

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Monday, June 19, 2006
Room 166, NDSU Wellness Center
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. Espegard, Joel C. Heitkamp, Jerry Klein

Others present: See attached appendix

The committee considered the minutes of the April 26-27, 2006, meeting. Senator Heitkamp said Mr. Daryl Gronfur, Bismarck, who presented information regarding his brother's case at the April meeting, spoke to him regarding the content of the minutes. He said Mr. Gronfur felt the minutes should include an exchange he recalls occurring at the meeting in which he believed that Senator Heitkamp told Mr. Timothy Wahlin, Workforce Safety and Insurance, the injured worker likely would have a good medical or legal malpractice claim.

Chairman Keiser requested the Legislative Council staff review the tapes of the April 26-27, 2006, meeting and report back to the committee.

It was moved by Senator Heitkamp, seconded by Representative Johnson, and carried on a voice vote that the minutes of the April 26-27, 2006, committee meeting be approved conditionally upon review of the tapes.

Chairman Keiser welcomed the committee members to the NDSU Wellness Center. He explained the committee will be receiving information from Workforce Safety and Insurance and will not be reviewing any cases at this meeting. He said it is his plan to have a two-day meeting in July or August at which the committee will review the final four injured worker cases for the interim.

Chairman Keiser called on Mr. Gary Fisher, Director, Wellness Center. Mr. Fisher welcomed the committee to the Wellness Center. He said the building expansion that is taking place at the Wellness Center has been funded through student fees and this expansion will triple the size of the facility. Additionally, he said, if members of the committee are interested in receiving a tour of the Wellness Center, he would be pleased to show them around the facility.

WORKFORCE SAFETY AND INSURANCE FUND

Chairman Keiser called on Mr. Charles Blunt, Executive Director and CEO, Workforce Safety and Insurance, to present information regarding the current status of the Workforce Safety and Insurance

fund, its anticipated status going into the 2007 legislative session, and the status of the premium rate package. Mr. Blunt distributed to committee members a three-ring binder containing written copies of the computer presentations and supplemental written information for all of the presentations being made by Workforce Safety and Insurance for the committee. A copy of the material in the binder is on file in the Legislative Council office. Additionally, Mr. Blunt brought to the committee's attention the presence of Mr. Robert Indvik, Chairman of the Workforce Safety and Insurance Board.

Mr. Blunt provided a computer presentation reviewing the current and anticipated position of the Workforce Safety and Insurance fund and reserve surplus. He said the fund is currently in a positive position, resulting in the board's decision for a zero percent increase in rates. However, he said, because the payroll cap is increasing, the result will be an approximate 3 percent premium increase. He said the minimum premium will increase from \$125 to \$250.

In response to a question from Senator Klein, Mr. Blunt said the rate structure is set to allow Workforce Safety and Insurance to capture and collect the necessary premium dollars for the year. He said the fact that there are dividends being paid is not in conflict with the 3 percent increase in premiums.

In response to a question from Senator Heitkamp regarding the premium increase and the dividends being distributed, Mr. Blunt said if a new business starts in North Dakota this year, that business would not receive a dividend based upon past premium payments. He said the rate levels are stable and the premium increase recognizes increased wages and increased medical expenses. He said there are increasing numbers of workers for which workers' compensation coverage is being paid and there is an inflationary factor.

In response to a question from Representative Keiser regarding the fund surplus, Mr. Blunt said the Workforce Safety and Insurance Board will likely wait until after the 2007 legislative session before it determines how to deal with the remaining surplus funds. He said when the fund exceeds 140 percent of liability, the board determines how to deal with the excess of the surplus funds. He said he does not support distributing higher dividends. He said the use of surplus funds needs to be addressed prudently to benefit all North Dakotans.

Chairman Keiser called on Mr. Glenn Evans, Workforce Safety and Insurance consulting actuary, to present testimony regarding the Workforce Safety and Insurance fund. Mr. Evans said over time the state's average weekly wage has increased and medical costs have increased. Additionally, he said, the state's economy has become larger with more employed individuals. He said the number of injuries occurring to workers is increasing and this increase is because there are more workers and the number of injuries per 100 workers is increasing. He said when reviewing workplace injuries, medical injuries are classified as either "time-loss" or "medical-only." He said 80 percent of the workers' compensation injuries in North Dakota are medical-only and there has been an increase in the number of these injuries. He said the time-loss injuries make up a smaller portion of the number of injuries but are more expensive claims for the state.

In response to a question from Senator Heitkamp, Mr. Evans said if the workers' compensation rates are being set at an appropriate level, the growth in the economy does not really matter; however, anytime you look strictly at the number of workers' compensation claims, the increase in the economy and increase in the number of workplace injuries may become a factor. He said North Dakota has some of the most stable workers' compensation rates in the country and also has some of the lowest workers' compensation premiums.

