WORKERS' COMPENSATION

MANAGEMENT-LABOR ADVISORY COMMITTEE

Full MLAC Meeting

August 7, 2013
9 a.m. – Noon

Committee Members Present:
Tami Cockeram, City of Hillsboro
Carol Duncan, General Sheet Metal, Clackamas
Paul Goldberg, Oregon Nurses Association, Tualatin (by phone)
Elana Guiney, Oregon AFL-CIO, Salem
John Mohlis, Oregon Building Trades Council, Portland
Kathy Nishimoto, Duckwall-Pooley Co., Hood River
Ben Stange, Polk County Fire District No.1, Independence
Bridget Quinn, NECA-IBEW Electrical Training Center, Portland
Jaron Sue, Marquis Autumn Hills, Portland
Theresa VanWinkle, MLAC Committee Administrator

Members Excused:
Patrick Allen, DCBS Director, *ex-officio*
David Andersen, Andersen Construction Company, Portland

Agenda Item	Discussion
Opening	Meeting called to order at 9:05 by John Mohlis. Minutes from June 28, 2013 minutes will be reviewed at the next full MLAC meeting.
Impairment Rating Subcommittee	John Shilts, Administrator, Workers' Compensation Division (WCD) discussed the process regarding permanent disability and rating impairment in Oregon. A memo was provided to the committee by Cara Filsinger, Policy Advisor, Workers' Compensation Division, to summarize information previously discussed before the MLAC full committee as well as the Subcommittee on Impairment Rating. When a worker is disabled from a work-related injury they are eligible for Permanent Partial Disability (PPD). First, an impairment rating is intended to compensate a worker for loss of use or function of body part or system. Second, work disability compensates for loss of earning capacity due to a work-related injury and the resulting impairment. Standards for rating PPD are set in the Oregon Administrative Rules (OAR) which are created using a public process. Oregon is not required to use a specific American Medical Association (AMA) guide, but instead uses regularly updated OAR which are unique to Oregon. Many of the rules contained in OAR use range of motion to measure impairment, but this has been identified by some as less desirable and these individuals seek a better alternative. An estimated 90% of claims where PPD is part of the impairment rating uses range of motion

The full MLAC committee previously heard testimony regarding this issue a number of times. Stakeholder input in this area falls into 3 categories:

1. Change the way Oregon requires impairment to be rated
2. Require the use of a specific AMA edition. Mr. Shilts noted that there is some opposition to changing to 6th Edition.
3. change or improve areas that use range of motion measurement

Mr. Shilts reviewed the AMA methodology and the AMA 6th Edition with the committee. He also provided information about state-by-state comparisons, reminding the committee that these types of comparisons are "apples to oranges" as Oregon has its own system not emulated in other states.

Mr. Shilts discussed efforts made over the past last three legislative sessions regarding making changes to the PPD system in Oregon, stating that the decision made by MLAC was to encourage return to work as a beneficial outcome. The current benefit structure reflects this.

When the MLAC Subcommittee on Impairment Rating suspended work in 2011 it concluded that there are pitfalls to using range of motion, specifically noting that range of motion fails to provide unbiased ratings and/or reflect loss of function in every case. The Subcommittee agreed that improvement could be made in the current system, but testimony was insufficient to sway them in one direction or another. When the Subcommittee went on hiatus in 2011, it recommended that a structured study be undertaken. Details not for such a study were not laid out at that time. The expectation was that the full committee would reconvene and the subcommittee would take the issue up following the work done on the issue of Access to Medical Treatment.

Elana Guiney asked whether or not any of the 10% of cases not using range of motion rated differently already. Mr. Shilts gave the example of the amputation of a finger or a brain injury, stating that while there may be at times some review of residual range of motion those injuries are rated primarily based on a schedule of benefits. There could be both physiological and psychological impairment in addition to physical impairment, which are not measured by range of motion. Ms. Guiney asked if things that pertain to range of motion are consistently rated as such. Mr. Shilts indicated that the administrative rules require that we predominantly follow a range of motion methodology.

