

WORKERS' COMPENSATION
MANAGEMENT-LABOR ADVISORY COMMITTEE

Full MLAC Meeting

March 27, 2019

1:30 p.m. – 3 p.m.

Committee Members Present:

Aida Aranda, Oregon and Southern Idaho Labor-Employers Trust {via teleconference}

Kevin Billman, United Food and Commercial Workers {via teleconference}

Tammy Bowers, May Trucking {via teleconference}

Jill Fullerton, Clackamas County Fire Department {via teleconference}

Alan Hartley

Lynn McNamara

Kathy Nishimoto, Duckwall Fruit {via teleconference}

Ateusa Salemi, Oregon Nurses Association {via teleconference}

Diana Winther, IBEW Local 48 {via teleconference}

Kimberly Wood, Perlo Construction

Committee Members Excused:

Cameron Smith, *Ex officio*

Staff:

Theresa Van Winkle, MLAC Committee Administrator

Cara Filsinger, Workers' Compensation Division

<u>Agenda Item</u>	<u>Discussion</u>
Opening (0:00:00)	Kimberly Wood opened the meeting at 1:35 p.m.
2019	<u>HB 3022</u>
Legislation	
Review (0:01:20)	Keith Semple, Oregon Trial Lawyers Association, provided a handout with updated language from ongoing negotiations. Keith stated the highlighted language is still under discussion.
	Diagnostics. Keith Semple reviewed the three areas that need more conversation. One area is the “notwithstanding” language and whether it applies to other parts of the statutes. There are areas that should be addressed and linked to this provision; they are still discussing what should apply. They’re trying to find language somewhere between applying to a single statute or the whole chapter.
(0:03:36)	Elaine Schooler, representing SAIF and employer groups, agrees that it is hard to detangle diagnostic services from other things like billing, charting procedures, and managed care organization processes. One concern is the interpretation of compensable injury and how medical services should be processed.

