

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

March 28, 2008
10:00 a.m. – 12:00 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
Tracy Brill, Portland Fire Fighters Association, Portland
Ellen Cutler, Harry and David Operations Corp., Medford
Lon Holston, Laborers' International, Local 483, Portland
John Kirkpatrick, IUPAT District Council, Portland
Greg Miller, Gunderson LLC, Portland
Mike O'Rourke, Plumbing and Steamfitters UA 290, Tualatin
Sheri Sundstrom, Hoffman Construction Company, Portland
Lou Savage, Senior Policy Advisor, DCBS, Committee Administrator

Committee Members Excused:

Bob Shprack, Oregon Building Trades Council, Portland
Cory Streisinger, Ex-Officio Member, Department of Consumer and Business Services (DCBS), Salem

Public Testimony:

Abigail Herman, Workers' Compensation Board Chairman
Margaret Weddell, Workers' Compensation Board Member
Michael Woods, Oregon OSHA Division Administrator, DCBS
John Shilts, Workers' Compensation Division Administrator, DCBS
Barb Smith, Benefit Services Section Manager, Workers' Compensation Division, DCBS

Sheri Sundstrom, committee chair, called the meeting to order at 10:03 a.m.

Review Minutes

The committee reviewed the January 15, 2008 full MLAC meeting minutes. One correction was suggested by Lou Savage, Committee Administrator.

A motion was made by Mr. Holston and seconded by Mr. O'Rourke to approve the January 15, 2008 minutes with the correction. All members present voted aye.

Ms. Sundstrom announced that the subcommittees are still working on ideas and will be meeting on April 11th for Death Benefits, Significant Court Cases and Multiple Jobs. The Reconsideration subcommittee will meet at a later date.

Introduction

Ms. Sundstrom invited Abigail Herman, Workers' Compensation Board (WCB) Chairman, to introduce the new WCB board member. Margaret Weddell, the newest member of the WCB, is a long time practitioner of workers compensation law since 1993, very active in Oregon Trial Lawyers Association and Workers' Compensation and she is an adjunct professor at Lewis and Clark Law School.

Ms. Weddell thanked the committee for the opportunity to be introduced.

Workers' Benefit Fund Report – Michael Wood, OR-OSHA Division

Michael Wood, Oregon OSHA Division Administrator, presented information from the OSHA Workers' Benefit Fund Report. He clarified that OSHA does not have a workers' benefit fund and that this is OSHA's report on some workers' benefit fund expenditures.

Mr. Wood introduced some background information regarding the fund. He mentioned that workers' compensation and others across the country are involved in ergonomic related claims that continue to be a significant impact to losses to the fund and workers. Oregon has tried a number of industry specific focuses, one of the most successful areas is in the health care industry. There are a number of ergonomic issues, the largest one being patient or resident handling (lifting people). This area is an enormous source of injury and it has a ripple effect on the industry. He also said increasing recruitment and retention issues are brought into focus in this area.

Mr. Wood mentioned the Oregon Coalition of Health Care Ergonomics, which worked with the department to sponsor two conferences that were focused on ergonomic issues and health care. The most recent conference was a year and a half ago. This conference held a stakeholder meeting to discuss obstacles to making zero lift or minimal lift environments a reality in health care. The meeting produced a request to the department to leverage resources available to demonstrate an effective patient handling program model. The department concluded that they wanted to launch demonstrations in two target groups: a rural hospital critical care and a long term care facility.

Mr. Wood said that a grant issued under the director's authority and out of the Workers' Benefit Fund to each of the institutions funds the models.

Mr. Wood said the Oregon Nurses Association has provided ergonomics expertise. He said this is a one time project to develop the two models. These will be facilities of choice from a worker's perspective and resident or patient perspective because it provides safety for both. Lifting isn't just a workers safety issue but a patient's as well. Places that do this right become models. Mr. Wood said there is interest in the models from the National Nurses Association and the State Hospital Association. He said they are hopeful that facilities of choice will develop external certification which other facilities can strive to achieve. Total of both grants is around a million dollars for the facilities.

