

WORKERS' COMPENSATION REVIEW COMMITTEE

North Dakota Century Code (NDCC) Section 54-35-22 establishes the Workers' Compensation Review Committee. The committee is directed by law to review workers' compensation claims brought to the committee for the purpose of determining whether changes should be made to the workers' compensation laws. Section 54-35-22 establishes the membership of the six-member committee as follows: two members of the Senate who are appointed by the majority leader of the Senate, one member of the Senate who is appointed by the minority leader of the Senate, two members of the House of Representatives who are appointed by the majority leader of the House of Representatives, and one member of the House of Representatives who is appointed by the minority leader of the House of Representatives.

Committee members were Representatives George J. Keiser (Chairman), Bill Amerman, and Donald D. Dietrich and Senators Nicholas P. Hacker, Richard Marcellais, and Terry M. Wanzek.

The committee submitted this report to the Legislative Council at the biennial meeting of the Council in November 2008. The Council accepted the report for submission to the 61st Legislative Assembly.

BACKGROUND

General Background

The state laws addressing workers' compensation in North Dakota are primarily found in NDCC Title 65. The administrative rules adopted by Workforce Safety and Insurance (WSI) are found in North Dakota Administrative Code Title 92. Additionally, Article X, Section 12, of the Constitution of North Dakota specifically addresses the state's workers' compensation agency, essentially providing for a constitutional continuing appropriation to the workmen's compensation fund for the purpose of paying workers' compensation benefits. North Dakota Century Code Section 54-35-22 became effective August 1, 2005, and was originally set to expire August 1, 2007; however, this expiration clause was repealed in 2007. The committee must meet once each calendar quarter unless the committee chairman determines a meeting that quarter is not necessary because there is no claim to review. The committee is required to operate according to the laws and procedures governing the operation of other Legislative Council interim committees. The committee followed the typical interim calendar.

2007-08 Interim

During the 2007-08 interim, the Workers' Compensation Review Committee and the Industry, Business, and Labor Committee were two interim committees specifically charged with studying workers' compensation-related issues. In accordance with a directive of the chairman of the Legislative Council, the Industry, Business, and Labor Committee reviewed WSI premiums, benefits, and accountability and transparency methods and the results of consultant

reviews of claims review, human resources, and management areas.

In addition, the Legislative Audit and Fiscal Review Committee was charged with receiving annual reports from the executive director of WSI and the chairman of the WSI Board of Directors under NDCC Section 65-02-03.3 and with receiving a report from the executive director of WSI, chairman of the WSI Board of Directors, and the auditor regarding the biennial performance audit of WSI under Section 65-02-30; the Budget Section was charged with receiving periodic reports from WSI and the Risk Management Division of the Office of Management and Budget on the success of a single workers' compensation account for state entities covered by Chapter 32-12.2 under Section 65-04-03.1; and the interim Industry, Business, and Labor Committee was charged with receiving from WSI a safety audit of the Roughrider Industries work program and performance audit of the program of modified workers' compensation coverage under NDCC Section 65-06.2-09.

REVIEW PROCEDURE

The committee began the interim by establishing a procedure and protocol for conducting its charge. The committee made minor revisions to the application packet used during the 2005-06 interim. The revised application packet included a cover letter explaining the application process and eligibility requirements, a copy of NDCC Section 54-35-22, a "Release of Information and Authorization" form, and a "Review Issue Summary" form.

The committee discussed how best to notify the public of the committee's activities in order to solicit injured employees to have their claims reviewed, confidentiality and how to protect the confidentiality of the WSI records of injured employees, and whether there are steps the committee could take to better assist injured employees in organizing their issues for review.

The committee notified all legislators of the committee's charge and made an affirmative decision to attempt to hold committee hearings around the state as may be appropriate to accommodate the location of the injured employees having their claims reviewed by the committee.

