

WORKERS' COMPENSATION
MANAGEMENT-LABOR ADVISORY COMMITTEE
Full MLAC Meeting
February 22, 2019
9 a.m. – 12 p.m.

Committee Members Present:

Alan Hartley
Kathy Nishimoto, Duckwall Fruit
Kimberly Wood, Perlo Construction
Aida Aranda, Oregon and Southern Idaho Labor Employers Training Trust {via teleconference}
Kevin Billman, United Food and Commercial Workers {via teleconference}
Ateusa Salami, Oregon Nurses Association {via teleconference}
Diana Winther, IBEW Local 48
Tammy Bowers, May Trucking
Jill Fullerton, Clackamas County Fire Department {via teleconference}
Lynn McNamara, City County Insurance
Cameron Smith, Director, Department of Consumer and Business Services (DCBS), ex officio

Staff:

Theresa Van Winkle, MLAC Committee Administrator

Agenda Item	Discussion
Opening (0:00:00)	Diana Winther opened the meeting at 9:02 am. Members via teleconference were Aida Aranda, Kevin Billman, Ateusa Salemi, and Jill Fullerton (until 10:30 am), all other members present.
Meeting Minutes (0:00:50)	Diana Winther noted that the minutes from the February 8, 2019 MLAC meeting had a few typos. Diana Winther moved and Kimberly Wood seconded to approve the minutes, with the typos corrected. Committee unanimously approved February 8th minutes (all members present voted yes, all members on the phone voted yes)
(0:02:57)	Diana Winther reviews the January 11, 2019 minutes. Kathy Nishimoto moved and Kimberly Wood seconded to approve the minutes. Committee unanimously approved January 11th minutes (all members present voted yes, all members on the phone voted yes)
Department Updates	Theresa Van Winkle, Committee Administrator, made announcements and provided updates:
(0:03:30)	- Theresa Van Winkle congratulates Lynn McNamara on being reappointed to another term on MLAC.
(0:03:53)	- No changes on the forward looking administrative rulemaking calendar .
(0:04:01)	Lou Savage, WCD Administrator, gives a presentation on Workers' Compensation Modernization Program . It is in the department's budget request for the 2019-2021 biennium.

(0:16:41)	- Diana Winther asks if part of the planning processes includes hiring additional staff. Lou Savage responds yes, he also mentions that the funds for this are premium assessment funds. The estimated figure for this project is \$15 million, but that is subject to change.
(0:18:48)	- Tammy Bowers asks if you switch to electronic reporting, what are the plans in regards to the signed 801 and the signed 827. Lou Savage responds that he doesn't think that we would abandon requirements, how those will get submitted is a good question and that is something that will get looked at.
(0:19:19)	- Alan Hartley states that this would have substantial labor cost savings if employees are not entering each claim in by hand. Lou Savage responds yes and that is part of the planning process, and some of the tasks that people have now would change. This effort is designed to make things more efficient and not about being a cost cutting effort.
(0:20:11)	- Kimberly Wood asks since MLAC doesn't review the department's budget, does this require MLAC input or was the presentation just informational. Lou Savage responds it is just informational.
(0:21:09)	- Theresa Van Winkle states that once session is over an update can be provided on this topic.
(0:22:19)	- Lynn McNamara asks if there are ways that you can ease everyone into this process and have interim steps it would be helpful because it is going to be a long process. Lou Savage responds that this is modernizing our business process and the technology will follow. Lou states as the planning effort goes along, we hope to see ways to improve our business processes even before the technology is implemented.
(0:23:05)	- Kathy Nishimoto states that she is curious if the program is going to be built from scratch or if they are going to go out and get something that is already in place and adjust it to fit Oregon's needs. Lou Savage responds that we are looking at how other states have done their modernization. Lou states that we have helped to form a national task force on states that have done modernization and states that are in the process of modernizing have a forum to talk to one another. Lou says our IT division is not in a position to tackle a task like this, so if the project was going to be done "in-house" considerable additional resources would be needed.
2019 Legislation Review (0:24:53)	Theresa Van Winkle provides an update on current legislation. The House of Business and Labor Committee had hearings on three of the bills MLAC has voted for recommendation. HB 2087 is scheduled to be voted on by House members on February 25, 2019. HB 2406 will be on the House floor February 26, 2019. HB 2788 will sit for awhile until it gets to a sub-committee. Theresa Van Winkle states that in regards to the other bills, HB 2413 amendments have been finished up and they will be presenting at the March 8, 2019 MLAC meeting as well and providing updates, they have

submitted an amendment request and it may be ready in time for the presentation. For HB 3022, it has a public hearing on February 27, 2019.

