WORKERS' COMPENSATION
MANAGEMENT-LABOR ADVISORY COMMITTEE

SUBCOMMITTEE ON HB 2418/ SB 507

Labor & Industries Building, Room 260
350 Winter Street NE, Salem, OR

Friday, March 29, 2019
9 a.m. – noon

Subcommittee Members Present:

Aida Aranda
Kevin Billman
Jill Fullerton
Alan Hartley
Kathy Nishimoto
Kimberly Wood
Lynn McNamara
Cameron Smith, *ex officio*

Staff:
Theresa Van Winkle, MLAC Committee Administrator
Adonia Stevens, administrative assistant, DCBS, Director's Office

Attendees:
Nelson Hall, Attorney
Sam Hutchinson, City of Portland Fire and Police Disability Retirement Bureau
Frank Stratton, Special Districts Association
Dr. Eugene Klecan
David Barenberg, SAIF Corp.
Kathy Gehring, SAIF Corp.
Jaye Fraser, SAIF Corp.
Ben Stewart, SAIF Corp.
Holly O'Dell, SAIF Corp.
Troy Clausen, Oregon State Sheriffs' Association
Patrick Sieng, Association of Oregon Counties
Jack Dempsey, OSFFC
Andrew Graham, Attorney
Hasina Wittenberg, SDAO
Scott Winkles, League of Oregon Cities
Jennifer Flood, Ombudsman for Injured Workers
George Goodman, SDAO
Karl Koenig, OSFFC
Julia Hier, Claims Policy Analyst, Workers' Compensation Division

Agenda Item	Discussion
Opening (00:00:00)	
	Lynn McNamara calls meeting to order, introductions
00:02:00	Nelson Hall: There is a mark up to the -3 amendment and there is also a -4. Clarified the "non-volunteer" from the cancer presumption. We have given definition to "firefighter" and "public safety personnel" as non-volunteer. We do have mark up for psychiatric nurse practitioner. It is specifically defined as a psychiatric nurse practitioner and is certified by the Oregon Nursing Board. That level of nurse practitioner is allowed to prescribe, not just practice therapy. Cleaned up the trauma related disorder language to list. Posttraumatic stress disorder, acute stress disorder, adjustment disorder. Changing the wording from "Trauma or stressor" to "trauma and stressor." On line 21 changing "as a trauma related or stress related" to "trauma related and stressor in the fifth edition or current edition of the Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association." After discussion with members of the Psychiatric community, we decided to remove major depressive disorder. Knowing that it is something first responders suffer from, but is not a specifically related to trauma. On page 3, paragraph (C) we removed "the cause of the death, disability or impairment of health is unrelated to performing duties as a fire service professional or as public safety personnel." So that there is no confusion on that this is for non-volunteers, and that there are only three disorders listed, not the five as originally proposed.
00:06:40	Lynn McNamara: Are the changes being proposed coming from the subcommittee or conversations with the stakeholders? Nelson Hall: These are from the subcommittee discussions. Lynn McNamara: And the bill itself, how is it in the legislature? Jack Dempsey: SB 507 is in the Senate Work-force committee and awaiting a hearing, the house bill will to move into the rules committee. Andrew Graham: goes over the Special Districts Association proposed -4 amendment. This proposal would shift the burden of proof to the employer, who would have to disprove the elements of the claim based on 656.802(3) and disprove them on a clear and convincing basis. It gives the workers the benefit of

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the doubt. It would give the employer a legitimate way to disprove those claims that are not of a real and legitimate sense.
The -4 amendment, has employees the same categories as the -3 version. Limits the covered conditions to Posttraumatic stress disorder and acute stress disorder. The Special Districts Association invited Dr. Eugene Klecan to explain why these are what should be listed and not others.

Alan Hartley can you explain "real and legitimate sense?"

