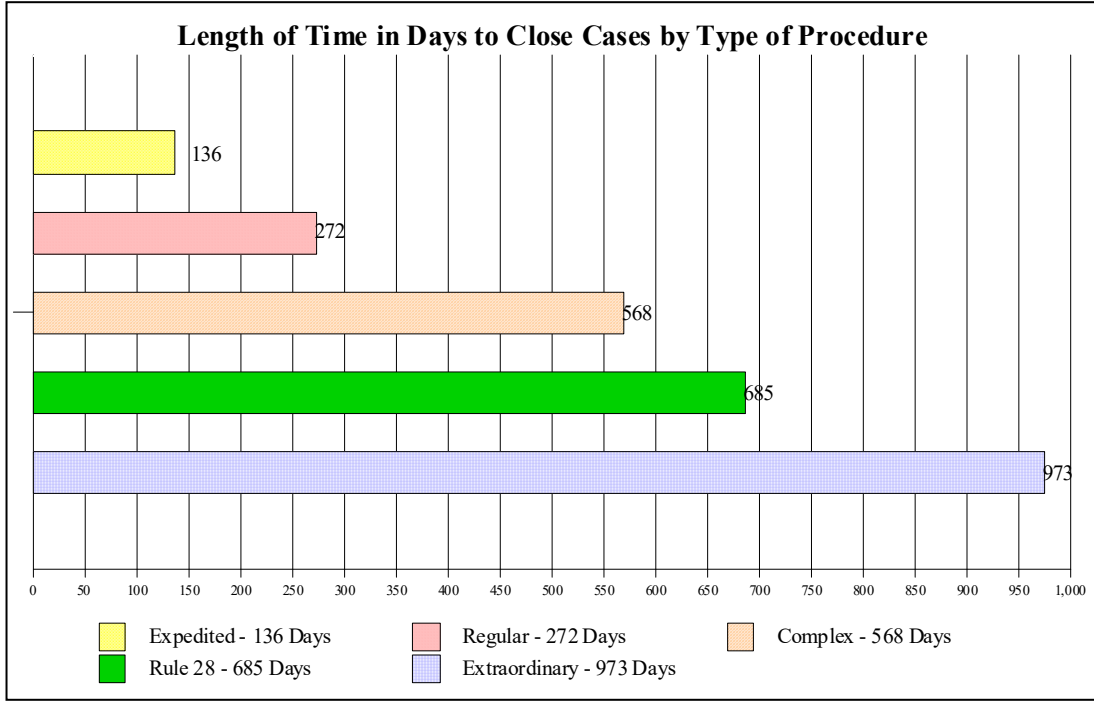
<sup>72</sup>Fourteen cases were extended by Rule 28 and are counted in that section. See Section VII.B.4.

<sup>73</sup>The complex case that took 890 days to close had extensive discovery as well as pandemic related delays. It eventually settled but required a minor's compromise which took four months to obtain, closing almost three years after the arbitration process began.

<sup>74</sup>The extraordinary case that took 1,544 days to close was originally designated complex. It was also the subject of a Rule 28 extension for good cause. An outside, non-Kaiser entity joined the matter before the extraordinary designation was made. The pandemic forced several delays before the case settled, but required a minor's compromise that took nearly a year to obtain.

<sup>75</sup>The case that took 2,397 days to close is described in footnote 67.

**Chart 11**



**VIII. COST OF ARBITRATION**

**A. OIA Arbitration Fees**

In an OIA arbitration, a claimant must pay a \$150 arbitration filing fee<sup>76</sup> and half of the neutral arbitrator’s fees, in addition to any attorney’s fees and fees for expert witnesses. State law provides that neutral arbitrator fees be divided equally between the claimant and the respondent.<sup>77</sup> State law also provides that if the claim for damages is more than \$200,000, the matter will be heard by an arbitration panel, which consists of three arbitrators – a neutral arbitrator and two party arbitrators.<sup>78</sup> In OIA arbitrations, parties may waive their right to party arbitrators and still proceed with a claim for damages for more than \$200,000.

<sup>76</sup>Unlike California Superior Courts, the filing fee has not increased during the OIA’s operation and is lower than court filing fees (other than small claims court).

<sup>77</sup>California Code of Civil Procedure §1284.2.

<sup>78</sup>Party arbitrators are selected and paid for by each side.

The OIA system provides mechanisms for a claimant to obtain a waiver of either the \$150 arbitration filing fee and/or the claimant's portion of the neutral arbitrator's fees and expenses. When claimants ask for a waiver, they receive information about the different types of waivers and the waiver forms.<sup>79</sup>

## **B. Options Claimants Have to Waive Fees**

### **1. Waiving the \$150 Arbitration Filing Fee**

Pursuant to state law, the \$150 arbitration filing fee waiver is available to claimants whose gross monthly income is less than three times of the national poverty guidelines.<sup>80</sup> The OIA informs claimants of this waiver in the first notice sent to them. Rule 12 gives claimants 75 days from the date the OIA receives their demands for arbitration to submit this form. The completed form is confidential and only the claimant and/or claimant's attorney know if a request for the waiver was made, granted or denied.

### **2. Waiving the Arbitration Filing Fee and the Neutral Arbitrator's Fees and Expenses**

Upon disclosure of financial information, a claimant may request a waiver for extreme financial hardship.<sup>81</sup> Rule 13 requires the waiver form to be served on both the OIA and Kaiser. Kaiser has the opportunity to object before the OIA grants or denies this request. If granted, claimant does not have to pay the neutral arbitrator's fees or the \$150 arbitration filing fee. A claimant who obtains this waiver is also allowed to have a party arbitrator at claimant's expense.

