

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

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

Thursday, September 21, 2006  
Harvest Room, State Capitol  
Bismarck, 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 Joel C. Heitkamp, Jerry Klein

**Member absent:** Senator Duaine C. Espeland

**Others present:** See appendix

**It was moved by Senator Klein, seconded by Representative Amerman, and carried on a voice vote that the minutes of the August 9-10, 2006, committee meeting be approved as distributed.**

Chairman Keiser said the committee has completed its review of injured employees' claims. He thanked the 11 injured employees who brought forward their claims for review by the committee, recognizing the significant amount of time and energy it takes to put together a review as well as the stress or anxiety of having personal cases reviewed and made public.

Chairman Keiser said the committee has already approved and recommended two bill drafts, both relating to the firefighter presumption of coverage. He said the Legislative Council staff has prepared two additional bill drafts to be reviewed by the committee. He said over the course of the committee meeting the committee will review the issues raised in each of the 11 injured employee claims as well as the two new bill drafts.

#### **CASE REVIEW**

##### **First Case**

Chairman Keiser said Ms. Florence Haux was the first injured employee to have her case reviewed. He said her case was heard on December 1, 2005, in Bismarck. He stated the primary issue she raised was the retirement presumption and its application to workers who were injured before the retirement presumption went into effect in 1995, yet who did not receive a determination of permanently and totally disabled until sometime following the effective date of the retirement presumption.

Chairman Keiser called on committee counsel to review bill draft language drafted in response to this issue. She said the Legislative Council staff prepared a bill draft based on language provided by Workforce Safety and Insurance [70198.0100]. She said Section 2 of this bill draft creates a new section to North Dakota Century Code (NDCC) Chapter 65-05, providing an alternative calculation for additional

benefits payable. She said this section of the bill draft is intended to address the retirement presumption issue raised by Ms. Haux.

Chairman Keiser called on Mr. Timothy J. Wahlin, Workforce Safety and Insurance, for comments regarding the retirement presumption issue raised by Ms. Haux. Mr. Wahlin stated that under Section 2 of the bill draft, subsection 1 addresses the group of individuals to which the alternative calculation applies. He said subsection 2 provides the alternative calculation for these eligible injured employees. He said in most cases this alternative calculation would dramatically increase the amount and period of receipt of additional benefits payable. With this proposed legislative change, he said, for this limited group of injured employees the calculation under NDCC Section 65-05-09.4 would use the injured employee's pre-August 1, 1995, date of injury as the date of first disability.

In response to a question from Senator Heitkamp, Mr. Wahlin said the calculation under NDCC Section 65-05-09.4 is based on the date of disability. He said this date is used because that is the date upon which the injured employee is unable to work.

Senator Heitkamp said it is a likely reality that from the date of injury forward an injured employee is earning less money and is less able to prepare for retirement.

Representative Keiser said this provision of the bill draft is meant to address issues arising from the transition of the pre-1995 system to the post-1995 system for workers' compensation benefits. He said Ms. Haux represents a class of individuals who got caught in the transition. He said this language is intended to address these issues and aid in the transition.

In response to a question from Representative Keiser, Mr. Wahlin said in the case of Ms. Haux, she is scheduled to receive additional benefits valued at approximately \$3,600 over a period of 2.9 years. He said under this proposed language, her additional benefits would be valued at approximately \$67,000 over a period of 13.7 years.

**It was moved by Senator Heitkamp, seconded by Representative Amerman, and carried on a voice vote that the committee approve Section 2 of the bill draft relating to an alternative calculation for additional benefits payable, with the correction of changing the reference to "application" to "reapplication".**

In response to a question from Representative Keiser, Mr. Wahlin said Section 2 of the bill draft is retroactive to the extent injured employees who meet the qualification under subsection 1 would receive a payment to reflect the correction in their additional benefit payable calculation. For example, he said, in the case of Ms. Haux, her additional benefit payable would be recalculated using this new formula, she would receive a lump sum to reflect this correction, and without having to reapply for benefits this recalculation would happen automatically.

In response to a question from Senator Heitkamp, Mr. Wahlin said Section 2 of the bill draft does not address pre-1995 claims. He said individuals who were injured and received a determination of permanent and total disability before August 1, 1995, were not affected by the retirement presumption and therefore are essentially receiving lifetime benefits. He said the additional benefit payable section of the law does not apply to these pre-1995 injured employees.

Chairman Keiser called on Mr. Sandy Blunt, Workforce Safety and Insurance, for comments regarding the alternative calculation for additional benefits payable. Mr. Blunt said Workforce Safety and Insurance has structured settlement authority, which allows the injured employee and Workforce Safety and Insurance to enter an agreement to provide for a lump sum payment or alternative distributions for the additional benefit payable. He said some injured employees may wish to receive a present value lump sum or an accelerated distribution of their additional benefits payable.

