

WORKERS' COMPENSATION
MANAGEMENT-LABOR ADVISORY COMMITTEE
Subcommittee on Legislation Meeting

October 11, 2019
1:30 p.m. – 3:30 a.m.

MLAC Members Present:

Diana Winther, IBEW Local 48
Alan Hartley
Kimberly Wood, Perlo Construction
Tammy Bowers, May Trucking
Lynn McNamara (via teleconference)

Staff:

Theresa Van Winkle, MLAC Committee Administrator
Jeffrey Roddy-Warburton, MLAC Assistant

Attendees:

David Barenberg, SAIF Corporation
Kevin Anderson, Sather, Byerly & Holloway, LLP
Kirsten Adams, Associated General Contractors
Jennifer Flood, Ombudsman for Injured Workers
Keith Semple, attorney for injured workers and Oregon Trial Lawyers Association
Sue Quinones, City of Portland
Sheri Sundstrom, Hoffman Construction
Elaine Schooler, SAIF Corporation
Jovanna Patrick, Claims Attorney OTLA
Julia Hier, WCD Policy Analyst
Dan Schmelling, SAIF Corporation
Gina Wescott, Special Districts Association
Matt Lawrence, Tolleson Conratt et el.
Nicole Peterson, Oregon Restaurant and Lodging Association
Ron Atwood, Defense Lawyer (via teleconference)
Jordan Bice, Oregon Trucking Association, Safeway, Fred Meyer (via teleconference)
Greig Lowell, Workers' Compensation Board
Cathy Ostrand-Ponsioen, Workers' Compensation Division
Cara Filsinger, Workers' Compensation Division
Gayle Shields, attorney
Sally Coen, Workers' Compensation Division
Bob Nicholas, GIS analyst
Jay Kessell, Oregon Trial Lawyers Association
Lou Savage, Workers' Compensation Division
Allison Lesh, SAIF Corporation
Jaye Fraser, SAIF Corporation
Kathy Gehring, SAIF Corporation
Trevor Beltz, Oregon Medical Association
Montana Lewellen, Legislative Advocates

Agenda Item	Discussion
Opening (0:00:00)	Kimberly Wood MLAC Co-Chair, opened the meeting at 1:28 p.m. the committee is meeting to discuss time loss issues. Kimberly Wood begins round table introductions.
(00:04:55)	Keith Semple, OTLA discusses the proposed legislation of HB 3022. Keith Semple states that OTLA does not plan to bring any new language forward for the short legislative session and no decision have been made about what might happen with the bill during the next long session but he hopes that some consensus might be reached between both parties. The focal point is time loss issues. Keith Semple states that he would like the committee to discuss data and how it can be gathered for time loss. Keith Semple discusses the details of the document that OTLA brought to the meeting as a handout .
(00:14:15)	Jovanna Patrick, OTLA, discusses what happened when a worker is declared medically stationary and before the closure comes out. Jovanna Patrick states that during this time there is procedural time loss if the worker is not released to full duty work or if they don't have a continuing release. The procedural time loss gets taken out of their permanent disability award. There are incentives for the insurer to close the case quickly because of overpayment which can not be collected because there is not enough permanent disability. This process can take months for unknown reasons. Jovanna Patrick also mentions that a lot of workers rely on that lump-sum money they receive at the end of their time loss and that is why they recommend that the dollar-for-dollar reduction not be permitted.
(00:16:50)	Keith Semple discusses the transition between procedural and substantive time loss and how some notice to workers might be help them with the transition. Jovanna Patrick adds that workers not being notified about being declared medically stationary is an issue. Keith Semple states that doctors can only back date work restrictions for 14 days but the medically stationary date can be back dated as far back as they want which causes overpayment issues.
(00:22:20)	Keith Semple discusses the next topic which is that workers should be notified before payments of lost wages are cut off. Currently there is no law that requires workers to be notified and they often find out they have been cut off because they don't receive their check. If the workers are notified it gives them time to make any corrections before they get cut off and lose their payments. Jovanna Patrick adds that it shouldn't create too much more work for the insurer because the adjuster already has to determine time loss every 14 days and it would just be one more additional step for the insurer.
(00:26:22)	Keith Semple discusses how OTLA believes that insurers should have incentives to make settlement payments on time. Keith Semple explains that there are two types of settlements, first is claims disposition agreements (CDA) which have a payment deadline and second is disputed claims settlements (DCS), which do not have a deadline. Keith Semple believes both should have the payment deadline and there should be a requirement in the law. Kimberly Wood asks if it is the CDA that has the statutory limit

and DCS does not? Keith Semple responds that is correct. Kimberly Wood asks how long is the statutory limit? Keith Semple responds 14 days. Tammy Bowers asks if there is a rule that the DCS has to be paid within 30 days? Jovanna Patrick responds that there is not, but there is a rule that states orders are final within 14 days.

