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

August 20, 2008
10:00 a.m. – 11:00 a.m.
Conference Room 260, Labor & Industries Building
350 Winter Street NE, Salem, Oregon

Committee Members Present:
Linda Barno, ESIS, Inc., Portland
Tracy Brill, Portland Fire Fighters Association, Portland
Lon Holston, Laborers' International, Local 483, Portland
Greg Miller, Gunderson LLC, Portland
Kathy Nishimoto, Duckwall-Pooley Co., Hood River
Mike O'Rourke, Plumbing and Steamfitters UA 290, Tualatin
Jeri Ray, Timber Products Company, Springfield
Sheri Sundstrom, Hoffman Construction Company, Portland

Committee Members Excused:
Bob Shiprack, Oregon Building Trades Council, Portland
John Kirkpatrick, IUPAT District 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 10:13 a.m.

Ms. Sundstrom announced all lobbyists and stakeholders that wish to meet with MLAC members to please arrange with Lou Savage to accommodate stakeholder meetings.

There was unanimous consent by the subcommittee that the minutes from June 26, 2008 be adopted.

Department Follow up Course and Scope

Cathy Ostrand-Ponsioen, Workers' Compensation Division (WCD), discussed a course and scope law overview memo and document with course and scope case examples. She emphasized this is a general overview and not a comprehensive view since there are many areas of course and scope law.

Ms. Ostrand-Ponsioen described a basic definition of "compensable injury," which is essentially "an accidental injury arising out of and in the course of employment requiring medical services or resulting in disability or death." Between 1965 and 1990, several provisions were added to the statutory definition. She said since 1990, the only changes to the definition of compensable

injury have been provisions regarding combined conditions, consumption of alcohol or controlled substances, and disabling compensable injuries.

Ms. Sundstrom clarified that this is case law rather than statute. Ms. Ostrand-Ponsioen confirmed her presentation covered case law.

Ms. Ostrand-Ponsioen discussed the following points relating to course and scope:

- The work-connection test. An injury is compensable if it arises out of the course and scope of employment. The work connection test requires both elements. Ms. Ostrand-Ponsioen described examples of courts' approach to the test.
- Arising out of Employment. This is the casual link or connection between the injury and the employment. The test is whether the risk of the claimant's injury either resulted from the nature of his work or whether the work environment exposed him to the risk. There are three categories of risks:
    - Risks distinctly associated with the employment (compensable);
    - Risks personal to claimant (not compensable); and
    - Neutral risks
- In the Course of Employment. This concerns the time, place, and circumstance of the injury. An injury occurs in the course of employment if it takes place within the period of employment, at a place where a worker reasonably may be expected to be, and while the worker reasonably is fulfilling the duties of the employment or is doing something reasonably incidental to it.
- Statutory Exclusions. Three types of injuries are excluded from compensability under the statute, even if they arise out of and in the course of employment:
    - An injury to an active participant in an assault.
    - An injury incurred while engaging in recreational or social activities.
    - An injury caused by the worker's consumption of alcoholic beverages or unlawful consumption of a controlled substance.

Ms. Ostrand-Ponsioen discussed course and scope case examples including the reasoning behind each ruling in regards to in the course of and arising out of employment.

Course & Scope of Employment – Chris Davie, SAIF

Mr. Davie submitted written testimony for the record regarding proposed statutory language to address three court cases discussed in subcommittee. The following are the cases and proposed language:

- <u>Sisco v. Quicker Recovery</u>
    - The worker was injured when he was resisting arrest by a police officer after he was stopped for speeding. Mr. Davie believes the subcommittee was interested in a narrow limitation on compensability. The following language avoids the need to determine whether the conduct in question was criminal:

        - 656.005 (7)(b) "Compensable injury" does not include:
          (D) Injury the major contributing cause of which is the failure of the injured worker to follow the lawful orders of a law enforcement official.

- Francisco G. Rodriguez
    - ORS 656.267 clearly requires the worker to specify a new medical condition or omitted condition when filing a claim. The Workers' Compensation Board has ruled that a formal denial must be issued even if the basic requirements for a claim have not been satisfied. Mr. Davie said the following amendment would clarify the intent of the statute and avoid a tortured litigation process:
        - 656.267 (2)(new b)
          If the claim is not properly initiated because the worker failed to designate a condition, the insurer or self-insured employer shall advise the worker in writing that the claim has not been perfected. Under these circumstances, no formal denial of the claim is required.
    - Mr. Davie requested the subcommittee to allow additional time to study how to address this issue while protecting the rights of the worker.