Andrew Graham: perceptions that doesn't exists in the real work environment. If the perceptions aren't aliening with what is real in the workplace. For example, if someone were to feel that a first responder came across a finger cut and tried to claim it as an extraordinary trauma.
The doctors examining and treating the patient would not see it as this and the claim would be rebuttable.
In addition, witnesses would be able to come in and say what this person is saying happened, isn't really what happened.

00:12:36 Andrew Graham introduces Eugene Klecan, M.D. to the committee and audience. Sharing that he will be speaking on Posttraumatic stress disorder and acute stress disorder.

00:13:00 Eugene Klecan, M.D. Dr. Klecan gives a brief biography of his education and qualifications to speak on the matters of PTSD and acute stress disorders. The doctor has been both a general practitioner and an emergency room physician. He has seen many cases of trauma related illness.
For the last 15 years he has been doing full-time independent medical exams for trauma related claims.
Seeing PTSD claims have become an epidemic in the last 10 years. It is not just firefighters and police officers; it is the general population. Diagnostic and Statistical Manual of Mental Disorders (DSM) 5 was written by psychiatrist. In the DSM 5 it has a chapter about trauma diagnoses.
On the matter of Posttraumatic Stress Disorder, it is a very lengthy, very detailed, very complex, and very specific diagnosis. All of the criteria must be present, if any is missing the person does not have PTSD. The diagnosis can not be made within 30 days of the event. The difference between PTSD and acute stress disorder is the time line. If a first responder goes through a traumatic event, they can be diagnosed with acute stress disorder right away. If they experiencing symptoms 30 days later, you would need to look at a diagnosis of PTSD.
In the DSM 5 adjustment disorder is listed right after PTSD. Adjustment disorder has nothing to do with trauma. It is experienced when a person has experienced a stress or loss that is upsetting to them. Looking at a firefighter who can report from being in a situation that was very stressful and they have a variety of symptoms. A careful evaluation of this person shows that they have some or most of the criteria for PTSD fulfilled, but one or two are not. An according to DSM 5, PTSD cannot be diagnosed.

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Not all adjustment disorders are trauma related.
This bill, who is differentiating these diagnoses? DSM 5 has become a standard and it is available to the public. A problem is that some are reciting the manual and claimants have come into my office after being coached recite it. Others come in and say I have PTSD but when asked what their symptoms are they don't know. They get very angry when told that PTSD isn't a symptom it's a diagnosis. The current law says the burden of proof is on the claimant and it is difficult to diagnose.
When I see someone with a PTSD claim they feel it is my job to disprove it. I have to do an evaluation, but many times they feel I am trying to take away their diagnosis of PTSD.
With this bill I can't prove they don't have PTSD without first of all going through the whole process of finding out what their diagnosis is.
Doctors are trying to get the information and are trying to make a differential diagnosis. If the patient has a preemptive diagnosis it is very difficult to find the real diagnosis. The patient is on the defensive. If you are dealing with a presumption of PTSD it is difficult to get a real diagnosis and when the patient feels they have to give certain answers. You are not there to disprove they have PTSD, but to find out what they have so that you can help them. What I see is when a worker is granted the diagnosis of PTSD and you go on for some months and they don't have PTSD you have problems. If they do have PTSD and are removed from it completely, that isn't the way to treat it. They lose themselves and it has become a career ender.

00:28:02 Andrew Graham: speaks on the causation standard on one of the versions of the bill, in order to disprove the claim, an employer would have to prove that work was not even a minor cause of the condition. He asks Dr. Klecan if you could say that work wasn't even a minor contributor?

Dr. Eugene Klecan responds, virtually all emergency responders report that they all have some sort of trauma disorder from a single event or cumulative events. If any whiff of trauma is in there and that's all they need to say to have PTSD then then they don't need it evaluated by people like me.
PTSD is not caused by trauma.

Lynn McNamara asks for further explanation.

Dr. Eugene Klecan responds with an example. As a doctor he can't say that trauma had nothing to do with it. It is an impossible standard. Saying that trauma had nothing to do with it is not what the DSM is saying.

