

SENATE COMMITTEE ON PUBLIC AFFAIRS

January 29, 1999 Hearing Room B

3:00 p.m. Tapes 4 - 5

MEMBERS PRESENT: Sen. Gene Derfler, Chair

Sen. Joan Dukes, Vice-Chair

Sen. Charles Starr

Sen. Thomas Wilde

MEMBER EXCUSED: Sen. Eileen Qutub

STAFF PRESENT: Brian E. Smith, Administrator

Rachel E. Halupowski, Administrative Support

MEASURE/ISSUES HEARD: SB 460 Public Hearing and Work Session

These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.

TAPE/#	Speaker	Comments
TAPE 4, A		
000	Chair Derfler	Opens meeting at 3:07 p.m. and opens public hearing on SB 460.
<u>SB 460 PUBLIC HEARING</u>		
012	John Shilts	Manager, Benefits Section, Workers' Compensation Division and Staff Support to Management Labor Advisory Committee (MLAC). Presents (EXHIBIT A) .

		<p>States the major portions of the 1995 Workers' Compensation reform legislation are slated to sunset on December 31, 2000. States MLAC reviewed all of the sunset provisions in 1998, and determined that the system is working properly. Recommends that all of the sunsets be repealed, except the sunset relating to the exclusive remedy provision of the law, which should be extended until December 31, 2004. Believes there needs to be a study undertaken to determine the impact of the major contributing cause and pre-existing conditions upon workers and employers. States permanent disability benefits need to be raised to a level close to the national median. States there also needs to be minor modifications made to the provisions relating to the stay of vocational assistance benefits, and to workers who have been subject to a managed care organization (MCO) after contract termination.</p>
040	Tim Nesbitt	<p>Executive Director, Oregon State Council of the Service Employees International Union (SEIU). Opposes SB 460 (EXHIBIT B). States respect for MLAC, but disagrees with their position. Explains that exclusive remedy provisions are unfair to the worker. Asks why injured workers, once denied benefits, need to give up the right to sue their employer. States the case of <u>Terry Smothers v Gresham Transfer</u> illustrates the problem with exclusive remedy. Explains the employee was denied benefits under the workers' compensation law, but when he sued his employer for negligence, he was told he did not have the right to sue.</p>
090	Nesbitt	<p>States that the exclusive remedy provision denies workers access to the legal system that would be their basic right outside of the workplace. Explains that if Smothers had been a customer, and not an employee, his right to sue would have been uncontested.</p>
100	Nesbitt	<p>States the 1990 major contributing cause provision should be repealed in favor of the pre-1990 criteria. States MLAC had reached a compromise on the exclusive remedy and the major contributing cause provisions, but SB 460 does not support the compromise. States rates for permanent partial disability (PPD) have been increased to match the national median, but they fall short of matching inflation and wage increases since 1981. Believes the PPD rate increases need to be permanent. Asks the committee to listen to the injured workers testimony and consider changes in benefit calculations, and the requirements for injured workers to be subject to an MCO prior to claim acceptance. Asks the committee to also consider allowing injured workers to have their own physician examine when the initial claim is denied and to allow public comment regarding certification of MCOs.</p>
115	John Portis	<p>Injured worker, former construction laborer from local 296, associated with the Injured Workers Alliance. Opposes SB 460 (EXHIBIT C). States that Vocational Rehabilitation Division (VRD) funding should not be eliminated without alternative funding in place. States VRD encourages disabled people, supplies help with their disabilities and gives them direction in retraining job programs. States VRD has helped him to get back into school for retraining. States, as a single parent, he has lost everything and spent his retirement while solving his Workers' Compensation issues.</p>
169	Ernest Delmazzo	<p>Injured Workers Alliance. Presents (EXHIBIT D). States in 1998 MLAC cancelled all but two monthly public full committee meetings. Explains that the Oregon Workers' Compensation Ombudsman's Division is responsible for protecting injured workers from abuse by compensation carriers, but the division has only six employees, and has received 44,310 inquiries involving injured</p>

