NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Wednesday and Thursday, August 9-10, 2006
Harvest Room, State Capitol
Bismarck, North Dakota

Representative George J. Keiser, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives George J. Keiser, Bill Amerman, Nancy Johnson; Senator Jerry Klein

Members absent: Senators Duaine C. Espegard, Joel C. Heitkamp

Others present: See Appendix A

It was moved by Representative Johnson, seconded by Representative Amerman, and carried on a voice vote that the minutes of the June 19, 2006, committee meeting be approved as distributed.

Chairman Keiser said over the course of the two-day meeting, the committee will be reviewing four workers' compensation claims. Additionally, he said, the committee will be conducting traditional committee work and receiving information regarding the previously reviewed claims. He said this is the final meeting at which injured workers will be presenting the claims for the committee to review. He said the next meeting likely will be the final meeting of the committee and at that meeting the agenda will provide for the committee to review the issues raised over the course of the interim as well as to consider possible bill drafts for recommendation to the Legislative Council.

CASE REVIEWS

Over the course of the two-day meeting, the committee reviewed workers' compensation claims for the injured workers--Ms. Verna Nagel, Ms. Cindy Loughman, Ms. Bernie Huber, and Mr. George Raber.

First Case

Chairman Keiser called on Mr. Chuck Kocher, Workforce Safety and Insurance Office of Independent Review, to assist in presenting Ms. Nagel's case for review by the committee. Mr. Kocher distributed to committee members a binder containing information provided by Workforce Safety and Insurance. He said the information in the binder includes a case summary of the injured worker's records as well as a list of the statutory provisions the injured worker is interested in addressing.

Case Summary

Mr. Kocher provided a summary of Ms. Nagel's case. He said Ms. Nagel filed an application for workers' compensation benefits in connection with an injury to her lower back sustained on July 7, 2001. He said Workforce Safety and Insurance accepted liability for the injury and awarded payment of the associated benefits. At the time of her injury, he said, Ms. Nagel was employed as a licensed practical nurse.

Mr. Kocher said following Ms. Nagel's injury, she continued to perform her daily work duties as she continued working for her preinjury employer. In February 2002 Mr. Kocher said Ms. Nagel participated in a functional capacity evaluation, which placed her in a sedentary/light category of work. He said because this classification prevented Ms. Nagel from continuing her employment as a licensed practical nurse, she started receiving temporary partial disability benefits on July 21, 2002. He said on January 22, 2003, Workforce Safety and Insurance received a fraud hotline report and as a result investigative services were assigned to Ms. Nagel's claim.

Mr. Kocher said as the result of a secondary functional capacity evaluation performed in February 2003, which again placed Ms. Nagel on the sedentary/light category of work, Ms. Nagel was able to work 4 to 5 hours per day 24 hours per week. Ms. Nagel was not able to return to her preinjury employer because there were no jobs available within the functional capacity examination guidelines.

Mr. Kocher said on July 24, 2003, Ms. Nagel was referred to a physician for a second medical opinion for her work-related back injury. Following the examination by this physician, Ms. Nagel submitted a letter to Workforce Safety and Insurance regarding the examination and her frustrations related to this examination.

On June 18, 2004, Workforce Safety and Insurance issued a notice of intention to discontinue benefits. He said this discontinuation of benefits was based on the belief that Ms. Nagel had willfully and intentionally made material false statements to her medical providers and to Workforce Safety and Insurance regarding her physical condition with respect to her driving capabilities and activities.

Mr. Kocher said Ms. Nagel acquired legal representation and filed a request for reconsideration of the notice of decision. He said on August 3, 2004, Workforce Safety and Insurance issued a fraud order

against Ms. Nagel. In the fraud order Workforce Safety and Insurance denied payment of any further benefits on the claim, including medical, disability, vocational rehabilitation, and permanent partial impairment benefits. He said the order included an order for repayment of disability benefits in the amount of $5,263.27. He said through her attorney, Ms. Nagel requested the assistance of the Office of Independent Review to review the order. He said on October 18, 2004, the Office of Independent Review closed the file without any change and provided a certificate of completion. He said Ms. Nagel timely filed a request for reconsideration and demand for formal hearing.

On March 22, 2005, a stipulated settlement was offered which would have provided for the following provisions:

1. Claimant remains eligible for payment of reasonable and necessary medical expenses for treatment directly related to her lower back injury;
2. Claimant is not entitled to any further disability or vocational rehabilitation benefits in relation to this claim;
3. Workforce Safety and Insurance agrees not to collect any part of the $5,263.27 overpayment directly from the claimant, except out of any benefits resulting from a future workers' compensation claim;
4. The claimant does not admit to any wrongdoing; and
5. Workforce Safety and Insurance will revoke its fraud order dated August 3, 2004, and the claimant withdraws her request for hearing regarding that issue.

Mr. Kocher said the proposed stipulation was rejected by Ms. Nagel and her claim went on to administrative hearing. Mr. Kocher said on September 21, 2005, a hearing was conducted on Ms. Nagel's claim and on November 23, 2005, the administrative law judge issued her findings of fact and conclusions of law. He said the administrative law judge concluded "the greater weight of the evidence shows that Ms. Nagel willfully misrepresented her physical condition, capabilities, and activities to WSI and her medical providers. She repeatedly stated that she had to stop several times while driving to and from Bismarck, and that she was doing so, when in truth, she was not. Ms. Nagel's statements were obviously intentional and material to an accurate determination of her work ability. They were made repeatedly and were made to influence her doctor's consideration of her ability to work and for WSI's process of determining her eligibility for benefits." The administrative law judge's findings of fact and conclusions of law went on furthermore to state "the greater weight of the evidence does not show that Ms. Nagel's false statements caused WSI to pay benefits in error. The majority of medical personnel found that the modified work available for Ms. Nagel did not match the FCE, and Dr. Krause removed Ms. Nagel from work in consideration of the FCE. Since the greater weight of the evidence does not show that WSI paid benefits in error based upon Ms. Nagel's false statements, Ms. Nagel is not required to reimburse WSI for benefits paid."

Finally, he said, the administrative law judge's findings of fact and conclusions of law provided "her false statements were designed to impede WSI's ability to determine her eligibility for benefits. Accordingly, her false statements were material and she must forfeit any additional benefits relative to her injury." Mr. Kocher said on December 5, 2005, Workforce Safety and Insurance adopted the recommended order of the administrative law judge. He said Ms. Nagel did not appeal this order and as such the order became final.

Issues for Review

Mr. Kocher stated that North Dakota Century Code (NDCC) provisions the claimant indicates are at issue in the review are Section 65-05-25, relating to lump sum settlements, and Section 65-05-35, relating to filing false claims or false statements.

Chairman Keiser called on Ms. Nagel to present the issues she would like the committee to review. Ms. Nagel said she received the assistance of Mr. Kocher in organizing the issues she would like the committee to review and the material in the binder distributed by Mr. Kocher includes an explanation of the items she would like the committee to consider.

Ms. Nagel explained the circumstances surrounding her workplace injury. She said the inappropriate working environment was an issue relating to her workplace injury. She further explained the limitations on activities of daily living she experiences as the result of her workplace injury. Additionally, she explained her dissatisfaction with some of the employees at Workforce Safety and Insurance, including one of her caseworkers. She said this caseworker did not listen and did not care.

Ms. Nagel provided a detailed explanation of the physical examination that took place as part of the second opinion requested by Workforce Safety and Insurance. She said the physician chosen by Workforce Safety and Insurance was rude, condescending, and sexually inappropriate.

Ms. Nagel said she has never knowingly committed any fraud of any kind to anyone. She said the videotapes of the Workforce Safety and Insurance private investigator clearly provide that she did nothing wrong and the private investigator hired by Workforce Safety and Insurance told one lie after another.

Ms. Nagel said as a result of this workers' compensation situation, Workforce Safety and Insurance has dropped all coverage and her private medical insurance through Blue Cross Blue Shield, for which she pays a monthly premium, does not provide any coverage for her work-related injury. Additionally, she said, the entire process has taken well over 15 months. She said she believes Workforce Safety

and Insurance seems to think that an injured worker is not entitled to do anything after an injury except the little bit of work it claims fits the injured worker. She said it is wrong that the injured worker is required to stay down, rest, and get up out of bed only to go to work. Ms. Nagel said because she refused to overdose herself on pain medications and since she refused to put others in jeopardy while driving, Workforce Safety and Insurance threw out her claim, claiming the videos actually did show the things the investigator accused her of doing. She said the videos and video notes prove she did not do the things the private investigator accused her of doing. She said it is not fair that the administrative law judge is on the payroll of Workforce Safety and Insurance.

