

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

June 26, 2008  
1:00 p.m. – 2:00 p.m.  
Conference Room 260, Labor & Industries Building  
350 Winter Street NE, Salem, Oregon

***Committee Members Present:***

Linda Barno, ESIS, Inc., Portland  
Lon Holston, Laborers' International, Local 483, Portland  
Greg Miller, Gunderson LLC, Portland  
Jeri Ray, Timber Products Company, Springfield  
Mike O'Rourke, Plumbing and Steamfitters UA 290, Tualatin  
Sheri Sundstrom, Hoffman Construction Company, Portland

***Committee Members Excused:***

Tracy Brill, Portland Fire Fighters Association, Portland  
John Kirkpatrick, IUPAT District Council, Portland  
Bob Shprack, Oregon Building Trades Council, Portland  
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 9:00 a.m.

Ms. Sundstrom introduced a new management member of MLAC, Jeri Ray with Timber Products Company, to the committee and staff. Ms. Sundstrom said the members are very appreciative of Ms. Ray giving her time to the committee.

There was unanimous consent that the minutes from June 9, 2008, be adopted.

Ms. Sundstrom explained she wanted to go through the cases that have been brought before the subcommittee and see if the subcommittee wishes to go forward.

Chris Davie, SAIF Corporation, reviewed the two new cases introduced to the subcommittee from the last meeting: *Jonathan W. Brust* and *Sisco v. Quicker Recovery*.

Ms. Sundstrom asked how often this type of case comes up? Mr. Davie said not very often and he does not hear about cases that are denied so he is not certain. The circumstances in these cases seemed so strained and removed from the normal interactions in the work place. He said the issue of interest is when you draw that line. The tow truck driver case is the more extreme of the course and scope cases.

Jeri Ray asked why wasn't horse play considered in the *Jonathan W. Brust* case?

Ms. Sundstrom said it probably started out as horse play and escalated. In Ms. Ray's mind she does not see why this case wasn't considered horse play.

Mr. Savage asked Mr. Davie how he would fix the course and scope situation without broadening it to much?

Mr. Davie said he did not come prepared to propose a solution. He did suggest if the act was criminal that perpetrates the injury then that could cause the claim to not be compensable or perhaps make a parallel with the statute regarding drug and alcohol consumption. If the major contributing cause of the injury is proven to be the consumption of drugs or alcohol then claim is not compensable.

Mike O'Rourke expressed concern that this might cause more problems, for instance, where you draw the line. Linda Barno agrees there is a fine line in these cases. The two cases that are obvious to her are the tow truck driver where the individual disregarded a direct work order from the employer.

Mr. Davie said there is some dispute on the Brust case as to who was the aggressor and who pulled out the weapon first.

Mr. Holston said he does not want to cross the line where the employer is trying to discipline the employee and the employee does not have recourse if they do not follow instructions. If an employee is injured within the course and scope of employment then they should be covered. He said the employer has the right to discipline the employee.

Ms. Barno is concerned this is sending the message fighting is ok in the workplace.

Greg Miller said if the root cause is horse play it can be denied and not found compensable. If an employer encourages fighting or provides an unsafe or hostile work environment then it should be compensable.

Mr. Holston said there is already a system already in place to handle this issue.

Ms. Sundstrom is interested to know if it was horse play, how did they lose? Mr. Davie said as SAIF was litigating this case if the actions could have been considered horse play they would have brought it forward.

Ms. Sundstrom said it appears something needs to be tweaked to make course and scope clearer.

Mr. Davie said the claim is not compensable if there is an altercation and the injured party is the aggressor. Sometimes interpretation of the statute can dilute the original intent.

Ms. Sundstrom said the goal of the committee is to look at cases that have changed the original intent of the statute.

Mr. Savage asked whether this interpretation relied on other cases? There should be a pattern of erosion. He said without knowing this it is hard to determine if this is a one time deal or is there a pattern that might be changing the original intent of the statute.

John Shilts, administrator, Workers' Compensation Division, said there is a long standing history of course and scope cases. The statute itself has changed, but what has really changed is the interpretation of the statute. He said each case is judged for itself.

Ms. Sundstrom would like to know more about a possible pattern of course and scope cases.

Mr. Davie gave examples of other cases where conflicting personalities in the workplace led to fights and compensable claims.

Ms. Sundstrom asked the department for a timeline of substantial course and scope changes and research regarding illegal activities on the job.

