

WORKERS' COMPENSATION REVIEW COMMITTEE

North Dakota Century Code (NDCC) Section 54-35-22 establishes the Workers' Compensation Review Committee. The committee is directed by law to review workers' compensation claims brought to the committee for the purpose of determining whether changes should be made to the workers' compensation laws.

North Dakota Century Code Section 54-35-22 establishes the membership of the six-member committee as follows: two members of the Senate who are appointed by the majority leader of the Senate, one member of the Senate who is appointed by the minority leader of the Senate, two members of the House of Representatives who are appointed by the majority leader of the House of Representatives, and one member of the House of Representatives who is appointed by the minority leader of the House of Representatives. The chairman of the Legislative Council designated the chairman of the committee. Committee members were Representatives George J. Keiser (Chairman), Bill Amerman, and Nancy Johnson and Senators Duaine C. Espgaard, Joel C. Heitkamp, and Jerry Klein.

The committee submitted this report to the Legislative Council at the biennial meeting of the Council in November 2006. The Council accepted the report for submission to the 60th Legislative Assembly.

BACKGROUND

General Background

The state laws addressing workers' compensation in North Dakota are primarily found in NDCC Title 65. The administrative rules adopted by Workforce Safety and Insurance (WSI) are found in North Dakota Administrative Code Title 92. Additionally, Article X, Section 12, of the Constitution of North Dakota specifically addresses the state's workers' compensation agency, essentially providing for a constitutional continuing appropriation to the workmen's compensation fund for the purpose of paying workers' compensation benefits.

North Dakota Century Code Section 54-35-22 became effective August 1, 2005, and remains in effect through July 31, 2007. The committee must meet once each calendar quarter unless the committee chairman determines a meeting that quarter is not necessary because there is no claim to review. The committee is required to operate according to the laws and procedures governing the operation of other Legislative Council interim committees. The committee followed the typical interim calendar.

2005-06 Interim

Although the Workers' Compensation Review Committee was the only interim committee specifically charged with studying a workers' compensation-related issue, the following committees were charged with receiving audits and reports from WSI during the 2005-06 interim:

Legislative Audit and Fiscal Review Committee

The Legislative Audit and Fiscal Review Committee was charged with receiving annual reports from the executive director of WSI and the chairman of the WSI Board of Directors under NDCC Section 65-02-03.3 and with receiving a report from the executive director of WSI, chairman of the WSI Board of Directors, and the auditor regarding the biennial performance audit of WSI under Section 65-02-30.

Budget Section

The Budget Section was charged with receiving a biennial report from WSI on all revenues deposited in and expenditures from the building maintenance account of the WSI fund under NDCC Section 65-02-05.1 and with receiving periodic reports from WSI and the Risk Management Division of the Office of Management and Budget on the success of a single workers' compensation account for state entities covered by Chapter 32-12.2 under Section 65-04-03.1.

Industry, Business, and Labor Committee

The interim Industry, Business, and Labor Committee was charged with receiving from WSI a safety audit of the Roughrider Industries work program and performance audit of the program of modified workers' compensation coverage under NDCC Section 65-06.2-09.

Previous Interims

2003-04 Interim

The Legislative Council chairman directed the Commerce Committee to receive a report from WSI regarding the 2004 rate increase proposed by WSI and projections for future rate assignments. The committee did not recommend any bill in response to the report.

House Concurrent Resolution No. 3050 (2003) would have provided for a study of the equity of the current system for awarding workers' compensation death benefits and the feasibility and desirability of creating a death benefit investment system. The Legislative Council did not give priority to this study.

2001-02 Interim

House Concurrent Resolution No. 3064 (2001) would have provided for a study of workers' compensation fraud by employers, employees, attorneys, health care providers, and rehabilitation service providers in order to identify the financial impact of such fraud on the workers' compensation fund, the most appropriate method of addressing such fraud, and the cost of addressing such fraud. The Legislative Council did not give priority to this study.

1999-2000 Interim

Section 3 of House Bill No. 1422 (1999) provided for the Legislative Council to receive a report from the Workers' Compensation Bureau regarding recommendations from the bureau's study of the awards

provided to injured employees with permanent impairments caused by compensable work injuries. The interim Commerce and Labor Committee received this report and did not recommend any bill in response to the information received.

Section 5 of Senate Bill No. 2214 (1999) provided for the Legislative Council to receive a report from the Workers Compensation Bureau regarding the recommendations from the bureau's study of the benefits available to persons receiving long-term disability or death benefits from the bureau. The Commerce and Labor Committee received this report and did not recommend any bill in response to the information received.

1995-96 Interim

Section 3 of Senate Bill No. 2403 (1995) provided for a Legislative Council study of the feasibility and desirability of the Workers Compensation Bureau establishing a system through which injured employees whose disability benefits cease upon reaching retirement age under House Bill No. 1228 (1995) would receive a pension or an annuity in lieu of further disability benefits and a review of the different methods through which the pension or annuity would be established and paid, who would be responsible for administering the pension or annuity, and to which injured employees the pension or annuity would be paid. The Commerce Committee did not recommend any bill as a result of this study.

PROCEDURE ESTABLISHED

The committee began the interim by establishing a procedure for conducting its charge. The committee designed an application packet, which included a cover letter explaining the application process and eligibility requirements, a copy of NDCC Section 54-35-22, a "Release of Information and Authorization" form, and a "Review Issue Summary" form. In preparing this application packet, the committee discussed the importance that applicants understand the case review process is not a forum for appeal. Additionally, the committee determined for purposes of the committee's activities a survivor of an injured employee would qualify as an injured employee and would be eligible to apply for case review.

The committee discussed how best to notify injured employees of the committee's activities. The application forms were made available online on the Legislative Council's web site. The committee received testimony that Concerned Advocates Rights for Employees (CARE) is an association in the state which could notify injured employees; however, this association generally works with active claims. A representative of the North Dakota AFL-CIO testified the organization would try to distribute application forms as appropriate.

The committee made an affirmative decision to attempt to hold committee hearings around the state as may be appropriate to accommodate the location of the injured employees having their cases reviewed by the committee. The committee received testimony raising the concern that once an injured employee's case

becomes final, the injured employee may not have any incentive to appear before the committee.

The committee recognized the personal nature of the case reviews and made a determination that the committee members, a representative of WSI, and interested persons should not raise or discuss nonpertinent details of an injured employee's workers' compensation record.

The committee discussed whether steps could be taken to assist an injured employee in organizing and presenting the employee's case for review. The committee considered the concern that injured employees do not have the high technical level of expertise held by the lawyers and other professionals of WSI, resulting in what could turn out to be an unfair playing field for case reviews.

The committee requested \$10,000 from the Legislative Council to provide \$500 per injured employee for the purpose of allowing the injured employee to pay a third party for assistance in organizing and clarifying the case to be brought forward to the committee. The chairman of the Legislative Council denied this request.

In addressing the issue of how to help an injured employee summarize workers' compensation issues for a case review, the executive director of WSI offered the assistance of an employee of the WSI Office of Independent Review to serve as an ombudsman to assist injured employees in preparing their cases for review by the committee. A representative of the North Dakota AFL-CIO testified in support of having the employee of the Office of Independent Review serve as an ombudsman to assist in case preparation and suggested the committee should provide the ombudsman with specific instructions and expectations.

The committee accepted the offer of the executive director of WSI and utilized the services of this ombudsman for each of the 11 cases reviewed by the committee. The committee chairman and committee counsel worked with the ombudsman to establish a procedure that was used throughout the interim. As part of this procedure, the executive director of WSI identified an employee of WSI who would serve as the primary respondent to the workers' compensation issues raised by the injured employees.

The following procedure was followed to determine eligibility for a case review and to prepare for the committee meeting at which the case 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 the ombudsman, 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 ombudsman contacted the Legislative Council staff to provide a recommendation regarding eligibility for review. Upon receipt of this recommendation, the Legislative Council staff contacted the committee chairman to make a determination of eligibility.
4. Upon a determination of eligibility, the injured employee was contacted by the ombudsman to begin the case preparation. Injured employees had a choice of whether to work with the ombudsman.
 - a. Regardless of whether the injured worker 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 the representative of WSI. Although these binders were distributed at each committee meeting, they remained the property of the Office of Independent Review and were returned to the ombudsman 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 representative of WSI of the:
 - a. Identity of the injured employee who would be appearing before the committee for a case review; and
 - b. Statutory cites of the basic issues being raised by the injured employee.

The committee established the following committee meeting procedure, which was followed for each of the 11 cases 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. The binder also contained a copy of NDCC Title 65.
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 case review.
6. The committee members had an opportunity to discuss the issues raised.

Each of the 11 cases reviewed was allocated a half-day, either the morning or the afternoon portion of a committee meeting, during which the initial review was conducted. Following the initial review, the committee retained the authority to continue to discuss 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 cases were reviewed, a representative of WSI was available to access the injured employee's workers' compensation records electronically.

CLAIMS REVIEWED

The committee held seven meetings. The first meeting was primarily devoted to establishing the case review procedure; the second meeting reviewed the first case; the third meeting reviewed the second and third cases; the fourth meeting reviewed the fourth, fifth, sixth, and seventh cases; the fifth meeting was committed to committee work; the sixth meeting reviewed the eighth, ninth, tenth, and eleventh cases; and the seventh meeting was primarily devoted to concluding the work of considering issues raised in the case reviews, including the consideration of bill drafts.

First Case

Case Summary

The following is a chronological list of events of the injured employee's workers' compensation case:

- September 1991 - The injured employee incurred a compensable work-related injury. The injured employee returned to work and experienced a worsening in her medical condition until June 2002, at which point the injured employee could no longer work due to the work-related injury incurred in 1991. In September 2003, WSI declared the injured employee was permanently and totally disabled.
- December 1, 2005 - The Workers' Compensation Review Committee reviewed the injured employee's case. At the time of review, the injured employee's monthly workers' compensation disability benefits and Social Security widow's benefits were approximately \$1,684.
- December 31, 2005 - Workers' compensation disability benefits terminated due to the workers' compensation retirement presumption and workers' compensation additional benefits payable began. The injured employee's monthly additional benefits payable and Social Security widow's benefits were estimated to be approximately

\$768. October 2010 is the estimated date upon which the additional benefits payable will terminate.

