

**WORKERS' COMPENSATION  
MANAGEMENT-LABOR ADVISORY COMMITTEE  
Full MLAC Meeting**

December 11, 2014

9:30 a.m. – Noon

***Committee Members Present:***

Aida Aranda, Oregon & Southern Idaho Laborers-Employers Training Trust, Corvallis  
 Guy Boileau, Louisiana-Pacific Corporation, Portland  
 James Denham, ATI, Albany  
 Carol Duncan, General Sheet Metal, Clackamas  
 Paul Goldberg, Oregon Nurses Association, Tualatin  
 John Mohlis, Oregon Building Trades Council, Portland  
 Elana Pirtle-Guiney, Oregon AFL-CIO, Salem  
 Theresa Van Winkle, MLAC Committee Administrator  
 Patrick Allen, DCBS Director, *ex-officio*

***Committee Members Absent:***

Ben Stange, Polk County Fire District No.1, Independence  
 Jaron Sue, Marquis Autumn Hills, Portland

<b>Agenda Item</b>	<b>Discussion</b>
<b>Opening</b> (0:00:00)	Guy Boileau opened the meeting at 9:33 a.m.
<b>Review of October 17, 2014 MLAC Minutes</b> (0:00:14)	Guy Boileau requested a motion to approve the <a href="#">minutes</a> from the October 17, 2014 meeting. John Mohlis moved to approve the minutes and Jim Denham seconded the motion. They minutes were approved on a 7-0 vote.
<b>Attorney Fees 101</b> (0:00:31)	<p>Mike Manley, Department of Consumer and Business Services (DCBS), Central Services Division, <a href="#">presented</a> information on attorney fees in Oregon's workers' compensation system. Mr. Manley's presentation focused primarily on claimant attorney fees, which are more heavily regulated. Potential legislation is focused on this area. His presentation covered five areas: system objectives, reasons for fees, who pays them, recent history, trends in workload and fees, and terminology.</p> <p>There are five system objectives:</p> <ul style="list-style-type: none"> <li>• To provide, regardless of fault, sure, prompt and complete medical treatment for injured workers and fair, adequate and reasonable income benefits to injured workers and their dependents</li> </ul>

- To provide a fair and just administrative system for delivery of medical and financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceedings, to the greatest extent possible
- To restore the injured worker physically and economically to a self-sufficient status
- To encourage maximum employer implementation of accident study, analysis and prevention programs
- To provide the sole and exclusive source and means by which subject workers, their beneficiaries and anyone otherwise entitled...shall seek and qualify for remedies for such conditions

Reasons for claimant attorney fees are:

- Reversing a denial
- Obtaining an increase in compensation
- Getting penalties or sanctions
- Preventing a decrease in compensation
- Negotiating settlements

These are the basic reasons an attorney earns a fee. Some of these fees are paid out of the compensation paid to the claimant, others are assessed fees paid by insurers or self-insured employers in addition to compensation. The latter do not reduce benefits to the worker and are not based on a percentage of the worker's award, but are instead based on the adjudicator's judgment of a reasonable fee (see page 8 of [presentation](#)).

Recent workers' compensation attorney fee history includes:

- 1999 – last threshold change for settlement fees
- 2003 – penalty amount to worker with an employer-paid attorney fee and added fees for medical/vocational disputes
- 2007 – litigation costs paid for denied claims and attorney fee liens if attorney was instrumental in obtaining compensation
- 2009 – fees available in new circumstances and fee caps indexed to inflation
- 2013 – report on 2009 change, no major system cost impact identified

Recent trends in workers' compensation include:

- Claimant Fee Trends from 1989-present
- Defense Legal Cost Trends from 1989-present
- System Workload Trends from 1996-present
  - Accepted Disabling Claims
  - Denials
  - Claim Closure/Resolutions

