

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

January 15, 2008
10:00 a.m. – 11:30 a.m.
Conference Room 260, Labor & Industries Building
350 Winter Street NE, Salem, Oregon
(A map is available upon request)

Committee Members Present:

Linda Barno, ESIS, Inc., Portland
Tracy Brill, Portland Fire Fighters Association, Portland (via telephone)
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
Cory Streisinger, Ex-Officio Member, Department of Consumer and Business Services, Salem
Sheri Sundstrom, Hoffman Construction Company, Portland

Committee Members Excused:

Ellen Cutler, Harry and David Operations Corp., Medford
Bob Shiprack, Oregon Building Trades Council, Portland

Sheri Sundstrom, Committee's Co-Chair, called the meeting to order at 10:07 a.m.

Meeting minutes

Meeting minutes were approved, without changes, by all members present.

Mr. Holston announced for the record that he would join the Multiple Jobs and Death Benefits subcommittees.

Legislative Issues

2008 Session: Mt. Bachelor volunteers – John Shilts

The case Mt. Bachelor Ski Education Foundation v. Employment Department, which was originally introduced at the Oregon House of Representatives' Committee on Business and Labor, may have some workers' compensation implications. There exists some concern about the outcome of the case, which was decided by the Court of Appeals in favor of the Employment Department.

The Workers' Compensation Division was asked to put together an opinion with input from MLAC. The Business and Labor Committee will try to address issues arising from the Court of Appeals decision during the February Supplemental Session.

Mr. Lou Savage added that the February session will move rather quickly, and that the present meeting was scheduled so that MLAC could issue an opinion before the Business and Labor met

again on January 22, 2008. The February Session's procedures will not differ from the regular Legislative Session's.

Mr. Shilts summarized the facts of the case:

Mt. Bachelor Ski Education Foundation (MBSEF) required volunteers to attend ski events, in exchange for which volunteers received a season pass. The Employment Department claimed the ski season passes constituted "wages" for which MBSEF was responsible to pay unemployment taxes. MBSEF, on the other hand, claimed the season pass were not wages, and therefore refused to pay unemployment taxes. The Court of Appeals sided with the State and found that MBSEF was indeed providing "wages" to its volunteers.

There is concern about the impact of the Court of Appeal's decision in regard to volunteerism. In regard to workers' compensation, the policy issues are fairly straightforward: Many employers elect to provide workers' compensation coverage for volunteers who may or may not be subject to workers' compensation laws. In exchange, the employer retains its exclusive remedy.

However, the non-profits and the employers who rely on volunteers may find the expense of providing coverage to their workers discouraging. Insurance coverage provides a benefit and protects employers from tort liability, but it is expensive.

Legislative Concept 76, which the WCD received from Legislative Counsel on January 14, 2008, proposes a narrow solution to the issues that arose in the case. First, ORS 653.020 (Employment statute) will be modified to exempt ski volunteers from employment definitions and requirements; and second, ORS 656.027 (non-subject workers exemption under Workers' Compensation) will be modified to include the language, "a person who receives no wage other than ski passes for performing volunteer ski patrol activities and ski area program activities performed by ski operators (under ORS 30.970) or by a non-profit organization."

Section 2 and Section 3 of the LC were similar in content because of sunset provisions.

Mr. Kirkpatrick said he would be comfortable following the Employment Department's lead. Mr. Miller agreed, citing similar situations with golf resorts. He believes there will be fallout in the future if the issues are not addressed promptly.

Mr. Savage commented that interested parties were discussing the possibility of having a "more robust" bill. However, the February Session is too short, and the specific issue deals with ski volunteers, so the decision was to deal with the issue at hand now, and leave the implications for later.

It was pointed out that many employers elect to provide coverage even when they are not required to do so – the idea behind elective coverage is avoiding other types of liability. This bill would not result in a rush of employers electing coverage for their volunteers, but it allows those who *want* to provide volunteer coverage to do so.

Ms. Sundstrom called for a roll-call vote on whether to support LC 76. Vote: 6 Ayes, 2 excused (Cutler and Shiprack)

2009 Session: HB 2756, Scrivener's error – John Shilts

Legislative Counsel informed WCD that HB 2756 contained an error.

There are medical professions that are subject to time limits when treating an injured worker. MLAC had agreed that HB 2756 would make all time limits consistent, starting on the day of the first visit. However, due to the scrivener's error, some time limits continue to start on the date of injury, not the day of the first visit.

Thus, the Workers' Compensation Division would recommend to the 2009 Legislature that the scrivener's error be corrected. The error cannot be corrected by rule.