### **3. Waiving the Neutral Arbitrator's Fees and Expenses**

No financial information is required by signing the Waiver of Objection to Payment of Fees Form and Waiver of Party Arbitrators - Claimants Form provided in Rules 14 and 15. For claims under \$200,000, the claimant must agree in writing not to object later that the arbitration was unfair because Kaiser paid the fees and expenses of the neutral arbitrator. For claims over \$200,000, the claimant must also agree not to use a party arbitrator.<sup>82</sup>

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<sup>79</sup>See Exhibit J for the fee waiver packet.

<sup>80</sup>California Code of Civil Procedure §1284.3.

<sup>81</sup>The fee waiver application is based on the form used by state court.

<sup>82</sup>If the claimant waives his/her right to a party arbitrator but Kaiser wants to proceed with party arbitrators, Kaiser will pay all of the neutral arbitrator's fees and expenses. See Exhibit J for copies of the waiver forms.

## **C. Number of Cases in Which Claimants Have Waived Their Fees**

### **1. Arbitration Filing Fee**

The OIA received 43 requests to waive the \$150 filing fee. The OIA granted 36 and denied 7.<sup>83</sup> Twenty-two of these claimants also submitted and received a waiver of the filing fee and a waiver of the neutral arbitrators' fees and expenses discussed in the next section.

### **2. Arbitration Filing Fee and the Neutral Arbitrator's Fees and Expenses**

The OIA decided 72 fee waiver requests. Kaiser objected to one. The OIA granted 67 and denied 3.<sup>84</sup> Two requests were pending.

### **3. Neutral Arbitrators' Fee Allocation**

State law requires arbitration providers, such as the OIA, to disclose neutral arbitrators' fees and fee allocations for closed cases. We received fee information from neutral arbitrators in 448 cases that closed.

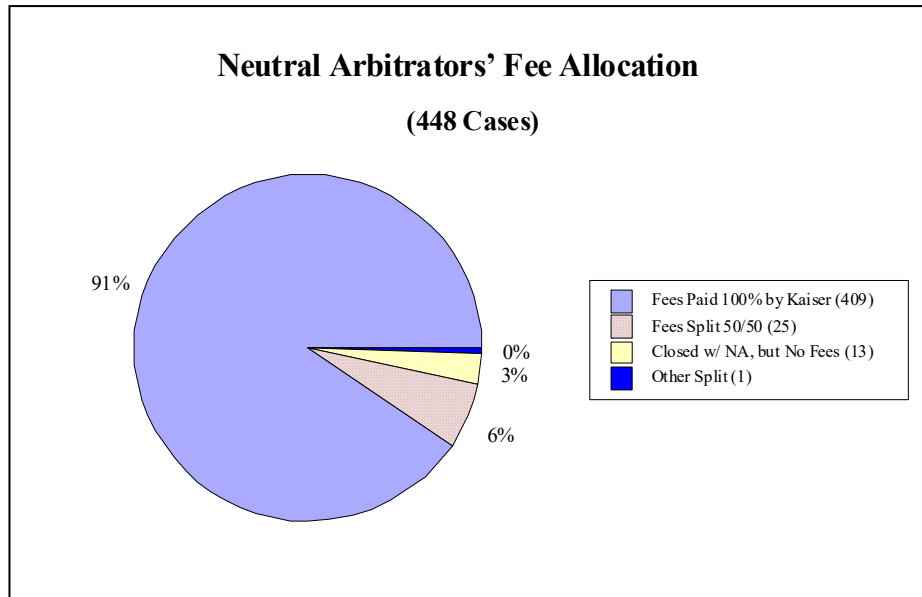
Kaiser paid 100% of the neutral arbitrators' fees and expenses in 409 cases. Fees were split 50/50 in 25 cases. One case had a different split, with claimant paying 35%. In 13 cases, no fees were charged. See Chart 12.

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<sup>83</sup>Two submitted the waiver of filing fee and neutral arbitrator fees form pursuant to Rule 12 and granted, two paid the filing fee, and three resubmitted the forms providing additional or missing information which were granted. See Rule 12.

<sup>84</sup>One request was resubmitted providing missing information and was granted. The other two paid the filing fee.

**Chart 12**



**D. Fees Charged by Neutral Arbitrators**

Neutral arbitrators on the OIA panel set their own fees. They are permitted to raise their fees once a year, only in new cases. The fees ranged from \$200/hour – \$1,600/hour. The average hourly fee was \$700. Some neutral arbitrators also offered a daily fee with a range of \$1,000/day – \$13,000/day. The average daily fee was \$5,658.

In 435 cases where the neutral arbitrators charged fees, Kaiser paid 100% of the neutral arbitrators' fees in 94% of these cases. The average neutral arbitrator fee in this category was \$9,230. The range was \$413 – \$117,101. This excludes the 13 cases in which there were no fees. The average for all cases, including those with no fees, was \$8,962.

In cases where the neutral arbitrator wrote an award are considered, the average fee was \$49,451. The range was \$20,000 – \$117,101.

**IX. EVALUATIONS OF NEUTRAL ARBITRATORS AND THE OIA SYSTEM**

When cases close, the OIA sends forms to counsel for the parties and *pro per* claimants asking them questions about the OIA, the arbitration process, and the neutral arbitrator, if any. The OIA sends the neutral arbitrator a similar form with questions about the OIA and the arbitration process. This section discusses the highlights of the responses we received from the parties and the arbitrators. The copies of the forms are set out in Exhibits K, L, and M, respectively.

**A. Parties Evaluate the Neutral Arbitrators**

The OIA sends neutral arbitrator evaluations to counsel for the parties or *pro per* claimants only in cases where the neutral arbitrator made a decision that concluded the case.

The form asks parties to evaluate their experience with the neutral arbitrator in 11 different categories including: fairness, impartiality, respect shown for all parties, timely response to communications, understanding of the law and facts of the case, and fees charged. More importantly, they are asked whether they would recommend this arbitrator to another person with a similar case. The inquiries appear in the form of statements, and all responses appear on a scale from 1 - 5 with 5 being agreement and 1 disagreement. The evaluations are anonymous, though the parties filling out the forms are asked to identify themselves by category and how the case closed.

