

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Wednesday, April 30, 2008
Dakota Hall, Holiday Inn of Fargo
Fargo, North Dakota

Representative George J. Keiser, Chairman, called the meeting to order at 1:00 p.m.

Members present: Representatives George J. Keiser, Bill Amerman, Donald D. Dietrich; Senators Nicholas P. Hacker, Richard Marcellais, Terry M. Wanzek

Others present: See [Appendix A](#)

Donald L. Clark, State Representative, Fargo
Jasper Schneider, State Representative, Fargo
Tim Mathern, State Senator, Fargo

It was moved by Representative Amerman, seconded by Senator Hacker, and carried on a voice vote that the minutes of the June 27, 2007, meeting be approved as distributed.

INTRODUCTION

Chairman Keiser said at today's meeting the committee will discuss the status of the committee's activities and recent activities relating to Workforce Safety and Insurance, receive an overview of the Workforce Safety and Insurance Office of Independent Review process, and review one workers' compensation case.

STATUS AND RECENT ACTIVITIES

Chairman Keiser called on Mr. Sylvan Loegering, North Dakota Injured Workers' Support Group, to comment on the group's activities. Mr. Loegering said the group's purposes are to provide assistance to injured workers and to work for changes in North Dakota law to ensure injured workers get sure and certain relief.

In response to a question from Representative Dietrich, Mr. Loegering said the group is in the process of setting up a website.

Mr. Loegering said he would like to be involved with the committee's activities as the committee moves forward during the interim.

Senator Wanzek and Senator Marcellais said they have constituents who may be interested in applying to have the committee review their cases.

Chairman Keiser called on Mr. Timothy Wahlin, attorney, Workforce Safety and Insurance, to provide an update on the Workforce Safety and Insurance continuing jurisdiction project.

Mr. Wahlin stated that under the continuing jurisdiction project, Workforce Safety and Insurance is accepting applications from employees who were injured after 1994 and is reviewing the claim

decisions, facts, and law to determine whether a mistake or misunderstanding took place. Under Workforce Safety and Insurance's grant of continuing jurisdiction, Workforce Safety and Insurance has the authority to remedy mistakes.

Mr. Wahlin said as of April 13, 2008, Workforce Safety and Insurance received 234 applications, reviewed 92 of these claims, and requested additional information relating to 13 of these claims. Workforce Safety and Insurance plans to continue to receive applications through June 30, 2008.

In response to a question from Representative Amerman, Representative Keiser said the purpose of the continuing jurisdiction project is to address statements that hundreds of the state's workers' compensation cases were improperly denied. Under the state's workers' compensation system, it is difficult for an injured worker to have a case reopened; however, Workforce Safety and Insurance has continuing jurisdiction to reopen cases, regardless of whether there is new evidence. He said, although the Workers' Compensation Review Committee does not have statutory authority to review all of the continuing jurisdiction cases, he anticipates Workforce Safety and Insurance will provide the committee with a final report on the status of the project when completed.

Chairman Keiser said injured workers can sign authorization to release forms to authorize Workforce Safety and Insurance to release claim information to any person the injured worker identifies.

Chairman Keiser said during the 2007-08 interim the Workers' Compensation Review Committee has taken more steps to publicize the activities of the committee than the committee did during the 2005-06 interim.

OFFICE OF INDEPENDENT REVIEW

Chairman Keiser called on Mr. Cade Jorgenson and Mr. Chuck Kocher, Workforce Safety and Insurance Office of Independent Review, to present an overview of the independent review process.

Mr. Jorgenson made a computer presentation ([Appendix B](#)) addressing the history of the Office of Independent Review, the mission of the Office of Independent Review, as well as the independent review appeal process.

In response to a question from Representative Keiser, Mr. Kocher said the Office of Independent Review constituency services addresses concerns

raised by a broad range of representatives of entities, including legislators.

Mr. Kocher said injured workers are notified of the Office of Independent Review's services through receipt of a letter that includes contact information.

In response to a question from Representative Amerman, Mr. Jorgenson said the role of the Office of Independent Review is to advocate for the correct decision, and not to advocate for the injured worker or for Workforce Safety and Insurance. He said the issue of whether the Office of Independent Review should have its own legal counsel has been discussed in the past, but it was decided that because the office is designed to provide alternative dispute services legal counsel is not necessary.

Senator Wanzek requested at a future meeting the committee receive a flow chart of the Workforce Safety and Insurance appeal process.

Senator Hacker said it would be helpful for injured workers to have online access to a simplified overview of how the state's workers' compensation process works.

Representative Keiser said the name "Office of Independent Review" does not accurately reflect the services provided. He said the office is not actually independent of Workforce Safety and Insurance and constituency services do not actually provide services to the injured worker. He said he supports the idea of changing the name to more clearly reflect the roles of the office.