		workers from January through December of 1998. States the division has not increased its staff in over three years, though inquiries have increased by almost 40%. States Oregon employers, who get Oregon Workers' Compensation Insurance, are immune from employee lawsuits, even if the employer is grossly negligent.
222	Delmazzo	States insurance providers have influence over hospitals and physicians, and use their power to intimidate professionals who try to help the injured worker. States the injured worker's attorney receives compensation based on what the state law or courts dictate, while the insurance company's attorney earns considerably more money. States that many injured workers are forced into settling claims out of financial necessity. States that favorable Oregon Workers' Compensation Board rulings can take two years and can be appealed by the insurance carrier, twice. States the process can take 14 months or more. States that during the process the worker will not receive temporary disability benefits. States it took him 21 months to proceed with his own Workers' Compensation claim. States there is something wrong with the system and he is entitled to his compensation when injured on the job. Believes the insurance agencies "starve you out" through time-consuming court delays.
263	Delmazzo	States that Oregon Workers' Compensation insurers are not required by existing laws to pay for medical treatment where the sole benefit of treatment is pain relief. States insurance companies can re-close a claim retroactively. Explains that if the worker is unable to return to work with their employer, because of medical reasons, he may eventually receive limited career retraining. States he has serious spinal cord damage and has not been able to be retrained through the insurance agency. States he will never find a job that pays 80% of the wages he was making before his injury.
311	Delmazzo	Believes compensation carriers claim injured workers are not qualified for retraining because they believe the injured workers can find a job on their own that pays 80% of their former wages. States from the time of his injury, it took two years and two months to receive surgery.
335	Chair Derfler	States the committee is not here to retry his case, but would like him to address the issue.
337	Delmazzo	States that people who get prompt immediate medical care could be back in the work force, but the insurance agencies prefer to "starve-out" the injured workers.
365	Chris Davie	SAIF Corporation. Presents (EXHIBIT E) . Supports SB 460. Believes the elements of the law that would be sunseted have contributed to good results over the last few years and believes the sunsets should be adjusted as reflected in SB 460.
395	Jennifer Webber	Oregon Workers' Compensation Attorneys (OWCA). Presents (EXHIBIT F) . Opposes SB 460. States there are parts of the bill OWCA supports, however, the negative impact that the exclusive remedy provision has had on injured workers outweighs the positive parts of the bill. States her written testimony details the SB 460 issues OWCA supports and opposes.

420	Peter Preston	Attorney, Portland. Represents claimants under the Workers' Compensation Act and plaintiffs who have suffered personal injuries. Presents (EXHIBIT G) . States that SB 460, as it relates to exclusive remedy, is not constitutional.
460	Chair Derfler	Asks if the committee is violating the Constitution.
TAPE 5, A		
000	Preston	States that by passing SB 460 the committee will be in violation of the Oregon Constitution. States the Oregon Constitution provides for remedy if injured. States the exclusive remedy provision takes away a remedy for those injured people who have not suffered a major contributing cause as a compensable work related injury. Explains that in order for an injured worker to sue his employer, he would need to prove that the employer was actively negligent. Believes that honest mistakes are not a license to sue.
024	Chair Derfler	Asks if the employee should need to prove he was not a contributing cause to the accident.
025	Preston	States that in the Workers' Compensation system an employee needs to prove his injury as a major contributing cause. Comments that the Workers' Compensation system is dangerous and can be deemed as unconstitutional. Believes the committee's goals should be to create certainty in exchange for reasonable benefits. States in SB 460 there is no remedy for an injured worker who cannot prove major contributing cause in certain classes of injury. States SB 460 tells employers they are insulated from being at fault.
075	Bradley Witt	Secretary-Treasurer, Oregon American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). Presents (EXHIBIT H) . Opposes SB 460. States that they agree with some of the issues of SB 460, but would like the committee to put into legislative statute the objectives that were outlined by MLAC from their September 23 rd final report. Believes by including those objectives it would guarantee the study would take place and results could be posted. Suggests that the select panels of physicians who are used in MCOs, because of cost issues, be certified for MCOs that handle Workers' Compensation claims.
103	Chair Derfler	Asks if the panel, besides being there for cost efficiency, is ensuring that the injured workers are getting proper treatment.
108	Witt	States that the physician panels who are working for medical insurance are also working for Workers' Compensation. Asks why the cost savings of the physician panels for MCOs are not recognized as a potential cost savings for Workers' Compensation. Believes the panels will allow for greater worker acceptance and afford the opportunity to negotiate who presides on the panels. States "...we probably don't have much of an argument against the select panels, at that point, because we have been part of that process of selection." States he is an advocate for 24-hour coverage, but will not push that point at this time.
140	Chair Derfler	States the Governor made it clear that he would veto any bill that did not receive

