

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

February 6, 2009
9:00 a.m. – 11:00 a.m.
Conference Room F, Labor & Industries Building
350 Winter Street NE, Salem, Oregon

Committee Members Present:

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

Committee Members Excused:

Tracy Brill, Portland Fire Fighters Association, Portland
John Kirkpatrick, IUPAT District Council, Portland
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 9:03 a.m.
There was unanimous consent by the subcommittee that the minutes from November 17, 2008 with two corrections be adopted.

Discussion of Statute of Limitations for Occupational Disease and Injury Claims

Ms. Sundstrom encouraged everyone present to participate in today's discussion.

Ms. Sundstrom referred to the Freightliner vs. Holman case cited in testimony presented by Deborah Sather, Oregon Trial Lawyers Association, in which the Court of Appeals criticized the ORS 656.807 statute of limitations as being unclear.

Ms. Sundstrom asked Ms. Sather to present the four criteria on determining occupational disease listed in the ORS 656.807.

Ms. Sather expressed her wish to move on to recent decisions from the Workers' Compensation Board. Ms. Sundstrom asked Ms. Sather to explain how the cases are affected by these four elements.

Ms. Sundstrom read from Ms. Sather's testimony on the Bohemia case and referred to HB 2271 from the 1987 legislation, quoting Bob Shiprack's comments on the issue.

According to Ms. Sather the four elements in ORS 656.807 are:

1. Worker discovered the occupational disease.
2. Worker should have discovered the occupational disease.

The committee discussed language of ORS 656.807.

Ms. Sather pointed out the inconsistency of the first two elements, because the day the worker had actually discovered the disease would always be preceded by the day the worker should have discovered the occupational disease.

3. The date the worker becomes disabled.
4. The date the worker is informed by physician that they are suffering the occupational disease.

Ms. Sather explained the reason for confusion between the intended and the current uses of these criteria in the statute.

Ms. Sather presented examples of series of trichloroethylene (TEC) cases that have recently been decided by the Workers' Compensation Board. Ms. Sather explained the effect of ORS 656.807 language on the decisions in these cases and hypothesized about what would have happened with these cases if the language in the statute was different.

The committee members and Mr. Sather discussed the significance of science in TEC cases.

Ms. Sundstrom noted there is a problem with many occupational disease claims happening after the worker has already left the employment.

Linda Barno explained that when there is a failure to file these claims or notify the employer, the employer is prevented from doing the right thing. In addition, by waiting to file a claim, the employee acquires further damage to their health and presents a potential health threat to other employees.

Ms. Barno pointed out the importance of ensuring that everyone is working cooperatively together in order to address the issue.

Ms. Sundstrom asked Ms. Sather about the solution to dealing with the language ambiguity in the statute.

Ms. Sather explained that the claim has to be filed within one year or whichever is the earlier of the following dates:

1. The date the worker was first treated for the symptoms of the claimed disease
or

2. The date the worker was first disabled, either temporarily or permanently, by the claimed disease; and
3. Within one year of the date when, in the exercise of reasonable care, the worker should have discovered facts indicating the claimed disease was work-related.

Lon Holston noted that in his experience workers don't know what their occupational disease is and finding out can carry on for a long time. He pointed out the original intention of the statute is to protect the worker once they discover they have a disease. Mr. Holston expressed his concern about getting into many other issues.

Ms. Barno raised a question about the term "disabled" in the statute and about how it relates to hearing loss claims.

Ms. Sather explained that hearing loss situation presents its own unique challenges and is beyond this statute.

Anthony Miller, Oregon Self-Insurers Association, suggested that determining a reasonable timeframe for a claim would be very helpful.

Ms. Sather explained that the ability to determine causation is critical to early learning. Work sites change over time and it is difficult to investigate what happened in the past and if it is occupationally related or not.

Mr. Holston pointed out the difference between determining the beginning of occupational injury and occupational disease. Mr. Holston expressed his concern about the committee's approach to addressing this issue and at the same time protecting the worker.

Ms. Sather explained the proposal provides flexibility to the worker in filing claim.

Ms. Sundstrom expressed her concern about the ambiguity of language in the statute and the importance of ensuring the language in this part of the statute is very clear in order to avoid long-term legal cases.

Chris Moore, Oregon Trial Lawyers Association, voiced his concern about the earlier timeframe on occupational diseases in the proposed statute.

Ms. Sundstrom asked Ms. Sather if the proposed language is the same as the one presented in the November meeting.

Mr. Moore noted there are some differences in these proposals.

The committee discussed problems related to hearing loss cases with Mr. Alvey, Mr. Moore, and Ms. Sather.

Anthony Miller offered to sit down with interested parties to come up with a proposal with more clear language.

Ms. Sundstrom suggested that all parties try to figure out what constitutes the timely notice of accident. Ms. Sundstrom proposed a solution to the timely notice problem, a requirement to file a form to report accident, and asked the committee members for their opinion on her suggestion.

Committee members discussed the logistics behind the process of filing an accident report form.

Jennifer Flood, Ombudsman for Injured Workers, raised an issue about notice of an incident versus notice of a claim. Ms. Flood voiced her concern about creating incidents as claims, and about adding more requirements and time frames on workers. Ms. Flood expressed her opinion that there is a need for clarification of “claim” and “incident.”

Mike O’Rourke pointed out the fact that employees fear job termination if they file a form and report injury.

The committee members proceeded to discuss the issue of employees’ hesitation to file accident forms.

Mr. Alvey expressed his fear that people filing an injury report might be under the impression that they had filed a claim.

Ms. Sundstrom asked John Shilts, Workers’ Compensation Division, to explain the penalties for employers who preclude worker from filing a claim.

Mr. Shilts explained how the Department of Consumer and Business Services deals with bad actor employers.

Ms. Flood expressed her concern about taking away workers’ rights to get benefits.

Ms. Sundstrom asked the work group to discuss the issue brought up by Ms. Flood.

Ms. Barno made a request to the work group to look into the specific issue of hearing loss.

Roger Pearson, Workers’ Compensation Board, offered to provide copies of TCE cases to the work group.

Meeting adjourned at 11:09 a.m.