

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### **WORKERS' COMPENSATION REVIEW COMMITTEE**

Wednesday, March 29, 2006

Rooms 148-154, Research Park I, NDSU Research and Technology Park  
Fargo, North Dakota

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

**Members present:** Representatives George J. Keiser, Bill Amerman, Nancy Johnson; Senators Duaine C. Espeland, Joel C. Heitkamp, Jerry Klein

**Others present:** See Appendix A

Representative Keiser requested the committee consider amending the minutes of the December 1, 2005, committee meeting to provide on page 1 that instead of Ms. Haux being fired from her job as a nurse assistant due to her inability to perform the required work, the minutes read Ms. Haux was released from her employment as a nurse assistant due to her inability to perform the required work.

**It was moved by Representative Johnson, seconded by Senator Klein, and carried on a voice vote that the minutes of the December 1, 2005, committee meeting be approved as amended.**

#### **CASE REVIEWS**

Chairman Keiser said the committee will review two workers' compensation claims at today's meeting. He said the committee will follow a similar procedure that was followed at the December 1, 2005, meeting.

#### **FIRST CASE**

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

#### **Case Summary**

Mr. Kocher provided a summary of Ms. Ostlie's case. Mr. Kocher said Ms. Ostlie is a firefighter who filed an application for workers' compensation benefits on January 28, 2005, in connection with a heart condition. He said on February 25, 2005, Workforce Safety and Insurance issued a notice of decision dismissing Ms. Ostlie's application for benefits. He said Workforce Safety and Insurance determined the injured worker did not establish that she sustained a compensable injury by accident arising out of and in the course of her employment.

Mr. Kocher said Ms. Ostlie's application for coverage claimed the basis of her eligibility was that as part of her annual physical required for firefighter personnel, her electrocardiogram (EKG) results indicated she had a heart condition. He said Ms. Ostlie underwent a series of medical tests to determine the extent of her condition in an effort to determine if she was able to continue her employment as a firefighter. He said on February 17, 2005, Ms. Ostlie's physician examined her and indicated her stress test and echocardiogram and ultimately an angiogram did not show any disease. Her echocardiogram was negative. The physician allowed Ms. Ostlie to return to work without restrictions.

Mr. Kocher said the denial of benefits by Workforce Safety and Insurance was based on the fact the ultimate test results came back negative and there was no objective medical evidence to indicate a work injury.

Mr. Kocher said on March 11, 2005, Workforce Safety and Insurance received Ms. Ostlie's request for reconsideration of the decision to deny her claim indicating that the tests were necessary for the employer to feel confident that she was not at risk for future cardiac-related incidence. He said on April 20, 2005, Workforce Safety and Insurance issued a dismissal of Ms. Ostlie's claim finding the "greater weight of the evidence does not indicate that Ms. Ostlie sustained a compensable injury by accident arising out of or in the course of her employment." He said Ms. Ostlie did not timely appeal the dismissal of her claim and as such the order became final.

#### **Issues for Review**

Mr. Kocher stated the North Dakota Century Code (NDCC) provisions the claimant indicates are at issue in the review are Section 65-01-02, as the definitions relate to compensable injury; Section 65-01-11, relating to the burden of proof; Section 65-01-15, as the section addresses yearly documentation required for firefighters and law enforcement officers; and Section 65-01-15.1, as the section relates to the presumption of compensability of certain conditions of full-time paid firefighters.

In response to a question from Senator Heitkamp, Mr. Kocher said the law provides a claimant has 30 days from the issuance of the notice of decision in which to request an appeal. He said Ms. Ostlie did file with the Office of Independent Review at about

45 days following the notice but because she has exceeded the 30-day limit no services were provided.

In response to a question from Representative Amerman, Mr. Kocher said he understands Ms. Ostlie used 107 hours of sick leave, incurred medical expenses, and used 12 hours of family leave in order to accommodate her time off work.

Chairman Keiser called on Ms. Ostlie, injured worker, to present the issues she would like the committee to consider. Ms. Ostlie provided a written handout addressing her concerns, a copy of which is attached as Appendix B.

Ms. Ostlie said in looking at NDCC Section 65-01-15.1, the presumption clause for firefighters, her situation seemed to have met the requirements. She said she is a full-time paid firefighter who has been employed for at least five years, who has never smoked, and who participates in regular physical examinations.

Ms. Ostlie said she is concerned the law has been interpreted to not provide coverage for situations like hers. She said based on the nature of her job, she thought it was especially important to follow up on the results of the EKG. Additionally, she said, her physician wanted to confirm or deny the results of the stress test before allowing her to return to work. She was unable to return to work until after the angiogram results were reviewed. She said she is concerned it is possible she was denied coverage because her physician checked the box stating this was not a work-related injury. Ms. Ostlie said throughout the process, her paperwork was completed timely and all other criteria were met, except for meeting the 30-day requirement for the appeal. Finally, she said, it is her understanding that at least one other firefighter in her department had the same situation and his claim was approved and he received benefits.