Representative Amerman asked for data regarding the number of reviews done by the Office of Independent Review on denials based on the finding of preexisting conditions. Mr. Jorgenson said Workforce Safety and Insurance does not track this specific data; however, data does indicate that in the third quarter of 2007, approximately 30 percent of the Office of Independent Review assistance requests addressed some element of a preexisting condition or a degenerative condition.

Chairman Keiser requested that Workforce Safety and Insurance provide the committee with a flow chart of the workers' compensation system, statistics relating to Office of Independent Review requests for assistance, and suggestions on a possible name change to clarify the role of the Office of Independent Review.

In response to a question from Representative Amerman, Mr. Jorgenson said for most cases it takes the Office of Independent Review 37 days to 39 days from initial contact to the issuance of a certification of completion. However, he said, some cases take several months to issue the certificate of completion, depending on a variety of factors, such as whether additional medical information is requested.

Mr. Jorgenson said the Office of Independent Review has five full-time equivalent (FTE) positions and a one-half FTE position for an administrative assistant.

Chairman Keiser called on Mr. Bruce Furness, Interim Executive Director and Chief Executive

Officer, Workforce Safety and Insurance, for comments on the committee's activities. Mr. Furness said he is supportive of the committee's activities and is happy to be involved in the process.

CASE REVIEW

Chairman Keiser reviewed the procedure that will be followed to receive the injured worker's case for review. He said the injured worker presenting the case for review today is Mr. Noel Walter of Audubon, Minnesota. He said committee members had an opportunity before the meeting to review the injured worker's Workforce Safety and Insurance records. Additionally, he said, a representative of Workforce Safety and Insurance is available at the back of the meeting room to access the injured worker's records electronically if the need arises during today's meeting. He said if at any point in the meeting a committee member would like to view the injured worker's records he can recess the meeting to allow for the review. He said he will run a rather informal meeting to provide a comfortable atmosphere for the injured worker to present his case for review. Chairman Keiser welcomed Mr. Walter and his wife, Mrs. Karen Walter.

Chairman Keiser called on Mr. Kocher to assist Mr. Walter in presenting Mr. Walter's case for review by the committee.

Mr. Kocher distributed to committee members a binder containing information prepared 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 statement of the issues for review by the committee.

Case Summary

Mr. Kocher provided a summary of Mr. Walter's case. He said Mr. Walter filed an application for workers' compensation benefits on January 5, 1999. He said at the time of the injury Mr. Walter was working as a firefighter for the city of Fargo.

Mr. Kocher said the 1999 claim was the result of chest tightness and shortness of breath. On February 9, 1999, Workforce Safety and Insurance denied the claim on the basis that the chest discomfort was caused by nonemployment factors, including a bicuspid aortic valve, which is a congenital condition affecting 1 percent to 2 percent of the population. Mr. Walter returned to work as a firefighter for the city of Fargo.

Mr. Kocher reported that on March 7, 2006, Mr. Walter filed a second application for workers' compensation benefits claiming an enlarged aorta, leaking heart valve, and high blood pressure. On April 27, 2006, Workforce Safety and Insurance accepted liability for Mr. Walter's hypertension, but denied his application for the aortic valve condition, claiming the issue had been addressed in 1999.

Mr. Kocher said that on May 24, 2006, Mr. Walter requested reconsideration of the April 27, 2006, decision, claiming a 1999 postoperative valve

replacement diagnosis established aortic insufficiency, a tricuspid valve, and that the surgical finding showed that Mr. Walter did not have a congenital bicuspid valve as previously believed.

Mr. Kocher reported that on June 7, 2006, Workforce Safety and Insurance's medical consultant performed a records review and opined that at surgery the aortic valve was found to not be congenitally abnormal. Based on this information, on June 20, 2006, Workforce Safety and Insurance determined Mr. Walter met the criteria for the firefighter presumption under North Dakota Century Code (NDCC) Section 65-01-15.1, and accepted his claim.

Mr. Kocher said that on October 17, 2006, Workforce Safety and Insurance directed Mr. Walter to undergo an independent medical examination. The independent medical examiner opined that Mr. Walter's valvular heart disease was not a congenital condition but that he had developed a valvular infection in the past that caused the condition. The independent medical examiner further opined that another possibility was that Mr. Walter had "subclinical rheumatic fever as a child; although, this, to me, seems somewhat less likely because his mitral valve was unaffected."

Mr. Kocher stated that on November 16, 2006, Workforce Safety and Insurance issued a notice of decision denying further liability, finding that Mr. Walter's valvular heart disease was caused by a prior infection of rheumatic fever and not any work-related activity. On December 1, 2006, Workforce Safety and Insurance received a letter from Mr. Walter's attorney, Representative Jasper Schneider, requesting reconsideration of the November 2006 decision. Representative Schneider claimed Workforce Safety and Insurance did not have any objective medical evidence that Mr. Walter's heart condition was not the result of his work as a firefighter.