The OIA sent 224 evaluations and received 39 responses, or 17%. Five identified themselves as *pro per* claimants, five as claimants’ counsel, and 28 as respondents’ counsel. One did not identify a side.

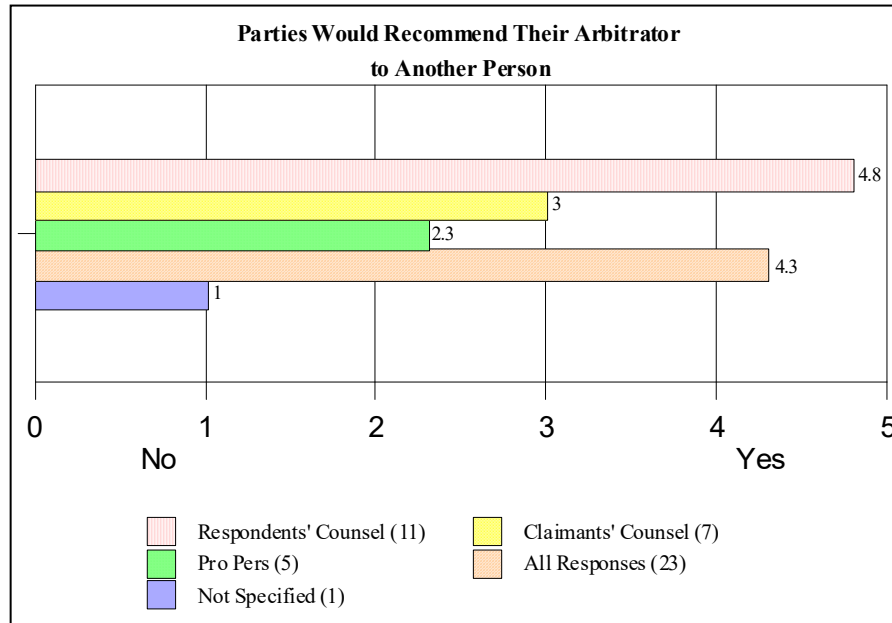
Table 5 highlights the average responses to some of the inquiries.

**Table 5 - Parties’ Evaluations of Neutral Arbitrators**

Question	Claimants’ Counsel (5)	<i>Pro per</i> (5)	Respondents’ Counsel (28)	Not Specified (1)	Total (39)
Impartial and treated parties fairly	3.0	1.5	4.9	1.0	4.2
Treated parties with respect	3.8	3.5	5.0	3.0	4.6
Explained procedures and decisions clearly	3.2	3.0	5.0	3.0	4.5
Understood applicable law	2.8	3.3	4.8	3.0	4.3
Understood facts of the case	2.6	2.0	4.9	1.0	4.2
Fees reasonable for work performed	3.7	3.0	4.8	1.0	4.5
Would recommend this arbitrator	3.0	2.3	4.8	1.0	4.3

As shown in Chart 13, the average on all responses when asked whether they would recommend this arbitrator to another person with a similar case was 4.3.

**Chart 13**



**B. Neutral Arbitrators Evaluate the OIA System**

Under Rule 48, when cases close, the neutral arbitrators complete questionnaires about their experience with the *Rules* and the overall system. The information is solicited to evaluate and improve the system. As with the evaluations sent to the parties to evaluate the neutral arbitrators, the OIA sends these forms to neutral arbitrators in cases where the neutral arbitrator closed the case. The OIA sent questionnaires in 112 closed cases and received neutral arbitrator responses in all cases.

The arbitrators’ average response was 4.8 agreeing that the procedures set out in the *Rules* had worked well in each specific case. The responses averaged 5.0 agreeing that based on this experience, they would participate in another arbitration with the OIA. The responses averaged 5.0 agreeing that the OIA had accommodated their questions and concerns in their specific case.

The questionnaire also includes two questions that asks arbitrators to check off features of the system which worked well and those that needed improvement in their specific case. The majority identified features of the OIA system that worked well. See Table 6.

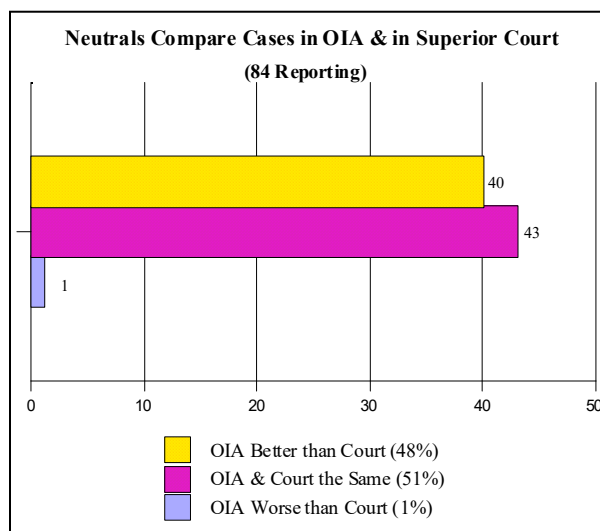


**Table 6 - Neutral Arbitrators' Opinions Regarding the OIA System**

Feature of OIA System	Works Well	Needs Improvement
Manner of neutral arbitrator's appointment	82	0
Early management conference	82	0
Availability of expedited proceedings	42	0
Award within 15 business days of hearing closure	42	5
Claimants' ability to have Kaiser pay neutral arbitrator	74	2
System's Rules overall	86	0
Hearing within 18 months	44	1
Availability of complex/extraordinary proceedings	33	0

Finally, the questionnaire asks the arbitrators whether they would rank the OIA experience as better, worse, or about the same as a similar case tried in court. Eighty-four arbitrators made the comparison. Forty arbitrators, or 48%, said the OIA experience was better. Forty-three arbitrators, or 51%, said it was about the same. One arbitrator (1%) said the OIA experience was worse may have done so by mistake.<sup>85</sup> See Chart 14.

