Management Labor Advisory Committee
Permanent Total Disability Subcommittee
Wednesday, September 1, 2004
Labor and Industries Building, Conference Room F

Subcommittee Members Present:
Bob Shiprack, Oregon Building Trades Council, Tualatin, OR
J.L. Wilson, NFIB, Oregon Chapter, Salem, OR
Lisa Trussell, Associated Oregon Industries, Salem, OR
Brad Witt, Oregon AFL-CIO, Salem, OR
Ken Hector, CNF Service Company, Portland, OR
Lon Holston, AFSCME, Grants Pass, OR

Subcommittee Member Excused:
Diane Janzen, NorPac Foods, Inc., Lake Oswego, OR

Staff Present:
Lou Savage, Director's Office
Myrna Curzon, Director's Office
Nancy Bieber, Workers' Compensation Division
John Hofer, Workers' Compensation Division
John Shilts, Workers' Compensation Division
Jerry Managhan, Workers' Compensation Division
Debbie Hughes, Workers' Compensation Division
Mike Manley, Information Management Division
Travis Wall, Injured Worker Ombudsman

REVIEW MINUTES FROM JULY 1, 2004 SUBCOMMITTEE MEETING
Bob Shiprack called the Management Labor Advisory Committee Permanent Total Disability (PTD) Subcommittee meeting to order at 9:10 a.m. Bob noted that Co-chair JL Wilson would be arriving late due to a previous obligation. Ken Hector moved to approve the minutes as submitted; Lisa Trussell seconded the motion. The following committee members approved the minutes: Bob Shiprack, Brad Witt, Lisa Trussell, and Ken Hector. JL Wilson was not in attendance at the time the vote was taken.

PRESENTATION OF POLITY OPTIONS, John Shilts
John Shilts provided a brief agenda of the Workers' Compensation Division's (WCD) proposed presentation and requested approval from the Chair. Approval was given for the following presentation:
Mike Manley, Information Management Division, History of permanent total disability (PTD) in Oregon.
Travis Wall, Ombudsman for Injured Workers, Presentation on concerns about current PTD law and practices as well as ideas for addressing concerns.
John Shilts and Jerry Managhan, Draft language for possible changes to PTD
John Shilts, Jerry Managhan, and Mike Manley, Cost estimates on policy changes.

Mike Manley, Information Management Division, History of PTD in Oregon
Mike gave a handout to the committee titled "PTD Frequency Trends." The handout is part of the permanent meeting record. The following summary of the handout was given:

Accepted disabling claims--the rate has been down since 1990.

PPD awards- the trend was upwards through 1990, but it has been down since 1990. Some of the downward trend is because of PPDs being replaced with CDAs.

Fatalities – per 1000 accepted disabling claims--There have been declining claims overall from 1970 through mid 80s then leveling off. Claims dropped by half since early 70s. PTD grants per 1000 accepted disabling claims is more jagged. Since late 1980s PTD grants per 100 accepted disabling claims has gone downwards much faster than fatalities. Net PTD grants is the total grants minus rescissions.

Total and Net PTD Grants Milestones -- 1975 statute changed to eliminate statutory PTD which allowed certain combinations of scheduled body parts to provide presumption of PTD; 1977 requirement that worker seek work, statute changed to require two-year reevaluations of PTD; 1979 reevaluation responsibility moved from WCB to WCD; 1987 rating standards imposed across system, Board's Own Motion reduced, standard of review changed for Board orders; 1990 CDAs permitted, reconsideration process mandatory, OAR seek work requirement; 1995 definition of gainful being Oregon minimum wage, limitation of evidence on PTD at hearings limited to reconsideration record.

Travis Wall, Ombudsman for Injured Workers, Presentation on concerns about current PTD law and practices as well as ideas for addressing concerns
Travis Wall, Ombudsman for Injured Workers, identified a number of issues and problems that workers confront around PTD and possible remedies as perceived by workers. The proposed solutions are from the worker perspective.
Gave handout "PTD issues and problems and possible remedies" and reviewed each item for the committee. The handout is part of the permanent meeting record.

Committee Discussion:
Committee members asked for a discussion of the two-year evaluation process. Travis Wall and Edith Hayden from the Office of the Ombudsman for Injured workers provided the following information as received by their office from injured workers:
The worker is asked to come in for a medical evaluation, which may be over several days. The physicians they use are most often in Portland. Some workers have reported that this is a hardship for them. The Office of the Ombudsman for Injured Workers was contacted by an attorney representing several clients who were being reviewed more often than every two years. The attorney believed it was a hardship for the clients. They have also had reports that some vocational evaluations are done without face to face contact with the worker

John Shilts and Jerry Managhan, Draft language for possible changes to PTD
Jerry Managhan and John Shilts provided draft language titled 'Definition of "gainful occupation"; thresholds for reexaminations; offset of PTD benefits against awards of PPD benefits in response to requests from committee members. The document is part of the permanent meeting record. Jerry explained language changes to the committee.

Definition of "gainful occupation"
With this language a forty-hour work week at minimum wage would be the minimum threshold for gainful employment. This does not require someone to work a forty-hour workweek, but uses that language to establish a monetary threshold. Other options also provided at the bottom of page one of the document were: "a gainful occupation is one that pays wages equal to or greater than…150 percent (or 100, or some other figure) of the poverty level; 50 percent (or 33, or some other figure of the state average weekly wage per week; wages which pay at least 80 percent (or some other figure) of the adjusted weekly wage; 810 dollars (or some other figure) a month adjusted wages (social security disability."

WCD reviewed what other states do regarding gainful employment. They consulted the Workers Compensation Research Institute. It appears that most states have thresholds based on case law similar to Oregon. WCD offered to continue to do further research at the request of the subcommittee.