Issues for Review

The injured employee's workers' compensation issue was that she disagreed with the application of the retirement presumption law to her claim. Because her injury date was in 1991 and the retirement presumption law was not enacted until 1995, the 1995 law should not apply to her situation. The fact she had a break in the continuous flow of disability benefits after July 31, 1995, should not jeopardize her ongoing disability benefits as long as she remains disabled and unable to work due to the 1991 injury. The date of injury should be the deciding factor in determining which benefits structure applies.

The injured employee brought forward the following points in support of her issue:

1. The current system penalizes injured employees who are motivated and make every effort to go back and work. In a comparable case study in which there is a different outcome, a hypothetical employee was injured before the retirement presumption went into effect in 1995; however, since the date of injury, this hypothetical injured employee maintained that she was totally disabled and unable to return to work and as a result retained her disability benefits through the present date even though she is over age 65. Because this hypothetical injured employee had no break in her disability benefit payments after July 31, 1995, she will be able to qualify for ongoing disability benefits into the future and will not be impacted by the retirement presumption law.
2. Workforce Safety and Insurance should remain the responsible government entity to provide her with the necessary financial assistance that will allow her to pay her bills and maintain a reasonable livelihood. Up until her injury in 1991, the injured employee had been setting aside money for retirement; however, following her injury and the illness and death of her husband, she was forced to drain these retirement savings. Her ability to work and earn a living and to establish retirement savings has been compromised by her work-related injury. The termination of disability benefits effective December 31, 2005, puts her in a very difficult financial position. In preparation for the reduction in income that will become effective January 1, 2006, the injured employee went through bankruptcy proceedings and she will need to apply for public assistance. There will be a cost-shifting of her financial needs to other government programs.

Workforce Safety and Insurance Response

The representative of WSI provided a brief legislative and judicial history of the workers' compensation retirement presumption law. The WSI representative

testified that in 1995 the workers' compensation fund was \$240 million in debt. In 1995 the Legislative Assembly enacted a statutory presumption that an injured employee who becomes eligible for Social Security retirement benefits is considered retired and therefore no longer eligible for workers' compensation disability benefits. This retirement presumption is addressed under NDCC Section 65-05-09.3(2). The legislation creating this presumption became effective on August 1, 1995, and as enacted applied to all injured workers regardless of the date of injury. Legislative history indicated the retirement presumption was enacted to provide an initial savings reduction in benefits of \$35 million and ongoing savings to the fund of \$2 million to \$5 million per year.

In 1997 the Legislative Assembly amended the retirement presumption law and created an additional benefit payable for injured employees whose disability benefits were canceled due to the retirement presumption. The additional benefits payable benefit is computed as a percentage of the workers' compensation weekly disability benefit and is based on the length of time the injured employee received these disability benefit payments.

Additionally, following the enactment of the 1995 retirement presumption law, two cases began working their way through the court system. In 1998 the North Dakota Supreme Court issued decisions in these two cases, providing that the 1995 amendments did not apply to injured employees who were receiving permanent total disability benefits before August 1, 1995. The North Dakota Supreme Court ruled there is a constitutional protection for the injured employee's expectation of ongoing benefits. It is because of these two Supreme Court cases that under the hypothetical case raised by the injured employee, the hypothetical injured employee receives full benefits even after reaching retirement age.

If an injured employee is continuously receiving workers' compensation disability benefits, the North Dakota Supreme Court determined that the retirement presumption does not apply; however, if an injured employee has been in and out of receipt of workers' compensation disability benefits, the retirement presumption under NDCC Section 65-05-09.3 applies.

The WSI representative testified WSI research indicates there is an estimated \$40 million pricetag associated with granting the injured employee's request if this class of injured employees avoids the retirement presumption and continue to receive full workers' compensation disability benefits. Approximately 101 to 103 injured employees appear to be in a similar situation as the injured employee appearing before the committee.

The \$40 million figure was based upon the cost to the fund projected until the time of death of the injured employees. These costs would come directly out of the WSI reserve fund and would not be charged back to the injured employees' past employers.

Comments by Interested Persons

A representative of CARE testified bills were introduced in past legislative sessions to address these retirement presumption issues but the bills were defeated. Testimony of interested persons questioned the validity of the \$40 million pricetag, and there was testimony that if the \$40 million pricetag is accurate, the correct response is to increase premiums to help the injured employees.

Concern was raised that although health insurance premium rates have been going up, workers' compensation premiums have not been going up in North Dakota. The explanation posed for this inconsistency was that instead of raising workers' compensation premiums, the injured employee benefits were lowered.

The committee received testimony from a representative of the North Dakota AFL-CIO stating the adversarial business of insurance impacts WSI decisions of whether to make an award. Under the state's workers' compensation system, the injured employee is put in the position of having to maximize a claim's potential by requesting the maximum amounts and types of benefits for which the injured employee may be eligible because if the injured employee does not do this, the injured employee loses and WSI wins by accomplishing its goal of limiting liability. The bottom line is that WSI works for the WSI Board of Directors, which has the goal of limiting liability.

Second Case

Case Summary

The following is a chronological list of events of the injured employee's workers' compensation case:

- January 28, 2005 - The injured employee filed an application for workers' compensation benefits in connection with a heart condition. The injured employee was a full-time paid firefighter whose annual physical, required of firefighter personnel, produced results indicating she had a heart condition, the result of which made her ineligible to work as a firefighter.
- February 17, 2005 - The injured employee's physician examined her and indicated her tests did not show any heart condition. The physician cleared the injured employee to return to work without restrictions.
- February 25, 2005 - Workforce Safety and Insurance issued a notice of decision dismissing the application, indicating the injured employee did not establish that she sustained a compensable injury by accident arising out of and in the course of her employment. The injured employee requested reconsideration of the decision, but WSI did not change its decision. The injured employee filed an untimely appeal and the denial decision became final.

Issues for Review

The injured employee's workers' compensation issues were that her temporary disability should have qualified as a compensable injury by accident arising out

of and in the course of her employment; if WSI denies a claim, WSI should have to provide the injured employee sufficient information regarding why the claim was denied so that the injured employee can take any necessary actions to correct any mistakes that might have been made; and she should have been given a longer period to appeal the WSI decision.

The injured employee brought forward the following points in support of her issues:

- The injured employee used 107 hours of sick leave, incurred medical expenses, and used 12 hours of family leave in order to accommodate her time off work. Until she received the medical determination that the initial test was a "false positive," she was required to behave as if she had a heart condition.
- If a firefighter ignores a bad test and it turns out to be a real heart event, that firefighter not only puts the firefighter but the firefighter's coworkers in danger. To make matters worse, if a firefighter refuses to take a physical provided by the employer, the firefighter is disqualified from the presumption clause.
- Shift work makes it difficult for firefighters to meet the 30-day appeal deadline.

Workforce Safety and Insurance Response

The WSI representative testified that although it is correct that the presumption of compensability for firefighters is addressed under NDCC Section 65-01-15.1, the issue brought forward was even more basic than this presumption clause. The real issue is whether there is an injury. In this injured employee's situation, there was a positive test but no cardiac condition and therefore a determination of no injury. Recognizing the purpose of workers' compensation, it is imperative that the system require proof of a work-related injury. If the workers' compensation system provided benefits in the case of no injury, the system would change to be something else, such as a health insurer.

The WSI representative testified that the 30-day period that is set to allow a person to appeal a notice of decision is a balancing act. Workforce Safety and Insurance needs to balance the interest of managing claims and giving a reasonable amount of time to appeal a decision. The 30-day window for appeal is specifically designed for finality. Testimony of the WSI representative was that 30 days is enough time to register an appeal, and all that is required to meet the 30-day requirement is a telephone call.

The committee received the testimony of the executive director of WSI indicating WSI would have paid the injured employee's claim if WSI could have found a way to interpret the law in her favor. However, it is the opinion of WSI that the law does not provide for payment of such claims.

Comments by Interested Persons

The committee received the testimony of a local attorney in support of providing WSI coverage of unpaid medical bills associated with a firefighter's medical

examination that followed from her false positive test results. Additionally, the attorney commented on the injured employee's good fortune to have received the assistance of a union representative in addressing the committee. The attorney pointed out the state's workers' compensation system is run by doctors and lawyers, and this is a problem that plays into the 30-day appeal issue. Under the workers' compensation system, injured employees have given up their rights and are supposed to be getting something in return. The attorney testified the quid pro quo arrangement is not working.

The committee received the testimony of a representative of CARE in support of extending the 30-day period for appeal. Although there is a need for finality, an injured employee does not always have enough information from the medical profession in order to make a determination on whether to appeal.

The committee received the testimony of a representative of North Dakota Firefighters No. 1099 in support of an extension for appeals from 30 to 45 days.

Third Case

Case Summary

The following is a chronological list of events of the injured employee's workers' compensation case:

- August 1990 - The injured employee filed for workers' compensation benefits in connection with a July 1990 work-related automobile accident. The accident resulted in a spinal cord injury causing quadriplegia. At the time of injury, the injured employee had been earning \$60,138.54 per year, which qualified her to receive the maximum weekly benefit in effect at the time of her injury, equal to \$321 per week. In addition, the injured employee received a workers' compensation permanent partial impairment award of approximately \$153,000.
- July 2005 - The injured employee received a workers' compensation supplemental weekly benefit adjustment of \$9, which brought her disability rate to 60 percent of the state's current average weekly wage. From this date forward, the injured employee will be eligible for annual adjustments in the supplementary benefits as long as she is entitled to permanent and total disability benefits. Although the amount of the supplementary benefits is related to the state's average weekly wage, it is estimated to increase approximately 3.9 percent per year.
- March 29, 2006 - The committee reviewed the injured employee's claim. At the time of review, the injured employee's net weekly workers' compensation benefit was \$261.81, which reflected a Social Security offset of \$68.19 to recognize her receipt of Supplemental Security Income.