**Chart 14**



<sup>85</sup>The neutral arbitrator checked all of the features as working well and commented that nothing needed improvement.

Overall, the neutral arbitrators were pleased with the OIA's performance, describing it as responsive, efficient and helpful. One arbitrator appreciated the OIA's guidance in navigating the rules, while others noted that the OIA is prompt in its response to inquiries, and does so in a clear, fair and expeditious manner.

Neutral arbitrators also commented that the *Rules* worked well and that no improvement in the system is needed. However, several arbitrators asked that Rule 37 be changed to allow for more time to serve the award, suggesting a 30-day standard. Another asked that Rule 25 be changed to provide 10 days instead of 5 days in which to return the AMC form. Some arbitrators asked specifically for new rules: one addressing dismissal of a case when the only claimant dies; one requiring a certificate of merit<sup>86</sup> to be filed before a case may proceed; and one where Kaiser pays the *pro per*'s half of the arbitrator's fees in instances where the *pro per* fails to execute the required waiver forms.<sup>87</sup> One arbitrator asked for a rule preventing Kaiser from filing a cost bill after a hearing in which they prevail, since members are contractually obligated to arbitrate their disputes.

Many neutral arbitrators expressed frustration with their *pro per* cases complaining about the *pro per*'s inability to navigate the system or to follow the *Rules*. Some commented that *pro pers* are disadvantaged when compared to experienced Kaiser attorneys, have little chance to prevail, and that the OIA should encourage *pro pers* to seek attorney legal representation (which it does). Others commented that the OIA should provide *pro pers* with important deadlines including the date to submit a medical expert declaration. Another thought that the OIA should provide clear prohibition against ex parte communications.<sup>88</sup>

### **C. Parties Evaluate the OIA System**

The OIA sends the parties an additional one-page evaluation asking about their experience with the *Rules* and the overall system. The form is similar to, but shorter than, the form sent to the neutral arbitrators.

As with the other forms, this form asks the parties, on a scale from 1 - 5, whether they agree or disagree that the *Rules* had worked well in their case and whether they would rank the OIA experience as better, worse, or about the same as a similar case in court. The form also includes a questions about their experience obtaining medical records. A "5" is the highest level of agreement.

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<sup>86</sup>California does not have a certificate of merit requirement in medical malpractice cases. However, in some states, a sworn affidavit by a medical expert declaring that there is sufficient evidence to bring a medical malpractice claim is required prior to the filing of the case.

<sup>87</sup> See Rules 14 and 15.

<sup>88</sup>The OIA contacted these arbitrators, asking if they have seen the modifications to Rule 54 and if they had any additional comments or suggestions. No responses have been received.

The OIA sent 898 evaluations and received 108 responses, or 12%. Eight identified themselves as *pro per* claimants, 16 as claimants’ counsel, and 76 as respondents’ counsel. Eight did not specify a side.

Table 7 highlights the average responses for some of the inquiries.

**Table 7 - Parties’ Evaluations of the OIA System**

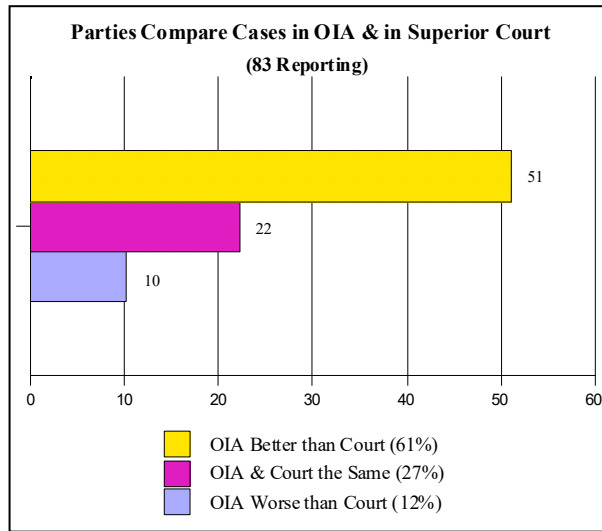
<b>Question</b>	<b>Claimants’ Counsel (16)</b>	<b><i>Pro per</i> (8)</b>	<b>Respondents’ Counsel (76)</b>	<b>Not Specified (8)</b>	<b>Total (108)</b>
Procedures worked well	4.3	2.7	5.0	4.5	4.7
Obtaining medical records went well	4.2	3.0	5.0	4.7	4.7
OIA responsive to questions/concerns	4.5	4.0	4.9	4.9	4.8

The form also asks the parties if they have had a similar experience in Superior Court and, if so, to compare the two. Of the 83 people who made the comparison, 51 said it was better. Twenty-two said it was the same. Ten said it was worse.<sup>89</sup> See Chart 15 and Table 8 for the breakdown.

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<sup>89</sup>Of the ten people who said the OIA experience was worse, five may have done so by mistake as they responded with all “5’s” and in one instance commented that the courts are not as accommodating in terms of continuances. The others complained that these cases belong in court with a jury, that the arbitrator was “greedy” and did not follow the law.

**Chart 15**



**Table 8 - Parties Compare the OIA System & Superior Court**

	Made Comparison	Better	Worse	About the Same
Claimants' Counsel	16	5	5	6
<i>Pro per</i>	2	1	1	0
Respondents' Counsel	59	43	2	14
Not Specified	6	2	2	2
Total	83	51	10	22

Overall, the parties were complimentary of the OIA, describing it as courteous and responsive. One said they appreciated the OIA's response to questions about the *Rules* and wished it could provide legal advice. Some commented that the ability to jointly select an arbitrator and the easy access to those arbitrators, is an appreciated benefit not available in the court system.

