

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Wednesday, August 21, 2013
Harvest Room, State Capitol
Bismarck, North Dakota

Senator Lonnie J. Laffen, Chairman, called the meeting to order at 2:00 p.m.

Members present: Senators Lonnie J. Laffen, Tom Campbell, George B. Sinner; Representatives Bill Amerman, Curtiss Kreun, Gary R. Sukut

Others present: See [Appendix A](#)

Chairman Laffen welcomed the committee members, representatives of Workforce Safety and Insurance (WSI), and interested persons. He called on Committee Counsel to review the [Supplementary Rules of Operation and Procedure of the North Dakota Legislative Management](#).

Committee Counsel stated the Workers' Compensation Review Committee is a statutory committee, created under North Dakota Century Code Section 54-35-22, and therefore differs slightly from the typical Legislative Management interim committee. However, she said, the statute provides the "committee shall operate according to the laws and procedures governing the operation of other legislative management interim committees."

CLAIM REVIEW

At the request of Chairman Laffen, Committee Counsel reviewed the procedure and application forms used by the Workers' Compensation Review Committee during the 2011-12 interim. She distributed a copy of the application packet ([Appendix B](#)) used during the 2011-12 interim and a copy of the letter ([Appendix C](#)) sent to members of the Legislative Assembly to notify them of the activities of the Workers' Compensation Review Committee.

Committee Counsel said if the committee follows the pattern of the previous Workers' Compensation Review Committees, it is likely the committee will be scheduling meetings across the state to accommodate injured employees having their claims reviewed.

In reviewing the application procedure, Committee Counsel said the proposed application packet includes a cover letter explaining the application process and eligibility requirements, a copy of Section 54-35-22, a "Release of Information and Authorization" form, and a "Review Issue Summary" form.

Committee Counsel reviewed Section 54-35-22, including the statutory requirement the committee meet once each calendar quarter or less often if the committee Chairman determines that meeting is not necessary because there are no claims to review, the statutory eligibility requirements for claim review, the open meeting provisions, and the confidentiality provisions. She said traditionally the committee has considered how best to notify the public of the committee's activities in order to solicit injured employees to have their claims reviewed and has recognized there are confidentiality issues and discussed how to protect the confidentiality of the WSI records of injured employees.

Committee Counsel said in the past the committee has posted the application packet on the legislative branch website, informed the AFL-CIO, WSI, and the State Bar Association of North Dakota of the online application packet, and notified all legislators of the committee's charge. Additionally, she said, during previous interims the committee has made an affirmative decision to hold committee hearings near the location of the injured employees having their claims reviewed by the committee. She said in considering whether steps could be taken to improve notification, the committee may wish to consider also notifying the North Dakota Chamber of Commerce and individuals who have been active in helping injured employees who have workers' compensation issues.

Committee Counsel said in the past the committee adopted the following procedure to determine eligibility for claim review and to prepare the injured employee for the committee meeting at which the claim was reviewed:

1. An injured employee would submit to the Legislative Council office a complete "Release of Information and Authorization" form. In addition, the applicant could submit a "Review Issue Summary" form on which the applicant could summarize the issues the applicant wanted the committee to review.
2. Upon receipt of a completed application, the Legislative Council staff forwarded a copy of the application information to an assigned ombudsman at WSI who reviewed the application to make a recommendation regarding whether:
 - a. The applicant was an injured employee or the survivor of an injured employee;
 - b. The workers' compensation claim was final; and
 - c. All of the administrative and judicial appeals were exhausted or the period for appeal had expired.
3. Following this review, the WSI ombudsman contacted Committee Counsel to provide a recommendation regarding eligibility for review. Upon receipt of this recommendation, Committee Counsel contacted the committee Chairman to make a determination of eligibility.
4. Upon a determination of eligibility, the injured employee was contacted by Committee Counsel and the ombudsman to begin the case preparation.
 - a. Regardless of whether the injured employee accepted the assistance of the ombudsman, the ombudsman prepared a summary of the case to present at the committee meeting.
 - b. At the injured employee's discretion, the ombudsman assisted the applicant in organizing the issues for review.
 - c. The ombudsman prepared a case review packet and included this in a binder of information prepared for each committee member, Committee Counsel, and a WSI representative. Although these binders were distributed at each committee meeting, they remained the property of WSI and were returned at the completion of each committee meeting.
5. Before each committee meeting the ombudsman met with Committee Counsel to review the case summary and workers' compensation issues being raised.
6. Upon receipt of these workers' compensation issues, Committee Counsel notified the WSI representative of the identity of the injured employee who would be appearing before the committee for a case review and, as appropriate, the statutory citations of the basic issues being raised by the injured employee.

