WORKERS' COMPENSATION
MANAGEMENT-LABOR ADVISORY COMMITTEE
Subcommittee on Independent Medical Examinations

September 28, 2016
2:30 p.m. – 4:00 p.m.
Labor & Industries Building, 350 Winter Street NE, Salem, Oregon

Committee Members Present:
Guy Boileau, Louisiana-Pacific Corporation
Tammy Bowers, May Trucking
Lynn McNamara, CityCounty Insurance
Ben Stange, Polk County Fire District No.1
Kevin Billman, United Food and Commercial Workers
Ateusa Salemi, Oregon Nurses Association
Diana Winther, IBEW Local 48 {via teleconference}
Kimberly Wood, Perlo Construction
Theresa Van Winkle, MLAC Committee Administrator

Committee Members Absent:
Alan Hartley, Shari's Restaurants
Aida Aranda, Oregon & Southern Idaho Laborers-Employers Training Trust

Meeting Participants:
Betsy Earls, Associated Oregon Industries
Jaye Fraser, SAIF Corporation
David Barenberg, SAIF Corporation
Dan Schmelling, SAIF Corporation
Myra Aichlmayr, Workers' Compensation Division
Cara Filsinger, Workers' Compensation Division
Juerg Kunz, Workers' Compensation Division

Agenda Item	Discussion
Opening (0:00:00)	Guy Boileau called meeting to order at 2:36 p.m.
Public Testimony (0:00:25)	Betsy Earls, Associated Oregon Industries, provided testimony. Associated Oregon Industries is concerned about lack of doctor participation in this process. Associated Oregon Industries would like another look at getting more participation from medical community before looking at other solutions. Guy Boileau clarified with Betsy that she was talking about having more teeth in regards to making treating physicians respond to an IME report.
Discussion:	Guy Boileau asked Tammy Bowers to share her experience in getting

DRAFT

Agenda Item	Discussion
Physician response to IME reports (0:02:30)	responses from treating physicians. Tammy responded that if the physician doesn't respond, they send a second request by certified mail. If there is no response to the second request (this is rare), their attorney tries to conference with the physician. They have never had the problem of doctors not replying. Guy noted that Lou Savage made a comment in a prior meeting that sanctioning physicians might not be the most effective way to garner a response. The concern is that it is already difficult to get physicians to conduct examinations. Guy would go with soliciting suggestions from the affected community on the best way to get a response. Guy also asked how many Worker Requested Medical Examinations (WRME) are done on an annual basis. Tammy replied that according to the previous meeting minutes there are 150 WRMEs each year. Guy Boileau summarized the issue the subcommittee is addressing and the draft recommendations for discussion. Guy encouraged any additional input. ▪ If a denial is issued based off an Independent Medical Exam (IME) and the worker timely appeals that decision, they are entitled to WRME. Right now, if an IME is sent to the treating physician and they don't respond, it's treated as concurrence with the IME and as a result the worker doesn't get WRME. ▪ A law change proposal is if the treating physician does not respond, then it would be treated as non concurrence and the worker would get a WRME. This would modify the third criterion for obtaining a WRME. ▪ Another law change proposal is to allow the worker to select a physician from the certified IME provider list. Additionally, allow the worker to get assistance from the Ombudsman for Injured Workers (OIW).
Public Testimony (0:09:25)	David Barenberg, SAIF Corporation, said that MLAC is missing a step because the medical community hasn't been consulted on why providers aren't responding. Before taking a different step, MLAC needs to engage with the medical community. David thinks that an appropriate step would be to ask physicians what the issue is and whether there are things we can do in the system to support and encourage their response. David noted that Lou Savage had a good concern; we want to ensure doctors are available for employees. David believes that we need to consult the medical community about why this problem exists to fully vet the issue before moving forward.
Discussion: Physician response to IME	Kimberly Wood responded to David Barenberg that if doctor response were sole issue, that would be right step. However, Kimberly's understanding from the last meeting is that some insurers aren't providing