Ms. Ostlie said the state's law should be designed to provide coverage for public servants who fit the criteria of the presumption for firefighters. She said she is concerned that injured workers face a situation where it is unknown where to go for assistance when correcting errors in a claim. Additionally, she said, the law should be changed or clarified in some way to prevent the same thing that happened to her from happening to anyone else.

Ms. Ostlie said she feels that Workforce Safety and Insurance should have some responsibility for educating physicians in the state regarding the workers' compensation laws. She said if a claim is denied, the injured worker should have more information regarding why the claim was denied so that the injured worker can take any necessary actions to correct any mistakes that might have been made. Finally, she said, as in her situation, if a mandatory physical for a firefighter indicates a "false positive" it is critical to know the health facts. She said some of the negative consequences of failing to provide coverage in situations like hers is that next time she has a physical examination and the EKG is again abnormal she might ignore it because of the

fear of having to pay another \$2,000 out-of-pocket expenses. She said if she ignores a bad test and it turns out to be a real heart event, she not only puts herself but her coworkers in danger if she had a health problem on a call. To make matters worse, she said, if she refuses to take the next physical provided by her employer, she will be disqualified from the presumption clause. She said it is a hard-to-win situation.

In response to a question from Senator Heitkamp, Ms. Ostlie said in a job such as hers where she does shift work, the 30-day limitation to appeal a notice of decision is a bit short and did not seem like enough time. She said not only did the experience result in out-of-pocket expenses but it was very stressful to go for a month believing you may have a serious heart condition.

In response to a question from Representative Amerman, Ms. Ostlie said in trying to address the situation with Workforce Safety and Insurance, she made three or four phone calls and then her union representative also contacted Workforce Safety and Insurance. Ultimately, she said, the response from Workforce Safety and Insurance was that the denial is because of the way the presumption clause is worded under the statute.

In response to a question from Senator Heitkamp, Ms. Ostlie said she is familiar with another case similar to hers and in that case the firefighter was initially denied but then approved following his appeal.

In response to a question from Senator Klein, Ms. Ostlie said the cost of the time she took off work was approximately \$2,000 which included her medical expenses and the fact that she had to take sick leave and family medical leave.

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

Chairman Keiser called on Mr. Tim Wahlin, Attorney, Workforce Safety and Insurance, to provide testimony regarding issues raised by Ms. Ostlie. Mr. Wahlin said although it is correct that the presumption of compensability for firefighters is addressed under NDCC Section 65-01-15.1, the issue brought forward is even more basic than this presumption clause. He said the issue actually goes to whether there is even an injury. He said there was a positive test but no cardiac condition and therefore a determination of no injury. He said the situation Ms. Ostlie describes lacked the required eligibility elements.

Mr. Wahlin said Ms. Ostlie's claim that the physician checked the wrong box should not be a concern for the committee. Her claim was not denied on the basis of what box the physician checked. Once a claim is filed with Workforce Safety and Insurance, the agency goes through the application to clean up any errors that might have been made.

Mr. Wahlin said something to keep in mind when addressing a workers' compensation claim is that in cases like Ms. Ostlie's where she has a private insurer, such as Blue Cross Blue Shield of North

Dakota, the insurance agency may deny private pay coverage if it is a workers' compensation claim.

In response to a question from Representative Keiser, in which he stated the situation seems to be a Catch-22 where an individual lives a clean lifestyle, has the required examination as required under law, and then is not covered, Mr. Wahlin said he does not have a clear answer on what should be done. Instead, he said, he recommended the committee focus on the purpose of workers' compensation. He said all workers' compensation systems require that there be a work-related injury. He said examinations are the correct way to handle high-risk jobs like firefighters but regardless there needs to be an actual injury. He said that 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.

In response to a question from Senator Heitkamp, Mr. Wahlin said in the case of Ms. Ostlie, the reason Workforce Safety and Insurance did not pay the claim is that the law says there must be a workplace injury and under North Dakota law that provides there must be objective medical proof of injury and in her case this requirement was not met. Additionally, he said, the 30-day period that is set to allow an individual to appeal a notice of decision is a bit of a balancing act. He said Workforce Safety and Insurance needs to balance the interest of managing claims and giving a reasonable amount of time to appeal a decision. He said he thinks 30 days is enough time and all that is required to meet the 30-day requirement is a phone call. He said that Workforce Safety and Insurance broadly interprets what qualifies as an appeal.