Committee Counsel reviewed the committee meeting procedure that has been followed during previous interims. She said for each claim reviewed by the committee:

1. Committee members had an opportunity before and during each committee meeting to review the binder of case review packets and to review each injured employee's WSI electronic records.
2. The ombudsman summarized the injured employee's case.
3. The committee received a list of the workers' compensation issues brought forward for review. At the discretion of the injured employee, these issues were presented by the ombudsman, the injured employee, a representative of the injured employee, or more than one of these individuals.
4. One or more representatives of WSI commented on the workers' compensation issues raised.
5. Interested persons were invited to comment on the workers' compensation issues raised as part of the claim review.
6. Committee members had an opportunity to discuss the issues raised.

Committee Counsel said historically each of the claims reviewed is allocated a half day--either the morning, afternoon, or evening portion of the committee meeting--during which the initial review is conducted. Following the initial review, the committee retains the authority to continue to discuss the issues raised as part of the review. Periodically, the committee would request additional information on specific issues and review this information at one or more future meetings. During each committee meeting at which claims are reviewed, a WSI representative was available to access the injured employees' records electronically.

Committee Counsel said traditionally the role of the WSI ombudsman has been filled by Mr. Chuck Kocher, the WSI representative role has been filled by Mr. Timothy Wahlin, and the role of providing WSI electronic records has been provided by Ms. Patsy Peyerl. The committee members were introduced to these three representatives of WSI.

Committee Counsel said the committee reviewed 11 claims during the 2005-06 interim, 15 claims during the 2007-08 interim, 4 claims during the 2009-10 interim, and 2 claims during the 2011-12 interim.

In response to a question from Senator Laffen, Representative Sukut said during the 2011-12 interim when he was Chairman of the committee, the committee recommended several bill drafts related to one of the injured employees who had their claims reviewed. Representative Amerman said during his time on the committee, it has been common to have bill drafts that tweak the state's workers' compensation system to make improvements, and it is also common for WSI to respond to issues raised without requiring legislation.

In response to a question from Senator Sinner, Representative Sukut said although he is not certain why the number of claims being reviewed is decreasing, it is possible that when the committee was first created the claimants thought the claim review process would change the outcome of their claims and, perhaps over the years, there has been a better understanding that the purpose of the committee is to evaluate the state's workers' compensation laws. He said it is important to continue to have ongoing discussions to consider better ways to inform claimants of the opportunity to appear before the committee. Senator Laffen said perhaps the numbers have decreased because there are fewer workers' compensation issues that need to be addressed.

Senator Sinner stated perhaps the committee's role would be clearer to the public if the committee used different words to describe the committee activities, such as referring to "law review" or "review of the law" instead of "claim review." He also questioned whether the Legislative Council tracked the number of times the online application for claim review has been downloaded from the website.

In response to a question from Senator Laffen, Mr. Wahlin said the notice of appeal WSI sends to claimants does not reference the Workers' Compensation Review Committee, but the WSI website does link to the application on the legislative branch website.

Senator Sinner said he would like WSI to take some additional action to notify the public of the committee's activities. Additionally, he said, he would like the Legislative Council to keep a list of the number of applications it mails.

Mr. Stephen Little, Attorney, Bismarck, said of the approximately 35,000 initial denials WSI issues each year, fewer than 1,000 make it to the Decision Review Office (DRO) stage. Additionally, he said, there are only a handful of attorneys in the state who practice in the area of workers' compensation; therefore, perhaps it would work well to contact those attorneys and inform them of the committee's activities.

Representative Kreun said the committee needs to be careful to be clear the claim review performed by the committee is not designed to change the outcome of the workers' compensation claim.

In response to a question from Senator Laffen, Mr. Wahlin said the application forms the committee has used in the past have worked fine.

Chairman Laffen said he will direct Committee Counsel to continue to do what has been done in the past, as well as notify the North Dakota attorneys who practice workers' compensation law.

REPORTS AND STUDY

Chairman Laffen called on Committee Counsel to review the committee's charge to receive reports and the study charge. She said the committee is charged with receiving the following reports:

1. A report from the Director of WSI, the Chairman of the WSI Board of Directors, and the audit firm regarding the quadrennial performance evaluation of WSI and select no more than four elements for inclusion in the performance evaluation (Section 65-02-30);
2. A biennial report from WSI regarding compiled data relating to safety grants issued under Chapter 65-03 (Section 65-03-05);

3. An annual report from WSI which includes reports on pilot programs to assess alternative methods of providing rehabilitation services (Section 65-05.1-06.3); and
4. A report from WSI on recommendations based on a biennial safety review of Roughrider Industries work programs and a biennial performance review of the program of modified workers' compensation coverage by WSI (Section 65-06.2-09).