Ms. Nagel stated the rates set for attorney's fees are inadequate. She said the rate is far lower than the actual cost, which results in the injured worker being forced to pay this difference.

In response to a question from Representative Amerman, Ms. Nagel said the claim that she committed fraud for secondary gain is ridiculous. She said that as a result of her injury her family cattle operations have cut back significantly, resulting in less money. She said it is clear there is no monetary gain in her being injured.

In response to a question from Senator Klein, Ms. Nagel said she first had back surgery in 1982 and this treatment was successful and she was allowed to return to her normal activities. She said it was this reinjury of her back at work that has caused her current problems. She said that even though Workforce Safety and Insurance terminated her benefits, she continues to seek treatment and she has experienced some improvement as the result of pain management.

In response to a question from Representative Keiser, Ms. Nagel said she receives her current medical coverage through Blue Cross Blue Shield as a supplemental policy for her Medicare.

In response to a question from Representative Johnson, Ms. Nagel said her suggested change in the workers' compensation system is that individuals need to be made to tell the truth. She said in pursuing these fraud cases it is important the decisionmakers truly review the tapes to ensure they reflect the story being told by the private investigator.

In response to a question from Representative Keiser, Ms. Nagel said at the administrative level, her attorney did document the problems with the fraud tapes but she does not believe the administrative law judge actually reviewed the tapes.

In response to a question from Representative Keiser, Ms. Nagel said when it came to determining whether to sign the stipulated settlement, it was not until the form was provided for signature that she became aware of the overpayment provision, which provided if she ever made another workers' compensation claim, the overpayment would be taken off the top. She said she had been ready to sign but Workforce Safety and Insurance would not remove the overpayment provision.

Workforce Safety and Insurance Response

Chairman Keiser called on Mr. Timothy Wahlin, Workforce Safety and Insurance, to provide testimony regarding the issues raised by Ms. Nagel. Mr. Wahlin stated it is uncontested that Ms. Nagel received a workplace injury. However, he said, it was the activities following the injury that resulted in the termination of benefits. He said Workforce Safety and Insurance analysts are trained to pick up signs regarding conflicting medical reports. Procedurally, he said, in the case of Ms. Nagel, there was a functional capacity evaluation performed in February 2003 which placed limitations on Ms. Nagel. He said because there were limitations and because there did not appear to be any positive movement in her condition, Workforce Safety and Insurance requested a second opinion. He said the second opinion was radically different from the treating physician's medical report.

Mr. Wahlin stated a review of the videotapes made by the private investigator indicate that when driving Ms. Nagel did not make the frequent stops directed by her treating physician. Additionally, he said, the material on the videotapes conflicts with the report made by Ms. Nagel regarding her activities.

Ms. Nagel provided committee counsel with a copy of the videotapes made by the private investigator. She said the activity shown on the tapes clearly differs from the investigator's notes.

Representative Keiser said committee members can contact committee counsel and view the tapes. He said it appears Ms. Nagel's treating physician wrote an order directing her that when she is driving that she move positions every 7 to 10 minutes.

Mr. Wahlin stated the administrative law judge's findings of fact are very instructive. Essentially, he said, the findings indicate the injured worker has limitations but her activities differ from her claimed limitations. He stated Workforce Safety and Insurance generally abides by the limitations established by a treating physician but if Workforce Safety and Insurance questions the limitations, Workforce Safety and Insurance may seek clarification or a second opinion.

In response to a question from Representative Keiser, Mr. Wahlin stated Workforce Safety and Insurance is not obligated to follow up on hotline tips. He said Workforce Safety and Insurance considers the tips in light of the case and the information available.

Mr. Wahlin stated in determining whether there is a case for fraud, it needs to be established whether a false statement has been made with the intention of getting payment of benefits or services or whether there has been a willful misrepresentation of a physical condition. He said in the case of Ms. Nagel, the false statements may have started with the functional capacity examination resulting in

7- to 10-minute limitations on driving or sitting in a single position. Additionally, he said, Ms. Nagel regularly represented to her treating physician that she had to stop several times while driving. He said the private investigator's videotapes did not support this claim.

Ms. Nagel said she did often stop and the fact that her vehicle required frequent brake repairs supports this allegation. She said it is possible the investigator was so far behind he just might not have seen her stop or he might not have been following the correct vehicle.

Mr. Wahlin said in the case of conflicting evidence, the decisionmaker needs to establish the credibility of the evidence.

In response to a question from Representative Johnson, Mr. Wahlin stated Workforce Safety and Insurance often contracts with private investigative units. He said if Workforce Safety and Insurance were to learn that a private investigator was not truthful or was not credible, it would no longer contract with that private investigator.

Ms. Nagel said a newspaper article in *The Bismarck Tribune* indicated there have been unfavorable evaluations of the Workforce Safety and Insurance special investigation unit.

In response to a question from Representative Amerman, Mr. Wahlin said in the case of the stipulated settlement, Workforce Safety and Insurance did not directly contact Ms. Nagel but instead contacted her attorney. He said periodically Workforce Safety and Insurance will agree to a settlement offer but he was not privy to Ms. Nagel's conversation with her attorney so he is not able to comment on why she did or did not accept the stipulated settlement offer.

Representative Amerman said taking money from future claims seems wrong in a case like this.

In response to a question from Representative Keiser, Mr. Wahlin said he is not aware of any Workforce Safety and Insurance records regarding the activities and communications surrounding the settlement offer. However, he said, Ms. Nagel's attorney does represent a significant percentage of the workers' compensation claims in the state and he is familiar with the system and protocol.

In response to a question from Senator Klein, Mr. Wahlin said in the case of Ms. Nagel, there is an overpayment note in the system so if she files a claim for a new injury, any benefit payments will be offset until the overpayment is recouped.

Representative Keiser said intuitively it seems as though the injured worker's attorney should receive a written copy of the stipulated settlement document, providing enough time for the parties to review and consider the offer.

Ms. Nagel said she believes her telephone conversations with her caseworker were taped. She said she would like to know how much money Workforce Safety and Insurance spent on pursuing her fraud investigation.

In response to a question from Representative Johnson, Mr. Wahlin stated in the case of a payback, if the payback amount is collected, future cash benefits would then go to the injured worker.

In response to a question from Senator Klein, Mr. Wahlin said if fraud is determined to have taken place, future claims for that injury are shut down. However, he said, future claims for unrelated injuries will be covered. He said there will be no repayment if there is never a future claim.

Comments by Interested Persons

Chairman Keiser called on Mr. Daryl Gronfur, Bismarck, for comments regarding the issues raised by Ms. Nagel. Mr. Gronfur stated in listening to the case presented by Ms. Nagel, it appears her thought process is very disjointed, just like his brother, Mr. Douglas Gronfur, an injured worker whose case was reviewed in an earlier meeting. Additionally, he said, Ms. Nagel seems to exhibit paranoia just like his brother does.

Mr. Daryl Gronfur stated fraud investigations are not necessarily a true reflection of an entire situation. Instead, he said, a fraud investigation is nothing more than a single snapshot in time. He said in the case of the injured worker who is on pain medication and antidepressants, these injured workers are not very accurate historians, especially as time passes. Mr. Gronfur said he does not believe the Legislative Assembly has any control over Workforce Safety and Insurance as he believes it is a rogue agency.

Representative Keiser said he disagrees with some of Mr. Gronfur's most immediate statements and requested that Mr. Gronfur limit his statements to the issues raised by Ms. Nagel.

Representative Keiser called on Mr. Sebald Vetter, Concerned Advocates Rights for Employees, Bismarck, for comments regarding the issues raised by Ms. Nagel. Mr. Vetter said there was conflicting testimony and the only way to clear this up is to actually review the tapes and Ms. Nagel's file. He said that nobody is totally without fault, but once Workforce Safety and Insurance determines there was no fraud taking place on Ms. Nagel's farm, the investigation should have ended. Instead, he said, the investigator followed her off the farm and essentially drummed up a new fraud claim.

