

WORKERS' COMPENSATION
MANAGEMENT-LABOR ADVISORY COMMITTEE
Full Committee Meeting

February 19, 2021
9:00 a.m. – 12:00 p.m.

Committee Members Present:

Alan Hartley
Kimberly Wood, Wood Risk Management Service
Diana Winther, IBEW Local 48
Lynn McNamara
Tammy Bowers, May Trucking
Kathy Nishimoto, Duckwall Fruit
Scott Strickland, IOUE Local 701
Andrew Stolfi, DCBS Director, *ex officio*
Jill Fullerton, Clackamas County Fire Department
Ateusa Salemi, Oregon Nurses Association
Kevin Billman, United Food and Commercial Workers

Staff:

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

Agenda Item	Discussion
Opening (0:00:00)	Kimberly Wood opens meeting at 9:03 a.m. Theresa Van Winkle does roll call. Kimberly Wood begins the review on the February 5, 2021 MLAC meeting minutes and asks if anyone has any discussion about them. Diana Winther states that she has one correction about the wording of a question that she asked during the meeting and Sally Coen's answer to that question. Theresa Van Winkle states that we will review that part of the meeting and get the correction made. MLAC will hold off on approving meeting minutes until next meeting.
Department Updates (0:02:00)	Theresa Van Winkle gives an update on the COVID-19 presumption legislation, HB 3025 and SB 488 and their similarities and differences. Theresa Van Winkle states that neither bill has a scheduled hearing date yet.
HB 2040 (0:04:00)	Sally Coen, Workers' Compensation Division (WCD) Administrator begins the discussion on HB 2040 WCD electronic claim reporting. Sally Coen details the current process of claims and how the process will work after the modernization project is complete and things are done electronically. This bill allows WCD to specify by rule what types of claim information must be reported electronically. The intent of the bill is to only change the manner in which insurers and self-insured employers report claims data to WCD and not to change any existing requirements for

written claim information notifications that companies are required to give workers. Sally Coen states that WCD will use the public rulemaking process and rely on our stakeholders and MLAC to vet out any issues. The soonest WCD would adopt the new rules is July 1, 2023. Sally Coen states WCD did request [a -1 amendment](#) which clarify the effective date and correct typographical errors. WCD has shared the memo they got from Legislative Counsel that explains the form and style updates. Sally Coen states that WCD understands that there may be more proposed amendments to come.

- (0:08:00) Diana Winther in regards to the concerns about the style and form changes asks if the memo from the Legislative Counsel would be considered evidence if it were up for interpretation in the future. Sally Coen responds that WCD did enter that memo into legislative record during the January 27, 2021 hearing so it is in the legislative history.
- (0:13:00) Scott Strickland asks if the memo from the Legislative Counsel details why the changes were made. Sally Coen responds that is correct.
- (0:11:00) Keith Semple, Oregon Trial Lawyers Association (OTLA) gives his testimony on HB 2040 and states that OTLA is still concerned about the LC changes and he doesn't believe that anything LC writes in a memo or puts on the record is going to allay that concern. Keith Semple states that SAIF is concerned about the changes as well. Keith Semple also states that they are concerned about data retention in terms of retaining denial copies. He would also like to know WCD current retention policy. Sally Coen responds that WCD will provide their retention policy to everyone. David Barenberg, SAIF states that they agree with Keith Semple and the LC changes and thinks it is best to keep the existing language.
- (0:14:30) Kimberly Wood states that MLAC as a whole is in support of OTLA and SAIF's concerns and wants to know if they can send a letter stating MLAC is in support of the bill to Legislative Counsel, but that they do have some concerns about the changes that they have made and the potential impacts those changes could have. Theresa Van Winkle responds no because MLAC is part of the executive branch and the Legislative Counsel is part of the legislative branch, it would be more appropriate for MLAC to send a letter to the committee chair.
- (0:15:00) David Barenberg states he doesn't think the issue is convincing Legislative Counsel, he thinks the issue is that they've opined and that an amendment can be requested that takes out those changes and Legislative Counsel does not have power over legislation.
- (0:16:30) Kimberly Wood asks the committee what they want to do next, does MLAC want to vote to support the underlying bill and not the LC changes,
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or do we want to wait for an amendment to come. Diana Winther states that MLAC needs more time to coordinate between the different stakeholders and what they decide what MLAC will recommend and she is gravitating to having a recommendation like Kimberly Wood is suggesting. Theresa Van Winkle states that the next steps would be to have a work session on HB 2040. Kimberly Wood states that MLAC would like the parties that have concerns with the bill to work it out if they can without impacting the bill, and she asks WCD to let MLAC know if there is a work session scheduled. Theresa Van Winkle responds yes MLAC will be notified.