Mr. Davie discussed the statute of limitations cases.

Ms. Sundstrom said she recalled Deborah Sather was going to put together a proposed fix to the statute of limitations issues.

Mr. Davie said in the case of *Karjalainen v. Johnston & Pennywise, Inc.* the issue is whether a pre-existing condition can be used as a major contributing cause analysis. SB 485 said someone cannot use it unless that condition had been previously diagnosed for treatment except for arthritis. He said an arthritic condition can still be counted as a pre-existing condition even though it had never been treated previously. In *Karjalainen*, the question is whether a degenerative disk disease was actually an arthritic condition.

Mr. Shilts said at the time SB 485 was being debated there was discussion about arthritis and arthritic conditions being redefined. The committee could not come to a decision where the majority of both sides could support redefining the definition. Mr. Shilts said there was discussion this could leave the door open to future litigation.

Mr. Shilts discussed the *Roberts v. SAIF Corp.* case. Subcommittee members discussed the Roberts case and decided to add it to the list of course and scope issue cases.

Mr. Davie discussed the *Francisco G. Rodriguez* case and said this involved a new or omitted condition claim. The statute says that the claim has to contain certain elements. In this particular case, the new condition claim was for something that seemed to be a symptom of a condition that was already accepted, which was chest wall pain.

Ms. Barno is concerned the symptom itself is not different from the condition. Mr. Rodriguez wasn't asking for any other medical diagnosis but adding the pain as a new or omitted medical condition.

Mr. Shilts said this can play out in a reconsideration request if we determine something is a sequella of the accepted condition the division would rate that. It would not be rated if it was considered a separate condition.

Ms. Barno asked if pain needs to be added to every single claim? Mr. Shilts replied no it does not.

Mr. Davie said the issue is where the statute is clear you would have to make a claim for a condition. In this case, the board said if you are disputing whether it is a symptom or a condition they issue a denial. He said it seems this is creating a litigation process that was not intended.

Ms. Sundstrom asked if there are other situations like this? Mr. Davie said they receive new and omitted claims by the day.

Mr. Savage asked if Mr. Davie has any suggested fix for this? Mr. Davie said he did not have one today, he could prepare something and he seemed to recall suggesting a fix in testimony from a previous subcommittee meeting.

Mr. Davie explained the *Jose S. Sandoval-Perez* case to the committee regarding backup denials.

Mr. Shilts said Mr. Davie brought up there are barriers in the law as it stands for disputes. Mr. Shilts said there is a short list of statutory reasoning for back up denial and there is a time limit as well. Once you go past those timelines no one can do anything about it.

Ms. Barno said if there is a format in place where there is no question about the compensability of the claim. She does not like the worker to have a back up denial. She said we have a process in place could we review this in conjunction with the Insurance Division?

Mr. Shilts said sometimes there are disagreements between insurance companies later.

Mr. O'Rourke said more doctors everyday turning down workers' compensation claims. He hopes MLAC will look at this issue.

Ms. Sundstrom asked Jennifer Flood, Ombudsman for Injured Workers, if she sees this situation with the insurance carriers where the worker is harmed? Ms. Flood replied situations she encounters where the worker can be harmed is when one carrier says they don't have coverage so they deny and tells the worker to file with another carrier – time loss benefits stop until the papers get to the new carrier.

The subcommittee asked Ms. Flood questions regarding instances where a worker could be harmed because of a carrier denial and the worker must file a claim with another carrier.

Mr. Savage asked what is the response to the argument the carrier is responsible for making decisions if they mess up then it is the cost of doing business? Mr. Davie replied that is basically how it is today.

Mr. Davie suggested a possible solution, if a carrier messed up and another carrier is not willing to pick up the claim then they have to take it. If there are two willing insurance companies to pick up the claim then there is no detriment to the worker as Ms. Flood discussed.

Savage asked if that option is not available? Ms. Flood said she has encountered examples where one carrier realized their mistake accepting the claim and they pass it on to the right carrier and things work out. She said the statute is structured in a way that if it was litigated a carrier cannot back up and deny it since they already accepted responsibility for the claim.

Ms. Sundstrom listed items to discuss at the next subcommittee meeting:

- Further research on course and scope by the department
- Chris Davie will present a fix on the *Jose S. Sandoval-Perez* case - Denials
- Information on the Freightliner and Godfrey cases

The subcommittee was adjourned at 9:58 a.m.