Mr. Vetter said in the case of an injured worker either private insurance or the state's workers' compensation program should pay the claim. He said if one party does not pay the claim, the other party should.

Representative Keiser said generally either the private insurer or Workforce Safety and Insurance will pay a claim; however, in the case of fraud, or drug or alcohol use that influence the accident, the private insurer no longer pays.

Chairman Keiser called on Mr. Ed Christensen, injured worker, Bismarck, for comments regarding the issues raised by Ms. Nagel. He said he would like the executive director of Workforce Safety and Insurance

to review Ms. Nagel's case. He said this is especially appropriate considering the executive director was responsible for replacing the head of the fraud unit.

Mr. Christensen said everyone has the same goal, they all want to see Ms. Nagel return to work. He said the real issue should be whether Ms. Nagel went back to work, not whether she drove her car and whether she stopped her car every 7 to 10 minutes.

Committee Discussion

Representative Keiser said the issues raised by Ms. Nagel include whether there should be changes in the fraud program. He said he hopes the special investigation unit has the necessary resources to check out fraud tips when it determines it is appropriate. He said perhaps the real issue is whether there should be a back-door option for injured workers who have been found guilty of fraud.

Senator Klein said it appears Ms. Nagel had an issue with her employer and also that she believes Workforce Safety and Insurance did not treat her as well as she should have been treated.

Representative Keiser said it would be nice if injured workers were able to receive the help necessary so that fraud never occurred. However, he said, once a court determines fraud has occurred, all of the fraud provisions kick in. He said he thinks Workforce Safety and Insurance should follow these fraud laws.

Representative Keiser said as it relates to the issue of physician-placed limitations, Ms. Nagel's physician placed limitations that essentially made her unemployable. He said the fraud investigation indicated Ms. Nagel's activities did not comply with these limitations.

Ms. Nagel said she never told Workforce Safety and Insurance or her treating physician that she could not drive more than 10 minutes. She said she could not drive comfortably for more than 10 minutes. Additionally, she said, the tapes and fraud report are not consistent and the administrative law judge chose to ignore these discrepancies.

Representative Keiser said Ms. Nagel needs to remember today's case review is the beginning of the committee's review. He said the committee will hold at least one more meeting before the end of the interim and the committee may choose to further discuss Ms. Nagel's case at that time.

Second Case

Chairman Keiser called on Mr. Kocher to assist in presenting Ms. Loughman's case for review by the committee. Mr. Kocher distributed to committee members a binder containing information provided by Workforce Safety and Insurance. He said the information in the binder includes a case summary of the injured worker's records as well as a list of the statutory provisions the injured worker is interested in addressing.

Case Summary

Mr. Kocher provided a summary of Ms. Loughman's case. He said Ms. Loughman sustained an injury to her lumbar spine on June 7, 2004, while employed as a licensed practical nurse. He said Workforce Safety and Insurance accepted her claim and awarded specific benefits for the treatment of her acute lumbosacral back sprain through the date she reached preinjury status.

Mr. Kocher explained Ms. Loughman had a preinjury history of back problems and in 1997 she had undergone non-work-related surgery fusing the L5-S1 vertebrae. He said Ms. Loughman was notified Workforce Safety and Insurance did not accept any liability for her chronic low back pain, the old trauma, or the degenerative disc condition attributable to the preexisting back problems. However, he said, Workforce Safety and Insurance agreed to accept her claim for payment of medical benefits through November 19, 2004.

Mr. Kocher said on November 19, 2004, Workforce Safety and Insurance issued a notice of decision denying further liability. He said on December 6, 2004, Workforce Safety and Insurance received Ms. Loughman's timely written request for reconsideration but that Workforce Safety and Insurance reviewed her request and did not find any additional information to change its decision.

Mr. Kocher said on March 2, 2005, Ms. Loughman requested the assistance of the Office of Independent Review to review the order denying further liability. He said on May 4, 2005, the Office of Independent Review closed the file without any change to the order. On May 19, 2005, he said through her legal counsel, Ms. Loughman requested a hearing on the order denying further liability. He said on October 6, 2005, the administrative law judge conducted a hearing on her case, at which Ms. Loughman contended she was entitled to benefits because her right sacroiliitis was causally related to her compensable lumbar spine injury of June 7, 2004. He said the administrative law judge concluded that "the greater weight of the evidence indicates that Loughman's sacroiliitis as of November 19, 2004, is related to preexisting lumbar back conditions, not to the work injury of June 7, 2004." He stated that the administrative law judge further concluded Ms. Loughman had not met her burden of proving that her June 7, 2004, work injury either actually caused a new injury to her S1 joint or worsened the severity of or substantially accelerated the progression of preexisting back problems.

Mr. Kocher said Workforce Safety and Insurance adopted the recommended findings of fact and conclusions of law, Ms. Loughman did not appeal, and as such that order became final.

Issues for Review

Mr. Kocher stated North Dakota Century Code provisions the claimant indicates are at issue for review are Section 65-01-02, relating to the definition

of compensable injury, and Section 65-05-04, relating to the continuing jurisdiction of Workforce Safety and Insurance over properly filed claims.

Chairman Keiser called on Ms. Loughman and her husband, Mr. Robin Loughman, to present the issues they would like the committee to review. She said Mr. Kocher assisted her in putting her issues in writing and a document outlining her concerns is included in the committee's binder.

Ms. Loughman said she has many concerns, including:

1. She is concerned Workforce Safety and Insurance is not accountable to anyone. She said she believes there should be a monitoring organization. In her case, she said, it was only after the administrative level that she found out her attorney had not requested any additional information and thinks if she would appeal this to the district court she ought to be able to include additional information.
2. She said Workforce Safety and Insurance should be required to follow the recommended finding of the administrative law judge.
3. She said when a physician testifies for Workforce Safety and Insurance, that physician should be required to be a specialist in the area of the injury. In her case, she said, the injury was the S1 joint; however, neither of the doctors that testified at the administrative level specialized in S1 fusions.
4. She believes that Workforce Safety and Insurance tries to drag out the process as long as possible so an injured worker gets into a financial bind and has no choice but to go back to work, regardless of whether there is an ongoing injury.

Ms. Loughman said it is her belief that Workforce Safety and Insurance always sides against the injured worker, with the belief the injured worker is trying to defraud the system. She said that as a result of her workplace injury, she has had to move to Minnesota in order to qualify for medical assistance. She said she and her husband are so mad at this state they may never return.

Representative Keiser said the committee is recommending a bill draft that in special instances would extend from 30 to 45 days the period of time in which a party may appeal. He asked whether she would support extending the time for appeal. Ms. Loughman said she understands there are time constraints and situations where individuals may require more time but in her case it took eight months for them to get a court date and this is too long.

In response to a question from Representative Keiser, Ms. Loughman said at the administrative hearing, the administrative law judge said that Workforce Safety and Insurance has the choice of whether to actually accept the administrative law judge's recommended order. Mr. Loughman said he also heard the administrative law judge state this. Additionally, he said, at the administrative level their attorney did not bring up any additional information. He said a good attorney would have requested and presented this additional information.

Workforce Safety and Insurance Response

Chairman Keiser called on Mr. Wahlin to provide testimony regarding the issues raised by Ms. Loughman. He said in this case, the issue brought forward is that a determination needed to be made by Workforce Safety and Insurance regarding whether the injury was work-related or non-work-related.

Mr. Wahlin said as it relates to a recommended order of the administrative law judge, Workforce Safety and Insurance has the right to accept or reject the findings, conclusions, and order. He said the parties to the case may choose whether to appeal, including Workforce Safety and Insurance, the injured worker, and the employer.

Mr. Wahlin said at the district court level, all the parties are bound to comply with the district court's order; however, the parties may determine whether to appeal the decision to the North Dakota Supreme Court.

Ms. Loughman said she tried to appeal the administrative law judge's order but by the time the attorney contacted her, the time for appeal had passed.

In response to a question from Representative Johnson, Mr. Wahlin said with the exception of special circumstances, the district court does not retry the entire workers' compensation case but instead reviews the record created below.

In response to a question from Representative Amerman, Ms. Loughman said in her case the Workforce Safety and Insurance doctor claimed her treating doctors did not know of her prior injuries.

In response to a question from Representative Amerman, Mr. Wahlin stated it is common to have physicians testify by telephone, in part because of the high cost associated with attending hearings in person.