**It was moved by Representative Keiser, seconded by Senator Heitkamp, and carried on a voice vote that Section 2 of the bill draft further be amended to allow for structured settlements if the Legislative Council staff determines this change is necessary to allow Workforce Safety and Insurance to enter these structured settlements or alternative distributions.**

### Second Case

Chairman Keiser said Ms. Tana Ostlie is an injured employee who had her case reviewed on March 29, 2006, in Fargo. He said Ms. Ostlie's primary concern related to the full-time paid firefighters' presumption. He said the committee has already addressed her concerns in the bill drafts [[70088.0100](#) and [70087.0200](#)], which the committee has already approved, as amended, to be recommended to the Legislative Council.

### Third Case

Chairman Keiser said Ms. Christina Carroll had her case reviewed by the committee on March 29, 2006, in Fargo. He said the primary issues raised in the review of Ms. Carroll's case were the issue of supplementary benefits and the long period of time it took before Ms. Carroll received a supplementary benefit to address cost-of-living changes and the

issue of funds being available for vehicles and vehicle adaptation for individuals like her who have catastrophic injuries.

Chairman Keiser said Ms. Carroll will join the committee telephonically while the committee reviews her case. He said the committee is making special accommodations for Ms. Carroll in recognition of her significant mobility limitations which resulted from her work-related injury. Ms. Carroll provided a written document to reiterate some of the concerns she raised in the course of her case review, a copy of which is on file in the Legislative Council office.

Chairman Keiser called on committee counsel to review portions of the bill draft [[70198.0100](#)] which addresses the issues raised by Ms. Carroll. Committee counsel said Section 1 of the bill draft specifically addresses the motor vehicle issues raised by Ms. Carroll and Section 6 of the bill draft provides that the changes in the motor vehicle law would apply to all purchases and repairs that take place after July 31, 2007. Additionally, she said, Section 5 of the bill draft addresses eligibility for supplementary benefits; however, the changes made in this section apply to claims filed after December 31, 2005, so they would not apply to Ms. Carroll's claim.

Senator Heitkamp said he supports the changes to the motor vehicle law but questioned whether it is necessary to wait until August 1, 2007, to make these changes effective. He supported adding an emergency clause to address Section 1 of the bill draft.

Chairman Keiser called on Mr. Ed Christensen, injured employee, for comments regarding issues raised by Ms. Carroll. He requested the committee provide a retroactive clause to make this law change applicable to purchases and modifications that have already taken place.

Mr. Blunt said he would support adding an emergency clause to the bill draft which would apply to all of the provisions in the bill draft.

**It was moved by Senator Heitkamp, seconded by Senator Klein, and carried on a voice vote that the bill draft be amended to include an emergency clause that applies to all of the appropriate provisions of the bill draft.**

**It was moved by Representative Johnson, seconded by Senator Klein, and carried on a voice vote that the committee approve Section 1 of the bill draft relating to motor vehicles and motor vehicle adaptations for catastrophically injured employees.**

Ms. Carroll said she also raised the issue of the inadequacy of her monthly income. She said she has been injured for 16 years and it is not feasible to continue to live on her monthly income. She said injured employees with catastrophic injuries need larger cost-of-living adjustments.

Mr. Wahlin said the supplemental benefits under NDCC Section 65-05.2-01 have changed since Ms. Carroll became an injured employee. He said the proposed changes under Section 5 of the bill draft do

not address pre-1995 injured employees such as Ms. Carroll. He said before 1995 the period of time an injured employee may have to wait to receive a supplementary benefit was 10 years; however, for post-1995 injuries, this period was decreased to seven years and the formula was changed.

Ms. Carroll asked what the committee is proposing to do to help her and injured employees like her. She said she understands the supplementary benefit changes made under Section 5 of the bill draft would not apply to injured employee such as herself.

In response to a question from Representative Keiser, Mr. Wahlin said he is not certain of the exact number of individuals who fall within Ms. Carroll's category of injured employees, but his recollection is it is a fairly large group of individuals.

In response to a question from Representative Amerman, Mr. Blunt said for those injured employees filing claims after December 31, 2005, the proposed language in the bill draft would provide for a three-year period, after which the injured employee would be eligible for supplementary benefits.

Ms. Carroll said in 1990, following her injury, she entered a settlement for \$150,000. She said this sum of money was meant to last a lifetime; however, she now realizes how unrealistic this was. She said if she is having this problem living on her monthly workers' compensation benefits, it is likely others in her same situation are having these same problems. She said if she knew then what she knows now she never would have settled for \$150,000.

