

**NOTICE OF PUBLIC MEETING
WORKERS' COMPENSATION
MANAGEMENT-LABOR ADVISORY COMMITTEE
SIGNIFICANT COURT CASES SUBCOMMITTEE**

October 10, 2008
9:00 a.m. – 10:00 a.m.
Conference Room 260, Labor & Industries Building
350 Winter Street NE, Salem, Oregon

Committee Members Present:

Linda Barno, ESIS, Inc., Portland
Tracy Brill, Portland Fire Fighters Association, Portland
Lon Holston, Laborers' International, Local 483, Portland
Greg Miller, Gunderson LLC, Portland
Mike O'Rourke, Plumbing and Steamfitters UA 290, Tualatin
Bob Shiprack, Oregon Building Trades Council, Portland
Sheri Sundstrom, Hoffman Construction Company, Portland

Committee Members Excused:

Kathy Nishimoto, Duckwall-Pooley Co., Hood River
Jeri Ray, Timber Products Company, Springfield
John Kirkpatrick, IUPAT District Council, Portland
Cory Streisinger, Ex-Officio Member, Department of Consumer and Business Services, Salem

SIGNIFICANT COURT CASES SUBCOMMITTEE

Sheri Sundstrom, subcommittee chair, called the meeting to order at 9:08 a.m.

Approval of the minutes from September 25, 2008 was suspended until the next subcommittee meeting due to clarification purposes.

Committee Discussion - Course & Scope Cases

Chris Davie, SAIF Corporation, presented a handout regarding course and scope language proposals on the Sisco v. Quicker Recovery case. At the last subcommittee meeting, Mr. Davie was asked to research the words used in his proposed language. Mr. Davie said lawful order shows up in a variety of places in statute. He also found the preferred term for a law enforcement official is "peace officer," which is defined in ORS 161.015 (4) and includes the definition of a police officer. He recommends amending his original proposed language to:

656.005 (7)(b) "Compensable injury" does not include:

(D) Injury the major contributing cause of which is the failure of the injured worker to follow the lawful orders of a peace officer, as defined in ORS 161.015 (4).

Mike O'Rourke said there are two sides to every issue.

Tracy Brill raised concerns about the proposed language. She asked what if a person does not hear a lawful order? Who decides whether the worker heard the order? Mr. Davie said originally the language he proposed said a claim is not compensable if it is committed during a crime. He mentioned questioning happens all the time and there is an appeals process to establish facts in a hearing.

Lou Savage asked if there was a definition of lawful order or peace officer in case law? Mr. Davie said he did not know. Mr. Savage requested case law definitions from Mr. Davie before reporting back to MLAC.

Ms. Sundstrom clarified what the subcommittee discussed at the last meeting. She emphasized it is important for subcommittee members to come to every meeting.

Lon Holston said he is struggling with the within the course and scope of employment. He believes in law and order but is not sure if one particular case should dictate changes to the law.

Linda Barno said the employer asked the employee to cooperate and the worker did not comply. Whether this is addressed now or later she believes this needs to be monitored in the system to make it fair.

It was agreed to bring this issue to the full committee and let a stakeholder pick up the issue.

Ms. Brill said she has a hard time with the language, if one officer gives an order then it is just hearsay until it goes through the court. In the realm of police writing, the report is not written on just the officer. She said if a worker does not comply with a command or maybe didn't hear it as a command, then they wouldn't get coverage.

Mr. Davie explained the proposal from the previous meeting regarding an insurer wrongly accepting a claim. He is still working on the language and is not sure if there is a fair solution for this problem.

Committee Discussion – Notice of Claim Cases & Statute of Limitations

Deborah Sather, attorney, proposed revisions of statute of limitations for filing claims under ORS 656.265 (Injuries) and 656.807 (Occupational diseases). Ms. Sather gave several policy reasons for having a statute of limitations. She said when a worker is injured, a problem arises in delivering that information to the employer in a sufficient way to inform the employer what, where, and how this happened at work. Ms. Sather proposes revising statute to clearly state that a worker must provide the employer with written notice of an accident within 90 days and must file a claim for benefits within one year of an injury. This involves changing references from “notice” to “written notice of an injury” and changing “claim” into a claim for workers’ compensation benefits.

Mr. Holston said he does not believe in an open ended ticket, but he would need to discuss this proposal a little more. He said the sooner workers' injuries are fixed the better things become.

Ms. Barno said the injury log says a worker has wrist pain but they don't get treatment. They continue their job and later they are in worse pain. The worker fills out an 801, when does the 60 days begin? From the first notice or from the date the 801 was filed? Ms. Sather said an injury log says what happened. She said a requirement for the log could be writing more detailed information when a worker is injured so the employer knows exactly what happened. This could be a check-a-box or just a requirement to write more details.

Mr. Holston asked who would be responsible for keeping the log? Ms. Sather said it is responsibility of management to take care of the log and the worker's responsible for letting the employer know about an injury and file a claim.

Mr. Savage asked if the division has the authority to mandate a log? Ms. Sather said she has not thought about it, but it might be an option.

Ms. Sundstrom said at Hoffman Construction Co. the job site employees have a checkbox on their timecards, which indicate they were injured on the job. Ms. Sather said an injury log is a very convenient way to be notified if a worker is injured. She said a worker should know before a year that they have an injury and then go to the doctor.

Mr. O'Rourke raised concerns about an injured worker who after the year time limit has a valid reason to file a claim. He asked if there can be extension? Ms. Sather said there are a few exceptions in the workers' compensation system. When there are exceptions, there must be a very good reason why the time limit is challenged.

