

WORKERS' COMPENSATION
MANAGEMENT-LABOR ADVISORY COMMITTEE

SUBCOMMITTEE ON SB 489 MEETING

March 5, 2021
10:00 a.m. – 12:00 p.m.

MLAC Members Present:

Alan Hartley
Kimberly Wood, Wood Risk Management Services
Diana Winther, IBEW Local 48
Kathy Nishimoto, Duckwall Fruit
Scott Strickland, IOUE Local 701
Kevin Billman, United Food and Commercial Workers
Andrew Stolfi, DCBS Director, *ex officio*

Staff:

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

Attendees (names are from list showing in GoTo meeting; we were unable to identify participants joining only by phone)

Dan Schmelling, SAIF
Elaine Schooler, SAIF
David Barenberg, SAIF
Jaye Fraser, SAIF
Greig Lowell, Workers' Compensation Board
Jennifer Flood, Ombudsman for Injured Workers
Jodie Phillips Polich, attorney
John Powell, various clients
Jovanna Patrick, attorney
Keith Semple, attorney
Kirsten Adams, Associated General Contractors
Matt Lawrence, attorney
Nichole Guilfooy
Paloma Sparks, Oregon Business & Industry
Steve Schoenfeld, attorney
Todd Johnson, NCCI
Sally Coen, Workers' Compensation Division (WCD)
Lori Graham, WCD
Katie Whitehead, DCBS
Matt West, WCD
Troy Painter, WCD
Summer Tucker, WCD
Barb Belcher, WCD

Agenda Item	Discussion
Opening (0:00:00) (0:01:40)	<p data-bbox="451 304 1031 336">Kimberly Wood opens meeting at 10:33 a.m.</p> <p data-bbox="451 378 1412 598">Keith Semple, OTLA starts the meeting off by going over the specifics SB 489 and gives an overview of the legislative concept that OTLA has drafted which will be the framework for a compromise agreement. Keith Semple then gives an overview of the current law and the concerns that OTLA has with it. In the meeting chat Keith Semple lists out the order of the topics:</p> <ul data-bbox="500 598 1412 966" style="list-style-type: none"> - Given 2-year limitation for workers to litigate time loss issues, what is an appropriate limitation for insurers/self insured to audit? - How much time is reasonable for backdating work restrictions? What exceptions are reasonable for claims in litigation or when mistakes are identified later? - Should there be some limits on the dollar amount of overpayments that can accrue or how much of the impairment compensation can be taken? - What type of notice should be given to worker before discontinuing time loss payments?
(0:18:00)	<p data-bbox="451 997 1380 1102">Kimberly Wood asks Keith Semple if he wants to start the discussion on the time disparity for the two sides and look at equality for both. Keith Semple states that is correct.</p>
(0:11:40)	<p data-bbox="451 1144 1412 1764">Elaine Schooler, attorney with SAIF, discusses the broader time loss bill from the 2019 session that included more changes than the current form of the bill. Elaine Schooler also discusses the changes in people now working from home as compared to in the office due to COVID, and how that put the conversations about SB 489 on hold. Elaine Schooler states that both sides have reached out and had helpful conversations about maintaining benefits for workers and give employers more certainty on their part for work releases. Elaine Schooler states that she understands some of OTLA’s concerns with the two-year limitation, and one case that comes to mind is Swint v. The City of Springfield, a case which talks about the two-year limitation and how it should be applied that is worth discussing down the road. Elaine Schooler discusses the 14-day retroactive limitation and the worker’s concerns with time loss, SAIF too has similar concerns with time loss that continues indefinitely what they call “open-ended time loss authorizations.” Elaine Schooler discusses auditing claims and what SAIF looks at like overpayments, underpayments, and time loss after medically stationary dates.</p>
(0:19:00)	<p data-bbox="451 1795 1412 1879">Keith Semple responds that he agrees that is what we understand from the defense stakeholders and their concerns over open time loss. Keith Semple</p>

invites Jodie Phillips Polich and Jovanna Patrick to jump in on the discussion regarding open-ended time loss restrictions as well as discussing some of the hassles and possible solutions like seeing workers regularly or sending the doctors a letter or just talk to the doctor asking if they can no longer verify the worker's time loss. Keith Semple states he really wants to discuss some of the 14-day disparities and all of the issues and he would like to find what is reasonable for both sides.