In response to a question from Representative Keiser, Mr. Blunt said the period after which an injured employee will receive supplementary benefits has decreased from 10 to 7 years and now to 3 years under this proposed bill draft language. He said injured employees who receive a supplementary benefit three years following an injury is the same group of injured employees who will fall within the parameters of 2005 House Bill No. 1171. He said although these injured employees in the three-year parameter will be receiving a cost-of-living adjustment sooner, these injured employees are also under the retirement presumption. He said unlike an individual in Ms. Carroll's situation, who will receive the cost-of-living adjustment for life, a post-1995 injured employee falls under the retirement presumption and does not receive lifelong benefits but instead receives an additional benefit payable.

In response to a question from Representative Keiser, Mr. Blunt said he believes there are approximately 900 injured employees who are in Ms. Carroll's situation. He said this bill draft will not address supplementary benefits for individuals such as Ms. Carroll.

In response to a question from Senator Heitkamp, Mr. Blunt said Workforce Safety and Insurance is not in a position to take action on Ms. Carroll's case unless there is legislative change. He said one thing Workforce Safety and Insurance could do to help meet Ms. Carroll's needs is to place her in a 24-hour

care facility. However, he said, Workforce Safety and Insurance has not pursued this action, recognizing her need for independence.

Chairman Keiser said in considering whether to take legislative action to address the supplementary benefit issue raised by Ms. Carroll, the committee may wish to draft legislation or individual legislators may wish to pursue this issue.

Senator Heitkamp thinks if the committee had added a supplementary benefit provision to the committee bill draft, to address injured employees in the same situation as Ms. Carroll, the success of the entire bill draft would have been jeopardized because of the fiscal impact. However, he said, this issue does need to be addressed during the 2007 session.

Representative Amerman said he is not ready to request the addition of a provision to the committee's legislative package to address the supplementary benefit issues raised by Ms. Carroll.

Mr. Christensen raised the concern that the figure of 900 injured employees who fall within Ms. Carroll's situation may not be accurate. For example, he said, when Ms. Haux raised her issues regarding the retirement presumption, Workforce Safety and Insurance initially stated the number of 104 potential injured employees within the retirement presumption. He said this number was later decreased.

Mr. Blunt said the initial run of cases indicated as many as 104 injured employees might have fallen within the retirement presumption, but further investigation indicated that only 40 of those injured employees have actually been determined permanently and totally disabled.

Chairman Keiser called on Mr. John Halvorson, Workforce Safety and Insurance, to comment regarding the number of individuals in Ms. Carroll's situation. Mr. Halvorson stated that initial research indicates that of the approximately 900 injured employees within the class of injured employees in the same supplemental benefit situation as Ms. Carroll, approximately 60 to 65 of these injured employees are catastrophically injured.

Chairman Keiser called on Mr. Sebald Vetter, Concerned Advocates Rights for Employees (CARE), for comments regarding issues raised by Ms. Carroll. He said he would support creation of a fund to help catastrophically injured employees such as Ms. Carroll.

Representative Keiser said the issue of supplemental benefit amounts raised by Ms. Carroll will need to be addressed by individual legislators during the 2007 legislative session.

Chairman Keiser called on Mr. Daryl Gronfur, Bismarck, for comments regarding the issues raised by Ms. Carroll. He said if there are all these different classes of injured employees who fall within different laws, the Legislative Assembly should cover these injured employees under the law that is most beneficial to the injured employee.

Representative Keiser said bills can be applied retroactively if the Legislative Assembly so chooses.

He said when determining whether to apply a workers' compensation law change retroactively, the legislators consider a variety of issues, including that workers' compensation premiums paid for an employee are based on the law that is in effect at the time of the injury.

#### Fourth Case

Chairman Keiser said Ms. Mary Bethke brought her case to the committee for review on April 26, 2006, in Bismarck. He said the primary issues raised by Ms. Bethke relate to the workers' compensation system for occupational rehabilitation and employability determinations. He said the committee has not proposed any legislative language to address the issues raised by Ms. Bethke; however, the occupational rehabilitation system was changed in 2005 House Bill No. 1171. He said the Legislative Assembly will be continuing to receive status reports on the implementation of House Bill No. 1171, including how the occupational rehabilitation system is changing under this law.

#### Fifth Case

Chairman Keiser said on April 26, 2006, in Bismarck, the committee reviewed the case of Mr. Douglas Gronfur. He said Mr. Daryl Gronfur, Douglas' brother, assisted in the review of this case. He said the primary issues raised in this review relate to reapplication for disability benefits and reopening of claims.

In response to a question from Senator Heitkamp regarding what the injured employee would like to see in the committee's bill draft, Mr. Daryl Gronfur said he would like the law to allow his brother to essentially "go back in time" to allow the right decision to be made.