[HB 3022](#)

(0:27:40)

Cathy Ostrand-Ponsioen, WCD Legal Issues Coordinator and Julia Hier, WCD Claims Policy Analyst give a general overview and provide some [background on HB 3022](#) and the four or five big laws discussed in the February 8, 2019 MLAC meeting.

(0:30:29)

- Kimberly Wood asks for clarification on whether or not *Brown* changed and ultimately the *Brown* decision is what it was originally. Cathy responds that is correct, and that the Court of Appeals decision in 2014 is what changed the interpretation with the Supreme Court reversing that, now it is back to what it was. Cathy continues overview.

(0:31:57)

- Tammy Bowers asks if there can be diagnostic services to determine the extent of the compensable injury after the acceptance. Julia Hier responds the diagnostics can occur after the notice acceptance, but under the current interpretation of the law the diagnostic services have to be related to the accepted conditions. Cathy Ostrand-Ponsioen continues overview.

(0:34:38)

- Kimberly Wood asks if initially they accept a combined condition because there is a preexisting condition that exists but there is also an injury and the two things combined are creating the problem and also asks if the original condition is being denied or just the combined condition. Julia Hier responds yes and gives an example. Kimberly Wood wants to make it clear that the work related injury is not the one getting denied. Julia Hier responds that that is correct.

(0:37:08)

- Alan Hartley asks in regards to the *Brown* case example once the lumbar strain was resolved and is no longer a contributing issue, under the proposed legislation at what point does treatment stop with workers' compensation, and what about degenerative diseases that don't go away. Julia Hier responds that there could be different interpretation on what the proposal would do. The removal of combined conditions, in her opinion, it could suggest that the treatment could continue related to the injury, you would no longer have the option on processing as a combined condition with the major cause denial. Julia says as far as "when" she couldn't answer that with certainty.

(0:38:08)

- Diana Winther asks along the same lines of the *Brown* example, when it ceases to be the major contributing cause, do you continue to get treatment on an injury until it is 100% resolved or just when it drops below being 50% of the contributing cause. Julia Hier says if it is accepted as a combined condition, the threshold is that the compensable injury, is no longer the major contributing cause, which is means no longer then 50%. As far as the ability to ascertain when that change in ability occurs, it is a medical opinion.

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- (0:39:21) - Diana Winther asks once an injury is 49% of what your accepted claim is, does treatment for that injury stop being paid for by your workers' compensation claim. Julia Hier responds if the claim is accepted as the combined condition she believes that it would. Tammy Bowers responds that she believes that is not the case because if it is an accepted strain, the strain has to be medically stationary before they can close the claim. You just get to stop paying for the combined condition, and you are still responsible for the accepted claim and the accepted claim is not being denied. Diana Winther adds that is when it becomes a medical determination. Cathy Ostrand-Ponsioen adds when the accepted injury becomes the lesser cause, once that condition is medically stationary then the claim is closed and permanent disability is determined.
- (0:40:40) - Kimberly Wood states if there wasn't a combined condition the same is true, once its medically stationary it isn't a denial of the combined condition, it does not effect that worker any differently then a worker that doesn't have a combined condition. They both would still have the ability to receive treatment until the point in time when they are considered medically stationary for there accepted claim. Julia Hier responds that the legal standard would be helpful. Julia references that medical services are under ORS 656.245 and she provides details.
- (0:42:00) - Kimberly Wood asks if they can provide examples to the committee. Julia Hier responds yes. Cathy Ostrand-Ponsioen continues overview.
- (0:43:50) - Kimberly Wood asks if the word "merely" is removed does it have a significant impact. Cathy Ostrand-Ponsioen responds that the interpretation would change if the word merely is removed.
- (0:45:50) - Alan Hartley asks for examples of what types of preexisting conditions could be a result of the workers age, sex, race, etc. Julia Hier responds that there have been times that this has come up. One example is degeneration in the spine, a doctor could say that is because they are 65 years old (age related) or because they have a long family history of back issues (genetics related).
- (0:47:05) - Alan Hartley give a scenario where a certain gender might be more calcium deficient then another, could that be a contributing factor to them being more susceptible to a broken bone. Julia Hier responds if that were the medical opinion then yes.
- (0:47:27) - Tammy Bowers asks if this could apply to a hearing loss claim. Julia Hier responds that it would come down to the medical testimony. If the doctor says it applies than it might apply.
- (0:47:47) - Diana Winther asks if they have seen cases where because women tend to have smaller wrist they are more predisposed to getting carpel tunnel, and that that has been considered a preexisting condition. Julia Hier responds that she has heard that talked about
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but can't recall off hand if that was a determining factor. Cathy Ostrand-Ponsioen continues overview.