Committee Counsel said as a result of amendments made to Section 65-02-30--providing the WSI performance evaluation is performed quadrennially instead of biennially--this interim the committee will be selecting elements to be included in the performance evaluation. She said next interim the committee will not select elements.

Additionally, Committee Counsel said [2011 House Bill No. 1051](#) directs the committee to study the WSI preferred provider program created under Sections 65-05-28.1 and 65-05-28.2. She said the study charge provides the committee may conduct this study by including it as one of the four elements the committee selects to be included in the WSI independent performance evaluation that will be conducted during this interim.

BACKGROUND

Chairman Laffen called on Mr. Bryan Klipfel, Executive Director and CEO, Workforce Safety and Insurance, to provide an overview of WSI as well as WSI trends and initiatives. Mr. Klipfel provided written testimony ([Appendix D](#)).

Mr. Klipfel said WSI has been an active participant in the committee's activities and, without need for legislation, has changed some of WSI's protocols as a result of issues raised at the committee meetings. For example, he said, as a result of concerns raised in committee, in addition to issuing written notice, WSI now also calls injured employees to inform them if benefits will be ceasing. Additionally, WSI has reviewed the forms it uses for its notices and has taken steps to make them easier to understand.

In response to a question from Senator Sinner, Mr. Klipfel said an employer's experience rating impacts that employer's premium; with a higher frequency of claims resulting in a higher premium.

In response to a question from Representative Amerman, Mr. Klipfel said WSI's increasing use of nonbenefited employees is a bad situation. He said although the wages of a nonbenefited employee are typically more than those of a full-time equivalent (FTE) employee, WSI saves money by not paying benefits for these nonbenefited employees.

In response to a question from Senator Laffen, Mr. Klipfel said there has been a 40.3 percent increase in benefits over the last five years which has resulted from WSI's cost of living adjustments (COLAs). He said if the cost of living in North Dakota should go down in some future year, WSI will not decrease benefits. He said as WSI sets premium rates and considers reserves, anticipated COLAs are taken into account.

In response to a question from Senator Sinner, Mr. Klipfel said at a future meeting he will provide the committee with information regarding the WSI safety programs.

In response to a question from Representative Amerman, Mr. Klipfel said nonbenefited employees at WSI fill a variety of roles, including vocational rehabilitation, customer service, and claims analysts.

2013 LEGISLATION

Chairman Laffen called on Ms. Jodi Bjornson, General Counsel, Workforce Safety and Insurance, to provide a review of the 2013 workers' compensation-related legislation. Ms. Bjornson provided written material ([Appendix E](#)).

In response to a question from Senator Sinner, Ms. Bjornson said WSI does not have a capture code on how many claimants are impacted by 2013 House Bill No. 1080. She said she will provide the committee with more information on this matter.

PERFORMANCE EVALUATON

Chairman Laffen called on Mr. Gordy Smith, Audit Manager, State Auditor's office, for an overview of the quadrennial WSI performance evaluation and elements that will be included in the 2014 performance evaluation. Mr. Smith provided written testimony ([Appendix F](#)).

Mr. Smith said the State Auditor will be including the following four elements in the WSI performance evaluation:

1. Independent medical evaluations (IMEs), including a review and documentation of the entire IME process; an analytical review and sampling of the overall number of lost time claims; and analyzing and reporting on the percentage of times an IME was included for lost time claims; determining the total costs made to IME physicians and other third parties related to IMEs; reviewing and documenting the process WSI follows to recruit IME physicians and determining if WSI is following relevant state statutes; and determining the percentage of times the IMEs were conducted by North Dakota physicians.
2. Fraud investigations, including a review and documentation of the processes WSI uses to detect and investigate employer fraud, employee fraud, and medical provider fraud; identifying the WSI divisions specifically responsible for investigating employer, employee, and provider fraud; determining if WSI uses any specialized software to help identify potential employer, employee, and medical provider fraud; ascertaining if WSI provides sufficient training to all appropriate employees regarding the identification and investigation of fraud; identifying and reviewing the number of investigations of each type of fraud; determining if WSI is using any key performance indicators to create a formalized evaluation process for fraud investigations; and comparing WSI's return on investment for fraud investigations.
3. Claims, including evaluating the appeals process available to claimants; sampling denied claims submitted to the DRO; evaluating if WSI's adjustments to its initial denial rate are comprised of incident-only events or if other factors are involved; and reviewing trend information and conducting analysis on the number of claims filed for each year covered by the performance evaluation.
4. Vocational rehabilitation, including determining if WSI has sufficient policies and procedures established to guide the staff and to establish protocol to ensure consistent, quality services for the return-to-work injured employees; evaluating if WSI performance measures are in place to routinely evaluate the performance of the vocational rehabilitation division; selecting a minimum sample of claims in which the claimant required return-to-work services and determining if WSI appropriately met its responsibilities and related timelines; and determining how WSI compares with other workers' compensation systems in returning injured employees to the workforce.