DRAFT

Agenda Item	Discussion
report (0:11:39)	the IME report in the first place. Even if we get doctors to engage, that won't address the insurer issue. David said that makes sense; you can't expect a doctor to respond to something they don't have. David thinks that there are multiple issues, but that it goes back to the doctor to start. Juerg Kunz, Workers' Compensation Division (WCD), agreed with Kimberly Wood. Additionally, he noted that there are quite a few insurers who send the IME report to the provider but don't say anything with it, they just send a copy. If the provider gets such a report, they probably won't respond to it because there is no request for a response. There is nothing in the current rules that mandates a provider to respond to an IME report if not asked. Additionally, there is nothing in the rules that states that the insurer must ask for the provider's concurrence or non-concurrence. Juerg has also seen situations where the provider sends a response to IME report to the insurer without being asked and then bills insurer. The insurer then won't pay for the doctor's response because they didn't ask for it. Due to that experience, that provider won't respond to an IME report unless specifically asked. That might be contributing to the issue. Juerg thinks that there is no single cause to this issue. Guy Boileau asked about the idea of using prescribed language to the doctor that says they need to respond by certain time and if they don't respond, the inference will be that they don't concur.
(0:16:05)	Jaye Fraser, SAIF Corp., commented that after the last meeting, SAIF had a conversation internally about the issue and considered what would be a middle step to solve this issue. SAIF's general practice is to always provide the IME report to the attending physician; however, they don't always ask the attending physician lots of questions. Additionally, they don't always get a response to their questions. Jaye reiterated David Barenberg's earlier point that we don't have doctors in this conversation. Jaye also mentioned that the IME companies send a copy of the IME report to the attending physician. Jaye suggested the possibility of having a rule prescribing that the insurer must send the IME report to the attending physician and include some language regarding consequences. Another option would be a letter from the IME company. Jaye doesn't think that doctors don't want to answer, but that it's more a matter that they don't know they need to. Ben Stange asked Jaye Fraser about what happens with the idea on non-concurrence. Jaye responded that would be an option for the committee to consider, but she would like to suggest that is a conversation that could be informed by what we hear from medical providers. Jaye has heard of (particularly in rural communities) doctors treating the entire community or family. If the doctor concurs with an IME report, that could result in

DRAFT

Agenda Item	Discussion
	denial of a claim. The doctors are reluctant to concur, and Jaye would not want to put them in position of making them do something without including medical community in the conversation. Jaye suggested including the Medical Advisory Committee (MAC). Cara Filsinger, WCD, commented that MAC advises the DCBS director on medical issues, and they have a variety of doctors on the committee. Cara would be happy to take some questions to them. Some of the MAC doctors perform IMEs. Additionally, the Oregon Medical Association (OMA) knows about this committee and these meetings. Cara has been in communication with OMA. Guy Boileau asked Cara Filsinger to contact MAC and asked everyone to get questions to Cara. Guy observed that the overriding issues or questions are: • Why doctors are not responding? • Do they doctors understand the consequences? • What do we need to do to get them to respond?
(0:24:38)	Tammy Bowers asked Jaye Fraser if SAIF doesn't ask for a concurrence when sending an IME because they are accepting the claim. Jaye responded that it varies. Sometimes it is simply notifying the attending physician that the IME has happened. The claims adjuster may be on the phone telling the attending physician that they don't need a concurrence. Not every IME results in the denial of a claim. Tammy commented that she would not want to make rule requiring that they ask for concurrence if 50% of the time it results in an acceptance. On other hand, if the worker is being discriminated against on the WRME in some situations, that would need to be corrected. Ben Stange revisited the issue of the small town doctor mentioned by Jaye Fraser. Ben thinks that MLAC could come up with language that doctors would be comfortable with that doesn't expressly say "I one hundred percent concur." Jaye responded that she thinks that is reasonable. SAIF doesn't have the view that the worker is never entitled to WRME. Guy Boileau asked if language like that is something that can be done by rule. Theresa Van Winkle responded that perhaps, but was not sure all of it can be done by rule. Ateusa Salemi asked for clarification on how a worker ends up going to an IME. Dan Schmelling, SAIF Corp., responded that typically, if there is a question of compensability of the medical condition, the insurer may schedule an IME to determine causation. Ateusa Salemi also clarified with Guy Boileau that if an IME says the condition is not work related, the