Representative Amerman said it is pretty common to receive correspondence from constituents in which the constituents reference Dr. Robert Cooper.

Mr. Wahlin stated Dr. Cooper had been the Workforce Safety and Insurance medical director at the time of Ms. Loughman's case. He said one of the ways Workforce Safety and Insurance used Dr. Cooper was for utilization reviews. He said Dr. Cooper is no longer the medical director at Workforce Safety and Insurance.

Representative Keiser called on Mr. Charles Blunt, Executive Director, Workforce Safety and Insurance. Mr. Blunt stated Dr. Cooper is actively practicing medicine. He said he had been employed by Workforce Safety and Insurance as a part-time medical director at 20 hours per week with a salary of $215,000 plus benefits.

Ms. Loughman stated it is hard for her to believe a physician making $215,000 a year for 20 hours a week is unable to testify in person at an administrative hearing. She said she had expenses associated with attending the hearing as well but none of these expenses were recognized by Workforce Safety and Insurance.

Mr. Loughman stated he thinks Dr. Cooper should have physically examined his wife before he made an opinion on her physical condition. He said he believes it is clear Dr. Cooper was on the Workforce Safety and Insurance payroll and as such made decisions against the injured worker.

Mr. Blunt stated Dr. Cooper's role is not to examine injured workers but to review the records of the treating doctors.

In response to a question from Representative Keiser, Mr. Wahlin stated in a civil case, the normal burden of proof is "more likely than not," or more than 50 percent. He said typically in workers' compensation claims, it is the injured worker who has the burden of proof. If no evidence is presented, he said, typically the burden will not be met. However, he said, in the case of Ms. Loughman, there was evidence presented, he said, it was just that the burden was not met. Mr. Wahlin stated that although Workforce Safety and Insurance should not take the role of presenting a case against itself, it does not hide the ball. He said Workforce Safety and Insurance provided Ms. Loughman's attorney with the entire record.

In response to a question from Representative Keiser, Mr. Wahlin stated Workforce Safety and Insurance has physicians and nurses on staff to review medical records, train claims staff, and attend medical appointments.

In response to a question from Senator Klein, Mr. Kocher said an administrative hearing was requested on May 19 and was conducted on October 6.

Mr. Wahlin stated two to three months is a common period of time between requesting a hearing and actually conducting the hearing.

In response to a question from Representative Amerman, Mr. Wahlin stated the Workforce Safety and Insurance medical director is not a member of the Workforce Safety and Insurance Board. He said the board does have a separate member on the board who represents the medical community.

In response to a question from Representative Johnson, Ms. Loughman said her first treating physician was not a specialist and therefore referred her to a specialist. She said while waiting for her appointment with the specialist, she did see a pain management doctor.

Mr. Loughman stated a Minot doctor reviewed his wife's records but refused the case because he did not know how to treat or perform S1 joint procedures. He stated his wife's first fusion was successful. He said he thinks he and his wife know more about her condition than the attorney did and the attorney failed to do his job. He said the system needs to be changed to allow specialists' opinions to weigh more heavily in the decisionmaking. He said Workforce Safety and Insurance refused to provide a second opinion by a specialist.

In response to a question from Representative Keiser, Ms. Loughman said the S1 joint is below L5.

Ms. Loughman asked whether there is any way to reopen the case because she believes the attorney did not do his job.

Mr. Wahlin stated the litigation is complete. He said it might be possible to request that Workforce Safety and Insurance exercise its continuing jurisdiction by requesting the case be reopened.

Representative Keiser said in the case of exceptional circumstances, Workforce Safety and Insurance may be justified in reopening an injured worker's case. He said Workforce Safety and Insurance is charged with following the law and there are public policy reasons in support of making it difficult to reopen a case once it becomes final. He said the Legislative Assembly is responsible for establishing this policy of making it difficult to reopen cases.

Ms. Loughman said she met the appeal timelines but her attorney dropped the ball. Mr. Loughman said he and his wife had requested a copy of the administrative hearing transcript to help prove their attorney's representation was inadequate but he was told it would cost approximately $1,000 to get a copy of this transcript.

Mr. Wahlin stated the cost of a transcript depends on how the proceedings were recorded. He said in the case of a stenographer, a copy of the transcript can be expensive.

In response to a question from Representative Amerman, Mr. Wahlin said although periodically Workforce Safety and Insurance sends an injured worker for a second opinion, this is done in the vast minority of cases.

Ms. Loughman said since her case was so controversial, she does not understand why Workforce Safety and Insurance did not send a nurse with her to her doctor's appointment.

Mr. Wahlin said he is not able to provide information regarding why a nurse was not assigned to Ms. Loughman's case.

Comments by Interested Persons

Chairman Keiser called on Mr. Vetter for comments regarding the issues raised by Ms. Loughman. Mr. Vetter said it appears the injured worker's lawyer goofed up again, just like the first case the committee heard today, and just like the first case it appears as though there is still an injured worker who is not at fault.

Mr. Loughman said the Legislative Assembly should make arrangements to pay for the transcript and allow the committee members to listen to the hearing.

Mr. Blunt said due to the exceptional circumstances, he will direct that a transcript of Ms. Loughman's administrative hearing be provided to Ms. Loughman at no cost.

Chairman Keiser called on Mr. Christensen for comments regarding issues raised by Ms. Loughman. He said that only fools represent themselves but through experience he has learned that injured workers really need to ride their attorneys. He said nobody cares about the case as much as the injured worker so the injured worker needs to take on the burden of pushing through the entire case. He said he would never recommend going to court without an attorney.

Chairman Keiser said the Loughmans have every right to make comments regarding their experience with their attorney but the others present at the committee meeting need to be very careful of the comments they make as the Loughman's attorney is not present to defend himself or otherwise make comments.

Chairman Keiser called on Mr. Daryl Gronfur for comments regarding the issues raised by Ms. Loughman. He said in determining eligibility, special weight should be given to the opinion of the injured worker's treating doctor. He said he would like to receive additional information regarding the qualifications of the medical director of Workforce Safety and Insurance.

Mr. Loughman said he did request that Workforce Safety and Insurance provide a second opinion but the request was denied.

Mr. Blunt said the Workforce Safety and Insurance medical director is a medical doctor but having said that, it is impossible to have one medical doctor cover all disciplines. He said in the case of a spinal fusion, it is established in the medical community that there is resulting pressure above and below the point of the fusion. He said every individual is different in how the individual is impacted by a spinal fusion.

Committee Discussion

Senator Klein said this is the beginning of the committee's review of Ms. Loughman's case and the committee will need additional time to review and consider the information she has provided.

Representative Keiser said Ms. Loughman is the ninth injured worker to have brought a case forward to be reviewed by the committee. He said he recognizes there are some reoccurring themes in the cases the committee has reviewed. For instance, he said, the committee has repeatedly heard of issues relating to legal representation. He said overall it might be helpful to have a system that provides for a better informed and better educated injured worker.

Representative Johnson said several of the injured workers who have brought their cases to the committee for review have brought forward issues relating to the medical profession or legal profession not doing an adequate job.

Ms. Loughman said she submitted a complaint to the attorney disciplinary board but she feels like it was discounted.

Mr. Loughman said he thinks it should be the law that an injured worker has a right to a second opinion by a specialist.

Representative Amerman said one of the common issues in the cases brought forward to the committee for review is that an average injured worker is up against a very complex sophisticated system as well as a complex sophisticated state agency. He said it should come as no surprise that it is difficult for an injured worker to fully understand the system.

Senator Klein said assuming there are 20,000 workers' compensation claims each year in this state and this committee has only reviewed nine cases, generally it seems like the system is working. He said the committee should be careful not to make sweeping changes that negatively impact the system.

Ms. Loughman said that on behalf of injured workers, many do not know whether resources or recourse is available. She said in her case, her legislators did not offer any assistance and she only heard of the Workers' Compensation Review Committee from the receptionist at the State Bar Association of North Dakota who informed her of this committee in the course of filing a disciplinary complaint against her attorney.

Chairman Keiser thanked the Loughmans for attending the committee meeting. He reminded them the committee will be giving further thought to Ms. Loughman's case and they are encouraged to submit additional information if they believe it is necessary.

