

**NOTICE OF PUBLIC MEETING
WORKERS' COMPENSATION
MANAGEMENT-LABOR ADVISORY COMMITTEE
SUBCOMMITTEE MEETINGS**

November 13, 2007
9:00 a.m. – 4:00 p.m.

Conference Room F, Labor & Industries Building
350 Winter Street NE, Salem, Oregon
(A map is available upon request)

Committee Members Present:

Linda Barno, Schnitzer Steel Industries, Portland
Ellen Cutler, Harry and David Operations Corp., Medford
Lon Holston, Laborers' International, Local 483, Portland
John Kirkpatrick, IUPAT District Council, Portland
Greg Miller, Gunderson LLC, Portland, OR
Mike O'Rourke, Plumbing and Steamfitters UA 290, Tualatin
Sheri Sundstrom, Hoffman Construction Company, Portland

Committee Members Excused:

Tracy Brill, Portland Fire Fighters Association, Portland
Bob Shiprack, Oregon Building Trades Council, Portland
Cory Streisinger, Ex-Officio Member, Department of Consumer and Business Services, Salem

Sheri Sundstrom, Committee's Co-Chair, called the meeting to order at 9:07 a.m.

Lon Holson, who has just rejoined MLAC, has not had an opportunity to join any of the committees.

Death Benefits Subcommittee

Members: Ellen Cutler, John Kirkpatrick, Mike O'Rourke, Sheri Sundstrom

Speakers:

Mr. John Shilts, DCBS Workers' Compensation Division
Mr. Mike Manley, DCBS Information Management Division
Ms. Jennifer Flood, DCBS Ombudsman for Injured Workers

Public Testimony:

Mr. Barrett J. Behurst, Sr.
Mrs. Cammy Wilberger and Mr. Greg Wilberger

Mr. Shilts explained that the purpose of the subcommittee is to carry out the provisions of Senate Bill 835 (SB 835), which has asked MLAC to study the adequacy of death benefits paid to the beneficiaries of workers who have suffered fatal injuries. The study must include, but is not limited to, the current method of calculating burial benefits in relation to the actual cost of burial; the current formulas for determining benefits; the categories of beneficiaries who are entitled to benefits; and the feasibility of providing lump sum benefit payments to beneficiaries.

MLAC must present its findings to the legislature by January 31, 2009.

Additionally, Mr. Shilts observed that the Workers' Compensation Division's (WCD) retroactive reserve reimburses insurers for benefits disbursed under older statutes that need to be brought to current levels; that benefits are paid to the deceased's surviving spouse and children (if any); that benefits are not tied to the worker's wage at injury, but to the State's Average Weekly Wage (SAWW); and that the maximum burial allowance cannot exceed 10 times the SAWW. Mr. Shilts also explained how benefits are calculated.

The committee had questions about entitlement to the burial allowance if no beneficiaries have been designated (e.g. the worker is single at the time of death). They also asked about the availability of death benefits to survivors, and wondered whether there were common law cases they could study.

Committee members asked questions about a seeming discrepancy in the memo provided related to the benefit levels for the worker's children who are dependent on the surviving spouse.

Mr. Behurst testified as to the inadequacy of burial and death benefits. He would like to see burial allowances increased, specially for those cases in which the worker's body must be transported to the deceased's burial ground of choice. Current benefits, he said, do not amount to much when the worker dies far from his or her home.

He would also like to see the law take into account the parents' loss of income and future care when their child dies on the job.

Members brought up ideas and comments about the way the parties to a fatal claim handle the situation. Some of the issues mentioned were:

- " The process of claim handling after a fatal on-the-job injury
- " Whether there is a booklet available that deals with death on the job specifically
- " Whether insurers have "best practices" they follow when handling fatal claims
- " Whether a brochure to the mortuary could be a solution or at least part of the solution
- " The triggers that prompt OR-OSHA, insurers, Ombudsman for Injured Workers to act
- " Whether a brochure to educate the parties could be a first step in addressing the sensitivity issues
- " Whether out-of-state insurers (the choice of some smaller employers) would have the capability to appear in person to handle the claim, therefore providing a "personal touch."

Mr. and Mrs. Wilberger's daughter, Brook, was abducted from her place of work and is still missing, which brought up the following issues:

- " Since Brook's whereabouts were unknown, the Wilbergers did not file a Workers' Compensation claim until a year after her disappearance, which resulted in a denial for untimely filing.
- " There was no burial – and therefore no burial allowance – even though police authorities do not believe she will be found alive.