(0:23:00)

Jovanna Patrick, worker's attorney, states that SAIF's real focus is on the notice that the claimant gets because so much of what we do as lawyers and what the insurance companies do is get reports from doctors and the chart notes, the claimants don't get any of that information and they are told not to work. So, what happens later is the insurer gets the doctor to change that and no notice is sent to the claimant, and by the time the claimant gets the missed check they cannot talk to the doctor to go back and fix that or go back and work those hours. Jovanna Patrick states that this is when the insurer has gone back and changed the date to two months prior and claims all the money is an overpayment and that is why a worker needs to get a notice. Jovanna Patrick also discusses open-ended work releases, denied claims from a doctor not writing a work release, and the audit process and why it needs to be done earlier not just at the closure of the claim. Jovanna Patrick describes the late arrival of checks and claimants being told to wait 7 to 10 days and how that cuts into the 14 days they have to go back and fix a missed payment. Jovanna Patrick would just like to see the rules be fair for claimants.

(0:29:00)

Elaine Schooler clarifies what she stated in regards to the audit, they are auditing during the claim and during a final audit at closure to review all of the time loss authorizations so adjusters are constantly looking at their work releases. Elaine Schooler states there is an assumption that adjusters immediately receive work restrictions the moment they get them from the worker's doctor and that is often not the case. In regards to the notices, Elaine Schooler states there are rules that require notices be sent to the worker and she goes over those rules, and states that it is something that can be discussed further in rulemaking.

(0:32:30)

Jodie Phillips Polich, OTLA, states that one of the key issues for them is parity between the workers and the insurers in the retroactive aspect of benefits. She adds that the retroactive changes and work restrictions on the medically stationary date is most difficult for workers to understand, and as the worker's legal representative it is impossible to address them because of the 14 day limitation. Jodie Phillips Polich also comments on claim adjusters' audits and sometime when a claims adjuster changes the new one doesn't do an audit. Jodie Phillips Polich discusses some of the issues with MCOs in regard to time loss authorization.

(0:36:40) Keith Semple comments on a statement he made in chat in regards to Elaine Schooler talking about workers in between doctors not seeking treatment. He states for things like that the insurer can send out a letter stating they need a response from the worker within 14 days and to confirm if there are reasons beyond the worker's control that they have not sought treatment and their claim can be closed for failure to treat. Keith Semple says that the big issue is if there is a mutual concern about the 14 day limitations and the inability to go back in litigation or to correct a mistake or late notices because there was a problem with work restrictions, and whether it is fair to have two-year limitations on workers and not insurers.

(0:40:00) Kimberly Wood states that she appreciates all the concerns Keith Semple, Jovanna Patrick, and Jodie Phillips Polich have brought up, because as an employer she knows how hard it can be to get a work release from a doctor. Kimberly Wood also states that as employer she has had workers whose doctors will sent out a release that they have modified restrictions and as soon as the worker got it they went back to the doctor to have them taken off work again, which continued for months and months and was very frustrating. Kimberly Wood states another concern is there is only so much you can do to address the cost of a claim, and as the employer you can't and shouldn't be involved in the medical aspects of a claim. The employer can offer light duty so the worker stays engaged which is a positive for the employees, and light duty also reduces time loss payments for the insurer. Kimberly Wood comments she has some concerns about back dating some of that too much.

(0:42:50) Scott Strickland states there is obviously a disparity that exists, and it is a disparity where a sophisticated party doesn't have the same limitations put on them ad an unsophisticated party does, which seems counterintuitive. So, he would be interested in why that disparity exists, was it created for a reason or it just hasn't been addressed yet.

(0:43:00) Elaine Schooler states we need a bit of a historical overview, I believe some of, if not all, of these changes arose out of the Mahonia Hall reforms when time loss was unchecked in many ways, and that was part of the workers' compensation system at the time. In addition, there were no limits so time loss could go on indefinitely and there was very little oversight which was not good for getting workers back to work or employers bringing them back to work as part of their recovery. Some of the limits that were put into place included the 14 day limitation. Elaine Schooler states that she hears OTLA's concerns about the 14 day retroactive limitation, and the way it is currently proposed that there is no limit and that is concerning in particular where, for example, a worker doesn't like the restrictions the doctor provided so they get the doctor to retroactively change their restrictions when they had already been released for regular

work. Elaine Schooler says she believes situations like that can be problematic and undermine the ability of a treating physician to address work restrictions. She adds the goal should be for workers to see their doctor regularly and have work restrictions addressed regularly, with exceptions like post-surgery, and then getting them back to work and off time loss.

