

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

March 19, 2008
1:00 p.m. – 3:00 p.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
Lon Holston, Laborers' International, Local 483, Portland
John Kirkpatrick, IUPAT District Council, Portland
Mike O'Rourke, Plumbing and Steamfitters UA 290, Tualatin
Bob Shiprack, Oregon Building Trades Council, Portland
Sheri Sundstrom, Hoffman Construction Company, Portland
Lou Savage, Senior Policy Analyst, DCBS, Committee Administrator

Committee Members Excused:

Tracy Brill, Portland Fire Fighters Association, Portland
Ellen Cutler, Harry and David Operations Corp., Medford
Greg Miller, Gunderson LLC, Portland
Cory Streisinger, Ex-Officio Member, Department of Consumer and Business Services, Salem

Speakers:

John Shilts, DCBS Workers' Compensation Division
Jim Van Ness, DCBS Workers' Compensation Division
Mike Manley, DCBS Information Management Division

Public Testimony:

Christopher Moore, Attorney-at-Law, Malagon, Moore & Jensen
Mark Davison, Oregon Self-Insurers Association

RECONSIDERATION SUBCOMMITTEE

Bob Shiprack, subcommittee chair, called the meeting to order at 1:04 p.m.

***DCBS Survey Results About Appellate Review Unit Services –
John Shilts, Jim Van Ness & Mike Manley***

Mr. Shilts introduced the DCBS survey results regarding the Appellate Review Unit (ARU) Services. The survey is part of the record. Mr. Manley explained the results of the survey that assessed the three major customer groups of ARU from 2006: injured workers, attorneys, and insurer claims examiners. Survey objectives were to assess the strengths and weaknesses of the ARU Services to determine how to improve the reconsideration process and secondly to reach

out to customers and obtain a majority opinion. Mr. Manley further reflected on the weak results concerning the customers perspective on ARU business practices.

Lou Savage, Committee Administrator, asked for the speakers to give a brief overview of what the Appellate Review Unit (ARU) does so that people can understand the background and be on the same page with survey information.

Mr. Van Ness explained the ARU process for reconsideration and the involvement of the medical arbiter. A customer will receive Notice of Closure from the insurer and has 60 days to appeal for a reconsideration. When the ARU receives a request for reconsideration they send letters to the customer, insurer and any attorneys involved notifying them the process has begun. Reviewers will either issue an Order of Reconsideration or delay for 60 days further if they need more information such as scheduling a medical arbiter exam. The appellate reviewer will review all reports and information from all parties involved and then issue an Order on Reconsideration.

Mr. Shiprack clarified Mr. Van Ness that 2/3 of the ARU cases deal with medical arbiter issues that involve extended issues such as permanent disability or impairment.

Mr. Manley continued explaining the ARU survey process and results. Management was asked to work with the Information Management Division (IMD) on the sample. The 2006 participants in the reconsideration process were included in the sample: claims adjustors, attorneys, and workers. The survey was based on two cases: random sample for the worker participants and all the attorneys and claims examiner customers were surveyed. Initial contacts were made with a pre-notification letter, mailing of survey questionnaire, and they had options to reply by mail or online. When the initial letters went out there were many questions that came up about the survey so the letter was rewritten to better explain the process. Finally, there were more mailings and phone call follow-ups for non-respondents.

Results reflect a very low response rate of 15% from the worker group. This raises questions about the workers that did respond, that they might have responded for different reasons.

Mr. Manley discussed the figures in the survey concerning impartiality, overall customer service, timeliness, accuracy, helpfulness, and availableness of information.

One problem with the results in terms of attorneys and insurers – they have much more communication with ARU than the workers do. Therefore, it is very hard to interpret the results for the workers group for much of the survey, especially in terms of the workers contact with ARU.

Mr. Savage asked if there were several claim examiners with the same insurer. It may be that even within the same insurer different claim insurers may have different perspective of the process.