- " When/if Brook is found, the burial expenses will no longer be available to the Wilbergers.
- " Brook had student loans for which her parents are now responsible. Under the statute, parents do not receive any financial help from the insurer in a situation like this.
- " There is a significant lack of sensitivity on the part of insurers when dealing with fatal claims. For example, the Wilbergers' insurer sent Brook a medical card a week after the claim was filed.

The Wilbergers proposed to the Committee that the financial obligations of single workers should be taken into account when awarding benefits.

Ms. Flood, who going beyond the scope of her duties as Ombudsman has served as a liaison between insurers and death benefit beneficiaries in the past, is of the opinion that fatality claims should have a separate set of rules/procedures since adjusters sometimes will handle the claim apparently with a lack of sensitivity, but nonetheless adhering to existing rules and laws.

Presently very few of the families involved in fatal claims have contacted Ms. Flood with questions, and there is not one point of contact or "go to" person to whom beneficiaries of fatal claims can call. Moreover, there are "gaps" in the process: what is legally required from adjusters does not allow them to handle the situation delicately, and the information necessary to handle these claims appropriately is not readily available.

Committee members asked what is included in burial benefits; what it would take to close the "gap" mentioned; what the protocol for handling fatal claims would look like if there was one; what will be done and who will do it when fatal claims are denied; what are the additional needs identified in addition to what the Senate Bill requires; whether items included in the burial allowances could be subject to a fee schedule; and whether a lump sum disbursement could be appropriate when a worker with no beneficiaries suffers fatal injuries on the job.

Records Retention Subcommittee

Members: Greg Miller, Mike O'Rourke, Sheri Sundstrom

Speakers:

Mr. Jerry Managhan, DCBS Workers' Compensation Division

Ms. Jennifer Flood, DCBS Ombudsman for Injured Workers

Mr. Fred Bruyn, DCBS Workers' Compensation Division

In response to the Committee's request for information about records retention, Mr. Managhan gave a quick overview of what the laws of the State of Oregon require of the workers' compensation insurers:

- " Some self-insurers, with permission of the director of DCBS, may keep records outside of the state;
- " Insurers are not required to keep records onsite, but they are required to produce records within 14 days of request, 30 days if the records are offsite;
- " Insurer must keep all records until life of the claim has been exhausted (i.e. the worker has died);

- " Denied claims records may be destroyed after the denial is final by operation of law (all appeals have been exhausted);
- " After a certain amount of time, insurers may move files outside of the state as long as they are able to access them promptly if needed;
- " If the insurer cannot reproduce the file, the insurer has to recreate the file and process the claim/aggravation as if the insurer possessed the record.

Mr. Managhan went on to address and clarify some statistics presented, pointing out that complaints against insurers arise from workers who do not receive their files promptly after requesting a hearing, and from the division requesting information in order to address a dispute; that most complaints are resolved with a couple of phone calls; and that it is not often that records would disappear completely, as happened in the Johnston case.

Mr. Managhan, prompted by members' questions, explained that there is no "chain of custody." Ms. Flood pointed out that the Workers' Compensation Division has difficulty penalizing insurers for their inability/unwillingness to produce a file when there is no proof that they or their third-party administrators (TPA) ever had possession of the claims file to begin with.

It was also observed that, although not the keeper of the file, the division does keep some documents in its files, which are sometimes used by insurers to recreate their files when the latter have been lost. Members asked if it would be possible for the division to check on insurers' storage facilities/methods and ensure that due diligence is being applied in record keeping procedures.

Mr. Bruyn reminded the Committee that the main action sought from the subcommittee was to address Mr. Johnston concerns.

Multiple Jobs Subcommittee

Members: Linda Barno, Tracy Brill (absent), John Kirkpatrick, Sheri Sundstrom

Speakers:

Mr. John Shilts, DCBS Workers' Compensation Division

Public Testimony:

Mr. Chip Bartel, Special Districts Association of Oregon (SDAO)

Ms. Susan Laviere, Oregon Self-Insurers Association (OSIA)

Mr. Shilts gave an overview of concurrent benefits and coverage available for volunteer workers, and presented some data about what other states are doing about this subject.

Mr. Bartel and Ms. Lavier, who represent Special Districts of Oregon and the Oregon Self-Insurers Association respectively, gave a presentation in behalf of insurers and employers who pay the volunteer position's assumed wages to injured workers even though the workers are not losing any wages from their paid position.