In response to a question from Representative Keiser regarding the trend of the increasing number of medical-only claims, Mr. Evans said unfortunately not all of the state data distinguishes between the two types of medical claims. He said North Dakota is not particularly unusual in this inability to track data distinguishing between these two types of medical claims.

WORKERS' COMPENSATION RETIREMENT LAW

Chairman Keiser called on Mr. Evans to present information regarding the workers' compensation retirement law history. Mr. Evans provided a computer presentation, which is included in the binder material.

Mr. Evans reviewed the current law and past law relating to workers' compensation permanent total disability, supplemental benefits, and retirement. As part of this review, he reviewed the supplemental benefits laws under the current benefits structure and under the immediate past benefits structure. As part of this presentation, Mr. Evans distinguished between high wage earners and low wage earners and distinguished between the benefits structures of a catastrophically injured individual and a noncatastrophically injured individual.

In response to a question from Representative Keiser regarding the implementation of the new benefits structure for permanently and totally disabled

injured workers, Mr. Evans said he understands the new law is being phased in but he does not know specific numbers regarding how many workers are negatively affected due to the transition.

In response to a question from Senator Heitkamp distinguishing between a 25-year-old worker who is injured and a 40-year-old worker who is injured, Mr. Evans said there is a valid point that if you are injured early in your working career, your workers' compensation benefits are capped at that point. He said he is not aware of studies addressing this issue of young injured workers and he is not aware of other states specifically addressing this issue.

In response to a question from Representative Amerman, Mr. Wahlin stated a declaration of permanent and total disability may occur at any time.

In response to a question from Representative Keiser regarding the current benefits structure for termination of supplemental benefits at retirement age, Mr. Evans said he did not address this issue and the Social Security offset issue in his slides because they are unique to each worker. He said under the old benefits structure, the Social Security offset remains with the claim at a fixed level and the offset did not increase as the Social Security benefit increased.

In response to a question from Senator Espgaard, Mr. Evans said under the old benefits structure, there was a Social Security offset at retirement as an injured worker transitioned from Social Security disability to Social Security retirement. He said Social Security does provide for a cost-of-living adjustment but the workers' compensation offset was calculated at the initial Social Security level and the offset did not increase with the Social Security cost-of-living adjustments.

In response to a question from Senator Klein, Mr. Evans said in the case of an injured worker who became injured during the transition from the old retirement benefits structure to the current retirement benefits structure, it is possible the worker would be worse off than under the old benefits structure and worse off than under the current benefits structure.

Representative Johnson said she would like to receive information regarding how many injured workers were caught in the transition between the old retirement benefits structure and the new retirement benefits structure. Mr. Evans said approximately 100 claims fall within this category.

Chairman Keiser called on Mr. Sebald Vetter, Concerned Advocates Rights for Employees (CARE), Bismarck, for comments regarding the presentations on the fund and the benefits structures. Mr. Vetter questioned which benefits structure was being referred to as the "old law."

Mr. Evans said when he refers to the old benefits structure for purposes of permanent total disability, he is referring to the pre-1995 benefits structure.

Representative Keiser reminded Mr. Vetter that 2005 House Bill No. 1171 will change how things are done at Workforce Safety and Insurance.

Mr. Vetter said under the current permanent partial impairment system, very few workers benefit because very few injured workers meet the 50 percent impairment requirement.

Chairman Keiser called on Mr. Ed Christensen, CARE, Bismarck, for comments regarding the presentations on the fund and benefits structures.

Mr. Christensen said in the scenario of a high wage earner, the system allows that injured worker to go 10 to 13 years without a cost-of-living adjustment. Additionally, under the state's permanent partial impairment system, North Dakota's benefits are lower than other states until the injured worker has 36 percent body impairment.

Mr. Christensen said if a worker is injured in North Dakota, the only raise that injured worker is ever going to get is a Social Security cost-of-living adjustment. He said he fails to see the logic in giving employers rebates. He said in today's day and age, insurance premiums go up so why should not the Workforce Safety and Insurance premiums go up as well, allowing injured workers' benefits to continue at a reasonable level.

In 1919, Mr. Christensen said, the state signed an agreement with the injured worker to provide workers' compensation benefits and to provide injured workers with sure and certain relief, in return for losing the right to bring an action against an employer. Over time, he said, Workforce Safety and Insurance has become an insurance company.

Mr. Christensen said the state's workers' compensation agency should be working for both sides, not just the employers.

Chairman Keiser called on Mr. Gronfur for comments regarding the presentations regarding the fund and the benefits structures. Mr. Gronfur questioned how rates could actually be decreasing when taking into account inflation, while medical costs are increasing. He questioned whether this means the benefits being provided to injured workers are actually decreasing.

In response to a question from Mr. Gronfur, Mr. Wahlin said there is a waiting period for supplemental benefits. He said an injured worker is not entitled to supplemental benefits for a period of time which used to be 10 years and which will now be 7 years.