Senator Espegard said as he views the situation brought to the committee, because the private insurance covered the tests, the employer provided sick leave coverage, and the test ended up being a false positive, he thinks everything worked as well as you could hope. He said he does not have an opinion on whether 30 days is an adequate appeal but he does believe that it is important to remember that Workforce Safety and Insurance is not a medical insurer.

Senator Heitkamp said we need to remember Ms. Ostlie's situation that the North Dakota workers' compensation system has a statutory requirement to have physical examinations.

In response to a question from Representative Keiser, Mr. Wahlin said following a Workforce Safety and Insurance notice of decision, either the employer or employee may file an appeal. Additionally, he said, Workforce Safety and Insurance retains the authority to reopen a case if circumstances require, regardless of the time period.

In response to a question from Senator Klein, Mr. Wahlin said regardless of the timing of the appeal, he believes Ms. Ostlie's situation did not reflect a compensable injury. He said it is likely the same decision would have resulted regardless of whether it

had been appealed all the way to the North Dakota Supreme Court.

In response to a question from Representative Amerman, Mr. Wahlin said there are very few ways for an injured worker or an employee to avoid the 30-day appeal requirement. He said one exception might be if the focus of the appeal is on why the timeline requirements of the appeal were missed.

In response to a question from Senator Heitkamp, Mr. Wahlin said although an injured worker or employer always has the opportunity to take a case to court, the chances of success are remote if the period of appeal has passed. He said the 30-day window for appeal is designed specifically for finality.

In response to a question from Senator Espegard, Ms. Ostlie said the changes she would like to see include clarification of the law that a false positive would qualify as a workplace injury.

### **Comments by Interested Persons**

Chairman Keiser called on interested persons to make comments regarding the issues raised by Ms. Ostlie. Chairman Keiser called on Mr. Jasper Schneider, Attorney, Fargo, for comments regarding Ms. Ostlie's issues. Mr. Schneider said workers' compensation is an area of law in which he practices; however, he is not personally familiar with Ms. Ostlie's case. He said generally he would take the position that the unpaid medical bills associated with a firefighter's medical examination that followed from her false positive examination should be covered by Workforce Safety and Insurance. Additionally, he said, Ms. Ostlie has appeared before the committee on her own. He said she is very fortunate that she had union representation to help her organize her thoughts but 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. He said under the workers' compensation system, injured workers have given up their rights and are supposed to be getting something in return. He said the quid pro quo arrangement is not working.

In response to a question from Representative Amerman, Mr. Schneider said if Ms. Ostlie were to appeal the decision in her case, the first hurdle that would need to be overcome would be the 30-day appeal issue. He said this appeal issue would be difficult to overcome. The second hurdle, he said, would address the payment of claim issue. He said regardless of whether there is a compensable injury, because the physical examination is a statutory requirement, Workforce Safety and Insurance should be required to pay these claims.

In response to a question from Senator Espegard, Mr. Schneider said Workforce Safety and Insurance does not act in the same capacity as a private health insurer.

Chairman Keiser called on Mr. Sandy Blunt, CEO, Workforce Safety and Insurance, for comments regarding Ms. Ostlie's issues. Mr. Blunt said he is familiar with Ms. Ostlie's case and Workforce Safety

and Insurance did want to pay the claim; however, it is the opinion of Workforce Safety and Insurance that the law does not provide for payment of such claims. Additionally, he said, regarding the 30-day appeal period, the 30-day period is not ironclad and Workforce Safety and Insurance tries to accommodate claimants as much as possible. He said that first responders are very important employees and he thinks it is very important that the state be supportive of this profession.

In response to a question from Senator Klein, Mr. Blunt said he is not aware of many instances of a false positive such as the situation made by Ms. Ostlie. He said the issue of a false positive being covered is unique to firefighters and law enforcement.

In response to a question from Senator Heitkamp, Mr. Blunt said yes, if he was in Ms. Ostlie's shoes for three weeks he would have felt like he did have a heart condition. He said this is one area where Workforce Safety and Insurance should be standing up and providing coverage; however, as written the law does not provide for coverage. He said the law could be amended to address what type of coverage would be reasonable under circumstances such as Ms. Ostlie's. He said he cannot speak on behalf of the Workforce Safety and Insurance Board and whether the board would support such an amendment but he is supportive of such an amendment.

In response to a question from Representative Johnson regarding the interrelationship between Workforce Safety and Insurance and the private insurer, Mr. Blunt said in the case of a private health care insurer, if Workforce Safety and Insurance pays any part of a claim, the insurer will stop covering any instance of insurance claims related to that workers' compensation health-related issue.

