

# WORKERS' COMPENSATION MANAGEMENT-LABOR ADVISORY COMMITTEE

December 3, 2008  
10:00 a.m. – 12:00 p.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  
John Kirkpatrick, IUPAT District Council, Portland  
Greg Miller, Gunderson LLC, Portland  
Kathy Nishimoto, Duckwall-Pooley Co., Hood River  
Mike O'Rourke, Plumbing and Steamfitters UA 290, Tualatin  
Jeri Ray, Timber Products Company, Springfield  
Bob Shiprack, Oregon Building Trades Council, Portland  
Sheri Sundstrom, Hoffman Construction Company, Portland

## ***Committee Members Excused:***

Cory Streisinger, Ex-Officio Member, Department of Consumer and Business Services, Salem

Sheri Sundstrom, committee co-chair, called the meeting to order at 9:01 a.m.

Ms. Sundstrom requested that the minutes from October 17, 2008 be approved at the next MLAC meeting.

## ***Subcommittee Reports***

### ***Significant Court Cases***

The subcommittee is working with SAIF to discuss possible recommendations.

### ***Attorney Fees***

The subcommittee invited claimant's attorneys, Oregon Trial Lawyers Association (OTLA), SAIF, and others to present. The committee will have more to discuss in January from recommendations made by OTLA.

### ***Death Benefits***

Cara Filsinger, Workers' Compensation Division (WCD), circulated the draft death benefits report to the legislature for MLAC member review and feedback. There was one correction to the recommendations made by MLAC members to LC 790 Death Benefits. Legislative Counsel said the domestic partner language is not required to be updated in the section, that HB 2007 enacted is sufficient. Therefore, the concept was drafted excluding this recommendation.

## ***Reports from the Department of Consumer and Business Services (DCBS)***

### **Return-to-Work Program Update**

Barbara Smith, WCD, discussed updates to the Return-to-Work Program since the MLAC Interim Study in 2004. MLAC studied return-to-work programs and issues and made recommendations for program enhancements and options. Ms. Smith submitted an updated report for the record, which provided actions and outcome results since the recommendations made in 2004.

Linda Barno expressed her excitement about how well the program is going. She asked if there was an easy way to track which employers are utilizing the program the most. There was brief discussion about employers paying for eligibility evaluation, if the worker is released for work, and if the evaluation is necessary.

There was concern from MLAC members that some workers do not use the preferred worker card because of the stigma. Some workers may think if they use the card, then the employer will not hire them. Ms. Sundstrom suggested maintaining a list of employers that hire preferred workers, if they are willing to have their names disclosed, to negate some of the stigma.

### **Interpreter Services Project Update**

Kara Olsen, Interpreter Services Project Manager, WCD, reported on updates of the interpreter services project. As project manager, Ms. Olsen has outlined a project design and begun to gather information from the Department of Human Services (DHS). Ms. Olsen received information from Washington State regarding their interpreter services. Washington is doing a lengthy study on this issue now and agreed to share this information once it is complete. She is also gathering data from DCBS and the Workers' Compensation Board. Ms. Olsen will continue gathering information from other states, stakeholders, and health care providers, analyze them, and determine the fiscal impact of interpreter services added to the WCD system.

### ***Presentation & Public Comment on Proposed 2009 Legislation:***

The department presented the following concepts a second time for MLAC approval to print these concepts as bills:

- **LC 487 Vocational Assistance Streamlining:** streamlines several processes relating to workers' compensation vocational assistance programs. The bill clarifies certification of vocational counselors and provider organizations, allows disability payment extensions during vocational assistance, and consolidates administrative appeal language in the appropriate statute.

Discussion: No discussion.

**Action:** A motion was made and seconded to approve LC 487 to be printed as a bill. A vote was taken and the following members voted aye: Linda Barno, Greg Miller, Sheri Sundstrom, Kathy Nishimoto, Tracy Brill, Lon Holston, Mike O'Rourke, and Bob Shiprack. Due to John Kirkpatrick's late arrival, he abstained from the vote. Motion passed.

- **LC 488 Forum for Workers' Compensation Disputes:** clarifies that disputes in workers' compensation matters not otherwise specified should be resolved administratively within the workers' compensation system instead of being litigated in the courts.

Discussion: Mr. Kirkpatrick and Mr. Shiprack expressed concerns to the committee regarding this concept including exclusive remedy. Jerry Managhan, Deputy Administrator, WCD, and Shawn Miller, Liberty NW, explained the exclusive remedy and how it relates to this concept. Mr. Shiprack said he would like other stakeholders to look at the language once the bill is printed.