		acceptance by MLAC and the Public Affairs Committee. Asks if MLAC has received and reviewed Wittis written testimony.
145	Witt	States he gave suggestions to MLAC and recalls there was discussion for a period of time, but MLAC did not resolve the issue. Recommends allowing the injured worker to be treated outside of the MCO protocols at his/her option until the claim is accepted. Believes there is no balance of obligations; the insurer is not obligated to accept the claim, yet the injured worker is obligated to be treated under the protocols.
166	Chair Derfler	Comments that today he was informed the injured worker will be treated until the claim is recognized. Believes an agreement has been reached on this issue.
169	Witt	States the injured worker should not give up their right to choose, absolutely, the type and particular service provider. Suggests allowing injured workers, at their own expense, to be treated outside of the MCO, without jeopardizing their Workers' Compensation claims or benefits. Believes the best doctors are not members of a network. States some doctors feel there is a lack of flexibility and the paperwork is onerously demanding. States that injured workers, who feel they need better care than they are receiving from their MCO, should have the right, at their own expense, to be treated by their choice of physician.
196	Witt	Suggests that claimants can opt for outside exams when their initial claim is denied upon an MCO finding. States the cost to be reimbursable, if the claimant wins on appeal. States if the injured worker is wrong, he/she would be responsible for the costs incurred by the outside exam.
213	Chair Derfler	Asks who takes precedence over the claim when the doctors do not agree.
218	Witt	States the issue would be resolved through the appeals process. States if the individual has a legitimate problem with the denial, he/she would be compensated for seeing another physician. States that public comment should be allowed when MCOs apply for certification. Asks for protection for permanent partial disability benefits from inflation, with an escalator clause that would be tied to the cost of living.
241	Witt	States that with many injured workers suffering total disabilities and holding down multiple jobs, wage replacement for those workers is not adequate, and their benefits are not sufficient to continue their family level of income. Suggests the workers be compensated for all of their wage loss, or at least 2/3 of the loss.
255	Chair Derfler	Asks how to pay for it, if one party cannot be held responsible for both jobs. Asks if the system would be socialized to pay those wage losses.
262	Witt	States that Workers' Compensation is an actual insurance and would be used as an insurance solution to cover a loss.
270	Chair Derfler	Asks if the Workers' Compensation insurance would be employee purchased.

