Department of Consumer
& Business Services

Information Management Division

Analysis of the 2001 Session of the Oregon Legislature: Workplace Injuries and Illnesses

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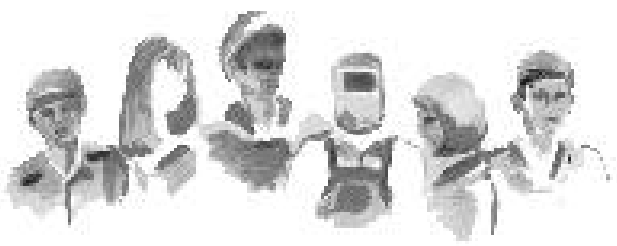
Novermber 2001



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Safety and Health

Oregon OSHA, a division within the Department of Consumer and Business Services, is a "state plan" agency. Federal approval of a state plan depends, in large part, on the state's provision "for the development and enforcement of safety and health standards… at least as effective in providing safe and healthful employment and places of employment as the standards promulgated" under the federal Occupational Safety and Health Act of 1970.[1]

OR-OSHA's strategic plan, developed in partnership with federal OSHA, may be summarized as having "a primary objective… to improve occupational safety and health in workplaces throughout the state while maintaining a system that is fair to both workers and employers. One of the fundamental ways to change occupational safety and health practices is to couple OSHA enforcement with consultation and training assistance for employers and employees. It is OR-OSHA's goal to achieve a balance between enforcement and voluntary assistance programs."[2] Toward those ends, the 2001 Legislative Assembly:

- Approved the department's submitted budget, including cuts in both enforcement and voluntary assistance positions within OR-OSHA. Staffing for Consultative Services decreased from 42 to 36 consultants. The authorized number of inspectors dropped from 86 to 80. Since 1992, however, the number of filled inspector positions has reached 80 only once.
- Also approved cutting the funding for new grants in the Workplace Redesign Program, which promotes research into new solutions to ergonomic, health, and safety problems.
- Passed three bills amending the Oregon Safe Employment Act (Oregon Revised Statute 654). Two of the bills relate to enforcement of civil rights, by the Bureau of Labor and Industries, and farmworker housing.[3] The debate on the third, Senate Bill 485, included a contention that changes in the Employer Liability Law (in ORS 654) will lessen incentives for employers to maintain a safe workplace.[4]

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[1] See http://www.osha-slc.gov/OshAct_data/OSHACT.html

[2] This three-sentence statement of objectives and goals is from the OR-OSHA web page "About Us." http://www.cbs.state.or.us/external/osha/about.htm

[3] The intent of House Bill 2352, relating to unlawful practices and the authority of BOLI, is to make civil rights statutes easier to understand and use. House Bill 3573 establishes a Farmworker Housing Development Account. A number of other bills affecting farmworker housing also passed.

[4] See, for example, "Senate passes worker injury bill," in *The Oregonian*, March 23, 2001.

- Did not act on several bills, dubbed the "Safe Hospital Campaign," that addressed standards for patient care.[5]

Senate Bill 485 will probably improve OR-OSHA's surveillance for workplace hazards—the capability to know how many injuries and illnesses are occurring in any given workplace. In Oregon, surveillance is based mostly on records of accepted disabling workers' compensation claims. Because SB 485 loosens restrictions on acceptance of claims (compensability), OR-OSHA will be aware of more disabling injuries and illnesses.[6] This may lead to an increase in demand for OR-OSHA's programs, including enforcement.

However, at least three shortcomings in workers' compensation data affect OR-OSHA's surveillance:

- Reports of nondisabling (medical-only) claims to the department are not required. Some research indicates that these claims result from hazards that are most amenable to OSHA-type interventions.
- A claim that is denied on the basis of the major contributing cause standard of proof may identify a workplace hazard. Although denied claims are reported to the department, the records do not distinguish major contributing cause denials.
- A report to the legislature included suggestions that some injuries may be going unreported.[7] Results from the 2000 Oregon Population Survey provide evidence that "workers do not report some relatively serious injuries and illnesses to their employers," either as a claim or a recordable incident.[8]

At the federal level, Congress gave direction on safety and health standards by:

- Passing the Needlestick Safety and Prevention Act.
- Repealing federal OSHA's ergonomic standards.

OR-OSHA has promulgated standards for exposure control plans for needlestick safety and prevention, and establishment and maintenance of a contaminated sharps injury log.

As for ergonomics, OR-OSHA's stated policy has been to follow the federal lead on developing standards to reduce the prevalence of musculoskeletal disorders. The 2001 Legislative Assembly agreed that proceeding slowly is the correct course. Thus, Oregon

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[5] These include House Bills 2700, 3614, 3615, 3616, 3617, and 3618, several of which related to patient as well as worker safety. One bill that did pass, HB 2800, mandates written staffing plans and limits forced overtime.

[6] The department estimates that 425 to 850 hitherto denied claims will be accepted as disabling under provisions of SB 485. In addition, as many as 2,450 denied nondisabling claims will be accepted, but this type of claim is not reported to the department. There may also be a number of claims accepted in response to the *Smothers* decision.

[7] See, for example, pp 27-28, *Final Report: Oregon Major Contributing Cause Study*, *October 5th, 2000*. http://www.cbs.state.or.us/wcd/pdfs/finalmcc.pdf

[8] *Workplace Injuries and Workers' Compensation Claim Filing: Results from the 2000 Oregon Population Survey* (January 2001). http://www.cbs.state.or.us/external/imd/rasums/wcresults/wcresults.html

has not joined California and Washington in developing state-specific rules to reduce musculoskeletal disorders. In Oregon, musculoskeletal disorders resulted in an estimated $190 million in workers' compensation benefits (incurred losses) in 2000, for a total of more than $1.8 billion since 1990.[9]

Insurance, Liability, and Special Funds

The Workers' Compensation Law advises that "an exclusive, statutory system of compensation will provide the best societal measure of those injuries [and illnesses] that bear a sufficient relationship to employment to merit incorporation of their costs into the stream of commerce." Workers' compensation insurance premiums, paid by Oregon's employers, finance most of the costs of income and medical benefits for workplace injuries and illnesses provided by the Workers' Compensation Law. Under the law, an employer may also self-insure.

