

WORKERS' COMPENSATION
MANAGEMENT-LABOR ADVISORY COMMITTEE
Full MLAC Meeting
July 17, 2020
1:00 p.m. – 5:30 p.m.

Committee Members Present:

Alan Hartley
Kimberly Wood, Perlo Construction
Diana Winther, IBEW Local 48
Tammy Bowers, May Trucking
Kevin Billman, United Food and Commercial Workers
Lynn McNamara, City County Insurance
Kathy Nishimoto, Duckwall Fruit
Ateusa Salemi, Oregon Nurses Association
Andrew Stolfi, DCBS Director, *ex officio*

Members Excused:

Jill Fullerton, Clackamas County Fire Department

Staff:

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

Agenda Item	Discussion
Opening (0:00:00)	Kimberly Wood opened the meeting at 1:01 pm. Kimberly Wood states that the Governor's letter states that the committee with need to conclude today (July 17, 2020). Theresa Van Winkle states that all members, except Jill Fullerton, are present.
Department Updates (0:05:00)	Jessica Giannettino Villatoro, Political Director, Oregon AFL-CIO gives her testimony on why she believes that a presumption is needed and goes over some data that she brought to the committee.
(0:11:23)	Keith Semple, OTLA, gives his testimony going over who the presumption would apply too and goes over the language provided that shows significant movement from workers advocates compared to what was found in LC-293 (attached here).
(0:19:30)	Sheri Sundstrom, Hoffman Construction gives her testimony highlighting how important education is during this pandemic.
(0:23:21)	Holly O'Dell, SAIF gives SAIF's testimony and details on the draft of the rule SAIF provided to MLAC that addresses some of the issues that MLAC has identified.

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- (0:33:05) Benjamin Debney, Workers' Compensation Defense Attorney, gives his testimony on the problems, solutions, and the potential presumption.
- (0:39:55) Sam Hutchison, gives his testimony and recommendation that City of Portland not be pulled into the presumption or legislation this fall because it will actually give lesser benefits to Portland employees than they are getting now.
- MLAC takes a break for caucus at 1:44 p.m.**
- (0:42:45) Kimberly Wood states that the meeting will move on to talking about the inconsistencies in the claim processing among carriers and how exposure is handled in terms of acceptance and denial. Kimberly Wood states that it is time to talk about the two solutions that are on the table for the presumption.
- (0:45:33) Kevin Billman asks in regards to rule changes what are the AFL-CIO's concerns and why. Jessica Giannettino Villatoro responds that she realizes that DCBS has multiple stakeholders and with her limited interaction over the past few years, the rulemaking with DCBS has been very difficult because the stakeholder engagement on the worker side has always occurred after rules are filed and the process to get them to engage in pro-worker changes has been difficult.
- (0:48:20) Keith Semple discusses the details of the SAIF proposal and states that some of the things in the proposal are good and not ones that they would oppose, but some just don't go far enough to address the problem and protect the essential workers. He also states that the issues that need to be fixed are beyond administrative rule.
- (0:49:12) Kevin Billman asks what are the rule making changes that AFL-CIO believes are harming workers. Jessica Giannettino Villatoro responds first was the change to the calculations of the average weekly wages to determine how much a worker gets paid when they are on time loss, the second was the union hiring hall rule not being taken into concern.
- (0:58:00) Lynn McNamara asks in regards to essential workers that don't come in contact with the public being covered by this presumption, how many people would be covered by this presumption in Oregon. Keith Semple responds that it is difficult to enumerate who gets the presumption and who shouldn't, and the goal is not to get the presumption for every single worker but for the workers that high exposure jobs. He states he does not have an estimate of how many people this presumption would cover. Jessica Giannettino Villatoro responds in regard to covered workers who are not exposed that it might be unclear but what they meant in section
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8(a)where is says “subject workers work site” was that the worker would have to be on the job site, not telecommuting.

(1:02:20) Diana Winther states that it is her understanding that if there is an interest in this committee making a recommendation for a presumption with the understanding that negotiations need to continue, we are not barred from doing that.

(1:04:22) Kathy Nishimoto asks in regards to the local public health authority and positive COVID-19 tests, if some don’t have a medical background, how would that be accepted. Keith Semple responds that he doesn’t know if a policy decision was made when we looked at the language that a non-medical provider would be sufficient for the diagnosis, it is open to discussion. Ateusa Salemi asks if Kathy Nishimoto is referring to MD versus nurse practitioner versus PA, because the people in the medical department have some medical background or health care. Kathy Nishimoto responds that it is her understanding that a few counties don’t have medical staff reviewing these. Jessica Giannettino Villatoro responds that should be as drafted, refers to which authorities or agencies have the ability to authorize the worker to return to the work site.