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- (0:06:09) Kimberly Wood asks if the proposal is all new language? Keith Semple answers correct.
- Keith Semple clarifies they don't have concerns about billing or the other areas that employers have raised. They want this provision to be interpreted as distinct from the accepted conditions. They aren't that far apart on language and want to make sure that each side is comfortable.
- (0:07:31) Elaine Schooler said that they have talked about providing legislative testimony to state the intent for the new section. If the courts end up looking at the legislative record, then that will provide clarification.
- (0:08:30) Keith Semple moves to the next area of disagreement which is use of the word "claim." He doesn't know that it is a major sticking point, but they need to figure out what to say.
- (0:09:16) Lynn McNamara states that claim seems to fit as well as anything. Keith Semple comments that the word may be superfluous. That is why this needs more discussion.
- (0:10:10) Keith Semple reviews next on whether surgical procedures should be covered as a diagnostic service, for example diagnostic injections. He is concerned about taking surgical procedures off the table. He said it does not come up very often. He gives an example such as arthroscopic surgeries and whether that would fall under diagnostics. He states the diagnostic section should not bleed over to regular medical services, and not limit diagnostics for accepted conditions.
- (0:13:20) Kimberly Wood asks if the last highlighted section was carved out, could it trigger another process. Keith Semple responds that the surgical procedures must be reasonable and necessary to diagnose, as opposed to curative treatment.
- (0:14:45) Kimberly Wood asks if there is another way to get at it. For example, we don't want to do knee surgery to find out if there is arthritis under the guise of diagnostics. She isn't opposed to the concept, but there should be a higher burden to prove the need.
- (0:15:54) Keith Semple said we are trying to find common ground on the subject. In the scenario provided, the insurer could deny the surgery as not reasonable or necessary for diagnostic purposes or deny it because it was curative; but there would be a process through the department or MCO to determine whether it is necessary.
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- (0:17:04) Kimberly Wood asks if it is possible to accept the diagnostics part, but not the surgery. Elaine Schooler says that it is typically all or nothing and gives an example. It is difficult to separate those things out and she imagines the surgery would be all or nothing. Keith Semple said it is not reasonable to stop a surgery part way through to discuss the issue.
- (0:18:22) Lynn McNamara says if you can find language where there isn't a dispute in the first place that would be the goal.
- (0:18:34) Elaine Schooler states their concerns about surgery and surgical procedures. She states the tricky part is that it can go into curative care. The doctor will not stop surgery half way through, they will continue to fix the patient. Elaine says they do not want to bypass the new or omitted condition claim process, as there is an existing avenue to correct conditions that were left off. She states another issue is the language about the nature or extent of the condition, which is open to interpretation. Surgery procedures require follow up care, post-operative visits, physical therapy, etc. After claim closure, some surgeries trigger automatic permanent impairment awards, so how would that be addressed? SAIF is concerned that many surgeries will be pitched as diagnostic, instead of a new condition claim.
- (0:23:31) Keith Semple comments they are not looking for a back door behind new/omitted conditions. A challenge is that they make the request for new/omitted conditions based on diagnostics. They do not want to use diagnostics for things that are firmly diagnosed. The question is how the language can address the concerns without being too broad. In his experience diagnostic surgeries are very rare. They will have further discussion.
- (0:26:47)
- (0:27:00) Kimberly Wood says they will work through next topic and then caucus.
- Ceases denials.** Keith Semple reviews [proposed language](#) and the areas of disagreement. Management proposes using pathological effects, which is a much higher standard. He comments that will invite litigation.
- (0:28:00) Alan Hartley asks is pathological just physical injuries? Keith Semple says that the intent was not to limit the type of injury. They think if the conclusion is based on objective medical findings, then it is related to the industrial accident. They are trying to find language.
- (0:29:59) Elaine Schooler commented on the choice of pathological that is verifiable, to move beyond subjective complaints. There will be litigation because the language is new.
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- (0:31:21) Alan Hartley asks if pathological includes psychological problems. Elaine Schooler replies it could to the extent it was for an injury. A doctor would have to provide more information.
- (0:31:51) Elaine Schooler discusses objective medical findings in injury claims and whether subjective medical reports could be used to weigh against preexisting conditions. They could add some language that clarifies what can be used in the calculation.
- (0:33:07) Keith Semple commented that pathological may include subjective reporting. He cites an example of exacerbation of arthritis and how do you figure that out. The question is how much weight the subjective information will be given. There will be a challenge to the burden of proof in that situation and information needs to be persuasive. Keith comments there may be a way to get at the issue of nebulous findings that people are concerned about.
- (0:37:02) Arthur Towers, Oregon Trial Lawyers Association (OTLA), comments on the process of discussions. It has just been seven weeks, but he feels that they have a better understanding of various perspectives. The amount of agreement reflects progress. They are invested in the MLAC process until we get the issues worked out.
- (0:38:37) David Barenberg, SAIF Corp., echoes prior comments. The language in workers' compensation law is far more complicated than many areas. The people working on the language have been working hard. The challenge is every word has a specific meaning and circumstances. They need a bit more time to work on the language.
- (0:40:20) Arthur Towers indicated they are at the problem-solving phase and not negotiation phase. They think this will help.
- (0:40:51) Lynn McNamara asked about legislative deadlines. David Barenberg says they want to get it done as fast as they can and reviews the legislative deadlines. Their hope is there will be Legislative Counsel language for House Business and Labor committee. If that is not possible then it could move into another committee to continue work. Arthur Towers commented that he agrees that the parties have been working hard and that a little more time will result in language.
- (0:43:14) Kimberly Wood asked if we allow more time, would parties ask the house committee to keep the bill alive and describe the process that is happening. Arthur Towers said that is what should happen and MLAC work should be recognized.
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- (0:44:53) Kirsten Adams, Associated General Contractors, said she is meeting with Chair Barker this afternoon and can update him.
- (0:45:29) Committee recessed for caucus at 2:20 p.m.
- (0:46:00) The committee reconvened at 2:55 p.m. and Theresa Van Winkle took roll call of members present.
- (0:47:42) Kimberly Wood thanked all parties for working hard and comments on the collaborative effort. The committee wants to give the parties more time. They would like a report back on Friday March 29 at the subcommittee meeting. She comments on the assurance that parties will work in a collaborative manner.
- (0:50:07) Theresa Van Winkle asks if she should put a request for an amendment in the queue. Kimberly Wood said it may not matter. Theresa Van Winkle said procedure wise it would be in line for drafting and not tied to a committee.
- (0:51:21) Kimberly Wood asked for clarification on what is going forward, is it just these two issues and not the entire bill. Keith Semple responds correct.

Meeting Kimberly Wood adjourned the meeting at 3:05 PM.
Adjourned
(0:52:17)

*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>