The "workers' compensation tax"—paid in equal hourly shares by employers and workers—also provides for roughly $100 million in annual benefits that are awarded out of the Workers' Benefit Fund: some forms of reemployment assistance, certain cost-of-living adjustments, liability for specified costs of some reopened claims, etc. In addition, employers pay a "premium assessment" tax. These revenues, currently around $43 million annually, fund much of the systems regulation, including occupational safety and health, carried on by the Department of Consumer and Business Services.

Employers may be liable for civil damages under permitted exceptions to the "exclusive remedy" provisions of the law. Insurance known variously as Part B, Coverage B, etc., is available to cover most if not all of that liability. Workers who are able to purchase or arrange for coverage under private or group disability insurance and health insurance afford themselves better coverage for injuries and illnesses, in the event of a denial of workers' compensation liability.

In Oregon and many other states, the key questions for evaluation of liability under workers' compensation have been:

- How narrow is the range of compensable injuries, where claims will be accepted? [10]
- How adequate are benefits in restoring an injured worker to self-sufficiency? [11]
- What is the cost of premiums paid by employers (an important business-climate factor)?

Recent decisions from Oregon's appellate courts have highlighted questions about liability for workplace injuries and illnesses. Beginning in January 2000, an informal group of Management and Labor leaders worked out a compromise agreement on that

[9] See "Musculoskeletal Disorders" at the Information Management Division's "Research Alert" page, http://www.cbs.state.or.us/external/imd/realert.html

[10] See *Final Report: Oregon Major Contributing Cause Study, October 5th, 2000.* http://www.cbs.state.or.us/wcd/pdfs/finalmcc.pdf

[11] A forthcoming NIOSH-funded study on lost earnings in several states, including Oregon, aims to address the latter question. The Oregon Supreme Court's *Smothers* decision specifies that it does not address adequacy.

and a number of other issues. The 2001 Legislative Assembly enacted most of this agreement as Senate Bill 485, which also included provisions for the Oregon Supreme Court's *Smothers* decision (May 2001). [12] The bill will affect the overall liability for workplace injuries and illnesses in several ways:

- Loosens the "major contributing cause" exclusion, which prevents payment of benefits under workers' compensation insurance for some cases where there are preexisting conditions.
- Responds to *Smothers* by codifying a limited right for a worker to pursue a civil-negligence action against the employer, when a claim is denied under the major contributing cause statute. This affects workers who cannot prove that a work-related incident was the major contributing cause (at least 51 percent) of their injury or disease. The official estimate of damages that may be payable to workers under *Smothers*-type actions is a range of $3.5 million to $70 million per year.[13] Undoubtedly, the legislature received assurances that workers' compensation Coverage B is available in sufficient amounts to insure Oregon's small-employer base.
- Specifies statutes of limitations on *Smothers*-type civil-negligence actions. One implication is that workers with older denials of workers' compensation claims are prohibited, retroactively, from commencing an action.
- Directs the Management-Labor Advisory Committee to recommend to the 2003 Legislative Assembly an exclusive, no-fault, expeditious alternative remedy to civil litigation on major contributing cause denials. Their recommendation will probably address financing of the liability. The legislature's call for study is expressly posited upon allowing time for the Department of Consumer and Business Services (DCBS) to collect data on *Smothers*-type actions.
- Lessens the likelihood of an injured worker's recovery of damages under the Employer Liability Law.[14]
- Mandates that health benefit plans will be the first payer for certain medical services provided to insured injured workers if the workers' compensation claim is denied. Workers' compensation insurers will pay the balance on diagnostics and services directed toward pain alleviation and disability stabilization. Uninsured injured workers remain liable for payment if the claim is denied. The workers' compensation insurer is not liable if it denies the claim within 14 days.
- Responds to the Oregon Court of Appeals' *Johansen* (March 1999) decision by shifting liability for some costs of indemnity benefits from premiums to the Workers' Benefit Fund. The bill affects new or omitted medical condition claims that arise more than five years after first closure of the claim or the date of injury. The court noted that there are no time limits for liability on new condition claims. [15]

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[12] The court declared the exclusive remedy provisions of ORS 656.018 (1995) unconstitutional under the state Constitution's "remedy clause." See http://www.publications.ojd.state.or.us/S44512.htm

[13] This departmental estimate is based on half a percent to 10 percent of total benefits paid. See page 26, *Final Report: Oregon Major Contributing Cause Study, October 5th, 2000.*

[14] The ELL is in ORS 654, the Oregon Safe Employment Act, rather than ORS 656, the Workers' Compensation Law.

[15] See http://www.cbs.state.or.us/external/wcb/year99/coa/orders99/mar/ca100445.htm

- Directs that other costs will be absorbed by the Workers' Benefit Fund: an expansion of indemnity benefits under the Workers' Compensation Board's "own motion" authority, plus new temporary disability benefits for workers with multiple jobs.
- Repeals the "sunset" on "exclusive remedy" as the fifth objective of the law, which had been scheduled to end on the last day of 2004.

The effect of this legislation on total workers' compensation system costs is "essentially flat: The workers' compensation pure premium rate—the average rate that employers pay to their insurance companies—will decline by 0.1 percent for 2002… the twelfth consecutive year of rate reductions in Oregon…. Cumulative premium savings to employers since 1990, however, amount to approximately $6.3 billion."[16]

The 2001 Legislative Assembly also turned its attention to competition among insurers for workers' compensation premiums. Responding to charges by the insurance industry that SAIF Corporation (the competitive state fund) engages in "predatory pricing" of workers' compensation insurance,[17] legislators commissioned a "workers' compensation marketplace study." The report's major assertions and findings echoed some of the insurance industry's complaints, and modified or dismissed others: [18]

- The public interest is best served by a competitive marketplace for workers' compensation insurance.
- If current economic conditions prevail—increased medical cost inflation and lower investment earnings—then profit rates within Oregon's insurance market could be driven to "dangerously low" levels.
- The more immediate concern is not that Oregon is moving toward a SAIF monopoly, but that SAIF and Liberty Northwest so dominate the market that they constitute a "duopoly".
- SAIF's income tax exemption does not constitute a significant competitive advantage.
- SAIF's most significant competitive advantage is its ability to pay large dividends to policy holders, and this is fully consistent with its statutory mission to make insurance widely available and affordable.
- SAIF's ability to pay large dividends comes from the absence of laws governing distribution of earnings and its practice of repeatedly adjusting claims reserves downward.