Kathy Nishimoto asked how many states still use range of motion. Mr. Shilts stated that he would get a firm number and let her know. He also said that within the AMA 6th edition, which uses a different methodology, range of motion is still considered, but it is not the predominant methodology. Ms. Nishimoto asked about complaints from injured workers or their attorneys that awards are incorrect under Oregon's current system. Mr. Shilts stated that there were two answers to her question. First, there are appeals regarding the benefit provided and its accuracy based on the model used in Oregon. Second, we are not hearing complaints about the methodology itself that he is aware: rather, it is practitioners that are questioning the range of motion methodology?

Tami Cockeram asked about the number of appeals that are returned with an increase in impairment rating. Mr. Shilts stated that he would get that information and let her know, indicating that there is a percentage that either increase or decrease, and that given that most appeals are made by the worker there are typically more reconsiderations that raise the finding than lower it but it can go both ways.

Theresa VanWinkle, Committee Administrator, asked about previous discussion revolving around the cost of doing a study and the cost of training practitioners in the event a different methodology is adopted. Mr. Shilts indicated that the cost to practitioners would be fairly minimal, and would involve retraining both for practitioners and carriers. The discussion had not evolved further.

Ms. VanWinkle asked if this would be one of the topics within the study. John Mohlis asked how this would work. Mr. Shilts stated that the current system defines that the date of injury determines which law and rules will apply to the rating of the claim. As an example, a worker injured in 2005 would be subject to the current laws in that year, not in the current calendar year. Because of this, there is an impact on workers in terms of timing. If the committee wants to address this, there is also the issue of identifying at what point the change takes affect and to whom it applies.

Mr. Mohlis asked if a change in the law was necessary in order to authorize a study of this nature. Mr. Shilts indicated that the Workers' Compensation Division (WCD) does not have funding for this type of study factored into its legislatively approved budget, so if WCD was to coordinate and oversee this study it would need to have funding for it in the budget, which would be obtained via legislative processes. However, if there was another way to get the study done then no, no law change would be needed.

Ben Stange asked about finding a way to compare appeals based on this model to those of other states. Mr. Shilts stated that there can be some rough comparisons done in terms of appeal rates. One area for a more direct comparison is that PPD is typically an area that is frequently appealed nationally, which means that there are many appeals made and hearings conducted. Oregon is different in that it has an administrative dispute process, and the standards applied to a case are applied consistently at all levels of decision-making. An insurer that is doing the initial work toward an award applies the same standards as would an Administrative Law Judge (ALJ), the Workers' Compensation Division, or the Oregon Supreme Court. While Mr. Shilts was not sure if this was true in other states, he indicated he would find out and report back to the committee.

Ms. Cockeram asked if the AMA 6th Edition only addresses the loss of function, and if so if this would impact the earning capacity of injured workers. Mr. Shilts stated that this issue is something that has yet to be determined. His understanding is that AMA 6th Edition is a different model for determining impairment.

Mike Manley, Department of Consumer and Business Services, Central Services Division discussed the two types of compensation within PPD: impairment and work disability. If an impairment rating of 15% is given using the current standards, question is how that applies to work disability side. There are modifiers applied to

the impairment rating so the amount of impairment is a starting point for determining the work disability. If you change the impairment rating method and that in turn changes the generosity of impairment ratings; the change will ultimately impact both sides of PPD.

Ms. Cockeram asked if only impairment is addressed in the AMA 6th Edition, will that impact work disability as well? Mr. Manley indicated that modifiers would not be impacted but impairment would be. Modifiers are specific to Oregon. PPD is the most distinctive feature of a lot of state workers' compensation systems so it is difficult to estimate how changes implemented by other states would impact Oregon if those same changes were implemented here.

Jennifer Millemann, Workers' Compensation Division, Resolution Section, stated that any change in impairment will ultimately change the award, so the method with which impairment is determined does have an impact. 90% of cases may involve range of motion, but that is only one part of impairment.