Issues for Review

In presenting her issues for review, the injured employee received the assistance of a family member who is an attorney. The injured employee's workers' compensation issues were:

- The 15-year period during which the amount of her workers' compensation benefits did not increase is bad public policy. Workforce Safety and Insurance should be required to provide her with a lump sum payment to compensate her for this 15-year period in which WSI did not provide her cost-of-living increases.
- The WSI vehicle modification allowance is inadequate.

The injured employee brought forward the following points in support of her issues:

- If the injured employee's 1990 preinjury earnings were adjusted to current day value, her earnings would be comparable to \$120,000 per year.
- The injured employee's income is inadequate, resulting in her subsidizing her daily expenses with credit; her being unable to repair her vehicle; her being unable to afford a handicapped-accessible apartment, which would cost more than \$700 per month in rent; and her being unable to perform background checks on the workers she hires as assistants, which has resulted in making her very vulnerable and being a victim of theft by some of her workers.
- She essentially is being punished. The injured employee's employer paid her workers' compensation premium at a high rate for a high wage earner; however, the benefits she is receiving do not reflect what her employer paid into the system.
- She has been able to live on her own by managing her own care and hiring assistants to help her. The fact that she can live on her own saves the state \$1,500 per month compared to nursing home expenses. She has not exploited the system and is a very hard worker who should be commended.
- Inflation can be a friend of government but it is an enemy of individuals on fixed incomes. The system is morally wrong to degrade an injured employee from the highest-paid employee to the lowest-paid employee.
- In civil lawsuits an award takes into account cost-of-living adjustments. Under the workers' compensation system, the injured employee has given up the right to bring lawsuits but is not given the same benefits of cost-of-living adjustments under this system.
- Her daily living expenses differ from most individuals in that in addition to paying for food and housing, she hires workers to help her with every aspect of daily living and has travel needs for medical purposes.
- The state's investment in modifying her van was a very good investment because it has allowed her to travel to her medical appointments in Minnesota and Colorado in a much less expensive manner than air travel.

Workforce Safety and Insurance Response

The WSI representative testified that in the case of a catastrophically injured employee who requires a

modified vehicle, WSI pays for the modifications and installation of a lift for the injured employee's van. However, the law does not allow WSI to continue to supply vehicle modifications or lifts. He said this is a one-time benefit.

The committee reviewed examples of how the law calculates supplementary benefits for injured employees based upon the date of injury and distinguishing between high and low wage earners. The law relating to supplementary benefits was amended in 1999 and then again in 2001. The 2001 amendments apply to injured employees who were injured in 2001 and forward. The injured employee having her case reviewed by the committee is covered under the pre-1999 law.

The WSI representative testified using the same scenario examples of injured employees under the current law, every one of the injured employees would be eligible to receive supplemental benefits beginning in the eighth year. However, under current law, the amount of a lower-earning injured employee's supplementary benefits would be higher than that of a higher-earning injured employee.

Under the pre-1999 supplementary benefits law, the long-term goal was to put all injured employees at the same rate over time. Under current law, lower wage earners receive larger supplementary benefits and higher wage earners receive smaller supplementary benefits; however, all injured employees begin receiving these benefits after seven years.

The WSI representative testified in comparing North Dakota's law with other states, the majority of workers' compensation systems do not provide for any cost-of-living adjustments. If the law were changed to give the same supplementary benefits to employees injured before 1999, there would have to be a retroactive alteration of the benefits scheme. Anytime there is retroactive application, there is a risk of constitutional problems because there are typically winners and losers under such a transition.

Comments by Interested Persons

The committee received testimony from a representative of CARE recommending the state make funds available to assist injured employees in buying modified vehicles and recommending the state take better care of injured employees. The committee received the testimony of an injured employee in support of giving special consideration to catastrophically injured employees.

Fourth Case

Case Summary

The following is a chronological list of events of the injured employee's workers' compensation case:

- January 2000 - The injured employee filed a compensable workers' compensation claim.
- June 2001 - The injured employee underwent a functional capacity evaluation, which placed the injured employee in the light physical demand level of employment; in October 2002 the injured employee completed a 25-hour training course, providing her with administrative assistant,

customer service, and basic computer skills training; and in November 2002 the vocational consultant's report indicated that the injured employee had the necessary skills to obtain employment as a customer service representative, administrative assistant, and secretary. At the time of injury, the injured employee's weekly earnings were determined to be \$420. The occupations for which the injured employee was trained were determined to have weekly earnings of approximately \$389.

- December 2002 - Workforce Safety and Insurance issued an order denying the injured employee further disability and vocational rehabilitation benefits. In January 2003 the injured employee requested the assistance of the Office of Independent Review to review the WSI order. The injured employee reported that she did not feel she was capable of acquiring employment within the occupations listed and earning at the salary amounts listed. Workforce Safety and Insurance offered to adjust the estimated earning to \$360 a week, which would make the injured employee eligible for temporary partial disability benefits, but the injured employee rejected the proposal and elected to proceed to hearing.
- July 2003 - The administrative hearing was conducted but the injured employee did not participate. In September 2003 the administrative law judge upheld the order denying further disability and vocational rehabilitation benefits.

Issues for Review

The injured employee's workers' compensation issues were:

- Following her injury, the training she received through WSI did not make her whole. She said the training was inadequate, in part because it did not consider her age, background and experience, and a realistic view of the job market and starting wages.
- Her employer made it very difficult for her to return to work. She said she faced harassment and discrimination from her preinjury employer when she returned to part-time work following her injury and her employer requested that she work beyond her medical limitations.
- Workforce Safety and Insurance did not provide adequate assistance in finding a postinjury job and ultimately she found her own job.

Workforce Safety and Insurance Response

The WSI representative testified that before the injured employee's workplace injury, her work history showed she had been employed in the service sector. As a result of her injury, she is required to leave that type of work and enter a different, safe sector of employment. Following the injury, WSI enrolled the injured employee and she completed a skill refresher course. The workers' compensation system allows and provides an injured employee with a forum in which to disagree with proposed retraining schedules or plans.

However, this injured employee requested a hearing on the matter but then chose not to attend the hearing.

The WSI representative testified when an injured employee is faced with changing job sectors, WSI tries to employ both the carrot and the stick. Under the training process, WSI first looks for the least invasive form of retraining program. Workforce Safety and Insurance does ask for the injured employee's opinions and preferences in what type of employment the injured employee would like to enter postinjury.

Comments by Interested Persons

The committee received testimony from a representative of CARE disputing the WSI claim that when WSI arranges for rehabilitation services, the injured employee gets an opportunity to give preferences and is given a choice regarding what kind of training or rehabilitation is undertaken. When an employee is injured, it is very hard for that employee to know what options are available under the system.

The committee received testimony from injured employees who had received workers' compensation rehabilitation services. Some of these injured employees voiced dissatisfaction with the rehabilitation system.

Fifth Case

Case Summary

This injured employee had a very long and detailed list of entries in his workers' compensation record; therefore, the list of events has been significantly abbreviated. A more complete list of events is included in the North Dakota Supreme Court decision *Gronfur v. North Dakota Workers' Compensation Fund*, 2003 ND 42; 658 N.W.2d 337, and the supporting briefs. The following is the abbreviated chronological list of events of the injured employee's workers' compensation case:

- July 1996 - The injured employee filed a compensable workers' compensation claim in connection with a workplace injury. The initial diagnosis indicated a herniated disc at the L4-L5 level, and this was the basis upon which the employee received his initial medical care and his return-to-work services. Based on this diagnosis, the injured employee was released to return to gainful employment as an advertising sales representative, general merchandise sales representative, communication equipment sales representative, or management trainee. Temporary partial benefits were to be paid to the injured employee for a period of up to five years. The injured employee never returned to work.
- October 1999 - The injured employee underwent an MRI of his entire lumbar spine, resulting in a different diagnosis of mild facet hypertrophy at L3-L4, L4-L5, and L5-S1; a small left paracentral neural foraminal disc extrusion at T11-T12; and a small left paracentral disc protrusion at T12-L1. In April 2000 the injured employee underwent a spinal fusion at T11 and T12 and T12 and L1 levels of the spine and WSI accepted liability for this medical condition.

- February 23, 2000 - The injured employee filed a request for disability benefits indicating a worsening of his injury and in April 28, 2000, WSI issued an order denying reapplication indicating that although the injured employee had sustained a significant change in his compensable medical condition, the injured employee had not suffered an actual wage loss (because he had not returned to work after the 1996 injury) caused by the significant change in his compensable medical condition.
- April 2003 - The Supreme Court upheld the order denying reapplication.
- April 26, 2006 - The committee reviewed the injured employee's claim and in August 2006 the committee learned WSI denied the injured employee's recent request to have WSI exercise its continuing jurisdiction and reopen the injured employee's case.

Issues for Review

In presenting his issues for review, the injured employee received the assistance of his brother. The injured employee's brother presented the injured employee's issues, distributing to committee members a folder containing a significant amount of information compiled to help present the injured employee's case for review. The injured employee's brother testified the information presented for the injured employee primarily relates to the three areas of:

- The injured employee's injury and the medical treatment he received;
- The injured employee's release to return to work; and
- Legal issues relating to medical treatment, the requirement that loss of wages be established, and the appeal and review process.

The specific concerns raised include disagreement with the North Dakota Supreme Court decision; Job Service North Dakota and WSI come to different conclusions regarding an injured employee's ability to perform work; inadequate legal counsel; inadequate medical services in the initial diagnosis; and that throughout the whole workers' compensation process, the injured employee was on high doses of narcotics that have impacted his ability to follow the status of his case. The injured employee's request was that he would like the law to allow him to essentially "go back in time" to allow the right decision to be made.