A majority of *pro pers* however, were critical of the arbitration process, claiming that it is difficult to understand and appears to discourage claimants from representing themselves. One commented that arbitrators should listen to *pro pers* more and stated that the process was similar to a divorce mediation. Several commented that Kaiser should either pay for, or waive, the cost of medical experts and attorneys to provide a level playing field, so that "the people with most money don't always win."

Claimant attorneys and *pro pers* complained that obtaining medical records was difficult and time-consuming and Kaiser's processing center is unprofessional. Several complained they were provided with unreadable files and duplicate or altered records. One commented that it is not uncommon for Kaiser to produce incomplete medical records, while another said Kaiser's attorney provided a copy only after several months of failed attempts.

Some claimant attorneys felt the arbitrators are beholden to Kaiser and the OIA should limit the number of new cases a neutral arbitrator can have. Others thought the OIA should not allow Kaiser to force the selection of party arbitrators, particularly in cases where claimants have waived their right to one. Some attorneys sought clarification of Rule 8 regarding service of amended demands for arbitration and service of individually-named, non-corporate entities, and asked for rule changes that cover guardians ad litem.

## **X. ROLE OF THE ARBITRATION OVERSIGHT BOARD**

### **A. Membership**

The membership of the AOB is a distinguished one which includes well-respected members of the community. The AOB is chaired by Richard Spinello, retired Executive Director of Financial Risk and Insurance at Children's Hospital of Orange County. The vice-chair is Donna Yee, retired Chief Executive Officer of the Asian Community Center of Sacramento Valley. Ms. Yee has been the acting chair since July while the chair recovers from an accident.

Kennedy Richardson, retired Litigation Practice Manager for the Kaiser Foundation Health Plan resigned from the board in December. Matt Weber, Deputy General Counsel for TMC HealthCare joined the AOB in October.

The current membership of the AOB in alphabetical order (pursuant to the AOB bylaws, no more than four members may be Kaiser-affiliated):

**Carlos Camacho**, Staff Director for the Orange County Labor Federation, AFL-CIO, Orange County.

**Doris Cheng**, medical malpractice attorney representing claimants, San Francisco.

**Patrick Dowling**, MD, MPH, Professor and Chair of the Department of Family Medicine, David Geffen School of Medicine at UCLA, Los Angeles.

**Sylvia Drew Ivie**, Special Assistant to the President, Charles R. Drew University of Medicine and Science, Los Angeles.

**Margaret B. Martinez**, MPH, retired Chief Executive Officer of the Community Health Alliance of Pasadena, dba ChapCare, Pasadena.

**Honorable Carlos R. Moreno**, former California Supreme Court Justice, Los Angeles.

**Kenneth Pivo**, retired medical malpractice attorney representing respondents, Santa Ana.

**Tony Rodriguez**, Vice President and Assistant General Counsel, Litigation / Legal Department, Kaiser Foundation Hospitals / Health Plan, Oakland.

**Richard Spinello**, retired Executive Director of Financial Risk and Insurance, Children's Hospital of Orange County.

**John Swartzberg**, MD, FACP, Clinical Professor, *Emeritus*, University of California Berkeley School of Public Health, Berkeley.

**Matt Weber**, Deputy General Counsel for TMC HealthCare, Oro Valley, Arizona.

**Donna L. Yee**, MSW, PhD, retired Chief Executive Officer of the Asian Community Center of Sacramento Valley, Sacramento.

**Roxana Heidi Yoonessi-Martin**, MD, JD, Compliance Officer and Lead Counsel, Southern California Permanente Medical Group, Pasadena.

## **B. Activities**

The AOB oversees the OIA's administration of cases in the arbitration system. In quarterly meetings, it reviews and makes recommendations on regular and quarterly reports from the OIA. The AOB also makes requests for supporting information as needed.

The AOB reconvened the *Rules* sub-committee to discuss and refine modifications to Rules 9 and 39. It approved both Rule changes.<sup>90</sup> Temporary Rule 4<sup>91</sup> has lapsed since Rule 39 has been modified. The AOB continues to receive quarterly updates regarding the status of cases open more than 18 months.

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<sup>90</sup>Any changes of the *Rules* requires the agreement of two-thirds of all the members of the AOB, as well as a majority of the non-Kaiser related board members.

<sup>91</sup>See Exhibit E for a list of the temporary rules.

The AOB continues to work jointly with the OIA to further its commitment to improve the diversity of the OIA panel of neutral arbitrators. The AOB receives quarterly reports regarding panel demographics and receives quarterly reports regarding the OIA’s recruitment efforts.

Finally, the AOB reviews the draft annual report and provides comments. Exhibit N shows the AOB Comments on the Annual Report for 2023.