- (00:29:28) Alan Hartley asks why would the worker waive the right to get a penalty? Jovanna Patrick responds that they don't realize they are doing it. Kimberly Wood asks if the dozens of cases that they have each year are ones that are before the Workers' Compensation Board. Jovanna Patrick responds that if it is a settlement that hasn't been paid yet then yes, if it is just a late payment then it is with the division.
- (00:30:00) Jovanna Patrick moves to OTLA's last issue which is in a dispute over time loss calculations, employers should be expected to produce the wage record.
- (00:32:26) Kevin Anderson, Sather, Byerly & Holloway, LLP discusses the contents of the [letter that he submitted in response to OTLA's time loss issues](#). The letter gives a detailed response to each of the 5 issues OTLA has.
- (00:37:12) Tammy Bowers states that she wants it to be fair for both the worker and the employer, but she doesn't see how it is fair that an employer can pay time loss for (an example) four months but then can only get an overpayment back for 14 days of that. Tammy Bowers asks how can we make this fair for the workers and the employers? Keith Semple responds it's a challenging thing to do and one fix could be backing dating the medically stationary date.
- (00:41:40) David Barenberg, SAIF, thanks OTLA for their hard work and states that they want to go about fixing these issues in a way that is least disruptive to the system by addressing issues quickly.
- (00:44:28) Keith Semple asks if anyone tracks overpayment data? Sally Coen, WCD responds that WCD doesn't track general overpayment data but WCD does track the claims that are audited on the accuracy audit. Sue Quinones, City of Portland, states that the city has been tracking the overpayments for the past 13 years. Dan Schmelling, SAIF Corporation, states that SAIF tracks overpayments on a claim-by-claim basis. Keith Semple responds that could be a good starting point to determining what an average overpayment might be.
- (00:46:30) Diana Winther asks where a good starting point for this discussion would be. Keith Semple responds that maybe a good start would be with an initial stakeholder discussion outside of this meeting.
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- (00:49:50) Ron Atwood, Defense Lawyer, one of the issues that comes to mind in regards to overpayments is the open ended time loss authorization. Ron Atwood adds that in terms of the settlement documents he thinks a survey of settlement documents as it relates to the payment of the DCS as well as waiver of first approval dispute. Jennifer Flood, Ombudsman for Injured Workers, responds when the Stoltz decision came out it created the penalty of attorney fees from the CDAs.
- (00:54:43) Kimberly Wood states that we should decide what data we need to gather for each one of the issues, and decide if we are talking about making statutory changes or rule making changes, as well as finding out how often these issues occur.
- (00:56:20) Greig Lowell, Workers' Compensation Board, states that all the settlements come through the board and in regard to the carve out language they have all of that information and would be willing to gather that data for the committee.
- (00:56:50) Keith Semple says that the department would have the data when they catch the under- or overpayments. They would also be the ones looking at if employer and insurer are in compliance.
- (00:57:15) Kimberly Wood asks Sally Coen if WCD would be able to get numbers on under- and overpayments. Sally Coen responds yes, and clarifies that WCD does not audit the insurer's audit of the claim. Jennifer Flood asks Sally Coen if WCD's data will only show over- and underpayments that the auditors determine. Sally Coen responds yes. Keith Semple adds that this set of data came into discussion when we were talking about changing the time loss rules and doing a straight average.
- (00:58:50) Dan Schmelling, SAIF, states that there are multiple reasons for an overpayment, and if you have an overpayment because you made an error in the TPD calculation if you catch it with the next payment you might recoup the overpayment and/or pay the underpayment. He also adds that there are also overpayments due to payments past the medically stationary date. Dan Schmelling states that the data might not show why each overpayment happened but just that they did happen.
- (01:00:10) Jennifer Flood states that there are overpayments due to incorrect processing or not enough information, but she is not seeing a lot of the overpayments are due to error.
- (01:01:26) Diana Winther appreciates what Kevin Anderson said about not wanting to add something to the procedures that could end up being an issue, but for unrepresented workers that don't have all of the knowledge of how things work, clarity for the workers to know their rights is important. Alan Hartley
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asks how is a worker supposed to be aware of what they need to do. Dan Schmelling responds that when a claim qualifies for closure the insurer is required to send out a notice, but understands that notice might not be clear.