The committee adopted the following procedure, which was used during the previous interim to determine eligibility for a claim review and to prepare the injured employee for the committee meeting at which the claim was reviewed:

1. An injured employee would submit to the Legislative Council office a complete "Release of Information and Authorization" form. In addition, the applicant could submit a "Review Issue Summary" form on which the applicant could summarize the issues the applicant wanted the committee to review.
2. Upon receipt of a completed application, the Legislative Council staff forwarded a copy of the application information to an assigned

ombudsman at WSI's Office of Independent Review (OIR), who reviewed the application to make a recommendation regarding whether:

- a. The applicant was an injured employee or the survivor of an injured employee;
 - b. The workers' compensation claim was final; and
 - c. All of the administrative and judicial appeals were exhausted or the period for appeal had expired.
3. Following this review, the ombudsman contacted the Legislative Council staff to provide a recommendation regarding eligibility for review. Upon receipt of this recommendation, the Legislative Council staff contacted the committee chairman to make a determination of eligibility.
4. Upon a determination of eligibility, the injured employee was contacted by Legislative Council staff and the ombudsman to begin the case preparation.
- a. Regardless of whether the injured employee accepted the assistance of the ombudsman, the ombudsman prepared a summary of the case to present at the committee meeting.
 - b. At the injured employee's discretion, the ombudsman assisted the applicant in organizing the issues for review.
 - c. The ombudsman prepared a case review packet and included this in a binder of information prepared for each committee member, committee counsel, and the WSI representative. Although these binders were distributed at each committee meeting, they remained the property of OIR and were returned at the completion of each committee meeting.
5. Before each committee meeting, the ombudsman met with committee counsel to review the case summary and workers' compensation issues being raised.
6. Upon receipt of these workers' compensation issues, committee counsel notified the WSI representative of the identity of the injured employee who would be appearing before the committee for a case review, and, as appropriate, the statutory cites of the basic issues being raised by the injured employee.

The committee established the following committee meeting procedure, which was followed for each of the 15 claims reviewed by the committee:

1. Committee members had an opportunity before and during each committee meeting to review the binder of claim review packets and to review each injured employee's WSI electronic records.
2. The ombudsman summarized the injured employee's case.
3. The committee received a list of the workers' compensation issues brought forward for review. At the discretion of the injured employee, these issues were presented by the ombudsman, the injured employee, a representative of the injured employee, or more than one of these individuals.

4. One or more representatives of WSI commented on the workers' compensation issues raised.
5. Interested persons were invited to comment on the workers' compensation issues raised as part of the claim review.
6. The committee members had an opportunity to discuss the issues raised.

Each of the 15 claims reviewed was allocated a half-day--either the morning, afternoon, or evening portion of a committee meeting--during which the initial review was conducted. Following the initial review, the committee retained the authority to continue to discuss issues raised as part of the review. Periodically, the committee would request additional information on specific issues and review this information at one or more future meetings. During each committee meeting at which claims were reviewed, a WSI representative was available to access the injured employee's WSI records electronically.

CLAIMS REVIEWED

First Claim

Claim Summary

The following is a chronology of events of the injured employee's claim:

- January 1999 - The injured employee was a firefighter who filed an application for workers' compensation benefits as the result of chest tightness and shortness of breath.
- February 1999 - Workforce Safety and Insurance denied the claim on the basis that the chest discomfort was caused by nonemployment factors, including a bicuspid aortic valve, which is a congenital condition affecting 1 percent to 2 percent of the population. The injured employee returned to work as a firefighter.
- March 2006 - The injured employee filed a second application for workers' compensation benefits claiming an enlarged aorta, leaking heart valve, and high blood pressure.
- April 2006 - Workforce Safety and Insurance accepted liability for the injured employee's hypertension, but denied his application for the aortic valve condition, claiming the issue had been addressed in 1999.
- May 2006 - The injured employee requested reconsideration of the April 2006 decision, claiming a 1999 postoperative valve replacement diagnosis established aortic insufficiency, a tricuspid valve, and that the surgical finding showed the injured employee did not have a congenital bicuspid valve as previously believed.
- June 2006 - Workforce Safety and Insurance opined that at surgery the aortic valve was found not to be congenitally abnormal and, based on this information, WSI determined the injured employee met the criteria for the firefighter presumption under NDCC Section 65-01-15.1 and accepted his claim.
- October 2006 - Workforce Safety and Insurance directed the injured employee to undergo an independent medical examination (IME). The

IME doctor opined the valvular heart disease was not a congenital condition but had developed as a result of a valvular infection in the past that caused the condition. The IME doctor further opined a possible but less likely possibility was the injured employee might have had subclinical rheumatic fever as a child.