DRAFT

Agenda Item	Discussion
	claim is denied (or part of the claim is denied). Additionally, if the worker wants to appeal the IME report, the only way they have to appeal is for the attending physician to disagree with the IME report. Ateusa Salemi observed that letters often go to a doctor's office assistant. Ateusa noted that Tammy's company follows up on the IME report, and asked what SAIF's practice is. Dan Schmelling responded that the best practice is to find out what the attending physician thinks about IME report, and that they'll be asking whether they concur or not. Ateusa pointed out that doesn't happen in every case, and sometimes reports just go without asking for feedback. Dan Schmelling said that the insurer has to provide report every time; however, they don't have to ask for comment. SAIF's best practice is to get the attending physician's opinion. If SAIF has to defend that at a hearing, they want to know whether the attending physician agrees with the IME or not. Jaye Fraser noted the attending physician's testimony has more weight than the IME doctor at hearing because of their history with the worker. The worker can also change attending physicians. Ben Stange asked how SAIF answers worker inquiries about the treating physician's response to the IME report when SAIF didn't receive a response from the physician. Dan Schmelling said that they say that the attending physician hasn't responded.
(0:33:10)	Guy Boileau commented that a central theme is that attending physicians should know that there are consequences when they don't respond. Ateusa Salemi commented that the questions are really open-ended and that there could be a variety of reasons for their non response. Ateusa asked what can be done to get them to respond. Some doctors will bill insurers for the paperwork. Tammy noted that doctors do get paid for their response. Tammy followed up on Jaye Fraser's comment that the IME companies are sending the IME report to the attending physician. Tammy doesn't know of any IME company that does that and asked Jaye if she talked to IME companies that automatically send the report. Jaye responded it is SAIF's understanding that all the IME companies they work with send it out. Tammy asked Dan Schmelling why he wants the IME company to participate in the claim processing work. Dan responded that they introduced it just as an option to consider. Jaye commented that it wouldn't be the IME company stepping in, and it wouldn't be their form. It would just be a way to get questions to the attending physician if a worker goes to an IME. Tammy Bowers asked about whether the insurer or third party

DRAFT

Agenda Item	Discussion
	administrator could be required to ask for concurrence in cases where a denial will be issued. Dan Schmelling responded that would be another option to consider. Tammy asked if there would be any issues with that. Jaye responded that she didn't see any issues off the top of her head, but said that they would need the opportunity to think about it and see if there are any unintended consequences. Dan commented that it might cut down paperwork in cases where they obtain an IME and will be accepting the claim. Tammy noted that as soon as IME comes in to a claims adjuster, they will know whether they will accept or deny the claim. If they send the IME report to the attending physician with a concurrence letter, that would be simple for the attending physician. And if the IME is going to be used for a denial, you would have to at least ask if they agree. Right now, there's no requirement that they even ask. Jaye responded that she can't imagine any reason that SAIF would disagree with that.
(0:37:14)	Juerg Kunz mentioned that the division sees a lot of IME reports, which can be anywhere between 20-50 pages long. Additionally, attending physician review of the IME report is quite time consuming. Tammy Bowers asked if billing codes vary depending on the length of the report. Juerg said yes, it is an Oregon specific code and there's no fixed fee schedule amount. The attending physician would have to say how long it took and would be paid more if it takes longer. Concurrence or non-concurrence is important to the insurer when the insurer denies the claim and the worker appeals. At the point when the attending physician receives that IME report, the insurer probably hasn't made a decision yet. There is the potential of wasting time and money on the attending physician's response when there's never a need for them to respond. Tammy clarified that would be in the case when an IME company sends the report instead of the claims adjuster. Juerg responded yes. Guy Boileau asked if there is an issue if all requests for concurrence included boilerplate language regarding the consequences of non response. Dan Schmelling responded that non response viewed as non concurrence is for the purpose of whether the worker is eligible for a WRME. Whether the attending physician agrees or disagrees with parts of or the entirety of the IME report, that's going to be litigated. When assigning meaning to non response, we're looking at it from the perspective of whether the worker would be eligible for a WRME. When going to hearing, it's about whether the attending physician agreed with the medical opinion. If the attending physician agrees, you have both the attending physician and the IME provider saying that it is not work related. Dan doesn't think that's where we want to go with the non response means concurrence or non concurrence because that gets to the compensability of the claim. That should still be developed through the medical and the physician's opinions.