Third Case

Chairman Keiser called on Mr. Kocher to assist in presenting Ms. Huber's case for review by the committee. Mr. Kocher said the binder he distributed earlier includes a case summary of the injured worker's records as well as the list of the statutory provisions the injured worker is interested in addressing.

Case Summary

Mr. Kocher provided a summary of Ms. Huber's case. He said that Ms. Huber timely filed an application for benefits for an injury to her back which occurred on June 23, 1992. He said she incurred this injury while she was working as an accounting clerk at a local hospital. He said Ms. Huber's initial diagnosis was for a lower back sprain or strain and Workforce Safety and Insurance accepted liability for the claim. He said she remained off work until August 19, 1992, at which time she returned to work on a part-time four-hour-a-day basis. He said that during this time, Ms. Huber was paid temporary partial disability benefits.

Mr. Kocher said that Ms. Huber continued part-time employment until June 28, 2002, at which time she underwent surgery for an anterior posterior fusion at

L3-4, L4-5, and L5-S1. He said that wage loss benefits were reinstated and she was paid temporary total disability in the amount of $232 per week.

Mr. Kocher said that on January 14, 2003, Ms. Huber returned to part-time work with her preinjury employer and she once again was paid temporary partial disability benefits. He said that due to her worsening medical condition, Ms. Huber stopped working in July 2005 at which time she was reinstated on temporary total disability benefits, which she has been receiving to date.

Mr. Kocher said that on May 4, 2006, Ms. Huber participated in an independent medical evaluation as a result of which the physician indicated that Ms. Huber could be released back to gainful employment with no restrictions on the number of hours she could work during the day or the number of hours she could work during the workweek provided she works within her restrictions of avoiding repetitious bending, twisting, and stooping and that she should be engaged in activities that allow for frequent position changes and should not lift, push, pull, or carry anything greater than 15 pounds from floor to waist height, with no greater than 10 pounds from waist height to chest height. Additionally, he said, her restrictions include not lifting, pushing, pulling, or carrying anything above chest height.

Mr. Kocher said on May 24, 2006, Ms. Huber's treating physician reported that he disagreed with the findings of the independent medical evaluation physician stating that Ms. Huber is not capable of gainful employment.

Mr. Kocher said at the time of Ms. Huber's injury, she was receiving $8.69 per hour and at the time of her termination of employment in July 2005, she was making $12.50 per hour; however, with the workers' compensation benefits setoff, her net take-home pay remained essentially the same for 10 years. He said she is currently receiving $232 a week from Workforce Safety and Insurance and this amount will be reduced to $135.42 a week as a result of her recently being determined eligible for Social Security disability benefits.

Issues for Review

Mr. Kocher stated that the issues raised by Ms. Huber include that over the period of time from her injury to the present, she has never been able to benefit from a wage adjustment at her place of employment. Additionally, he said, Ms. Huber is concerned about her ability to return to work and earn a competitive wage. He said that the North Dakota Century Code provision the claimant indicates that is at issue is Section 65-05-08(8) relating to disability benefits.

Mr. Kocher said he worked with Ms. Huber in preparing and organizing her issues that she wants the committee to review. He said as part of the documents included in the binder, he included a document prepared by Ms. Huber outlining her issues and concerns. Mr. Kocher said Ms. Huber indicated her primary concern is that she has not received a wage increase in the past 13 years. He said that in the past 13 years, Ms. Huber has received bonus lump sum payments to compensate her for excellent performance at her job but all of these payments have gone to Workforce Safety and Insurance as a setoff.

In response to a question from Representative Keiser, Ms. Huber stated that her first back surgery was successful and at this time she is seeking a discogram to establish whether a second surgery is needed. She said the discogram is a diagnostic procedure used to establish the health of the disc.

In response to a question from Representative Amerman, Ms. Huber said that anytime her employer gave her a bonus or increased her wages, her workers' compensation payment was decreased.

In response to a question from Senator Klein, Ms. Huber said that since her workplace injury, Workforce Safety and Insurance has covered her medical bills related to her injury and she has been generally happy with the treatment she has received. However, she said, she is unhappy with the recent denial of her request for a discogram and she is very dissatisfied with the lack of monetary increases in her cash benefits.

In response to a question from Representative Amerman, Ms. Huber said that in denying her physician's request for a discogram, Workforce Safety and Insurance suggested she undergo a myelogram. However, she said, her doctor will not accept a myelogram as a diagnostic tool for her condition.

Ms. Huber said she also takes issue with the independent medical examination performed by the doctor chosen by Workforce Safety and Insurance. She said the doctor to whom she was sent does not perform back surgeries but instead refers his patients to her back surgeon. She took issue with a system that would allow a nonspecialist to decide the treatment standard for a specialist.

Workforce Safety and Insurance Response

Chairman Keiser called on Mr. Wahlin to provide testimony regarding issues raised by Ms. Huber. He said that the facts presented by Mr. Kocher and Ms. Huber appear to be accurate. He said that since her workplace injury, Ms. Huber has been treated conservatively for her back injury.

Mr. Wahlin said under NDCC Section 65-05-08(8), the only time the underlying average weekly wage is recalculated is if the injured worker returns to work for 12 consecutive months at a higher wage. He stated the only workers' compensation benefit with a cost-of-living adjustment built in is permanent total disability, which provides for an adjustment after seven years of receiving benefits.

Mr. Wahlin stated that it appears as though the current status of Ms. Huber's case is that she is receiving temporary total disability and it will be necessary to consider whether there are retraining opportunities, after which time her status will be reconsidered.

In response to a question from Senator Klein, Mr. Wahlin said generally when an injured worker rolls into the classification of full disability, retraining is considered.

In response to a question from Representative Amerman, Mr. Wahlin said in the case of Ms. Huber, her current benefits are in accordance with the law.

In response to a question from Representative Keiser, Mr. Wahlin said the utilization review program provides for the best, most affordable, least invasive medical care. He said occasionally there are disagreements between doctors and Workforce Safety and Insurance is implementing a system of specialized review boards to consider treatment options.

Mr. Wahlin said 2005 House Bill No. 1171 does not apply to Ms. Huber because her injury took place before January 1, 2006.

Representative Keiser said perhaps there would be value to providing a retroactive application of House Bill No. 1171.

Mr. Wahlin said Ms. Huber's claim was filed in 1992 and is clearly outside the applications of House Bill No. 1171. Mr. Blunt said he would not support retroactive application of House Bill No. 1171 because there would be too many "what ifs" that would be difficult to resolve. However, he said, under House Bill No. 1171 an injured worker would not be faced with 13 years of ongoing claims.

Comments by Interested Persons

Chairman Keiser called on Mr. Doug Kapaun, injured worker, Jamestown, for comments regarding the issues raised by Ms. Huber. He said as North Dakotans, we grow up thinking we will all take care of each other; however, within the workers' compensation system, there are no services to help the injured worker as the injured worker navigates through the system.

Chairman Keiser called on Mr. Al Huber, Ms. Huber's husband, for comments regarding the issues raised by Ms. Huber. He said his wife loved her job and wanted nothing more than to return to work.

Mr. Huber said that since her workplace injury, it has become a reality that prescription medication is a regular part of her life and it impacts her activities of daily living. Additionally, he said, as a result of her injury, she has lost her full-time benefits provided by her employer, such as 401K retirement benefits.

Mr. Huber said throughout her experience with the workers' compensation system, his wife has done everything asked of her. He said she has seen doctors as necessary, including going to the necessary specialists when general practitioners were unable to treat her. He said this is especially frustrating at this point in her experience with Workforce Safety and Insurance because that specialist requested a diagnostic procedure, as a precursor to additional treatment, and Workforce Safety and Insurance is refusing to provide that diagnostic procedure. He said it is not fair that his wife is being caught in the middle.

Chairman Keiser called on Mr. Vetter for comments regarding the issues raised by Ms. Huber. He said it is not fair that Workforce Safety and Insurance can have an independent medical examiner flown in from Minnesota who essentially makes the decision that trumps the decision of all other physicians.

Committee Discussion

Mr. Blunt said Ms. Huber has done everything asked of her and she is a hard worker who appears to be caught in the middle. He said the law that applies to Ms. Huber does not seem to have contemplated this type of situation in which the injured worker has continuously attempted to return back to work but for periods of less than 12 months.

In response to a question from Senator Klein, Mr. Blunt said that he would go back and look at Ms. Huber's record to make a better determination of why the discogram is being denied. He said generally discograms are denied because they are invasive procedures and there is a concern the diagnostic procedure may do more damage than good.