- November 2006 - Workforce Safety and Insurance issued a notice of decision denying further liability, finding the injured employee's valvular heart disease was caused by a prior infection or rheumatic fever and not any work-related activity.
- December 2006 - The injured employee requested reconsideration of the November 2006 decision, claiming WSI did not have any objective medical evidence the injured employee's heart condition was not the result of his work as a firefighter.
- February 2007 - Workforce Safety and Insurance issued an order revoking the June 2006 acceptance of the injured employee's benefits and denied any further benefits.
- October 2007 - Workforce Safety and Insurance entered a stipulated agreement with the injured employee which essentially reversed the WSI denial.
- The Workforce Safety and Insurance representative reported that following the injured employee's claim review by the committee, the injured employee had a setback in health and has had to stop his vocational rehabilitation plan at this time and is therefore receiving full benefits. However, the injured employee did incur an overpayment due to income he received from firetruck sales. The injured employee was entirely forthcoming regarding the possibility of receiving payment for earlier sales and for that reason he had been requested to provide WSI verification of income by submission of federal income tax filings. With the most recent submission, WSI determined there was a \$9,000 overpayment. The parties were working on a stipulation to provide the injured employee an extended period of time to pay back this overpayment.

Issues for Review

The workers' compensation issues raised by the injured employee included:

- Workforce Safety and Insurance should not have denied benefits unless there was evidence showing the condition was not work related.
- The Office of Independent Review should be empowered to do more and should be entirely independent of WSI.
- The claim took too long to be resolved and should never have gone past the reconsideration stage or OIR stage. Workforce Safety and Insurance should be required to adhere to strict time limits, just as the injured employee is required to do. This claim took 582 days from the initial claim to the final decision. Additionally, WSI had not been timely in paying medical bills.

- The notice of denial should be easier for a layperson to understand. The fine print is not consumer-friendly.
- The tone of correspondence from WSI to injured employees should be less adversarial.
- The fact WSI can reverse its own rulings at any time results in a poor relationship between WSI and the injured employee. Additionally, WSI should be required to do its research and investigation thoroughly and quickly at the beginning of a claim instead of putting injured employees through the roller coaster ride of being denied, approved, terminated, and finally approved.
- Mileage reimbursement should reflect the distance from the start of travel to the end of travel instead of from city limit to city limit.
- Independent medical examination medical providers contract to provide services to WSI and therefore are not independent.

Workforce Safety and Insurance Response

The WSI representative provided a review of NDCC Section 65-01-15.1(1), which provides:

Any condition or impairment of health of a full-time paid firefighter or law enforcement officer caused by lung or respiratory disease, hypertension, heart disease, or an exposure to a bloodborne pathogen as defined by section 23-07.5-01 occurring in the course of employment, or occupational cancer in a full-time paid firefighter, resulting in total or partial disability or death is presumed to have been suffered in the line of duty. The condition or impairment of health may not be attributed to any disease existing before that total or partial disability or death unless the contrary is shown by competent evidence.

The injured employee's claim revolves around the last sentence of NDCC Section 65-01-15.1(1) because the law provides WSI must establish "competent evidence" to shift the burden back to the injured employee. The claim involved a very complex heart diagnosis and sometimes reaching the correct decision takes time.

The WSI representative testified he is not aware of WSI providing heightened scrutiny to high-cost claims. The injured employee's claim will not be subject to an ongoing audit, but as in all claims, if at some point additional information arises, WSI will reevaluate the claim as appropriate.

Comments by Interested Persons

The committee received the testimony of a representative of the North Dakota AFL-CIO in opposition to how the state's workers' compensation law requires a higher burden of proof of injured employees than the law requires of WSI.

The committee received the testimony of a representative of Concerned Advocates Rights for Employees (CARE) that, like this injured employee, there are injured employees across the state who live with the same fear of going to the mailbox because of the concern WSI will reverse an earlier decision.

The committee received the testimony of an injured employee that the state's workers' compensation system works well for small injuries, but when it comes to serious injuries the system does not work well.