In response to a question from Senator Heitkamp regarding whether Workforce Safety and Insurance has the authority to reopen claims after they become final, Mr. Wahlin said Workforce Safety and Insurance does have the authority to exercise its discretion to reopen a case that has otherwise become final.

Representative Keiser said as in Mr. Douglas Gronfur's case, Workforce Safety and Insurance is regularly faced with conflicting medical reports. He said ultimately a final decision needs to be made.

Mr. Daryl Gronfur said Workforce Safety and Insurance refused to reopen his brother's case. He questioned why Workforce Safety and Insurance would refuse to reopen his brother's case when new medical evidence shows the initial diagnosis was improper and therefore it would have been improper for his brother to continue to work. He said had the proper diagnosis been made right away, his brother would have been eligible to receive wage loss benefits; however, with the improper diagnosis his brother was determined to be ineligible for wage loss benefits.

Senator Heitkamp said he does not think there is anything that can be put into statute to address the

issues raised in the review of Mr. Douglas Gronfur's case. He said the bottom line goes to the issue of how Workforce Safety and Insurance does business--the philosophy being used.

Mr. Christensen said Workforce Safety and Insurance is not going to change the way it does business unless the Legislative Assembly takes action to force this change.

Chairman Keiser called on Ms. Verna Nagel, injured employee, for comments regarding the issues raised in the course of the review of the case of Mr. Douglas Gronfur. She said in Mr. Gronfur's case there were problems relating to diagnostics. She said under the current system, Workforce Safety and Insurance will always side with the diagnosis of a lesser injury.

Chairman Keiser called on Mr. David L. Kernnitz, AFL-CIO, for comments regarding the issues raised in the review of Mr. Gronfur's case. He said he thinks the issue goes to the question of how a decision becomes final and therefore unappealable. He said once these decisions become final, even after receipt of additional medical evidence, these cases are essentially unable to be reopened. He said he recognizes a change in the law regarding finality may have a fiscal impact. He said in 2003, Senator Lyson introduced Senate Bill No. 2167, which would have better addressed after-acquired medical evidence. He said under this 2003 bill, an injured employee would have had four years in which to request a case be reopened to reassess compensability based on after-acquired medical evidence. He said this bill was not successful and never got out of the Senate.

Mr. Blunt said the individuals who work for Workforce Safety and Insurance are not hurtful people. He said Workforce Safety and Insurance has reviewed Mr. Gronfur's case and as part of this review there is medical evidence that nobody has talked about before this committee.

In response to a question from Senator Heitkamp, Mr. Blunt said if Workforce Safety and Insurance had thought that it had gotten Mr. Gronfur's case wrong, it does have the authority to reopen that case to make things right.

Mr. Daryl Gronfur said his brother's case went all the way through to the Supreme Court level, but the issues addressed on appeal were reapplication and wage loss. He said the Supreme Court decision never addressed the issue of after-acquired medical evidence.

Representative Keiser said the majority of legislators recognize the need to have closure and finality in workers' compensation cases. He said one of the problems the Legislative Assembly faced pre-1995 was lack of closure. He said the Legislative Assembly has taken affirmative steps to provide closure while still retaining Workforce Safety and Insurance's ability to exercise its discretion to reopen a case.

Mr. Vetter said the whole point behind having Mr. Gronfur's case reopened is to address wage loss.

Chairman Keiser called on Mr. Douglas Gronfur to comment regarding his case. Mr. Gronfur said his initial injury was misdiagnosed. He said his initial injury was the same as the injury he had when he was determined to be permanently and totally disabled. He said any claim that he did not seek work following his injury is false, the problem was that nobody would hire him with his limitations.

Representative Amerman said he is not seeking committee sponsorship of a bill draft to address the issues raised in the course of Mr. Gronfur's case review, but he does think it is important to know the Supreme Court decision addressing Mr. Gronfur's case was a 3 to 2 opinion, so it was not a slam dunk.

Senator Heitkamp said the committee needs to realize all the talk about Mr. Douglas Gronfur's weight and the impact his weight had on his eligibility for benefits ceased to be an issue on the date his employer hired him. He said once his employer hired him at that weight, it is no longer appropriate to consider weight as an issue related to compensability.

Senator Heitkamp said he remembers 2003 Senate Bill No. 2167, and it was introduced to force this exact discussion of after-acquired medical evidence.

### **Sixth Case**

Chairman Keiser said Mr. Troy Beckler had his case reviewed April 27, 2006, in Bismarck. He said the primary issues in his case relate to reapplication for disability benefits and admission of additional evidence at the district court level. Additionally, he said, Mr. Beckler raised the issue of whether entitlement to Social Security benefits should result in an injured employee being qualified for Workforce Safety and Insurance disability benefits.