(1:06:30) Kathy Nishimoto asks if an employer was doing whatever they could to keep employees from being exposed but hang out together off site and are exposed, would that just be a Duckwall claim automatically. Keith Semple responds no it would be a situation where Duckwall would seek to rebut the presumption and point out that the person had another known exposure.

(1:10:30) Alan Hartley states that we should focus on the definition being refined to distinguish customer facing workers from non-customer facing workers. Ateusa Salemi adds that all of the situations mentioned would be rebuttable. She also states that she wants to focus on actual denials for people that would have been covered by this presumption.

(1:13:40) Kathy Nishimoto asks how does the presumption increase industry compliance. Keith Semple responds that it will take all of the things that we are discussing out of the realm of liberal interpretations of statute and having a couple of different ways we view claims, it will give the worker one standard .

(1:15:00) Kathy Nishimoto asks how is contact tracing and presumption fit together and would we stop contact tracing if it is going to be a presumption. Keith Semple responds he would hope not. Kathy Nishimoto asks how does this presumption compare to the other states presumptions and why is it so broad. Keith Semple responds that he doesn’t have a complete breakdown of that but the data is available.

(1:20:04)

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- (1:24:20) Kathy Nishimoto asks how does a presumption encourage a worker to file a claim and how does it keep the employer from retaliating. Keith Semple responds in respects to the retaliation issue that is being addressed in other legislation that is being proposed, but it is not being proposed to MLAC because retaliation is not in Chapter 656. In regards to encouraging employees to file claims he hopes that they would see it as a more viable avenue and that it is not an impossible process. Keith Semple adds that the presumption isn't tailored to solve those problems. Kathy Nishimoto asks why have a presumption then. Keith Semple responds MLAC is mostly trying to resolve the problems that are in Chapter 656, and the concern in the impossible burden on the worker to prove exposure at work.
- (1:25:39) Diana Winther states that for both regular claims and workers' compensation claims, having to prove they got it at work is a disincentive for the workers. She also states that she believes that the presumption does help encourage employees to file claims.
- (1:29:05) Kimberly Wood asks if SAIF has done some research on what other states are doing and is Oregon's presumption in line with other states. Holly O'Dell responds currently there are 13 states that have some sort of presumption. Twelve of them relate to whether the claim is compensable and one relates to a period of time loss. She also adds that in some of the states, COVID-19 would have been excluded from being compensable without the presumption. A few of the states require the worker to prove they were exposed at work and four of the states have schemes similar to Oregon's and one of those is the clear and convincing standard that is used today.
- (1:32:09) Kevin Billman asks what is AFL-CIO's analysis of what other states have done. Jessica Giannettino Villatoro responds first that she does not fundamentally agree with most of what Holly O'Dell shared, but there is additional context available when comparing the states presumptions, like the time when the presumptions occurred. Oregon's presumption mirrors the denial rates that are seen in the DCBS data. Jessica Giannettino Villatoro also adds that a lot of states declared who was and wasn't an essential worker, which closed more business they Oregon did.
- (1:33:23) Kathy Nishimoto asks how would a presumption work for an employee who tested negative but did show some symptoms. Keith Semple responds they would get a very limited amount of benefits by making use of their presumption.
- Ateusa Salemi states that when we are talking about who a presumption would help we need to review the denial data. Ateusa Salemi states that it troubles her that health care workers are being denied at the rates they are being denied. Jessica Giannettino Villatoro responds she needs a little
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- (1:36:15) more time to go through the industry specific data, but she shared the data broken down by insurer denial rates.
- (1:39:52) Tammy Bowers asks in regards to LC 283 if a person tests negative and they never have any symptoms, do they get an accepted presumptive acceptance notice on their workers' compensation claim. Keith Semple responds it would probably be an accepted claim but for a very limited amount of benefits. Tammy Bowers ask if this is an injury and not an occupational disease, a person could have multiple claims of COVID-19 because they can have multiple different exposures. Keith Semple responds that could be the case.
- (1:41:09) Diana Winther asks if SAIF accepts the claim for exposure, which is different than accepting the claim for COVID-19. Holly O'Dell responds that is correct.
- (1:48:40) Tammy Bowers asks if a nurse has no exposures at work, but does get COVID-19 would she automatically have an accepted claim. Keith Semple responds that there would be a rebuttable presumption that she has a compensable claim and the employer would be able to rebut it. Tammy Bowers asks if employees that come into contact with the public don't have to prove they came into contact with anybody at work that had COVID-19 is that correct. Keith Semple responds yes that is correct. Tammy Bowers asks what about janitorial services (non-hospital) that come into your office after hours covered by this presumption. Keith Semple responds that a lot of those janitorial services work in multiple places and right now the presumption is trying to catch everyone in hopes to not leave anyone out and narrow it down later.
- (1:54:40) Alan Hartley states that we need to define what an essential worker really is because some careers might have been customer facing before the pandemic but have now switched and are not. Alan Hartley also states that the clear and convincing evidence piece should be removed for something more reasonable. Jessica Giannettino Villatoro states that the purpose of the presumption is to have a clear and convincing standard, but this draft does allow for a rebuttable based on exposure. Kimberly Wood states that we need to talk about the presumption in regards to the level of proof required by the employer.
- (1:59:28) Lynn McNamara asks if the potential impact on the workers of the rebuttable presumption has been considered. Keith Semple responds that digging into the worker's personal life is probably already happening as part of claim investigation and he doesn't think this presumption makes it any less likely to happen.
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(2:05:46) Kimberly Wood asks if SAIF proposal for administrative rule fixes addresses the two categories he is mentioning. Keith Semple responds it does not. Holly O'Dell responds the proposal solves the primary issue that workers need to know where they were exposed and before any denial requires a medical opinion to determine where the worker was exposed. Holly O'Dell in regards to rules being enforced over denials without a medical opinion or the exposure not being work related states that the enforcement is the same the enforcement authorities at WCD and at the board . In regards to rulemaking versus statute and the pros and cons Holly O'Dell states the presumption could be required to be a statute and the rule proposal could be faster and easier to change if needed.

