

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

April 11, 2008  
10:30 a.m. – 12 p.m.  
Conference Room 260, Labor & Industries Building  
350 Winter Street NE, Salem, Oregon  
(A map is available upon request)

***Committee Members Present:***

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  
Mike O'Rourke, Plumbing and Steamfitters UA 290, Tualatin  
Bob Shiprack, Oregon Building Trades Council, Portland  
Sheri Sundstrom, Hoffman Construction Company, Portland

***Committee Members Excused:***

Linda Barno, ESIS, Inc., Portland  
Ellen Cutler, Harry and David Operations Corp., Medford  
Cory Streisinger, Ex-Officio Member, Department of Consumer and Business Services, Salem

**SIGNIFICANT COURT CASES SUBCOMMITTEE**

Sheri Sundstrom, subcommittee chair, called the meeting to order at 10:32 a.m.

The committee reviewed the March 14, 2008 MLAC significant court cases meeting minutes. Cara Filsinger, acting committee administrator, suggested a correction to the minutes. The committee approved the minutes with the corrections.

Sheri announced the meeting might brief because people that wished to testify were not available to speak today. Also, the two cases that will be presented today will also be discussed at the next subcommittee meeting to allow for public testimony and an additional court case introduction.

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

Cathy Ostrand-Ponsioen the assistant manager for the Policy and Communications Section of WCD gave a brief overview of the two new court cases brought to the attention of the Workers' Compensation staff by the SAIF Corporation. Ms. Ostrand-Ponsioen submitted a summary provided by SAIF for the record. SAIF will present more detailed information at the next subcommittee meeting. The summary of the cases was presented as follows (from additional handout):

**Francisco G. Rodriguez, 59 Van Natta 2422, abated 59 Van Natta 2729 (2007).**

*Claimant had an accepted injury claim for a disabling left chest wall contusion and left 8<sup>th</sup> rib fracture. Claimant requested acceptance of “chronic chest wall pain as a result of the 8<sup>th</sup> rib fracture condition” as a new or omitted medical condition. The insurer responded with a “No Perfected Claim” letter, which stated that claimant’s claim was not perfected because he requested acceptance of a symptom rather than a medical condition or diagnosis. Claimant appealed, arguing that the letter was a denial. The ALJ upheld the insurer’s de facto denial of chronic chest wall pain.*

*On review the board found that claimant had perfected his claim. The board reasoned that whether claimant’s request described a condition or merely a symptom was a question to be resolved when determining compensability. Because claimant had clearly requested acceptance of chronic chest wall pain, he had perfected his claim for a new medical condition under ORS 656.267(1). Because the insurer had neither accepted nor denied the claim within the required time period, the claim was de facto denied.*

**Jose S. Sandoval-Perez, 48 Van Natta 395 (1996).**

*SAIF provided coverage for the employer on Oct. 6, 1992, the date of claimant’s injury. CNA assumed coverage for the employer effective Jan. 1, 1993. Claimant filed his claim in March 1993 using a CNA claim form. CNA accepted the claim. The employer subsequently realized the mistake and notified its parent corporation, which notified CNA. CNA issued a disclaimer of responsibility; advised claimant to file a claim with SAIF; rescinded its acceptance of claimant’s claim; denied responsibility for claimant’s injury; and requested designation of a paying agent. SAIF issued a compensability denial (which it later rescinded) and a responsibility disclaimer. The ALJ determined that CNA could rescind its acceptance, CNA was not prohibited from issuing a back-up denial on the merits, and SAIF was responsible for claimant’s injury. The ALJ ordered SAIF to reimburse CNA for its claim costs.*

*The board reversed those portions of the ALJ’s order, concluding that CNA’s denial was not based on “later obtained evidence” sufficient to support a back-up denial under ORS 656.262(6). The board reasoned that at the time the claim was filed CNA, as a corporate entity, knew or should have known that it was not providing coverage, even if accurate coverage information was not available to the branch office.*

**Related case:**

**Oregon Insurance Guaranty Assoc. v. Hall, 200 Or App 128, rev den 339 Or 544 (2005).**

*Reliance provided workers’ compensation coverage to employer until Aug. 1, 2000. AAIC began providing coverage to employer on Aug. 1, 2000. Claimant sustained an injury on Sept. 13, 2000 and filed a claim. Employer mistakenly sent the claim to Reliance, which in turn mistakenly accepted the claim. When Reliance became insolvent on Oct. 3, 2001, OIGA assumed Reliance’s rights, duties, and obligations. OIGA notified claimant that his*

