

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

June 9, 2008
9:00 a.m. – 10:00 a.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
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

Committee Members Excused:

Bob Shiprack, 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.

There was unanimous consent that the minutes from April 11, 2008, be adopted.

Ms. Sundstrom requested a review of the significant court cases. At the next subcommittee meeting she would like to decide on which cases MLAC wishes to go forward on.

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 significant court cases that have been discussed in subcommittee so far.

Ms. Sundstrom asked for the summaries to be court cases that are MLAC related specifically.

Ms. Ostrand-Ponsioen reviewed the following cases: Clarke vs Oregon Health Sciences University, Freightliner LLC v. Holman, Godfrey v. Fred Meyer Stores, Karjalainen v. Curtis Johnston & Pennywise, Inc., Roberts v. SAIF Corp., Francisco G. Rodriguez and Jose S. Sandoval-Perez.

Ms. Sundstrom said the mission of this subcommittee is to review cases that have significantly changed the original intent of legislation.

Statute of Limitation - Deborah Sather

Deborah Sather, attorney, Sather, Byerly & Holloway, LLP discussed the statute of limitations, which is the timeline that a worker must act before they lose their right to file a claim. In Oregon, the statute overtime has required the worker to give written notice within 90 days of the injury and up to a year to file a claim. She said in 2004 this changed after the *Vsetecka v. Safeway* case where the court of appeals ruled that a worker recording an injury in an injury log is sufficient enough notice to file a claim.

In the *Godfrey v. Fred Meyer Stores* case the worker told their supervisor they were injured. Fourteen months later the worker goes to the doctor and files a claim. This was considered outside of the year long criteria. The court of appeals looked at the statute and said given the wording in the statute workers can give written or oral notice. The worker never wrote a claim and was found to be compensable.

Ms. Sather proposed to address this issue by modifying the existing statute to give three elements: when, where and how. She envisions some basic information provided through written notice, which must be given through the mail to the employer or DCBS.

Mr. Savage asked if a worker wrote into the log that they had an injury this would not be sufficient under Ms. Sather's proposal? Ms. Sather said it depends on what the log asked for. She said if there is not enough information then it may not be considered sufficient.

Mr. Savage asked on the second case, if the form had the information, which the manager wrote it into the log would that be sufficient? Ms. Sather said she believed that this would not be sufficient.

Mr. Savage asked in the first instance the worker could comply with first requirement of when the injury happened. Would it make a difference that the manager wrote it on the workers behalf? Ms. Sather believes that the proposal allows for someone to give notice on the workers behalf.

Ms. Barno said her concern is that signing into the OSHA log is an incident log but is different than the workers compensation claim for medical or disability treatment. Ms. Sundstrom said there is a first aid log for workers' compensation. Ms. Barno said there should be a line for employers so they know when to act – notice is when you get the claim for medical treatment or time loss.

Ms. Sather said there has been a lot of confusion over time. There is notice of an injury and then there is a claim for benefits. She said notice of an injury according to what she drafted is a writing that says when, where, and how. She said lots of things could be in a log but it does not necessarily mean they are injured.

Ms. Barno said a number of times employees have come to her and told her they injured themselves but they did not think they needed any treatment. She would like them to tell her if they need to go to the doctor or need time off – this would be filing a claim. She asked when does the clock start ticking? Ms. Sather said the clock has to start ticking for the worker on the day the injury happened. She said unlike occupational diseases, which are more vague in the onset, the worker knows when they are injured. If the worker does not have enough information within 90 days then how can the incident be that important?

Ms. Sather said her firm is still working on language for statute of disease since there is virtually no effective statute of limitations - the wording is too awkward the way that it is written. She said that it will be presented to the committee later.

Ms. Sundstrom asked about the timeframes with notice of 90 days and up to one year to file a claim – has this been in the statute forever or did it come out of Mahonia Hall? Ms. Sather said she thought it preexisted Mahonia Hall.

Mr. Kirkpatrick said in observation that he does see the vagueness of written notice or not. He would like to see this fixed so it is clear to the employee and employer. He said he does not see the argument in either of the two cases against the compensability of the claims based on whether they were work related - it becomes more of an argument about timeliness.

Mr. Kirkpatrick observed two pronged claims: occupational disease or injury.

Ms. Sather said in the occupational disease context it is hard to know if it is associated with work. Mr. Kirkpatrick asked Ms. Sather with the hearing loss case if she had a problem with how it played out? Ms. Sather said the worker knew he had work related hearing loss and needed hearing aides but waited to get treatment until several years later. She said you can not mitigate the injury and cannot get any work for the person or do any effective investigation when you wait that long to file a claim.

Mr. Miller said if he knows a worker is losing their hearing he would work with them to protect their hearing such as placing them in a less noisy environment under 85 decibels. Early intervention is the key and the employer needs to act on prevention and hearing tests.

Mr. Savage asked if it was known that the worker had regular check ups? Ms. Sather said it was not known.

Mr. Miller said you can live 6 years with hearing loss but someone may not be able to live with an elbow injury. A worker could put off the hearing loss for a long time and live with it.

Ms. Sundstrom said that the check ups and testing is not required.

Mr. Miller said that everyone has to be tested in his work environment.

Ms. Sather said this presents unique challenges over time. There are many reasons why people don't want to go to a doctor for hearing loss. She said this hearing loss case triggered this decision which says there is no statute of limitations for occupational disease claims.

Mr. Kirkpatrick does not think there is a solution to rely on the injury log. He believes that injury should be well communicated to the employer. Ms. Sather agreed that it should be something in writing.