- HB 3022**
(0:51:20) Theresa Van Winkle begins discussion of the priority areas of [HB 3022](#). Arthur Towers, Randy Elmer, and Keith Semple from [Oregon Trial Lawyers Association \(OTLA\) begins their testimony on HB 3022](#).
- (0:52:00) - Arthur Towers, Political Director OTLA testifies and states that OTLA wants to focus on the four key topics of the bill, and note that they see broader problems with the system.
- (0:54:54) - Diana Winther states that she would like OTLA to keep their testimony brief so that other people get the chance to testify.
- (0:55:39) - Kimberly Wood asks OTLA what MLAC members they have been working with on this bill. Keith Semple, OTLA, responds that they met with Lynn McNamara and Kathy Nishimoto and some of the labor members, but not every MLAC member. Lynn McNamara responds that yes they did meet but it was not specifics about the bill. Kathy Nishimoto seconds that statement. Kimberly Wood states that the committee really just learned what the OTLA is trying to do with the bill a couple of days before the February 8th MLAC meeting.
- (1:00:00) - Alan Hartley states that he would like to get any written testimonies or materials more in advance to review them instead of right before the meeting. Arthur Towers apologizes and that is the goal to get them in ahead of time.
- (1:01:00) - Keith Semple says the summary they provided is a summary of the last meetings testimony.
- (1:01:50) - Alan Hartley states that since it is a complicated issue it is even more complicated to read the summary for the first time while testimony is going on.
- (1:02:01) - Theresa Van Winkle states that her understanding is to narrow the focus on the four major topics. Keith Semple responds that he hopes the focus is on his testimony and summary. Diana Winther states that the committee recognizes that this is a continuing conversation.
- (1:02:40) Keith Semple begins his testimony and gives details on the four major topics of the bill.
- (1:06:48) - Kathy Nishimoto asks if they can currently ask for a new accepted condition. Keith Semple states that is correct.
- (1:07:08) - Kimberly Wood asks why it is different than asking for a new or omitted condition. Keith Semple responds with how do you find out if an impact that caused a contusion also tore a nerve or broke a bone if you are only looking at the contusion, and you only get treatment for the contusion. Kimberly Wood responds there are diagnostics, and they don't have ask to get them accepted. Keith Semple states that he believes she is referring to a situation where the insurer has "goodwill" and a desire to get to the bottom of the
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- extent of the event. Current law does not require them to pay for anything beyond what is necessary to determine the nature and extent of the bruise. They are trying to determine the extent of the worker's injury and get them back to work.
- (1:09:30) - Kimberly Wood asks what data they have that supports that insurers aren't doing that and that individuals are not providing diagnostics that they are requesting. Keith Semple responds that he does not have access to large amounts of data but he does have a lot of situations that they see workers go through and access to court cases.
- (1:11:35) - Alan Hartley gives a scenario, in the worst case a worker has a bruise, six weeks later the bruise is gone but they still have the pain. In the worst case scenario what happens to the worker. Keith Semple responds in the worst case scenario, the doctor asks for an MRI and the insurer denies it and says that all they have is a bruise. The worker has an option of just giving the condition a random name and hope that condition exists without the diagnostic studies. If they fail then whatever condition name they gave it gets denied that becomes final. If they don't get the diagnostic, and can't prove the condition is significantly related to the event then their claim for the bruise is closed and they get no permanent impairment.
- (1:12:25) - Alan Hartley asks if the worker could open a new claim. Keith Semple responds that they still don't know what to call the condition.
- (1:14:49) - Kimberly Wood asks is there no appeal process if they ask for diagnostics and the answer is no. Keith Semple responds the worker has the right to appeal but the legal standard is the services necessary to determine the extent of the injury.
- Tammy Bowers asks for the ORS number for diagnostic medical care. Keith Semple responds ORS 656.245.
- (1:15:10) - Randy Elmer, Attorney OTLA, wants to address Alan Hartley's question and provides a worst case scenario example for a case that he is dealing with. He also adds that the medical service rule is OAR 436-010. Arthur Towers add that these are the sorts of cases they are starting to see. Keith Semple continues testimony.