In response to a question from Senator Heitkamp, Mr. Wahlin said when a workers' compensation claim becomes a time-loss claim, the injured worker's wages are calculated and this amount is used throughout the life of the claim. However, he said, if the injured worker returns to the workforce, then Workforce Safety and Insurance reevaluates that injured worker's wages.

Chairman Keiser called on Ms. Deb Bale, injured worker, Jamestown, for comments regarding the presentations regarding the fund and the benefits structures. Ms. Bale said she had a hard time understanding the presentations. She said she would

be more interested in hearing workers' compensation success stories.

Ms. Bale said she would like Workforce Safety and Insurance to show examples of what types of permanent partial impairments qualify for different body impairment ratings.

Senator Heitkamp said he would like to receive information on what typical workers typically earn at different stages in their employment careers.

Senator Klein said Senator Heitkamp might have a point and it might be valuable to see how many permanently and totally disabled workers fall within which age brackets.

Representative Keiser requested Workforce Safety and Insurance provide profile data that indicates the number of injured workers within each age range and the date of the injury.

Senator Heitkamp said the committee needs to be aware of how important it is when an injured worker's benefit level is established because that is going to be the injured worker's benefit level for life, if unable to return to work.

WORKFORCE SAFETY AND INSURANCE LEGISLATIVE PACKAGE

Chairman Keiser called on Mr. Blunt to provide information regarding the Workforce Safety and Insurance legislative package for the 2007 legislative session. Mr. Blunt gave a computer presentation, a written copy of which is included in the binder material.

Mr. Blunt testified the 2007 legislative proposals from Workforce Safety and Insurance will include:

- Allow the nondependency death award to be distributed based on the wishes of a will (where applicable) instead of the closest living relative.
- Limit the filing window for dependency allowance payments.
- Fully exempt Workforce Safety and Insurance from the required use of the Information Technology Department services. This would allow Workforce Safety and Insurance the option of using the most appropriate and cost-effective service in each individual case. To the extent services could be provided more cost effectively internally, through the Information Technology Department or another service provider, this option could be selected. This would also ensure that Workforce Safety and Insurance policyholders are getting the best value for their premium dollars.
- Request 10 additional full-time equivalent (FTE) 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. This was requested by the committee two sessions ago.

- Provide enhancements to the injured worker 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 a vehicle 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 where a false positive test occurs on physicals for firefighters and law enforcement officers under the presumption clause (requested by the interim Workers' Compensation Review 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.
- Minor cleanup language items from last session which do not materially affect the law in any way.
- Fund, construct, and maintain a permanent workers' memorial on the State Capitol grounds. Workers killed on the job would be memorialized initially and then each year on Workers' Memorial Day a ceremony would be held to add the previous year's names of those killed on the job.
- Budget.

In response to a question from Senator Heitkamp, Mr. Blunt said Workforce Safety and Insurance needs to go to the Legislative Assembly to request additional FTE positions. He said the cost associated with 10 FTE positions would be addressed through workers' compensation rates.

Representative Keiser said the 1 percent reduction on student loan interest rates may not be a large enough reduction. Mr. Blunt said under the Workforce Safety and Insurance injured worker education loan program, the interest is deferred during the period of education. Mr. Indvik said the Workforce Safety and Insurance Board will consider the issue raised by Representative Keiser.

Representative Amerman said he understands \$15 million of the fund's surplus is designated to be used for education but he has not heard many details on how this is going to be used.

Mr. Blunt said details regarding the use of the education funds include how to qualify and the interest rate.

In response to a question from Representative Amerman regarding the proposal to designate peace officer status for the special investigation unit staff, Mr. Blunt said the special investigation unit staff members are employees of Workforce Safety and Insurance and are not contract workers.

In response to a question from Representative Amerman, Ms. Jodi Bjornson, Workforce Safety and Insurance, stated initial evaluations indicate the change in status would not have any liability impact for the state.

Senator Heitkamp asked what all goes along with peace officer status. Ms. Romi Leingang, Workforce Safety and Insurance, stated peace officer status allows for better safety of investigators. She said Workforce Safety and Insurance has not yet gone to the North Dakota Peace Officers Association members to get their opinions on this proposed legislation but will contact the association in August.

In response to a question from Representative Johnson, Ms. Leingang said an example of the safety needs of a special investigation unit staff member are illustrated by a situation in which the staff member walked into an employer investigation at which there were drugs and weapons.

Senator Heitkamp asked what would happen if every state agency sought exemption from the Information Technology Department requirements. Mr. Blunt said the North Dakota University System is partially exempt from the Information Technology Department requirements and would seek an exemption for Workforce Safety and Insurance because it is very unique and different from most state agencies.

Senator Heitkamp questioned the rationale behind the proposal for the optional coverage choice for newspaper delivery personnel. He said that his experience is that most newspaper carriers are minors.

Mr. Blunt said under current law, an employer has an option of whether to provide coverage to a newspaper carrier. He said the national trend is moving toward providing coverage for these employees.