Mr. Wood said the actuaries have looked at it in terms of the impact on the Workers' Benefit Fund assessment. The status of the fund is currently holding assessment artificially low and spending the

balance. The actuaries have looked at the impact of expenditure and they see no impact on the assessment as a result of this funding.

Mr. Wood said in terms of staffing and resources for this – Oregon OSHA has struggled with finding a point person to work on ergonomic issues to move this effort forward in relation to healthcare. He said they have been recruiting for almost two years to find the right person to be an ergonomics outreach coordinator to help on this project and others as well. Mr. Wood introduced the new hire for the ergonomics outreach coordinator – Yutonah Bowes. He said they should see more of the innovation and efforts to, in a meaningful way, knock the injury rates down in healthcare and other industries as well.

Ms. Sundstrom said she is glad to see the money from the Workers' Benefit Fund going to this project.

Mr. Miller asked if the group has looked at technologies regarding ergonomic issues around the world? Mr. Wood replied the patient handling industry is international in scope and there have been some dramatic things done in this country. He said one of the discoveries of the conference is that it became international in scope. The challenge is less identifying the technology rather than the cohesiveness of the program to support the technology. He said cultural acceptance and how that works in the work place is the challenge.

Mr. Miller said that the systemic program has to be wide spread to have teeth to make sure there are reductions in injuries and lifting hazards. Will lifting with the machine be mandatory or will they have the option to lift? Mr. Wood said the equipment must be bought and then training provided to teach how to operate it. He said there must be some enforcement mechanism and there must be buy-in from the users so they know they are expected to use the machine. When they understand that it is for their benefit and the patient's benefit as well this can motivate them to use the machine to lift.

Mr. Wood said ergonomics has so many different payoffs. Proper patient handling will assist productivity, it will deal with retention issues, reduce unnecessary injury and illness, increase patient and worker safety and getting people to understand is one of the struggles.

Mr. Wood said one of the places that is difficult in this setting is the safety committee. To guide and hold management accountable and to define a culture to lay out expectation for their peers. He said they developed a training program, which is specifically designed to assist committee members in making safe patient handling a reality. Mr. Wood said he is pleased by the level of creativity people have brought to the health care area.

Mr. Miller said he thinks it is money well spent, with the baby boomers aging, more and more people will be in long term care facilities and rehab hospitals so we need to make sure that it will benefit long term.

Mr. Kirkpatrick asked if this is a study or to purchase equipment that otherwise would not have been able to? Will there be a control? Is it going to be compared to facilities that don't have the grant funds to see what the outcome is?

Mr. Wood said it is best to describe it as a pair of case studies. He said an assessment will be done to see changes over time and to implement new ideas. He expects to see evaluation in less than a year and ongoing assessment from there. Determining staying power for long term continuation is important as well. Mr. Wood said the equipment will be purchased from the Workers' Benefit Fund but it is part of a whole with the study activities, assessment, training and management follow through and commitment to a full zero lift program. He said a grant through SETAC should handle the training part.

Mr. Kirkpatrick said he supports the program and in particular when thinking of emergency providers.

Ms. Barno asked if this was similar to the work site redesign program? Mr. Wood said there are similarities to this program. The basic statutory authority is the same as the redesign program. He said the program was eliminated by recommendation from MLAC and staff.

Workers' Compensation Division 2009 Legislative Concepts – John Shilts

John Shilts, administrator, Workers' Compensation Division (WCD), introduced Barbara Smith, manager of the benefits section of WCD.

Mr. Shilts commented on Mr. Wood's presentation that the best situation is the claim that never happens. The division is very pleased that the committee was favorable to Mr. Wood's report. Mr. Shilts thanked committee members for meeting with him over the last several weeks to help improve the WCD agenda and providing very valuable input.