- (01:04:50) Keith Semple states that it is overwhelming to get important information in amongst all of the other information that is in the notices. Jovanna Patrick wonders if it can be in the claim acceptance letter. Keith Semple thinks that the letter should state what conditions are accepted on the claim so the workers know.
- (01:07:18) Jovanna Patrick states that sometimes the communication is lacking between the doctor, the insurer, and the claimant. Alan Hartley asks so the insurer claims medically stationary and then the doctor responds no we don't think so, and then the worker is never informed of this. Jovanna Patrick responds yes. Keith Semple add that as attorneys they would get letter signed by the doctor that the worker is clear to return to work in discovery and the worker might not see that same letter and doesn't know they are cleared. Diana Winther asks if by this time is the damage already unfixable. Keith Semple responds a lot of the time it is unless the doctor is willing to admit the mistake. Jovanna Patrick adds that even if the doctor does want to fix the mistake they can only correct the last 14 days.
- (01:11:25) Keith Semple gives praise to SAIF's letters that they send out to workers informing them they have been released to regular employment and that it is their obligation to contact their employer. Kirsten Adams, Associated General Contractors, asks if clients that have received those letters find them helpful and are something that the clients understand. Keith Semple responds yes he thinks it is helpful, Jovanna Patrick adds that some might not like that news though and she gets lots of calls about the letter. Alan Hartley asks if there is a requirement that when the insurance company overrules the doctor that the worker be notified. Keith Semple responds there is a requirement to notify the worker when they have been released to regular work and provide them their reinstatement rights. Alan Hartley asks if that is always done. Keith Semple responds it is very rarely done. Alan Hartley asks if that is the issue we should be addressing instead of making a new rule. Keith Semple responds that is one option.
- (01:13:40) Kimberly Wood states that there still will be an issue with the back dating that the letter about being released to work still won't fix. Keith Semple responds that in regards to notices one about back dating would be helpful to inform workers they are not going to get that next time loss check.
- (01:14:44) Elaine Schooler, SAIF Corporation, believes that it is important for the workers to get more education about the process of time loss in the beginning so they can be empowered to know what is going on through the process.
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- (01:15:34) Keith Semple states one of the challenges is the worker expects to get a notice on day 14 and then they get nothing and they are now concerned that they did something wrong and they aren't going to get their checks. Tammy Bowers responds hopefully they are getting the notices of closures in the mail. Keith Semple responds that is a different issue but he is referring to as the claim is going along, if the insurer knows the worker isn't getting a check the worker needs to know that information too. Tammy Bowers mentioned the earlier MLAC session about how an employer can terminate time loss and how they can not just terminate it whenever they feel like it. Keith Semple responds one of the ways it can be terminated is if the work restrictions are not received. Keith Semple states he believes that is when the doctor is unable to verify the work restrictions that triggers the obligation to send a notice to the worker. Jennifer Flood asks if that is from an open ended authorization. Keith Semple responds generally, yes if the work restrictions are closed instead of open ended they go to the date where it ends.
- (01:20:50) Julia Hier, WCD Policy Analyst, in regards to notice requirements and checks not being issued, she states there could be an issue with people knowing who is the correct attending physician and what sort of obligations will need to be met.
- (01:21:26) Kimberly Wood asks if anybody else has topics they would like to bring up for discussion. David Barenberg states that he would eventually like to discuss the topic of the complexity of the system and the complexity of the documents, but that is its own topic separate from this meeting.
- (01:23:23) Sheri Sundstrom, Hoffman Construction, discusses the potential of workers being able to access information about their claims online, she asks if any companies have that access. SAIF Corporation responds that they have that access for their clients. Jennifer Flood gives details about what information those clients can see online about their claim.
- (01:25:40) Kimberly Wood asks in regards to claim information being available online, do most injured workers have access to the internet. Jovanna Patrick responds there is an age divide, younger workers have a lot more access and the ability to use the internet than the older workers. Jovanna Patrick also states that a language barrier can be an issue for workers accessing information online.
- (01:27:35) Jennifer Flood states that even if they look online to see that their payment hasn't been issued yet, it doesn't give them any information about why it hasn't been issued. Kimberly Wood mentions the state of Washington's system has the ability for notes to be added for workers to see and the ability to do everything electronically. Sheri Sundstrom mentions that the
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number of workers that use Washington's system is amazing. Kimberly Wood states that she would like to see Washington's numbers on how many people are using the online system and how many it is available to. Kathy Gehring, SAIF, responds that last time she saw the number it was about 18% of the workers were using the online features, but that 18% is focused more on workers with a disabling claim or are going to be looking for payment information. Keith Semple asks if that is 18% of the 30% of total number of workers that have the online access available to them. Kathy Gehring responds yes.

(01:30:20) Jennifer Flood states that workers will call in and say they can't access MyClaim (Washington's online system) Kathy Gehring states that is due to only 18% being signed up for access.

(01:31:15) Kimberly Wood states that for next steps there is some data that WCD and SAIF needs to be gather. Kimberly Wood also states that the subcommittee is going to take a break until the beginning of 2020. Kimberly Wood encourages the stakeholders to meet again because of how effective it was last time they did that.

(01:33:00) Tammy Bowers asks in the ombudsmen's office has seen a huge increase in calls since the workers' compensation multi-language help page started going out. Jennifer Flood responds no, but they don't tag each call and ask if they are calling because they got the letter about the help page, but she has seen an increase in translation services being requested.

Meeting Adjourned Kimberly Wood adjourns the meeting at 3:15 p.m.