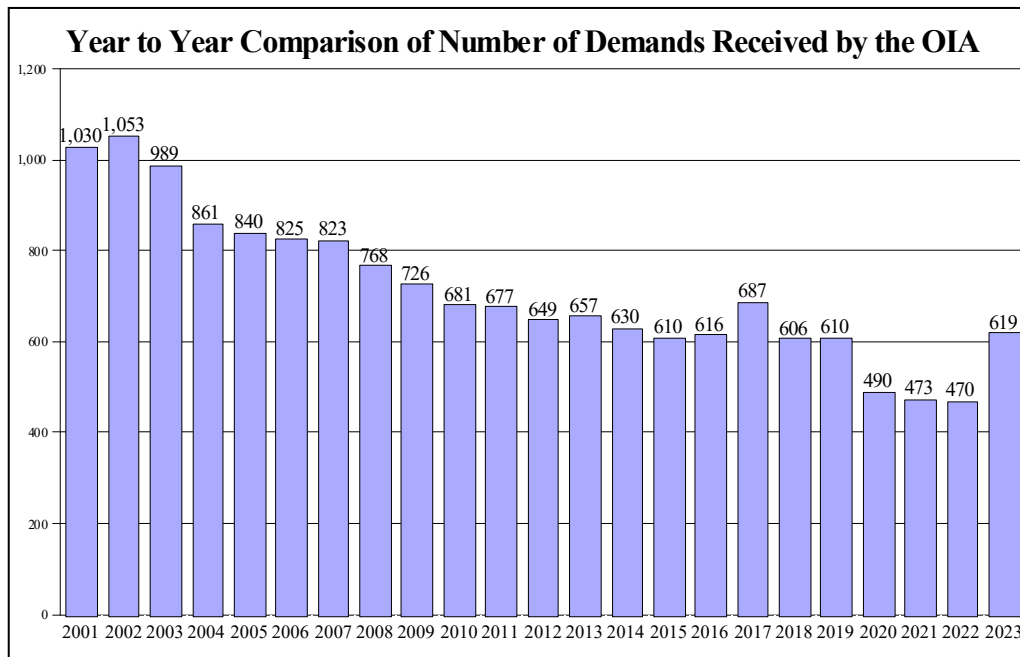
## XI. TRENDS AND DATA OVER THE YEARS OF OPERATION<sup>92</sup>

Using the data that the OIA has published in prior reports, this section considers the operation of the OIA over time.

### A. Number of Demands for Arbitration

In 2023, the OIA received 619 demands for arbitration, 149 more than last year and the largest increase since its inception. Chart 16 shows the sharpest decline of demands received occurred between 2003 and 2004 (a decrease of 128) and the largest increase occurring from 2022 to 2023.

**Chart 16**



<sup>92</sup>Unless otherwise noted, this section compares data over the years since 2001, the first time the OIA reported on a calendar year. Prior reports covered partial years.

## **B. Number of Neutral Arbitrators**

There were 176 neutral arbitrators on the OIA panel, one less than last year. The panel has ranged from 164 in 2021 to 326 in 2006. On average, 41% have been retired judges. This year, 55% are retired judges - 2% more than last year and the highest percentage of judges over all time. The composition of the panel of neutral arbitrators includes those who have plaintiff's side experience and those who have defendant's side experience. This year, 91% report medical malpractice experience.

## **C. Number of Arbitrators Who Served**

The percentage of neutral arbitrators on the OIA panel who have served in any given year remains consistent with the number of demands. This year, the OIA received 619 demands and had 176 arbitrators. Sixty-three percent (63%) of those arbitrators served on a case this year. This is 5% more than last year and 7% less than the highest percentage over all time.<sup>93</sup>

## **D. Number of Arbitrators Who Wrote Awards<sup>94</sup>**

This year, the lowest number of neutral arbitrators wrote awards (19 wrote 23 awards). The largest number of arbitrators (93) who wrote awards occurred in 2004, with an average of 68 – 91% writing a single award. This year, 84% wrote one award.

## **E. Number of Arbitrators Who Served After Making a Large Award<sup>95</sup>**

Ninety-two (92) different neutral arbitrators have made 119 awards of \$750,000 or more in favor of claimants. Most of the neutral arbitrators who made the awards were members of the OIA panel, but nine were not. The awards have ranged from \$750,000 to \$25,638,059.

As Chart 17 illustrates, most neutral arbitrators who have made awards of \$750,000 or more served again. Specifically, 73 neutral arbitrators served 1,799 times after making their awards for \$750,000 or more. In more than half of these cases (812), the parties jointly selected the neutral arbitrator.<sup>96</sup>

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<sup>93</sup>In 2003, the OIA received 989 demands and had 287 neutral arbitrators, 70% served on a case.

<sup>94</sup>The OIA began comparing this data in 2003.

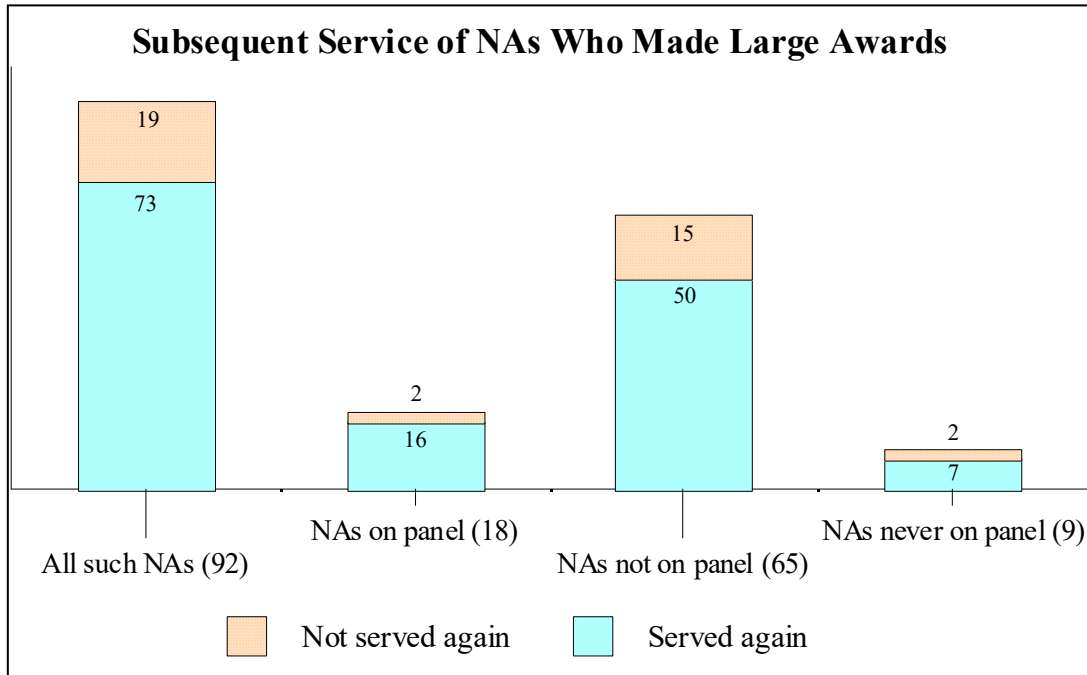
<sup>95</sup>In 2023, the award amount increased from \$500,000 to \$750,000. See Sections II.G. and III.C.4.