Mr. Shilts presented four WCD legislative concepts to propose for 2009. The following is a summary of the proposed legislative concepts:

- ***Concept #1 – Forum for Workers' Compensation Disputes***

This concept clarifies that workers' compensation disputes that come out of Oregon's workers' compensation laws and rules, but that are not otherwise specifically provided for in the law, first be reviewed by the director under the existing administrative dispute resolution process. The concept does not apply to disputes that are currently in the jurisdiction of the Workers' Compensation Board or disputes that already have a specific statutory exception to exclusive liability/remedy.

In addition, a related statute needs clarification in light of the exclusive remedy provisions. This concept allows a medical service provider to bring a medical service dispute the same as workers, employers, and insurers. Along with the streamlined appeal process, it will also help avoid situations where harmed parties or classes of parties have no remedy in the workers' compensation system (which opens the door to plaintiffs seeking remedy via the circuit court).

- ***Concept #2 – Placeholder for MLAC Death Benefit Study***

SB 835 (2007) required the Management-Labor Advisory Committee (MLAC) to study the adequacy of death benefits in the workers' compensation system. The study includes evaluation of: burial benefits in relation to the actual burial costs; current formulas for determining benefits; categories of beneficiaries entitled to benefits; and the feasibility of providing lump sum benefit payments. A final report to the legislature is due by January 31, 2009.

- *Concept #3 – Housekeeping and Regulatory Streamlining*

This legislative concept recommends six law changes intended to streamline the division's regulations, improve understanding and readability of the law, or shift the division's regulatory focus to match the policy outcome intended. These include: Notice of Closure, care provider timeframes, Reemployment Assistance Program employer requirements, Claim Cost Reimbursement for preferred workers, time limit for premium assessments for preferred workers, and administrative review of medical fee disputes.

- *Concept #4 – Vocational Assistance Streamlining*

This concept streamlines several processes relating to vocational assistance programs. It clarifies processes for certification of vocational counselors and provider organizations, allows disability payment extensions during vocational assistance, and consolidates administrative appeal language in the appropriate statute.

Mr. Shilts discussed the history and context for the first concept. He said the department's concern is that taking workers' compensation related matters out of the workers' compensation system and into the circuit courts when the statute doesn't allow it undermines the fundamental exclusive remedy of the law. He would like the disputes to first stop at the director or the Workers' Compensation Board for resolution.

Mr. Shilts said the first concept would clarify the disputes in workers' compensation matters by stopping in the workers' compensation system first except those that are specified in law outside the system. He said the department would like to see disputes and workers' compensation matters to be solved administratively within the workers' compensation system before they go on and are mitigated in other courts. If workers' compensation matters are appealed enough they do eventually get to the court of appeals and the supreme court. Mr. Shilts said he is looking for a conceptual go ahead from the committee. The concept will have to be approved by DCBS, the Department of Administrative Services, and the Governor and then it goes to legislative counsel for drafting.

Mr. Shilts said a secondary part in the exclusive remedy is that there are situations where parties to the dispute are not allowed to be parties based on workers compensation law. The problem is it raises the specter of these parties not having a remedy in the system. In the case of Smuthers no remedy created problems. He would like to create a process to funnel these types of disputes into the

workers compensation system but also provide a remedy for the parties. Remedy does not mean that they win. Remedy means they have access to a hearing in court.

Mr. Shilts said another area which is part of this package is to allow medical service providers to bring medical disputes when the dispute affects the medical provider. Especially in a situation where the medical service provider has already provided the disputed the service but the provider is not receiving payment. This concept does not impact the Workers' Compensation Board's jurisdiction.

Mr. Savage asked how many additional cases there would be a year?

Mr. Shilts said only a few that he is aware of but the division cannot predict those in the future that are coming.

Mr. Kirkpatrick said the language put into the statute could be fairly simple language change.

