

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

September 25, 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
John Kirkpatrick, IUPAT District Council, Portland
Greg Miller, Gunderson LLC, Portland
Kathy Nishimoto, Duckwall-Pooley Co., Hood River
Jeri Ray, Timber Products Company, Springfield
Sheri Sundstrom, Hoffman Construction Company, Portland

Committee Members Excused:

Tracy Brill, Portland Fire Fighters Association, Portland
Mike O'Rourke, Plumbing and Steamfitters UA 290, Tualatin
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 1:08 p.m.

There was unanimous consent by the subcommittee that the minutes from August 20, 2008 be adopted.

Ms. Sundstrom said the subcommittee has looked at various issues over several months and it has been narrowed down to a few specific areas.

Chris Davie, SAIF Corporation, described the Sisco vs. Quicker Recovery case. At a prior meeting, Mr. Davie pointed out it was an injury that occurred in course of job, but the tow truck driver's conduct would be considered criminal conduct because he was arrested. Questions were raised whether the driver was convicted. Mr. Davie was not sure of the outcome of the case. He said there was push back from the committee on proposed statutory changes where the claim would not be compensable if the individual was doing something criminal. During the August 20th meeting, he proposed specific language to the subcommittee:

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.

John Kirkpatrick asked if the final test will be the outcome in law whether there was a conviction? This would be when the proposed language would apply? Mr. Davie said there are many elements of what is compensable under the law and statute that does not require a conviction. The statute says a claim is not compensable if sufficient evidence shows the injured worker was under the influence of drugs or alcohol. Mr. Davie said if the compensability were contingent on a conviction, it is not practical because it could take a year to determine a conviction and the compensability of the claim must be decided in 60 days.

Mr. Davie said this solution gets away from the concern about was it really illegal because the person wasn't convicted yet.

Mr. Kirkpatrick said you would still have to have some test to determine if the claimant satisfied the lawful order of a law enforcement official. He asked how would you accomplish that?

Mr. Davie said it is no different than what they have to do to determine the compensability of claims all of the time.

Greg Miller asked if there were allegations the driver was under the influence of drugs and alcohol? Mr. Davie said no the driver was initially pulled over for speeding.

Linda Barno said her concern is the employer says cooperate with law enforcement and as a result of his non-compliance, he ends up getting hurt and the employer is responsible. At what point does the employer draw the line? If the worker persists on their own accord, that is costly doing business. Mr. Kirkpatrick agreed with Ms. Barno. He said the problem with making changes in the workers' compensation system is what is intended to remedy a situation may have other implications that could have consequences.

Mr. Davie said they did look at the ripple effects in terms of unintended consequences from the language proposed.

Chris Moore, attorney for injured workers, said he is concerned about the proposed language for the Sisco case on the lawful orders and law enforcement official part. Mr. Moore is concerned how these might be interpreted later. He proposed defining law enforcement officials so it will not be misinterpreted.

The subcommittee recessed for a short labor caucus.

Lon Holston asked what is the current status of the Sisco case? Roger Pearson, managing attorney for Workers' Compensation Board (WCB), explained the Sisco case. He said the board ultimately upheld the denial regarding a combined condition and based on medical evidence found the claim not compensable. Mr. Pearson believes this case has been appealed and is on its way to the court of appeals.

Ms. Sundstrom asked if this denial was based on the medical portion only? Mr. Pearson said as the case was tried, the carrier's denial was on a number of bases: course and scope because there was a combined cause, but the injury was not caused by that. The claim was found not compensable based on the medical evidence, but it was found compensable in the course and scope. It was returned to the board to reconsider based on the medical question. The board decided the medical condition was not compensable.

Mr. Kirkpatrick asked if there was some common ground with support to the employer's decision on this narrow specific case? Is there some other intent here and have there been other cases with similar issues?

Ms. Sundstrom asked if this is something SAIF will be going forward with? Mr. Davie said SAIF will not go forward with the proposal, but wanted to bring it to the attention of MLAC.

Mr. Holston asked why deal with it until there is something definitive to continue with? He does not feel comfortable moving the proposal on to the full committee when it has not been fully vetted.

John Shilts, Administrator, Workers' Compensation Division, said in the first court of appeals decision they ruled on the course and scope issue. They ruled in favor of the worker. This sets precedent and is now case law. He said what is still being litigated is the combined condition or medical denial still on this case.

