

Key Legislation Enacted by the 2001 Legislature November 2001

This document highlights the key provisions of the workers' compensation bills that were enacted this session, and notes some ancillary bills that are likely to affect either the administration of the law or segments of the workers' compensation community.

SB 485 was introduced and managed by WCD as the vehicle for labor and management agreements on changes needed to correct imbalances and unintended consequences of 1990 and 1995 legislation. It is the most complex and comprehensive workers' compensation bill since 1995. Key elements include:

Smothers v. Gresham Transfer decision. While this bill does not squarely address the recent Supreme Court decision in *Smothers v. Gresham Transfer*, it does create a means for addressing this new and significant exposure to employers. In addition, there are parts of the bill that DCBS estimates will lessen the impact of this decision on employers by at least 20%.

SB 485 directs the Management-Labor Advisory Committee (MLAC) to address the *Smothers* exposure during the interim. It directs MLAC to recommend to the 2003 Legislative Assembly an exclusive, nofault, expeditious, alternative process and remedy to the court system that addresses major contributing cause denials. Further, workers who file a tort claim against their employer must exhaust their workers' compensation remedy first, thus avoiding the extra costs associated with simultaneously litigating a workers' compensation claim and a court case.

Pre-existing conditions. SB 485 changes the law in regard to preexisting conditions in three ways:

- It narrows the definition of "preexisting condition" by excluding certain factors such as age, gender, family history, and the like, which are now sometimes relied upon to defeat claims;
- It prohibits consideration of "preexisting conditions" that were never diagnosed or treated prior to the work injury; and
- It partially changes the burden of proof by requiring an employer to prove a preexisting condition is the primary cause of a worker's problems before the claim can be denied.

These last two changes do not apply to claims that involve "arthritis" or "arthritic conditions."

Permanent Partial Disability rates. SB 485 temporarily increases permanent partial disability rates so that Oregon's disability rates move up to the national median. These temporary rates "sunset" in December 2004, requiring MLAC and Legislature to again address the rates in 2003. This sunset was included in the bill in partial response to the *Smothers* decision.

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Johannsen. SB 485 provides a compromise in response to another significant liability exposure to employers arising from the *Johannsen* court decision, by streamlining and restructuring benefits so that any time loss or permanent disability benefits paid because of this decision are reimbursed to the insurer from the Workers' Benefit Fund. That in turn precludes insurers from needing to pass on the increased costs to employers.

Employers' Liability Act. Under existing law workers may file Employer Liability Act (ELA) claims against third parties other than their own employers who have control over the conditions at a hazardous work site, such as a general contractor on a construction project. Under this bill, a worker who is deemed to be more than 50% at fault in his or her own injury may not recover on ELA claims. This introduction of "contributory negligence" as an employer defense - part of the package of labor-management agreements that resulted in SB 485 - was strongly opposed by claimants' attorneys, who argued that this change was unnecessary, harmful to workers and had no place in a workers' compensation bill.

Miscellaneous benefits and claims processing changes. Several other changes are included in this bill, the most notable of which are:

- reducing the time insurers have to accept or deny claims from 90 to 60 days; increasing the maximum rate for temporary time loss benefits;
- requiring that wages earned from all of the worker's jobs are to be included when calculating the rate of temporary total disability;
- providing workers the right to submit a deposition during the mandatory administrative reconsideration by the director of a permanent partial disability award;
- allowing workers to receive an impartial medical examination when litigating a claim denial that was based on an insurer medical examination;
- allowing workers to refuse offers of modified work under limited circumstances without loss of wage replacement benefits;
- changing the requirements to open a Board's Own Motion claim and streamlining voluntary re-openings by insurers; and
- correcting a transposition error from the 1999 legislation, which set the current permanent partial disability rates.

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SB 485 enjoyed a broad range of support. Among the supporting groups and interests was the Management-Labor Advisory Committee, the Oregon AFL-CIO, Associated General Contractors, Associated Oregon Industries, the Oregon Building Trades Council, AFSCME, and SAIF Corporation.

There are some modest increases in responsibility for DCBS; however, the department will absorb the new administrative responsibilities associated with SB 485 without increasing the size of our budget.