Chairman Keiser called on Mr. Sebald Vetter, Concerned Advocates Rights for Employees (CARE), Bismarck, for comments regarding Ms. Ostlie's issues. Mr. Vetter said the 30-day period for an appeal is not long enough. Although he recognizes the need for finality, the injured worker does not always have enough information from the medical profession in order to make a determination on whether to appeal. He said Workforce Safety and Insurance should be required to take care of people in an honest and compassionate way.

Chairman Keiser called on Ms. Kelli Poehls, Fargo-Moorhead Chamber of Commerce, for comments regarding Ms. Ostlie's issues. Ms. Poehls said she did not have any position on whether the 30-day period for appeal should be changed. However, she does think it would be helpful for employers and employees to receive some clarification on what actually qualifies as an appeal.

In response to a question from Senator Heitkamp, Ms. Poehls said she is not aware of business receiving any specific training from the Fargo-Moorhead Chamber regarding workers' compensation coverage but the Greater North Dakota Chamber of Commerce does offer some training regarding the

workers' compensation system. She said she looks to the state to run a workers' compensation program that meets the needs of employees and employers.

Chairman Keiser called on Mr. Darren Schimke, North Dakota Firefighters No. 1099, for comments regarding Ms. Ostlie's issues. Mr. Schimke said he is very grateful that the state has passed a law providing for a presumption of compensability for firefighters. However, he said, he would like an extension for appeals from 30 to 45 days. He said that under the presumption law there seems to be some room for interpretation. He said if a firefighter abides by all the requirements, Workforce Safety and Insurance should have the obligation to interpret the law in favor of coverage for firefighters.

Chairman Keiser called on Mr. Douglas Kapaun, injured worker, for comments regarding Ms. Ostlie's issues. He said his experience has been that in order for an appeal to be effective, the appeal needs to be filed in writing. He said a phone call to Workforce Safety and Insurance is not adequate to meet the 30-day appeal deadline. However, he said, he thinks the 30-day period for appeal is acceptable.

### Committee Discussion

Chairman Keiser recognized the beautiful facilities the committee is using at the North Dakota State University Research and Technology Park. He specifically thanked Senator Tony Grindberg for making this room available for the committee.

Representative Keiser said his understanding of the presumption clause is that the presumption would provide that regardless of whether heart or lung injury is shown to be work-related, in the case of firefighters there is a presumption that it is. He said it is recognized that lifestyle impacts a firefighter's lung and heart health and therefore the law requires a healthy lifestyle for the presumption to apply. He said he thinks Workforce Safety and Insurance followed the law in the case of Ms. Ostlie's claim. However, he said, the committee should consider whether to change the law to provide coverage for a case such as Ms. Ostlie's. He said if the law is changed, he would recommend limitations so a false positive has a limited amount of time under which it is covered.

Senator Heitkamp said he would support draft legislation to clarify the presumption. He thinks that Ms. Ostlie's claim should have been covered under the law as written now. Additionally, he said, he would support lengthening the appeal period from 30 to 45 days.

Representative Keiser said if the period of appeal is extended, it is important to remember that this extension also applies to employers.

Senator Heitkamp said a 45-day period of appeal would better accommodate monthly review of paperwork.

Senator Klein said he thinks the 30-day period of appeal is adequate. If he receives mail from Workforce Safety and Insurance it gets his attention

right away and as an employer he deals with the issue immediately.

Mr. Vetter said the 30-day period for appeal is generally adequate unless you need to get additional information from a physician, in which case 30 days is not always adequate.

Mr. Wahlin said the 30-day period for the appeal is the time by which you need to appeal; however, it is possible to have additional medical evidence submitted after the 30 days.

Senator Espeland said that now that he better understands the presumption clause, he is supportive of this law. He said because the periodic physical examination for firefighters is paid for by the employer, he does not think workers' compensation should be required to pay for a false positive. He said perhaps the law should be changed to require employers to pay for medical expenses arising out of false positive examinations.

Representative Keiser said an employer covers medical expenses through the Workforce Safety and Insurance premiums and the premiums should reflect this coverage.

The committee requested that committee counsel draft two bill drafts addressing the presumption clause. The first bill draft would provide limited coverage for false positive examinations. The second bill draft would extend from 30 to 45 days the period of appeal for claims filed under the presumption clause.

## SECOND CASE

Chairman Keiser called on Mr. Chuck Kocher to assist in presenting Ms. Christina Carroll's case for review by the committee. Mr. Kocher distributed to committee members a binder containing information provided by Workforce Safety and Insurance. He said the information in the binder includes a case summary of the injured worker's records as well as a list of the statutory provisions the injured worker is interested in addressing. Additionally, he said, Ms. Carroll has made arrangements to have Mr. Larry Baer assist her in presenting her issues.