Legislation was introduced to transfer some of SAIF's investment earnings to fund other state programs. House Bill 3797 would have created an "Economic Security Fund," purportedly to assure funding for schools and state services during a recession. Next came HB 3980, which as introduced would have created an "Examination and Accountability Commission Fund," subject to legislative disposition, after an allowance by formula for dividends and a transfer to the Workers' Benefit Fund. This legislation

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[16] See the department's news release at http://www.cbs.state.or.us/external/dir/do/news_rls.html

[17] See the Legislative Revenue Office's summary (Sep 2000) of hearings by the House Interim Revenue Committee, April and June 2000, at http://www.leg.state.or.us/comm/lro/report%2010-00.pdf

[18] See *An Economic and Actuarial Analysis of Financial Incentives in Oregon's Workers' Compensation Insurance Market* (April 2001), done under contract with the Office of the Oregon Secretary of State.

also would have reduced SAIF's competitive advantage.[19] Those efforts came to naught, though an amended House Bill 3980 did pass: the Secretary of State will arrange a second annual audit, an independent actuarial review of SAIF's reserves and surplus (surplus is typically a contingency for unexpected or catastrophic losses).

Over the years, there has been much discussion and debate concerning the status and operations of SAIF, and the Industrial Accident Fund (IAF) in particular. The Industrial Accident Fund is a trust fund exclusively for the uses and purposes declared under the Workers' Compensation Law. Financing is by all moneys received by SAIF under ORS 656, as paid to the State Treasurer. The 1982 Legislative Assembly, meeting in "special session, " gave the State of Oregon the right to direct legislatively the disposition of any surplus in excess of actuarially necessary reserves and surplus. This right was somewhat constrained by the Oregon Supreme Court's *Alsea Veneer* decision (Nov 1993), which held that the 1983 Legislative Assembly inappropriately transferred $81 million to the State General Fund.[20] In all likelihood, the debate over the IAF will continue.

The legislature passed other bills that will affect several aspects of workers' compensation insurance and the Workers' Benefit Fund:

- Approved the DCBS-requested budget for systems regulation. This budget includes an understanding that approximately $3 million per year will be transferred from the WBF to the Premium Assessment Operating Account (PAOA); and that the premium assessment rate, the tax on employers that funds the PAOA, will increase by 0.7 percentage points, to an equilibrium (minimal volatility) rate.[21]
- Senate Bill 267 amends the financial regulation of insurance companies. Among its many provisions are a phased-in increase in capital and surplus requirements and a change in reinsurance laws, in the event that an insurer becomes insolvent.
- Senate Bill 977 provides that funds may be advanced from the Workers' Benefit Fund to pay benefits to injured workers when an insurance company defaults on its obligation to pay claims, prior to a declaration of insolvency. Funds advanced from the WBF are limited to the amount of securities on deposit with the Department of Consumer and Business Services, upon which the WBF will have a claim for reimbursement. This bill comes in response to the default on payments on about 500 claims, by Superior National during the summer of 2000.[22] During the previous Assembly, department-sponsored legislation (passed as Senate Bill 220, effective 10/23/99) had deleted the authority of the director to require direct financial

[19] See, for example, "Beneath bill lies fight for workers' comp market," in *The Oregonian,* March 28, 2001.

[20] See the department's *HB 2033 Report to the Sixty-Ninth Legislative Assembly Regarding SAIF* (Jan 1997), an extensive study of the financial and other related regulatory status of SAIF.

[21] Senate Bill 592 of 1999, sponsored on behalf of the Oregon Self-Insurers Association, requires a formal hearing, within administrative rulemaking statutes, on the rate set for the PAOA. The department sets rates for premiums and the Workers' Benefit Fund without formal hearings. See the premium assessment rate recommendation, at http://www.cbs.state.or.us/external/dir/do/pdf/wcrecommend2002.pdf

[22] For background, see the Workers' Compensation Division's "Notice to Injured Workers" (Aug 2000). http://www.cbs.state.or.us/external/wcd/docs/superiormemo.html

responsibility from the employer in the event of inadequate cash on deposit by the employer's surety or guarantor.[23]

- The effect of three house bills will be a net expansion of the number of "subject workers" covered by the Workers' Compensation Law.[24]
- Two bills modify requirements under public contracting laws for workers' compensation insurance coverage.[25]
- Senate Bill 354, a departmental bill, permits certain employers to submit annual, rather than quarterly, reports on the workers' compensation tax assessments due.

Compensability

The foundation of workers' compensation is a no-fault system of insured employer liability. Workers' compensation insurance provides benefits payable to workers for work-related injuries and illnesses, as an "exclusive remedy" that protects employers from liability in most civil actions that a worker might contemplate.

However, the question of compensability—when does a work-related injury or illness merit payment of a workers' compensation claim—has been a contentious issue in Oregon's Workers' Compensation Law. [26] For many, the crux of the debate has been the "major contributing cause" statute. Major contributing cause provides that a disability or need for treatment is compensable only if work, rather than a preexisting condition, is at least 51 percent responsible for the injury or illness. For others, the primary issue has been achievement of a workers' compensation system that is the "exclusive remedy" bar none. Others yet have emphasized the interaction of major contributing cause and exclusive remedy.

Responding to the possibility of a breakdown in the Management-Labor consensus on workers' compensation, Governor Kitzhaber put together an informal advisory group of "six key Oregon Labor and Management leaders with expertise in the system." In May 2000, the Governor announced that the group had reached several agreements toward preserving the larger consensus. Among the provisions was a proposal to "create fairer *compensability standards* and benefits for injured workers."[27] With a few modifications, the 2001 Legislative Assembly enacted these agreements into law as Senate Bill 485.

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[23] See the repealed ORS 656.268(10), in *Laws relating to Workers' Compensation and safe employment in Oregon, 1997 - 1999*.

[24] House Bill 3816 implements Ballot Measure 99 of 2000, establishing a Home Care Commission that will be the employer-of-record for 14,000 home care workers hitherto not subject to the Workers' Compensation Law. House Bill 3094 exempts certain soccer referees and HB 3100 clarifies the exemption for City of Portland firefighters and police.

[25] Senate Bill 507, introduced on behalf of Liberty Northwest Insurance Company, and House Bill 2617, a Labor bill.