In response to a question from Senator Espgaard, Mr. Blunt said 80 percent of the newspaper carriers in the state are adults. He said some newspaper carriers are under age 18 and would be covered under workers' compensation.

Mr. Blunt said the national trend is to provide workers' compensation coverage for newspaper carriers. However, he said, he does acknowledge that there may be a perception that workers' compensation is punching back at newspapers regarding how

Workforce Safety and Insurance may be treated in the media.

In response to a question from Representative Keiser, Mr. Blunt said the legislative proposal to replace the existing 75 percent experience rate surcharge cap with an unlimited, actual experience rating cap would make special provisions for smaller employers. He said because smaller employers typically do not generate enough payroll to qualify for experience rating, there are stop cap provisions to protect the smaller employers. He said smaller employers would be considered base-level employers.

Representative Keiser said he thinks it is a huge improvement for the legislative package to be available for review before the legislative session.

Mr. Blunt said his goal is to make the 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.

Chairman Keiser called on Mr. Dave Sandy, Workforce Safety and Insurance, to provide a presentation regarding the Workforce Safety and Insurance budget request for the 2007-09 biennium. Written information regarding the budget request is included in the binder material.

Mr. Sandy said the total of the Workforce Safety and Insurance budget appropriation for the 2007-09 biennium is \$52,215,474. He said this figure includes the \$14 million investment in the information technology plan. He said excluding the information technology plan, the appropriation request reflects an increase of approximately 14 percent over the current biennium.

Senator Espgaard noted the proposed increase in salaries and wages is 16 percent. He said this is a significant increase in payroll expenses.

Mr. Sandy said he is not certain what the increases in salaries and wages have been in previous bienniums.

Senator Heitkamp questioned whether it is fair to provide Workforce Safety and Insurance employees a 16 percent increase in salaries and wages, if the state is not providing comparable increases to employees of other state agencies.

Mr. Blunt said his job is to look out for Workforce Safety and Insurance employees and he strives to have a highly qualified workforce.

In response to a question from Senator Espgaard, Mr. Blunt said the industry standard for employee turnover is 12.7 percent, whereas Workforce Safety and Insurance is at 11 percent.

Chairman Keiser called on Mr. David L. Kemnitz, President, North Dakota AFL-CIO, Bismarck, for comments regarding the committee's activities. Mr. Kemnitz distributed the document *A Decade of Workers' Compensation Change 10 Years of Reductions in Benefits to Injured Workers*. A copy of this document is on file in the Legislative Council office. Mr. Kemnitz said the document was published in June 2000 so it does not reflect legislative changes made in the 2001, 2003, and 2005 legislative

sessions. Mr. Kemnitz reviewed the document and requested committee members consider the information in this document.

In response to a question from Senator Heitkamp, in which he recognized the value of the information in the document, Mr. Kemnitz said the publication is a joint effort between the North Dakota Labor Education Council and the Schneider, Schneider, and Phillips Law Firm, Fargo. He said the law firm was very generous in providing legal research for a low fee.

Mr. Kemnitz requested committee members make a request for legal services be provided to injured workers who present their cases before the Workers' Compensation Review Committee.

Chairman Keiser called on Mr. Christensen for comments regarding the Workforce Safety and Insurance legislative package presentation. Mr. Christensen said he questions the proposal to change the status of special investigation unit staff to peace officer status. He said he is concerned an investigator with peace officer status would be empowered to go onto the private property of an injured worker.

Ms. Bjornson said under current law, an investigator is considered a private investigator.

Chairman Keiser reminded members of the public that this is not an actual public hearing on the merits of the proposed legislation but is instead intended to bring to the public's attention that there will be a legislative package and the elements of that proposed legislative package.

Chairman Keiser called on Ms. Bale for comments regarding the Workforce Safety and Insurance legislative package. Ms. Bale said she spoke with the injured worker, Ms. Florence Haux, and Ms. Haux requested Ms. Bale inform the committee Ms. Haux would have been better off if she had gone on full disability instead of trying to work. She said Ms. Haux is going through the administrative hearing process.

Ms. Bale commented regarding several of the Workforce Safety and Insurance legislative proposals, including questioning why injured workers are being subjected to drug tests; whether suicide deaths would be included in the proposed memorial for deceased injured workers; why the Legislative Assembly would want to give Workforce Safety and Insurance its own police force; and why legislators argue about their daily reimbursement rates, which exceed her weekly benefits.

Senator Heitkamp took issue with being talked-down to by Ms. Bale. He said legislating is hard work and advocating for injured workers is difficult at best. He said it is a disservice for individuals, such as Ms. Bale, to be so negative in trying to initiate change. He encouraged Ms. Bale's continued participation but said he hopes that she will offer positive suggestions on how to improve the system, instead of being so negative.

Chairman Keiser called on Mr. Michael Menschel, injured worker, West Fargo, for comments regarding the committee's activities. Mr. Menschel said up until

now he was unfamiliar with the activities of the Workers' Compensation Review Committee. He provided a brief review of the history of his experience with Workforce Safety and Insurance, medical providers, workers' compensation rehabilitation services, and the plight of his family. He said he would like to have his case reviewed by this committee.