(2:12:25) Kimberly Wood asks if in her experience with medical opinions is that the doctors are unable to determine exposure. Holly O'Dell responds that in the proposal the carrier or self-insured pays for the medical opinion, we could ask the worker's provider or get an IME, often she advises to accept the claims.

(2:15:05) Diana Winther asks if SAIF considered making the medical opinion a requirement. Holly O'Dell responds in the proposal requested if there if there is no medical opinion available it would be on the carrier or self-insured, if they cannot find somebody willing to weigh in to determine where the worker was exposed then the claim needs to be accepted.

(2:20:35) Ateusa Salemi asks what to do for the workers that don't have the benefit of having SAIF as their insurance carrier. Holly O'Dell responds that the proposal has a process that all insurers will have to follow. Ateusa Salemi responds that it should be legislation that they have to follow and not a rule. Holly O'Dell agrees.

(2:23:25) Diana Wither in regards to rule versus statute asks, is there a difference in how that would be perceived. Holly O'Dell responds that in the end whether it is a presumption or a rule if the carrier doesn't follow the law the individual worker will have to appeal.

(2:25:05) **MLAC Committee takes a break for caucus**

MLAC committee reconvenes at 4:10pm

(2:27:20) Diana Winther states that while she appreciates all of the hard work that SAIF has put into their suggestion the Labor side of MLAC doesn't believe it go far enough to protect the workers and she is strongly in favor of pursuing a presumption and continuing the conversation. Ateusa Salemi agrees with that Diana Winther.

(2:33:45) Kimberly Wood states that she appreciates everyone's involvement and that the Management side of MLAC believes that SAIF's proposal does address all of the issues and that their proposal covers more employees without having a complex method to determine who is or isn't covered and that it is easier to change than a presumption, if needed. Kimberly Wood also states that a retroactive piece should be added to the proposal.

(2:34:25) Kathy Nishimoto states that she makes her decisions on irrefutable data, and she doesn't see it for a presumption so it is hard for her to support it.

(2:37:25) Kimberly Wood states that both Labor and Management are disappointed that a solution could not be found and that it would have been nice for this to come to MLAC a long time ago. Kimberly Wood states that there is going to be two different recommendations coming out of MLAC.

(2:39:00) Tammy Bowers asks if the suggestion regarding the audit being done for the carriers can be added to address issues in 9 and 10. Kimberly Wood states that Management is in favor of that. Diana Winther responds that Labor doesn't have any issues with DCBS doing audits.

(2:40:35) Kimberly Wood asks if there should be a claims threshold for businesses needed X number of claims before the rule kicks in. Diana Winther responds that we should look at SAIF percentages and adjust it to something reasonable.

(2:41:02) Tammy Bowers states that DCBS can do an audit right now and don't need a new rule, and wants to know if we can ask DCBS to specifically go and do an audit to ensure a proper investigation was completed without having a threshold. Kimberly Wood agrees and states that it doesn't necessarily need to be a rule but it would be in the recommendation to DCBS.