Workforce Safety and Insurance Response

The WSI representative testified if an injured employee believes he or she is unable to work, there is an appeal process that can be pursued. In the case of this injured employee, the injured employee did not pursue the appeal process to address the determination of disability and ability to perform work. When the injured employee finally did appeal, it was related to the issue of wage loss and the district court and the Supreme Court did not overturn the decision of WSI. There is a process established to appeal decisions and

in order to make the system work, this process needs to be followed.

The WSI representative testified that in the situation in which the process fails to protect an injured employee, there is the ability to make the situation right. If the matter relates to the injured employee's injury, WSI may review an injured employee's case through WSI's continuing jurisdiction.

The WSI representative testified that the North Dakota Supreme Court decision addressing the injured employee's appeal was one of four cases addressed by the North Dakota Supreme Court in 2003 dealing with a specific issue of reapplication based upon a significant change in the compensable medical condition. The Supreme Court cases were *Lesmeister*, *Beckler*, *Bachmeier*, and *Gronfur*. In the case of this injured employee, the medical records and the court records indicated the injured employee could work. It is the injured employee's contention that he could not, and he failed to appeal this issue.

The committee received the testimony of the executive director of WSI that if WSI had thought it reached the wrong decision in the injured employee's case, WSI has the authority to reopen the case to make things right.

Comments by Interested Persons

The committee received testimony from interested persons regarding the issues raised in the injured employee's case review. Members of the public commented on the significant amount of preparation and time the injured employee's brother invested in assisting his brother present his case for review. Testimony of other injured employees addressed concerns about the injured employee's experience with receiving an improper diagnosis; with the inadequate rehabilitation services provided to the injured employee; and with the possible discrimination the injured employee received due to his weight.

The committee received the testimony of a representative of the North Dakota AFL-CIO that the issues raised by the injured employee go to the question of how a WSI decision becomes final and therefore unappealable. Once a WSI decision becomes final, even after receipt of additional medical evidence, these cases are unable to be reopened. The issue of after-acquired medical evidence is not a new issue. In 2003, Senate Bill No. 2167 was introduced to address the issue. Under this 2003 bill, an injured employee would have had four years in which to request a case be reopened to reassess compensability based on after-acquired medical evidence.

Committee Discussion

The committee discussed the issues of reapplication for disability benefits; reopening of claims; and after-acquired medical evidence. Committee members raised concerns regarding finality and problems related to lack of closure. The committee also discussed equity issues related to after-acquired evidence.

Sixth Case

Case Summary

The following is a chronological list of events of the injured employee's workers' compensation case:

- April 1983 - The injured employee filed an application for workers' compensation benefits in connection with a compensable work-related injury to his right wrist. The injured employee participated in return-to-work services and was released to return to work. The injured employee held a variety of jobs, each ending the employment when pain from repetitive arm, wrist, and hand movements became too severe to continue working. The injured employee filed a series of reapplications for disability benefits claiming a worsening in his condition. The dates for reapplication of benefits were February 12, 2001; June 18, 2001; August 27, 2001; October 18, 2001; December 3, 2001; and June 10, 2002.
- January 2003 - Workforce Safety and Insurance entered a stipulated settlement with the injured employee, in which it was agreed to resolve all of the applications for benefits for the year 2001. It was further agreed that WSI and the injured employee would proceed to litigate the 2002 reapplication, which was denied by an administrative law judge in August 2002.
- At the district court level, the district court denied the injured employee's request to reopen the record and supplement the record with exhibits for consideration. The district court affirmed the WSI order denying reapplication benefits, concluding that the claimant did not establish an actual wage loss as required under law. In February 2005 the North Dakota Supreme Court affirmed the district court decision, denying the injured employee's reapplication for benefits.

Issues for Review

The injured employee's workers' compensation issues were:

- The inability to admit additional evidence into the record following the administrative hearing.
- The impact of a Social Security determination of disability. Once an injured employee is determined to be eligible to receive Social Security disability benefits, the injured employee should automatically be found to be eligible to receive workers' compensation disability benefits for that injury.
- The impact of an injured employee being found in noncompliance. As an injured employee, there is a constant threat of termination of benefits for failing to comply with medical treatment plans and retraining programs. The threat of suspension or termination causes undue stress and pressure. Workforce Safety and Insurance needs to be more sensitive to the injured employee's physical and psychological well-being. Additionally, there is an issue that arises when an injured employee needs to follow the medical advice of the treating

physician when this advice conflicts with the injured employee's existing workers' compensation program and there is a concern that following the physician's directions may result in a WSI finding of noncompliance, resulting in suspension or termination of benefits.

- Unnecessary spending of WSI funds, including spending of funds on unnecessary fraud investigation, forcing injured employees into retraining programs, trigger point injection limitations, and excessive litigation costs spent defending WSI decisions.
- Timeframe limitations for a claimant to recognize a workforce injury.

Workforce Safety and Insurance Response

The WSI representative testified that from a legal standpoint, he had never reviewed a more litigated claim than this injured employee's claim. The injured employee's case includes two North Dakota Supreme Court decisions. However, for purposes of the issues brought to the committee for review, the topics generally relate to reapplication. The intent of WSI in entering the settlement was to leave the most legally valuable application to go to the North Dakota Supreme Court, hoping the Supreme Court would provide some guidance in this area of reapplication.

The WSI representative testified there is a medical basis for limiting trigger point injections. WSI has addressed the issue of trigger point injections through North Dakota Administrative Code Section 92-01-02-34(5)(i). The general rule is that WSI treatments are intended to help an injured employee's medical condition improve; however, once a medical treatment stops improving the condition, it becomes palliative in that it does not improve the underlying condition. A trigger point injection is a palliative treatment.

The WSI representative reviewed the closed claim presumption that if an injured employee does not receive treatment for a period of four years, the injured employee then has the burden to prove the work injury was the sole cause of the new injury, which is a higher standard than for initial application. Although aging is usually a contributing factor to most degenerative conditions, which makes it difficult to prove the workplace injury was the sole cause of the new injury, approximately one-third of the applications for reopening are accepted by WSI.

The WSI representative testified that as it relates to retraining programs, there are social and psychological benefits to rapidly returning an injured employee to some type of employment following an injury. Generally, there is a 12-week window to successfully get an injured employee back to work, and after 12 weeks, the chance of returning to work decreases to 50 percent. Workforce Safety and Insurance does push injured employees into retraining because of the problems associated with an injured employee remaining in an unsafe job.

The WSI representative testified that as it relates to the loss of wage requirements, the statute is quite clear and the series of North Dakota Supreme Court cases

have supported the interpretation of WSI. Loss of wages is necessary to give WSI the incentive to get an injured employee to return to work or undergo retraining.

The WSI representative testified the tests used to qualify for Social Security disability benefits and workers' compensation benefits are different; the basis of awarding benefits is different; and the parties involved are different. Additionally, linking the two programs could result in constitutional issues regarding improper delegation of legislative authority.

Comments by Interested Persons

The committee received testimony from a representative of the North Dakota AFL-CIO. The testimony on the issues raised by this injured employee and the rebuttal made by WSI made it clear WSI seeks to limit its liability and will not pay to relieve an injured employee's pain. This position is contrary to the statutory requirement that the workers' compensation system is designed to provide injured employees with sure and certain relief. The committee is faced with the issue of determining what is sure and certain relief. Under NDCC Section 65-01-01, as amended in 1994, the law now provides Title 65 is not to be construed liberally to any party. Under the old law, Title 65 required liberal construction in favor of the injured employee, and this liberal construction helped provide an injured employee with sure and certain relief.

Seventh Case

Case Summary

The following is a chronological list of events of the injured employee's workers' compensation case:

- December 1990 - The injured employee filed a workers' compensation claim in response to a compensable work-related injury. In November 1992 the parties entered a stipulated settlement agreement through which the injured employee was paid a lump sum settlement of \$15,159 as full and complete settlement of the claim for disability benefits and vocational retraining benefits. The stipulation provided the lump sum money was to be used for the sole and exclusive purpose of the injured employee becoming a residential paint contractor and establishing the self-employment venture.
- October 1995 - Workforce Safety and Insurance issued an order denying further benefits and a demand for repayment in the amount of \$15,159. Workforce Safety and Insurance concluded the injured employee breached the agreement between the parties, resulting in an overpayment of benefits. The injured employee requested a hearing before an administrative law judge, and in April 1996 the administrative law judge affirmed the order and it became final.
- December 2003 - The injured employee filed a workers' compensation claim in connection with an injury incurred as a painter. Workforce Safety and Insurance denied the application for benefits, determining the injured employee was not entitled to any additional workers' compensation benefits

in connection with the December 1990 injury and that his 2003 work injury was to the same exact body part and was therefore denied. The injured employee appealed this decision and the administrative law judge affirmed the order of WSI. The injured employee appealed to the district court and the district court affirmed the decision of the administrative law judge. This order became final.

Issues for Review

The injured employee presented multiple pages of workers' compensation issues. The injured employee's primary workers' compensation issues were:

- Workforce Safety and Insurance is not abiding by its requirement to provide sure and certain relief to injured employees, regardless of question of fault.
- During the course of processing his 1990 workers' compensation claim, the claims analyst made false statements and made mistakes that were not fixed.
- Employers are not providing safe work environments for employees. More should be done to provide employees with a safer work environment.
- The Office of Independent Review is not doing the job it was intended to do and therefore should be closed.
- The North Dakota workers' compensation system should be changed from its current no-fault insurance model to a private insurance company model.
- Retraining opportunities for injured employees are inadequate.
- Injured employees in North Dakota do not have access to legal counsel. The limitations on an injured employee's attorney's fees are improper and the result of the attorney's fees limitations is that injured employees are left without legal representation.
- The district court standard of review should be changed so the district court is able to reevaluate the facts of the case.

Workforce Safety and Insurance Response

The WSI representative testified the 2003 claim filed by the injured employee centered around the 1990 claim. Following the 1990 injury, the rehabilitation evaluation found that the activity of painting was inappropriate given the injured employee's limitations; therefore, it was arranged to have the injured employee participate in rehabilitation and retraining. The injured employee and his attorney objected to the rehabilitation retraining and proposed the injured employee begin a venture as a painting contractor under which he would submit bids and hire painters to actually perform the painting.