Mr. Manley explained that the workers that have gone through the ARU process over 90% are represented by an attorney and they do most of the work when they come through reconsideration. Therefore, the worker might not feel that you have something to say or no

interest. Mr. Manley added that the attorney is handed everything or the insurers handle the reconsideration process so the worker has very little involvement.

Mr. Manley suggested lessons learned from the survey, mainly if they were to do another survey they would separate the workers from the attorneys and insurers and inform them about the process. This ensures that they understand the ARU process. Workers would be surveyed separately in the future and the survey would not be as long.

Mr. Shilts added it was a great learning experience for future assessments. He mentioned that an emphasis can be placed on workers association with the ARU process through the medical arbiter. He believes this could be a good way for the workers to connect with the process since the low worker response might suggest that they did not respond because they did not understand or have direct involvement in the process.

Mr. Savage asked about workers' responses to surveys in the past on process. He related that human nature would be if you got a lousy result the process stunk. Mr. Manley mentioned that it was a consistent problem in assessment.

Mr. Shiprak recalled a past survey, Access to Care Providers, where workers satisfaction was high.

Major Changes to the Reconsideration Process Since 1990 – John Shilts & Jim Van Ness

Mr. Manley then went on to review legislation that made major changes to the reconsideration process since 1990. These include: 1990 SB 1197, 1995 SB 369, 1997 SB 118 and SB 119, 1999 SB 220, 2001 SB 485, 2002 SB 297, 2004 SB 285, 2005 SB 757 and 2006 HB 2408.

Ms. Sundstrom clarified that there hasn't been an increase of reconsideration requests as a result of SB 757. Mr. Manley agreed that there has not been an increase. Actually he said there has been a decrease in the number of disabling claims but the percentage 15% to 17% that reconsideration sees remains the same.

Mr. Shiprack questioned if the worker is unhappy with the reconsideration process what percentage of the order is appealed? Mr. Manley replied that 1/4 are appealed and the number of appeals is going down.

Mr. Savage asked how many of those appeals are reversed. Mr. Manley answered they are trying to pull the statistics but they did know that 30% of that 25% actually get written. Mr. Shilts added that they are hoping to be back with that information soon.

Issues with the Reconsideration Process from an Attorney's View - Christopher Moore

Mr. Moore, an attorney specializing in injured workers for workers' compensation, discussed 2 areas of permanent disability: substantive law of permanent disability and the process by which disputes of permanent disability are resolved. Mr. Moore focused on the process of disputes of permanent disability only.

Mr. Moore slightly disagreed with the department on the changes made since 1990 regarding SB 369 in 1995. According to Mr. Moore, SB 369 was not approved by MLAC. He does not know how changes can be seen as a clarification.

Mr. Shiprack stated for the record that Labor opposed SB 369.

Mr. Moore discussed the problems he sees with the reconsideration process. Fewer attorneys are willing to get involved with reconsideration process because of the difficulty of going through it in a meaningful way. Mr. Moore thanked the committee for their hard work.

Mr. Moore continued explaining hypothetically how a worker would come to his office and go through the reconsideration process. First, he assumes the injured worker is unrepresented and on day 1 the Notice of Closure issues. Once the notice issues the 60 days to request reconsideration begins. Then he assumes the worker is able to get attorney the next couple of days after Notice of Closure. This is most likely 3-5 days after the notice of closure is issued. The request for discovery goes out and the insurer, under Administrative Rules has reasonable amount of time to provide information so approximately they have 2-3 weeks of production. That means he only has a month to challenge the Notice of Closure.

Mr. Moore continued, once discovery is received he must make sure all the pertinent information is there including information from the attending physician. He said there are other issues: can the worker return to regular work? Also, the wage rate is important for calculation of permanent/partial disability. Mr. Moore explained, currently, statute mandates if the wage rate is on the face of the document that issue must be litigated at the first opportunity, which is reconsideration. Insurers tend to not send the wage rate. He said it is difficult to get a wage rate issue resolved before the reconsideration option.