Second Claim

Claim Summary

The following is a chronology of events of the injured employee's claim:

- October 1994 - The injured employee incurred a workplace injury to his low back and left thigh. Workforce Safety and Insurance accepted liability on the claim and paid the associated medical expenses and disability benefits.
- 1995 - The injured employee underwent a spinal fusion at the L4/L5 level, at which time WSI paid the associated medical expenses and disability benefits.
- January 2000 - The injured employee underwent spinal surgery, resulting in an anterior lumbar intrabody fusion at the L4/L5 and L5/S1 levels, an implanted proximity/BAK cage at the L4/L5 level, implantation of a femoral prosthesis of the L5/S1 level, and a pedicle fixation at the L4/L5 level. Upon recovery from surgery, the injured employee was assigned rehabilitation services.
- March 2001 - Workforce Safety and Insurance issued a notice of intention to discontinue benefits, noting the vocational rehabilitation plan was approved by WSI. The notice indicated temporary total disability (TTD) benefits would cease effective March 29, 2001, because the vocational rehabilitation plan provided the injured employee was qualified to work in the areas of computer support technician/technical support specialist, management trainee/assistant manager, and telemarketer. The injured employee reported his experience was employers were not willing to hire him and in the occasions he was hired, his physical limitations resulted in him having to quit the job.
- March 2001 - The injured employee made a timely request for reconsideration, claiming he was still disabled and unable to work and he was attending Bismarck State College in pursuit of a degree in computer information and processing because he believed it would be to his advantage to complete his computer training before returning to work.
- March 2001 - Workforce Safety and Insurance issued an order denying further disability and vocational rehabilitation benefits, indicating the injured employee was capable of acquiring gainful employment as provided under the vocational rehabilitation plan.
- April 2002 - The administrative law judge issued his recommended findings of fact, conclusions of law, and order, stating the preponderance of the evidence supported the WSI order.
- May 2002 - Workforce Safety and Insurance adopted the administrative law judge's recommended findings of fact, conclusions of law, and order. The order became final.

Issues for Review

The workers' compensation issues raised by the injured employee included:

- The injured employee disagreed with WSI's determination he was employable at the time WSI made that determination.
- The injured employee was unsatisfied with the rehabilitation services offered. Specifically, some of the concerns with rehabilitation services included the belief the functional capacity evaluation (FCE) was performed prematurely because at the time it was performed he was still healing from his surgery; WSI should have assisted in paying for his college expenses; the vocational plan for the injured employee to be a computer support technician/technical support specialist was unrealistic because he did not have the necessary experience or training; and WSI should provide assistance to the injured employee in actually conducting a job search and benefits should continue until employment is found and kept.
- The preferred worker program is inadequate. Specifically, the injured employee reported injured employees are not well enough informed and employers do not seem knowledgeable about or interested in the program.
- The WSI system is too cumbersome for medical providers and, therefore, medical providers are hesitant to treat injured employees.
- Workforce Safety and Insurance should help injured employees pay for legal representation during the appeal process.

Workforce Safety and Insurance Response

The WSI representative responded to the issues raised by the injured employee. The WSI representative reviewed NDCC Section 65-05.1-01(4), which sets out the following hierarchy of rehabilitation services available to injured employees:

The first appropriate option among the following, calculated to return the employee to substantial gainful employment, must be chosen for the employee:

- a. Return to the same position.
- b. Return to the same occupation, any employer.
- c. Return to a modified position.
- d. Return to a modified or alternative occupation, any employer.
- e. Return to an occupation within the local job pool of the locale in which the claimant was living at the date of injury or of the employee's current address which is suited to the employee's education, experience, and marketable skills.
- f. Return to an occupation in the statewide job pool which is suited to the employee's education, experience, and marketable skills.
- g. Retraining of one hundred four weeks or less.

The WSI representative testified that in applying the hierarchy to this claim, although the injured employee had significant experience, education, and work history; a four-year degree; and recent coursework in electronics and computers, the first four options were not appropriate. The fifth option was the first appropriate option for the injured employee. Workforce Safety and Insurance followed the law by identifying the first available option in the hierarchy. Workforce Safety and Insurance is not an employment agency and nationwide very few states have rehabilitation services as ambitious as North Dakota's system.

The WSI representative testified a 1996 decision of the North Dakota Supreme Court ruled that NDCC Section 65-05.1-01 does not require that WSI find an injured employee a job, but that it is WSI's duty to see to it that the injured employee can reasonably compete in the job market in the state. The WSI representative stated if this role is changed, the change would dramatically alter what WSI does; it would make WSI a guarantor of payments and allow injured employees to abuse the system.

The WSI representative provided a brief overview of the preferred worker program, including steps taken to inform injured employees and employers about the program. The representative reported the program is provided under NDCC Section 65-05-36, and although there is a three-year limit that applies to each individual employee-employer relationship, there is no limit on how many times an employee uses the program nor on the number of times an employer uses the program.