The motion to approve a correction of the scrivener's error passed. Vote 6 Ayes, 2 excused (Cutler and Shiprack).

Subcommittee updates

Multiple Jobs Subcommittee

Ms. Barno reported one work meeting had taken place for the Multiple Jobs Subcommittee on November 28, 2007. At the meeting, various organizations presented issues of interest.

The work group agreed that "the devil is in the details," and that further discussion was necessary.

Reconsideration Subcommittee

Mr. Shilts recommended that the Reconsideration Subcommittee follow the review process the MLAC Vocational Assistance Review Subcommittee followed previously, since both processes function similarly.

The WCD could present results from surveys of injured workers and stakeholders and a discussion paper from focus groups, much like it did for the Vocational Assistance review.

Ms. Sundstrom reiterated MLAC's goal is not to necessarily change the reconsideration process, but merely to review it. She and Mr. Shiprack would like to "look at it and ... see where we are at, is there case law that has changed it, should [the process] be enhanced?"

Mr. Savage and Mr. Shilts recommended – rather than focusing on options – asking the public and stakeholders to provide testimony and input.

Ms. Sundstrom expressed a desire to receive more information from the Workers' Compensation Division about what has changed since reconsideration's inception 17 years ago.

Death Benefits Subcommittee

Ms. Jennifer Flood, Ombudsman for Injured Workers, attended a December 11 meeting to discuss communication issues revolving around fatality claims, and to gather information and ideas about possible solutions.

The main communication barrier between parties to a workers' compensation fatality claim seems to be knowledge. She mentioned, for example, that insurance companies do not find out about a death on the job until they see it in the media, and that funeral directors fail to recognize when a death may be related to an on-the-job injury.

Through all of this, she said, her office wants to implement new ways of communicating with families about fatalities on the job. To start, she may obtain information from the National Guard about formal procedures currently in use by the organization for communicating with the families of deceased soldiers.

Additionally, OR-OSHA has started letting Ms. Flood know of recent fatal injuries. Unusually, there had been four fatalities during the week prior to this meeting, totaling five this year. One case involved a Spanish-speaking family. Issues in this case included transportation of the body back to the worker's home country, questions regarding what members of the family qualified as dependents of the worker, and compensation workers injured/killed on the job who were undocumented and resided illegally in the country.

In another case, however, Ms. Flood's involvement was limited to helping the insurer communicate with the funeral home.

Her recommendations include:

- Continue with outreach
- Institute formal procedures, as needed
- Develop a simple, easy-to-understand, informational brochure
- Look at the administrative rules to see where the rules need to "make sense" for fatality claims; carve out a section for fatalities
- Look more closely at claim closures
- Develop, with the help of insurers, an adjuster's guide that would give claims processors the tools, resources, and best practices guidelines they may need to deal with fatal claims.

Ms. Flood also touched on what is included in fatal benefits. Her recommendation is to pay out a set amount that the survivor(s) can use in any manner they consider appropriate.

Mr. Savage wanted to know what funeral directors know about the workers' compensation system.

Ms. Flood replied that there is no significant knowledge at all – funeral directors have no idea as to what the family is entitled in a burial benefit.

Ms. Sundstrom asked about the quantity of funeral homes in Oregon, to which Ms. Flood replied by pointing at the “little book” provided by the Oregon Funeral Directors Association (OFDA), which includes all funeral homes in the state.

Mr. Kirkpatrick asked whether other states had standardized costs, and Ms. Sundstrom wanted to know about set amounts.

The WCD will start developing notices and advisories, with the insurers.

Committee members thanked and commended Ms. Flood for her excellent work, and brought the issue of parents not receiving any money, wondering what had happened to a provision that, until 1995, provided for payment to parents.

Ms. Barno also suggested looking employers who do not have a workers’ compensation or safety manager to guide employers through the proper procedures.

WCD Administrator Report

Clarke v. OHSU: New Supreme Court decision dealing with medical malpractice. The case cited Smothers, and emphasized the importance of exclusive remedy. Workers’ compensation seems to be on firm legal footing.

SRS v. Royal: This case could erode exclusive remedy, and the Significant Court Cases subcommittee may want to consider the policy implications that the case brings forth – there is no forum inside the workers’ compensation system for disputes between insurers.

The policy question is whether a specific or general language in statutes would provide a forum within the workers’ compensation system to hear cases that would otherwise fall outside of the jurisdiction of workers’ compensation.

Committee assistant will e-mail to MLAC members viable dates for future meetings.

Meeting was adjourned at 11:30 a.m.