

**Management Labor Advisory Committee
Thursday, April 28, 2005
Veterans Building Auditorium**

Committee Members Present:

John Kirkpatrick, IUPAT District Council, Tualatin, OR
Mike O'Rourke, Plumbing and Steamfitters UA 290, Tualatin, OR
Bob Shiprack, Oregon Building Trades Council, Tualatin, OR
Sheri Sundstrom, Hoffman Construction Company, Portland, OR
J.L. Wilson, NFIB, Salem, OR
Lon Holston, AFSCME, Grants Pass, OR
Ken Hector, CNF Service Company, Portland, OR
Lisa Trussell, Associated Oregon Industries, Salem, OR
Cory Streisinger, Department of Consumer and Business Services

Committee Members Excused:

Diane Janzen, NorPac Foods, Lake Oswego, OR

Staff Present:

Myrna Curzon, Director's Office
Jerry Managhan, Workers' Compensation Division
Lou Savage, Director's Office
John Shilts, Workers' Compensation Division
Travis Wall, Injured Worker Ombudsman

Bob called meeting to order at 8:32

REVIEW MINUTES

A motion was made and seconded to approve the minutes of the April 14, 2005 meeting. A vote was taken and the following committee members voted aye: Bob Shiprack, Mike O'Rourke, John Kirkpatrick, Lon Holston, JL Wilson, Sheri Sundstrom, Ken Hector, and Lisa Trussell. The motion passed.

DEFINITION OF REGULAR WORK AND ESSENTIAL FUNCTIONS; HB2408 AS POSSIBLE VEHICLE

John Shilts, Administrator WCD

Mr. Shilts provided a document titled "Suggested language for HB2408." The suggested language addresses when a worker should be entitled to a work disability benefit. With the suggested language if the worker returns to regular work at the job held at the time of injury, he/she would not be eligible for work disability benefit. The suggested language also defines regular work. A body of case law would support this language. SB757 has a sunset date. The committee would need to make the decision whether or not to tie the definition of regular work to the same sunset date.

Chuck Lundeen, Liberty Northwest

Liberty NW has submitted testimony on this at past meetings and supports the basic concept that a worker who has been released to regular work should not be getting the disability benefit. Mr. Lundeen expressed some concern with the sub G language in the suggested language provided by Mr. Shilts.

Randy Elmer, OTLA

Mr. Elmer testified in opposition to the proposed amendments, expressing that he feels they will lead to more litigation. He also expressed concern that there may be after the fact analyses saying the worker can perform essential functions. Mr. Elmer testified that if the amendment passes, he feels the analysis of essential job functions should take place at the time of injury.

Travis Wall, Injured Worker Ombudsman

Mr. Wall presented written testimony to the committee in opposition to the proposed amendments. Mr. Wall's testimony addressed the following topics: cost neutrality, proposed definition of regular work, and the potential for litigation.

Committee Discussion:

The committee discussed comments made by those who testified regarding definition of regular work and essential functions, cost neutrality projections of SB757, case law regarding essential functions and regular work, and the potential for litigation. Labor members agreed that benefits should not be paid to someone who does not deserve them, but expressed concern with the definitions of regular work and essential functions. Management members communicated that they felt it was their original intention when SB757 was passed to include the language as reflected in the first paragraph in "Suggested Language for HB2408."

Action:

Ken Hector made a motion to adopt the proposed language in the document "Suggested Language for HB2408." JL WILSON seconded the motion.

Discussion:

Committee discussed the effective date, cost neutrality, and potential for abuse by employers using lay-offs to avoid paying the benefit. In addition committee members discussed an option of adopting the changes made in paragraph one of the recommendation regarding release or return to regular work, but having the department address the definition of regular work in a rulemaking process.

Action: The motion was amended to adopt the changes made in paragraph one which would remove *i, ii, and iii* and add **"the worker has been released to or has returned to regular work at the job held at the time of injury,"** but not add sub F or G that define regular work and essential functions. Ken Hector accepted the change in the motion.