[26] See *Final Report: Oregon Major Contributing Cause Study*, *October 5th, 2000,* commissioned by the 1999 Legislative Assembly on the recommendation of the Management-Labor Advisory Committee. The report recently received top honors from the International Association of Industrial Accident Boards and Commissions. See http://www.cbs.state.or.us/wcd/pdfs/finalmcc.pdf

[27] Governor's Office press release, May 11, 2000. http://www.governor.state.or.us/governor/press/p000511.htm

The final version of the bill included last-minute revisions in response to the Oregon Supreme Court's *Smothers* decision (May 2001), which found for a limited right to a civil-negligence action for some injured workers with denied workers' compensation claims. The court declared the exclusive remedy provisions of ORS 656.018 (1995) unconstitutional under the state Constitution's "remedy clause." Affected are workers who have been injured or made ill at work but receive no workers' compensation benefits because they cannot prove that the work-related incident was the major contributing cause of their injury or disease. [28] In essence, *Smothers* was the court's restatement of its earlier decision in *Errand* (1995): denial of a claim gives a worker a right to a civil action. The amendment to ORS 656.018 that the court invalidated by *Smothers* was a legislative modification (SB 369 of 1995) of exclusive remedy in light of *Errand*: denial of a claim does not give the worker a right to a civil action. That amendment was in fact retained by SB 485 of 2001, which also removed the sunset on the provision. It now passes constitutional tests, presumably, because SB 485 also codified within the Workers' Compensation Law the limited rights to a civil-negligence action.

These 2001 amendments to the Workers' Compensation Law loosen the compensability statutes. They also make compensability more complex:

- The legal definitions (applied separately to injury and illness claims) of preexisting condition no longer include conditions that "predispose" a worker to disability. However, the clarification that a "condition does not contribute to disability or need for treatment if the condition merely renders the worker more susceptible to the injury" applies specifically to injury claims.
- The preexisting condition may serve to exclude compensability only if it has been diagnosed or treated for symptoms prior to the injury, new medical condition, or worsened condition. Exceptions include arthritis or an arthritic condition, or if the claim is for an occupational disease.
- When a preexisting condition combines with an otherwise compensable workplace injury to cause or prolong disability or the need for treatment, the employer bears the burden of proof that the preexisting condition is the major contributing cause of the disability or need for treatment. This new burden of proof does not apply to occupational diseases.
- Written notice of acceptance or denial of a claim must be furnished to the worker within 60 days, rather than 90 days. Senate Bill 485 also subjects "omitted condition claims" to the 60-day rule; prior statute required insurers to respond within 30 days to the worker's allegation of a condition omitted from the notice of acceptance.
- A worker who appeals a compensability denial that is based on a report from a compelled insurer medical examination (IME) may request an examination from a physician on a medical arbiter list maintained by the Department of Consumer and Business Services, if the worker's attending physician does not concur with the findings from the IME.
- A claim for a worsened injury or illness made after the 5-year aggravation period (a statute of limitation on liability covered by premiums) is also compensable if the injury or illness requires treatment prescribed in lieu of hospitalization that is

[28] See http://www.publications.ojd.state.or.us/S44512.htm

necessary to enable the worker to return to work. Under prior statute, the compensability of these claims turned on hospitalization or surgery.

- Relating to the *Smothers* decision, a worker may pursue a civil-negligence action for a work-related injury or illness that has been determined by final order to be not compensable. This right extends to cases where the worker has failed to establish that a work-related incident was the major contributing cause of the injury or disease. The legislature also codified statutes of limitations on the right to an action.
- Also with respect to the *Smothers* decision, the Management-Labor Advisory Committee (MLAC) will recommend to the 2003 Legislative Assembly an exclusive, no-fault, expeditious alternative remedy to civil litigation over major contributing cause denials.

The intent of these amendments appears to be a redefinition of certain key concepts in the law, such as "preexisting condition" and "burden of proof."[29] One probable effect will be an increase in the number of accepted claims.[30] The threat of unlimited employer liability under a *Smothers*-type action may put pressure on insurers to deny fewer claims, as well: perhaps especially those claims similar to the *Smothers* case that remain not compensable under SB 485.[31] However, the complexity of these amendments, taken separately and operating together as a dynamic whole, will heighten the importance of medico-legal evidence in determining compensability.[32] This, combined with the shorter time for insurers to investigate and make decisions, may very well increase the incidence of litigated claim denials, at least in the short term.

In sum, the *Smothers* decision did not invalidate the major contributing cause standard, and Senate Bill 485 provides exclusions but otherwise preserves it. The 2001 Legislative Assembly did not hear three bills that would have substantially weakened the major contributing cause standard, or invalidated it in favor of a material cause standard.[33] Material cause includes, for example, employer negligence as alleged in the *Smothers* case. At this point, a return to the legally simpler but ostensibly more costly material-cause standard seems unlikely.

Claims Processing and System Administration

Processing claims and providing compensation for a worker is the responsibility of insurers and self-insured employers. Through its Workers' Compensation Division, the Department of Consumer and Business Services strives "to provide fair, effective, and responsive administration of the workers' compensation system." The division's

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[29] "Find" the Legislative Assembly's "Staff Measure Summary" on SB 485 at http://www.leg.state.or.us/comm/sms/SMS01Frameset.html

[30] The department estimates that as many as 3,300 new claims will be accepted on an annual basis.

[31] At a "Smothers Symposium" (June 2001), a spokesperson for Liberty Northwest stated that the state's largest private insurance company may accept claims if a liability exposure exists, such as from OR-OSHA citations for violations of safety and health standards.

[32] For more details on medical-legal evidence and responsibilities, see "Medical Services" below.

[33] Senate Bill 544 would have removed the insurer's right to issue a "current-condition" denial, when the work-related incident is no longer the major contributing cause of the worker's disability or need for treatment, and SB 547 would have redefined preexisting condition as including only prior injuries. Senate Bill 543 proposed to return the standard to material contributing cause, for illness as well as injury claims. All three bills were introduced on behalf of the Oregon Workers' Compensation Attorneys.

oversight includes rulemaking, dispute resolution, audits, investigations, and sanctions, as well as education and training.[34] In addition, the division administers programs that provide reimbursements for the various benefits available from the Workers' Benefit Fund.