Jack Dempsey: Taking adjustment disorder out, what is being said about PTSD is it is a very high standard to get a diagnosis. It is hard to rebut if you can't say if any of it is work related. If you check all those boxes saying they have PTSD then you should be able to tell if it is work related.

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Dr. Eugene Klecan: There are many other criteria for a diagnosis of trauma related. He provides an example The bill as written wants me to prove that work had nothing to do with the PTSD. And unless the employer or doctor can prove that the work related trauma had nothing to do with it, then can't do that.

Jack Dempsey: asks why can't you do that? Why can't you diagnose that it did have an effect?

Andrew Graham: There are a lot of boxes that need to be checked. But once you have a diagnosis then it becomes causation, and that is an extremely low bar to say that it was work related.

00:34:24 Alan Hartley: It goes back to that 1% idea? That you can't prove that there is nothing that didn't happen everyday that was less than 1% of the cause. Because these first responders are so exposed to these traumatic events.

Jack Dempsey: How can you tell if something is 51% or 49% of the cause?

Nelson Hall: you are explaining diagnoses that are trauma related. You don't have PTSD unless it is trauma related, is that correct?

Dr. Eugene Klecan responds that is true for PTSD, yes. But not for adjustment disorder.

Nelson Hall: Adjustment disorder is under the chapter for DSM 4 and DSM 5, correct?

Dr. Eugene Klecan for DSM 5 yes, I don't remember 4.

Nelson Hall: We are not talking about adjustment disorder over some divorce or bankruptcy. We are talking about adjustment disorder as it relates to a trauma.

Dr. Eugene Klecan: disagrees with the description.

00:36:26 David Barenberg: asks how Dr. Klecan finds where the condition might stem from.

Dr. Eugene Klecan: Giving an example of a firefighter who is having stress from life events. A father who has passed away at an early age from a heart attack, high cholesterol, and high blood pressure. His doctor recommends reducing his stress level. So this firefighter is stressed about what the stress of his job could be causing. He tells the employer he can no longer be a fire fighter because of stress. They deny him disability due to stress.
He then goes back to his doctor and talks about all the stressors in his job and the doctor gives him a diagnosis of PTSD.

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When this firefighter comes to me and I do a through evaluation and in the end say that he is stressed. He is worried about having a heart attack and he may have a disorder, he may have anxiety, he may have another condition, but it isn't PTSD.

Scott Winkles: If the bill passes with the -3 amendment, and a person is diagnosed with PTSD and they don't have it, would it be harmful to them?

Dr. Eugene Klecan responds with yes. The way this is worded anyone could claim PTSD and be treated accordingly.

00:36:52 Kimberly Wood: This bill sounds like it could do more harm than good. Those individuals who have been diagnosed with PTSD could likely be harmed if it is a misdiagnosis.
If the wrong person gives the diagnosis, should the wording be much more narrow to make sure the right people are making the diagnosis, not all are as well versed in the DSM as a psychiatrist would be.

Dr. Eugene Klecan talks about who should be making the diagnosis. Nurse practitioners are not qualified to do this. It is rare for a psychiatric nurse practitioner to diagnose anything. Psychologists are, but training and knowledge is different. Just because they have a masters in psychology or an M.D. doesn't mean they are using the DSM 5 correctly or at all.
The way its written the bill as written leaves it wide open to let anyone diagnose.

Kimberly Wood: It isn't that the presumption exists, it is that there is no way to rebut it the way its written. You want to make sure there is a check, a way to make sure the diagnosis is correct. Its to protect the worker so they don't go down the wrong road.

Dr. Eugene Klecan: says that is accurate.

47:00 Jack Dempsey: Coming back to causation piece, not the diagnosis and a police officer in a shooting, but a divorce and having kids taken away. How can you say that home stress is 51% of the problem and the officer doesn't have PTSD? How do you come to the determination that the majority is being caused by non work related stress? How do you arrive at those percentages?