Representative Keiser explained the process Mr. Menschel needs to follow to have his case reviewed by the committee; however, he said at this point all of the injured workers have been selected for the final meeting to review cases. He said if Mr. Menschel would like to have an individual legislator look at his case, that may be an appropriate action.

Senator Heitkamp recommended that Mr. Menschel speak to Mr. Kemnitz and review the document he distributed to committee members.

WORKERS' COMPENSATION REAPPLICATIONS

Chairman Keiser called on Mr. Wahlin to provide a presentation regarding how the state's workers' compensation laws address "worsening medical conditions" and the associated consideration of loss of wages for purposes of reapplications. Mr. Wahlin's presentation included a computer presentation, a written copy of which is included in the binder material.

Mr. Wahlin said North Dakota Century Code (NDCC) Section 65-05-08 addresses reapplication for workers' compensation benefits. He said this law essentially creates a two-part test, requiring an employee suffer a significant change in a compensable condition and that the change must cause an actual wage loss.

As part of Mr. Wahlin's presentation, he included reapplication statistics for 2003, 2004, and 2005. He said in 2003, 89 percent of the reapplications were paid; in 2004, 95 percent of the reapplications were paid; and in 2005, 93 percent of the reapplications were paid.

In response to a question from Representative Amerman, Mr. Wahlin said if an injured worker does not agree with the reapplication decision, that injured worker may avail themselves to the appeals process.

In response to a question from Representative Keiser seeking clarification on what qualifies as a significant change, Mr. Wahlin said this is best established by looking at examples. He said the examples in his slides seek to provide clarity on this issue.

In response to a question from Representative Amerman regarding the number of reapplications received in a year, Mr. Wahlin said the situations leading to a reapplication are varied. He said often an injured worker is treated conservatively and over a period of time this may ultimately result in a medical

condition that does worsen and does require additional treatment.

Senator Heitkamp requested that Workforce Safety and Insurance provide committee members with statistics regarding reapplication numbers for 1996, 1997, and 1998.

In response to a question from Representative Keiser regarding whether 2005 House Bill No. 1171 will impact reapplication figures, Mr. Wahlin said yes, this new law likely will impact the number of reapplications. He said this new law will incentivise injured workers to return to work and ultimately this may result in increased reapplications later down the road.

Chairman Keiser called on Mr. Gronfur for comments regarding the reapplication presentation. Mr. Gronfur reviewed the reapplication process his brother undertook, summarizing the information he provided to the committee at the April 26-27, 2006, committee meeting.

Chairman Keiser called on Mr. Vetter for comments regarding the reapplication presentation.

Mr. Vetter requested verification on what would happen if an injured worker who had been inactive for a period of four years sought reapplication. Mr. Wahlin stated that in the case of an injured worker who is inactive for four years but who had never found work following an injury, the medical portion of a claim would still be valid; however, it is difficult to provide too much information regarding whether the injured worker would be able to receive lost wages given the limited information.

Senator Klein said the concern raised by Mr. Vetter that the reapplication process does not seem to work the same way as Mr. Wahlin said it does could be addressed by the committee if the actual injured worker to which Mr. Vetter alludes would sign a release.

Chairman Keiser called on Mr. Menschel for comments regarding the reapplication presentation. Mr. Menschel stated how in his situation he was assigned to a workers' compensation doctor who informed him it was not the doctor's job to determine whether Mr. Menschel could return to work but instead it was to provide whether he had work limitations.

SPECIAL INVESTIGATION UNIT

Chairman Keiser called on Ms. Leingang for a presentation regarding the Workforce Safety and Insurance special investigation unit, including the unit's expenditures for investigating employer and injured worker fraud and an overview of the investigative process. Ms. Leingang's computer presentation is included in the binder material along with supporting documents comparing special investigation unit statistics for the years 2004 and 2005 and the first quarter of 2006. As part of her presentation, Ms. Leingang provided statistics regarding nationwide workers' compensation fraud and insurance and medical fraud.

In response to a question from Representative Amerman, Ms. Leingang said she does not have specific data on North Dakota workers' compensation fraud and insurance and medical fraud.

Representative Amerman said it seems like a scare tactic to use statistics unless they specifically apply to North Dakota.

Ms. Leingang reviewed what the special investigation unit does and how it receives information upon which it acts.

In response to a question from Representative Keiser, Ms. Leingang said yes, the special investigation unit staff does have subpoena authority.

In response to a question from Representative Johnson, Ms. Leingang said the most used methods for reporting to the special investigation unit are the hotline, reports from employers, and reports from Workforce Safety and Insurance staff members.

Ms. Leingang said in the last quarter of 2004, Workforce Safety and Insurance began implementing changes meant to provide for more efficient use of special investigation unit resources. She said beginning with the 2005 statistics, the data distinguishes between risk investigation referrals and special investigation unit referrals.