### Case Summary

Mr. Kocher provided a summary of Ms. Carroll's case. He said Ms. Carroll filed for benefits on August 22, 1990, in connection with a July 6, 1990, automobile accident. He said the accident resulted in a spinal cord injury causing quadriplegia. He said that Workforce Safety and Insurance issued a notice of decision awarding benefits to Ms. Carroll and agreed to accept liability for associated medical expenses and disability benefits.

Mr. Kocher said Ms. Carroll currently receives workers' compensation disability benefits in the amount of \$330 a week, with a Social Security offset in the amount of \$68.19, for a net payment of \$261.81 per week. He said these figures take into account a \$9 workers' compensation supplemental weekly benefit adjustment that began July 1, 2005. He said the \$9 weekly increase was due to the supplementary

payment law, designed to bring her disability rate to 60 percent of the state's current average weekly wage.

Mr. Kocher said at the time of Ms. Carroll's injury, she was 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. He said under NDCC Section 65-05.2-01 regarding eligibility for supplementary benefits for injuries occurring before August 1, 1999, a claimant who is receiving permanent total disability benefits for a period of 10 consecutive years or more may be eligible for supplementary benefits. He said the eligibility for supplementary benefits lasts as long as the claimant is entitled to permanent and total disability benefits. He said Ms. Carroll will remain entitled to supplementary increases in the future in accordance with the adjustments with the state's average weekly wage.

### Issues for Review

Mr. Kocher said Ms. Carroll expressed to him her primary concern relates to the supplementary benefits section of the law. He said up until 2005, Ms. Carroll had not received an adjustment in her weekly benefit rates since the onset of her injury in 1990. Finally, Mr. Kocher said it is important to the committee to be aware that the supplementary benefit laws applicable to Ms. Carroll have been amended since the time of her injury which would result in injured workers with later injury dates experiencing different outcomes.

In response to a question from Representative Keiser, Mr. Kocher said Ms. Carroll did not receive a cost-of-living adjustment in her workers' compensation benefits for a period of 15 years.

In response to a question from Senator Klein, Mr. Kocher said Ms. Carroll will likely experience annual adjustments in the amount of 3.9 percent from July 2005 forward.

In response to a question from Representative Keiser, Mr. Kocher said Ms. Carroll's initial benefit amount back in 1990 was calculated based on the maximum benefit amount of the average weekly wage.

Chairman Keiser called on Mr. Baer to present the issues raised by Ms. Carroll. Mr. Baer said prior to her injury in 1990, Ms. Carroll was a very highly compensated employee. He said if Ms. Carroll's preinjury earnings were adjusted to current day value, her earnings would be comparable to \$120,000 per year. He said this is a significant difference from her current receipt of \$17,000 per year. Mr. Baer said Ms. Carroll lives very frugally and although Workforce Safety and Insurance did provide her with modifications to a van at the time of her injury, even with her frugal lifestyle the van has worn out. Unfortunately, he said, with the cost-of-living increases, Ms. Carroll has now begun to subsidize her daily expenses with credit.

Mr. Baer said in considering Ms. Carroll's lifestyle, it is important to note that with her current benefit

amount she is not able to afford a handicapped-accessible apartment. He said if she were to live in a handicapped-accessible apartment, the least expensive unit available in Fargo would cost more than \$700 per month.

Mr. Baer said under the workers' compensation system, Ms. Carroll has essentially been punished. He said her 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 in.

Mr. Baer said in effect Ms. Carroll works for the state. He said given the level of her injury, her care is very complicated. However, he said, Ms. Carroll has been able to live on her own by managing her own care and hiring assistants to help her. He said the fact that she can live on her own saves the state \$1,500 per month compared to nursing home expenses. He said Ms. Carroll has not exploited the system and she is a very hard worker and should be commended.

Mr. Baer said the problems within the workers' compensation system have not been fixed. He said the current system guarantees that injured workers like Ms. Carroll will go broke. To make matters worse, he said, the federal government, in an attempt to save money, is proposing to cut supplemental security income benefits by the amount of the state workers' compensation benefits. He said there seems to be a race to offset state and federal payments.

Mr. Baer said in looking at Ms. Carroll's lifestyle, in addition to having to pay rent and hire assistants to help her with every aspect of daily living, Ms. Carroll has travel needs for medical purposes.

Mr. Baer said within her current budget Ms. Carroll is unable to perform background checks on the workers she hires as assistants and this has resulted in making her very vulnerable and being a victim to theft by some of her workers. Additionally, he said, the state's investment in modifying Ms. Carroll's van was a very good investment. He said her handicapped-modified van has allowed Ms. Carroll to travel to her doctors' appointments in Minnesota and Colorado in a much less expensive manner than air travel.

Mr. Baer said inflation can be a friend of government but it is an enemy of people on fixed incomes. He said the system is morally wrong to degrade an injured worker from the highest-paid employee to the lowest-paid employee.