As it relates to returning to work, the WSI representative reported although WSI is not empowered to force the preinjury employer to take an injured employee back in a modified position, as part of the rehabilitation services, WSI is tasked with contacting preinjury employers to try to facilitate the return of the injured employee.

Comments by Interested Persons

A representative of CARE testified 99 percent of the injured employees he works with want to return to work but there are some areas of concern. For example, WSI says jobs are available for injured employees but also says WSI is not a job placement agency. The reality is some of these injured employees are not able to find postinjury employment. He requested guidance from the experts on how best to get injured employees back to work in jobs that allow them to support themselves and their families.

Third Claim

Claim Summary

The following is a chronology of events of the injured employee's claim:

- August 2005 - The injured employee, while working as chief of police, sustained multiple gunshot wounds to his lower torso while attempting to apprehend a suspect. Workforce Safety and Insurance accepted liability for the injury and benefits were paid accordingly.

- November 2005 - The injured employee was treated by his physician for the evaluation and management of neutrophilia, a blood disorder related to an elevated white blood cell count. The physician noted the injured employee had a persistently elevated white blood cell count since his gunshot wound. Additionally, the physician opined the neutrophilia may be due to smoking and dental carries.
- April 2006 - Workforce Safety and Insurance issued a notice of decision denying benefits for medical services for the treatment of neutrophilia, a condition WSI determined to be unrelated to the workplace injury.
- April 2006 - A second physician indicated no definitive ideology for the injured employee's elevated white blood cell count. The second physician opined the elevated white blood cell count was related to the injury due to the fact there is no other appreciable cause for his elevated white blood cell count, and the only other factor that would play into this would be his gunshot wounds. A third physician noted the injured employee had an elevated white blood cell count in the past, but was of the opinion the current elevated white blood cell count since the accident was more likely the result of that injury.
- April 2006 - The injured employee filed a written request for reconsideration of WSI's April 2006 notice of decision denying benefits for medical services.
- August 2006 - The IME physician opined the elevated white blood cell count was unrelated to the gunshot wounds or any deep-seated infection or inflammation, noting no signs or symptoms of any deep-seated infection, inflammation, blood disorder, or other pathology related to any elevated white blood cell count. The IME physician noted documentation in the medical records that the injured employee's white blood cell count had been elevated as early as 2003.
- October 2006 - Workforce Safety and Insurance issued an order denying coverage of the blood disorder, indicating that the greater weight of the evidence did not indicate the neutrophilia was caused by the work injury.
- The injured employee requested assistance from OIR, and the advocate assigned to the claim reviewed the records and, in conjunction with WSI, offered a stipulated settlement to resolve the dispute by paying for one-half of the out-of-pocket expenses associated with the denied bills. The injured employee denied the settlement offer as he felt the issue of the high white blood cell count was a direct result of the work-related injury.
- March 2007 - The Office of Independent Review issued its certificate of completion with no change to the order.
- July 2007 - The administrative law judge issued the recommended findings of fact, conclusions of law, and order indicating the order denying specific benefits should be affirmed. The injured

employee had failed to establish by a preponderance of the evidence that his medical care related to the treatment of neutrophilia was related to his work injury. Workforce Safety and Insurance adopted this order and the order became final.

- The injured employee brought a civil action and entered a settlement awarding him a civil award of \$150,000. In accordance with NDCC Section 65-01-09, WSI was subrogated to the rights of the injured employee to the extent of 50 percent of the damages recovered, to a maximum of the total amount WSI paid or would otherwise pay in the future in compensation and benefits for the injured employee.
- Since his injury, the injured employee returned to work in a modified position as a city administrator. Because the injured employee's postinjury employment earnings are less than his preinjury earnings, the injured employee will be eligible for temporary partial disability (TPD) benefits for a period not to exceed five years.

