

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

March 14, 2008
10:30 a.m. – 12:00 noon
Conference Room F, 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
Lon Holston, Laborers' International, Local 483, Portland
Greg Miller, Gunderson LLC, Portland
Mike O'Rourke, Plumbing and Steamfitters UA 290, Tualatin
Sheri Sundstrom, Hoffman Construction Company, Portland

Committee Members Excused:

Ellen Cutler, Harry and David Operations Corp., Medford
Bob Shprack, Oregon Building Trades Council, Portland
Cory Streisinger, Ex-Officio Member, Department of Consumer and Business Services, Salem
John Kirkpatrick, IUPAT District Council, Portland

Sheri Sundstrom, subcommittee chair, called the meeting to order at 10:30 a.m.

Ms. Sundstrom started the meeting by stating the purpose of the meeting; that additional information was being provided by the (Workers' Compensation) Division about significant cases affecting the Workers' Compensation system. She asked the division and those present "spread the word" about significant cases so that everyone that wants a chance to participate can do so at the subcommittee level.

The agenda will cover some cases that law firms have brought forth; Cathy Ostrand-Ponsioen will summarize them; Norman Cole from Sather Byerly and Holloway will present the attorneys' standpoint; and then the subcommittee will open up public comment.

At the end of meeting, the committee will come up with additional dates for subcommittee meetings.

Lou Savage introduced, and everyone welcomed, Kristen Miller, the new committee assistant who will replace Vio Rubiani beginning on April 10, 2008.

Summary of Cases – Cathy Ostrand-Ponsioen, Workers’ Compensation Division

Following a request from this subcommittee, the Workers’ Compensation Division, reached out to stakeholders in search of significant court cases they would want MLAC to consider. Specifically, WCD sent out an e-mail to the Workers’ Compensation Section of the Oregon State Bar. Debra Sather, from Sather Byerly & Holloway, brought up the cases that are presented today. The summary of the cases was presented as follows (from handout):

Godfrey v. Fred Meyer Stores, 202 Or App 673 (2005).

ORS 656.265 requires that a worker give the employer notice of an accident resulting in injury or death. The issue in this case was whether a worker’s oral report of an injury to her employer was legally sufficient notice.

The worker orally advised her supervisor that she injured her wrist at work the day before. The supervisor then made an entry into the employer’s computerized database under “Employee Incident Report.” More than a year later, the worker filed a written claim, which the employer denied. The employer argued that the statute requires a worker to submit written notice within 90 days of an accident, or within one year if the employer knew of the injury. The worker argued that she was only required to provide notice within one year, and the notice does not need to be in writing. The board upheld the denial.

The Court of Appeals, noting that the drafting of ORS 656.265 is less than perfect, examined the text of the statute and discussed two possible interpretations. Under the first possibility, the worker’s notice to the employer of an accident or injury must be in writing. Under the second possible interpretation, notice of an injury may be given in one of three ways: 1) written notice apprising the employer when, where, and how an injury has occurred; 2) a report or statement secured from the worker concerning an accident which may involve a compensable injury; and 3) use of a form prescribed by the director. The court concluded that under the second way of providing notice – a report or statement secured from the worker – the notice need not be in writing. Noting that the purpose of the notice is to ensure that employers obtain enough information to enable them to determine whether to investigate an accident, the court concluded that an oral report from a worker is sufficient, if it contains the required information. Accordingly, the worker’s notice was timely.

On remand the board set aside the employer’s denial of the claim. The board noted the distinction between timely notice of an injury and timely filing of a claim.

In the Matter of the Compensation of Jose Amador, 59 Van Natta 2115 (2007).

In this Order on Reconsideration the board, citing Godfrey, rejected the employer’s argument that ORS 656.265(4) requires a claim to be filed within one year of the accident, stating that ORS 656.265(4) refers to notice of an accident, but does not impose a requirement regarding the timeliness of claim filing.

Freightliner LLC v. Holman, 195 Or App 716 (2004).

At issue in this case was whether the worker’s hearing loss claim was timely filed. During his 29 years working for the employer, the worker was regularly exposed to loud noise. He knew he suffered from work-related hearing loss although he did not have medical confirmation, nor was

his condition disabling. He filed a workers' compensation claim six years after leaving his employment. Shortly thereafter his physician verified that he had work-related hearing loss. The employer denied his claim as untimely. An ALJ set aside the denial and the board affirmed.