	<ul style="list-style-type: none"> <li>○ Hearing Requests</li> <li>○ Claim Disposition Agreements</li> <li>● Average Fees/Case trend as compared to Average Wage Growth</li> </ul> <p>Mr. Manley clarified some fee regulation terminology. He defined “rate” as a percentage of a dollar amount obtained, “threshold” as a point where a percentage rate changes, and “cap” as a fixed dollar amount that cannot be exceeded except in ordinary circumstances.</p> <p>Paul Goldberg asked about the percentage formulas and if they based on a time study. Mr. Manley stated that they were not to his knowledge. Elana Pirtle-Guiney asked a question regarding areas workers’ compensation attorney fees come from and what percentage came from each area. Mr. Manley indicated that he would provide her with that information, but his understanding is that that as settlements have become more common within the system approximately two-thirds of fees come from that area. Carol Duncan asked about legal defense cost trends vs. fees and if there was a way to break that information out. Mike said would find out for sure and report back, but that the vast majority was for legal counsel.</p>
<p><b>Attorney Fees in Oregon’s Workers’ Compensation System</b> (0:25:42)</p>	<p>Jeff Gerner, SAIF Corporation, explained the <a href="#">attorney fee process</a>. The end goal is to create a fair, just, and balanced system. There are two types of defense lawyers: in-house counsel working on a salary basis, and retained counsel billing insurance companies on an hourly basis. Individual workers retain their own attorneys. Referrals come to these attorneys from a variety of sources. Retaining an attorney is highly encouraged within the system. Most claimant attorneys are in private practice and do not base their practice solely in one area of law, so most do not practice workers’ compensation law exclusively.</p> <p>There are three types of attorney fees in workers’ compensation cases. First is the “out of”, which is the default. The fees are statutory, so if there is no statutory right to the fee there is no fee. If the insurer or self-insured employer pays the worker and the attorney shows that the worker is entitled to more benefits the attorney receives a percentage of those additional benefits. Fees also come out of settlements and claims disposition agreements. A disputed claims settlement agreement is one where parties disagree over the compensability of something. The agreement can be made on total claims or on individual aspects of claims. The major driving force is not out-of compensation, the changes in fee costs tend to be centered on what insurers pay in assessed fees.</p> <p>In 1995, SAIF had 44 trial counsel, now they have 26, even though their business has grown by 50%. The entire workers’ compensation system has gotten smaller. While there is no system of public defenders in</p>

	<p>workers' compensation litigation, in Mr. Gerner's opinion there are enough attorneys.</p> <p>A 2012 <a href="#">study</a> by the Oregon State Bar indicates that for all attorneys in all specialties the average income is \$124,861 and the median income is \$94,743. About 3% of surveyed attorneys indicate they incorporate workers' compensation as a part of their practice. The study showed that the average workers' compensation attorney earns approximately \$140,000, with a median salary of \$93,000.</p> <p>The system is such that attorneys fees have increased almost three times over what the average weekly wage has increased, and has increased over three times the rate of inflation.</p>
<p><b>2015 Legislation Review</b> (1:06:09)</p> <p>(1:09:50)</p> <p>(1:13:52)</p>	<p>Dr. Vern Saboe, Oregon Chiropractic Association, <a href="#">discussed LC 270</a> and <a href="#">LC 519</a>. The intent of LC 270 is to bring consistency within managed care organizations (MCO) regarding numbers of visits and allowances for chiropractors and naturopaths to be given attending status for the duration of a workers' compensation claim. Currently two MCOs allow for attending status, and there is no consistency between MCOs regarding the number of allowed visits. While the majority of patients will resolve within the given time period, some will not. Theresa Van Winkle, Committee Administrator, asked if the cumulative total number of visits in the bill was a floor or a ceiling. Dr. Saboe indicated that it was a floor.</p> <p>LC 519 addresses a disclosure piece to ensure that injured workers understand their treatment rights and can see the provider of their choice. In 2011, similar legislation was introduced and involved a separate document. The current bill would modify the existing form, requiring that the employer or provider discuss treatment rights with the injured worker and have both the employer or provider and the injured worker sign the form. As currently drafted the bill would be difficult for the Workers' Compensation Division to enforce, so will be amended to require employers to send the form along with the 801 form to the insurer.</p> <p>Chris Moore, attorney for injured workers, <a href="#">discussed LC 361</a>, regarding elimination of barriers for injured workers. Mr. Moore stated that workers' compensation cases are infinitely more complex than they were in the 1990s, as is the system itself. Self-representation is not a sound decision because injured workers are not experts in the legal system. They are asking for a review of the entire fee structure. Most lawyers for injured workers have been practicing for over 20 years and younger lawyers are not going into this type of practice because of the difficulty in payment. Attorney fees are very small part of the workers'</p>