Ms. Sundstrom said this case has already been settled on course and scope.

Mr. Kirkpatrick requested a copy of the decision.

Ms. Barno said this sends a message to workers that it is ok to not comply with law enforcement or a lawful order and they will get covered.

Ms. Sundstrom asked what is the pleasure of the group? Mr. Savage said there are other employer stakeholder groups that can move forward with this proposal if they wish to.

Mr. Shilts said it is part of MLAC's statutory charge to look at court cases and bring them to the attention of the legislature. He said usually a legislator can be found to sponsor a bill.

Ms. Sundstrom said when the significant court cases subcommittee was first formed, stakeholders brought issues forward regarding case law that changed the original intent.

Jeri Ray asked if MLAC decides not to bless this proposal MLAC can still report this case to the legislature and then see if stakeholders pick it up?

Mr. Kirkpatrick said if there is a stakeholder that wishes to pursue this, then they would bring it forward as draft language to MLAC again for review.

The subcommittee agreed to report their findings and proposal to the full MLAC committee, but to leave the concept for stakeholders to pick up if they wish to pursue it.

Mr. Davie explained the Francisco G. Rodriguez case to the subcommittee. He said he asked for more time regarding the case to decide on where to take the issue.

Mr. Kirkpatrick said this case is a tough one. Sometimes an injured worker does not know about all their conditions, but find out about them later.

Mr. Davie said there may not be a legislative answer for this case.

Mr. Davie described the Jose S. Sandoval-Perez case to the subcommittee. He said there have been contentious issues around the method insurance companies reimburse one another. The courts have said the first insurance company should never have accepted the claim. Mr. Davie said there is not really a way to square it up and make it fair. He said the proposal is to amend the statute and put rules in place to allow the transfer of that claim. The following is Mr. Davie's proposed language:

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.

Ms. Sundstrom said she has a problem with this proposed fix. If a case is transferred to another carrier and the case is in disarray, this is asking another carrier to take on a potential exposure when they did not have the ability to do their own investigation. This could be at a substantial cost to take on the claim. She said how it is now, whoever made the mistake is taking on the full exposure. The carrier should have done due diligence to make sure there was coverage in place before they accepted the claim. She said insurance companies have 60 days to determine who the correct carrier is. Ms. Sundstrom understands mistakes are made, but she is uncomfortable with this proposal.

Ms. Barno asked currently how is this situation handled? Ms. Barno is concerned there could be a lapse in coverage and the injured worker is left with no coverage. Mr. Davie said if there are willing parties it is handled smoothly.

Mr. Davie said normally these situations are discovered in a reasonable amount of time. He said these are usually things that show up in six months. Mr. Davie said he does not know whether rulemaking could do something and he will look into the subcommittee's suggests, such as transferring responsibility from a certain point forward.

Mr. Savage asked if the department can write rules now? Mr. Davie said the first carrier cannot deny the claim once they have accepted it if they knew at the time they had coverage and rules cannot get around this.

Mr. Shilts said the department does have a legislative concept that deals with an aspect of this issue. The concept will ensure if there is litigation that it occurs on a claim it will stay in the workers' compensation system.

Ms. Sundstrom said she would not mind discussing this issue with Mr. Davie to refine the idea.

Mr. Kirkpatrick said he had not thought about Ms. Sundstrom's perspective regarding insurers – whoever accepted the claim first has ultimate responsibility for the life of the claim.

Ms. Sundstrom said Washington State Department of Labor and Industries employers will pick up the claim and then deny it and let the Oregon employer step in. She wished to bring this to the attention of the subcommittee and mention inter-state differences in law make things difficult.

Mr. Shilts said Washington has promulgated legislation and is working on rules. He said there are new twists in their legislation and the department has a lot of homework to do to figure out if reciprocity on this issue is an option.

Chris Moore, attorney for injured workers, suggested a couple of solutions:

1. Find a way to shift responsibility without issuing a formal denial.
2. If the carrier that is responsible has a dispute regarding how the first carrier processed the claim, then there can simply be litigation between the two carriers about what aspects of the claim will be passed on and which ones will remain with the carrier that made the mistake.

Ms. Sundstrom said the proposed language and solutions will need more discussion.

Ms. Sundstrom requested the Washington legislation be forwarded to her.

The next subcommittee meeting will be Friday, October 10, 2008.

Meeting adjourned at 2:02 p.m.