Mr. Baer said the health coverage Ms. Carroll has received by Workforce Safety and Insurance has been amazing. He also recognizes the state has made investments in the workers' compensation system and those investments have been paying off.

Mr. Baer asked the committee to consider the plight of injured workers, such as Ms. Carroll, and look at the situation they are in and whether a 3.9 percent increase over 15 years is appropriate. He said ideally the state would provide injured workers, such as

Ms. Carroll, a lump sum payment to make up for these years without a cost-of-living adjustment.

In response to a question from Representative Amerman, Representative Keiser said when legislation is drafted it can clarify whether it applies retrospectively or prospectively.

In response to a question from Senator Heitkamp, Ms. Carroll said after her initial injury she received a lump sum of approximately \$153,000 from Workforce Safety and Insurance as well as her weekly benefit amount. She said she receives supplemental security income from the federal government; however, much of this amount is offset. Mr. Baer said in civil lawsuits an award takes into account cost-of-living adjustments. He said under the workers' compensation system the injured worker has given up the right to bring lawsuits but is not given the same benefits of cost-of-living adjustments under this system.

Chairman Keiser called on Ms. Carroll to provide comments regarding her situation and issues she would like the committee to review. Ms. Carroll said since her injury it is clear her living costs have gone up. Additionally, due to her living arrangements and her injury, she has lost everything. She said the workers who assist her are a constant part of her life and because she manages her care this allows her to save the state money. However, she said, some of her workers have stolen from her and over the years her personal belongings have essentially all been lost.

Ms. Carroll said the struggles of daily living include a lack of feeling in her hands which results in regularly injuring her hands. She said she has essentially worn out her van. Her brother has paid for recent van repairs. Finally, she said, expenses have gotten so overwhelming that she has approximately \$19,000 of living expenses on her credit card.

In response to a question from Representative Amerman, Mr. Baer said Ms. Carroll's initial lump sum payment from Workforce Safety and Insurance was calculated under statute and in part is based on the percentage of Ms. Carroll's disability.

In response to a question from Representative Amerman, Mr. Baer said Ms. Carroll has had some of her requests for medical services denied. For example, he said, years ago Workforce Safety and Insurance denied Ms. Carroll's request for a hysterectomy, claiming the need was not due to a work-related injury.

### **Workforce Safety and Insurance Responses**

Chairman Keiser called on Mr. Wahlin for comments regarding Ms. Carroll's claim and issues. Mr. Wahlin provided a document showing examples of how the law calculated supplementary benefits for injured workers, a copy of which is attached as Appendix C. Mr. Wahlin said the first page of the document reflects the old law regarding supplementary benefits, the law that Ms. Carroll falls under. In looking at the list of examples of his handout, Mr. Wahlin said under the old law "Injured

Worker A" reflects a low wage-earning employee who would be eligible for a supplementary benefit in the 11th year; "Injured Worker B" reflects a mid wage-earning injured worker who would be eligible in a change of benefits beginning with the 11th year; "Injured Worker C" reflects a higher-earning injured worker who would be eligible to receive supplementary benefits beginning the 16th year; and "Injured Worker D" reflects a high wage-earning employee who receives the maximum amount of benefits at the time of injury, resulting in the first supplementary benefits in year 17.

Mr. Wahlin said in 1999 and 2001 the supplementary benefit law was revised and the current formula applies to injured workers injured in 2001 forward. He said using the same examples of injured workers under the current law, every one of the injured workers would be eligible to receive supplemental benefits beginning in the eighth year. However, he said, under current law, the amount of a lower-earning injured worker's supplementary benefits would be higher than that of a higher-earning injured worker.

Mr. Wahlin said under the old supplementary benefits law, the long-term goal was to put all injured workers at the same rate over time. Under current law, he said, lower wage earners will receive larger supplementary benefits and higher wage earners will receive smaller supplementary benefits; however, all injured workers will begin receiving these benefits after seven years.

In response to a question from Senator Heitkamp, Mr. Wahlin said he is not certain why the seven-year period was chosen. He said in comparing North Dakota's law with other states, the majority of workers' compensation systems do not provide for any cost-of-living adjustments. He said Ms. Carroll is not covered under current supplementary laws because her injury occurred before 2001. He said if the law were changed to give the same supplementary benefits to Ms. Carroll, there would have to be a retroactive alteration of the benefits scheme. He said anytime this is done, there are risks of constitutional problems because there are typically winners and losers under such a transition. Mr. Wahlin said he is not certain why the supplementary benefit law was not amended to include earlier injured workers such as Ms. Carroll. However, it is likely the decision was related to the fiscal impact.