*claim was not a covered claim and that it would not be assuming responsibility for it. Claimant asked AAIC to process the claim and AAIC denied responsibility, acknowledging that it would have been responsible had another insurer not accepted the claim. The ALJ and board found that OIGA was responsible.*

*The Court of Appeals reversed and remanded, finding that the claim was not a “covered claim” under the OIGA statutes because the policy with Reliance was not in force at the time of claimant’s injury. The court stated that OIGA steps into the shoes of an insolvent insurer only if the claim is a “covered claim.” The court noted that OIGA is intended to be the insurer of last resort and in this case OIGA was not claimant’s insurer of last resort because AAIC provided coverage on the date of injury and remained a solvent insurer.*

*On remand, the court held AAIC responsible for claimant’s claim.*

Ms. Sundstrom can identify a bit with these cases. With all the CCIPs (Contractors Controlled Insurance Programs) that Hoffman is doing right now, they have found workers will turn in a claim to the carrier that normally insures the subcontractor. They will be working on the claim and all of a sudden realize that it is a CCIP. Some of the claims are accepted and some come back. Ms. Sundstrom believes that something needs to be done for clarification. She does not know how serious a problem it is across the board but she does identify with it.

Mr. Shiprack said that this is an insurance issue and perhaps the insurance commissioner should take a look at this.

Ms. Sundstrom said John Shilts had testified the concern by the department especially in the case of *Specialty Risk Services v. Royal Indemnity Co.* is that there should be something so that it is taken care of in the Workers’ Compensation arena as opposed to civil court.

Ms. Filsinger said that at the last full MLAC meeting the Workers’ Compensation Division submitted a concept regarding this issue.

John Shilts, Administrator, Workers’ Compensation Division addressed the case issue. The *Specialty Risk Services v. Royal Indemnity Co.* case is what really caught the department’s interest. The proposed legislative concept is broader in terms of trying to instruct the courts in Oregon that if it’s a worker’s compensation dispute then it needs to be resolved through the Workers’ Compensation administrative process. He said this will be a two step process: first to get the bill to get legislation in place and second to work through the rules process in terms of procedure to file and resolve disputes.

Ms. Sundstrom said more testimony to come at the next subcommittee meeting for the people that were not able to make it.

Mr. Shiprack reported to the committee regarding recent meetings going on at the Workers’ Compensation Board. In particular, out of compensation attorney’s fees. The board is

contemplating going into rule making to look at increasing the threshold on disputing claim settlements. Currently the attorney receives twenty-five percent to the attorney and ten percent of anything over the settlement amount. There was interest in raising those attorney fee thresholds. The board asked for a small committee to meet, Mr. Shiprack representing the AFL-CIO and Lon Holston participated on this committee.

Mr. Shiprack wishes to take a look at the whole area of attorney fees. There was an interest in raising these fees because there is a perception that there is a real aging group of attorneys that do workers' compensation and it is getting harder for workers to get legal counsel. Mr. Shiprack said after discussion with AFL-CIO and others he was not prepared to raise those thresholds. He wants to take a larger look at the attorney issue system wide. He is unsure what the board has done since the small committee meetings and planned on administrative rule making. Mr. Shiprack contacted the Oregon State Bar to take a look the fee thresholds and make recommendations. He believes that more research needs to be gathered.

Mr. Shiprack said there appear to be times where it is hard to justify a worker paying for the attorney fees as a result of action by the insurer. The claimant's attorney works hard.

Ms. Sundstrom said that this was changed last session. If the attorney prevails on a denial the claimant gets reimbursed. Mr. Shiprack said he thought this was only if there were expert witnesses.

Mr. Holston said he has an interest in this. It has been a long time since the attorney fee issue has been addressed. He said it has risen enough to become an MLAC issue. Mr. Holston believes this is an opportunity and the responsibility of MLAC to which he would like to see this committee take on and look at before this next legislative session.

Roger Pearson, managing attorney for Workers' Compensation Board, said a report will be issued from the advisory committee. The board wanted to submit proposed rule regarding attorneys fees to the advisory committee and have another meeting to include the public.

Meeting adjourned at 10:55 a.m.