In response to a question from Mr. Vetter, Ms. Leingang said the special investigation unit staff members do not independently initiate investigations.

Senator Klein said there must be thousands of possible ways to commit fraud, including fraud committed by employees, employers, and medical providers.

Ms. Leingang said a survey performed in the 1990s indicated that employees are less likely to be defrauding than are employers.

Chairman Keiser called on Mr. Doug Kapaun, injured worker, Jamestown, for comments regarding the fraud presentation. In 1999, Mr. Kapaun said his 22-year-old son was killed as a result of an employment injury and the employer was not paying workers' compensation premiums. He said his experience was that he never learned of workers' compensation taking steps to investigate that employer.

Chairman Keiser called on Mr. Gronfur for comments regarding the fraud presentation.

In response to a question from Mr. Gronfur, Ms. Leingang said when performing home health visits, the visitor is not looking at whether fraud is being committed. She said an individual can find out whether the individual has been a subject of investigation by contacting Workforce Safety and Insurance. She said this information is accessible once an investigation is closed.

In response to a question from Representative Keiser, Ms. Leingang said in the case of an injured worker who violates the limitations established by a physician, the investigator tries to establish whether there is a pattern of activity versus a one-time violation.

Senator Heitkamp said the statistics provided by Ms. Leingang and the statistics included in the documents distributed by Mr. Kemnitz do not agree with each other. He said the document distributed by Mr. Kemnitz indicates more emphasis is placed on fraud investigations of injured workers. He requested the receipt of information indicating what changes have taken place from 1995 to the present regarding the treatment of fraud investigation of employers versus injured workers.

Representative Amerman requested additional information regarding whether the special investigation unit spends more resources on same size employers than others. Specifically, he said he has a sense that smaller employers are investigated more often than larger employers.

WORKERS' COMPENSATION VOCATIONAL REHABILITATION

Chairman Keiser called on Ms. Robin Halvorson, Workforce Safety and Insurance, and Ms. Beth Veeder, CorVel Corporation, to provide a presentation regarding the state's workers' compensation vocational rehabilitation process, including a review of the requirements an injured worker must meet to access educational funds through the state's workers' compensation programs.

Ms. Halvorson provided the committee with a computer presentation, a written copy of which is included in the binder material. Ms. Halvorson summarized the vocational rehabilitation services provided to injured workers, summarized the 2005 legislative changes relating to rehabilitation services, and reviewed the scholarship loan fund.

Ms. Veeder said there are approximately 302 open rehabilitation cases. She said within 24 hours of a referral to CorVel, the caseworker makes contact with the injured worker.

Representative Keiser said legislators typically hear one of two types of concerns regarding rehabilitation and CorVel. One, he said, in the case of an older worker who performs physical labor, the injured worker claims CorVel sends the injured worker to an unwanted desk job. Two, he said, legislators hear complaints about the income test as it relates to finding postinjury employment.

Senator Epegard said he also hears concerns regarding injured workers being trained for jobs that are not available in their community.

Ms. Veeder said as part of the services she provides, she explains the income test options and that there may be some compensation available for the injured worker's loss and ability to earn. She said she understands working for a lower wage is upsetting but in part these injured workers are faced with starting over.

Ms. Veeder said in the western portion of the state, she knows there are limitations because some of the jobs for which injured workers are trained are only available in the eastern part of the state. Additionally,

she said, CorVel seeks to match the skills of an injured worker with the interest of the injured worker.

In response to a question from Representative Keiser, Ms. Halvorson said the Workforce Safety and Insurance preferred worker program provides employers with incentives to hire injured workers. She said these incentives may include the injured worker's workers' compensation claims may be waived for a period of time, a portion of the injured worker's wages may be paid for a limited period of time, Workforce Safety and Insurance may provide funding for job accommodations, and for a limited amount of time Workforce Safety and Insurance may not charge a future workers' compensation claim to the employer.

In response to a question from Representative Amerman, Ms. Halvorson said the preferred worker program does not apply to preinjury employees going back to their preinjury employer.

In response to a question from Representative Johnson, Ms. Halvorson said the coordinator for the preferred worker program promotes the program throughout the state. Additionally, she said, eligible injured workers receive contact information to learn more about the program. At this time, she said, there are 112 employers participating in the program.

Senator Espgaard said it seems like we should do more to help an injured worker earn the injured worker's preinjury wages, or at a minimum, ensure the injured worker does not earn less than the state average weekly wage.

Ms. Halvorson said it is a reality that physical laborers often earn more than light laborers. She said 2005 House Bill No. 1171 will allow Workforce Safety and Insurance more latitude than the old hierarchy of rehabilitation options.

In response to a question from Senator Espgaard, Ms. Halvorson said there are two education programs available to injured workers. First, she said, the scholarship program is available in exceptional circumstances. She said this scholarship program allows up to \$10,000 for up to five years of education. She said an example of when this program might be applicable is when an injured worker receives a significant physical injury. Second, she said, is the educational loan fund, which provides for an educational loan at 1 percent below the Bank of North Dakota prime rate fixed.