Unlike in the supplemental disability benefits (SDB) system (where an injured worker who is unable to perform both the job-at-injury and the secondary job receives both wages up to the state maximum), a worker in a volunteer position receives his volunteer assumed wages even when the worker continues working in, and getting compensation from the for-pay job.

Ms. Sundstrom did not remember having a discussion about volunteer workers when the committee last spoke about multiple jobs.

Mr. Shilts explained the rationale behind the coverage for volunteers system: employers decide to pay a premium to their workers' compensation carriers that will guarantee volunteers will be covered as subject workers. In return, employers ensure that by paying these premiums, injured workers are limited to seek redress only through the workers' compensation system (exclusive remedy).

Members raised questions about what happens with SDB after aggravation, and about whether this may be an insurance underwriting issue.

Ms. Barno proposed scheduling a meeting to discuss the issue further.

Reconsideration Subcommittee

Members: Linda Barno, Greg Miller, Mike O'Rourke, Bob Shiprack (absent), Sheri Sundstrom.

Speakers:

Mr. John Shilts, DCBS Workers' Compensation Division

Mr. Jim VanNess, DCBS Workers' Compensation Division

Mr. Mike Manley, DCBS Information Management Division

Public Testimony:

Mr. Christopher Moore, Attorney-At-Law, Malagon, Moore & Jensen

Mr. Shilts gave an overview of the reconsideration process, including the percentage of claims that are appealed to the department, the Hearings Division, the Board, and the Court of Appeals. He also explained what timeframes apply when an injured worker requests reconsideration of his or her Notice of Closure to the Appellate Review Unit; the medical arbiter request process and what happens when the worker waives the right to an exam; the definitions of impairment and disability; and where the reconsideration process came from.

He recognized that tradeoffs were made in the adoption of the current process, that for some people the changes have been good, and that for others it has not. He expected many arguments to come forward on why MLAC should maintain, discard, or modify the current reconsideration system.

Mr. Shilts added that the Workers' Compensation Research Institute (WCRI) is publishing a report based on the Oregon Workers' Compensation system that will include information and recommendations on the reconsideration process.

Ms. Cutler asked if there was any part of the process that was receiving special attention or pressure, to which Mr. Shilts responded in the negative. The process, he said, just needed a revision since it had been 17 years since it was last evaluated, that there are groups with strong opinions on either side of the argument – those who would love to see the process stay, and those who would love to see it go.

Ms. Cutler expressed a desire to see the “numbers buried in the 17%” of injured workers that appeal their Notices of Closure to ARU. Mr. Shilts said he would provide information on who appealed and why.

Mr. Savage asked what the scope the appeal was, to which Mr. Shilts responded by explaining the appeals process, that once the Order on Reconsideration is issued, the record is reviewed *de novo* by the Administrative Law Judge (ALJ), but new evidence is not admitted – ALJ can only interpret the law, see that it was applied correctly.

Ms. Barno asked if the Medical Arbiter could testify at the hearing, to which Mr. Jim Van Ness, replied in the negative. He added that only the report submitted by the medical arbiter would be considered for the decision.

Mr. Shilts then clarified that WCD does not have a stake in the issue, that the division wants what is best for Oregon, to which Mr. Holston added that it is imperative that MLAC look at the issue since there is a lot of discussion at the legislature level.

Mr. Kirkpatrick, on the other hand, expressed a desire to know why cases were appealed all the way to the Court of Appeals.

To the question as to when the WCRI report would be available, Mr. Shilts replied the division was expecting to have it in October of 2006, after it was presented in Boston.

(The report, whose theme was “Lessons from Oregon,” focused on four areas – the reconsideration process was one of them; MLAC was another.)

Mr. Manley clarified that the reasons for the delay were believed to be related to the state of Montana contracting with a researcher to do some other pressing project and a researcher being ill.

Committee members asked for more research, statistics, etc. and Mr. VanNess pledged to obtain the documentation for which the members asked.

Mr. Christopher Moore expressed a dislike for the process, and clarified he did not have solutions for the committee, but concerns about the process that he would like MLAC to address.

First, Mr. Moore did not want to address the Permanent Partial Disability (PPD) rating, since the issue does not concern him.