Ms. Sundstrom said there almost needs to be some sort of acknowledgement from the employer that the worker does not need medical care or even acknowledgement that the employer has received notice from a worker of an injury.

Ms. Sather said a way of verification could be made with administrative rules to go along with the statute.

Introduction of new significant cases to the subcommittee – Chris Davie

Chris Davie, SAIF Corporation, presented two new cases to the subcommittee. The *Sisco v. Quicker Recovery* is not a SAIF case but the *Jonathan W. Brust* case is. The following is a brief description of each case:

Sisco v. Quicker Recovery, 218 Or App 376.

Sisco was a tow truck driver who was stopped for speeding. Despite his dispatcher's admonition to cooperate with the police, he refused to show his license. When told he was under arrest, he locked himself in his truck. After persistent refusal to leave his truck, police used a stun gun to subdue him and forcibly removed him. He was cited for several offenses, including resisting arrest. Five days later, he went to a doctor and alleged he was injured in the altercation. The claim was denied, and the denial was affirmed by the ALJ and the Board on review. The Court of Appeals determined that the injuries occurred in the course and scope of employment and remanded the case to the Board to consider other arguments.

Jonathan W. Brust, 60 Van Natta 447.

Brust worked at an auto repair shop. The employer told Brust to instruct another employee to drive a car to DEQ for testing. Brust got the attention of the co-worker by "tweaking" his nipple. The co-worker took offense. An argument ensued, followed by pushing and shoving. The scuffle was broken up, but shortly thereafter, Brust approached the co-worker with a knife and the co-worker grabbed a brush. Brust was hit by the brush handle and suffered a broken arm. SAIF denied the claim. The ALJ set aside the denial and the Board affirmed the ALJ.

Mr. Davie said the issue in each case is whether the claimant's conduct was so extreme as to take the claimant outside the course and scope of employment.

Mr. Davie said the Court and the Board also relied on judicial precedent, including the Supreme Court's 1997 decision in *Redman Industries, Inc. v. Lang*, 326 Or 32. This involved two people in a fight at work. The Court basically said if you are fighting about something that is not directly related to the work place then that is probably not compensable. If the work environment causes the workers to get into a fight then that can be compensable. The statute does limit if drugs and alcohol are involved. Mr. Davie said the statute could be amended to limit injuries that result from criminal activity or conduct to not compensable.

Mr. Savage said one of these guys could have been charged with assault? He said in that case Mr. Davie's fix would take this situation out of the workers' compensation system.

Ms. Brill asked how can this be determined criminal without a conviction? Mr. Davie replied criminal can be determined by what is in the statute or you could require the fix to say there must be a criminal conviction.

Ms. Sundstrom said she did not believe being tasered by a police officer is within the course and scope of employment. She said the second case, getting into a brawl is within the course and scope either and this should be out of the work place.

Ms. Brill said she would not want to be the one responsible for making the decision that this was criminal activity without going through the court of law. She said she would have all kinds of questions and mitigating circumstances surrounding this. Mr. Davie said nothing in the case suggested that the officer's actions were mitigating. Ms. Brill said omission does not mean that it didn't occur.

Ms. Barno said her concern would be that as an employer she has 60 days to make an accept or deny decision and there is no way that a charge will be settled within that 60 days.

Ms. Sundstrom said it boils down to are they in the course and scope of employment.

Mr. O'Rourke said like in the first case, if he was pulled over for speeding while on the job that he would expect the company to stand behind him within reason. Mr. O'Rourke believes this is opening a can of worms.

Mr. Holston said when looking at responsibilities what he sees is a culture in the work place that allows this type of behavior. He asked who's responsibility is it to maintain order. In the second case there is a risk in which the work environment exposes the employee. He said that all sides have to be looked at and find some way that makes sense. Mr. Holston said that people must use good common sense.

Ms. Sundstrom said from her perspective these two cases are ridiculous.

Ms. Sundstrom requested copies of the decisions on the two cases be provided to the subcommittee. Also, she would like to get some input from people regarding any of these cases and thoughts at the next meeting.

Mitchel Nixon, an injured worker, discussed his case and claim before the subcommittee. He said he was injured on the job April 28, 2007. He tore a bicep muscle in his right shoulder with a torn rotator cuff. He said he was denied claim after 60 days and the legal system has stretched his claim out and he still has his injuries. He still has not had medical treatment and is suffering. He said he sold everything in his home to sustain himself until his claim is processed. He said the attorneys are backed up and he wants to know why this is taking so long. He is concerned that his daughter does not have child support and that she is suffering now that he is unable to work with his injuries. Now that he cannot pay his child support the district attorney said they want to take away his drivers license. He believes the State of Oregon and Workers' Compensation Division can do a better job with helping workers.

Ms. Sundstrom thanked Mr. Nixon for coming to testify before the committee. Mr. Holston also thanked Mr. Nixon for testifying as the committee does not hear from injured workers very often.

Mr. Kirkpatrick asked Mr. Nixon what was the nature of the denial? Mr. Nixon replied that the soft tissue injury did not happen at his work even though his job involved stacking large objects.

Mr. Kirkpatrick asked if Mr. Nixon had talked to the Ombudsman's Office for Injured Workers? Ms. Sundstrom asked if Jennifer could talk to Mr. Nixon.

Ms. Sundstrom said at the next meeting the subcommittee will discuss cases on the list. She wishes the subcommittee to come to a decision if there are any the cases the subcommittee should pursue further and if so what the timeline will be.

Meeting adjourned at 10:01 a.m.