In response to a question from Representative Keiser, Ms. Veeder said CorVel has been contracting with Workforce Safety and Insurance since 1992. Ms. Halvorson said in addition to CorVel, Workforce Safety and Insurance does contract with other providers. She said typically Workforce Safety and Insurance puts out a request for proposal (RFP) for these services but this last year the contract was renewed with CorVel without issuing an RFP. She said the reason for this renewal was to have experienced providers, such as CorVel, assist in the transitions relating to House Bill No. 1171.

Chairman Keiser called on Mr. Gronfur for comments regarding the rehabilitation presentation. Mr. Gronfur reviewed the concerns he had with how his brother's case was affected by rehabilitation services.

Chairman Keiser called on Mr. Vetter for comments regarding the rehabilitation presentation. Mr. Vetter said injured workers need help finding jobs. He said it would be a real service if CorVel would help the injured worker get a job before the injured worker was kicked off workers' compensation.

In response to a question from Representative Keiser, Mr. Vetter said he thinks if an injured worker is forced to work for less than the preinjury wages and is not able to reach the preinjury wages within a specified period, such as five years, Workforce Safety and Insurance should continue to make up the difference between the preinjury and postinjury wages.

In response to a question from Mr. Vetter, Ms. Halvorson said beginning June 22, 2006, a new Workforce Safety and Insurance employee will be working with injured workers to help them seek jobs. She said these services may include resume skills. Additionally, she said, this new employee will work with employers to better accommodate injured workers.

Chairman Keiser called on Mr. Christensen for comments regarding the rehabilitation presentation. Mr. Christensen said an injured worker cannot be expected to live on \$8.83 per hour.

In response to a question from Representative Keiser, Ms. Halvorson said the funding for the preferred worker program comes from the general fund. She said she is not certain of the amount set aside for this program.

Chairman Keiser called on Mr. Kemnitz for comments regarding the rehabilitation presentation. Mr. Kemnitz said he has nothing but good things to say about Ms. Halvorson and Ms. Veeder. Instead, he said, he would focus on the rehabilitation law. In 1972, Mr. Kemnitz said studies of the workers' compensation system indicated the ultimate goal of vocational rehabilitation was to get the injured worker back to self-sufficiency. He said the current law does not allow Workforce Safety and Insurance to use all of the possible tools to get injured workers back to work. For example, he said, there are several educational opportunities and resources that could be utilized to help these injured workers. He said the Legislative Assembly should amend the law to provide more rehabilitation services to injured workers.

Mr. Kemnitz said prior to the changes in the 1980s, injured workers had more input into what would be included in their vocational rehabilitation plan; however, now Workforce Safety and Insurance is the leading force in creating that plan.

In response to a question from Representative Keiser, Ms. Halvorson said that up until now, Workforce Safety and Insurance has not surveyed injured workers following rehabilitation. However,

beginning recently, quarterly surveys will be done throughout the vocational rehabilitation process.

Representative Keiser said he is just not sure what more could be done in the area of rehabilitation. However, he said, he does hear concerns about injured workers being forced to work for lower wages and he said this is a statutory issue that could be addressed.

BILL DRAFT

Chairman Keiser called on committee counsel to present a revised version of a bill draft [\[70087.0200\]](#) relating to workers' compensation "false positive" heart and lung tests of firefighters and law enforcement officers.

Committee counsel said this revised bill draft is based upon language she received from Workforce Safety and Insurance. She said this new law provides that "if a medical examination produces a false positive result for a condition covered under this section, the organization shall consider the condition to be a compensable injury. In the case of a false positive result, neither the coverage of the condition nor the period of disability may exceed twenty-eight days." Additionally, she said, the bill draft retains the effective date as provided in the first version.

Chairman Keiser called on Ms. Tana Ostlie, injured worker, whose case was earlier reviewed by the committee. Ms. Ostlie said other than the actual denial of her claim, her experience with Workforce Safety and Insurance and with the Workers' Compensation Review Committee has been very positive. She said in reviewing the language of the bill draft, she does have a concern with the 28-day limit. She said in her case she was lucky that she got her followup appointment within two weeks but this is only because she was able to take advantage of somebody else's canceled appointment.

Representative Keiser said he would hope the medical community would act quickly in the case of a heart or lung condition.

Mr. Blunt said Workforce Safety and Insurance did discuss the issue of whether to extend the period beyond 28 days but because the payment cycle is 28 days, this seemed like the most appropriate amount of time.

Representative Johnson suggested the committee change the 28-day maximum period to 56 days to ensure a firefighter or law enforcement officer has adequate time to seek appropriate followup care. Senator Espegard said he supports extending this period to 56 days even though he assumes it will never take this long for a firefighter or law enforcement officer to receive additional medical testing.