Sally Coen, Workers' Compensation Division (WCD) responds in regards to DCBS's ability to audit that we do have really broad authority to go in and look at the claims and the claims processing. For WCD to make any formal findings about claims would need to look at denials that were final by operation of law because during the appeal period the worker could still appeal to the Workers' Compensation Board and we would not have jurisdiction to be able to make any final finding about what happened in those claims. Tammy Bowers asks if DCBS would be able to tell if a full proper investigation was done. Sally Coen responds DCBS can look at claims for informational gathering purposes but not for making formal findings expect for denials that were final and not being appealed. Sally Coen states that WCD will need to talk to Department of Justice in regards to several of the proposed rules. Sally Coen adds that DCBS can follow the current rule that requires a reasonable investigation of the claim before issuing a claim denial. Diana Winther asks in there is not adequate

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- (2:50:32) investigation that doesn't actually change anything for the worker does it. Sally Coen responds that is correct. Alan Hartley adds that he would like to see what WCD can do.
- (2:52:32) Kevin Billman asks if informal investigations are public record and does the worker have access to it. Sally Coen responds that DCBS will have to speak to Department of Justice regarding that question.
- (2:54:42) Diana Winther states that the recommendation (for bad faith denials) to the Governor should be that MLAC is interested in looking into this process but at this time we do not have enough information to give a definitive recommendation. Kimberly Wood agrees.
- (2:55:52) Kimberly Wood in regards to number 14 unclear requirements regarding burden to do contact tracing and inform other employees when one has tested positive, states this goes back to what an employer can and cannot release and this is an education piece.
- (2:58:02) Kathy Nishimoto states that OSHA is addressing quite a few of these issues that pertain to safety. Kimberly Wood adds that the recommendation for number 14 is to defer to OSHA.
- (3:00:00) Kimberly Wood asks if number 15 is an education piece. Diana Winther responds that it could be depending on the circumstance.
- (3:02:00) Kathy Nishimoto in regards to number 18 states there is a task force they are starting to talk about paid family leave in Oregon and there has been \$30 million set aside and the first meeting is July 28th.
- (3:08:25) Diana Winther asks about who can authorize a worker to stay home, if it is a public official or the employer and she has concern how that fits into everything. Tammy Bowers and Kimberly Wood states that a COVID-19 exposure would mean they are covered during that 14 days. Diana Winther asks if we are expanding beyond someone that is the attending physician or not. Holly O'Dell responds there are two scenarios in which time loss might be authorized by an unusual source, that is either during a quarantine for an exposure or for a worker who is awaiting a test. SAIF has been very liberal on what sort of medical provider is required.
- (3:14:00) Kathy Nishimoto states that the CDC is very clear about who you can have in the workplace and what the employer is supposed to do if employees have been potentially exposed, they cannot be in the workplace for 14 days. Diana Winther wants to find a way to make a recommendation around this topic. Lynn McNamara states that both proposals do deal with it in a form.
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(3:15:45) Kimberly Wood asks is there any desire to make the recommendation to the Governor that the Division of Financial Regulation does accept NCCI's proposal. Both sides agree upon recommendation.

(3:17:00) Kimberly Wood in regards to PPE, asks MLAC if they are in favor of letting OSHA pursue options how to best handle PPE issues. Both sides agree .

Kimberly Wood states that now the task is to get all the things discussed into a recommendation letter. Theresa Van Winkle asks if there not a vote because each caucus in the recommendation letter speaks to the proposal they preferred. Kimberly Wood states that initially we did have some recommendation and flag somethings that we wanted to follow up on and make resolutions and some education parts. Kimberly Wood states that she would like to make note that both sides did come to agreement on quite a few things. Kimberly Wood asks if each thing needs to be voted on. Theresa Van Winkle responds no vote.

(3:18:50) Lynn McNamara states that rather than putting DCBS in the position outlining our position is it reasonable for each caucus to work of the weekend on a statement of what it recommends and why and provide that to DCBS on Monday.

(3:20:00) Theresa Van Winkle states that there also has been directives for various expressions of things like OSHA rule making and activities for WCD to conduct and that can be highlighted in the report as well. Theresa Van Winkle adds per the Governor's office in regards to being transparent about what each caucus is prioritizing.

(3:23:30) Kimberly Wood asks that all members of MLAC are copied on the recommendation. Theresa Van Winkle responds yes they will be.

Additional Testimony

- [Written testimony Oregon Association of Nurseries](#)
- [Oregon OSHA Infectious Disease Rulemaking](#)
- [Oregon OSHA Infectious Disease Invitation to Forums](#)
- [WCD preliminary report on insurer data call](#)
- Informational handouts Ombudsman for Injured Workers – [general](#) and [COVID-19](#)
- [Letter from Christian Gaston, office of Governor Brown](#)
- [Written testimony UPS](#)
- [Written testimony United States Bakers](#)
- [7/27/20 response to MLAC from Providence Health and Services](#)

Meeting
Adjourned

Kimberly Wood adjourns the meeting.

*These minutes include time stamps from the meeting audio found here:

<https://www.oregon.gov/dcbs/mlac/Pages/2020.aspx>

**Referenced documents can be found on the MLAC Meeting Information page here:

<https://www.oregon.gov/dcbs/mlac/Pages/2020.aspx>