Representative Keiser said it is not possible to change the law so that if an injured employee becomes eligible for Social Security disability, that determination would automatically qualify them for Workforce Safety and Insurance benefits. He said in addition to public policy issues, this automatic qualification would likely raise constitutional issues related to delegation of legislative authority.

In response to a question from Senator Heitkamp asking Mr. Beckler what changes he would like to see, Mr. Beckler said his position that a Social Security disability determination should play a role in workers' compensation eligibility is very narrow. He said he recognizes the need to have the Social Security disability injury be specific to that work-related injury.

Additionally, Mr. Beckler said the law should be changed to require the district courts to allow after-acquired medical evidence. He said if his treating physician and the independent medical examiner make a determination that an employee is injured, that should be adequate to establish compensability.

In response to a question from Representative Keiser, Mr. Beckler said he did have an independent medical examination by a physician in Fargo. He said

his treating physician and the independent medical examination physician agreed on his work limitation of two hours a day for about three days a week. He said this limitation in and of itself showed a wage loss.

In response to a question from Senator Heitkamp, Mr. Wahlin said the Social Security disability program is totally different from the workers' compensation system. He said each of the systems have different rules and different eligibility requirements. He said some Workforce Safety and Insurance claimants meet the requirements of one program, the other program, or both programs.

In response to a question from Senator Klein, Mr. Wahlin said he is not familiar with any Supreme Court cases in which Social Security disability status made a difference in a determination of compensability.

In response to a question from Representative Amerman, Mr. Wahlin said Social Security disability guidelines do provide for earning limitations.

Representative Keiser said in the case of Mr. Beckler, it appears that Workforce Safety and Insurance determined there was a work-related injury but that the injured employee was able to be retrained and returned to work. Whereas, he said, the Social Security disability determination found the injured employee had an injury that resulted in him being unable to be substantially and gainfully employed.

Senator Heitkamp said it is important to know that just because an issue is not included in the bill draft recommended by the committee, it does not preclude individual legislators from introducing legislation.

Mr. Kemnitz stated workers' compensation benefits are decreased due to receipt of Social Security disability. He said Workforce Safety and Insurance gets the benefit of this offset by paying a smaller benefit amount.

In response to a question from Representative Keiser, Mr. Wahlin said if a workers' compensation determination is made and becomes final, that decision cannot be reopened except by exercise of the discretion of Workforce Safety and Insurance. He said reopening a case is not an absolute right and it is not an appealable decision.

Mr. Daryl Gronfur said other than requesting Workforce Safety and Insurance to exercise its discretion, the only way to readdress an issue after a decision becomes final is to reapply. He said in the case of reapplication, the change in benefits would only go back 30 days before the reapplication.

### **Seventh Case**

Chairman Keiser said Mr. Clarence Voigt had his case reviewed by the committee on April 27, 2006, in Bismarck. He said the issues raised by Mr. Voigt primarily focused around fraud investigations. Chairman Keiser said none of the provisions in the bill drafts being considered by the committee addresses the issues raised by Mr. Voigt.

Senator Heitkamp said in the case of Mr. Voigt the system worked properly.

### **Eighth Case**

Chairman Keiser said Ms. Verna Nagel had her case reviewed by the committee on August 9, 2006, in Bismarck. He said the primary issues she raised related to fraud and to an independent medical examination versus a treating physician's recommendation. He said the bill drafts being considered by the committee do not address the issues raised by Ms. Nagel. However, he said, the issue of independent medical examination is going to be an ongoing issue that the Legislative Assembly will need to address.

Senator Heitkamp said past legislative attempts to address issues related to independent medical examinations have been beaten down. He said he thinks Workforce Safety and Insurance has the ability to fix this situation without changing current laws. He said the current law does not prohibit Workforce Safety and Insurance from changing how independent medical examinations are conducted.

Ms. Nagel said in her case she did not appeal the administration decision because she was essentially beaten down by the system. She said when she had her independent medical examination, Workforce Safety and Insurance chose the doctor and she did not have an option of whether to attend or participate in the examination. She said just like in any case there are good doctors and bad doctors and in her case Workforce Safety and Insurance chose a bad doctor. She said upon learning which physician she was being sent to, she asked to be sent to a different independent medical examination physician but Workforce Safety and Insurance refused.

Mr. Vetter said the independent medical examination system has been a concern of his for years. He said he thinks Workforce Safety and Insurance relies too heavily on independent medical examinations and gives too little weight to the determinations of treating physicians.

Senator Heitkamp said the committee owes it to Ms. Nagel and other injured employees to consider the issues relating to independent medical examinations.