Paul Goldberg asked if the purpose of the review was to get more accurate ratings or to reduce or change the benefit. Mr. Shilts said that the review was not a matter of reducing or increasing generosity, but was about whether or not alternative ways to measure impairment would result in more reliable findings. Mr. Goldberg asked if the study would be set up as a parallel to see what results cases would have given the two systems. Mr. Shilts indicated that this was one available option, and that the discussion with the subcommittee had just started to get into requirements of a study when it adjourned. There had been previous recommendations as far as looking at various types of benefits, so having a dual rating on a number of workers to determine impact is an available option. There would be costs to doing that in terms of rating the same worker in two different ways, so that would need to be funded. There was no in depth discussion or consensus regarding research model or design, but rather if the study should be undertaken at all.

Ms. Guiney asked about other possible methodologies. Mr. Shilts said that different states approach this question in terms of PPD differently. Typically a methodology will involve impairment and work disability or loss of earning capacity. Oregon looks at both. Some states base their impairment rating on one specific edition of the AMA guides. He further indicated that while there are other ways to evaluate residual functional capacity, he is not an expert in these methodologies.

Public testimony

Dr. Vern Saboe, Oregon Chiropractic Association said that he does not necessarily advocate the use of the American Medical Association (AMA) Guides 6th Edition specifically, but prefers a recommendation to use whatever edition is the most current. As medical knowledge improves the AMA guides are updated, so using most current guide applies the most current information. Dr Saboe indicated that a 7th edition would likely be available within the next 3-5 years.

Dr. Saboe discussed the diagnostic model used in the 6th Edition as compared to the range of motion model used in the 3rd Edition and by Oregon's current methodologies. He also discussed the list of peer reviewers who worked on the 6th Edition. He said that when the issue of the diagnostic model was presented to the

MLAC Impairment Rating Subcommittee in 2008, the subcommittee deferred to the Medical Access Committee (MAC). At that time MAC concluded that range of motion measurement is a poor indicator of impairment and is unreliable, not well correlated to impairment. Oregon's system is heavily dependent on the range of motion model, which Dr. Saboe feels leads that moving away from range of motion and toward a diagnostic model will improve validity and reliability. He stated that Oregon's unique modifiers could remain unchanged; they would just be supported by a more evidence based methodology.

Dr. Saboe, on behalf of the Oregon Chiropractic Association (OCA), requests that the committee consider a study that would look at adopting the most current evidence based methods and how Oregon's modifiers could be used with current edition. He supplied written testimony to this effect for the record.

Elana Guiney asked how measurements would be quantified besides using range of motion. Dr Saboe stated that an injury comes with a defined range, then the AMA guides tweak the degree of severity of the injury up or down within that range. It is a condition based model rather than a range of motion model. As an example, a worker may have a slipped disc, but it may not be "slipped enough" for nerve injury. Even without the nerve injury the disc will slowly deflate, and medical professionals know that this will cause the worker problems in the future. In the 3rd Edition, if there's no hard problem so there's no impairment; it does not take into account "the inevitable". Ms. Guiney asked for clarification that the 6th Edition evaluates the type of injury rather than the severity of injury. Dr. Saboe stated that the diagnostic range would be based on type of injury rather than on range of motion, but that severity would be a part of the determination of where an injury falls in the range.

Kathy Nishimoto asked how financial awards are determined based on the 6th Edition. Dr. Saboe indicated that he was unsure in terms of the equations used to determine award, but that a certain injury will have a correlating negative impact and that there is a formula to follow in determining the financial effect of that negative impact. He felt that the suggested study would investigate more accurate methods of determining impairment and applying modifiers.

Tami Cockeram asked if range of motion is a factor in the 6th Edition. Dr. Saboe indicated that for injuries such as to the spine, range of motion is not used, and that in either sub-acute or chronic injuries you could have full range of motion yet still have problems resulting from the injury.

