

**WORKERS' COMPENSATION
MANAGEMENT-LABOR ADVISORY COMMITTEE**

January 30, 2009
10:00 a.m. – 12:00 p.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
Mike O'Rourke, Plumbing and Steamfitters UA 290, Tualatin
Jeri Ray, Timber Products Company, Springfield
Bob Shiprack, Oregon Building Trades Council, Portland
Sheri Sundstrom, Hoffman Construction Company, Portland
Cory Streisinger, Ex-Officio Member, Department of Consumer and Business Services, Salem

Committee Members Excused:

John Kirkpatrick, IUPAT District Council, Portland
Kathy Nishimoto, Duckwall-Pooley Co., Hood River

Sheri Sundstrom, committee co-chair, called the meeting to order at 10:03 a.m.

Motion was made and seconded to approve the minutes from January 16, 2009 full MLAC meeting as submitted. All members voted aye. Motioned passed.

Subcommittee Reports

Attorney Fees

Greg Miller explained the discussion that took place at the subcommittee meeting on January 23rd about possible draft language on various attorney fee issues.

Martin Alvey, Oregon Trial Lawyers Association (OTLA), reported OTLA, SAIF Corporation, Oregon Self-Insurers Association (OSIA), and Liberty Northwest worked on issues discussed at the subcommittee meeting and included the resulting summary for the record. Many of the items on the summary were agreed to.

Mr. Miller requested OTLA, OSIA, SAIF Corp., and Liberty Northwest discuss their collaborated efforts and results with the full committee.

Chris Moore, OTLA, explained the summary to the committee. The following is a chart outlining the main points covered:

Subject	Legislative Changes
Attorney Fees for Defending Reclassification	<p>Add a new ORS 656.386(3): If a claimant requests claim reclassification under ORS 656.277, and the insurer or self-insured employer does not timely respond to the request, or if the insurer or self-insured employer requests a hearing, requests review, appeal or cross-appeal to the Court of Appeals, or petition for review to the Supreme Court, and the director, Administrative Law Judge, Board, or court finally determines that the claim should be reclassified to disabling, the director, Administrative Law Judge, Board, or court may assess a reasonable attorney fee.</p>
Attorney Fees for Defending Rescission of Notice of Closure	<p>Amend ORS 656.382(2): If a request for hearing, request for review, appeal or cross-appeal to Court of Appeals, or petition for review to the Supreme Court, and the director, Administrative Law Judge, Board, or court finds that the compensation awarded to the claimant should not be disallowed or reduced, or that the order rescinding a notice of closure should not be reversed, the employer or insurer shall be required to pay to [the claimant or] the attorney for the claimant a reasonable attorney fee in an amount set by the Administrative Law Judge, Board, or the court for legal representation by an attorney for the claimant at and prior to the hearing, review or appeal or cross-appeal.</p>
Attorney Fees for preserving benefits on appeal of closure	<p>Amend ORS 656.382: If an employer or insurer initiates a request for hearing, request for review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court of an Order on Reconsideration under ORS 656.268(6)(g), and the Administrative Law Judge, board or court finds that the permanent partial disability, permanent total disability, or temporary disability compensation awarded to a claimant should not be disallowed or reduced, the employer or insurer shall be required to pay to the [claimant or the] attorney of the claimant a reasonable attorney fee in an amount set by Administrative Law Judge, board or the court for legal representation by an attorney for the claimant at and prior to the hearing, review on appeals or cross-appeal.</p>
Attorney fees for prevailing on <i>de facto</i> denial of initial claim	<p>Amend ORS 656.386(1): (E) A claim for an initial injury or occupational disease to which the insurer or self-insured employer does not respond within 60 days.</p>
Attorney fee and penalties for delayed payments of settlements and fees. Fees for late discovery.	<p>Amend ORS 656.262: To allow a penalty and attorney fee for late payment of a disputed claim settlement. The claimant or claimant's attorney must first notify the insurer or self-insured employer in writing that the payment is late. If the payment is made within the next 2 business days, no penalty or fee is allowed. After that a modified, single axis matrix will provide for a penalty and attorney fee. The claimant will receive a percentage under the matrix based on the portion of the settlement proceeds allocated to the claimant. The claimant's attorney will receive an attorney fee under the matrix based on the portion of the settlement proceeds allocated to the claimant's attorney's fee.</p>

Revise cap in DCBS litigation	<p>Amend ORS 656.385: An attorney fee awarded pursuant to this subsection may not exceed \$3,000 absent a showing of extraordinary circumstances. The amount of such fee shall be adjusted annually by the percentage increase in the average weekly wage, if any. The Director of the Department of Consumer and Business Services, by rule, may prescribe methods for establishing the amount of such fee.</p>
Revise cap in responsibility cases	<p>Amend ORS 656.308: Such a fee shall not exceed \$2,500 absent a showing of extraordinary circumstances. The amount of such fee shall be adjusted annually by the percentage increase in the weekly wage, if any. The Director of the Department of Consumer and Business Services, by rule, may prescribe methods for establishing the amount of such fee.</p>
Revise cap on reasonableness issues	<p>Amend ORS 656.262: An attorney fee awarded pursuant to this subsection may not exceed \$3,000 absent a showing of extraordinary circumstances. The amount of such fee shall be adjusted annually by the percentage increase in the weekly wage, if any. The Director of the Department of Consumer and Business Services, by rule, may prescribe methods for establishing the amount of such fee.</p>

There were concerns expressed by Susan Lavier, OSIA; Sally Curey, Liberty NW; and Chris Davie, SAIF Corp. on several of the main points. OTLA will work with Legislative Counsel on draft language, taking into account the concerns, distribute it to the group, and return to MLAC with the language.