	<p>compensation system when looked at as a percentage. The proponents want to be paid for the work that they do, that they are not otherwise paid for. Workers' compensation attorneys are required to appear in court in some situations because to not do so would be malpractice, unethical, and make them subject to fines of up to \$1000, yet they are not paid for those court appearances. The Oregon State Bar study put all workers' compensation attorneys into one category, but there are many more defense attorneys than there are claimant's attorneys. This would skew the salary numbers upward, and even so, workers' compensation attorneys are among the most poorly compensated in Oregon.</p>
(1:25:21)	<p>Julene Quinn, attorney for injured workers, also spoke on LC 361. The overall intent is to increase access to attorneys for injured workers, and to ensure that the attorneys are paid for what they do. This bill does not cover all the gaps, only those deemed to be of the highest importance. Other systems allow fees, so workers' compensation should as well. Section 10 of the concept will help injured workers most. The proponents are requesting assessed fees (those imposed on insurers and self-insured employers) on this portion rather than taking the fee from the injured worker. This would relieve the injured worker of paying for fees in situations resulting from mistakes made by the employer and insurer.</p> <p>Mr. Moore added that defense attorney fees in workers' compensation are unregulated, but the claimant side is regulated.</p>
(1:43:24)	<p>Deb Bogart, Oregon Department of Administrative Services (DAS), <a href="#">clarified</a> issues pertaining to <a href="#">LC 675</a>. They will be back again to present to the committee once the clarifying amendments to the concept have been drafted. The concept's intent is to align Oregon statute with the rules the Legislature mandated DAS to adopt in order to avoid future claims and to continue to provide the additional level of temporary and permanent work for injured state workers. DAS is trying to make it clear that the intent was not to reduce or change benefits or rights for state workers in any way.</p>
(1:51:18)	<p>John Shilts, Administrator, Workers' Compensation Division added that it is important to understand that this issue goes back a long way. Return to work was into our system and is one of the best outcomes the system can produce. The division needed some clarification regarding the intent of the bill. Mr. Shilts believes that the intent of the concept is that if an injured worker is released to work and is not yet medically stationary, the agency at injury would first seek to reinstate the worker in his or her regular job with appropriate modifications. If that cannot be done, the second option would be to for a suitable job within the agency at injury. If the agency is unable to do so, it would then look for a temporary</p>