274	Witt	Suggests that the current Workers' Compensation insurance would cover the employee.
279	Chair Derfler	Suggests Witt go back to MLAC to make recommendations.
291	Steve Telfer	Management, representative MLAC. States SB 460 does an excellent job of putting into statutory format the recommendations MLAC has spent 24 months working on. States SB 460 is not perfect, but the sunset repeals are set out well, and the exclusive remedy extension and the permanent partial disability benefit are a balanced process, both set out to take place in 2004.
307	Vice-Chair Dukes	States in the report from MLAC, there were areas where both sides agreed that there were no answers for certain issues. Asks how to get to a resolution of areas that MLAC agrees need to be resolved, but has no solutions for those issues.
320	Telfer	States there are methods to resolve disputes. States MLAC has a substantial agenda to undertake, and they addressed the issues they knew needed to be addressed in this legislative session. States MLAC still has a lot of work to do, particularly the evolution of MCOs, and the idea of using health insurance panels as Workers' Compensation panels. States next week they will begin to build their agenda for this year.
346	Vice-Chair Dukes	Asks if exclusive remedy is one of those issues.
348	Telfer	States the exclusive remedy issue is before the Supreme Court, in <u>Terry Smothers v Gresham Transfer</u> . States his committee is not comprised of constitutional experts, and they need to wait to let the court decide.
360	Vice-Chair Dukes	Asks if this issue is a fairness or constitutional issue.
365	Telfer	States there is a long history of exclusive remedy being a trade-off for an exclusive system. States there is perceived unfairness and there is a lack of remedy for workers who have slipped through the cracks. States, at this stage, exclusive remedy is a constitutional issue.
379	Bob Shiprack	Executive Secretary, Oregon Building and Construction Trades Council. States that in SB 369, passed in the 1997 Legislative Session, only some portion of the bill was sunseted.
TAPE 4, B		
000	Shiprack	States that MLAC works in an advisory capacity, while the legislature makes policy. Comments that the committee should make policy decisions on the issues. States he would like to address the committee in the future about MLAC issues. States there are problems with insurance medical exams and time loss benefits. Comments that he would like to be given an opportunity to come in front of this committee with his personal concerns about Workers' Compensation issues.

040	Sen. Wilde	States, from a constitutional perspective, there are reasonable arguments involved when looking at exclusive remedy. Concerned about what is negligence in the work place. States that if a claim against an employer is not allowed and there is no other remedy in the law, in tandem a potential unconstitutional situation is created.
056	Shiprack	States Sen. Wilde is correct in surmising the dilemma posed to MLAC. States the dilemma causes master-servant relationships. States MLAC looked at due process, followed the Smothers case, but as a committee they decided to let the Oregon Supreme Court work out the issue.
077	Chair Derfler	Comments that the Governor has said that if the Public Affairs Committee passes a law without MLAC approval, the Governor will veto it. Explains the committee's powers have been usurped.
086	Shiprack	Hopes MLAC and Public Affairs will work together. Believes the Governor took that position because in the past the Workers' Compensation wars have raged.
092	Chair Derfler	States the committee's abilities have been removed. Comments that MLAC may need to see if the Governor feels the same way, otherwise bringing the issue before this committee is a moot point.
103	Shiprack	States that MLAC discovered data about the system that would be useful to the committee, with the exception of exclusive remedy, preexisting conditions, and coexisting conditions. States MLAC will embark on a study based on real claims to find the deception or reality. Expects to collect hard data to put into evidence, to help fix the system and to treat people fairly.
121	Vice-Chair Dukes	Asks if he expects results by next session.
123	Shiprack	Hopeful to have results by next session.
125	Telfer	States there needs to be a system designed to ask the right questions, as well as a methodical way to get the data, in a statistically reliable way. Believes it may take until 2004 to realistically evaluate who is being impacted by material contributing cause or multiple conditions.
150	Merle Campbell	Member, Injured Workers Organizing Committee, the Injured Workers Alliance, and Together Injured Workers Succeed (TIES). Presents (EXHIBIT I) . Opposes SB 460, specifically the sunset provision extending exclusive remedy into the year 2004. States exclusive remedy is in violation of Article 1 of the Bill of Rights, sections 10 and 20. States that exclusive remedy gives privileges to corporations and their representatives who are protected from lawsuits while their employees are not protected.
176	Chair Derfler	Asks if he recommends abolishing the Workers' Compensation system.
178	Campbell	Recommends that Workers' Compensation exclude the exclusive remedy