**Action:** A motion was made and seconded to approve LC 488 to be printed as a bill. A vote was taken and the following members voted aye: Linda Barno, Greg Miller, Sheri Sundstrom, Kathy Nishimoto, Tracy Brill, Lon Holston, John Kirkpatrick, Mike O'Rourke, and Bob Shiprack. Motion passed.

- **LC 489 Workers' Compensation Regulatory Streamlining:** streamlines several workers' compensation regulatory functions and shifts some regulations to be more outcome-based.

Discussion: No discussion.

**Action:** A motion was made and seconded to approve LC 489 to be printed as a bill. A vote was taken and the following members voted aye: Linda Barno, Greg Miller, Sheri Sundstrom, Kathy Nishimoto, Tracy Brill, Lon Holston, John Kirkpatrick, Mike O'Rourke, and Bob Shiprack. Motion passed.

- **LC 790 Workers' Compensation Death Benefits:** enhances death benefits for surviving family members by expanding the scope of the burial benefit and doubling it to 20 times the state average weekly wage; creating a new benefit for college-aged surviving children; and clarifying that if the worker has no surviving spouse or dependents, the insurer must pay the full remainder of permanent partial disability payments to the worker's estate.

Discussion: The Willberger and Behurst families will be acknowledged in the Death Benefits Report to the Legislature that Cara Filsinger is drafting. Lou Savage said Senator Vicki Walker was very receptive to this concept as well. Ms. Sundstrom acknowledged Jennifer Flood's, Ombudsman for Injured Workers, hard work and contribution to the death benefits concept.

Chris Davie, SAIF Corp., agreed the Death Benefits concept is a good product and the draft reflects the intention of the committee. Mr. Davie said there are a few questions that were left unanswered, which he will draft and share with the committee. Ms. Sundstrom said some of the questions could be remedied by Oregon Administrative Rules. She thanked Fred Bruyns, WCD, for attending the MLAC meetings in preparation for rulemaking needs.

**Action:** A motion was made and seconded to approve LC 790 to be printed as a bill. A vote was taken and the following members voted aye: Linda Barno, Greg Miller, Sheri Sundstrom, Kathy Nishimoto, Tracy Brill, Lon Holston, John Kirkpatrick, Mike O'Rourke, and Bob Shiprack. Motion passed.

Dr. Vern Saboe, Chiropractic Association of Oregon, introduced materials and a PowerPoint presentation submitted for the record regarding legislative concepts introduced by the House Business and Labor Committee.

- **LC 1297 Prohibits Employer Direction of Care:** This bill prohibits employers or insurers from directing or requiring the worker to obtain non-emergency medical services from a specific doctor, physician, nurse practitioner, occupational medical center, emergency care clinic, or other medical group, unless the worker is enrolled in a managed care organizations (MCO).

LC 1297 requires the director to assess the civil penalty when an insurer or employer directs an injured worker to obtain non-emergency medical services from a specified medical provider when the worker is not enrolled in a MCO.

Discussion: Dr. Saboe expressed concern to the committee that employers and insurers are directing and mandating where injured workers should go for non-emergency medical care. Dr. Saboe also asked WCD

to clarify when a worker receives an 801 with the 3283 printed on the back. Brian Light, Assistant Manager of the Compliance Section, WCD, clarified language in statute and rules concerning when a worker should receive an 801.

Kathy Nishimoto asked Dr. Saboe how he obtained the percentages in his presentation regarding the survey of injured workers directed by employers or insurers. Dr. Saboe confirmed he did not ask the workers specifically if they had been directed.

After discussion, some committee members suggested this issue is already addressed in statute or perhaps it can better be addressed by rule. It was suggested more outreach to employers to provide greater education regarding a worker's right to choose a provider would ensure they are not directed. There was concern the evidence provided by Dr. Saboe revealed a large number of workers being directed. Mr. Savage asked if there was a way to publish the orders issued as a deterrent to employers and insurers that choose to direct workers to specific providers.

**Action:** No action was taken.

- **LC 1300 Participation of chiropractic physicians in managed care plan:** requires an MCO to include any chiropractor on its panel that: 1) meets Oregon's licensing requirements; 2) is credentialed by a nationally recognized credentialing organization; and 3) agrees to comply with all the managed care organization's rules, terms, and conditions.

Discussion: Ms. Barno asked Dr. Saboe if the numbers presented in his PowerPoint were reflective of all workers' compensation injuries or spinal specific? Dr. Saboe said they were intermixed.

**Action:** No action was taken.

- **LC 1299 Participation of chiropractic physicians in managed care plan:** "come along provision" authorizes certain medical service providers to serve as primary care physicians for an injured worker enrolled in a managed care plan. Allows a worker who becomes subject to managed care plan to continue to be treated by certain medical service providers under certain circumstances.