- Jose S. Sandoval-Perez
    - The issue in this case is whether an insurer can withdraw acceptance of a claim after discovering that no policy was in force on the date of injury. This proposed amendment would permit the director to write rules for the orderly transfer of an accepted claim to the insurer who actually provided coverage. The current statute addressing this situation is very lengthy and the following words could be integrated into the existing subsection:
        - 656.262 (6)(a)
          Add: if the insurer discovers that a claim was inadvertently accepted for an injury occurring on a date when the insurer did not provide coverage to worker's employer, the insurer may deny the claim, even if the coverage information was available at the time of claim acceptance. The director shall, by rule, prescribe procedures for the processing of the claim to be transferred to the correct insurer and for the necessary monetary adjustments.

Mr. Lon Holston asked Mr. Davie if one of the cases mentioned was the jurisdictional problem where the court case ended up in Tennessee? Mr. Davie said there was a claim given to a subsidiary company and they thought they were doing right by accepting the claim, but the parent company discovered they did not have coverage.

John Shilts, Administrator, Workers' Compensation Division, said a second issue was the idea behind the legislative concept that was introduced to the subcommittee. The Tennessee court taking jurisdiction on an Oregon workers' compensation case that had to do with a bill. He said this is a little different from the case Mr. Davie was discussing. The legislative concept

recommendation is to reinforce that the Oregon workers' compensation is the exclusive remedy and they should be dealt with in the workers' compensation system.

Mr. Savage asked if the insurer stuck with the claim and wanted to get reimbursed by the insurer that really should have been paying the claim it would have to go to court to resolve it? Is there a vehicle in the workers' compensation system to resolve it? Mr. Davie said no there is not.

Perfecting a Workers' Compensation Claim – Deborah Sather, Attorney

Ms. Sather said to follow up from a previous subcommittee request to propose language to ORS 656.807 statute of limitation for occupational disease. She discussed the example case of the worker with hearing loss who retired and then six years later filed a workers' compensation claim as an occupational disease.

Ms. Sather asked the question why have a statute of limitations for occupational diseases?

1. If a claim is filed earlier rather than later, then it can stay a small problem. If it is a small disease problem, it can be treated easily.
2. Notice early on to an employer. If the employer is notified early about a problem, it can be corrected to prevent further workers from becoming sick or injured.
3. If the dispute occurred at work, everyone can look at it while still fresh.
4. Oregon businesses pay a premium based on payroll and experience rating. If there is an occupational disease, it should be rated in the experience rating. She said there are many coverage issues.

The following language changes are proposed by Ms. Sather:

- ORS 656.807 Statute of limitations for occupational disease claims. (1) All occupational disease claims shall be void unless a claim is filed in writing with the insurer or self-insured employer within one year of whichever is the later of the following dates:

  (a) The date the worker first treated for the symptoms of the claimed disease; or
  (b) The date the worker was first disabled, either temporarily or permanently, by the claimed disease; or
  (c) The date when, in the exercise of reasonable care, the worker should have discovered facts.

Ms. Sather said it is difficult to make perfect draft of statute of limitations because of two factors. One science is not perfect and doctors do not know everything regarding causation and two people do not go to the doctor for several reasons.

Mr. Davie said he agreed with the proposed language changes with one recommended tweak. Rather then the later of these three dates, he proposed going with the earlier of the first two dates. Having picked the date then take the later of that date and (c). The reason behind this is if the

later of the three dates is selected and that worker never becomes disabled which is a requirement under (b) then again the statute of limitations is left open because the third choice is never touched on. This takes care of the intent, but makes sure to put a stop on the statute of limitation at a finite point.

Mr. Savage asked if the language in (c) mirrors other statutes of limitations? Ms. Sather said yes the civil courts have used this for years and she believes in keeping with standards.

Ms. Sundstrom asked the subcommittee to please digest the items covered before reconvening the subcommittee.

Meeting adjourned at 11:07 a.m.