Senator Heitkamp said in pursuing the issue of independent medical examinations, proponents for injured employees better be ready to deal with the claim that an independent medical examination physician chosen by the injured employee "approves everybody" just like injured employees are claiming that the physician chosen by Workforce Safety and Insurance "denies everybody."

Representative Keiser said he understands the need of Workforce Safety and Insurance to perform independent medical examinations, but he would like to see Mr. Blunt work with the Workforce Safety and Insurance Board to see if improvements can be made to the current system. He said he supports the idea of allowing an injured employee to have someone accompany them to the actual examination. He also said perhaps there could also be a random audit of independent medical examinations, in which three

independent physicians review the independent medical examination.

Mr. Blunt said he will seek Workforce Safety and Insurance Board permission to hire an independent, external expert to audit independent medical examinations.

Representative Keiser said if Workforce Safety and Insurance hires the independent, external expert to perform the audit, he anticipates the injured employee will claim this expert is just another one of Workforce Safety and Insurance's "hired guns."

Mr. Douglas Gronfur said he had an independent medical examination and he is convinced the physician never fully evaluated him, because if he had, a correct diagnosis would have been made back in 1997.

Mr. Kemnitz said when NDCC Section 65-01-01 was amended to remove the provision that provided for liberal construction in favor of the injured employee, the workers' compensation system was changed, creating an adversarial dynamic between injured employees and Workforce Safety and Insurance. He said because of this change in dynamics, injured employees are forced to present their claims in the most extreme fashion because on the other side Workforce Safety and Insurance is aggressively trying to limit liability.

### **Ninth Case**

Chairman Keiser said Ms. Cindy Loughman had her case reviewed by the committee on August 9, 2006, in Bismarck. He said the primary issues raised were compensability of new injuries versus preexisting conditions and the independent medical examination versus the treating doctor's recommendation. He said the committee bill drafts being considered do not address the issues raised by Ms. Loughman.

Mr. Wahlin said in the evaluation of workers' compensation claims there is an ongoing struggle to determine preexisting conditions versus work-related conditions. He said it is not uncommon to have conflicting medical information while trying to make these determinations.

Chairman Keiser called on Ms. Patsy Pearl, Workforce Safety and Insurance, for comments regarding independent medical examinations. Ms. Pearl said she is a claims adjuster and from a claim adjuster's standpoint, independent medical examinations are avoided if at all possible. She said these examinations are avoided because they may create an adversarial relationship between the injured employee and Workforce Safety and Insurance, and because it takes a tremendous amount of work for the claims adjuster to arrange for an unbiased examination. She said independent medical examinations are required when there is something missing in the file and compensability is unable to be determined.

Representative Keiser said he recently reviewed an independent medical examination letter from a claims analyst to the independent medical

examination physician. He said the letter he reviewed was very objective.

In response to a question from Representative Amerman, Ms. Pearl said typically a claims adjuster makes arrangements for an examination to be performed and determines which medical professional will be conducting that examination. She said she tries to find a medical professional in the state but due to the small pool of medical practitioners in North Dakota, sometimes it is necessary to go out of state. She said when she arranges for an out-of-state examination, she typically looks to Minnesota. In addition to the small pool of medical practitioners in North Dakota, she said, some medical practitioners in the state do not perform independent medical examinations.

### 10th Case

Chairman Keiser said Ms. Bernie Huber had her case reviewed by the committee on August 10, 2006, in Bismarck. He said the issues raised include the determination of temporary partial disability benefits and the weekly benefit rate as well as an independent medical examination versus the treating doctor's recommendations.

Chairman Keiser called on Ms. Huber for comments regarding her case. She said she was injured in 1992 but was able only to return to part-time work for 15 years. She said because she was on partial disability benefits, there was no cost-of-living adjustment.

Mr. Wahlin said Workforce Safety and Insurance tried to collect data regarding the numbers of injured employees who have received temporary partial disability benefits for more than five years and at this point, the most accurate data they have is approximately 1,400 injured employees fall within this classification.

In response to a question from Senator Heitkamp regarding what she is requesting, Ms. Huber said thankfully her spouse has been able to contribute his earnings and benefits for the family. She said she thinks she would have been better off if she would have quit her job, but she loved her job and tried to do everything requested of her by Workforce Safety and Insurance.

Ms. Huber said she had an independent medical examination and that physician said she was able to work full-time. She said obviously she disagrees with this determination. Additionally, she said, she would like to see a cost-of-living adjustment made for long-term recipients of temporary partial disability.

Representative Keiser said it sounds like Ms. Huber would like an average weekly wage determination to take into account pay raises provided by employers or in some other way recognize pay raises.

In response to a question from Representative Keiser, Ms. Huber said the discogram that her treating physician is requiring as a diagnostic tool is still at issue. She said Workforce Safety and Insurance has

not informed her whether this diagnostic procedure will be covered.