Mr. Savage inquired even if there is no disagreement about the impairment issue if you don't challenge the wage issue then it is waved. Mr. Moore agreed that yes they are stuck.

Ms. Barno asked how does medical arbiter deal with time loss rates? Mr. Shiprack answered only 2/3rds of the time they deal with time loss rates. Mr. Moore added that the reconsideration process includes more than just the impairment issue, in other words he has to put all evidence together for the reconsideration (wage rates, clients testimony etc.).

Mr. Moore on a side note, discussed the change in the law in 2001 that limits testimony. He mentioned that clients can come in and talk about injury but they are not allowed to talk about wage rate and their job description.

Mr. Moore's main concern is that there is not enough time to gather information for the reconsideration. There is a significant time bind for attorneys prior to the claim. Gathering components with medical arbiter and other parties can drag things out for longer than the 60 days allotted. Many attorneys will not take on claims due to this dragged out information gathering and lack of time to accomplish this. Mr. Moore believes there should be a reasonable amount of time to obtain information.

Mr. Moore had two further issues with the reconsideration process:

Problem #1 – Frozen Record. Mr. Moore said it is much easier to deal with some factual issues in front of Administrative Law Judge than on paper. Disputes do arise specifically when it is client's vs. employer's word regarding the job description. He said credibility is an issue as well, if there are Doctor's issues such as a treating physician or medical arbiter makes simple errors that can be corrected by getting additional information the attorneys are frozen out from getting this information. He mentioned that frozen out means they cannot get that information and the correct outcome with the Administrative Law Judge.

Problem #2 – According to Mr. Moore, there is an enormous amount of work involved with a request for reconsideration. He said attorneys have significant trouble getting documents from employers and attorneys only receive 10 percent when they put in 10-15 hours of work on the background casework. Mr. Moore said reconsideration claims are highly technical with complex facts to compile for evidence in the reconsideration case.

Mr. Moore concluded that he would like to offer up these recommendations to MLAC to solve the problems with the current reconsideration process.

Mr. Savage clarified with Mr. Moore that if he or a claimant makes a decision to file for reconsideration that he feels stuck in terms of reconsideration process being finalized. Mr. Moore agreed that it is hard to find someone that will make a decision on the other side.

Mr. Shiprack reminded members and attendees that the intention of the Reconsideration Subcommittee is to take a comprehensive look at the process and make sure it is working well for everybody. He further asked the subcommittee if they wished to propose making any changes to the process to recommend to the full committee and invited anyone to come forward with suggestions by the next meeting.

Ms. Sundstrom mentioned she is not overly inclined to make significant changes to anything in the reconsideration process.

Mr. Shiprack gave a brief history of the reconsideration process. He said the reasoning for the mandatory reconsideration was because prior to 1990 claims could be voluntarily reconsidered. He mentioned the settlement percentage was very high so it was decided to try that in all the cases.

Ms. Sundstrom questioned SB 369 – no parts were compromised? Mr. Shiprack replied there was very little attempt to compromise. He said labor only had 5 minutes to testify on this bill in the House Committee.

Ms. Sundstrom inquired further into SB 369. Was SB 369 presented to the legislature and never presented to MLAC? Mark Davison from the Oregon Self-Insurers Association, confirmed that it was presented to MLAC and labor turned it down.

Mr. Savage clarified with Mr. Moore that the reconsideration timelines are statutory.

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A representative of self-insurers, Mr. Davison, suggested that they could bring an opinion paper to the next meeting to hear the insurers view. Mr. Shiprack recommended the self-insurers put together some thoughts regarding how to improve the reconsideration process.

The next full MLAC meeting is March 28th, 2008 at 10 a.m. in conference room 260. Also, the next subcommittee meetings will take place on April 11th.

The meeting was adjourned at 2:09 p.m.