SB 265 was introduced by WCD to correct the 1999 drafting error that transposed the amounts awarded to workers for “unscheduled disability” in the middle tier of the schedule. SB 265 was incorporated into SB 485.

SB 316 was introduced by WCD and passed, and clarifies that:

- a worker has one year from the date of first classification of a claim as non-disabling to challenge that classification;
- for disabling claims, the worker’s aggravation rights runs five years from the date of first claim closure; and
- for claims originally classified non-disabling that are not reclassified during the year following the original classification, the aggravation period runs five years from the date of injury.

SB 297, also introduced by WCD, restores a phrase inadvertently deleted last session that allows the director discretion to not appoint a medical arbiter in certain circumstances when it makes no sense to do so (such as when the worker has been hurt in an intervening non-industrial accident that further injures the same body part.) The bill also deletes a requirement that a worker must have returned to work in order to request that his claim be closed.

SB 977 was an insurance bill that WCD was able to amend to give the director the authority to advance payments from the Worker Benefit Fund to injured workers during the time when an insurer has defaulted on its obligations to pay claims, but has not yet been placed in liquidation by the court. After liquidation proceedings are completed and the insurer is placed in receivership, the Oregon Insurance Guaranty Association will refund the Worker Benefit Fund for any moneys advanced.

SB 507 was introduced at the request of Liberty Northwest Insurance Companies, and provides that employers temporarily in Oregon under public contract are exempt from carrying Oregon workers’ compensation coverage so long as they provide such coverage under the laws of another state.

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WCD supported this legislation, as the current law caused significant concern during the 2000 fire season when firefighters needed to move quickly from state to state, only to be delayed while additional workers' compensation coverage was secured. In addition to the concerns about delaying fire-fighters from reaching the fire-lines, it required their employers to carry double coverage. This bill removes a barrier to the prompt movement of firefighters between western states.

In addition, this bill also relieves Oregon employers, under public contract in other states with which Oregon has reciprocity agreements, from the unnecessary expense of paying for double workers' compensation insurance coverage.

SB 354 was introduced by WCD as the original vehicle for the labor-management agreements, which eventually became SB 485. After SB 354 was "guttled," it was "stuffed" with language that relieves over 2,000 employers with seasonal workers of the unnecessary requirement to report quarterly the number of employee hours worked and hourly payroll, when they have no employees. It allows those employers to report annually, relieving both them and the department of unnecessary and meaningless paperwork.

HB 3100 was introduced on behalf of the City of Portland. It clarifies the existing exemption from the workers' compensation law for firefighters and police officers of a city with a population greater than 200,000, when the city provides a disability and retirement system by charter or ordinance that provides benefits equivalent to those provided under the workers' compensation law. The City of Portland has had such a system since 1948.

The current language of the exemption is unclear, and gave rise to a disagreement between the City of Portland and DCBS as to whether the city's plan met the requirements of the statute. This change eliminates the conflict.

HB 2112 adopts the Uniform Electronic Transactions Act. Among other things, it provides for the legal recognition of electronic records, electronic signatures and electronic contracts, preempting any conflicting statutes elsewhere in Oregon law. The pertinent provisions provide that:

- a record or signature may not be denied legal effect or enforceability solely because it is in electronic form;
- a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation;
- if a law requires a record to be in writing, an electronic record satisfies the law; and
- if a law requires a signature, an electronic signature satisfies the law.

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Another section provides that a record may not be excluded from a proceeding solely because it is in electronic form. Yet another provides for the retention of electronic records, acceptance and distribution of electronic records by public agencies, and other provisions that may also affect WCD and the workers' compensation community.

DCBS will continue to assess the impact of this involved piece of legislation to ensure that we understand, and communicate to stakeholders, its application to the workers compensation law, rules and WCD's administrative practices.

HB 3980 sponsored by Representatives Bates and Gardner requires the Secretary of State to conduct an annual audit of SAIF Corporation, by contracting with a firm qualified to conduct independent actuarial reviews. It specifies certain contents of the audit and standards for the audit, and requires SAIF Corporation to pay the cost of the audit.

SB 104 establishes the Advisory Committee on Medical Privacy, which is charged with studying the relationship between the Health Insurance Portability and Accountability Act (HIPAA) and state information privacy laws. DCBS will provide a representative and staff support to the committee.