Mr. Vetter said Ms. Huber's case is just another example of the problems with the independent medical examination system. Additionally, he said, an injured employee such as Ms. Huber should be able to recognize pay increases.

Senator Heitkamp said he understands the desire and need for Workforce Safety and Insurance to keep injured employees in the workplace, but he thinks it is a disincentive for an injured employee to not receive any pay increase when receiving these long-term partial disability benefits.

Mr. Blunt said Workforce Safety and Insurance has looked into the issue of temporary partial disability benefits that are received over a long period of time. He said Workforce Safety and Insurance is trying to address this issue without creating unintended consequences such as disincentives for an injured employee to return to the workplace. He said he hopes to come up with an alternative to address this situation before the 2007 legislative session begins.

Representative Keiser said the situation of long-term temporary partial disability benefits seems like a hard issue for Workforce Safety and Insurance to defend. He said he encourages the Workforce Safety and Insurance Board to seriously address this issue.

In response to a question from Representative Johnson, Mr. Blunt said he does not have the specific information in front of him regarding the types of disincentives they are trying to avoid.

Representative Keiser said it is important for the workers' compensation system to try not to provide an injured employee with incentives to not return to work.

Senator Heitkamp requested that before the 2007 legislative session, Workforce Safety and Insurance give committee members an update on what issues Workforce Safety and Insurance will and will not be pursuing during the 2007 legislative session.

Representative Keiser said the Legislative Council staff will try to notify Ms. Huber of whether Workforce Safety and Insurance will be sponsoring legislation to address the issue she raised regarding long-term receipt of temporary partial disability benefits.

### 11th Case

Chairman Keiser said the committee reviewed the case of Mr. George Raber on August 10, 2006, in Bismarck. He said Mr. Raber was a volunteer firefighter who died while fighting a fire. He said the issues raised include whether there should be a volunteer firefighter presumption of compensability and the calculation of average weekly wage for seasonal employees.

Representative Keiser said the issues relating to volunteer firefighters are reoccurring. He said some rural fire districts provide a life insurance-type policy for the volunteers and some districts are not willing to levy the tax necessary to provide this product.

Senator Heitkamp said the North Dakota Firefighters Association is very active in North Dakota

politics and can advocate for legislative changes if they are desired. He does not think the legislation recommended by this committee would be the right place to address this issue. However, he said, he would consider being an individual sponsor of legislation addressing the volunteer firefighter issue if the association supported the change.

Representative Johnson said in past legislative sessions the Industry, Business, and Labor Committee considered providing volunteer firefighters with coverage under the North Dakota Insurance Reserve Fund, but this was problematic on several levels.

### COMMITTEE WORK

Chairman Keiser said Sections 3 and 4 of the bill draft [\[70198.0100\]](#) are not directly related to issues raised by injured employees who have had their cases reviewed during the interim. However, he said, they are related to information received by the committee during the interim.

Mr. Wahlin said Section 3 of the bill draft relates to death benefits. He said the substantive change addresses the situation of a catastrophically injured employee whose death is related to the work-related injury but the death occurs more than six years after the date of injury.

In response to a question from Representative Johnson, Mr. Wahlin said death benefits go to a surviving spouse or dependent. He said the death benefit helps to recognize the sacrifices made by spouses and dependents. He said in the case of a catastrophically injured employee, the family may make significant sacrifices for a long period of time.

Representative Keiser said in part due to improvements in technology, catastrophically injured employees are living longer. He said the changes in Section 3 of the bill draft help to address this issue.

**It was moved by Senator Klein, seconded by Representative Johnson, and carried on a voice vote that the committee support Section 3 of the bill draft relating to death benefits, with a correction of the statutory citation.**

Mr. Wahlin said Section 4 of the bill draft amends NDCC Section 65-05.1-08, which was enacted in 2005. He said the law was intended to provide for low-interest educational loans for injured employees or their surviving spouse or dependent child. He said the changes made in Section 4 would allow Workforce Safety and Insurance to set a lower interest rate than currently allowed.

In response to a question from Senator Heitkamp, Mr. Wahlin said this educational revolving loan fund supplements other Workforce Safety and Insurance programs, such as the guardianship fund and possible federal benefits. He said Workforce Safety and Insurance does a good job of informing survivors of possible benefits and programs that might be available.

Mr. Blunt said Section 4 of the bill draft provides a statutory maximum for the interest rates but does not

provide a minimum or floor for these interest rates. He said the Workforce Safety and Insurance Board is considering setting interest rates at approximately 2 percent, an amount that would be used to cover the administrative costs of the program.