The 2001 Legislative Assembly passed several bills affecting claims processing and system administration. Senate Bill 485 in particular has several major provisions:

- Significantly changes the definition of preexisting condition and puts the burden of proof on the employer, that a preexisting condition is the major contributing cause of the disability or need for treatment.[35] These amendments will affect insurers' practices for investigating claims.
- Modifies the definition of "worker" such that a person who has withdrawn from the workforce is not entitled to temporary or permanent total disability benefits.
- Mandates that insurers will furnish written notice of acceptance or denial of a claim within 60 days, rather than 90 days. Senate Bill 485 also subjects "omitted condition claims" to the 60-day rule, where prior law required insurers to respond to the worker's *notice* of omitted conditions within 30 days.
- Allows a worker an insurer-paid, "worker-requested medical examination" when the worker appeals a compensability denial that was based upon a required insurer medical examination (IME). This right extends to a worker whose attending physician disagrees with the IME report.
- Requires that wages earned from all the worker's jobs, with some exceptions, are to be included when an insurer calculates the rate of temporary total disability (TTD), and raises the ceiling on the TTD rate. Multi-job benefits will be paid so long as the insurer receives notice of other covered employment within 30 days of receipt of the initial disabling claim.
- Directs the insurer to continue paying temporary total disability benefits when an injured worker exercises new, limited rights to refuse modified employment.
- Provides a worker with the right to submit a deposition, paid for by the insurer but subject to cross-examination by the insurer, during the mandatory administrative reconsideration (the first step of an appeal of a permanent partial disability award).
- Affirms that insurers will process new condition claims, and omitted condition claims as well, in accordance with the *Johansen* decision (Oregon Court of Appeals, March 1999). The court had noted that there are no time limits for liability on a "new condition" claim, involving a condition other than the one initially accepted.[36]
- Changes the requirements to reopen a claim and reimburse insurers from the Workers' Benefit Fund, when the five-year statute of limitation on claim reopenings payable from premiums is reached.

[34] For a discussion of the legislature's actions regarding administrative dispute resolution, see below, "Litigation and Administrative Dispute Resolution."
[35] See "Compensability" for a more detailed analysis.
[36] See http://www.cbs.state.or.us/external/wcb/year99/coa/orders99/mar/ca100445.htm

Most of these amendments will require adoption or modification of administrative rules by the Workers' Compensation Division; or by the Workers' Compensation Board, which oversees "post-aggravation" benefits (payable after the five-year statutory limit on liability for claims costs from premiums). In addition, the amendment that provides for temporary disability benefits for wages from all covered employment will result in the creation of a new "program" under the Workers' Benefit Fund, for reimbursements by the Workers' Compensation Division to insurers; and the institution of "worker-requested medical examinations" will also be a WCD responsibility.

The legislature also addressed payment of compensation through Senate Bill 977, which authorizes the department to advance funds from the Workers' Benefit Fund to pay benefits to injured workers when an insurance company defaults on its obligations, prior to a declaration of insolvency. The department proposed this new program in response to the default on payments on about 500 claims, by Superior National during the summer of 2000. [37] The division sponsored two other bills, both of which passed, with relatively minor amendments to claims processing statutes.[38]

House Bill 2112, which adopts the Uniform Electronic Transactions Act, provides for legal recognition of electronic records. This bill probably has significant implications for the division's efforts to promote efficiencies and savings through electronic data interchange with insurers.

Changes in claims processing, especially from SB 485, will require corresponding changes in WCD's audits, investigations, and sanctions.[39] Two bills, introduced but not heard, would have directly amended audits of insurers and increased penalties against insurers. A third bill proposing increased penalties received hearings, but did not pass.[40] Sanctions likely will be a topic for this interim's Management-Labor Advisory Committee.

The legislature did not directly respond to the Oregon Supreme Court's *Koskela* decision (December 2000), which calls for "at least some kind of oral evidentiary hearing" in determining permanent total disability (PTD) benefits, rather than a "review of the written record," which included a "surveillance videotape."[41] Senate Bill 485's provision of a right to a deposition at administrative reconsideration, though reflecting the Management-Labor agreement made months before the *Koskela* decision, could

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[37] See "Workers' comp pay delayed," in the *Statesman Journal*, August 17, 2000.
For more background, see the Workers' Compensation Division's "Notice to Injured Workers" (Aug 2000). http://www.cbs.state.or.us/external/wcd/docs/superiormemo.html

[38] Senate Bill 297, relating to notices of closure, and SB 316, which clarifies time limits on injured worker rights. Another departmental bill, SB 269 (relating to the regulation of financial activities) was amended by the Senate, to require employers to request copies of vocational and medical reports.

[39] Senate Bill 609, sponsored at the request of State Farm Insurance Company, amends insurance code, with possible effects on the Workers' Compensation Division. The legislature also approved the DCBS budget, including elimination of two vacant positions dedicated to investigations.

[40] House Bill 3612, SB 853, and HB 3288 (the last, heard by MLAC and the assigned House committee).

[41] See http://www.cbs.state.or.us/external/wcb/year00/coa/orders00/dec/sc46351.htm
and "Litigation and Administrative Dispute Resolution," below.

conceivably satisfy the court's call for an oral evidentiary hearing. The case was remanded to the Workers' Compensation Board, and the decision there will likely govern processing of claims where PTD is at issue.

Medical Services

One objective of the Workers' Compensation Law is to provide, regardless of fault, sure, prompt, and complete medical treatment for injured and ill workers. In practice, however, medical services provided to an injured worker may not be more than the nature of the *compensable* injury requires; with few exceptions, Oregon's workers' compensation system does not pay for medical treatment when a claim is denied. Thus, some providers of medical services may be reluctant to treat injured workers, or they may delay some types of treatment, prior to an insurer's decision on compensability. One unfortunate result might be that an injured worker's recovery is delayed.

Through Senate Bill 485, the 2001 Legislative Assembly aimed to reduce uncertainty about payment for medical treatment:

- Insurers must accept or deny a claim within 60 days. Since 1990, the law had been 90 days.
- Payment is guaranteed for certain medical services provided to a health-insured injured worker even if the workers' compensation claim is denied. An uninsured worker remains liable for payment in the event the claim is denied.
- Amendments to compensability statutes should result in fewer claim denials, due to preexisting conditions, under the major contributing cause standard of proof.

Senate Bill 485 included other amendments relating to medical services. In Oregon, an injured worker designates an attending physician (often within the confines of a Managed Care Organization's panel of providers), who assumes primary responsibility for the worker's treatment. The attending physician (AP) also has a large medico-legal role: to begin with, a claim is compensable only if the physician establishes, by medical evidence supported by objective findings, that an injury arose out of and in the course of employment. The AP must also establish whether work was the major contributing cause of the injury or illness. The attending physician also must specifically authorize temporary disability compensation.