<sup>96</sup>Fourteen neutral arbitrators who made such awards were selected in 59 cases in 2023. In 32 of these cases, they were jointly selected.



Of the 19 neutral arbitrators who were not selected after making their awards, 2 were never on the OIA panel and 15 are no longer on the panel. The remaining two arbitrators have not served again.

**Chart 17**



## F. Types of Claims

The large majority of demands for arbitration are claims that allege medical malpractice. The percentage has ranged from 86 – 97%.<sup>97</sup> This year, 95% of the cases involved allegations of medical malpractice. Benefit claims are generally less than two percent (<2%).

## G. Claimants Without Attorneys

On average, 26% of claimants are in *pro per*. This year, 29% of claimants did not have an attorney.<sup>98</sup> Dealing with the concerns raised by *pro per* claimants has been a continuing issue for the OIA, the AOB, and neutral arbitrators. In 2023, the AOB approved changes to Rule 54<sup>99</sup>

<sup>97</sup>The range may actually be smaller because during the early years, a large percentage of demands gave no specifics and were categorized as “unknown.” Kaiser now provides information as to the type of claim being made.

<sup>98</sup>By contrast, in 2004 only 17% of claimants did not have an attorney, while more recently in 2022, 33% did not have an attorney.

<sup>99</sup>See Exhibit B, Rule 54.

which revised the language to be stated more clearly and provides additional information for *pro pers*.<sup>100</sup>

## **H. Joint Selections vs. Strike and Rank Selections**

The *Rules* give both parties the power to determine who their neutral arbitrator will be – or at least, who their neutral arbitrator will not be. The parties can jointly select an arbitrator who agrees to follow the *Rules*, and parties can also timely disqualify neutral arbitrators after their selection. The OIA provides both parties the same access to information about the neutral arbitrators. This includes evaluations of the neutral arbitrators by the parties in earlier cases.

The majority of arbitrators (79%) were selected by the strike and rank. The remaining (21%) were jointly selected by the parties. Annually, joint selections comprise 20% (2021) to 35% (2015) of arbitrator selections. The majority of jointly selected arbitrators were also on the OIA panel. The percentage has ranged from 55% (2011) to 89% (2023).<sup>101</sup>

## **I. Parties' Use of Options During Selection of Neutral Arbitrator**

The parties in 34 – 57% of the cases used postponement and disqualification allowing more time to select a neutral arbitrator.<sup>102</sup> Claimants made almost all of the postponements (99%, 7,396 out of 7,464) and the majority of disqualifications (76%, 1,187 out of 1,553).

The length of time to select a neutral arbitrator has remained consistent: 23 – 27 days for cases with no postponements. This year it took 23 days, maintaining the lowest average for 5 years in a row. For all cases where a neutral arbitrator was selected this year, it took 60 days, 3 days less than last year.

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<sup>100</sup>The OIA is also readily available by phone and email to answer questions from *pro per* claimants about the filing fee, neutral arbitrator selection, the *Rules*, and related items.

<sup>101</sup>There have been 19 cases in which the neutral arbitrator was selected by court order.

<sup>102</sup>A member of the OIA staff contacts the parties to remind them of the deadline to respond to the LPA. When contacting claimants or their attorneys, the OIA reminds them that they may seek a postponement if they are not able to return their responses by the deadline.

See Table 9 for year to year comparison of days to select neutral arbitrators since 2015.

**Table 9 - Year to Year Comparison of No Delay vs. Delays:  
Percentage and Average Number of Days to Select Neutral Arbitrators**

	2015	2016	2017	2018	2019	2020	2021	2022	2023
No delay	25 days 44%	24 days 51.7%	24 days 51.7%	24 days 51%	23 days 55%	23 days 46%	23 days 58%	23 days 55%	23 days 59%
Only Postponement	109 days 47%	110 days 40.9%	104 days 40.8%	104 days 42%	109 days 40%	108 days 48%	107 days 38%	111 days 40%	109 days 35%
Only Disqual.	62 days 4%	64 days 3.7%	61 days 3.4%	54 days 3%	55 days 2%	67 days 2%	54 days 3%	50 days 2%	62 days 3%
Postponement & Disqual.	173 days 5%	158 days 3.7%	165 days 4.1%	144 days 4%	149 days 3%	210 days 4%	149 days 2%	188 days 3%	202 days 3%
Total Selections	73 days	66 days	64 days	63 days	62 days	72 days	58 days	63 days	60 days

#### **J. How Cases Closed**

Most cases close by settlement. On average, 40 – 53% of cases settle. This year, 50% settled. On average, 21 – 28% of cases are withdrawn. This year, 26% were withdrawn. This year, five percent (5%) of cases were decided after hearing; four percent (4%) were dismissed by neutral arbitrators. The remaining cases (15%) were closed by summary judgment.

Of the cases that closed before the arbitration process was initiated, 20 (4%) were abandoned. The remaining cases were settled (6) or withdrawn (2).<sup>103</sup>

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<sup>103</sup>These cases account for 6% of the total number of closed cases (503), but are excluded from Section VII because the OIA does not begin measuring time until the fee is paid or waived.

Table 10 displays how cases have closed since 2015.