HB 2915
(0:20:00)

Theresa Van Winkle begins the discussion on [HB 2915](#) which applies heart/lung occupational disease presumption to City of Portland Police and Fire Disability Fund (FPDR) and gives a brief overview of the bill and [the -1 and -2 amendments](#). WCD also [provided a bill analysis](#).

(0:20:50)

Sam Hutchison, FPDR gives his testimony on HB 2915 and their support for the bill along with the amendments and states that no additional changes are needed. Tammy Bowers asks in the Portland fire fighters would be losing any benefits. Sam Hutchison responds no because this gives them a broader higher-level presumption for the heart and lung conditions.

(0:22:00)

Kimberly Wood moves the committee to vote on HB 2915. Diana Winther moves to recommend HB 2915 with the -1 and -2 amendments. Alan Hartley seconds. All MLAC members vote yes to support HB 2915 with -1 and -2 amendments.

SB 489
(0:24:00)

Theresa Van Winkle begins the discussion on [SB 489](#) on time loss authorization changes, this is the first time the bill has been in front of MLAC. Theresa Van Winkle gives an overview of the bill. The bill is currently in the Senate Labor and Business Committee and there is no scheduled hearing yet. WCD also [provided a bill analysis](#).

(0:25:40)

Arthur Towers and Keith Semple, OTLA give their testimony on SB 489 and what they have been working on for this bill. The first topic that they address is backdated work restrictions, and how they eliminated the restriction which they hope will make the solution fall somewhere in the middle. Keith Semple states the next change that they have made is in regards to workers not knowing why they are not receiving their checks, they want workers to be notified why their benefits are being suspended. Keith Semple adds that they have also put some limitations on the amount of overpayment that can accrue and how far back you can look, the numbers and time frames they have selected for these changes are up for discussion. Arthur Towers states that he agrees with Keith Semple's testimony and adds that they wanted to bring forward a bill that was

straight forward and levels the playing field for workers and this proposal feels less controversial than others that have been floated around.

(0:36:20)

Tammy Bowers asks if they are wanting to push SB 489 forward right now or is this just a starting point to open up discussion. Keith Semple responds we have no intention on pushing the bill forward right now. Tammy Bowers ask if they are wanting them to be able to authorize time loss past what the prior doctor indicated. Keith Semple responds that the goal is not to allow the new doctor to override the prior doctor, the focus is more on the worker getting a notice of overpayment for benefits not being due because of work restrictions were not clear, then they worker should have the right to go back and get those addressed. Tammy Bowers asks for a better understanding about cutting off time loss. Keith Semple states that sometimes time loss is cut off due to a bona fide job offer that the worker doesn't start for whatever reason, and he does see how a doctor coming in after a bona fide job offer and saying they should have to do that job can be a concern. Keith Semple adds that it would be reasonable to have an exception for situations where one doctor is trying to override the prior doctor's decision. Tammy Bowers would like to see they bill go to a work committee because there is so much to discuss. Keith Semple agrees.

(0:42:00)

Benjamin Debney, Wallace Klor Mann Capener & Bishop representing employees in Oregon, gives his testimony on SB 489 and his concerns about the bill. The first would be the cap of \$5,000, because many cases are greater than \$5,000. He to also thinks a work session would be preferable.

(0:44:30)

Matthew Lawrence, with Tolleson, Conratt, Nielsen, and Maher gives his testimony on SB 489, he states that he has an issue with all three parts that were proposed. Matthew Lawrence has issue with the 14 day retroactive because the system is set up to be controlled by doctors and attending physicians. The second issue is it provides a safeguard for the employer to understand and know what their exposures are going to be, and dating back 3 to 4 years is astronomical, but from what Keith Semple said that doesn't seem to be the intention. Matthew Lawrence also thinks a work session would be great. Matthew Lawrence also states that there is a technical error in the bill from the way he is reading it, he states that with time loss we use the terms suspend and terminate non-interchangeably, and it gets confusing in the bill with those terms not being used correctly which makes statute conflict with the way it is currently written. Matthew Lawrence states that we should continue the offset. He also states that there is an issue with overpayments when a worker gets a new job, sometimes they do not report it to the insurer which means they are double-dipping and receiving benefits they are not entitled to. Matthew Lawrence states that there are ways to correct the medically stationary date and to correct records prior to reconsideration to prevent overpayments.