An insurer that receives medical evidence that it considers inadequate may require the injured worker to attend an insurer medical examination (IME). Sometimes, the attending physician does not agree with the IME report. For those cases where disputed evidence is the basis for a claim denial, Senate Bill 485 provides that the injured worker who appeals the denial has the right to an insurer-paid "worker-requested medical examination."

Another medico-legal responsibility of the attending physician is to determine when the injured worker is released to work and any restrictions on job duties. Under Senate Bill 485, the worker may refuse modified employment that is otherwise within restrictions when the attending physician determines that the commute is beyond the worker's physical capacities.

Senate Bill 485 also creates a new duty for attending physicians: to cooperate with insurers to expedite diagnostic and treatment procedures and with efforts to return injured workers to appropriate work. This amendment may result in adoption of new administrative rules.

The cost of medical services continues to be an issue of interest to the legislature. A recent report asserts that medical cost inflation will continue into the future, likely exerting upward pressure on workers' compensation claim costs.[42] However, the 2001 Assembly did not pass any cost-containment measures that will directly affect workers' compensation. A noteworthy failed attempt—the second in as many sessions—would have expanded the authority of nurse practitioners to the level of an attending physician, including authorizing disability payments and reporting impairment findings necessary for claim closure (SB 680). Looming on the horizon are potential ballot measures: one initiative petition promises a discount prescription drug purchasing plan; another would confer upon all Oregon residents the right to medically necessary health care, through a single-payer system that would purportedly cost less than the present web of health-care financing schemes.[43]

The legislature also responded to the promulgation of federal regulations under the Health Insurance Portability and Accountability Act (HIPAA) of 1996 by enacting Senate Bill 104. This bill establishes an advisory committee to study the relationship between HIPAA and Oregon's information privacy laws, including those covering medical records accessed during or created for workers' compensation claims. The department will provide a representative and staff support to the committee.

Return-to-work Assistance

A fundamental objective of Oregon's Worker's Compensation Law is to restore the injured worker as soon as possible and as near as possible to a condition of self-support and maintenance as an able-bodied worker. Several sections of the statute authorize the provision of reemployment assistance to injured workers, under programs administered by the Workers' Compensation Division. The 2001 Legislative Assembly made only a few changes to return-to-work programs:

- Approved the requested budget for the Workers' Compensation Division, including cuts in funding for three reemployment assistance positions.
- Conferred upon injured workers limited rights to refuse modified work. This provision of SB 485 came in response to complaints from Labor about abuses in the Employer-at-Injury Program, under which injured workers are required to accept restricted-duty jobs.

[42] See *An Economic and Actuarial Analysis of Financial Incentives in Oregon's Workers' Compensation Insurance Market* (April 2001), done under contract with the Office of the Oregon Secretary of State.
[43] See the Secretary of State's database of initiative petitions, referendums, and legislative referrals, http://www.sos.state.or.us/elections/other.info/irr.htm

The legislature also passed House Bill 2352, which reorganized the civil rights statutes. These include the rights of injured workers to reinstatement and reemployment, but the intent of the bill was to make no substantive changes to civil rights statutes. Also, a bill that would have greatly expanded eligibility and benefits under vocational assistance was not heard (SB 854).

A recent study examined the efficacy of return-to-work programs, and highlights have been presented to this interim's Management-Labor Advisory Committee. Among injured workers determined able to return to work after recovery from their injuries or illnesses, those who had been placed in light-duty jobs under the Employer-at-Injury Program, while their claims were open, had the highest reemployment rates in the long term. They also had the strongest attachment to the labor force prior to injury. Severely disabled workers—unable to return to their regular jobs because of the workplace injury—who completed their vocational assistance programs or used the Preferred Worker Program had significantly higher rates of reemployment following the injury, compared to similarly disabled workers who did not use these benefits. However, optimal use of the two programs by severely disabled workers is relatively low, in the range of 20 to 25 percent. Other severely disabled workers who settled their claims via a Claim Disposition Agreement had low rates of post-injury employment and little or no access to return-to-work programs.[44]

Disability Benefits

Provision of "fair, adequate, and reasonable" income benefits to injured workers and their dependents is part of the first objective of the Workers' Compensation Law. Income benefits are paid for temporary and permanent disabilities, including death, resulting from work-related injuries and illnesses.

In May 2000, an informal advisory group of Labor and Management leaders reached a compromise agreement on several changes to Oregon's system. Among the provisions were proposals to "create fairer compensability standards and *benefits* for injured workers." With some modifications, the 2001 Legislative Assembly enacted this agreement into law as Senate Bill 485, which:

- Modifies the definition of "worker" such that a person who has withdrawn from the workforce is not entitled to temporary or permanent total disability benefits.
- Raises the ceiling on temporary total disability (TTD) benefits to 133 percent of Oregon's statewide average weekly wage.
- Provides TTD benefits for workers with multiple jobs such that covered earnings from all subject employers are considered in determining benefits.
- Removes the statutory "sunset" for permanent partial disability (PPD) benefits that accrue to workers injured on or after January 1, 2000. The new language also corrects a transposition error in those benefit rates (SB 460 of 1999) and makes up the difference in benefits for a few injured workers who received less than the 1999 Legislative Assembly intended.

[44] See *Return to Work in the Oregon Workers' Compensation System* (June 2001). http://www.cbs.state.or.us/external/imd/rasums/2847/01web/2847.pdf

- Provides that permanent disability benefits may be paid for a new or omitted medical condition claimed after the five-year aggravation period (a statute of limitation on liability covered by premiums).[45]

Senate Bill 485 further raised PPD benefits for injuries and illnesses that occur during the three-year period from 2002 through 2004. This temporary increase constitutes the fourth sunset placed on these benefits in as many sessions, beginning with the 1995 Legislative Assembly's repeal of a four-year experiment that tied PPD benefits to the statewide average weekly wage. Sunsets do provide a mechanism for a regular review by policy makers. With the latest increase in PPD benefits, policy makers acted on a key finding from a recent study, that the bottom tier of unscheduled benefits had declined significantly in value relative to wages over the past two decades.[46] This interim's Management-Labor Advisory Committee will be studying PPD benefits.