Discussion:

Currently, HB 2408 bill has an emergency clause on it. The committee discussed the effective date and a motion was made to remove the emergency clause and have a statutory effective date of Jan 1, 2006.

Action:

Regarding the motion to adopt the amendment that would remove *i, ii, and iii* and add **"the worker has been released to or has returned to regular work at the job held at the time of injury"** and remove the emergency clause thereby having a statutory effective date of January 1, 2006, a vote was taken and the following committee members voted aye: Bob Shiprack, Mike O'Rourke, John Kirkpatrick, JL Wilson, Sheri Sundstrom, Ken Hector, and Lisa Trussell. Voting nay: Lon Holston. The motion passed.

Chair Shiprack asked that WCD provide updates at regular MLAC meetings showing what is happening with cases.

Sheri Sundstrom also requested an update on Smothers at next meeting.

HB 2404 – CLOSURE OF WORKERS' COMPENSATION CLAIMS

Vicki Graves, Liberty NW

Ms. Graves presented written testimony to the committee regarding amending 656.268(5)(e). The amendments relate to penalties against an insurer or self-insured employer at reconsideration of the notice of closure. Ms. Graves testified that the intent of the amendments to HB2404 is to limit penalties against an insurer or self-insured employer to those situations in which the insurer has inappropriately closed the claim based on the information available at the time of closure.

Jerry Managhan, WCD

In 2000 laws were changed that identify when a penalty would be assessed to reflect when improper closures of claims happen. Mr. Managhan provided data on the numbers of penalties that have been issued.

Committee Discussion:

Committee discussed the details of how current law is written regarding the penalty. The intent was to insure that claims were properly processed and that all information available was considered at the time of claim closure. Committee members felt that the language as presented in the proposed amendment may need changes to accomplish the proposed concept.

Action:

A motion was made to accept the amendments as conceptually discussed. A vote was taken and the following members voted aye: Bob Shiprack, Mike O'Rourke, John Kirkpatrick, Lon Holston, JL Wilson, Sheri Sundstrom, Ken Hector, and Lisa Trussell. The motion passes.

H2588 STUDY OF CHIROPRACTIC SERVICES PROVIDED IN WORKERS' COMPENSATION CLAIMS

Vern Saboe, Chiropractic Association of Oregon

Mr. Saboe testified that he has worked with stakeholders and the –1 amendments represent agreement from stakeholders. In response to a previous suggestion that other providers be included in the study, he took the suggestion to Professor Greenlick at OHSU. The various provider groups are incongruent and therefore it would be problematic to gain a proper sample size that would make it a statistically valid study. The amendments would include the three largest carriers. Mr. Saboe suggested that an advisory committee be set up to review the design of the study. The study will not go forward if there is not a sufficient study group to make it a statistically valid study. Inclusion in the study would be optional.

Committee Discussion:

Concern was expressed regarding cohesion and consistency in the studies of chiropractors and other providers. The committee would like to look at contracting out any studies done so that same party is conducting both studies or combining so that there is only one study. The intent of the law regarding providers in workers compensation was not just to save money, but to get workers back to work in a cost effective manner--emphasis was on getting workers back to work. The committee also expressed concern about the cost of a study which focuses on just one discipline. The bill has a referral to Ways and Means due to the fiscal impact.

Action:

JL Wilson made a motion to approve the bill. Bob Shiprack seconded the motion. A vote was taken and the following members voted aye: Bob Shiprack, Mike O'Rourke, Lon Holston, JL Wilson, and Lisa Trussell. Voting Nay: John Kirkpatrick, Sheri Sundstrom, and Ken Hector. The motion failed due to lack of sufficient management support.

HB 670 TREATMENT STANDARDS FOR CARE PROVIDED TO INJURED WORKERS BY MCOs

Chair Shiprack explained that the purpose of bringing the bill to the committee at this meeting is to consider amendments that clarify. Committee members reviewed the amendments.