It was moved by Representative Johnson, seconded by Senator Espegard, and carried on a voice vote that the bill draft relating to workers' compensation false positive heart and lung tests of firefighters and law enforcement officers be

amended to provide for up to 56 days of workers' compensation coverage.

It was moved by Senator Espegard, seconded by Representative Amerman, and carried on a roll call vote that the bill draft, as amended, relating to workers' compensation false positive heart and lung tests of firefighters and law enforcement officers be approved and recommended to the Legislative Council. Representatives Keiser, Amerman, and Johnson and Senators Espegard and Klein voted "aye." No negative votes were cast.

WORKERS' COMPENSATION STIPULATED SETTLEMENTS

Chairman Keiser called on Mr. Wahlin for a presentation regarding stipulated settlements between Workforce Safety and Insurance and an injured worker. Mr. Wahlin provided a computer presentation, a written copy of which is included in the binder material.

Mr. Wahlin distinguished between settlements and buyouts. He said that 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. He said buyouts are not necessarily precipitated by a dispute. He said Workforce Safety and Insurance is not aggressive in pursuing buyouts.

In response to a question from Representative Keiser, Mr. Wahlin said in his experience, settlements and buyouts are not usually initiated by Workforce Safety and Insurance. However, he said, Workforce Safety and Insurance may raise the option of a buyout if an injured worker indicates a need.

In response to a question from Representative Keiser, Mr. Wahlin said he does not foresee any changes in the trend for stipulations. He said there might possibly be room for changes relating to buyouts but he is not aware of any changes pending.

WORKERS' COMPENSATION ATTORNEY'S FEES

Chairman Keiser called on Ms. Bjornson for a presentation regarding how the state's workers' compensation system limits attorney's fees for attorneys representing Workforce Safety and Insurance and attorneys representing injured workers. Ms. Bjornson provided a computer presentation, a written copy of which is included in the binder material. Additional supplementary documents are also included in the binder material. Ms. Bjornson reviewed the circumstances under which injured workers may retain legal representation and their attorney's fees would be paid by Workforce Safety and Insurance.

Ms. Bjornson said Workforce Safety and Insurance contracts with a private law firm to provide defense litigation representation for Workforce Safety and Insurance decisions on the appellate level and contracts with a different private law firm to provide

conflict counsel. She said for purposes of the defense litigation representation, the private law firm is contractually required to follow Workforce Safety and Insurance billing and litigation guidelines. She provided additional information setting out the fee caps for Workforce Safety and Insurance counsel and injured worker counsel.

In response to a question from Representative Keiser, Ms. Bjornson said if Workforce Safety and Insurance rejects the administrative law judge's decision, Workforce Safety and Insurance will raise the injured attorney's fee cap if the injured worker prevails.

In response to a question from Representative Amerman, Ms. Bjornson said approximately 6 percent of all administrative law judge decisions are rejected or modified by Workforce Safety and Insurance. She said she would provide the committee with more recent data at a future date. Additionally, she said, there are approximately 150 open workers' compensation cases being litigated at any given time.

Chairman Keiser called on Mr. Christensen for comments regarding the attorney's fees presentation. Mr. Christensen questioned why the injured worker's attorney's fees are only paid if the injured worker wins. He suggested that perhaps it would be more fair to treat both Workforce Safety and Insurance attorneys and injured workers' attorneys this way.

Ms. Bjornson said if there is a sum certain, such as a permanent partial impairment of \$1,000, Workforce Safety and Insurance will use a portion of this amount to pay the injured worker's attorney.

Chairman Keiser called on Mr. Vetter for comments regarding the attorney's fees presentation. In response to a question from Mr. Vetter, Ms. Bjornson said it is possible that Workforce Safety

and Insurance would pay outside counsel \$125 per hour for four hours' work to defend a \$1,000 benefit.

Representative Keiser said it goes both ways. He said an injured worker's attorney could receive a portion of a \$100,000 settlement, after putting in merely four hours' work.

Chairman Keiser called on Mr. Gronfur for comments regarding the attorney's fees presentation. Mr. Gronfur said if 6 percent of the administrative law judge decisions are rejected or modified, many of these cases go to district court and possibly the Supreme Court and the injured worker is forced to pay attorney's fees for representation at both of these levels.

Ms. Bjornson said on appeal, Workforce Safety and Insurance prevails at a rate of 70 percent.

Representative Keiser said he is somewhat bothered by the fact that if Workforce Safety and Insurance appeals to the district court, the injured worker's attorney might not get paid. He said he recognizes the other side of that argument is that if you lose at the district court or the Supreme Court level, you were wrong in the eyes of the court.

Representative Keiser thanked everyone from Workforce Safety and Insurance who presented information to the committee. He said the tentative meeting dates for the next committee meeting are August 8-9 or August 9-10, 2006.

No further work remaining, Chairman Keiser adjourned the meeting at 4:55 p.m.

Jennifer S. N. Clark
Committee Counsel

[ATTACH:1](#)