Dr. Saboe proposed if an injured worker is a current patient of a chiropractic physician and the physician agrees to follow the MCOs guidelines, then the chiropractor is allowed on panel for that injured worker.

#### *Public Testimony*

Ramona St. George, President and CEO, Oregon Health Systems, Inc., commented on LC 1299 and LC 1300. Ms. St. George discussed operational and service delivery issues these concepts might affect. She mentioned: (1) there really are no complaints or access issues and workers seem to be satisfied with their care, (2) credentialing – most MCOs do not use credentialing because there are other issues that go into provider care such as history and case care examples. Ms. St. George said the costs associated with this and professional liability can be quite high. She said since last session the concept has not changed and she does not think it is necessary now.

**Action:** No action was taken.

- **LC 1298 Allows chiropractor to make findings of permanent impairment:** allows a chiropractor to make impairment findings when the chiropractor is the attending physician.

Discussion: House Bill 2756 (2007) removed chiropractors' ability to make impairment findings for the purpose of evaluating a worker's disability. The concept restores chiropractors' ability to make impairment findings, if serving at the attending physician at the time of claim closure. Ms. Sundstrom asked if MLAC agreed to this last session?

There was discussion of moving to the 6<sup>th</sup> edition for rating permanent impairment. However, Jerry Managhan said the edition must be thoroughly assessed by the department before moving to the 6<sup>th</sup> edition can be considered. This edition will change the definition of permanent impairment/disability. It was suggested this could be an interim project for MLAC.

**Action:** No action was taken.

### ***Legislative Concept Proposals – Oregon Self-Insurers Association (OSIA)***

Drew Hagedorn, OSIA, previewed two OSIA legislative concepts and submitted documents for the record. Mr. Hagedorn assured MLAC members OSIA will bring the concepts back for approval after they are drafted by Legislative Counsel. Susan Lavier and Anthony Miller, OSIA, discussed the following concepts:

1. Supplemental Disability Benefits (SDB):
  - a. Propose amending ORS 656.210 to avoid the unintended instance where a volunteer worker receives substantially more wage replacement than what they actually earned.
  - b. Propose a time limit for documentation for a worker to provide an insurer/self-insurer documentation establishing secondary employment and a time limit for production of verifiable documentation of wages from the secondary employer.
  - c. Propose sufficient authority for the Director to promulgate rules to address SDB distinguished from Temporary Total Disability and temporary Partial Disability. If this is not the case, OSIA proposes providing the Director explicit authority to address the issue.
2. Administrative Closure:
  - a. Propose permitting insurers and self-insurers to administratively close workers' compensation claims when a preponderance of the medical evidence establishes a medically stationary status for the worker and the physician has not provided ratings for closure within a statutorily defined period.
  - b. Propose possible right of appeal for workers who believe the insurer/self-insurer failed to establish a preponderance of evidence that an employee is medically stationary. The insurer/self-insurer would remain liable for any penalties or damages related to premature closure.

Jennifer Flood, Ombudsman for Injured Workers, expressed concerns regarding the administrative closure concept and determining a worker medically stationary.

Bob Shiprack asked questions and recommended OSIA present these concepts to the Medical Advisory Committee (MAC) and share MAC's opinion with MLAC.

***Public Comment***

Marshall Coba, Oregon Society of Physician Assistants, and Ben Johnson, practicing Physician's Assistant (PA) in Grants Pass, discussed a potential legislative concept concerning physician assistants. Mr. Johnson pointed out two issues:

1. MCOs make their own rules and OHS in particular requires a physician to see patients every other visit. The physician assistants work as a team with the physician. This requirement creates logistic problems rurally.

Ms. Sundstrom recommended, if the issue cannot be resolved with the MCO, to bring it to the attention of the WCD Administrator John Shilts and the DCBS Director.

2. "Come Along Provision" – Physicians and PAs would like the injured workers to have a choice to stay with the physician they are working with even if they change MCOs.

Mr. Shiprack asked about the status of the temporary rule regarding medical providers. Mr. Managhan explained the department held hearings for the rules on providers and are working on the gathering testimony for adopting the permanent rule on January 2. He said the comment period has closed.

Ms. Barno asked about the status of the firefighter bill on constitutional issues. Hasina Squires, Special Districts Association of Oregon, discussed the Attorney General's opinion and mentioned she would forward information to members. Ms. Squires said when session begins she can provide a fiscal impact to the committee. She is happy to discuss the firefighter presumption legislation with the new MLAC members.

Meeting adjourned at 12:25 p.m.