Senator Heitkamp asked Workforce Safety and Insurance to provide at a future meeting data regarding how many injured, like Ms. Carroll, are currently under the state's workers' compensation system.

Representative Keiser said he recalls the 1999 legislation and there was a fiscal note. Additionally, he said, when workers' compensation premiums are calculated, they are based on the current workers' compensation structure and Ms. Carroll's employer's premiums were paid under the old structure.

Mr. Baer said the state needs to build a cost-of-living adjustment into the workers' compensation system. He said as far as constitutional arguments, the retroactive application would not retroactively diminish benefits but would raise benefits. He said the constitution does not prevent the state from treating different classes of injured workers differently.

In response to a question from Representative Keiser, Mr. Wahlin said in the case of an injured worker such as Ms. Carroll who requires a modified vehicle, Workforce Safety and Insurance will pay for the modifications and installation of a lift for her van. However, the law does not allow Workforce Safety and Insurance to continue to supply vehicle modifications or lifts. He said this is a one-time benefit.

Mr. Baer said North Dakota's law is too narrow as it relates to vehicle modifications. He said because the van is an essential part of Ms. Carroll's medical treatment, the state should provide Workforce Safety and Insurance with more discretion with how to deal with expenses relating to her vehicle.

In response to a question from Senator Heitkamp, Mr. Wahlin said in determining whether to provide coverage for an injured worker, there is a medical utilization review process. He said the basic issues raised in this review process include a determination of whether the injury is work-related and whether the proposed treatment is appropriate. Mr. Wahlin said a medical utilization review decision may be appealed. Senator Heitkamp said it seems common sense that a quadriplegic would have a medical necessity to undergo a hysterectomy.

Mr. Blunt testified that the decision regarding coverage of Ms. Carroll's hysterectomy was made 10 years ago and if that same request for medical coverage were made today Workforce Safety and Insurance would cover it.

Senator Heitkamp requested information for a future meeting regarding the direction Workforce Safety and Insurance will be going as it enters the 2007 legislative session.

In response to a question from Senator Klein, Mr. Blunt said as of June 2005 Workforce Safety and Insurance had a \$1.1 billion obligation over 30 years.

In response to a question from Representative Amerman, Mr. Blunt said in the case of Ms. Carroll, the one-time payment of approximately \$150,000 reflects a permanent partial impairment award. He said the award amount is calculated based on the percentage of disability and a number of weeks and wages. He said if the same injury were to occur today, the payment would be higher.

### **Comments From Interested Persons**

Chairman Keiser called on Ms. Chenoa Peterson, Fargo, for comments regarding Ms. Carroll's issues. Ms. Peterson said she is one of Ms. Carroll's assistants. She said she began working for Ms. Carroll in 1998 and has had the opportunity to see the theft and poor treatment of Ms. Carroll's

belongings. She believes a lot of this abuse by some of Ms. Carroll's workers has been the result of the inability of Ms. Carroll to be able to afford to do background checks and drug checks on her workers who assist her. She said she has seen how it is becoming more and more difficult for Ms. Carroll to find trustworthy workers to assist her.

Chairman Keiser called on Ms. Carole J. Gray, injured worker, for comments regarding Ms. Carroll's issues. Ms. Gray said she underwent rehabilitation following her injury and received a permanent partial impairment award in 1992 following a neck injury. However, she said, she did not qualify for a permanent partial impairment award in 1996 following her back injury. She said in her case she did utilize the Office of Independent Review and when she spoke to representatives of that office their comments were limited to noting how angry she was.

Ms. Gray said regarding the 30-day appeal period, it can be difficult to contact a caseworker or analyst at Workforce Safety and Insurance and in some instances it may take more than 30 days to determine how you would like to proceed once you receive your notice of decision. Finally, she said, she was recently injured again in the course of her work and she once again received poor service from Workforce Safety and Insurance.

Chairman Keiser called on Mr. Vetter for comments regarding Ms. Carroll's issues. Mr. Vetter said he thought the state made funds available to help injured workers, such as Ms. Carroll, buy modified vans. He said if these funds are not available now, they ought to make them available. He said the state needs to take better care of injured workers such as Ms. Carroll.

Chairman Keiser called on Mr. Kapaun for comments regarding Ms. Carroll's issues. Mr. Kapaun said the system should be designed in a way to give special consideration to catastrophically injured individuals such as Ms. Carroll.

### **Committee Discussion**

In response to a question from Senator Heitkamp, Mr. Wahlin said Workforce Safety and Insurance is in continuous discussion concerning its legislative package.

Senator Klein requested that Mr. Blunt work with the Workforce Safety and Insurance Board to try to get the board's support on legislative proposals recommended by the committee.