Mr. Shilts said yes the division has been playing with the language which is out to the Department of Justice, the board, but will be drafted at legislative counsel. He said this will bolster the exclusive remedy statute and it may be as simple as one or two sentences.

Ms. Barno thanked John for taking the time to brief the committee. She appreciates the fact that the division looks ahead to what is going on in other states. She is concerned this might inadvertently create a lien situation on medical providers in other states where a claim is closed and there are liens hanging out there. Ms. Barno said she will be looking closely at this to make sure that we don't create another avenue for bill payers.

Ms. Sundstrom asked if Liberty looked at this concept?

Mr. Shilts said Liberty brought one original case to his attention. He said he is setting up a meeting with John Johnson who is current counsel.

Mr. Savage asked if a company contracts services with a physician's patient and they don't get paid do we anticipate they will be able to use the system? Mr Shilts said yes the workers' compensation statute provides the direction on what we do and what should be paid. There is a separate issue there on contract law. We can uphold our statutes that we are required to uphold but there may be contract issues that say something different. At this time not sure or aware of cases if there is a difference between what we might order. In essence comes down to a dispute. If we order the insurance company to pay the fee schedule and there is a contract between provider and insurer that says something different we don't know which one will rule. He said he is not sure which one trumps the other - the contract or the statute. Assuming they have the ability to enter into contracts where they voluntarily decide to take a different approach than what is in the statute.

Mr. Savage asked if a physician contracts with an x-ray lab and the physician doesn't pay them then the x-ray lab goes after the physician does the change in the statute require the x-ray lab to use the workers' compensation system because it is a matter concerning a workers' compensation claim?

Mr. Shilts said if it's a workers' compensation dispute then he wants it to come through the system. He said if it is a dispute between workers' compensation statute and what a contract says they are not interested in getting into contract law.

Ms. Barno asked if there is a term in contract law for a secondary payee?

Mr. Shilts said there are all kinds of issues like this but when it is clearly a matter of workers' compensation then it should come through workers' compensation administrative and not played out in court.

Ms. Sundstrom said she can see where the lien might come in when a doctor's office has exclusive contract for diagnostics and they are billing workers' compensation and getting paid for the diagnostics and then all of a sudden they aren't paying anymore. She said she would be interested in seeing how this situation plays out in other states.

Ms. Sundstrom asked the committee if they were in agreement for concept #1 to move forward? The committee agreed to move forward with this concept.

Mr. Shilts discussed the second concept, which is a placeholder for death benefits. He said if the committee decides to change some of the existing law they will have a vehicle to do that.

Ms. Sundstrom asked the committee if they were in agreement for concept #2 to move forward? The committee agreed to move forward with this concept.

Mr. Shilts discussed the history and context for the third concept – housekeeping and regulatory streamlining. He said language will come forward to the committee at a later date to review.

Ms. Smith presented further background on the third concept regarding the time limit for premium assessments for preferred workers.

Members discussed the stigma related to a preferred worker card – many workers do not want people to know they are injured. They may have the mind set that the employer will not hire them even though the employer does get a benefit for hiring a preferred worker. Ms. Sundstrom said at a full MLAC meeting in the fall maybe staff can do a report out of usage of the preferred worker program.

Mr. Shilts said their role is to use the program as much as possible to get a worker a job or keep the worker on the job. Mr. Miller said he would like to see the numbers regarding workers that do not use the preferred worker card because of the stigma. Mr. Shilts said he would be glad to do a preferred worker report to the committee in the fall.

Ms. Smith said outreach signs are provided to employers that say, "We hire preferred workers."

Ms. Sundstrom asked the committee if they were in agreement for concept #3 to move forward? The committee agreed to move forward with this concept.

Mr. Shilts and Ms. Smith discussed the history and context for the fourth concept – vocational assistance streamlining. The committee agreed for concept #4 to move forward.