Paul Goldberg referenced some documents from a previous hearing that looked at different injuries from both the perspective of Oregon's current rating system and from that of using the 6th Edition, and that in all three examples Oregon's current rating system resulted in a higher award to an injured worker. He asked for clarification regarding the effect on awards to injured workers if the 6th Edition includes compensation for future complications. Dr. Saboe said that because of Oregon's modifier system the awards should remain relatively constant, but that the impairment rating itself would be more accurate. Mr. Goldberg asked how rater reliability would be changed by adoption of the 6th Edition. Dr. Saboe said that range of motion has "horrible examiner reliability".

Theresa VanWinkle, Committee Administrator, asked about the fundamental differences between the 5th and 6th Editions. Dr. Saboe indicated that the 6th Edition removed an additional pain rating chapter, with which he disagrees. He stated that "disability doesn't happen in a vacuum; people are disabled because it hurts, so this should be a part of impairment rating".

Carol Duncan asked how application differs between the 3rd and 6th Editions. Dr. Saboe indicated that because the 6th Edition is diagnostically based, which is a concept routinely used by doctors. This makes the 6th Edition easier for them to use than the 3rd Edition.

Julene Quinn, attorney, Kryger Alexander Carlson, discussed Chris Moore's written testimony submitted to MLAC at a prior meeting. She stated that many are discussing finding the most accurate method for determining impairment, but that really isn't the purpose of the system. Its purpose is to compensate the worker for their inability to earn the same money they could prior to the injury. Workers are concerned about being compensated, not the method used. Awards for some workers went up because more money went to those who were more seriously injured. Ms. Quinn indicated that any attempt to reduce benefits would "be met with huge resistance". She does not believe that Oregon's current system is "broken to the point that it needs to be redone". She is concerned that a change would be considered without having an adequate study conducted first, for which the Workers' Compensation Division (WCD) does not currently have the funding in place, and worries that a study conducted by those who have a stake in the outcome will be unable to provide an unbiased analysis.

Jaron Sue asked if workers' compensation attorneys were or were not in favor of a change in methodology. Ms. Quinn stated that it was not that they were in favor of inaccurate ratings, but that they would not be in favor of a decrease in awards to injured workers. She stated that "until you run numbers you don't know if you're compensating them for their loss". She also questions the current procedure, under which a worker has no opportunity to indicate whether or not an award is fair until after an insurance company closes their claim.

John Mohlis asked if Ms. Quinn or her colleagues have any experience in comparing how and award is calculated under the current Oregon system as compared to use of the 6th Edition. Ms. Quinn indicated that she believes that in other states awards have been reduced under the 6th Edition, and that some states have repealed its use. The 6th Edition may not be adopted in the same way in other states as it would be in Oregon, but in some other states there has been a negative impact as a result of the adoption of the 6th Edition.

Mike Manley, Department of Consumer and Business Services, Central Services Division discussed the distinction between evidence basis vs. accuracy. Evidence basis places heavy emphasis on diagnosis made in a case; they want to be very clear about how those diagnoses are described and what criteria are used to make that diagnosis. The next step is to translate those evidence based diagnoses into a numerical rating. Numerical determination is a consensus based process, and