(0:46:40) Diana Winther states that she doesn't think anyone disagrees with the idea that the goal is to get workers back to work, and we don't want to create a system that is problematic like it was pre-Mahonia Hall. Diana Winther adds as someone that talks to rather sophisticated workers (licensed electricians) who are 99.9% of the time more excited to return to work because they make more money at work than on time loss, they are still not as sophisticated as the insurers and the MCOs. Diana Winther states that she does hear Elaine Schooler's and others concerns about the open-endedness. Diana Wither asks if there anything other stakeholders have as a counter to a more acceptable time frame if we are all in an agreement that a 14 day timeframe seems problematic, but that open-ended also sounds problematic. Diana Winther asks do we have any sense of what meeting in the middle might look like.

(0:47:30) Elaine Schooler responds that if we can negotiate and come to a consensus, it is something that we are willing to explore with OTLA to make it so workers are not having these unanticipated gaps and ensuring that benefits are being appropriately paid in a timely fashion and that workers are aware of when they are going to get their next checks. She adds there are notices that go out when they initially file their claim and that's probably a result of our system where workers may not always read that as closely as we would like because it explains how temporary disability works and what their responsibilities are to ensure benefits continue. Elaine Schooler states that it doesn't seem like open-ended releases was something that OTLA was willing to put on the table to discuss.

(0:49:50) Keith Semple states Elaine Schooler's comments are correct it is not something they are willing to put on the table. Keith Semple states that OTLA has done their very best to tailor the issues to identify some glaring disparities to set up a framework of some very reasonable questions we can talk about, like should the two year limit apply to both sides. He states OTLA understands there are some concerns about the open-ended work restrictions but that is more or less all we're hearing in response to these tailored issues. Keith Semple adds that he would like to focus on the issues they brought to the table as opposed to broadening the discussion at this time. Keith Semple states that open-ended work restrictions will not be addressed in the legislative concept.

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- (0:51:50) Kirsten Adams, Associated General Contractors (AGC), in regards to the history on the time loss issues states when we are talking about changing things that were done during the Mahonia Hall reforms I think it only makes sense to talk what one change might mean to another area and looking at things in a broader standpoint might make sense.
- (0:52:30) Keith Semple states that what he is hearing is there needs to be a give to address the 14 day deadline and two year deadline for injured workers when it is open ended on the other side, the system is already lopsided on the issue and he is not sure how many more “gives” they can give.
- (0:54:00) Kimberly Wood states Jodie Phillips Polich put a comment in the chat:
- Jodie Phillips Polich (to Everyone): 11:21 AM: We as claimant's attorneys agree that seeking regular medical treatment is critical. Right now "regular" is defined as every 30 days. This can be very challenging for physicians, especially specialists, to accommodate and meet the medical needs of the broader community outside of workers' compensation system.
- Kimberly Wood in regards to the comment asks if the regular treatment is defined by statute or rule and if it is are there an exception. Jodie Phillips Polich responds the reason she put the regular in quotes is because the time loss can only go back 14 days, it can only last for 30 days, and you can only see your doctor every 30 days to accommodate the need for updated work restrictions. Is there a little bit of wiggle room for that, yes probably. Jodie Phillips Polich adds this is more challenging to manage in rural areas because it is harder to get seen by a doctor/specialist every 30 days. Kimberly Wood states that in her experience SAIF has been more lenient on 30 days, but she realizes that not all other carriers are as lenient. Jodie Phillips Polich states that OTLA’s “perfect world” would be no limitation and we get as long as the insurers do, but if there is come other time frame to simply change this 14 day retroactivity, we are willing to look at that because the purpose here is parity. She adds we are not really hearing that there are any concerns in the stakeholders, beyond ourselves, about the lack of parity.
- (1:00:00) Kimberly Wood reminds everyone in the past few years, with the last OTLA bill it was contentious at the beginning and people were dragging their heels, but ultimately, we were able to get where we needed be so she asks everyone to not get discouraged in this process.
- (1:01:00) Alan Hartley thanks Keith Semple for bringing this to everyone’s attention and being so well organized. He adds at this point I think we can all agree that the 14 days may be too short and the two-year limitation may be unfair
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if it is one sided. Alan Hartley stated that if something is wrong we should focus on fixing the problem not focus on horse trading for something else.