The WSI representative testified it was brought to the attention of WSI that the injured employee was painting. Upon investigation, the injured employee reported that he was a contractor and had purchased the necessary

equipment to perform this venture; however, the investigation indicated this was not the case.

The WSI representative testified the fraud case went to an administrative law judge and there was a finding the injured employee knowingly and willingly violated the terms of the stipulation. Under NDCC Section 65-05-33, the fraud provisions, the injured employee was required to forfeit any additional benefits in connection with the December 1990 injury as well as being required to repay the overpayment amount.

Eighth Case

Case Summary

The following is a chronological list of events of the injured employee's workers' compensation case:

- July 2001 - The injured employee filed an application for workers' compensation benefits in connection with a compensable workplace injury to her lower back. The injured employee participated in return-to-work activities and in July 2002 she began receiving temporary partial disability benefits.
- January 2003 - Workforce Safety and Insurance received a fraud hotline report and as a result investigative services were assigned to the injured employee's claim, and in June 2004 WSI issued a notice of intention to discontinue benefits based on the investigation results. The injured employee filed a request for reconsideration of the notice of decision.
- August 2004 - Workforce Safety and Insurance issued a fraud order against the injured employee, denying payment of any further benefits on the claim. The order included an order for repayment of disability benefits in the amount of \$5,263.27. The injured employee appealed this order.
- March 2005 - Workforce Safety and Insurance offered a stipulated settlement that would have provided for the following provisions: claimant remains eligible for payment of reasonable and necessary medical expenses for treatment directly related to her lower back injury; claimant is not entitled to any further disability or vocational rehabilitation benefits in relation to this claim; WSI 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; the claimant does not admit to any wrongdoing; and WSI will revoke its fraud order if the claimant withdraws her request for hearing regarding that issue. The injured employee rejected the proposed stipulation and the claim went on to an administrative hearing.
- November 2005 - The administrative law judge issued her findings of fact and conclusions of law, concluding the injured employee willfully misrepresented her physical condition, capabilities, and activities to WSI and her medical providers. The injured employee's statements were obviously intentional and material to an accurate determination of her work ability and for WSI's process of determining her eligibility for

benefits; however, the evidence did not show that the injured employee's false statements caused WSI to pay benefits in error and the injured employee was not required to reimburse WSI for benefits paid. The injured employee was ordered to forfeit any additional benefits relative to her injury. Workforce Safety and Insurance adopted the recommended order of the administrative law judge and the order became final.

Issues for Review

The injured employee explained the circumstances surrounding her workplace injury; provided a detailed explanation of the independent medical examination that took place as part of the second opinion requested by WSI; and provided details regarding the errors made by the private investigator hired by WSI to investigate her claim.

The injured employee testified she never knowingly committed any fraud of any kind to anyone and the videotapes of the WSI private investigator clearly provide that she did nothing wrong and the private investigator hired by WSI told one lie after another.

The injured employee raised the issue that the rates set for attorney's fees are inadequate. The rate is far lower than the actual cost, which results in the injured employee being forced to pay this difference. Additionally, the injured employee testified that as a result of this workers' compensation situation, WSI dropped all coverage and her private medical insurance, for which she pays a monthly premium, does not provide any coverage for her work-related injury.

The injured employee testified WSI takes the position an injured employee is not entitled to do anything after an injury except the little bit of work WSI claims fits the injured employee. She said it is wrong that the injured employee is required to stay down, rest, and get up out of bed only to go to work.

Workforce Safety and Insurance Response

The WSI representative testified that it is uncontested that the injured employee received a workplace injury. However, it was the activities following the injury that resulted in the termination of benefits. Workforce Safety and Insurance analysts are trained to pick up signs regarding conflicting medical reports. Procedurally, in the case of the injured employee, there was a functional capacity evaluation performed in February 2003 which placed limitations on the injured employee. Because there were limitations and because there did not appear to be any positive movement in her condition, WSI requested a second opinion. The second opinion was radically different from the treating physician's medical report. In the case of conflicting evidence, the decisionmaker needs to establish the credibility of the evidence.

The WSI representative testified the administrative law judge's findings of fact are very instructive. Essentially, the findings indicate the injured employee has limitations but her activities differ from her claimed limitations. The representative testified WSI is not obligated to follow up on hotline tips and WSI considers

the tips in light of the case and the information available. The WSI representative testified WSI often contracts with private investigators. If WSI were to learn that a private investigator was not truthful or was not credible, it would no longer contract with that private investigator.

Comments by Interested Persons

The committee received the testimony of an interested person that fraud investigations are not necessarily a true reflection of an entire situation. Instead, a fraud investigation is nothing more than a single snapshot in time. In the case of an injured employee who is on pain medication and antidepressants, that injured employee is not a very accurate historian, especially as time passes, and this impacts the injured employee's ability to manage a claim.

Additional testimony indicated that all parties have the same goal of wanting to see the injured employee return to work. The real issue should be whether the injured employee can return to work, not whether the injured employee stopped every 7 to 10 minutes when she drove her car.

Ninth Case

Case Summary

The following is a chronological list of events of the injured employee's workers' compensation case:

- June 2004 - The injured employee filed a workers' compensation claim in response to a workplace injury. 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. However, WSI limited the benefits because the injured employee had a preinjury history of back problems, and in 1997 she had undergone non-work-related surgery fusing the L5-S1 vertebrae.
- November 2004 - Workforce Safety and Insurance issued a notice of decision denying further liability. The injured employee filed a timely request for appeal. The administrative law judge concluded the injured employee's sacroiliitis is related to preexisting lumbar back conditions, not to the work injury of June 2004. The administrative law judge further concluded the injured employee had not met her burden of proving that her June 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. Workforce Safety and Insurance adopted the recommended findings of fact and conclusions of law. The order became final.

Issues for Review

The injured employee brought forward the following workers' compensation issues and points in support of these issues:

- Workforce Safety and Insurance is not accountable and therefore there should be a monitoring organization.

- Injured employees are victims of the system if they have inadequate legal representation. In this case, it was only after the administrative level that the injured employee found out her attorney had not requested any additional medical information. She said she tried to appeal the administrative order but by the time the attorney contacted her, the time for appeal had passed. She submitted a complaint to the attorney disciplinary board but feels the complaint was discounted.
- The appeal system is inadequate. Workforce Safety and Insurance should be required to follow the recommended finding of the administrative law judge. At the administrative hearing, the administrative law judge informed the injured employee that WSI had the choice of whether to accept the administrative law judge's recommended order. Additionally, when a physician testifies at a hearing for WSI, that physician should be required to be a specialist in the area of the injury. In her case, the injury was the S1 joint; however, neither of the physicians who testified at the administrative level specialized in S1 fusions.
- It should be the law that an injured employee has a right to a second opinion by a specialist. A Minot physician reviewed the injured employee's records but refused the case because he did not know how to treat or perform S1 joint procedures. The system needs to be changed to allow specialists' opinions to weigh more heavily in the decisionmaking.
- Workforce Safety and Insurance tries to drag out the process as long as possible so an injured employee gets into a financial bind and has no choice but to go back to work, regardless of whether there is an ongoing injury. Additionally, WSI always sides against the injured employee, with the belief the injured employee is trying to defraud the system.

Workforce Safety and Insurance Response

The WSI representative testified the workers' compensation issue brought forward is that a determination needed to be made by WSI regarding whether the injury was work-related or non-work-related. The WSI representative testified in the evaluation of workers' compensation claims there is an ongoing struggle to determine preexisting conditions versus work-related conditions and it is not uncommon to have conflicting medical information while trying to make these determinations.

Tenth Case

Case Summary

The following is a chronological list of events of the injured employee's workers' compensation case:

- June 1992 - The injured employee filed a workers' compensation claim for a compensable work-related lower back injury. The injured employee returned to her preinjury employment on a part-time basis and WSI paid temporary partial

disability benefits. She retained this part-time employment, with periodic lapses due to worsening of the work-related injury, until July 2005 when she stopped work due to her worsening medical condition. Workforce Safety and Insurance awarded the injured employee temporary total disability benefits.

- May 2006 - The injured employee participated in an independent medical evaluation, as a result of which the physician indicated the injured employee 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 physical restrictions. The injured employee's treating physician reported he disagreed with the findings of the independent medical evaluation physician, stating the injured employee is not capable of gainful employment.

Issues for Review

The injured employee's workers' compensation issues include:

- Over the period of time from her injury in 1992 to the present, the injured employee never benefited from a wage adjustment at her place of employment. At the time of the injured employee's injury in 1992, she was earning \$8.69 per hour and at the time she stopped working 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 over 10 years. The injured employee's current WSI benefits are \$232 a week, 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. Additionally, since her injury, the injured employee received bonus lump sum payments to compensate her for excellent performance at her job, but all of these payments have gone to WSI as setoffs against her workers' compensation benefits.
- She is concerned about her ability to return to work and earn a competitive wage. Workforce Safety and Insurance recently denied her treating physician's request for a discogram, which the physician requires in order to determine whether a second surgery is needed. A discogram is a diagnostic procedure used to establish the health of the disc.
- She takes issue with the independent medical examination performed by the physician chosen by WSI. The physician to whom she was sent does not perform back surgeries but instead refers his patients to her treating physician. The system is wrong to the extent it would allow a nonspecialist to decide the treatment standard for a specialist.

Workforce Safety and Insurance Response

The WSI representative testified that in accordance with WSI policy, the injured employee has been treated conservatively for her back injury. Under NDCC Section 65-05-08(8), the only time the underlying average weekly wage is recalculated is if the injured employee returns to work for 12 consecutive months at a higher wage. The only workers' compensation benefit with a cost-of-living adjustment built in is permanent total disability.

The WSI representative stated the current status of the injured employee's case is 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.

A representative of WSI indicated the injured employee had done everything asked of her and she is a hard worker who appears to be caught in the middle. The law that applies to the injured employee does not seem to have contemplated this type of situation in which the injured employee has continuously attempted to return back to work but for periods of less than 12 months. Additionally, the committee received testimony that generally WSI denies discograms because they are invasive procedures and there is a concern the diagnostic procedure may do more damage than good.