Mr. Moore’s issue had to do with:

1. The timeframe for responding to the Notice of Closure (NOC): Mr. Moore would like to see the timeframe extended since 60 days is “unworkable” for him. For example: if he represents a worker before the worker received the NOC, he would have most of the information he needs at the time of closure. However, if the worker hired him right as the worker received the NOC, it takes Mr. Moore between two and three weeks to obtain information from insurer, then another week to obtain information from the doctor, etc.

2. Freezing the record at the start of the reconsideration process: Mr. Moore believes freezing the record creates a horrible problem, specially now that work disability issues are a part of the reconsideration process and lots of money are at stake. For example, overtime and per diem issues are complicated and many times, facts of the case are left out because of the freezing. Also, if the worker's Attending Physician or medical arbiter are not trustworthy, there is no way to rebut their opinions or reports.

Finally, he said, the reconsideration process is complex. The ideal would be to fix all of it, not just parts of it.

Ms. Sundstrom finalized discussions on the reconsideration process by urging members to take a look at what prompted the changes that have been adopted.

Significant Court Cases Subcommittee

Members: Linda Barno, John Kirkpatrick, Greg Miller, Bob Shiprack (absent), Sheri Sundstrom.

Speakers:

Mr. John Shilts, DCBS Workers' Compensation Division

Ms. Kathy Ostrand-Ponsiaen, DCBS Workers' Compensation Division

Ms. Sundstrom started the meeting by reminding everyone that the subcommittee was originally formed in response to the "arthritis case."

Ms. Ostrand-Ponsiaen concurred, going over the case of a worker who fell down the stairs at work but had the claim partially denied due to his/her arthritic condition being considered pre-existing.

Karjalainen

The issue in this case was brought forward by labor representatives.

A worker falls at work. Before the injury, he had never complained about back problems. His claim is accepted for low back strain. Six weeks later, however, partial condition is denied because of pre-existing degenerative disc disease.

An agreement was reached between labor and management that if a worker has never been treated for a condition, nor was that condition ever diagnosed before, then the condition could not be understood to be pre-existing UNLESS it was an arthritic condition.

The worker appealed the denial of his degenerative disc disease, which the court overturned. The court argued the insurer did not diagnose the pre-existing condition as arthritis (even if symptoms were the same). Although degenerative disc disease had been commonly considered synonymous with arthritis, the court determined that, for this case and for statutory purposes, the definition of degenerative disc disease used in this case was NOT the commonly used term, "arthritis." Now the court uses the definition of arthritis on a case by case basis.

Roberts

Although the injury in this case arose "in the course and scope" of the worker's employment, the insurer denied the claim because the injury happened while worker was engaged in recreational activities (motorcycle racing). The issue is one of exclusive remedy (Smothers).

Specialty Risk Services (SRS) v. Royal Indemnity

SRS mistakenly accepted a claim, and a back-up denial was not allowed. SRS sued Royal Indemnity for illicit enrichment, and the Court of Appeals said the Circuit Court would have jurisdiction over the case. This case presents an exclusive remedy issue. The question is whether the statute should address mistakenly accepted claims or leave it to civil courts to deal with it.

Ultimately, the issue is whether Workers' Compensation wants to have a say in ALL issues pertaining to the system, or whether it should leave the Circuit Court to deal with a monetary issue between insurers. Something to consider, however, is whether the Workers' Compensation's system of exclusive remedy would be eroded even more by an issue like this.

Ms. Barno wondered whether this case really fit the "exclusive remedy" arena since it does not involve a worker's accident per se, and whether it would fall more in line with business law.

Mr. Shilts added that there is no remedy available for a case like this within Workers' Compensation. The question, then, becomes whether we want to create a catch-all remedy for all issues involving the system's players.

Mr. Holston expressed a concern that the exclusive remedy under the workers' compensation system may be "chipped at the corners" because of cases like this – cases that are litigated outside of the Workers' Compensation system.

Ms. Sundstrom disagreed that this case presented an exclusive remedy issue at all. She opined that this case presented a disagreement between insurers that has nothing to do with the employer being covered, or the injured worker being covered...

Mr. Savaged wondered whether workers' compensation carriers wanted to resolve issues like this within Workers' Compensation.

Mr. Shilts voiced his concurrence with Mr. Holston's concerns that the exclusive remedy under Workers' Compensation may be eroded.

Ochs and Mohammedy:

Issues are whether attorney fees should be payable even though the claim was denied and there were no "amounts then due"; and whether attorney fees should be allowed when DCS is not complied with (WCD has no jurisdiction after claim is denied).

Meeting was adjourned at 3:20 p.m.