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## **WORKERS' COMPENSATION REVIEW COMMITTEE**

Tuesday, October 26, 2021  
Harvest Room, State Capitol  
Bismarck, North Dakota

Senator Scott Meyer, Chairman, called the meeting to order at 9:30 a.m.

**Members present:** Senators Scott Meyer, JoNell A. Bakke\*, Curt Kreun; Representative George Keiser

**Members absent:** Representatives Dan Ruby, Mary Schneider

**Others present:** See [Appendix A](#)

*\*Attended remotely*

**It was moved by Representative Keiser, seconded by Senator Kreun, and carried on a voice vote that the minutes of the September 8, 2021, meeting be approved as distributed.**

### **REPORTS**

Mr. Timothy J. Dawson, Director, Office of Administrative Hearings, provided a report ([Appendix B](#)) on the statistical information of the results under the case processing standards and policies.

Ms. Jodi Bjornson, General Counsel, Workforce Safety and Insurance, presented testimony ([Appendix C](#)) regarding the statistical information of the results under the case processing standards and policies. She noted Workforce Safety and Insurance (WSI) is very pleased with the fewer number of days it now takes for a decision to be issued by the Office of Administrative Hearings, the efforts the Office of Administrative Hearings has made to improve efficiency are appreciated, and the improvements have worked well.

### **PERFORMANCE EVALUATION**

Chairman Meyer called on Mr. Christopher S. Joseph, Counsel, Legislative Council, to review a bill draft [[23.0003.01000](#)] repealing the quadrennial performance evaluation of WSI. Mr. Joseph noted the performance evaluation of WSI was established by House Bill No. 1440 (1997) and is codified as North Dakota Century Code Section 65-02-30. He noted House Bill No. 1056 (2011) changed the frequency of the performance evaluation from every 2 years to every 4 years.

Committee members questioned whether there are other audit mechanisms of WSI if the performance evaluation is repealed. Mr. Joseph noted:

- WSI is subject to an annual financial audit in which the auditing firm is selected by the State Auditor through a formal bidding process.
- WSI has an internal audit department to plan, direct, and complete internal audits and compliance reviews.
- WSI statutorily is subject to review at the purview of the Legislative Audit and Fiscal Review Committee as well as the State Auditor.

**It was moved by Representative Keiser, seconded by Senator Kreun, and carried on a roll call vote that the bill draft [[23.0003.01000](#)] repealing the quadrennial performance evaluation of WSI be approved and recommended to the Legislative Management.** Senators Meyer, Bakke, and Kreun and Representative Keiser voted "aye." No negative votes were cast.

## CLAIM REVIEW

The committee reviewed two workers' compensation claims brought to the committee by injured workers for the purpose of determining whether changes should be made to the statutes relating to workers' compensation as provided for under Section 54-35-22. For each of the claim reviews, the committee received a summary by Ms. Patsy Peyerl, Constituency Services, Workforce Safety and Insurance, of the injured employee's claim; a presentation by the injured employee of the claim and issues; and a response by a representative of WSI.

### Bethany Poole

#### Claim Summary

Chairman Meyer called on Ms. Peyerl to provide a summary of Ms. Bethany Poole's workers' compensation claim. Ms. Peyerl noted:

- Ms. Poole was working as a clerk for Altru Health System when she filed a claim for right shoulder, arm, elbow, and hand pain that she attributed to frequent chart handling from which she developed symptoms over time.
- The claim was filed with a listed date of injury of May 8, 2009, and WSI accepted her claim for a right shoulder injury and paid associated medical benefits. The notice of decision accepting the claim was dated October 15, 2009.
- Ms. Poole was treated for a right shoulder, wrist, and lower arm injury with the diagnoses of bicipital tendonitis and right wrist tenosynovitis. Dr. David Schall, orthopedic surgeon with Valley Bone and Joint Clinic in Grand Forks, stated in a medical note dated July 8, 2010, the right shoulder bicipital tendonitis was resolved and declared Ms. Poole at maximum medical improvement at the July 8, 2010, office visit.
- Ms. Poole contacted WSI on September 9, 2020, with a request to reopen her WSI claim. Ms. Poole's claim was in presumed closed status in accordance with Section 65-05-35 because there was no activity for over 4 years.
- WSI completed an internal physician advisor medical review on December 10, 2020, which provided there is no objective medical evidence the May 8, 2009, work injury or job duties were the primary factor in Ms. Poole's current right shoulder treatment.
- WSI issued an administrative order denying the reopening of the presumed closed claim on May 18, 2021.
- Ms. Poole did not file an appeal and the decision to deny the reopening of the presumed closed claim became final.

#### Ms. Poole's testimony

Chairman Meyer called on Ms. Poole to review her claim and discuss the issues related to her claim. Ms. Poole noted:

- Her May 8, 2009, work injury was the primary factor in her cervical spine condition and her right shoulder treatment. The symptoms were the same and resurfaced with her job duties.
- WSI should get a second opinion from an orthopedic surgeon for more accurate medical advice and expertise.
- WSI seems to have an ongoing issue with receiving medical records from medical providers, which is not WSI's fault. However, when WSI is unable to get an injured worker's medical records from the provider, the burden should not fall on the injured worker to provide the records.