Mr. Smith said the performance evaluation will provide the consultant report to the Workers' Compensation Review Committee in August 2014.

In response to a question from Senator Sinner, Mr. Smith said WSI's IME physicians disagree with the injured employee's treating physician 65 percent of the time. He said it is difficult to read into this data, and it is important to remember that approximately 15 percent of the IMEs are conducted by North Dakota physicians. Additionally, he said, he can revise the IME performance evaluation element to include consideration of whether the claim includes more than one IME and consideration of the physicians' specialties.

In response to a question from Senator Laffen, Mr. Smith said in one of the first WSI performance evaluations a North Dakota firm was awarded the contract.

Chairman Laffen called on Mr. Klipfel to present information regarding the status of the most recent WSI performance evaluation. He provided written testimony ([Appendix G](#)).

In response to a question from Senator Sinner, Mr. Klipfel said of the 50 performance evaluation recommendations, some of the recommendations that were closed out were not actually successfully implemented, such as the unsuccessful bill addressing narcotic use. He said he will provide Committee Counsel with a more detailed status report on the recommendations.

Chairman Laffen called on Mr. Wahlin to present the committee with proposed elements for inclusion in the 2014 WSI performance evaluation. He provided written testimony ([Appendix H](#)).

It was moved by Representative Sukut, seconded by Representative Kreun, and passed on a voice vote that the committee address its study of House Bill No. 1051 by including it as one of the four elements selected by the committee for inclusion in the WSI performance evaluation.

In response to a question from Senator Laffen, Mr. Wahlin said the WSI COLA is based on North Dakota wages and is not based on the physical residence of the injured employee.

In response to a question from Representative Kreun, Mr. Wahlin said, over the years, the issue of posttraumatic stress disorder (PTSD) has been discussed in a variety of different ways through the introduction of a variety of bills.

In response to a question from Senator Campbell, Mr. Wahlin said if the committee selected the wellness topic for inclusion in the performance evaluation, it would help quantify the impact of wellness issues, such as obesity.

In response to a question from Senator Sinner, Mr. Wahlin said if the wellness topic is selected for inclusion, he envisions the performance evaluation recommendations might address whether wellness issues could be addressed through premium rates or possibly through other mechanisms.

In response to a question from Representative Amerman, Mr. Wahlin said North Dakota provides very narrow workers' compensation coverage of PTSD.

In response to a question from Senator Sinner, Mr. Wahlin said WSI provides coverage for North Dakota National Guard members for in-state deployment but does not cover overseas deployment.

Senator Laffen said he is concerned the COLA adjuster WSI uses may be faulty. He said he thinks the adjustment should recognize cost decreases as well as cost increases.

Senator Campbell suggested the committee select the topics of narcotics, wellness, and COLA. Senator Laffen suggested selection of the topics of narcotics, appeals, and COLA.

In response to requests from Representative Amerman and Senator Sinner, Mr. Smith said he will expand the State Auditor's WSI performance evaluation element relating to claims to include consideration of the use of nonbenefited employees as claims adjusters and to include consideration of the use of administrative law judges for WSI administrative appeals.

Senator Laffen said with the State Auditor addressing the use of administrative law judges as part of the claim topic, he suggests selecting narcotics and then two of the following topics--wellness, PTSD, and COLA. Senator Campbell said he supports selection of wellness. Senator Sinner said he supports selection of PTSD.

It was moved by Senator Sinner, seconded by Representative Sukut, and carried on a roll call vote that the committee select the following four topics for inclusion in the WSI performance evaluation--House Bill No. 1051, COLA, narcotics, and PTSD. Senators Laffen, Campbell, and Sinner and Representatives Amerman, Kreun, and Sukut voted aye. No negative votes were cast.

No further business appearing, Chairman Laffen adjourned the meeting at 5:07 p.m.

Jennifer S. N. Clark
Committee Counsel

ATTACH:8