In response to a question from Representative Amerman, Mr. Wahlin said once the injured worker's average weekly wage has been determined, it will not be decreased, so the same rationale applies that although it will not be increased, it will not be decreased.

Representative Keiser said issues raised by Ms. Huber seem to indicate similarities between her case and the case of Ms. Haux in that both women are very hard workers who have repeatedly attempted to return to work. He said both of these ladies would have made more money if they had quit working. He said he truly believes this is the wrong message to send to injured workers and the system should not incentivize this type of activity.

Representative Keiser said the four primary issues he recognizes are that Ms. Huber has not had an increase in income, without her workplace injury she would have received raises from her employer, the system provides for disincentives for injured workers to return to work, and the system does not allow for cost-of-living adjustments. He said unfortunately Ms. Huber has not been able to establish an updated average weekly wage because she has not been able to go for a 12-month period without receiving cash benefits.

Mr. Blunt said temporary wage replacement benefits are by their very nature meant to be temporary and to only apply during the time of an injured worker's period of healing. He said that for this reason, cost-of-living adjustments are generally considered to be inappropriate for temporary wage replacements.

Representative Keiser said there may be value to considering alternatives to this situation of the long-term return to work. He questioned how many cases

are long term like this where an injured worker moves from full-time to part-time work in an attempt to return to work. He said the system should not be punishing or disincentivizing an injured worker for being a hard worker and returning to work.

Representative Amerman said the person who did the right thing has fallen through the cracks. He said he would like to have Workforce Safety and Insurance look up possible ways to address situations, such as Ms. Huber's. Additionally, as it relates to the issue of independent medical examinations, he thinks it is possible this issue needs to be addressed.

Representative Keiser said he understands the need to treat back injuries very conservatively and to forego invasive procedures when possible.

Ms. Huber said she is in a very vulnerable position. She said she has a real concern that she needs to do something because with her current physical condition she is unable to work.

Representative Johnson said she supports the efforts of Workforce Safety and Insurance to implement utilization review boards for specialized areas of treatment, such as back injuries. She said she would like to receive additional information regarding how the system treats these injured workers who have made multiple attempts to return to work.

In response to a question from Senator Klein, Mr. Blunt said Workforce Safety and Insurance is doing what it can to have independent medical examinations performed by North Dakota doctors. However, he said, many North Dakota doctors do not want to provide this service.

Mr. Blunt said generally in the case of an independent medical examination that physician spends time before the examination reviewing the injured worker's records. He said he recognizes that an injured worker has a need or an expectation that the doctor should spend an adequate amount of time doing a physical consultation in the examination room. He said Workforce Safety and Insurance is trying to address this need.

In response to a question from Representative Keiser, Mr. Wahlin said in the case of a back injury and degenerative issues related to a spinal fusion, the future back problems are not automatically treated as work-related but as long as there is a link it will likely be determined to be compensable.

Mr. Blunt said Workforce Safety and Insurance will look at the issues raised by the committee, recognizing the need to avoid unintended consequences in changing the law or policy.

Mr. Vetter said he has seen these independent medical examinations and they are not very thorough. He said it seems to him that the independent medical examination physicians know who pay their bills.

Ms. Huber thanked the committee for taking the time to review her case. She stated how this workplace injury has had an enormous impact on her life, including her ability to save for retirement and to establish her Social Security rate.

Fourth Case

Chairman Keiser called on Mr. Kocher to assist in presenting the case of Mr. George Raber. Mr. Kocher distributed to committee members a binder. He said the information in the binder includes the case summary of the deceased injured worker's records as well as a list of the statutory provision the injured worker's widow is interested in addressing.

Case Summary

Mr. Kocher said Mr. Raber was a volunteer firefighter for the Hebron Fire Protection District. He said on August 23, 2004, Ms. Aloha Raber filed an application for spousal workers' compensation benefits in connection with the death of her husband. He said Mr. Raber died on July 21, 2004, as a result of a heart attack he experienced while fighting a fire in his capacity as a volunteer firefighter.

Mr. Kocher said on October 6, 2004, Workforce Safety and Insurance issued a notice of decision denying the spouse's application for benefits finding that Ms. Raber did not prove her husband sustained a compensable injury by accident arising out of or in the course of his employment as a volunteer firefighter. He said on November 1, 2004, Ms. Raber, through her attorney Mr. Mike Helpern, requested reconsideration of the decision of denial claiming as Mr. Raber was actively fighting a fire, he stepped out of the fire truck he was driving and collapsed. Ms. Raber alleged that stressors of her husband's work at the date of his death include activities under extreme heat, extreme fire rating, high winds, structures in harm's way, mechanical problems with equipment, the need for additional support from other fire districts, and this being the second fire in the day in the same area.

Mr. Kocher said Workforce Safety and Insurance reviewed the evidence on file and on January 5, 2005, issued a dismissal of claim indicating the greater weight of the evidence did not indicate that with reasonable medical certainty that Mr. Raber's cardiac arrest was caused by his employment. He said that Workforce Safety and Insurance further indicated that Ms. Raber had not proven with reasonable medical certainty that unusual stress was at least 50 percent of the cause of her husband's cardiac arrest as compared with all other contributing causes combined. He said the Workforce Safety and Insurance standard for compensability is whether the combination produced stress greater than the highest level of stress normally experienced or anticipated in the position of a volunteer firefighter.

Mr. Kocher said on January 13, 2004, Ms. Raber's attorney requested assistance from the Office of Independent Review and on February 13, 2005, the Office of Independent Review closed the file without any change in decision.

Mr. Kocher said on March 8, 2005, Mr. Halpern requested a hearing on the dismissal of the claim and on August 17, 2005, an administrative hearing was conducted. Mr. Kocher said the finding of the

administrative law judge was that the greater weight of the evidence was that Mr. Raber suffered unusual stress when he fought a fire that was not the typical prairie fire he usually fought, with reasonable medical certainty this unusual stress was the only cause of his heart attack and death, and that as such Mr. Raber sustained a compensable injury by accident arising out of and in the course of his employment. He said on October 4, 2005, Workforce Safety and Insurance adopted the administrative law judge's recommended findings of fact and conclusion of law, with the result that the dismissal dated January 5, 2005, was reversed.

Mr. Kocher said following the order accepting liability, an order establishing Mr. Raber's average weekly wage was issued. He said the order issued on November 8, 2005, determined Mr. Raber's average weekly wage was $161 per week, which was calculated by reviewing his 2003 income tax forms. He said that once again Mr. Halpern sought assistance from the Office of Independent Review to review this order. He said following the review of the Office of Independent Review, Workforce Safety and Insurance issued an amended order establishing the average weekly wage was $171 per week. He said this order was not appealed and became final.

Issues for Review

Mr. Kocher said the issues for review include NDCC Section 65-01-02, the definition provisions; Section 65-06-02, relating to volunteer firefighters; Section 65-01-15.1, the presumption of compensability for full-time paid firefighters; Section 65-01-02(10)(a)(3), relating to compensable injuries; and Section 65-01-02(5)(a), relating to calculation of the average weekly wage. Mr. Kocher said Ms. Raber has worked with her attorney Mr. Halpern in organizing her issues for review and a written document summarizing these issues is included in the binder.

Chairman Keiser called on Ms. Raber and her attorney Mr. Halpern to present the issues they would like the committee to review.

Mr. Halpern said Mr. Raber was a volunteer firefighter who had a heart attack and died while fighting a fire. He said there is no dispute in regard to this statement. However, he said, the dispute arises as to whether Mr. Raber's death was compensable. He said the standard used by Workforce Safety and Insurance for all employees, except paid firefighters, is:

1. With reasonable medical certainty was there an increase in stress level over the normal stress level of 50 percent, when the employee was doing the job at hand; and
2. Did this increase in stress cause the heart attack or stroke with reasonable medical certainty.

Mr. Halpern said that despite evidence provided by an expert firefighter and expert medical witnesses, Workforce Safety and Insurance took the position "all summer prairie fires had all of the factors listed"; thus, there was no increase in stress and since there could be no autopsy, the probable cause of the heart attack could not be ascertained.