The executive director of WSI testified WSI has looked into the issue of temporary partial disability benefits that are received over a long period of time, and WSI is trying to address this issue without creating unintended consequences, such as disincentives for an injured employee to return to the workplace. The testimony indicated WSI will strive to come up with an alternative to address this situation before the 2007 legislative session begins.

Comments by Interested Persons

The committee received the testimony of the injured employee's husband that his wife loved her job and wanted nothing more than to return to work. Since her workplace injury, prescription medication is a regular part of her life and impacts her activities of daily living. Additionally, as a result of her injury, she has lost her full-time benefits provided by her employer, such as 401K retirement benefits. The husband testified his wife has done everything WSI has asked of her, including going to the necessary specialists when general practitioners were unable to treat her. It is especially frustrating at this point that WSI is refusing to provide a requested diagnostic procedure. It is not fair that his wife is being caught in the middle.

Committee Discussion

The committee members recognized the similarities between this injured employee and the first case. Both injured employees were very hard workers who repeatedly attempted to return to work. Unfortunately, both of these injured employees would have been better off financially if they had quit working. The committee indicated this is the wrong message to send to injured employees, and the system should not provide

disincentives to injured employees who have such strong work ethics. The committee found the issue of long-term temporary partial disability benefits seems like a hard issue for WSI to defend.

Eleventh Case

Case Summary

The following is a chronological list of events of the injured employee's workers' compensation case:

- July 2004 - The injured employee died as a result of a heart attack he experienced while fighting a fire in his capacity as a volunteer firefighter. The injured employee's spouse filed a workers' compensation claim for spousal workers' compensation benefits. Workforce Safety and Insurance issued a notice of decision denying the spouse's application for benefits, finding that the spouse did not prove the injured employee sustained a compensable injury by accident arising out of or in the course of his employment as a volunteer firefighter.
- November 2004 - The spouse requested reconsideration of the decision of denial, claiming the cause of death was adequately work-related. In January 2005, WSI issued a dismissal of claim indicating the evidence did not indicate with reasonable medical certainty that the injured employee's cardiac arrest was caused by his employment. The spouse requested a hearing on the dismissal of the claim.
- October 2005 - Workforce Safety and Insurance adopted the administrative law judge's recommended findings of fact and conclusion of law that the injured employee 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 the injured employee sustained a compensable injury by accident arising out of and in the course of his employment. The result of the ruling was that the dismissal was reversed.
- November 2005 - Workforce Safety and Insurance issued an order indicating the injured employee's average weekly wage was \$161 per week, which was calculated by reviewing his 2003 income tax forms. The spouse requested the assistance of the Office of Independent Review and following the review, WSI issued an amended order establishing the average weekly wage was \$171 per week. This order was not appealed and became final.

Issues for Review

The spouse received the assistance of her attorney in presenting her workers' compensation issues. The spouse, through her attorney, raised the issues relating to spousal workers' compensation benefits and computation of benefits.

The standard used by WSI for all employees, except paid firefighters, is 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 did this increase in stress cause the heart attack or stroke with reasonable medical certainty. The attorney testified that despite evidence provided by an expert firefighter and expert medical witnesses, WSI took the position that 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.

The spouse testified the problems she incurred in WSI calculating a weekly benefits amount were very frustrating. It seemed unreasonable to have to wait 15 months to resolve her case. She 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 WSI.

The attorney testified his position is 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, the initial wage calculation was for a weekly benefit amount of approximately \$140. The law provides for three possible calculations but WSI chose a different way. After he objected to the first calculation, WSI calculated the amount of \$160 per week, but this was still the incorrect amount. It was only after the Office of Independent Review stepped in that they were able to remedy this error.

The attorney suggested WSI provide a lump sum payment to spouses and dependents of volunteer emergency workers who die in the course of providing services. The bottom line is that not many North Dakota volunteer firefighters die in the course of performing their volunteer work, and the state needs to better support volunteer firefighters and emergency workers.

Workforce Safety and Insurance Response

The committee received the testimony of the WSI representative. Volunteer firefighters are covered under workers' compensation; however, they are not covered under the presumption law. In the case of the injured employee, the facts of the case were not absolutely clear and the administrative law judge could have found either way. Overall, the facts were not conclusive, and there was no autopsy to assist in providing more conclusive facts.

The committee received testimony regarding the circumstances surrounding the multiple miscalculations of the injured employee's average weekly wage. The injured employee was a seasonal worker, and this results in a more complicated calculation formula. The first miscalculation was a result of human error; whereas, the second miscalculation was the result of receiving additional information.

The committee received testimony that under the state's workers' compensation laws, volunteer firefighters do not have the option of opting in to the full-time paid firefighter presumption. There are a number of ways a volunteer firefighter's situation differs from that of a paid firefighter, including that in special situations, a fire chief can deputize citizens to be volunteer firefighters.

Comments by Interested Persons

The committee received the testimony of a volunteer firefighter who was injured in the course of fighting fires. The testimony was the treatment volunteer firefighters receive from WSI does not reflect what the people of North Dakota want.

Committee Discussion

The committee discussion included whether local governments are imposing the maximum levy for volunteer fire departments; whether there are reasonable insurance products available which might be appropriate for volunteer fire departments to purchase to assist volunteer firefighters; whether the workers' compensation system should include a special benefit for volunteers; whether the current proof requirements for heart attacks and strokes are appropriate; and whether it is desirable to provide surviving family members with a lump sum payment to help in the transition resulting from the work-related death of a member of the family.

Committee testimony indicated the issues relating to volunteer firefighters are recurring. Some rural fire districts provide a life insurance-type policy for the volunteers, and some districts are not willing to levy the tax necessary to provide this product. It was the opinion of the committee that because the North Dakota Firefighters Association is very active in North Dakota politics, it can advocate for legislative changes desired.

INFORMATION REQUESTED

Administrative Hearing and Appeal Process

The committee requested from WSI an overview of the administrative hearing and appeal process used for WSI determinations. The committee received an overview of the process, including a flow chart of the process. This overview included review of the period within which a party can appeal a decision, the option of reapplication following a final decision, and the typical timeframe of steps that need to be followed under the process.

As part of the case review process, the committee considered the appeal process and how it applied to each injured employee. Additionally, the committee considered the role of legal counsel in the hearing and appeal process. The committee received testimony from injured employees that although it is very important and valuable to be represented by an attorney, an injured employee is a victim in the system, especially if the legal services are inadequate. As part of this discussion, the committee received testimony regarding the small number of attorneys in the state who are both knowledgeable in workers' compensation law and who are willing to represent injured employees.

The committee considered how the workers' compensation system might be improved if injured employees were better-informed and better-educated in issues of workers' compensation. The committee noted that several of the cases brought to the committee for review related to examples of the medical profession or the legal profession not doing an adequate job. The average injured employee is up against a very complex,

sophisticated system as well as a complex, sophisticated state agency. The committee became aware of the fact that the workers' compensation system is very difficult for an injured employee or any layperson to fully understand.

Workers' Compensation Attorney's Fees

The committee requested and received an overview of how the state's workers' compensation system limits attorney's fees for attorneys representing WSI and attorneys representing injured employees. This overview included information regarding:

- Circumstances under which injured employees retain legal representation and their attorney's fees can be paid by WSI;
- The fee caps for WSI counsel and injured employee counsel; and
- Workforce Safety and Insurance private contract attorneys.

The committee received testimony from an injured employee who questioned why the injured employee's attorney's fees are only paid if the injured employee wins. The injured employee's suggestion was that it would be more fair to treat both WSI's attorneys and injured employees' attorneys the same way. The committee discussed the fact that if WSI appeals a decision, the injured employee's attorney might not get paid.

Fund Balance Status

As part of the study and the consideration of possible changes to the workers' compensation system, the committee considered the possible fiscal impact of changing the existing workers' compensation system. Committee members recognized the importance of being informed of the WSI fund status going into the 2007 legislative session in order to better evaluate the fiscal impact of any considered changes to the workers' compensation system.

The committee received an update of the WSI fund balance and the status and use of the excess funds resulting from the changed fund balance calculation requirements resulting from House Bill No. 1532 (2005). As part of this update, the committee received information regarding the use of surplus funds for the hazard elimination learning program (HELP), the injured employee education loan fund, a continuing appropriation for safety and education, and a dividend credit for premium payers.

Testimony by interested persons pointed out injured employees have had benefits cut over the past 10 years and now that there is a fund balance surplus, the injured employees deserve to be recognized.

Return-to-Work Services

In response to the issues raised in the course of the case reviews, the committee requested and received an overview of the existing and upcoming vocational rehabilitation and other return-to-work services offered through the state's workers' compensation system, including the services provided through independent contractors; access to education, including the

scholarship and the educational loan fund; and the preferred worker program.

The overview indicated that ultimately, following training, an injured employee is intended to return to the local or statewide job market. In the case of a lack of local or statewide jobs, an injured employee might receive retraining; however, sometimes there are conflicts between the educational programs offered and those an injured employee seeks. If retraining is not an option for an injured employee, it is then appropriate to move to identifying minimum wage jobs, which is the least sought after option when it comes to returning to work.

The committee received testimony that under the WSI return-to-work program, an employer is given incentives to retain an employee who is injured on the job. Additionally, the committee received information WSI is implementing a job developer program. Under this new program, a WSI employee will work around the state to place disabled workers in specific return-to-work jobs.

Committee members noted that constituents regularly raise concerns regarding rehabilitation services, including:

- In the case of an older employee who performs physical labor, the injured employee often claims that CorVel, a contractor with WSI, sends the injured employee to an unwanted desk job.
- The income test, as it relates to finding postinjury employment, is unfair.
- Injured employees are trained for jobs that are not available in their communities.