*The Court of Appeals, again noting the "imperfect drafting" of the statute, examined the text and context of ORS 655.807(1), which provides that an occupational disease claim must be filed by the later of one year from the date the worker first discovered or should have discovered the occupational disease or one year from the date the worker becomes disabled or is informed by a physician that the worker has an occupational disease. The court concluded that the start of the one-year limitation period is suspended until the last of the four events occurs. The court stated, "[E]mployer argues that ORS 656.807(1) as interpreted by the board creates a potentially limitless statute of limitations * * *. That argument, however, must give way to the statute's textual indicators and its legislative history." *Godfrey v. Fred Meyer Stores*, 202 Or App 673 (2005).*

Ms. Sundstrom reminded attendants and participants that this subcommittee was created to look at cases that have potential for changing the original intent of the statutes. She asked that people please keep in mind that original intent when discussing the cases.

Mr. Holston asked who was the "gatekeeper" in relation to sufficient information (who is in charge of determining what "sufficient information" was).

Ms. Ostrand-Ponsioen replied that the issue was really whether the information given to the employer in relation to an at-work injury "provides enough detail" for employer to figure out that a claim must be filed. She mentioned the *Vsetecka* case *Buzz Vsetecka*, 56 Van Natta 3872 (2004). (ALJ found a wrist injury was timely filed even when the entry in the employer's accident log did not answer the "how" question).

Lou Savage, Committee Administrator, asked for clarification as to whether oral notice is sufficient but only if it contains enough information?

Ms. Ostrand-Ponsioen answered that there is not enough case law to determine whether oral or written are sufficient in themselves. Either may be OK depending on other factors.

Attorney's viewpoint – Norman Cole, defense attorney, Sather, Byerly & Holloway, LLP

Mr. Cole argued for a change in legislation because current statutes are difficult to understand, definitions lack consistency, and cases provide endless opportunities to file claims.

He made a point that when workers get hurt, they file a claim. The statute talks about definitions, but makes no distinction between notice and claim filing. It also talks about knowledge of an injury, but not to what degree knowledge is sufficient to constitute an equivalent to filing a claim.

Further, he said, ORS 656.265 says "notice of an accident must be given." He wondered why the statute does not just allude to a claim having to be filed instead.

The interchangeability of the words “claim,” “notice,” and “knowledge” makes them blurry and indistinct.

Thus, his suggestions are as follow:

1. Create a definition of “initial claim.” For example: “A written request for compensation for injury or disease that employer receives.” Forms 801 and 827 would constitute sufficient documentation to file a claim.
2. Define the time in which a claim can be received. It does not matter whether that timeframe is 90 days, one year, two years, etc. – but the timeframe must be defined clearly.

When an injury on the job happens, a number of things take place: disability, need for medical attention, inability of a worker to do a job, impairment – whether it affects the worker’s capacity to earn wages or not. The time limit, whatever that is, should begin no earlier than the earliest of those events.

Ultimately, the question to answer would be: What event should start the clock?

3. Define the circumstances under which time limits may be extended. For example, if a worker does not know that a condition they suffer is related to his or her employment until something happens, say the doctor tells him or her – at that point the worker has knowledge. Since the worker does not acquire that knowledge within a set timeframe, why not accommodate those circumstances and extend the timeframe during which he or she can file a claim? After the worker reasonably should have known, then the time can start running.
4. Enact statute of ultimate repose, some moment in time after which no filing of a claim would be allowed, no matter what the circumstances. Of course, there should be exceptions for latent diseases, and allowances for employees whose employers intimidate them into not filing claims.

Ms. Sundstrom had specific concerns over the “knowledge/notice” differentiation. When someone gets hurt, she said, she wants to know immediately because of safety concerns. If the statute is changed, her concern was that the employer will lose its foothold.

With that, she opened the floor for discussion.

Mr. Miller thanked Mr. Cole for explaining his position. He added that the issue comes down to documentation. The onus is on the employer – if the employee reported carpal tunnel, for example, the notice is given to the supervisor the moment the employee said it hurts.

Mr. Cole replied that giving notice to the employer is a good thing, but distinct from a claim. In a claim, the worker says “I hurt *and* I want to file a claim.” He added that if time limits are going to be created, then we must distinguish claim from notice for the purpose of these time limits;

that the employee can give the employer notice for many things without that notice amounting to a claim; and to take into consideration the Longshoreman Act, where notice and claim are clearly distinct, with the notice not requiring filing of a claim. Oregon, he said, has blurred the line between notice and claim.

Ms. Barno agreed with Mr. Cole that a notice is very different from a claim.

Mr. Cole gave an example: if a worker's wrist starts hurting, she tells the employer, then goes to the doctor, and 18 months later files a claim. In this case, the timeframe to file a claim should start running from the date of the notice. He encouraged the Committee to define what is what, and which event starts the time running.