**Table 10 - Year to Year Comparison of How Cases Closed**

	2015	2016	2017	2018	2019	2020	2021	2022	2023
Settlements	44%	44%	47%	46%	45%	45%	45%	53%	50%
Withdrawn	26%	25%	25%	23%	26%	27%	26%	25%	26%
Dismissed	3%	3%	4%	5%	5%	5%	5%	5%	4%
Summary Judgment	10%	12%	11%	13%	11%	14%	13%	11%	15%
Awards	10%	9%	8%	6%	8%	4%	9%	6%	5%

**K. Awards for Claimants**

In those cases in which the claimant won after a hearing, the average award was \$580,527. Because the number of cases in any given year is small, the yearly averages can fluctuate greatly from year to year. The lowest average, \$156,001, took place in 2001, when the largest award was \$1,100,000. The largest annual average, \$4,901,115, took place in 2022 when the largest award was \$25,638,059. This year, the average was \$771,158, and the largest award was \$1,731,647.

Since 2010, the average percentage of cases in which claimants prevailed after a hearing was 34%.<sup>104</sup> This year, 13% of claimants prevailed, 33% less than last year and the lowest percentage of all time.

**L. Average Days to Close Cases**

The lowest average for all cases to close was 281 days in 2001. This year, it took 399 days, 34 days less than the highest average (433 days) last year. See Table 11.

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<sup>104</sup>Up until 2009, lien cases were included in this percentage. No new lien cases were received this year. Lien cases are brought by Kaiser against its members to recover costs of medical care provided to a member who received a third party recovery.

**Table 11 - Year to Year Comparison of Average Number of Days to Close, by Disposition**

	2015	2016	2017	2018	2019	2020	2021	2022	2023
Settlements	344 days	376 days	383 days	357 days	386 days	376 days	418 days	460 days	447 days
Withdrawn	227 days	255 days	249 days	230 days	238 days	267 days	305 days	256 days	263 days
Summary Judgment	371 days	363 days	372 days	356 days	388 days	363 days	403 days	361 days	401 days
Awards	584 days	589 days	598 days	653 days	676 days	660 days	784 days	1,022 days	760 days
All Cases	342 days	363 days	368 days	343 days	366 days	356 days	418 days	433 days	399 days

The OIA closely monitors each case that is open after 15 months to ensure the case remains in compliance with the *Rules*. Forty-one cases over all time have closed beyond the deadline set by the *Rules*. One case closed late in 2023.<sup>105</sup>

**M. Payment of Neutral Arbitrator’s Fees**

California law provides that the neutral arbitrator fees shall be divided equally between the parties, however, the *Rules* provide several ways to shift those fees to Kaiser.<sup>106</sup> This year, 94% of the fees were paid by Kaiser, 3% less than last year’s all time high (97%).<sup>107</sup>

**N. Evaluations of Neutral Arbitrators and the OIA System**

Since the year 2000, the OIA has sent the parties forms to evaluate their neutral arbitrators.<sup>108</sup> The evaluation asks, among other things, whether the neutral arbitrator treated the parties with respect and whether the parties would recommend the arbitrator to others. This year, the overall average increased from 3.7 last year to 4.3 (on a 1 – 5 scale) whether the parties would recommend the arbitrator to others. In 2022, this average was 3.7, and in 2004, it was 4.7.

The OIA also asks neutral arbitrators to evaluate the OIA system. The questions ask them to identify whether certain features are useful or not, whether the OIA is helpful or

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<sup>105</sup>See footnote 70 regarding the case that closed after its deadline.

<sup>106</sup>See Sections VIII.B.2. and 3 and Exhibit J.

<sup>107</sup>The lowest reported average, 81%, occurred 3 years in a row when the OIA began reporting this data in 2003. Pursuant to state law, provider organizations, like the OIA, are required to report the amount of a neutral arbitrator’s fees and the allocation on their websites.

<sup>108</sup>In 2013, the OIA began sending neutral arbitrator evaluations only in cases in which the neutral arbitrator made a decision that concluded the case.

responsive, and to compare the OIA system with the court system. The arbitrators' evaluations have always been positive. This year, 99% of the neutral arbitrators who answered the question rated the OIA system the same as, or better than, the state court system.

In 2009, the OIA began asking parties to evaluate the OIA system and the ease with which medical records were obtained. The form is similar to the form sent to neutral arbitrators and also asks parties to compare the OIA system to court. This year, 88% of the parties who answered the question rated the OIA system the same as, or better than, the state court system. This is 12% higher than last year, which was the lowest average of all time. The highest average (96%) was in 2018.

## **O. Conclusion**

The goals of the arbitration system as outlined by the Blue Ribbon Panel are set out in Rule 1. They provide for a fair, timely, and low-cost arbitration process which respects the privacy of the parties. The *Rules* and OIA procedures were created with these goals in mind.

This report describes the ways in which the *Rules* and OIA meet these goals. Some of the highlights include:

Neutral arbitrators are selected expeditiously, and cases close faster than the BRP recommendation.

The arbitration filing fee is lower than in court, and parties can, and do, shift the cost of neutral arbitrators to Kaiser.

The OIA provides parties with neutral arbitrators' applications and updates; evaluations received from the parties within the last five years; and redacted decisions by OIA neutral arbitrators within the last five years.

Parties may jointly select any neutral arbitrator, as long as the arbitrator agrees to follow the *Rules*.

Either party can timely disqualify the neutral arbitrator after the selection.

OIA arbitrations are confidential. Names of individual claimants and respondents are not disclosed.

The annual reports provide more information about arbitrations than any other arbitration provider. The OIA website provides a searchable database of all its cases since January 1, 2003.

It also includes a sortable database about cases received in the past five years as required by state law.<sup>109</sup>

The information in this report is collected and published on the OIA website to allow the AOB and the public to determine how well the arbitration system meets the goals in Rule 1 of providing a fair, timely, and low-cost arbitration process that respects the privacy of the parties.

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<sup>109</sup>No names of individual claimants or respondents are included, only corporate entities.