- (1:30:44) - Alan Hartley give a scenario, if a person has a lumbar bruise and it turns out it is part of the diagnostics they have arthritis, when does treatment stop. Keith Semple responds that the treatment stops when the injury is no longer the material cause of the need to treat the arthritis.
- (1:31:30) - Alan Hartley asks how is that different than current law. Keith Semple responds that the current law provides a major cause standard.
- (1:33:32) - Kimberly Wood states it would be easier to follow along with the bill if they different options were listed. Lynn McNamara adds that a menu would be helpful, Kimberly seconds that. Arthur Towers
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- responds that is the conversation that they really want to have and figure out how to go forward.
- (1:35:24) - Kimberly Wood asks if they are asking for a particular option or do they care what route it goes. Lynn McNamara adds that some of the bill is a nuclear option and people react to that and lose the impact of the specific issues, Diana Winther seconds that statement. Keith Semple continues testimony.
- (1:39:00) - Kimberly Wood asks when asking for a new or omitted condition, are you able to ask for multiple conditions (like a menu) at once or do you have to ask for each one individually. Keith Semple responds you can ask for an entire menu, but the problem is if you don't prove the existence of each one you lose the whole condition.
- (1:40:00) - Kimberly Wood give a scenario, if a worker says I would like to ask that you admit these conditions, and they say we will only admit the first one but not the others, is there is a problem with that. Keith Semple responds he doesn't think so. Kimberly Wood asks then is the problem that a worker may not have thought to list all of the conditions that might come up. Keith Semple responds no. Randy Elmer adds as a lawyer they are not the ones making up labels for new conditions, they use the labels that the doctors use on the medical records.
- (1:41:50) - Kimberly Wood asks when the 60 days is started over again, is that delaying the period of time that the client can get treatment. Randy Elmer responds as long as the new condition claim is denied. Keith Semple adds that it postpones the hearing as well.
- (1:42:34) - Kimberly Wood asks if their clients get to seek treatment and if the treatment is covered during that 60 days until they make the decision of denial. Keith Semple responds no. He adds that they can seek treatment and the doctor can send the bill to the insurer, and the insurer can sit on the bill until the claim is accepted or denied. Randy Elmer adds that generally speaking the delay in treatment is causing more disability.
- (1:44:04) - Tammy Bowers asks in regard to the 60 days on an original claim. Keith Semple responds they don't have to pay in in deferred status and if they deny it than they don't have to pay it at all.
- (1:44:30) - Tammy Bowers asks down the road if you have MRIs that show a disc protrusion and the doctors agree and it is accepted, and then two years later the you get an aggravation and the disc protrusion becomes a hernia. Does it matter that the protrusion is now a hernia? Keith Semple responds the insurer would still have the opportunity to contest if it is the same condition and it the aggravation is related to the protrusion.
- (1:46:30) - Kathy Nishimoto asks what is the standard for material cause. Keith Semple responds material cause is a factor of consequence, Randy Elmer adds it is a significant contributing factor.
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- (1:47:20) - Kathy Nishimoto asks if there is a way to get data on claims where diagnostics denials were involved. Randy Elmer responds they don't quantify the negative. Keith Semple adds you would have to have enough workers appealing things they know they can't succeed in doing and have them be denied to have it reflect in the data.
- (1:47:20) - Kimberly Wood states she believes that would be a good question for Jennifer Flood.
- (1:49:04) - Jennifer Flood, DCBS Ombudsman for Injured Workers, states that it is significant and the diagnostic issues happen all the time but she does not have data on it. She also believes that it would be very difficult to get that data. She also provides some examples. Keith Semple provides examples as well.
- (1:52:00) - Diana Winther asks in regards to doctors not wanting to work in the workers' compensation system, would addressing some of these concerns make it more appealing for medical professionals to provide care to injured workers. Keith Semple speculates that it concerns doctors, and he would like to hear from more medical professionals. Diana Winther says she would encourage that.
- (1:54:25) - Ateusa Salami states that doctors do stay away from some of this and narrowing it down would be helpful for doctors as well. Keith Semple mentions that doctors generally work with differential diagnosis.