The legislature did not directly respond to the Oregon Supreme Court's *Koskela* decision (December 2000), which calls for "at least some kind of oral evidentiary hearing" in determining permanent total disability (PTD) benefits.[47] The court remanded the case to the Workers' Compensation Board, and the decision there may set a precedent. One result of *Koskela* might be an increase in PTD awards. New awards of PTD benefits were made to only six injured workers, net, in 2000--a record low. Three bills pertaining to PTD benefits were not heard by the 2001 Legislative Assembly.[48]

Litigation and Administrative Dispute Resolution

The third objective of the Workers' Compensation Law is to provide a fair and just administrative system for delivery of benefits to injured workers, one that reduces litigation and eliminates the adversary nature of the compensation proceedings, to the greatest extent practicable. Achievement of that objective requires a balance between rights to due process, on the one hand, and avoidance of "frictional costs" and delays in decisions due to litigation, on the other. Oregon's approach to that balance includes a "bifurcated" system for appeals and dispute resolution within the Department of Consumer and Business Services, prior to any court review. This system includes formal hearings, stipulations, and settlements at the Workers' Compensation Board for some types of dispute; and mediation, administrative review, and formal hearings for other issues, by authority delegated to the Workers' Compensation Division.

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[45] There is already some thought that the statutory language might be interpreted as applying to a claim for a worsened injury or illness, as well. For an analysis, see the department's intranet, at http://www.cbs.state.or.us/internal/wcd/docs/admin/adminnb/9_7_01.htm

[46] In Oregon, injured workers awarded unscheduled PPD benefits receive at least the bottom tier of benefits, for disabilities of 20 percent or less. Unscheduled benefits are paid for injuries other than those on the statutory schedule, for losses to bodily extremities, vision and hearing: the back, for example, is an unscheduled body part. See *Oregon Permanent Partial Disability Benefits: Historical Trends and Interstate Comparisons* (September 2000). http://www.cbs.state.or.us/imd/rasums/4622/web00/4622.pdf

[47] See http://www.cbs.state.or.us/external/wcb/year00/coa/orders00/dec/sc46351.htm

[48] Senate Bills 544 and 856 would have provided for an oral evidentiary hearing. Both bills apparently interpreted *Koskela* widely, as applying to other permanent disability benefits. The third, SB 548, would have deleted the definition of gainful employment added to statute by SB 369 of 1995.

In May 2000, an informal advisory group of Labor and Management leaders agreed on several changes in the law, three of which would "create a less adversarial system for all." Making some modifications of its own, the 2001 Legislative Assembly enacted these agreements into law as Senate Bill 485. "Less adversarial" means:

- Increasing the opportunity for impartial medico-legal evidence, by providing that a worker who appeals a claim denied on the basis of an insurer medical examination (IME) may request an examination from a physician on a medical arbiter list maintained by the department. This right applies if the worker's attending physician does not concur with the findings from the IME.[49]
- Acknowledging that the purpose of light-duty jobs is to expedite the worker's return to work for the benefit of *all*, by giving injured workers limited rights to refuse light duty in some situations.[50]
- Allowing an injured worker the right to give a deposition during the administrative reconsideration of claim closure (determination of benefits finally due the worker, usually when the worker has become medically stationary).

Senate Bill 485 included a codification of a worker's limited right to pursue a civil-negligence action against the employer, as outlined by the Supreme Court's May 2001 *Smothers* decision.[51] This right extends to a worker whose claim is determined not compensable because the worker has failed to establish that a work-related incident was the major contributing cause of the worker's injury or illness. The bill also established statutes of limitations on the right to a civil-negligence action.

Other provisions of SB 485 will directly affect litigation and dispute resolution within the system:

- A worker who contemplates a *Smothers*-type civil-negligence action must first appeal the denial to the Workers' Compensation Board.
- Complex amendments to compensability statutes, combined with the shorter time for insurers to make a decision on compensability, may increase at least temporarily the incidence of litigated claim denials.
- Procedural changes for payment of post-aggravation (Board Own Motion) compensation give a lesser role to WCB. The board will establish procedures for resolution of disputes arising out of insurers' authority under the BOM statute to voluntarily reopen and close those claims.
- The Workers' Compensation Division will resolve disputes on medical services provided prior to the decision to accept or deny the claim.

Other introduced bills would have significantly altered litigation and dispute resolution. Senate Bill 439 would have reduced the number of members serving on the Workers'

[49] The enacted amendment modifies the original agreement, which called for joint worker-insurer choice of the IME physician from a list of certified providers, for all IMEs.
[50] The original agreement would have banned light-duty assignments at alternative worksites, such as non-profit organizations, but that proposal was scrapped.
[51] See http://www.publications.ojd.state.or.us/S44512.htm

Compensation Board, from five to four or three. The bill passed the Senate and the assigned House committee (though with a "minority report"), but did not come up for a vote of the full House prior to adjournment. Three bills that would have broadened the opportunities for attorney fees payable to representatives of injured workers were not heard.[52]

The Oregon Supreme Court's *Koskela* decision (Dec 2000) brought into question due process under the Workers' Compensation Law. The court held that the post-1995 statutory scheme for assessing whether a worker should receive an award of permanent total disability (PTD) benefits violates the due-process requirements of the U.S. Constitution. The court rejected the employer's motion to dismiss on the basis of the U.S. Supreme Court's *Sullivan* decision (March 1999), which held that a worker with an accepted claim has no property interest in medical benefits under the Pennsylvania workers' compensation system. Reasoning that Oregon's law differs from Pennsylvania's, the Oregon court held that acceptance of a claim signifies entitlement to benefits. Finding that determination of eligibility for PTD benefits is based entirely upon a review of a written record, the court called for "at least some kind of oral evidentiary hearing" in determining PTD benefits.[53]

The legislature did not directly respond to the *Koskela* decision. The provision by Senate Bill 485 of a right to a deposition at administrative reconsideration, though drafted long before *Koskela*, might possibly satisfy the court's call for an oral evidentiary hearing. Senate Bills 544 and 856, introduced in the 2001 Legislative Assembly but not heard, would have provided for an oral evidentiary hearing. Both bills apparently interpreted *Koskela* as having a wider application, to other permanent disability benefits.[54] The court remanded the case to the Workers' Compensation Board, and the decision there will likely determine due process for claims on PTD benefits.

Advocates and Advisory Groups

Injured workers and employers often find the workers' compensation system confusing or inaccessible. In recognition that comprehensibility and access are essential elements of the Oregon Workers' Compensation Law, statute provides for ombudsmen and advisory committees:

- An ombudsman for injured workers acts as their advocate by accepting, investigating, and attempting to resolve complaints, and provides information to protect their rights.
- An ombudsman for small business provides information and assistance.
- The Management-Labor Advisory Committee is an institution created in recognition of the partnership between employers and organized labor, the first accomplishments of which were Senate Bill 1197 of 1990 and a large increase in OR-OSHA staffing. The MLAC also has statutory duties: study aspects of the law as the members or the

[52] Senate Bills 541, 544, and 545. SB 544, in particular, addressed several aspects of representation for injured workers.