		provision.
185	Chair Derfler	States exclusive remedy is the heart of the system.
187	Campbell	Believes exclusive remedy is not the heart of the system. Explains his wife's employment with Nordstrom. States his wife missed a deadline on a doctor's release and Workers' Compensation refused to pay. States that Nordstrom did not pay when they were supposed to and they made the money owed a bargaining chip for settlement.
247	Campbell	Asks what the employment agencies are afraid of. States that attorneys for the industry get paid either way. States his wife received half of what her pay would be in settlement. States settlements were made in lieu of extended care. Opposes exclusive remedy, believing that it is unconstitutional.
280	Chair Derfler	States the Oregon Appellate Court found exclusive remedy Constitutional.
284	Campbell	States exclusive remedy protects a class, making them above the law.
285	Chair Derfler	States the case is in appeal with the Oregon Supreme Court.
306	Jeri Sundvall	Lead Organizer, Workers' Organizing Committee, Co-chair for Portland Jobs with Justice. Presents (EXHIBIT J) . States many injured workers are not getting their cases accepted, leaving them without money and using the Oregon Health Plan for their medical needs. States exclusive remedy is allowing people to fall through the cracks. States people come to her to find out their rights after being hurt on the job. Explains she works with minimum wage workers. Believes the only thing the Governor will consider is what MLAC endorses. Asks what the injured people do if they are not in unionized labor and are not represented by MLAC.
355	Chair Derfler	Explains that she would need to ask the Governor because the committee has no power to pass legislation on this issue without MLAC approval.
361	Sundvall	States the workers need better representation.
376	Leonard Smith	Injured worker from Portland. States there is no representation for him as an injured worker. States the program does not help him, though he has been disabled since 1976.
402	Ed Johnston	Injured worker from Newport. States it took nine years to get surgery, and "nine years to fight the system." States he lost his home, had to apply for food stamps, and only received \$298.00 a month in compensation. States corporations want more power, and he is distraught to see Oregon side with the corporations. States his physical ailments and his problems getting a job because insurance agencies will not pay to cover him.

TAPE 5, B

000	Johnston	States he was told to talk to his lawyer, not the insurance agency. Believes that peoplesí lives are destroyed by the system. States he has been to 30 doctors. States he lost his family. States Workersí Compensation kicked him back into the work force while he was still having black-outs. Believes corporations are running our lives. States he was injured in 1989 and the Oregon Pain Center and Disability Services gave him psychological exams to try and make him inept on paper. States he is still in litigation. States he expected to be paid back what he paid into the Workersí Compensation system.
075	Chair Derfler	Thanks him for his testimony.
084	Chair Derfler	States the committee does not have the ability to judge the cases.
089	Chair Derfler	Closes public hearing and opens work session.
<u>SB 460 WORK SESSION</u>		
100	Chair Derfler	Staff presents (EXHIBIT K) .
105	Sen. Starr	MOTION: Moves SB 460 to the floor with a DO PASS AS AMENDED recommendation.
		VOTE: 4-0 AYE: In a roll call vote, all members present vote Aye. EXCUSED: 1 ñ Qutub
	Chair Derfler	The motion CARRIES. SEN. DERFLER will lead discussion on the floor.
114	Chair Derfler	Closes work session. Closes committee meeting at 4:40 p.m.

Rachel E. Halupowski, Brian E. Smith,
Administrative Support Administrator

EXHIBIT SUMMARY

A ñ SB 460, written testimony, John Shilts, 1 p

B ñ SB 460, written testimony, Tim Nesbitt, 3 pp

C ñ SB 460, written testimony and chart, John Portis, 3 pp

D ñ SB 460, written testimony and MLAC web page, Ernest Delmazzo, 4 pp

E ñ SB 460, written testimony, Chris Davie, 1 p

F ñ SB 460, written testimony, Jennifer Webber, 3 pp

G ñ SB 460, written testimony, Peter Preston, 10 pp

H ñ SB 460, written testimony, Brad Witt, 4 pp

I ñ SB 460, written testimony, Merle Campbell, 2 pp

J ñ SB 460, written testimony and flyer, Jeri Sundvall, 3 pp

K ñ SB 460, -5 amendment, staff, 1 p