Mr. Kocher reported that on February 13, 2007, Workforce Safety and Insurance issued an order revoking the June 20, 2006, acceptance of Mr. Walter's benefits and denied any further benefits. On February 20, 2007, the Office of Independent Review received Mr. Walter's request for assistance. On March 23, 2007, the Office of Independent Review closed out the request for assistance without any changes to the order. On February 13, 2007, Mr. Walter and his attorney requested an administrative hearing.

Mr. Kocher said on October 1, 2007, Workforce Safety and Insurance entered a stipulated agreement with Mr. Walter which essentially reversed the Workforce Safety and Insurance denial.

Issues for Review

Chairman Keiser called on Representative Schneider, attorney for Mr. Walter, for comments on the issues relating to Mr. Walter's case. Representative Schneider thanked the committee for accepting Mr. Walter's case for review. He said when he accepted Mr. Walter's case he viewed it as a

strong case in part because of the firefighter presumption that presumes certain heart and lung disorders are work-related and because both the injured worker's physician and Workforce Safety and Insurance's physician agreed that Mr. Walter's condition was not congenital.

Representative Schneider said that, although this case did ultimately have a "happy ending," the process took almost two years to reach that ending.

In response to a question from Representative Amerman, Representative Schneider said issues related to the case and suggested changes in the system may include:

- Workforce Safety and Insurance should not have denied benefits unless there was evidence showing the condition was not work-related.
- The Office of Independent Review should be empowered to do more.
- The case took too long to ultimately be resolved. The case should never have gone past the reconsideration stage or Office of Independent Review stage.
- The notice of denial should be easier for a layperson to understand. The fine print is not consumer friendly.

Chairman Keiser called on Mr. Walter to discuss the issues relating to his case. Mr. Walter provided committee members with a timeline of events related to his case and his related comments ([Appendix C](#)).

Mr. Walter said issues related to his case and suggested changes in the system may include:

- The Office of Independent Review should be entirely independent of Workforce Safety and Insurance.
- Workforce Safety and Insurance should be required to adhere to strict time limits, just as the injured worker is required to do. This case took 582 days from the initial claim to the final decision. Additionally, Workforce Safety and Insurance has not been timely in paying medical bills.
- The tone of correspondence from Workforce Safety and Insurance to injured workers should be less adversarial.
- The fact that Workforce Safety and Insurance can reverse its own rulings at any time results in a poor relationship between Workforce Safety and Insurance and the injured worker.
- Mileage reimbursement should be changed to reflect the distance from the start of travel to the end of travel instead of from city limit to city limit.

In response to a question from Senator Wanzek, Mr. Walter said he consulted three physicians. He said the physician from the Twin Cities performed the independent medical examination. Mr. Walter said he disagrees with the independence of a physician who contracts to provide services to Workforce Safety and

Insurance; however, this independent physician agreed with Mr. Walter's treating physicians.

Senator Wanzek said in Mr. Walter's case it appears the correct steps were taken and the necessary evidence was present, but Workforce Safety and Insurance denied the claim anyway.

Chairman Keiser called on Mrs. Walter to comment on her husband's case. She said that, although she and her husband are college-educated, the workers' compensation system is very difficult to navigate. She said their distrust of Workforce Safety and Insurance is not fueled by the media, but by their own experience.

Mrs. Walter said she would like to see Workforce Safety and Insurance be required to do its research and investigation thoroughly and quickly at the beginning of a case instead of putting injured workers through the roller coaster ride of being denied, approved, terminated, and finally approved. She said she and her husband have endured a very difficult situation and she hopes their participation with the Workers' Compensation Review Committee will help so others do not have to go through what they have gone through.

Workforce Safety and Insurance

Chairman Keiser called on Mr. Wahlin to provide testimony regarding the issues raised by Mr. Walter, Representative Schneider, and Mrs. Walter. Mr. Wahlin reviewed NDCC Section 65-01-15.1(1), which provides:

Any condition or impairment of health of a full-time paid firefighter or law enforcement officer caused by lung or respiratory disease, hypertension, heart disease, or an exposure to a bloodborne pathogen as defined by section 23-07.5-01 occurring in the course of employment, or occupational cancer in a full-time paid firefighter, resulting in total or partial disability or death is presumed to have been suffered in the line of duty. The condition or impairment of health may not be attributed to any disease existing before that total or partial disability or death unless the contrary is shown by competent evidence.

Mr. Wahlin said the Workforce Safety and Insurance decision in Mr. Walter's case revolves around the last sentence of this law. Specifically, he said, the firefighter presumption law provides that Workforce Safety and Insurance must establish "competent evidence" to shift the burden back to the injured worker. He said Mr. Walter's case involves a very complex heart diagnosis and sometimes reaching the correct decision takes time.