Dr. Eugene Klecan: PTSD is caused by a trauma and nothing else. Each case is different and it is difficult to diagnose. The details matter. We take all of the information and make our best determination.

Jack Dempsey: can you say it is work related because the event happened at work.

Dr. Eugene Klecan: Anyone with the PTSD diagnosis correctly made fit with the criteria and there was a trauma.

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Very few people in the real world are susceptible to PTSD. They are already drug abusing or alcoholic or already have a psychiatric disorder. We look at all of those things, but if there is trauma, and the trauma is marginal that is when I would start to question.

00:50:07 Holly O'Dell, SAIF: There are two presumptions in this bill. In the event that a worker was diagnosed by a psychiatric mental health nurse practitioner, psychologist, or psychiatrist diagnosed that the emergency worker did have PTSD at one time, it would be rebuttable. And the second presumption is that it is work related. The provider would then be required to explain why it isn't work related.

Sam Hutchinson: Some individuals are going to Zoom Care and given a diagnosis of PTSD. And then a licensed psychiatrist says that isn't the right diagnosis. You can't overturn the diagnosis in this bill.

00:51:30 Holly O'Dell: cites Page 2, (of the -3) "A psychologist or psychiatrist has diagnosed a trauma…" SAIFs observation is that first presumption. There is no standard that the worker has PTSD or must show they have PTSD. If one provider diagnosed PTSD would say it is not rebuttable.
The second place is on page 3, (c) (C) "… may be rebutted only by clear and convincing medical evidence that…"
Typically, medical evidence that doesn't agree with the diagnosis is unpersuasive. Most of the time a judge wouldn't believe the second doctor on the different diagnosis.

00:53:54 Nelson Hall: there is nothing in this bill that says once you are diagnosed with PTSD you are stuck with it. There is nothing that says an employer can't challenge the findings. The bill says if the diagnosis is there then this presumption applies.

Holly O'Dell: SAIF has said that if one provider diagnoses it, it doesn't actually say if the diagnosis exists.

Nelson Hall: Where does it say if one diagnosis is made by somebody you are stuck with it?

Holly O'Dell: Page 2, (b), (A) says once any psychologist has diagnosed it then the presumption kicks in and there is no longer a determination it exits.

Nelson Hall: Says I'm not seeing it in there.

Andrew Graham: It says compensable if a "a psychologist or psychiatrist has diagnosed" the disorder that satisfies the statute.

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00:55:11 Nelson Hall: if you have been diagnosed with this disorder, there is a presumption that the person has PTSD. Then it is presumed you have the disorder. But the bill doesn't say you are stuck with the diagnosis if you get it.

Lynn McNamara: it sounds like you are saying the same thing. Other things also have to apply but you have to start with the diagnosis.

Nelson Hall: the point is that there is nothing in this bill binding you to the diagnosis of PTSD. If it turns out you don't have it then the presumption doesn't apply.

Lynn McNamara: the original conversations that have been had its no questions asked. You don't want the emergency personal to be exposed to the questions and all of what surrounds getting the diagnosis more than needed.

Nelson Hall: If it has been diagnosed by a very narrow set of practitioners then that should relieve the worker of having to go through the insurance evaluation system.
We have heard from Dr. Klecan about concerns about his fellow professionals making the diagnosis. By saying that one of our first responders would be inventing this is insulting. It is due to a life threatening trauma. That is part of the criteria in the DSM 5. To say that it is because of alcohol usage or drug abuse, that is the debate we shouldn't be putting them through.

01:00:37 Kimberly Wood: If I have a diagnosis of PTSD then the only thing that can be rebutted in the bill is if it is work related. There isn't a way you can challenge the diagnosis. That it should be looked at to make sure we have an accurate diagnosis. It just allows you to challenge being work related, but nothing more.

Nelson Hall: It's the difference between an affirmative statement and a non statement.

Kimberly Wood: can I rebut the diagnosis?