Mr. Halpern said he would like the committee to consider the following four issues:

1. Whether the rules are too difficult to overcome in most situations as they relate to heart attacks or strokes?
2. When presented with competent expert evidence, both medical and factual, especially without any rebuttal evidence, does Workforce Safety and Insurance have an obligation to pay a claim without the claimant having to resort to requesting a hearing?
3. Should the Legislative Assembly, if the current law is not changed, set up a fund to pay volunteer emergency workers a lump sum if they die while providing emergency services?
4. Whether Workforce Safety and Insurance has an obligation to follow the statutes as the rest of us are obligated to do?

Chairman Keiser called on Ms. Raber for comments regarding the issues she would like the committee to consider. She said she is disappointed that Workforce Safety and Insurance relied on statements that were made at the scene of the fire in determining whether her husband's death was compensable.

Ms. Raber said further investigation proved that her husband had no prior heart problems and she thinks it is misrepresented that she refused an autopsy. To the contrary, she said, as this event unrolled no request was ever made to have an autopsy.

Ms. Raber said the problems she incurred in calculating a weekly benefits amount was very frustrating. She said it does not seem reasonable to have to wait 15 months to resolve her case and perhaps it would be more helpful to allow a survivor to receive a lump sum payment.

Ms. Raber said she needed the help of an attorney to have the law applied correctly, whereas most people just accept the benefit calculation amount established by Workforce Safety and Insurance.

Mr. Halpern said it is his position that the initial denial was not based on competent medical reports and in the second denial there were two competent medical reports in support of finding of stress. Additionally, Mr. Halpern said the initial wage calculation was for a weekly benefit amount of approximately $140. He said the law provides for three possible calculations but Workforce Safety and Insurance chose a different way. After he objected to the first calculation, Workforce Safety and Insurance calculated the amount of $160 per week but this was still the incorrect amount. He said it was only after the Office of Independent Review stepped in that they were able to remedy this error.

Mr. Halpern said the presumption of coverage that applies to full-time paid firefighters and law

enforcement officers includes several requirements, such as regular physicals. He said that given the limited resources of local governments, it is not realistic to expect they would be able to pay for regular physicals for all of the volunteer firefighters. He said some volunteers might not pass the requirements of a physical and this is just an unfortunate reality of volunteer emergency services at the local level.

Mr. Halpern suggested Workforce Safety and Insurance provide a lump sum payment for emergency workers who die in the course of providing services. Mr. Halpern distributed a document that provides a state-by-state comparison of the death and pension benefits for volunteer firefighters. A copy of this document is on file in the Legislative Council office. The bottom line, he said, is that not many North Dakota volunteer firefighters die in the course of performing their volunteer work and the state needs to better support our volunteer firefighters and emergency workers.

In response to a question from Representative Keiser, Mr. Halpern said Mr. Raber was a volunteer for the Hebron Fire Protection District and he does not think the Hebron fire district is assessing its maximum tax of five mills.

Mr. Blunt said he attended the annual firefighters' meeting at which he learned of a private vendor that sells an insurance product that essentially provides coverage equal to the Workforce Safety and Insurance presumption of coverage for paid full-time firefighters.

Workforce Safety and Insurance Response

In response to a question from Representative Keiser, Mr. Wahlin said volunteer firefighters are covered under workers' compensation; however, they are not covered under the presumption law. He said in the case of Mr. Raber, the facts of the case were not absolutely clear and he believes the administrative law judge could have found either way. Overall, he said, in the case of Mr. Raber, the facts were not conclusive and there was no post-death medical examination to assist in providing more conclusive facts.

Representative Amerman said it seems like Workforce Safety and Insurance is willing to claim that it is "just following the law" and its hands are tied. In the case of Mr. Raber it looks like Workforce Safety and Insurance chose not to follow the law as it relates to the calculation of weekly benefits.

Mr. Wahlin said the definition of average weekly wage is very complicated and though he does not condone the making of a mistake in calculating benefits, he can understand how the mistake could happen.

In response to a question from Representative Keiser, Mr. Wahlin said in the case of Mr. Raber, the average weekly wage was calculated based on seasonal employment, which is a more complicated calculation.

Representative Keiser said if the calculation required to establish an average weekly wage is so difficult for Workforce Safety and Insurance professionals to perform, perhaps these calculations should be simplified.

Mr. Wahlin said one of the primary reasons seasonal employment calculations are so complicated is that seasonal employment encompasses such a widely divergent group of wage earners.

Chairman Keiser called on Ms. Patsy Pereyl, Workforce Safety and Insurance, for comments regarding Mr. Raber's average weekly wage calculation. Ms. Pereyl said in the case of Mr. Raber, the caseworker needs to use the higher of two calculations, which are based on a three-year earning period versus a one-year earning period. However, she said, in the case of Mr. Raber, as a result of human error the lower of these two figures was used. She said at the reconsideration level, this error was fixed. However, she said, during the Office of Independent Review evaluation, new information was found regarding earnings and a third average weekly wage figure was calculated.

In response to a question from Representative Keiser, Mr. Wahlin said there is a lump sum option for payment of benefits for employees who do not have dependents but this is not applicable in the case of Mr. Raber because his wife was a dependent.

Mr. Blunt said he extends his apologies to Ms. Raber. He said at the time her husband's claim was filed, he was the new chief executive officer at Workforce Safety and Insurance and it was he not Mr. Wahlin who made the agency decision. He said the facts have become more clear over time but the law remains there is a burden of establishing a 50 percent increase in stress before a claim is compensable.

In response to a question from Representative Amerman, Mr. Blunt said Workforce Safety and Insurance provides $6,500 for burial costs plus any medical costs associated with the injury leading to death.

In response to a question from Representative Keiser, Mr. Blunt said volunteer firefighters do not have the option of opting in to the full-time paid firefighter presumption. He said it is important for the committee members to remember that one way volunteer firefighters are unique is that in special situations a fire chief can deputize citizens to be volunteer firefighters. He said it seems clear that there are unique workers' compensation issues that could arise given the ability to deputize citizens.

In response to a question from Representative Keiser, Mr. Blunt said the Workforce Safety and Insurance premiums of volunteer firefighter units do not cover all of the expenses and this uncovered cost is spread out over all employers in the state.

Comments by Interested Persons

Chairman Keiser called on Mr. Geremy Olson, injured worker, for comments regarding the issues

raised by Ms. Raber. He said he was a volunteer firefighter in Wilton who received injuries in the course of fighting a fire. Mr. Olson distributed written correspondence outlining some of his concerns, a copy of which is on file in the Legislative Council office.

Mr. Olson said he thinks the treatment volunteer firefighters receive from Workforce Safety and Insurance does not reflect what the people of North Dakota want.

Chairman Keiser called on Mr. Vetter regarding the issues raised by Ms. Raber. Mr. Vetter says he sympathizes with Ms. Raber's situation. He said he takes issue with Workforce Safety and Insurance not accepting the injured worker's two doctors' reports.

Committee Discussion

Senator Klein said his local volunteer fire district purchased a private policy that is not statewide and not state-funded.

Representative Keiser said information he received in the Industry, Business and Labor Committee during the legislative session seems to indicate that approximately 50 percent of the communities are taking the initiative to buy a private policy for their volunteer emergency workers.

Mr. Halpern said prior to Mr. Raber's death, the local fire district had no idea there would be a 50 percent proof requirement to establish workers' compensation coverage for heart attacks and strokes.

Representative Keiser requested that Workforce Safety and Insurance consider a less complex calculation of average weekly wage, while still recognizing this is a complicated issue that may require a complicated formula.

Representative Johnson questioned whether it might be possible to fund some assistance for survivors of volunteers who die in the course of providing volunteer services.

Representative Keiser said the system is missing a lump sum payment to help families in transition resulting from the death of a member of the family. He said the lump sum could be in addition to existing benefits.

COMMITTEE WORK

During the course of the two-day meeting, the committee discussed items relating to issues raised by injured workers who had previously appeared before the committee.

Chairman Keiser called on Mr. Wahlin for comments regarding special investigation unit statistics for the period 1995 through 2006. Mr. Wahlin provided a written document reflecting these statistics, a copy of which is attached as Appendix B.

Chairman Keiser called on Mr. Daryl Gronfur for additional comments regarding the issues raised relating to the workplace injuries of his brother Mr. Douglas Gronfur. Mr. Daryl Gronfur reported that his brother's recent request to reopen his case was denied by Workforce Safety and Insurance. He said it is likely his brother's next step will be to contact an attorney to pursue his concerns.