OTLA mentioned possible sunsets with the proposals. Ms. Sundstrom and Bob Shiprack advised against doing sunsets, but instead suggested requiring a study in four years time. Stakeholders said a study would be adequate at a minimum.

ACTION: A motion was made and seconded to move the conceptual agreements on attorney fees to Legislative Counsel. A vote was taken and the following members voted aye: Linda Barno, Greg Miller, Sheri Sundstrom, Jeri Ray, Tracy Brill, Lon Holston, Mike O'Rourke, and Bob Shiprack. Motion passed.

2009 Legislation

The following bill from the Chiropractic Association of Oregon (CAO) was presented for MLAC approval to move forward in legislative committee:

- **HB 2045 Chiropractic Impairment Ratings** – Authorizes chiropractic physician serving as attending physician at time of claim closure to make findings regarding impairment for purpose of evaluating injured worker's disability.

Kevin Willingham, Workers' Compensation Division (WCD), said prior to HB 2756, attending physicians were able to rate impairment. HB 2756 took away chiropractors' ability to rate impairment. HB 2045 reinstates chiropractors' ability to rate impairment and is the same as LC 1298, which the committee reviewed at a previous meeting.

ACTION: A motion was made and seconded to recommend to the legislature HB 2045 as presented. A vote was taken and the following members voted aye: Linda Barno, Greg Miller, Sheri Sundstrom, Jeri Ray, Tracy Brill, Lon Holston, Mike O'Rourke, and Bob Shiprack. Motion passed.

Drew Hagedorn, Oregon Self-Insurers Association (OSIA), presented the following concept:

- **Vocational Eligibility Evaluations Concept** – OSIA proposes if a worker has been released for regular work, or entered into a Claims Disposition Agreement, then a vocational eligibility evaluation should not be required. They propose the following language change:
 - ORS 656.340(1)(B) The time the worker is medically stationary, if the worker has not returned to **or been released for** the worker's regular employment or **has not returned to** other suitable employment with the employer at the time of injury or aggravation and the worker is not receiving vocational assistance.

OSIA will bring back this concept in draft language along with their other concept draft language as it becomes available from Legislative Counsel.

Mary Botkin, American Federation of State, County and Municipal Employees (AFSCME), presented the following concept:

- **State Employee Return-to-work Concept** – Reintroducing the bill from last session, which requires the state to actively participate in a reemployment program and the preferred workers' program under workers' compensation.

Ms. Botkin said Mark Rasmussen, Department of Administrative Services (DAS), did a great job of placing these requirements in the rules. She expressed concerns that once Mr. Rasmussen and the current administration leave office the rules could change. She wishes the state employee return-to-work program be placed in statute. Ms. Botkin is waiting on draft language, which she will bring to the committee when it is released from Legislative Counsel.

Discussion:

Ms. Sundstrom noted there were fiscal concerns about the bill in the 2007 session. Ms. Botkin reassured the committee that the task force in the bill last session is no longer in the current concept.

Lon Holston said if state workers are injured on the job and cannot perform their current job but they have the skills/education to qualify for another job within the state, then they should be able to apply and be compelled to find those positions open. He believes it is a moral responsibility to move forward since it involves injured workers.

There was discussion about contractual issues and union support. Ms. Brill believes collective bargaining in unions is beyond the scope of MLAC. Mr. Savage asked if DAS has any anxiety about this concept.

Mark Rasmussen, DAS, said he would like to discuss with his administration before stating DAS's position on the concept. He believes that placing the concept in statute will not make a large difference in what they currently do.

Department of Consumer & Business Services Updates

Update on Medicare Mandatory Insurer Reporting Requirements

Cathy Ostrand-Ponsioen, WCD, gave an overview of new Medicare mandatory insurer reporting requirements that take effect this year. She submitted a document outlining the provisions and information printed from the Center for Medicare and Medicaid Services Web site for the record.

Discussion:

Members reviewed the requirements and noted the hefty fines of \$1,000 per day of noncompliance. They also discussed how difficult it is to understand all of the requirements.

Lou Savage clarified the claims that are reported are accepted claims or filed claims. Jennifer Flood, Ombudsman for Injured Workers (OIW), said from the worker's perspective when medical bills are not getting paid from Medicare, it is because they filed a workers' compensation claim. Approaching the Medicare or Medicaid age has an impact on settlement and having legal representation is very important. This has an impact on workers when they least expect it. Ms. Flood said the reporting requirements are not just for accepted claims.

Jerry Managhan, Deputy Administrator, WCD, said it is a complicated system since Medicare works through subcontracts throughout the United States. He said as the division receives information they will try to direct people to the right contacts. Ms. Sundstrom suggested it might be helpful to have the Web site link on the workers' compensation Web site.

Update on Accepted Disabling Claims Rate

The update on accepted disabling claims rate will be presented at the next full MLAC meeting.

Ms. Sundstrom made a request to the department to research the number of injured workers that live in Washington and work in Oregon, but receive medical care in Washington. She requested looking at all similar situations with injured workers at Oregon borders with California and Idaho as well. She is also interested in how much money goes out of state. Jerry Managhan, Deputy Administrator, WCD, said the division will look at the database and return at a later MLAC meeting with the information.

Tracy Brill clarified Ms. Sundstrom's interest in this issue is not to restrict the worker's ability to choose providers.

Laurel Gunderson, Providence Managed Care Organization (MCO), mentioned there are many injured workers that live in the Vancouver, WA, area and some in Walla Walla, WA, who go to medical providers in Washington.

Meeting adjourned at 11:44 a.m.