<p>(1:56:56)</p>	<p>position at another agency. Once the worker is determined to be medically stationary and the agency knows what the worker's permanent restrictions are, the agency is able to make better decisions about permanent placement. At that point the agency will go through a similar process: first the worker's regular job with modifications if necessary, then another permanent job within agency, then permanent reemployment at another agency within same branch of government.</p> <p>Paul Goldberg asked how frequently the state looks to other agencies in cases of temporary disability. Ms. Bogart stated that generally, the agency is able to accommodate the worker and that usually the job can be modified. Mr. Goldberg asked why the concept used "may" rather than "must". Ms. Bogart indicated that it comes down to how best to manage an injury. Asking an employee to work in another agency distances the relationship between the worker and the employer. Additionally, it is more difficult to supervise an employee working in another agency. Mr. Shilts added that in his 18 years as a DCBS manager he has never needed to look outside the agency to place an employee in modified work. Workers also have the right to refuse to be placed in another agency and not lose any benefits. Patrick Allen, Director, DCBS added that people working in one office and moving to another office within an agency is one thing, but in some lines of work might placement might be more difficult. Ms. Bogart stated that when the injury is temporary there are time loss benefits available, but once a worker is medically stationary the situation is different, so the concept provides more of a safety net by using "may" than with "must".</p>
<p><b>Public Testimony</b> (2:02:50)</p>	<p>Jerry Keene, attorney, spoke regarding LC 361. He is a volunteer for the Oregon Self Insurers Association (OSIA). OSIA just received the language of bill and has formed a committee to discuss their response. They have identified some aspects where they may agree and others where they may need more information. OSIA would like committee to know that there is a presumption that more lawyer participation equals more justice. Attorneys are helpful but in some processes, attorneys don't add to the quality of the decision, only to the quantity of time. Some parts of the current workers' compensation system were specifically designed to not incentivize attorney participation because it was determined that they would not be helpful to the process. Mr. Keene has watched MLAC from the beginning, and observes that over time members have been asked to make judgments on technical aspects that are beyond the scope of what should be assumed. He recommends asking the different parties to come to an agreement on subjects before presenting to the committee. Patrick Allen, Director, DCBS observed that approach might also bring bad ideas that had been well negotiated before the committee.</p>

(2:11:07)	<p>Scott Winkels, League of Oregon Cities (LOC) spoke regarding LC 270. LOC has concerns with the concept. While they understand the desire to have some consistency between managed care organizations, they would like some data that shows similar outcomes in cases where chiropractors and naturopaths are the attending physician for the life of the claim. LOC would like assurances that there will be similar outcomes and not added costs.</p>
(2:13:21)	<p>Lon Holston, former MLAC chair, provided <a href="#">written testimony</a> regarding challenges in the workers' compensation system. Mr. Holston sees a dwindling of claimant attorneys. The negotiations made on this subject in 2007 were the best deal possible at the time but were not sufficient. Primary care physicians who treat injured workers are dwindling as well. Mr. Holston related his personal experience with treatment challenges. He asked the committee to look at what was done in the past and to use the studies that were completed before. The committee took small steps in previous years, so using those studies would allow the committee to take additional steps in the right direction now.</p>
(2:19:36)	<p>Jennifer Flood, Ombudsman for Injured Workers, Department of Consumer and Business Services challenged idea that an unrepresented case is always a bad case. She stated that there are cases that are "bad" because the worker is unrepresented, not just because the case was invalid. She pointed out that average weekly wage (AWW) corrections are vital because they affect all benefits, and if calculated incorrectly are difficult to change. If a worker does not have an attorney, it is difficult for them to get one after the fact because of the time an appeal requires, and then the worker has to give up a part of the compensation they just fought to reinstate to that attorney. She stated that if the penalty structure was different there would be more incentive to calculate the AWW correctly the first time if penalties came from insurer pockets rather than from the injured worker. If a worker contacts her office and they find out they have been referred to insurance counsel but the worker is unable to retain an attorney to represent them there is an inequity.</p>
<p><b>Next Steps</b> (2:25:09)</p>	<p>Theresa Van Winkle, Committee Administrator, stated that the next meeting is scheduled tentatively for January 23. This will allow for the meeting to be held after the legislative deadline and bill numbers should be available. She asked members to check their availability and stated that she would send out an email to remind them.</p>
<p><b>Meeting Adjourned</b> (2:25:50)</p>	<p>Guy Boileau adjourned the meeting at 11:58.</p>

\*These minutes include time stamps from the meeting audio found here:  
<http://www.oregon.gov/DCBS/MLAC/audio.shtml> .

\*\*Referenced documents can be found on the MLAC Supporting Documents page here:  
<http://www.oregon.gov/DCBS/MLAC/pages/support.aspx>