Chairman Keiser called on Mr. Glenn Evans, Workforce Safety and Insurance consulting actuary, for comments regarding permanent total disability. Mr. Evans addressed the committee telephonically. His written presentation is attached as Appendix C.

In response to a question from Representative Keiser questioning how to get an accurate valuation of the status of permanent total disability claims while taking into account the 1995 and 2005 legislative reforms. Mr. Evans said that as an actuary, he is able to look at and give weight to the number of permanent total disability claims under the old law and under the new system. He said he anticipates there will be a drop in the number of these claims. He said the model used to project future claims reflects the law at the current time and it is this model that is used to evaluate and create an actuarial evaluation.

Chairman Keiser called on Mr. Wahlin to provide statistics regarding recommended administrative decisions. Mr. Wahlin said for the period January 1, 2005, through June 30, 2006, there have been 221 administrative hearings for Workforce Safety and Insurance claims. He said of these 221 hearings, 5 of the resulting decisions were rejected by Workforce Safety and Insurance and 24 of the decisions were modified and then accepted by Workforce Safety and Insurance. He said he does not have data regarding district court action following the administrative hearing.

Representative Keiser questioned how a case such as Ms. Huber would have been treated under 2005 House Bill No. 1171. Mr. Blunt said he would try to provide additional information regarding this matter.

Representative Johnson said she seeks better understanding of whether some of these issues raised by Ms. Huber have since been corrected.

Chairman Keiser called on committee counsel to address the issue of a typical employee's earnings over a lifetime. She said she contacted Workforce Safety and Insurance, Job Service North Dakota, and the State Data Center seeking information regarding the typical earnings of an employee over the course of the employee's lifetime. She said none of the agencies she contacted was able to provide relevant information to assist the committee. She said data is more meaningful if it addresses the earning capacity of a specified worker versus general data that covers the general population.

Representative Keiser suggested the committee seek no additional information on this. He said it is a valuable issue to consider but it is likely that helpful data is not readily available.

Chairman Keiser called on Mr. Blunt for testimony regarding the historic pay raises for Workforce Safety and Insurance employees. Mr. Blunt provided a written handout, a copy of which is attached as Appendix D.

In response to a question from Representative Keiser regarding whether Workforce Safety and Insurance has phantom employees, Mr. Blunt said it does not intentionally keep positions unfilled. He said all the positions are posted but there has been some shuffling that has taken place in order to allow for a new medical director and safety specialist.

In response to a question from Representative Amerman regarding whether the information provided for the 2006 wages reflects the 4 percent pay increase required under the recent Attorney General's opinion, Mr. Blunt said he does not anticipate there will be a need to receive additional authority from the Emergency Commission in order to accommodate the payments required under the Attorney General's opinion. He said in looking at pay for performance, it is based on a starting date versus a fiscal year; therefore, there are some complicated calculations that need to take place in determining how to implement the Attorney General's opinion.

Mr. Blunt said in response to the committee's request for reapplication rate data for wage loss replacement, Workforce Safety and Insurance does not have this data for the period 1995 through 1998.

Chairman Keiser called on Mr. Blunt to present information regarding the Workforce Safety and Insurance tentative legislative package for the 2007 legislative session. Mr. Blunt distributed a document outlining the initiatives being considered, a copy of which is on file in the Legislative Council office.

The committee discussed the tentative legislative ideas presented.

In response to a question from Representative Johnson regarding the proposal of releasing delinquent employer information, Mr. Blunt said approximately 10 percent of the employers in the state are delinquent.

In response to a question from Representative Johnson, Mr. Blunt said the law is very clear as it relates to the type of workers' compensation employer information Workforce Safety and Insurance employees may release and it is clear regarding the repercussions that may occur if Workforce Safety and Insurance employees release too much information.

Mr. Blunt said generally employers are supportive of the proposal to release delinquent employer information.

Mr. Blunt said the proposal to change the additional benefit payable structure to address the special class of injured workers who have been caught in the middle due to the retirement presumption would go back to the initial date of injury and would provide a choice of additional payments or a structured settlement.

Representative Keiser complimented Workforce Safety and Insurance for listening to the issues brought at the Workers' Compensation Review Committee during the interim.

Mr. Blunt said the tentative item regarding the cost-of-living adjustment increase would allow more agency discretion to implement a cost-of-living adjustment before the typical time.

Mr. Blunt said the proposal to provide for employee performance and pay scale modifications would create a legislative default that pay for performance would not be subject to across-the-board pay increases. He said the language would allow the Legislative Assembly to override this presumption but it would put a presumption in place so situations such as what occurred in the current biennium would not be repeated.

In response to a question from Representative Amerman, Mr. Blunt said the determinations associated with pay for performance are made through a structure that is in place. He said the structure provides for setting and reviewing goals. He said Workforce Safety and Insurance contracts with a private entity for assistance in determining pay for performance.

In response to a question from Representative Johnson, Mr. Blunt said that pay for performance applies to all Workforce Safety and Insurance employees. However, he said, the Workforce Safety and Insurance Board will be deciding how to treat him, the executive director, for purposes of pay adjustments. He said he will seek the same treatment as his employees receive.

Representative Keiser said it is his understanding the Legislative Assembly had every intention of removing Workforce Safety and Insurance from the statewide 4 percent raises; however, a mistake was made at the last hour and Workforce Safety and Insurance was not exempted.

Mr. Blunt said he recognizes that pay for performance is a privilege, not a right, and he takes it very seriously. He thanked Representative Keiser for recognizing the value of claims analysts and the hard work they do.

Representative Amerman questioned whether it might be appropriate to change Job Service North Dakota to pay for performance, given that it is essentially a federally funded program.

Representative Keiser said Job Service North Dakota is unique. He said the legislative history regarding Workforce Safety and Insurance being allowed pay for performance is that it had been experiencing job shortages and a revolving door of employees. He is not aware of such a similar issue existing with Job Service North Dakota.

Mr. Blunt reviewed the proposal of changing how to treat the death of a catastrophically injured individual who dies more than six years following an injury.

Chairman Keiser thanked Workforce Safety and Insurance and Mr. Kocher for all the work they provided during the interim. He said it is hard to imagine the process working had the committee not received the assistance of Mr. Kocher.

The committee discussed whether it would be appropriate to recommend legislation continuing the activities of the committee.

Senator Klein said the legislation creating this committee was difficult to pass in the Senate during the 2005 legislative session.

Representative Johnson said she would prefer the issue of continuation of these activities come from the legislative body instead of this committee. She said she would be interested in repeating this review process in a few years to see how 2005 House Bill No. 1171 impacts injured workers. Representative Keiser said the nature of the system is that the cases coming before the committee now are essentially "old system" cases because the laws being referred to typically already have been modified.

Representative Amerman thanked Workforce Safety and Insurance for its participation in the process.

Mr. Vetter addressed the committee and said he thought the committee members probably learned a lot during the interim. He said he would support one more interim of the committee's work and will watch during the 2007 legislative session to see whether there are any legislative changes resulting from the work of the committee.

Mr. Blunt said that for purposes of the following tentative legislative ideas, Workforce Safety and Insurance would be willing to partner with the Workers' Compensation Review Committee:

- Survivor benefit options;
- Enhancement of injured worker loan program;
- Vehicle flexibility for catastrophically injured;
- Additional benefit payable modifications;
- Cost-of-living adjustment increases; and
- Dependent survivor benefits for catastrophic claims in which the death is outside the six-year window.

It was moved by Senator Klein, seconded by Representative Johnson, and carried on a voice vote that if Workforce Safety and Insurance decides to pursue the six issues addressed by Mr. Blunt, the Legislative Council staff be requested to work with Workforce Safety and Insurance to prepare bill drafts for the next meeting.

It was moved by Representative Amerman, seconded by Representative Johnson, and carried on a voice vote that the Legislative Council staff be requested to prepare a bill draft to extend the expiration date of the Workers' Compensation Review Committee for one more interim.

Representative Keiser requested that Mr. Kocher review the issues presented by the 11 injured workers who had their cases reviewed by the committee and provide a summary document to committee members before the next meeting.

No further business remaining, the committee adjourned at 3:15 p.m.

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Jennifer S. N. Clark
Committee Counsel

ATTACH:4