Mr. Savage asked if someone got scratched during work and four months later the arm is swollen then they missed the 90 day deadline. What happens then? Ms. Brill gave an example of blood-borne pathogens. Ms. Sather said anytime skin is broken it needs to be logged and it's a big deal.

Ms. Sundstrom said she would like to get the Medical Advisory Committee's (MAC) opinion on this proposal as well. She asked if it is 90 days does something manifests or later?

Mr. Holston said there could be instances of repetitive injuries in a log but they missed the deadline. A statute of limitations and trying to define a date could prevent an injured worker from receiving care. He said employers should have proper logs. A statute of limitations would not be necessary if the employer had their own deal. He said there has to be a mechanism that makes good sense. He believes the subcommittee is on the right track and further discussion is good for both sides.

Mr. Miller asked what is the difference between the OSHA log and the first aid log? Ms. Sundstrom mentioned the OSHA 300 notice log is a federal requirement that tracks incidents that

happen on the job. She said the first aid log is valuable to inform employers and provide safety and prevention for injured workers.

Martin Alvey, Oregon Trial Lawyers Association (OLTA), said every case is individual and has individual circumstances. He said the Vsetecka case defined outside boundaries. The current statute is working for 98% of cases and adding a statute of limitations will bar many claims. Many people might file an 801 because they are not sure if the notice in the log will protect them. This will generate more claim process, attorney time, etc. He said the current system allows employers to do what they need. Mr. Alvey said the court of appeals is finally addressing what the lines and parameters are for the one case.

Ms. Sundstrom raised concerns that the interpretation of statute for this one case has enabled cases to be interpreted this way to infinity. She said this was most likely not the original intent.

Ms. Barno said she would like clarity for employers on when to file the first report. She said there is due diligence on the employee's and employer's part. It would be helpful to have clarity from the employer's perspective.

Chris Moore, OLTA, said he does not think the notice puts the employer at an obligation. He said the notice only requires the employer to investigate. If a claim is barred because it is not filed timely, the worker has no insurance and they pay for the bills out of their pocket. Some workers have a fear of losing their job if they file a claim. Mr. Moore said there should not be an arbitrary line drawn – there should be an escape valve in there.

Ms. Sather said the notice of accident and filing a claim are two separate things. She said a notice of accident is sufficient to trigger an employer to follow-up with the employee. Ms. Sather does not believe the system is working well if an employer gets blindsided with a claim after many years have passed.

Committee Discussion – Statute of Limitations & Occupational Diseases

Ms. Sather mentioned the courts have said the occupational diseases statute is very poorly worded, redundant, and does not work. Ms. Sather discussed her proposal for revision of Statute of Limitations for filing claims under ORS 656.265 (injuries) and 656.807 (occupational diseases). Ms. Sather said the problem with the current ORS 656.265 is the delivery of information regarding a worker's injury to the employer in context sufficient to inform the employer what, where, and how this happened at work. She proposed the language clearly state that a worker must provide the employer with written notice of an accident within 90 days and must file a claim for benefits within one year of an injury. This involves changing references to "notice" to "written notice of an injury" and changing "claim" into a claim for workers' compensation benefits.

Ms. Sather said from the *Freightliner LLC v. Holman* case, now the controlling Oregon law, a worker may delay filing an occupational disease claim until all four dates have occurred (date

disease first discovered, date disease should have discovered, date claimant is disabled, and date physician advises worker is suffering from an occupational disease). Recently the Workers' Compensation Board published decisions finding occupational disease claims timely if the worker was fully aware of the nature and extent of the occupational disease and had obtained treatment. Ms. Sather proposed amending the statute as follows:

ORS 656.807 Statute of limitations for occupational disease claims. (1) All occupational disease claims shall be void unless a claim is filed in writing with the insurer or self-insured employer:

- (a) within one year or whichever is the earlier of the following dates:
 - (i) the date the worker first treated for the symptoms of the claimed disease
or
 - (ii) the date the worker was first disabled, either temporarily or permanently, by the claimed disease; and
- (b) within one year of the date when, in the exercise of reasonable care, the worker should have discovered facts indicating the claimed disease was work-related.

Mr. Savage asked if it is reasonable to have a year to wait for the worker to go to the doctor?
Ms. Sather said yes it is reasonable.

Mr. Holston said what about a chronic cough? A physician would have no idea that the cough is work related until much later. The worker could miss all of these deadlines. He said he struggles with this deadline. Ms. Sather said she struggles with the deadline as well. Especially for workers that are exposed to chemicals in their work environment.

Ms. Sundstrom requested Michael Wood, OSHA Administrator, discuss the worker and chronic condition with MLAC at a future meeting. She would like to hear more about the boundaries of this proposal.

Martin Alvey, OTLA attorney, said the occupational disease statute has not been changed since 1987. He is concerned that Ms. Sather's proposed language will bar many claims.

Ms. Sundstrom mentioned if the law was working so well then there would not be interpretations of case law. She said the ramifications of this can be significant.

Ms. Sather said currently someone can be disabled, get medical treatment, know it's work related, and wait as long as they want to file a claim. She reminded members the court criticized the current occupational disease language.

Ms. Sundstrom requested the following for the next subcommittee meeting:

- 1995 boundaries

- Discuss if case law has changed the original intent of the law
- Michael Wood, OSHA, to discuss occupational injuries and diseases
- Medical Advisory Committee (MAC) to comment on injuries and occupational disease claims

Mr. Shiprack said before 1987 there was no occupational disease law. This legislation has not been looked at since then. He said for repetitive motion claims this legislation does not work at all.

Mr. Savage commended MLAC members on their high level discussion. He said their involvement in this process is very important.

Meeting adjourned at 10:31 a.m.