Mr. Wahlin apologized to Mr. and Mrs. Walter that their experience with Workforce Safety and Insurance impacted them in such a personal way. However, he said, he is proud of how Workforce Safety and Insurance did the right thing and paid Mr. Walter his benefits upon receipt of the information that Mr. Walter's valvular condition was not congenital. He

said the driving force is not money, but to reach the correct decision.

Representative Keiser said he thinks there is a difference between Workforce Safety and Insurance raising a "possible cause" and Workforce Safety and Insurance establishing "competent evidence." He does not want the burden to be interpreted as allowing Workforce Safety and Insurance to shift the burden by establishing a "possible cause."

In response to a question from Senator Hacker, Mr. Wahlin said if the law used language such as "definitive evidence" or "clear and convincing evidence" instead of "competent evidence" Mr. Walter's case would have been treated differently.

Senator Wanzek said Workforce Safety and Insurance's interpretation of the law seems to contradict or nullify the presumption.

In response to a question from Representative Amerman, Mr. Wahlin said he is not aware of any random audit of Mr. Walter's case; however, it is likely that Workforce Safety and Insurance reviewed Mr. Walter's case because of the stark reversal of the diagnosis from being a congenital condition to a noncongenital condition.

In response to a question from Representative Keiser, Mr. Wahlin said he is not prepared to discuss provider payment issues. He said he would have to do additional research to address these issues.

In response to a question from Representative Schneider, Mr. Wahlin said he is not aware of Workforce Safety and Insurance providing heightened scrutiny to high-cost cases. He said that, although he does recognize that costs do matter and at the end of the day Workforce Safety and Insurance needs to balance the books, he does not think the costs associated with a case impair sure and certain relief.

In response to a question from Representative Schneider's question about whether there is anything stopping Workforce Safety and Insurance from terminating Mr. Walter's claim next week, next year, or some other time down the line, Mr. Wahlin responded that Mr. Walter's case will not be subject to an ongoing audit, but, if at some point additional information arises, Workforce Safety and Insurance will reevaluate Mr. Walter's case as appropriate.

Chairman Keiser requested that an attorney from Workforce Safety and Insurance work with Representative Schneider and committee counsel to address possible amendments to NDCC Section 65-01-15.1(1) to avoid other injured workers going through what Mr. and Mrs. Walter went through.

Public Comment

Chairman Keiser opened the meeting for comments from the public. He said the comments should focus on issues raised in the review of Mr. Walter's case.

Chairman Keiser called on Mr. David L. Kemnitz, North Dakota AFL-CIO, for comments regarding the committee's case review. Mr. Kemnitz said he takes issue with the state's workers' compensation law

requiring a higher burden of proof of injured workers than it requires of Workforce Safety and Insurance. He said NDCC Title 65 contains numerous examples of which the injured worker is held to a higher burden of proof than Workforce Safety and Insurance.

Chairman Keiser called on Mr. Sebald Vetter, CARE, for comments regarding the committee's case review. He expressed sympathy to Mr. and Mrs. Walter and the troubles they have gone through with their experiences with Workforce Safety and Insurance.

Mr. Vetter said that, like the Walters, other injured workers in the state live with the same fear of going to the mailbox because of the concern that Workforce Safety and Insurance will reverse an earlier decision.

Chairman Keiser called on Ms. Denise Locnikar, an injured worker from Fargo, for comments regarding the committee's case review. She said, if college-educated people like the Walters do not understand the workers' compensation law and legislators do not understand the workers' compensation law, imagine how difficult it is for the average person to understand the workers' compensation law.

Ms. Locnikar said the state's workers' compensation system works well for small injuries, but when it comes to serious injuries like hers and Mr. Walter's the system does not work well.

Chairman Keiser reminded Ms. Locnikar that she can go through the application process to have her case reviewed by the committee.

Chairman Keiser called on Senator Mathern for comments regarding the committee's case review. Senator Mathern said the state's workers' compensation system needs to address costs better. He said costs get transferred to the health care system and the welfare system and costs impact an injured worker's quality of life. He said the system needs to be modified to minimize this passing of costs.

Senator Wanzek said the issues with Workforce Safety and Insurance have been frustrating. He said hurtful things have been said about legislators, injured workers, and Workforce Safety and Insurance employees. It is important, he said, for everyone to remember that we are all trying to improve the system. The committee is a good forum to have open and honest discussions.

Chairman Keiser thanked Mr. and Mrs. Walter for coming before the committee to have Mr. Walter's case reviewed. He said this case review has been a perfect example of how the committee was designed to work.

No further business appearing, Chairman Keiser adjourned the meeting at 4:10 p.m.

Jennifer S. N. Clark
Committee Counsel

ATTACH:3