He added that giving notice is not really the issue, that the claim filing is the issue. It is necessary to define what a claim is – a document writing that expresses an intention and a desire by the employee to receive compensation for an at-work injury.

Mr. Savage suggested a “look at reality.” He wondered if most workers would know that giving notice does not start their claim.

Ms. Brill asked whether the issue would be resolved if the notice and claim concepts were separated, time limits imposed, a difference made between the concepts, or a clear definition of “claim” made.

Mr. Cole emphasized his point that a claim needs to be in writing, which is the only way to clarify the definition of “claim.” A specific definition is also needed as to when to file the claim (which would be when medical services are needed). The statute should allow an extension of time for the worker to file a claim when the worker does not know that his at-work injury is not related to work, etc.

Mr. Cole also expressed a desire to have “an absolute deadline.” He mentioned that currently, there is no vindication on timeliness for employers because statutes have been interpreted in a way that results in timeliness issues hardly ever being thrown out during litigation. He doubted this was the intent of the legislature.

Mr. Savage asked whether this issue was harming insurers.

Mr. Cole responded in the affirmative. Frequency and costs of claims go into figuring out premiums. The problem with statute as it is being interpreted is that there are opportunities for the worker to come back and file a claim after years of injury; but the insurer has not factored in that potential future cost or premiums to be recovered, and has no way of evaluating.

Ms. Sundstrom asked what the statistics looked like in cases like these. Are there other cases? How often do these problems come up?

Mr. Holston wanted to know how many injuries vs. occupational diseases.

Mr. Miller shared an anecdote of a 1943 claim for exposure to asbestos his company just received. The injured worker was deceased, and the widow was applying for benefits. He wondered it would be possible (and right) to put a time limit on cases like those.

Mr. Cole said the time limit is a matter of policy and one with which he does not want to interfere; but he does want clarification.

Chris Davie, SAIF Corporation

The courts have stretched this issue to the limit and he has concerns. Mr. Davie would like to see a new statute, not just the change of one or two words. He is here to support the Committee and would be happy to work with Committee to solve issues.

Ms. Sundstrom asked Mr. Davie his thoughts on the worker giving written notice. She gave the example of her own company's procedures the worker having to notify the employer in writing of an injury, precisely for the purpose of referring back to it if a claim is later filed. If the worker does not notify in writing, then an investigation is not completed, and future safety issues cannot be addressed. Notice in writing at the time of injury is important.

Mr. Davie said before 1995, the worker had to file a claim or give written notice to the employer within 30 days of the injury with some exception. The 1995 amendments, however, changed the 30 days to 90 days and notice could be provided orally, but claim must be filed within one year. For some claims, like carpal tunnel and asbestosis, one year may not be enough. This is why he asks the Committee to look at the statute and start afresh.

Ms. Sundstrom said there is a stigma about filing a claim, so convincing workers to do it is difficult. There is no stigma associated with just giving notice to the employer, however, so it is easier for a worker to do that instead.

Ms. Barno offered that a notice was a "bookmark" until the worker decided to file the claim.

Mr. Holston asked if there was a dollar amount trigger for the claim. (In his experience, some employers had reimbursed the worker for their medical expenses without going through the claims process.)

Ms. Sundstrom and Ms. Barno quickly said that in Oregon, stepping out of the workplace to get medical care was the trigger. A claim MUST be filed once the worker requires treatment.

Mr. Davie clarified. When the worker goes to a medical provider, he files a Form 827 after telling the doctor that the injury happened at work. The doctor then sends the form to, say, SAIF and SAIF processes the form as if it was a form 801.

Mr. Savage asked if Mr. Davie's concern was with those workers who do not go to the doctor right away. Mr. Davie responded in the affirmative.

Mr. Holston asked Mr. Davie about the handout, which mentioned four cases. Mr. Holston wanted to know which four were proposed by SAIF, to which Mr. Davie clarified that two of

them, *Karjalainen* and *Freightliner* were there, and the other two will be presented at the next meeting.

Ms. Sundstrom asked if SAIF and Ms. (Debra) Sather could work together on future cases and bring them to the committee.

Mr. Davie said he would get in touch with Ms. Sather's office to work something out.

Mr. Miller said information about what other states do might be helpful, and asked WCD to put something together for the next meeting.

Ms. Ostrand-Posioen agreed.

Committee members talked about schedules for following meetings.

Cara Filsinger from the Workers' Compensation Division reminded the Committee that the study on Death Benefits was not due to the Legislature until January 2009, and that the study did not demand legislation, unless the Committee felt legislation was necessary. The WCD has a placeholder for just that purpose for the 2009 Legislative Session.

All-day subcommittee meetings were tentatively approved for April 10, and May 30.

Meeting was adjourned at 11:55 a.m.