(1:02:20) Paloma Sparks, Oregon Business & Industry, states that when we talked about this on February 19, 2021 she felt good about the message and thought we were ready to come to the table and have a reasonable conversation. She adds we are all participants in the same system and we are trying to work together to preserve the system and she would just like to remind everyone to speak kindly to each other. Paloma Sparks states that Keith Semple was pretty clear in the February meeting that they wanted to have an open discussion and work with everyone involved in our system, but Keith Semple's responses today make it seem like that is not something he is interested in, so lets all take a deep breath and talk about some of these hard issues and see where we can get.

(1:03:00) Elaine Schooler states that it may have come off like she was saying we only want something in return, but that is not at all what she intended to say. What she was trying to say is this is a system that is very carefully balanced and we want to make sure that any changes that are made to the system are taking into consideration the entire system. Elaine Schooler states that one of the reasons we feel so strongly about MLAC is because you look at the whole system and how to keep it balanced, and she also seconds the statements Paloma Sparks made.

(1:05:00) Jovanna Patrick states that from a claimant's perspective the system is not balanced right now, and it is statutorily not balanced right because of the 14 day and two-year limitations. Jovanna Patrick states that some of their frustrations are having to have these conversations with claimants all of the time. Jovanna Patrick states all of the worries the other side is having about claimants being able to go back are actually already happening right now for claimants across the board. She adds there are lots of ways in which insurers can close open ended authorizations. Jovanna Patrick states we have the same concerns about back dating and authorizations and we are just looking for some parity but we know it won't be perfect. She adds that she understands the rules are in the initial paper work but the claimants get so much initial paper work, and a lot of it is hard to understand, especially when they are non-English speakers.

(1:09:30) David Barenberg, SAIF states he would like to pick up on a point Jovanna Patrick made to flag for future discussion, which is the complexity of communication with workers and how we can simplify how we communicate better with workers. David Barenberg adds that it might be time now for the defense bar and others to get together and talk about what they have heard. He also appreciates Kimberly Wood's comments about a rocky start but we need time to talk amongst ourselves.

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- (1:11:30) Kimberly Wood states that her request is to come back to the next meeting on March 19, 2021, so that gives both sides two weeks to come together and have a discussion, because more was accomplished last time when both sides met outside of MLAC and then came together to talk about what they discussed. Kimberly Wood states she hears what Jovanna Patrick is saying and apologizes if what she was saying misinterpreted she was just sharing her experiences.
- (1:14:00) Scott Strickland thanks everyone for bringing up these issues and addressing it, so this discussion is very helpful. He also thanks OTLA for the way they laid everything out to address. Scott Strickland adds that he is still waiting for an answer on why these current disparities exist, but he realizes that he probably won't get the answer to that question right now. He adds if we can have answer to these very specific questions for the next time we meet that would be helpful and we need to take some time to process that and come back to it.
- (1:16:00) Kathy Nishimoto states please don't take her lack of response as not caring, she is hearing all the concerns she just wants to take a step back and take a look at all things so her team is not making rash decisions.
- (1:17:00) Keith Semple responds that is completely fair and understandable, and OTLA is fine with tabling the meeting discussion and each side going back to discuss. Keith Semple adds that eliminating back dating restrictions all together is not an expected end point, it is an expected beginning point. Keith Semple states the way he outlined the areas that OTLA sees being the core of the discussion and the negotiation and he did his best to leave those things open ended with the expectation that there would be some back and forth. Keith Semple clarifies that his intention of saying OTLA is not open to discussions regarding open ended work restrictions or cutting off work restrictions was not intended to be an aggressive stance, he is hoping to set these negotiations up for success it is just not something we can bring into the discussion or insert into the bill. He thanks everyone for participating.
- (1:20:00) Kimberly Wood asks Theresa Van Winkle if she can reach out to Bob Shiprack and Lisa Trussell about answering some of the specific questions about Mahonia Hall. Theresa Van Winkle states yes that can be done.

Testimony submitted for record but not discussed:

- [American Property and Casualty Insurance Association](#)

Meeting
Adjourned

Kimberly Wood adjourns the meeting at 11:56 a.m.

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

<https://www.oregon.gov/dcbs/mlac/Pages/sb489-subcom.aspx>

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

<https://www.oregon.gov/dcbs/mlac/Pages/sb489-subcom.aspx>

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