Nelson Hall: there is not an affirmative statement that says you can or can not. It the absence of a bar.

Sam Hutchinson: says part (c) (B) "a denial of a claim for compensation… must be on the basis of … that it is not work related" So it can be denied medically if it isn't work related, but not if the diagnosis is wrong.

Lynn McNamara: that is what the words say to me too.

Kimberly Wood: Are you willing to amend the language to allow if the diagnosis is wrong also?

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Nelson Hall: yes, I don't see it as necessary. You don't get to the terms of the rebuttal unless you have the diagnosis.

01:04:10 Kimberly Wood: at this point there is enough concern about it is needs to be added in there.

Andrew Graham: about adjustment order is there another chapter in DSM 5 were things could cause issues.

Nelson Hall: responds that yes it is elsewhere in the DSM 5. But the bill is only about how it is trauma related.

Dr. Eugene Klecan: PTSD is trauma related. But adding adjustment disorders can confuse everything. PTSD, by its very nature implies that it is trauma related.

Alan Hartley: Because adjustment disorders are general in nature it is harder to say what is causing it? There was past testimony that about 8% of the population has this PTSD, and 50% of firefighters. Are adjustment disorders more than 15% of the population?

Dr. Eugene Klecan: I can't say what percentage of the population has an adjustment disorder, it is a very broad term.

Jill Fullerton: with adjustment disorder, wouldn't that help rule out all of the other things that are not work related? Those wouldn't be covered in this bill, unless they are the ones listed?

01:07:45 Dr. Eugene Klecan: PTSD only comes to treatment. The diagnosis would be for treatment. In its essence adjustment disorder is not trauma related. It was put in the DSM 5 for people who have something like PTSD, but not quite. It open's it up to all the other things and there is no way to say it isn't related to work.

Alan Hartley: Only a small part could be related to adjustment disorder and then with this bill it will all need to be treated if any part is work related.

Lynn McNamara: this bill is talking about adjustment disorder as it appears in the trauma section of the DSM 5.

Andrew Graham: it only appears in the section for trauma in the DSM 5.

01:09:55 Karl Koenig: comments on purpose of the bill. And that he has been working for 40 years to get the laws changed.
There still perils of coming forward talking about dealing with stress at work.
We have worked with police and EAP.
Having this in place for about 15,000 workers is important.

Kathy Nishimoto: No one here isn't saying we don't appreciate what you do as a first responder. But narrow this bill so we take care of the first responders.

Karl Koenig: we have narrowed the bill. From thirty-five thousand to about fifteen thousand.

Kathy Nishimoto: narrow it so there is no question so its not going to have everyone jumping in.

Karl Koenig: Where is the clarity that you need? There are people in this room who don't like presumptions. We are here to talk about a very narrow band of employees and circumstances that could have them dealing with some horrific events.

Nelson Hall: How much narrower would you like this?

Kathy Nishimoto: the professionals are saying that there is a slight open door and we wouldn't be able to rebut it. Give us employers a chance to rebut it. If its truly there get them treatment for it.

Nelson Hall: so that we have a protected class that not everyone can jump in, we limit to specific trauma diagnoses, and the level of proof that takes to rebut this presumption.
Level of proof that is the standard mental health claim and how do employers overcome this presumption.

01:23:30 David Barenberg: there isn't an argument that people who need these services, get these services. There is a shared interest to make sure the workers get these services.
The standard is an impossible standard and rebuttable. The bill being more of a guarantee and not a presumption.
We are willing to look at a different standard but one that is more rebuttable.

Frank Stratton: The difference with cancer is that 10 out of 10 doctors are going to diagnose you with cancer. But with PTSD it is more difficult. When coworkers are saying it isn't legitimate. But if they have gone and gotten a diagnosis and we can't rebut it that is the problem.

Nelson Hall: if we were to include that the diagnosis can be challenged would that move this along?