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- (0:51:00) Tammy Bowers in regards to the case where Matthew Lawrence got the attending physician to correct the medically stationary date asks if he got an attorney fee. Matthew Lawrence responds we did not get the fee for getting the medically stationary date changed, but we did get a 10% fee when the recon was overturned. If the case would have gone to hearing it would have been included in his assessment of fees.
- (0:52:00) David Barenberg and Elaine Schooler, SAIF gives testimony on SB 489 and gives a brief update on the history of the bill. David Barenberg also agrees that a work group would be best. Kimberly Wood states that she believes everyone is in agreement that a work group is probably best and we will refer this over to a subcommittee. Diana Winther agrees that it should go to subcommittee.
- LC 3492**
(0:57:00) Theresa Van Winkle begins the discussion [on LC 3492](#). This is the first time the bill is in front of MLAC. WCD provides the [bill analysis for LC 3492](#). Sally Coen and Aaron Fellman join the committee and gives a brief update on the details of the bill which changes the definition of “employer” and “worker” in ORS chapter 656. Aaron Fellman [gives a presentation on LC 3492, ORS chapter 656, and independent contractors](#).
- (1:06:20) Tammy Bowers asks for clarification that LC 3492 isn’t really changing the definition on what an independent contractor is it is more changing what a subject worker if they are already not an independent contractor. Aaron Fellman responds that is accurate. Tammy Bowers asks if the definition of independent contractor is not affected is that correct. Aaron Fellman states that is correct, but the sponsor of LC 3492 is sponsoring another bill that would change the definition of independent contractor (HB 2498), and if both bills were in place it would have a larger impact on who is entitled to workers’ compensation. Tammy Bowers asks if WCD has any example of who this really applies to. Aaron Fellman responds the hypothetical worker who would be affected by this bill are people who are free from direction and control but do not meet the independent business requirement. Tammy Bowers asks about people who are not independent contractors and are currently not a subject worker, would this bill affect them so they would become a subject worker, do you have any examples of what kind of employee that is. Aaron Fellman responds that he doesn’t have any specific example. Tammy Bowers asks if it would affect volunteer workers. Aaron Fellman responds that he doesn’t know what specific group it would affect, but it will not impact large groups of people.
- (1:06:20) Alan Hartley states that he looks at this as a minor tweak but one that provides a lot of clarity. He also states that with more and more people working from home, control might be an issue later on.
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(1:13:00) Scott Strickland states he wants a better understanding of the intent behind the bill and asks if the purpose of the bill is to categorize all workers by splitting them into either being classified as an employee or as an independent contractor, as opposed to currently where they could fall outside either category. Aaron Fellman responds that is a fair summary.

(1:14:00) Kimberly Wood thanks Aaron Fellman for his presentation. She also states that she does have some concerns about how this bill could affect the construction industry, also how it might affect the gig industry.

Committee takes a brief recess

(1:15:00) Kimberly Wood reopens the meeting after recess and discussion on LC 3492 continues.

(1:15:30) James Robinson, injured worker, provides his testimony on rule changes, and shares his comments about the testimony on wage loss notices, and work contractors. Mr. Robinson does not agree with the changes in LC 3492 and the changes does not answer the needs of workers.

(1:23:00) Benjamin Debney, attorney, gives his testimony on LC 3492 and states that the idea of cleaning up the language is great but there are some unintended consequences because a change in statute especially a definitional term throws out or throws into question all prior case law. The bottom line is this will create a lot of new litigation.

(1:26:30) David Barenberg and Elaine Schooler, SAIF give their testimony on LC 3492 and they appreciate what Chair Holvey is trying to do by simplifying definitions across the system, and SAIF is looking at potential impacts these changes could have and they are working with OTLA. David Barenberg states that they agree with the issues Benjamin Debney has raised about the bill.

(1:29:30) Kirsten Adams, Public Affairs Council for Associated General Contractors gives her testimony on LC 3492. She states that she appreciates the attempt to try and streamline the independent contractor determinations across agencies but she agrees with Benjamin Debney and we need to make sure there are no unintended consequences with the definitional changes. Kirsten Adams states that she looks forward to being a part of further discussions. Kimberly Wood asks if she believes this is something Representative Holvey is working on with stakeholders and potentially there will be some changes. Kirsten Adams responds from what David Barenberg was saying that is her understanding.

(1:32:30)

Kimberly Wood states that she would like to hold off on voting on LC 3492 and look at it in future meetings because of the possible changes coming. Diana Winther agrees.

Meeting

Adjourned

Kimberly Wood adjourns the meeting at 10:45 a.m.

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

<https://www.oregon.gov/dcbs/mlac/Pages/2021.aspx>

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

<https://www.oregon.gov/dcbs/mlac/Pages/2021.aspx>