Ms. Barno asked about concept #1 by removing standard of the provider organization is that in line with keeping in line with third party administrators?

Mr. Shilts said yes it is in line and the division must be careful not to lose regulatory authority. He said the division could probably change the term from authorization to registration but this will have to be passed on to legislative counsel to decide. He said two other points: outside of ORS 656 that main concern is fraudulent billing. Assuming that self employer and insurer have right of action against the organization and that is most likely the biggest deterrent out there. ORS 656.990 if the division found that they lied to an insurer or to the director there are actual criminal penalties and fines. Mr. Shilts said the division decided to craft the language so existing regulatory authority is not lost. He said he also found an additional penalty that is fairly stiff that already exists in the statutes.

Ms. Barno said that she believes that the workers are most vulnerable at this time and she wants the most protection for them. Mr. Shilts said the division decided to do the authorization through rulemaking so there is the chance to have a conversation within the industry and identify criteria to follow in the rules.

Mr. Shilts said he discussed the vocational eligibility concept with committee members individually. This would bring streamlining to areas where the worker's are not eligible. He said that the department decided not to go forward with this concept. There was some support by MLAC members and some opposition from MLAC members. Therefore he made the recommendation to the Director that the department should not carry this concept.

Ms. Sundstrom asked if there were any objections by the committee. There were no objections.

Workers' Compensation Division Administrator Report – John Shilts

Mr. Shilts said the division is going forward with no policy option packages. The division is not asking for additional staff from the legislature. The division is continuously looking at what they are doing, how they are doing it and what the priorities are because they want to be quick inside the division to look at emerging issues. For example, the division is doing a rigorous review of field audit and taking a look at possibly changing the organization. Typically field audit has been on a schedule. The division has moved to a streamlined audit, which involves random sampling techniques. A big part of the process is education so the division is taking a look at audit processes. There is value for getting feedback on a regular basis but there is also value in identifying individual areas that need improvement. The division is looking at doing more just-in-time audits to get out more often and look at areas that are having difficulty and scoring lower for audits.

Mr. Shilts said a big issue is moving towards the full implementation of SB 559. This is moving away from a guaranteed contract and moving into the policy system of proof of coverage. The

division has revised the notice of compliance poster and will send it out. He said there are a lot less words on it. The division sent it out to stakeholders for comments.

Mr. Shilts said the division is moving to electronic filing of proof of coverage. The idea is to go 100% mandatory electronic filing of coverage. The division is excited about this move and will be able to meet the timelines.

Mr. Shilts said the division is also moving to electronic reporting of the medical data. The division is participating in the development of a national standard for physician billings to insurance companies – this is electronic. The big challenge will be that the insurer will get the bill and adequate notes at the same time.

Mr. Shilts said the division is moving to a far more advanced electronic claims system. The division is still on a Wang based system at the state – this was created to centralize the servers. Issues in terms of power have arisen. This meant that there was a hold up for WCD to move forward with their processes. The servers are back into the building to work on the processes. The division is going forward with a modernized sweep on applications. The payoff for customers is that WCD has a better capacity to deal in the electronic world and it is far more efficient.

Mr. Shilts said the Workers' Compensation Research Institute (WCRI) report on Oregon came out. This report identified four areas of Oregon that should be lessons for the rest of the nation. One of these includes MLAC. The report is highly complementary of the WC system.

Mr. Shilts said the issue of medical continues to be a really big focus for us. The division reorganized the division to create a medical section focusing on the medical issues. What WCD is trying to do is facilitate the public discussion and decision making with these medical issues through the Medical Advisory Committee (MAC).

Ms. Sundstrom said MAC is a great resource and she requested MAC come and present to MLAC.

Mr. Shilts said he can arrange that and MAC very much wants to have a connection with MLAC members.

MLAC subcommittees will meet on April 11, 2008 at 9 a.m. at the Labor & Industries building, conference room 260.

The meeting was adjourned at 11:58 a.m.