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Holly O'Dell: we would want to find out what was wrong with the worker. If that is what we need to look at so they can be properly treated and we can do that without a presumption. If the medical evidence is showing that the trauma or stressor, but not making a diagnosis.

Kimberly Wood: doesn't want to harm them because the presumption. The presumption that you have is not acceptable.

1:37:10 Nelson Hall: Do other states have different standards? Should Oregon follow in these standards? It comes down to what is that level of proof. What is the presumption in the first place? It has worked in cancer, it has worked in heart and lung. I'm not sure why it is different with mental health.

Kimberly Wood: We want the group to come to a consensus. We will make our recommendations and see if the bill moves forward.

George Goodman: insight on the bill and the cancer presumption. What is the difference between cancer and mental health? You can see and touch cancer, and mental health you can not. Mental health conditions are entirely based on the examiner. Many things have been moved since the cancer presumption was passed. He gives example of prior cases.
With "and stressor" being added to the wording is opening the door for a whole garbage can of adjustment disorders. The definitions should say something like "trauma disorders that are defined above" and then list them.

(the committee recessed for 30 minutes)

02:30:00 Nelson Hall: The proponents after some conversations, are willing to move and conversations have been productive. Willing to say diagnosis itself can be challenged.
Burden of proof, could be raised to a level of preponderance. There will be some word smithing and see if an agreement can be made.

Lynn McNamara: we, would like you to work it out.

Alan Hartley: asking about removing the nurse practitioner from a person being able to make the diagnosis.

Nelson Hall: At this point no, the nurse practitioner has certificate of psychiatric care should be included and it is such a small group of individuals who are able to make the diagnosis more should not be removed from that pool.

Kimberly Wood: asks the department to get a list of psychiatric professionals in the state.

Alan Hartley: clarifies what information he wants related to nurse practitioner, level of training, what are they allowed to treat, qualifications.

Theresa Van Winkle: We will be able to get a list for you of licensed professionals, including nurse practitioner who are certified to diagnose and treat trauma related disorders.

Nelson Hall: This is about diagnosis on the front end. So, even if its Dr. Klecan is the only one certified to diagnose, once they are diagnosed then we can move forward with treatment and it doesn't have to be the same person as who made the diagnosis.

Alan Hartley: this is a diagnosis question more than anything.

Kimberly Wood: asks for a list of the training they have.

Theresa Van Winkle: we will do some research and see. I know there is an in depth certification process. OHSU has a program, would that be sufficient or do we need more information?

Alan Hartley: says a list of what they are qualified to do, what they do every day and what they don't do every day. Do they actually do that initial diagnosis, that first part of the treatment.

Jack Dempsey: workers comp statute is the only that doesn't treat a nurse practitioner as a full provider. There is also a conversation right now about the number of individuals able to treat workers comp claims and looking to expand that number because of the limited few right now.

Nelson Hall: This is about the diagnosis, not the treatment. There are different schools of thought about treatment. There are different schools a thought that removing the claimant from the work place all together does them more harm. That's the treatment side, we are not here to talk about the treatment and the best coarse, it is to get the diagnosis and then go from there.

Julia Hier, Claims Policy Analyst, Workers' Compensation Division: Put together what other states have done in order to rebut claims of PTSD. Claims from the State of Washington and the State of Vermont. It is grouped with language and who is able to diagnosis. Also, Florida has just expanded their mental health statute when it comes to workers' compensation.

Theresa Van Winkle: discusses next meeting schedule.

Nelson Hall: I believe we are addressing the concerns that have been raised and we believe we can have a compromise. I have three things to address and we have compromise on those three, we might only need ten minutes.

Lynn McNamara: we won't be party to your discussions, so we might have questions.

Kimberly Wood: I don't know if there is an established number of things that need to be changed. If your intent is to simply draft language, I think it will be more time consuming than just hashing it out.

Lynn McNamara All of the stakeholders need to be on board with the compromise.

2:45:00 meeting adjourned.

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