Thresholds for reexaminations
The bold language on 656.206(5) allows regular reexamination for the first ten years, but after that the frequency of the reexaminations would be delayed or possibly even end after a specified number of years unless they have received prior approval from the director.
The "unless prior approval" allows the insurer to come to the director to request reevaluation if there is evidence that there may have been material improvement. Conversely, the insurer could go to the director and request a longer time period between reevaluations. There are WCD rules as well as case law that define material improvement.

Offset of PTD benefits against awards of Permanent Partial disability benefits 656.268
When an individual is receiving PTD benefits and a decision is made by the insurer or self-insured employer that the individual can perform work, reconsideration can be requested. This proposal would allow the worker to continue to receive PTD benefits until review is completed through reconsideration or the hearings division. For injured workers determined to be medically stationary prior to July 1 1990, the review goes to the hearings division; for injured workers determined to be medically stationary from July 1, 1999 the review goes to WCD for reconsideration.

An additional part of concept is that the worker continues to get paid PTD, but if the insurer prevails part of the discussion is that the insurer or self-insured employer would be indemnified from the Workers' Benefit Fund (WBF). The continued payment would

not be considered an overpayment to the worker. If it were considered overpayment, it could be recovered from the worker from any future benefits.

Ken Hector commented that reimbursement mechanisms are in effect in some states. Pennsylvania is includes PPD as well as TTD. A judge may rule that the insurer must to continue paying benefits until it is litigated. If the insurer prevails they are reimbursed from a state fund.

With the language "The insurer shall issue a notice of closure", current thought is that would trigger a vocational evaluation; but WCD will do more research on that.

The last page of the draft language document provides language for an option that would limit continued payment during the reconsideration process to a maximum of 12 months.

Committee Discussion:
A request was made for an analysis of the impact of the changes made during the last session to Permanent Partial Disability (PPD) and its effect on a high wage earner who is now capable of only minimal service.

John Shilts, Jerry Managhan, and Mike Manley, Cost estimates on policy changes
John Shilts explained that the cost projections on these ideas are only in the initial stages.

Mike Manley provided information on two charts to the committee, "Differences in cost between PPD and PTD claims, Source: NCCI Annual Statistical Bulletin" and "Claim Cost." The charts are included as part of the permanent meeting record. The Claim Cost chart shows the increased cost of an award which goes from PPD to PTD. This is based on the difference in indemnity cost between a PTD and either an average PPD, or four times the average PPD. Four times the average PPD was provided to allow for the possible event that PPD is not really average but is more severe. This reflects those who are severely injured but still meet the standard for PPD thus the PTD cost would be lower. The charts do not include cost to the Workers' Benefit Fund because of cost of living increases paid from the fund.

A chart titled "Estimate premium cost savings due to PTD benefits ending at age 65" in response to a question "What if PTD benefits ended at retirement age?" and "If Insurers are Required to Pay PTD Benefits Until their Rescission is Affirmed." The documents are part of the permanent meeting record.

For the chart showing costs if insurers are required to pay PTD benefits until their rescission is affirmed, it is assumed that time to get a hearing is an additional 10 months and based on 10 rescissions per year. These are the costs that would affect premium rates. A more complex model would be required to show the effect on the Workers' Benefit Fund.

The Workers' Compensation Division also provided to the subcommittee a chart showing the expenditures from the Workers' Benefit Fund for the past three fiscal years. The chart

is part of the permanent meeting record. The biggest expenditure is the retroactive program that provides cost of living increases. The Workers' Benefit Fund is funded through the cents per hour assessment to all employers and employees.

Committee Discussion:
Committee members discussed the availability of vocational assistance to those workers determined to be PTD. Most of the cases reviewed have been litigated and settled through CDA so often there is no eligibility evaluation. There are some definitions that limit the access of those identified at PTD to vocational assistance. If a person has been PTD for quite some time they fall into Boards Own Motion status and there are no vocational benefits available. If the insurer provides vocational benefits they do so as their own choice. To argue that the person can go back to work they have to have a vocational evaluation in the file. To the insurer or self-insurer it would be more economical to provide vocational assistance rather than do a CDA. Unfortunately, some workers would rather take the money than the vocational assistance. Under current standard to rescind the worker is ineligible if minimum work can be performed at minimum wage. The worker may take the CDA to avoid the risk. Many PTDs may have had vocational services early before their PTD award but for whatever reason were not successful with that.

Committee members discussed the importance of getting the worker back to work to benefit the worker.

Public Comment
Chris Davie – SAIF Corporation
Insurance companies are required by law to review cases regularly. If the worker no longer qualifies then the insurer has a duty to act upon that by rescinding. Regarding the recommendation that the worker continue to receive benefits while the reconsideration is being litigated, SAIF believes it is a good idea to continue to pay benefits until there has been an initial adjudication and on any future cases would like to choose to do that voluntarily. SAIF still needs to look at the legality of continuing to pay the benefit. They will be supportive of any changes in the statute that would support the continuation of benefits to the worker during the litigation period. There are two parts to the cost of continuing to pay benefits. SAIF is not asking for reimbursement for the statutory part. There is also a reimbursable part from WBF.

Regarding the two-year evaluation, SAIF has 850 PTD cases. When evidence in the file indicates that the worker may no longer be eligible – a multi-day evaluation may be requested. SAIF does not send 425 people a year out for evaluation. Most often the two-year evaluation consists of making sure that they have current information, current reports from the physician, current address, etc. There are times they have to make sure the worker is still alive, that someone has not fraudulently been cashing benefit checks. For 95% of the cases that is where it ends. It is only when there is evidence that the worker may no longer qualify that they go ahead with an exam.

The meeting adjourned at 11:00 a.m.