Senator Heitkamp said he would request that Workforce Safety and Insurance report to the committee at a future meeting regarding whether the employees of Workforce Safety and Insurance have different policy goals from the Workforce Safety and Insurance Board.

Mr. Blunt said meetings of the Workforce Safety and Insurance Board are taped and minutes are retained. Therefore, he said, a review of the minutes would reflect whether the board's policy differed in any

way from the employees of Workforce Safety and Insurance.

In response to a question from Senator Heitkamp, Mr. Blunt said he does not have any examples that come to mind of situations in which his policy goals differed from those of the Workforce Safety and Insurance Board.

In response to a question from Representative Amerman, Representative Keiser said he was the sponsor of the 2005 legislation that changed the calculation of the Workforce Safety and Insurance fund reserve requirements.

Mr. Blunt said the balance of the Workforce Safety and Insurance fund, with the change in the law, has resulted in an excess of \$140 million. He said this excess in the fund balance is being used for a variety of activities, including the creation of an injured worker education fund, a continuing appropriation for safety and education, and a dividend credit for premium payers. He said at a future meeting he will provide the committee with additional information regarding the use of excess funds.

Mr. Baer said given the recent testimony regarding the fund surplus, there should be no need to raise premiums in order to address the inequity of the system's treatment of injured workers such as Ms. Carroll.

Representative Keiser said prior to the 1995 legislation regarding the Workforce Safety and Insurance fund balance, the required balance had been based on an undiscounted fund balance. However, he said, because North Dakota's workers' compensation system is a monopolistic fund, it was determined the balance should be based on a discounted fund balance. He said in considering what to do with the resulting fund excess, it is important to remember that this surplus is paid by employers. For example, he said, if an electric company overcharged the consumer, the consumer would want a refund.

Senator Heitkamp said in the last several years, workers have had their benefits cut. He said the system is designed so employees have given up the ability to bring a civil action for the benefit of receiving sure and certain relief under Workforce Safety and Insurance. He said there is a flip side. In the 2005 legislative session, bills were squashed because of the fiscal impact but then late in the session it became apparent there would be a surplus and people were understandably a little bit upset about it. He said the point behind all of this is the surplus should have been part of the 2005 discussion on all workers' compensation bills and it went over poorly when it only entered the conversation late in the session, after earlier bills had been squashed based on lack of funding.

Senator Espgaard said traditionally the Legislative Assembly tries to be conservative in considering workers' compensation bills and it would have been helpful during the 2005 legislative session to have known all of the information upfront.

Senator Heitkamp said going into the 2007 legislative session, it will be important for Workforce Safety and Insurance to tell the Legislative Assembly upfront what the fund balance is.

Mr. Baer said he is familiar with the workers' compensation system in other states and he knows that other states have had to deal with the same debate.

Senator Espegard said it is important to recognize in North Dakota the change from a fully funded fund to a discounted fund has been a pretty liberal undertaking.

Representative Amerman said our workers' compensation average weekly wage is based on data from Job Service North Dakota. He said the Job Service data is likely based on workers' compensation exempt jobs. He said he would request at a future meeting the committee receive information regarding how the Job Service North Dakota average wage figure is determined and whether it includes exempt jobs such as farm labor.

Senator Klein asked for information at a future meeting regarding how many injured workers are under the system such as Ms. Carroll. Additionally, he would like to receive information on what it would cost to have injured workers, such as Ms. Carroll, caught up to the current benefit structure under the new law.

In response to a question from Representative Keiser, Mr. Blunt said the state does classify injured workers as catastrophically injured and this would be an appropriate way to do research regarding how many individuals like Ms. Carroll are under the system. He said there is a precedent for treating catastrophically injured workers differently from other injured workers.

In response to a question from Senator Klein, Mr. Blunt said the workers' compensation system does not limit lifetime medical benefits.

Senator Espegard said he would like to receive information at a future meeting regarding how many injured workers have received vehicle modifications and lifts and whether there may be possible ways to deal with the inequities of wornout modified vehicles.

Representative Keiser said at a future meeting he would like Workforce Safety and Insurance to provide a summary of the retirement presumption law and a summary of how different cases of injured workers have been impacted by the changes made to this law. Additionally, he would like Workforce Safety and Insurance to provide proposals on possible ways to address issues relating to the retirement presumption. Representative Keiser said the committee is reaching the point where it will have to stop accepting applications. The committee will need to wrap up case review next quarter and begin spending time on more traditional committee work in order to make recommendations to the Legislative Council.

Chairman Keiser said the committee's next meeting will take place in Bismarck and the plan is for the committee to conduct a two-day meeting and review four cases. The tentative dates for this meeting are April 26-27, 2006.

No further business remaining, Chairman Keiser adjourned the meeting at 3:30 p.m.

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Jennifer S. N. Clark  
Committee Counsel

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