**It was moved by Senator Klein, seconded by Senator Heitkamp, and carried on a voice vote that the committee support Section 4 of the bill draft relating to the educational revolving loan fund, with a correction of the statutory citation.**

**It was moved by Senator Klein, seconded by Representative Johnson, and carried on a roll call vote that the bill draft, as amended, relating to workers' compensation benefits for the catastrophically injured, additional benefits payable, death benefits, supplemental benefits, and loans for education, be approved and recommended to the Legislative Council.** Representatives Keiser, Amerman, and Johnson and Senators Heitkamp and Klein voted "aye." No negative votes were cast.

Chairman Keiser said the other bill draft [\[70188.0100\]](#) the committee requested for review at this meeting extends the expiration date of the committee's activities from July 31, 2007, to July 31, 2009.

Senator Klein said he supports the work of the committee, but he is not sure it is appropriate to have the committee sponsor an extension of the committee activities.

Representative Keiser said he does not want to appear to be self-serving by extending the work of the committee.

Senator Heitkamp said he wants to make sure the issues raised by this committee are dealt with during session. Additionally, he said, he does not want the possible existence of this interim committee to be a way for the Legislative Assembly to avoid dealing with issues that are brought forward during the session.

Mr. Sebald said he supports the actions of the committee.

The committee took no action on the bill draft extending the expiration of the Workers' Compensation Review Committee.

Senator Heitkamp said he takes issue with the philosophy of Workforce Safety and Insurance. He asked Mr. Blunt whether he thinks some branch of state government should be responsible and accountable for the actions of Workforce Safety and Insurance, and if not, why?

Mr. Blunt said the current board of directors structure of Workforce Safety and Insurance is an appropriate structure. He said in the past, executive directors of Workforce Safety and Insurance have not necessarily been experts in workers' compensation. He said historically, past directors have been political appointments.

Mr. Blunt said the issues the committee has faced during the interim are common issues that are being faced nationally and are not unique to North Dakota. Additionally, he said, under the current structure

Workforce Safety and Insurance is more accountable than private industry would be if it were providing the state's workers' compensation program.

In response to a question from Senator Heitkamp, Mr. Blunt said there is a performance audit and financial audit of Workforce Safety and Insurance. He said he is not in control over the timeline for finalization of these audits, but he understands that the audits will be reported to the Legislative Audit and Fiscal Review Committee once they are made final.

Mr. Blunt said the public issues relating to the audit include the 4 and 4 percent raise question and the Workforce Safety and Insurance Board composition. He said he does not want to make any specific comments on these issues until the audits are made final.

Senator Heitkamp said he raises this issue of the audits because he wants to make sure the committee members have all of the information available. He said there is a belief among some injured employees that there is a disconnect and these injured employees do not know where to go to get answers.

Representative Keiser said generally the cases reviewed by the committee this interim relate to pre-1995 law. He said he recognizes it takes time for issues related to the workers' compensation system to surface and come to the attention of legislators. Right now, he said, there are at least three workers' compensation systems under which injured employees are receiving benefits. He said in evaluating the system, there are those claims that are covered by the law that was in effect before the 1995 legislative session; those claims that arose after the 1995 legislative session but before the effective date of 2005 House Bill No. 1171; and the current system, which recognizes the changes resulting from 2005 House Bill No. 1171.

Representative Keiser said under the workers' compensation system being implemented as a result of House Bill No. 1171, workplace safety is taking more of a front seat in order to prevent injuries. He said he recognizes the state's workers' compensation system is not a perfect system, but it is improving. For

example, he said, current injured employee's satisfaction surveys indicate satisfaction is high.

Mr. Blunt said as executive director of Workforce Safety and Insurance, he understands that the injured employees are humans and these workplace injuries oftentimes change lifestyles, change the ability to earn, and change the ability to raise a family. He said the subject of workers' compensation is understandably very emotional.

Mr. Christensen said that in closing he wants the committee to remember that the old system provided injured employees with more benefits. He said he supported keeping Workforce Safety and Insurance as a state agency, but he thinks the system is going down the wrong road. He said he thinks the current state agency is not being held accountable and is a state agency in name only.

**It was moved by Representative Johnson, seconded by Senator Klein, and carried on a roll call vote that the chairman and the staff of the Legislative Council be requested to prepare a report and the bill drafts recommended by the committee and to present the report and recommended bill drafts to the Legislative Council.** Representatives Keiser, Amerman, and Johnson and Senators Heitkamp and Klein voted "aye." No negative votes were cast.

**It was moved by Senator Klein, seconded by Representative Johnson, and carried on a roll call vote that the meeting be adjourned sine die.** Representatives Keiser, Amerman, and Johnson and Senators Heitkamp and Klein voted "aye." No negative votes were cast. The committee adjourned at 2:10 p.m.

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Jennifer S. N. Clark  
Committee Counsel

[ATTACH:1](#)