As part of the committee's review of rehabilitation services, the committee requested and received an overview of House Bill No. 1171 (2005), which modified case management of workers' compensation claims and which is being implemented by WSI. The bill applies to employees who are injured after December 31, 2005. The committee considered how injured employees who had their case reviewed by the committee might have had different outcomes if House Bill No. 1171 had applied to them. Under this new case management system, there is a two-year maximum period under which an injured employee may receive temporary total disability, which is also known as work replacement. Upon reaching this two-year point, the injured employee basically has four options:

1. Release back to work;
2. Determination of permanent total disability, which requires a minimum of 25 percent permanent partial impairment;
3. Determination of temporary partial disability, which is limited to five years; or
4. Retraining and reeducation, which is limited to two years.

Under the retraining and reeducation option, an injured employee may attempt a trial of up to 20 weeks after which, if not successful, that injured employee may revert over to the temporary partial disability classification and receive up to three and one-half years' benefits. Under this new case management system, a temporary partial disability option is considered the

default. Additionally, within 90 days following injury, vocational rehabilitation is required to become involved in the injured employee's case.

The committee received testimony from interested persons that under this new case management system, the burden is shifted to the claimant and a two-year drop-dead date is introduced to the system. The new system essentially provides timelines under which WSI will be relieved of its obligations.

The committee received testimony that the rehabilitation system has failed the injured employee. The system limits services to the black letter of the law, resulting in the services merely meeting the minimums. Testimony was to the effect that WSI interprets the law very narrowly, in a manner that will limit the liability of WSI. The ultimate goal of rehabilitation services is to return the injured employee to self-sufficiency, and the existing system does not allow WSI to use all the possible tools to get injured employees back to work.

The committee received testimony throughout the case review process that realistically employers are hesitant to hire an injured employee who is trying to get back to work after an injury, especially if that injured employee is on a long list of medications to deal with the work-related injury and has work limitations.

Vehicle Modifications

In response to issues raised in the course of the third case review, the committee considered the issue of vehicle modifications for catastrophically injured employees. The law addressing vehicle modifications is included under NDCC Section 65-05-07(5), which also addresses real estate modifications. The law provides for a \$50,000 modification maximum.

In fiscal year 2004, WSI paid out approximately \$49,000 for vehicle and real estate modifications and in fiscal year 2003, this amount was approximately \$70,000. Testimony indicated there are approximately 66 catastrophically injured employees in the state's workers' compensation system and of these 66 individuals, 44 of the files are noted as being active, which means benefits are being paid in some way.

Under the vehicle modification law, the injured employee is required to provide a vehicle and WSI provides funds for the modification. The representative of WSI testified WSI would face a dilemma if an injured employee did not have an appropriate vehicle to modify. Under the current system, an injured employee's disability payments are meant to cover the day-to-day costs of life and the lump sum permanent partial impairment award is better suited to pay for a vehicle. Between the disability benefits and the permanent partial impairment award, an injured employee is expected to purchase a vehicle and then have WSI pay for the modifications.

The committee considered the problems that arise when an injured employee essentially outlives the usefulness of a modified vehicle. In considering the issue of vehicle modifications, some of the things the committee considered were what would happen if a modified vehicle were sold, whether a replacement schedule should be created to deal with modified

vehicles, and what would happen if an injured employee with a modified vehicle went through a divorce and there was a property settlement that addressed the ownership of the vehicle.

Workers' Compensation Benefits

The committee reviewed the current and past laws relating to workers' compensation permanent total disability, supplemental benefits, and retirement. As part of this review, the committee received information regarding the supplemental benefits law under the current benefits structure and under the immediate past benefits structure. The information distinguished between high wage earners and low wage earners and distinguished between the benefits structures of a catastrophically injured employee and a noncatastrophically injured employee.

The committee received information that the fiscal impact of being injured may vary based in part on the age at injury. If an employee is injured early in a working career, the workers' compensation benefits are capped at that point, which may negatively impact employees who have not been in the workforce very long and as a result have not reached a high earning level.

The committee received testimony from an injured employee that in 1919 the state signed an agreement with injured employees to provide workers' compensation benefits and to provide injured employees with sure and certain relief in return for the employees losing the right to bring actions against employers. The testimony was to the effect that, over time, WSI has become an insurance company that works for employers instead of for both sides.

Workers' Compensation Reapplication

The committee requested and received an overview of how the state's workers' compensation laws address "worsening medical conditions" and the associated consideration of loss of wages for purposes of reapplications. North Dakota Century Code Section 65-05-08 addresses reapplication for workers' compensation benefits, creating a two-part test, requiring that an employee has to suffer a significant change in a compensable condition and that the change must cause an actual wage loss. As part of this overview, the committee received reapplication statistics for 2003, 2004, and 2005, over which time the percent of reapplications that were paid by WSI ranged from 89 to 95 percent.

The testimony indicated that the situations leading to a reapplication are varied. If an injured employee is treated conservatively, over a period of time this may ultimately result in a medical condition that worsens and requires additional treatment. It is likely that House Bill No. 1171 will impact reapplication figures because the new system provides incentives to injured employees to return to work and ultimately this may result in increased reapplications later.

The WSI representative testified that if the loss of wages requirement were removed, WSI would lose the leverage it has to get injured employees to participate in retraining and other return-to-work activities. Workforce

Safety and Insurance needs to retain the leverage to get injured employees out of unsafe employment.

Special Investigation Unit

The committee requested and received an overview of the WSI special investigation unit, including the unit's expenditures for investigating employer and injured employee fraud; an overview of the investigative process; and comparative special investigation unit statistics for the years 2004 and 2005 and the first quarter of 2006.

The committee received testimony reviewing what the special investigation unit does and how it receives information upon which it acts. The testimony indicated the most used methods for reporting to the special investigation unit are the hotline, reports from employers, and reports from WSI staff members.

The committee received testimony from a WSI representative that a survey performed in the 1990s indicated that employees are less likely to be defrauding the workers' compensation system than others. An individual can contact WSI to inquire whether the individual was the subject of an investigation. This investigation information is accessible once an investigation is closed.

The committee discussed the fact that it received conflicting statistics, with one set of data indicating WSI puts more emphasis on fraud investigations of injured employees than employers. The committee also questioned whether the special investigation unit spends more resources on some size employers than others. There is a perception that smaller employers are investigated more often than larger employers.

Workers' Compensation Stipulated Settlements

The committee requested and received information regarding stipulated settlements between WSI and injured employees. The testimony of the WSI representative addressed the distinction between settlements and buyouts. A settlement refers to the resolution of a dispute through the use of compromise; whereas, a buyout refers to the payment of a sum that reflects the present value of future benefits. Buyouts are not necessarily precipitated by a dispute. The testimony of the WSI representative indicated WSI is not aggressive in pursuing buyouts. Settlements and buyouts are not usually initiated by WSI; however, WSI may raise the option of a buyout if an injured employee indicates a need.

Independent Medical Examinations

In response to the multiple times injured employees raised the issues relating to independent medical examinations (IMEs), the committee requested information from WSI regarding the steps being taken to address the concerns with IMEs.

The committee received testimony that WSI is in the process of implementing utilization review boards for specialized areas of treatment, such as back injuries. The executive director of WSI testified WSI is doing what it can to have IMEs performed by North Dakota

physicians; however, many North Dakota physicians do not want to provide this service.

The committee received testimony that for a typical IME the physician spends time before the examination reviewing the injured employee's records. The executive director of WSI testified WSI recognizes an injured employee may have an expectation that the physician should perform a full physical consultation in the examination room, and WSI is trying to address this expectation.

The committee received testimony from interested persons that IME physicians are biased in favor of WSI. The committee discussed the fact that if proponents for injured employees pursue IME physicians selected by an injured employee, there are going to be claims the physician never rules in favor of WSI.

The committee received testimony of a WSI claims adjuster that from the claims adjuster's standpoint, IMEs are avoided if at all possible. The IMEs are avoided because they may create an adversarial relationship between the injured employees and WSI and because it takes a tremendous amount of work for the claims adjuster to arrange for unbiased examinations. Independent medical examinations are required when there is something missing in the file and compensability is unable to be determined.

The committee encouraged WSI to take steps on its own to improve the IME system and consider the feasibility of implementing a random audit of IMEs.

Workforce Safety and Insurance Legislative Package

The committee received testimony that WSI is in continuous discussion concerning its legislative package. The executive director of WSI testified it is his goal to make the WSI legislative package available for public review as early as possible so people can support or oppose the package and have a meaningful opportunity to be prepared to do so.

In response to the committee's request to review the tentative WSI legislative package for the 2007 session, the committee received the following list of possible legislative items:

- Allow the nondependency death award to be distributed based on the wishes of a will, when applicable, instead of automatically to the closest living relative.
- Limit the filing window for dependency allowance payments.
- Fully exempt WSI from the required use of Information Technology Department services.
- Request 10 additional full-time equivalent positions in the areas of vocational rehabilitation (1), information technology (1), facility management (1), underwriting (1), loss control (2), and loss prevention (4).
- Provide a survivor benefits report to the House Industry, Business and Labor Committee.
- Provide enhancements to the injured employee educational loan program related to fixing the interest rate at a lower percentage and possibly expanding the eligibility criteria.

- Provide funds for the purchase as well as the adaptation of vehicles for those who are catastrophically injured (requested by the interim Workers' Compensation Review Committee).
- Provide benefits for a small window of time in very rare cases in which a false positive test occurs on physicals for firefighters and law enforcement officers under the presumption clause (requested by the committee).
- Work with stakeholders to redraft some form of a drug-testing bill.
- Work with stakeholders to modify the burden-of-proof provision in cases in which those involved in a workplace accident are found to have been under the influence of drugs or alcohol at the time of the accident.
- Seek permission to designate peace officer status for special investigations staff and allow investigators to travel in unmarked State Fleet Services vehicles for official business.
- Replace the existing 75 percent experience rate surcharge cap with an unlimited, actual experience rating cap.
- Clean up language referencing the prior risk management program.
- Remove the optional coverage choice for newspaper delivery personnel.
- Provide clarification language for the designated medical provider program.
- Propose minor cleanup language items from last session which do not materially affect the law in any way.
- Fund, construct, and maintain a permanent employees' memorial on the State Capitol grounds.
- Workforce Safety and Insurance budget.