Action:

A motion was made by Bob Shiprack and seconded by JL Wilson to accept the amendments with a do pass recommendation. A vote was taken and the following members voted aye: Bob Shiprack, Mike O'Rourke, John Kirkpatrick, Lon Holston, JL Wilson, Sheri Sundstrom, Ken Hector, and Lisa Trussell. The motion passed.

SB386 PERMANENT TOTAL DISABILITY

Jerry Managhan, Workers' Compensation Division (WCD)

Stakeholders have identified possible technical problems with the bill. WCD provided suggested amendments to address the concerns in a document titled "Issues raised on SB386-A dated 4/28/05". The suggestions address the following: 1. "Gainful employment" definition – does "52 weeks" and "four weeks" apply to periods of employment with the employer at injury or time in the work force?; 2. "Gainful employment" definition – reference to "average weekly wages" (meaning the worker's earnings) is too close to the reference to "average weekly wage" (referring to Statewide Average Weekly Wage); 3. "Gainful employment" definition – should the reference to the poverty guideline be more specific?; 4. Should there be a statutory definition for "materially improved medically" and "materially improved vocationally"?; 5. For PTD reversals, it is not clear whether reconsideration is allowed.; 6. There are conflicting ending dates for continued PTD benefits after appeal of reversal depending on when the appeal is filed.; 7. The bill requires "greater weight" for reports based on personal observation, but there are three other case law factors for weighing persuasiveness of an opinion. Should personal observation be added as a fourth factor; but not replace the existing tests?; 8. Reevaluation of permanent disability after vocational assistance should occur after a worker ceases participation in a training plan, not just when vocational assistance ends. Should the bill be clarified?; 9. The implementation dates appear to be in conflict.

Chris Davie, SAIF Corporation

Mr. Davie testified that there is case law that when you have more than one opinion you have to look at source, factual base and logical force. He suggested that a possibility would be to keep current case law but add another factor of personal observation of the worker.

Travis Wall, Injured Worker Ombudsman

Mr. Wall expressed concern about using the federal poverty level or 66 2/3 percent of the workers' average weekly wages prior to the date of injury as the definition of gainful occupation. As time goes by the federal poverty level will be adjusted with the cost of living but the 66 and 2/3% of the wages prior to injury will not adjust with inflation.

Committee discussion:

Committee members briefly discussed the recommendations and decided to have the PTD subcommittee review the recommendations and come back to the committee at the next meeting.

SB669 STUDY OF NONATTENDING PHYSICIANS

Lou Savage, Director's Office, Department of Consumer and Business Services

Mr. Savage gave the committee a brief summary of Senator Prozanski's amendment to 669. This study would be funded by the Premium Assessment Operating Account.

JL Wilson made a motion for a do pass recommendation. He expressed that he would like to see a single study possibly contracted out and recommended that chiropractors be added to this bill. Lon Holston seconded the motion.

Action:

Chair Shiprack asked the committee if there was any opposition to the recommendation that chiropractors be added to SB669. There was none. A vote was taken on the motion to support the bill as amended with a do pass recommendation. The following committee members voted aye: A vote was taken and the following

members voted aye: Bob Shiprack, Mike O'Rourke, John Kirkpatrick, Lon Holston, JL Wilson, Sheri Sundstrom, Ken Hector, and Lisa Trussell. The motion passed.

ADDITIONAL ITEMS OF DISCUSSION:

Committee members received a memo regarding HB 2717 from John McCullough, Presiding Administrative Law Judge of the Workers' Compensation Board. Mr. Hector asked that Mr. McCullough give a summary of the memo for the benefit of the committee and the public.

John McCullough, Workers' Compensation Board

Mr. McCullough gave a brief summary. The memo is part of the permanent meeting record. Some of the exceptions that were put in bill recently may not be broad enough. The memo provides recommendations to address the concern.

Committee Discussion:

Committee members generally expressed support for the recommendations, but no vote was taken.

NEXT MEETINGS:

PTD Subcommittee meeting: Friday May 6th 9am at Local 290 in Tualatin

Full committee Thursday, May 12 at 8:30 am in room 260 in the Labor and Industries Building

Meeting Adjourned