[53] See http://www.cbs.state.or.us/external/wcb/year00/coa/orders00/dec/sc46351.htm

[54] The Oregon Supreme Court's *Mount* decision (Oct 2001) remanded a permanent partial disability (PPD) case to the Court of Appeals "for further consideration in light of *Koskela*." This case appears to widen the question as to whether Koskela rights—some kind of oral evidentiary hearing—apply to PPD benefits.

director of the Department of Consumer and Business Services determine necessary, review the standards for evaluation of permanent disability, advise the director regarding any proposed changes in the operation of programs funded by the Workers' Benefit Fund, and make reports to the Legislative Assembly.[55]

- An advisory committee on medical care advises the director on the provision of medical care to workers.[56]

During the course of the 2001 Legislative Assembly, three bills were introduced or amended to create a "Legislative Ombudsman" office.[57] In their early forms, these bills would have placed all state ombudsman offices under the proposed Legislative Ombudsman and repealed, in particular, the statutory authority of the ombudsman for injured workers to accept complaints from injured workers. The final version of HB 3877, in the Ways and Means Committee on adjournment, would have retained the injured worker and small business ombudsman offices within the Department of the Consumer and Business Services, with no decrease in statutory authority.

The implementation of Senate Bill 485, the session's major legislation on workers' compensation, probably will lead to an increase in contacts for both the small business and injured worker ombudsman, because of the many changes in claim processing.[58] In addition, small employers likely will seek information on "Coverage B" under their workers' compensation insurance policy. This coverage is primarily for liability that may arise from a civil-negligence action filed by an injured worker following some denials of workers' compensation claims. The limited right to a civil-negligence action, based upon the Oregon Supreme Court's *Smothers* decision (May 2001), was codified by SB 485.

Senate Bill 485 itself was the result of closed-door meetings begun in January 2000, at the invitation of Governor Kitzhaber, by an informal advisory group of "six key Oregon Labor and Management leaders with expertise in the system." There were at least three antecedents for the formation of that group:[59]

- The Governor's dismissal of the entire MLAC membership in September 1999, including the statement that "the progress of the group has also taught us a great deal about what we need to know and do to make the process work even more effectively";

[55] Statute provides that MLAC "shall report" to the Legislative Assembly on significant court decisions, adequacy of benefits, medical and legal system costs, adequacy of assessments for reserve programs and administrative costs, and the operation of programs funded by the Workers' Benefit Fund. For more information about MLAC, see http://www.cbs.state.or.us/mlac/

[56] For more information, see http://www.cbs.state.or.us/external/wcd/docs/mac.html

[57] House Bill 3963, its Senate companion, SB 971, and HB 3877.

[58] For more details, see "Claims Processing and System Administration," above.

[59] See, for example, "Work injury system studied: Kitzhaber says reforms cost many injured workers their benefits," in the *Statesman Journal*, October 16, 1999.

- Oral arguments before the Oregon Supreme Court on a constitutional challenge to the adequacy of the exclusive remedy of workers compensation--the *Smothers* case--in November 1999;[60] and
- The filing of initiative petitions by Labor, dubbed the "Fairness to Injured Worker" campaign. The initiatives would have returned the Workers' Compensation Law to a material contributing cause standard: a worker who could prove that employment was a cause of the on-the-job injury or illness would receive workers' compensation benefits, regardless of any preexisting medical conditions.[61]

The initiative petitions were never circulated. In May 2000, Governor Kitzhaber (Democrat) announced that the informal advisory group that he had put together had negotiated a package of recommendations to improve Oregon's workers' compensation system. These were agreements, furthermore, that were acceptable to Senate Majority (Republican) Leader Gene Derfler, a champion for low-cost workers' compensation insurance. The new bipartisan, Labor-Management compromise focused on four major areas of agreement: [62]

- fairer compensability standards and benefits for injured workers,
- faster decisions that remove uncertainty about payment for medical treatment,
- more certainty to employers about future liability exposure, and
- a less adversarial system for all.

The Management-Labor Advisory Committee was reconstituted in the autumn of 2000. The members' primary concern was putting the agreements into the form of a bill. Their efforts extended over several months: public testimony was taken, and modifications were made to proposed statutory language. The resulting bill, SB 485, appeared to be headed toward certain passage, despite "concerns" voiced by the Oregon Self-Insurer Association and opposition from the Oregon Workers' Compensation Attorneys.[63] In May 2001, however, the Supreme Court released its long awaited *Smothers* decision. Reactions by advocates for employers came swiftly; passage of Senate Bill 485 suddenly seemed to be in jeopardy.[64]

The Governor, ultimately joined by Senator Derfler, recalled the informal advisory group. That group delivered another compromise, on what to do about the *Smothers* decision while also preserving most of the original agreements. Despite continuing opposition,

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[60] See "Appeal heard that challenges workers' comp," in *The Oregonian*, November 9, 1999.

[61] See the Secretary of State's database of initiative petitions, referendums, and legislative referrals, http://www.sos.state.or.us/elections/other.info/irr.htm

[62] Governor's Office press release, May 11, 2000. http://www.governor.state.or.us/governor/press/p000511.htm

[63] See, for example, "Panel OKs workers' compensation bill," in *The Oregonian,* March 15, 2001, and the Oregon Legislative Assembly Committee Minutes (2001 forthcoming) at http://arcweb.sos.state.or.us/legislative/legislativeminutes/

[64] See, for example, "Workers win right to sue over job injuries," in *The Oregonian,* May 11, 2001.

including two members of MLAC who voted against recommending passage of the final version, Senate Bill 485 passed overwhelmingly, becoming law on July 30, 2001.

Senate Bill 485 acknowledges the limited right to a civil-negligence action as a legal exception to the exclusive remedy under the Workers' Compensation Law. It includes statutes of limitations on that right, which effectively bar recovery under *Smothers* for a number of injured workers with denied claims. The bill also directs MLAC to recommend to the 2003 Legislative Assembly an exclusive, no-fault, expeditious alternative remedy to civil litigation over major contributing cause (preexisting condition) denials. One member of MLAC characterized the bill as "an agreement between labor and management [that] also protects the integrity of the labor management process that has been critical to the system reforms over the last decade."