DRAFT

Agenda Item	Discussion
	Jaye Fraser, Dan Schmelling, and Guy Boileau commented that the boilerplate language could be focused on "for the purposes of allowing a WRME". Guy noted that he doesn't know if the current default (which is concurrence) comes into play in compensability discussions at hearing. Dan Schmelling responded that you can't say that the attending physician concurred because they didn't respond. Guy said that it is a good point that language should be precise. Kimberly Wood commented that if MLAC is looking at adding language that gets sent out, it should be in a specific font and type print. If you see a form more than twice, you stop reading it. Kimberly would go to the point of dictating the font to make sure it is big and that the recipient can't miss it. Otherwise, the language wouldn't have much effect. Doctors won't read the information if there is too much information on the page, and their time is limited. We just need to make sure it draws their attention. Guy Boileau asked Dan Schmelling what SAIF's concurrence request letter looks like. Dan said that if is boilerplate language, he believes the administrative rules require a certain font, size, and it must be bold. Lynn McNamara noted that she likes this direction of trying to do something in rule. She thinks that we identified a gap here today that would be useful to fill and accomplish the goals we are talking about. Guy Boileau asked everyone to think about the questions for the MAC to give to Cara Filsinger within the next week. For stakeholders, Theresa Van Winkle said that her email is on MLAC webpage. Questions can be sent to Theresa as well. Theresa noted that Cara Filsinger has reached out to representatives from the Oregon Medical Association as well.
Discussion: Worker selection of WRME physician (0:48:05)	Cara Filsinger asked if the committee wanted to discuss the second proposal on the draft IME subcommittee recommendations document. Guy Boileau summarized the proposal and asked if there were any comments on it. Tammy Bowers asked for clarification on whether the worker requests the arbiter doctor. Guy Boileau said yes. Tammy clarified that the state selects the WRME doctor now, and asked whether it is a random selection. Cara Filsinger responded that it is not entirely random. There's a process for determining the WRME doctor. Tammy asked why that process would be changed. Guy responded that the employer get fair amount of input in the selection of an IME doctor. If we're going to be equitable, we give worker

DRAFT

Agenda Item	Discussion
	the same option. Tammy asked if there is still concern about issues of the worker not knowing what doctor to request. Guy said that is a concern to him. If this happens, Guy would ask the department to monitor number of WRMEs requested to see if there's a spike upward. An over aggressive advocate for the worker would advise that the attending physician shouldn't respond and then the worker would get a WRME. The advocate may then advise going with certain doctors they think will give the worker the answer they want. Guy thinks that's a concern. Myra Aichlmayr, WCD, clarified that WRME doctors are chosen by the division from the IME provider list. There is a deselection process where one name can be taken off and the division chooses from the two names left over. It is similar to the arbiter deselection process. There are very few WRMEs where the worker is not represented because they're going to hearing for a denied claim. The likelihood of a worker looking at the list of doctors and not knowing what to do pretty rare. The Ombudsman for Injured Workers is available to help. Cara Filsinger commented that this proposal came through to address the perception of bias issue, not processing.
(0:53:56)	Kimberly Wood pointed out that the worker already has three choices for a medical provider. The IME was created to give the insurer something similar. To some degree, the perception is skewed since there's not acknowledgement that was why IMEs exist. Employers or insurers may feel it imbalances it again. Workers have three choices of a doctor, employers and insurers don't. Myra Aichlmayr responded that she has heard from attorneys that have decided against doing a WRME because of the doctor the division selected. There's a perception out that providers on the IME list are not always as impartial. Cara Filsinger confirmed that she'll keep the concept on the list for now, along with the first law change proposal in the document (pending input from providers). Cara Filsinger followed up on other items in the recommendations document that MLAC can ask the division to do. ▪ Review the rules regarding IME provider certification, ethics standards, and training requirements. ▪ Revisit the IME worker survey since it currently it doesn't provide much useful information. For instance, the survey doesn't ask if the worker feels that there was bias towards them. The department doesn't get a lot of survey responses primarily because the facilities have their own questionnaire. Many workers don't feel compelled to fill out a survey unless they are filing a complaint. MLAC can request that the department revisit the survey and ask

DRAFT

Agenda Item	Discussion
	more meaningful questions about worker experiences at the IME. ▪ Updating the IME provider training video since it is not up to date. The department is already in the process of looking into this. Guy asked for comments on incorporating these suggestions into the subcommittee recommendations. Ben Stange agreed that these suggestions should be incorporated. Guy seconded. All members present voted aye, no one opposed. Cara Filsinger confirmed that the law change items from the draft recommendations would be revisited at the next meeting.
Meeting Adjourned (0:59:31)	Guy Boileau adjourned meeting at 3:35 PM

*These minutes include time stamps from the meeting audio found here:
http://www.oregon.gov/DCBS/mlac/Pages/exam-subcommittee.aspx

**Referenced documents can be found on the MLAC Meeting Information page here:
http://www.oregon.gov/DCBS/mlac/Pages/exam-subcommittee.aspx

DRAFT