Although the committee received testimony in support and in opposition to the proposed WSI legislative package, the committee members recognized the committee was not the appropriate forum to address the merits of the proposed legislation.

The committee requested that the executive director of WSI work with the WSI Board of Directors to determine whether the board supports the legislative proposals being recommended by the committee. The executive director testified that for purposes of the following tentative legislative ideas, WSI was willing to partner its efforts with these of the committee:

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

A representative of WSI testified WSI would attempt, before the start of the 2007 legislative session, to provide committee members with an update on those

issues WSI will and will not be pursuing during the 2007 legislative session.

COMMITTEE CONSIDERATIONS

Workers' Compensation Benefits

The committee considered a bill draft that addressed issues raised by injured employees during the case review process and issues raised by the committee in the process of the case reviews.

Vehicle Modifications

The committee considered the portion of the bill draft addressing the motor vehicle issue raised by the injured employee in the third case review. The provision amended NDCC Section 65-05-07(5), the law relating to real estate and motor vehicle modifications for catastrophically injured employees.

The provision allowed a catastrophically injured employee to qualify for up to \$100,000 for a specially equipped motor vehicle or vehicle adaptations, in addition to the \$50,000 allowed for modifications to real estate. The motor vehicle coverage may include vehicle and adaptation replacement purchases. The amended law would apply to all purchases and repairs that take place after July 31, 2007.

The committee considered whether the application of the provision should allow for retroactive coverage or whether the provision should provide for an emergency. The committee received testimony in support of retroactive application and in support of providing for an emergency clause.

Additional Benefits Payable

The committee considered the portion of the bill draft prepared in response to the retirement presumption issues raised by the injured employee in the first case reviewed by the committee. This provision would create a new section to NDCC Chapter 65-05, providing an alternative calculation for additional benefits payable. The testimony indicated in most cases, this alternative calculation would dramatically increase the amount and period of receipt of additional benefits payable. With this proposed legislative change, for this limited group of injured employees, the calculation under NDCC Section 65-05-09.4 would use the injured employee's pre-August 1, 1995, date of injury as the date of first disability.

The WSI representative testified under the alternative calculation created by this bill draft, the injured employee who brought this issue to the committee would go from anticipated additional benefits with a present value of approximately \$3,600 over a period of 2.9 years to anticipated additional benefits with a present value of approximately \$67,000 over a period of 13.7 years.

This provision of the bill draft addressed issues arising from the transition from the pre-1995 system to the post-1995 system for workers' compensation benefits. The first injured employee represented a class of individuals who got caught in the transition from one system to another and this portion of the bill draft would aid in the transition.

Death Benefits

The committee considered the portion of the bill draft which amended NDCC Section 65-05-16 relating to workers' compensation death benefits. The changes address the situation of a catastrophically injured employee whose death is related to a work-related injury but the death occurs more than six years after the date of injury. Current law requires the death must occur within six years of the injury.

The representative of WSI testified the change in the death benefit provision helps to recognize the sacrifices made by spouses and dependents. In the case of a catastrophically injured employee, the family may make significant sacrifices for a long time.

Committee discussion recognized that catastrophically injured employees are living longer due to improvements in technology, and these changes help address this issue.

Educational Fund

The committee considered the portion of the bill draft which amended NDCC Section 65-05.1-08, the law providing for the WSI educational fund, which was enacted in 2005. The changes expanded the scope of those individuals who may receive an educational loan from the fund to include an injured employee's surviving spouse and dependent child and decreased the interest rate that may be charged on these educational loans.

The WSI representative testified this educational loan fund supplements other WSI programs, such as the guardianship fund and possible federal benefits. The WSI Board of Directors is considering setting interest rates at approximately 2 percent, an amount that would be used to cover the administrative costs of the program.

Supplementary Benefits

The committee considered the portion of the bill draft which amended NDCC Section 65-05.2-01 regarding supplementary benefits. These changes would apply to claims filed after December 31, 2005, so they would not apply to any of the injured employees who had their cases reviewed by the committee.

Under the provision, for those injured employees filing claims after December 31, 2005, the proposed language would provide for a three-year period, after which the injured employee would be eligible for supplementary benefits--a decrease from seven years to three years.

The committee received testimony that this decrease in the period of time an injured employee must wait until receiving supplementary benefits is consistent with the trend that has been occurring. Before 1999 the maximum period of time an injured employee had to wait was in excess of 10 years, in 1999 that period was decreased to 10 years, in 2001 that period was decreased to 7 years, and this provision would decrease that period to 3 years.

Testimony indicated the class of injured employees impacted by this language would be the same class of injured employees who will fall within the parameters of House Bill No. 1171 (2005). Although the language provided the injured employees in the three-year

parameter would be receiving a cost-of-living adjustment sooner, these injured employees also are impacted by the retirement presumption. Injured employees who were injured before 1995, such as the injured employee in the third case reviewed by the committee, may have had to wait longer for supplementary benefits but will receive the supplementary benefits for life, whereas a post-1995 injured employee falls under the retirement presumption and does not receive lifelong benefits but instead receives an additional benefit payable payment.

The committee received testimony that the estimated number of injured employees who are covered under the supplementary benefit system in effect before the 1999 legislative changes is approximately 900, approximately 60 to 65 of whom are catastrophically injured. The committee recognized extending the supplementary benefit language to apply to employees injured before January 1, 2006, would result in a significant fiscal impact.

The committee received testimony questioning the validity of the 900 injured employees figure. Testimony indicated the initial figures used to establish a pricetag for the issue of the retirement presumption was too high and WSI later decreased the number. There was concern of WSI overestimating fiscal impacts in order to discourage legislative action.

A representative of CARE testified in support of creation of a fund to help catastrophically injured employees, such as the injured employee in the third case reviewed.

Firefighter Presumption

The committee considered two bill drafts in response to the firefighter presumption issues raised by the injured employee in the second case reviewed.

False Positives

The committee considered two versions of a bill draft amending NDCC Section 65-01-15.1, the law providing for a presumption of compensability for specified conditions of full-time paid firefighters and law enforcement officers. The second version of the bill draft added language providing that if a medical examination produces a false positive result for a condition covered under the presumption, WSI would be required to consider the condition to be a compensable injury. The language further provided the coverage for a false positive was limited to 28 days. The application of the amendment would apply to all false positive tests occurring as of the effective date of the Act.

The committee considered whether the application of this provision should provide for retroactive coverage in order to apply to the injured employee who brought this issue to the committee. Additionally, the committee considered whether 28 days was an appropriate period of time and whether it provided enough time to allow an injured employee enough time to confirm medical results.

Period for Appeal

The committee considered a bill draft amending NDCC Section 65-01-16, the law relating to the

procedures that must be followed in claims for workers' compensation benefits. The bill draft provided that for purposes of a decision issued under the firefighter and law enforcement officer's presumption, a party has 45 rather than 30 days in which to file a written request for reconsideration or rehearing of a notice of decision, administrative order, or notice that the Office of Independent Review assistance is complete.

The WSI representative testified the extension of time from 30 to 45 days applies equally to all parties, including the employer and the employee.

The committee received testimony from firefighters in support of the extension from 30 to 45 days. Testimony indicated firefighters are unique in some respects due to their shift work. Testimony suggested the same extension apply to the period within which a party may request assistance from the Office of Independent Review.

The committee received testimony in opposition to the bill draft, which indicated extending the period of appeal from 30 to 45 days is a step backward and creates a disparate system for different types of claims. Not only does the extension work against all the efforts of WSI and the Legislative Assembly to address the previous problems of backlogs of cases, but the extension could be used as a way for employers to extend the process.

Extension of Committee Activities

The committee considered a bill draft that would have extended the expiration date of the Workers' Compensation Committee from July 31, 2007, to July 31, 2009. The committee discussed whether it was appropriate for a committee to recommend legislation continuing the activities of that same committee. A committee-recommended bill draft extending the activities of the committee could appear to be self-serving, and it may be more appropriate to leave this decision to the legislative body.

The committee discussed the fact that the 11 cases that came before the committee for review were generally "old system" cases in that the laws raising the workers' compensation issues usually had been modified. The committee recognized the new case management system resulting from House Bill No. 1171 (2005) will impact employees injured after December 31, 2005, and there may be value to conduct the case

review process in a few years to monitor how the new case management system impacts injured employees.

The committee received testimony in support of and in opposition to the committee's case review system. The testimony in support of the committee's activities included that it was very educational for committee members. The testimony in opposition to the committee's activities included that injured employees needed the committee to provide legal representation to allow the injured employees to present the necessary information and to formulate issues and recommendations. Neutral testimony indicated the true judgment of the value of the committee will come during the 2007 session as the Legislative Assembly acts on the committee's bills and WSI's bills.

RECOMMENDATIONS

The committee recommends House Bill No. 1038 to address workers' compensation benefits by increasing coverage for specially equipped motor vehicles for catastrophically injured employees; creating an alternative calculation of additional benefits payable to address employees who were injured before July 1, 1995, but did not receive a determination of permanent and total disability until after July 1, 1995; increasing death benefits to cover a catastrophically injured employee who dies more than six years after the date of injury; expanding who may qualify for a WSI educational loan and decreasing the interest rates for these loans; and decreasing the period an injured employee is required to wait before receiving supplementary benefits. This bill includes an emergency clause.

The committee recommends Senate Bill No. 2042 to expand the presumption of compensability for full-time paid firefighters and law enforcement officers to provide coverage, not to exceed 56 days, if a medical examination produces a false positive result for a condition covered under the presumption.

The committee recommends Senate Bill No. 2043 that for purposes of claims brought under the presumption of compensability of full-time paid firefighters and law enforcement officers extends from 30 to 45 days the period within which a party to a notice of decision has to request a reconsideration, a party to an administrative order has to request the assistance of the Office of Independent Review, and a party to an administrative order or Office of Independent Review notice of completion has to request a rehearing.