#### Workforce Safety and Insurance Response

Chairman Meyer called on Mr. Timothy Wahlin, Chief of Injury Services, Workforce Safety and Insurance to respond to the issues raised by Ms. Poole. Mr. Wahlin noted:

- Section 65-05-35 provides a claim for benefits is presumed closed if WSI has not paid any benefit for a period of 4 years and a claim is presumed closed may not be reopened for payment of any further benefits unless the presumption is rebutted by clear and convincing evidence the work injury is the primary cause of the current symptoms.
- WSI's internal physician advisor medical review and a second review performed by another WSI physician advisor provided there is no objective medical evidence Ms. Poole's May 8, 2009, work injury or job duties were the primary factor in her current right shoulder treatment or in her cervical spine condition.
- It is common for medical providers to have a third party provide recordkeeping services for them. These third parties often respond and provide copies of medical records to the patient much faster and with less

hassle than they would with a request for medical records from WSI, even when WSI provides a signed release from the injured worker.

### **LuQmaan Nasrullah**

#### **Claim Summary**

Chairman Meyer called on Ms. Peyerl to provide a summary of Mr. LuQmaan Nasrullah's workers' compensation claim. Ms. Peyerl noted:

- WSI accepted Mr. Nasrullah's claim for frostbite to the fingers on December 4, 2013. The injury occurred after working in extreme cold conditions while working as a flowback operator for his employer. The documented weather on the date in question was -8 degrees Fahrenheit. Initially, only medical benefits were paid on the claim.
- WSI began paying disability benefits on December 5, 2013, and paying alternating periods of temporary total disability and temporary partial disability benefits from that point on the claim. There were periods in which the employer could accommodate his restrictions, and periods during which the employer could not offer work. This resulted in either temporary total disability or temporary partial disability being paid by WSI.
- Vocational rehabilitation services were assigned to the claim to identify return-to-work options for Mr. Nasrullah. He had a functional capacity assessment on January 24, 2017. The results of the functional capacity assessment placed him in the light physical demand category. His preinjury job was not a match for the functional capacity assessment findings.
- On June 29, 2017, WSI issued a notice of vocational case management report with temporary partial disability benefits under a retained earnings capacity. Mr. Nasrullah was presumed to be capable of earning the greater of the state's hourly minimum wage times the hours of release or the wages payable within the appropriate labor market. His earnings capacity was \$290 per week.
- Mr. Nasrullah was to begin receiving temporary partial disability benefits on this retained earnings capacity as of August 29, 2017. His projected end date for temporary partial disability was January 30, 2021. He would be required to perform a good-faith work search as a condition of receiving temporary partial disability benefits.
- In September 2020, Mr. Nasrullah's legal counsel filed a petition for re-evaluation and reinstatement. His claim is he was not able to be successful in a work search or work trial, thus reinstatement was required. Workforce Safety and Insurance's Retained Earnings Capacity Committee concluded he did not meet the burden in proving his good-faith work search was not successful.
- An administrative law judge affirmed WSI's administrative order terminating partial disability benefits after January 30, 2021. No appeal was filed, and the decision became final.

#### **Mr. Nasrullah's Testimony**

Chairman Meyer called on Mr. Nasrullah to review his claim and discuss the issues related to his claim. Mr. Nasrullah noted:

- When it comes to his benefits, he has been set up to fail because of his injury. His hands are too severely injured and deformed for him to seek employment in good faith. Prospective employers view him as a potential liability instead of an asset.
- The WSI process is not ideal for injured workers who cannot get back to work after their injury. The process was designed to protect WSI and employers, with no regard for the injured worker.
- WSI should have a program assisting permanently injured workers in finding employment.
- WSI should be an independent entity.

#### **Workforce Safety and Insurance Response**

Chairman Meyer called on Mr. Wahlin to respond to the issues raised by Mr. Nasrullah. Mr. Wahlin noted:

- Section 65-05-10 provides benefits must be paid during the continuance of partial disability, not to exceed a period of 5 years.
- Mr. Nasrullah was evaluated and the medical specialist rated him at 0 percent, whole-person impairment. The rating system in North Dakota starts with awards beginning at 14 percent. Section 65-05.1-01 pertains to rehabilitation services and it is the goal of vocational rehabilitation to return the injured worker to substantial gainful employment with a minimum of retraining as soon as possible after an injury occurs.

- Mr. Nasrullah's 5-year eligibility for temporary partial disability benefits ended on January 30, 2021, in accordance with his vocational plan issued back on September 1, 2017.
- Mr. Nasrullah did not prove a good-faith work search or that the work trial was unsuccessful.

No further business appearing, Chairman Meyer adjourned the meeting at 1:15 p.m.

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Christopher S. Joseph  
Counsel

ATTACH:3