Committee takes a brief recess at 10:59am

Committee resumes at 11:11am

- (1:57:10) - Diana Winther resumes the discussion on HB 3022
- (1:57:46) Sheri Sundstrom, a former MLAC member and with Hoffman Construction and former MLAC co-chairs Bob Shiprack and Lisa Trussell testify on HB 3022. Sheri Sundstrom states she is in support of deep dives into the issues, but she cautions making changes to parts of the bill that effect multiple other aspects, because some of the proposed changes in HB 3022 could have vast effects on other things. She also notes that her testimony does not mean that she isn't in support of changing the statute if it makes sense to do so.
- (2:02:00) Bob Shiprack gives a brief overview of why he is testifying and some of the history how the system became what it is today, the formation of MLAC, and the importance of the bill structure and language. He noted the legislative intent and the words in the statute are important.
- (2:08:20) Lisa Trussell testifies that the changes identified in HB 3022 are significant and cautions MLAC to be very thoughtful on what changes are necessary
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and how they make the changes. She provided examples of the issues and costs in 1989. Lisa commented on providers in the system and their participation, preexisting conditions, and the new health insurance laws.

(2:12:20) - Kimberly Wood asks when you read about the changes proposed in HB 3022, do you have concerns about a reverse effect and cost actually going up. Lisa Trussell responds absolutely she has those concerns especially about the definition of compensable and the legal standard.

(2:14:06) Kevin Anderson, attorney at Sather Byerly and Holloway, echoes caution on such a large proposal and there should be more time to study it. He cited example of the use of punctuation in statute; even removing one word can have long term effects.

(2:16:45) - Kimberly Wood asks about additional short term litigation when the law changes. She comments that the proponents have argued there will be more litigation if the law does not change. Kevin Anderson responds that he agrees but it depends on the changes.

(2:18:59) John Klor, attorney, has worked with self insured employers on legislation. He agrees the bill should be studied more. Some of the proposals will undermine Mahonia Hall agreements. The state is doing well now cost wise for employers. The changes in 1990 were a compromise to raise the bar on claims and reduce costs. John says there should be a cost analysis on the bill. The Oregon system is a model nationwide.

(2:23:00) David Barenberg, SAIF Corporation, introduces Elaine Schooler and Dan Schmelling. David indicated they only speak for themselves and not other insurers. He commented on prior testimony about Mahonia Hall only intended to reduce costs for employers, but it also increased benefits for injured workers. David indicated they did discuss some issues with OTLA previously.

(2:28:59) Elaine Schooler reviews [written SAIF testimony](#) and the topics of entitlement to diagnostic services, burden of proof in combined conditions, preexisting conditions, and new or omitted conditions. She commented that workers' compensation is a combination of medical opinion and law.

(2:40:09) - Kimberly Wood asks for clarification about the ambiguity of the changes to new or omitted conditions and whether it impacts future benefits. Elaine Schooler responds with an example that is impacted by medical opinion and the legal standard applied. The change makes it unclear what will happen.

(2:42:21) - Kimberly Wood asks if a doctor says there is a protrusion versus a herniation, is there a current mechanism for the worker to get

(2:44:45)	<p>clarification on what it is. Elaine Schooler responds that it does not, but it is not different from asking for multiple conditions through the new condition process. There is nothing in the law that prevents the worker from asking for a new condition.</p> <ul style="list-style-type: none"> - Alan Hartley said the worker is not getting treated while they wait for the claim processing. Diana Winther added that asking for the new condition they cannot get the diagnostic tests to determine what to ask for. Elaine Schooler responded that a new or omitted condition claim, there is already an accepted claim. Often they see overlapping treatment, for example physical therapy.
(2:46:00)	<ul style="list-style-type: none"> - Alan Hartley asked if the claim is already accepted and the concern is that the diagnosis is not correct. Elaine Schooler responds every case is different and provides an example. - Alan Hartley comments on prior example. Elaine Schooler said she cannot speak to the example without knowing the facts.
(2:48:51)	<p>Theresa Van Winkle discusses the written testimony submitted for the record from Oregon Professional Insurance Agents of Oregon/Idaho, SAIF, and a coalition of businesses,</p>
(2:49:40)	<p>Diana Winther comments there needs to be more conversation on the bill and that it will be moved to a subcommittee and asks for as much participation as possible. Kimberly Wood agrees with the statements.</p>

Meeting Adjourned (2:51:50)	<p>Diana Winther adjourns the meeting at 12:06 p.m.</p>
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*These minutes include time stamps from the meeting audio found here:
<https://www.oregon.gov/dcbs/mlac/Pages/2019.aspx>

**Referenced documents can be found on the MLAC Meeting Information page here:
<https://www.oregon.gov/dcbs/mlac/Pages/2019.aspx>