	committee decides what x condition with y findings has z numerical rating, and there is no standard against which to measure that. Putting a number to it is not an objective decision, but that is the number that goes into the impairment rating. Ms. Cockeram asked if it would be possible for the Workers' Compensation Division to provide the percentage of dollars paid for Permanent Partial Disability (PPD) that used loss of use function. Mr. Manley indicated that there are some relative amounts in the PPD update, but that it is important to remember that the impairment rating is used on both sides of the equation. Jennifer Millemann added that there are some injured workers who do not have a physical impairment, so even if they have a work-related inability to do their jobs, current Oregon law allows for no PPD award. Dr. Saboe added that numbers don't matter if there is no finding of impairment. He sees instances in which there's no loss of range of motion so there's no finding of impairment, but that is inaccurate. A more accurate method for who is impaired and who is not is critical. Brian Collins, injured worker, discussed range of motion and loss of income. He stated that the amounts received by injured workers do not compensate a person for their injury, but that is not the issue. These issues are important because life changes as a result of injury. The quality of life isn't the same following an injury. A more extensive look for basis of PPD and effect on the total person is needed, which is difficult to determine in a doctor's office in a controlled environment. He asks that the system take into consideration repetition and long term effect of injury, and asks the committee to remember that the system is for benefit of worker, not doctors, attorneys, or insurance companies.
Committee discussion	Theresa VanWinkle, Committee Administrator, asked the committee what they needed in addition to more time to review the materials provided. Tami Cockeram asked for a sampling of what Partial Permanent Disability (PPD) awards would look like using the American Medical Association (AMA) Guides 6th edition as compared to Oregon's current methodology. Bridget Quinn asked if it would be possible to apply the 6th Edition to earlier cases as a method of comparison. Ms. VanWinkle indicated that she had a document that she would provide to the committee. Elana Guiney asked about this document, wondering if it replaces the portions of Oregon's current system that use the 3rd Edition with the 6th Edition, or if it compares Oregon's current system to use of the 6th Edition without Oregon's other system components. John Shilts, Administrator, Workers' Compensation Division stated that there was some limited comparison work done with previous committee. Mike Manley stated that in 2006 there was a mandated study of the old Oregon system of determining PPD vs. the new Oregon PPD structure, which rated in parallel a set of approximately 400 cases. This study looked at Oregon's old system vs. its new system with three sets of criteria, then through the benefits structures. It found no statistically significant difference between the two. In that study the ratings could be done using same evidence in claim file, so raters would use same evidence to walk through rating process. If a new study seeks to compare information

generated in claims process under current system with the 6th Edition or other diagnosis based ratings process, analysts would have to go back to the doctors and have them review the process. This would be a long and expensive process. Ms. VanWinkle stated that any discussion of funding for a study would need to be reviewed by Pat Allen, Director, Department of Business and Consumer Services. Mr. Shilts stated that there may be funding options outside of direct government funding of a study, and that possibly stakeholders would be willing to do a joint study.

Ms. Guiney asked if there was a way to get a sense of what the limitations are with Oregon's current model and if there are the same or different limitations with the 6th Edition in terms of workers. Mr. Shilts indicated that WCD could provide some information regarding limitations, as well as mechanisms built into current system that have not been discussed by the committee. Ms. VanWinkle asked if this information had been a part of the discussions held by the Medical Advisory Committee (MAC). Mr. Shilts stated that it was. He said that one issue that came out of those discussions was that we have some laws in Oregon that go to compensability of accepted conditions, and that insurers are not required to accept every condition. Moving to a diagnostically based model would require some attending to that issue as well as looking at mechanisms in the current system which may or may not be sufficient if something manifests at a later date or was omitted in the initial rating.

Paul Goldberg asked about ways to construct a more global study. Mr. Manley said that you reach a point where there are so many pieces that you can't realistically say what resulted from the change in methodology and what did not. Analysts would have to look at the injuries not the payments, and then track 5-10 years of other factors such as economic climate. His sense was that a study of this nature would wind up with more questions than solutions.

Ben Stange stated that his issue with a study is that it would intend to shift money from one place to another because of the focus on remaining cost-neutral and on the injured workers themselves. He prefers to hear from workers on how they think the system should be improved rather than study the system itself to determine whether or not any specific group being left out and then fine tune the process to include them.

Brian Collins offered the use of his claim information for study if it was helpful to the committee, as it is an example of recent case history and is extensive.

Dr. Saboe stated that part of the equation is that we are talking about numbers where people have already been determined to be impaired. Specifically in spine related injury, looking at those found not to be impaired but might be under more evidence based methodology would be helpful.

Ms. Guiney stated that there should be a middle ground somewhere that plugs the holes without changing the entire system.

Next Steps	Theresa VanWinkle, Committee Administrator, will investigate the feasibility of a

	study. She will also establish agendas with the committee co-chairs and will start to look at possible legislation for the 2014 session. The next meeting date has not yet been established, but will be determined and committee members will be notified.
Meeting Adjourned	John Mohlis adjourned the meeting at 10:59.

**Referenced documents can be found on the MLAC Supporting Documents page here:
http://www.oregon.gov/DCBS/MLAC/pages/support.aspx