Issues for Review

The workers' compensation issues raised by the injured employee included:

- The denial of payment to medical facilities for the treatment of neutrophilia. The elevated white blood cell count was a direct result of the injury sustained from the gunshot wounds, worsening in periods of extreme pain related to the work injury. Any preinjury elevated white blood cell count was related to illness he was experiencing at the time the tests were run.
- Workforce Safety and Insurance should be required to pursue its own legal action against a responsible third party instead of requiring the injured employee to bring the civil action. If the injured employee brings the civil action, WSI should allow the injured employee to retain the entire monetary award for the pain and suffering endured. Workforce Safety and Insurance did not assist in the civil action but was able to benefit from all his hard work. Additionally, the communication with WSI regarding subrogation should be clearer. The injured employee had been victimized twice--first he was shot, and then WSI took 50 percent of his award without doing any of the work in the civil action.
- The TPD benefits should not be limited to a five-year period but, instead, should be based upon the injured employee's physical ability or inability to sustain the preinjury income level. The current TPD system penalizes the injured employee.
- The IME process should be revised. The injured employee never had the opportunity to meet the IME doctor, and at the administrative hearing level the IME doctor participated by telephone.

Workforce Safety and Insurance Response

The WSI representative focused on the issues of preexisting conditions, subrogation, and TPD. The WSI

representative provided a review of how North Dakota's workers' compensation law addressed preexisting conditions. Generally, WSI does not cover a preexisting condition; however, if there is a preexisting condition and a work injury substantially worsens that condition, the worsening of the condition is compensable by WSI.

The WSI representative testified in this injured employee's claim, the basis for denial of services was that the blood disorder was a preexisting condition with no medical opinion linking the condition to the work injury. It is a normal reaction for an individual's white blood cell count to increase following a gunshot wound; however, typically, that count will return to normal. In this claim there was no clear ideology for the injured employee's elevated white blood cell count. As WSI reviewed the injured employee's claim as it related to coverage of medical services attributable to the blood disorder, WSI went back and reversed payment on some medical bills that had been previously paid. The WSI representative testified WSI takes these situations very seriously, and in close cases "the tie goes to the worker."

The WSI representative reviewed NDCC Section 65-01-09, North Dakota's workers' compensation subrogation law. As a matter of policy, WSI encourages injured employees to pursue civil actions. Unlike a private insurance company, WSI does not have a duty to defend an insured worker. The law provides a compromise by which WSI is limited to a maximum of 50 percent of an award and the injured employee is allowed to keep the other 50 percent of an award, thereby acting as an incentive to encourage injured employees to bring third-party actions.

The WSI representative testified that in applying the subrogation law to this injured employee's claim, the WSI benefits paid to the injured employee had exceeded the 50 percent WSI took from the civil action award.

The WSI representative testified that in comparing North Dakota's workers' compensation subrogation laws to other states', most other states' workers' compensation systems take more than North Dakota's. Comparing the workers' compensation system to the general private insurance system, a private insurer typically takes 100 percent of the civil award if the insurance company's costs equal or exceed the civil award.

The WSI representative testified TPD benefits, addressed under NDCC Section 65-05-10, are meant to be a bridge, anticipating the injured employee will be able to return to full-time employment or, after a five-year period, will be able to work up to the preinjury wages. However, in some instances the injured employee will not be able to reenter the workforce and reach preinjury wages.

Fourth Claim

Claim Summary

The following is a chronology of events of the injured employee's claim:

- October 1975 - The injured employee filed an application for workers' compensation benefits due to an injury to his lower back. Workforce Safety and Insurance accepted liability for this

injury and paid the associated medical expenses and disability benefits.

- The injured employee received wage-loss benefits through April 24, 1977, during which time he had surgery and was diagnosed with a herniated disk at L5-S1. Wage-loss benefits were terminated in April 1977 because WSI deemed the injured employee employable and capable of performing gainful employment. The injured employee underwent further medical evaluation in the late 1980s and early 1990s during which time his medical condition deteriorated.
- May 1990 - The injured employee underwent a second surgery.
- July 1990 - Workforce Safety and Insurance wage-loss benefits were reinstated and paid continually through May 5, 1994, at which time WSI declared the injured employee permanently and totally disabled (PTD).
- December 2003 - Workforce Safety and Insurance issued a notice of intention to discontinue benefits, claiming the injured employee willfully and intentionally violated NDCC Sections 65-05-33 and 65-05-08, relating to the filing of a false claim or false statement. This notice indicated all future workers' compensation benefits would be terminated after July 20, 2004, and that an overpayment of benefits had occurred as a result of the willful false statements.
- June 2004 - The injured employee requested an administrative hearing relating to the order denying further benefits and the order for repayment.
- January 2006 - The administrative law judge submitted the initial recommended findings of fact, conclusions of law, and order indicating although the greater weight of the evidence of record shows the injured employee willfully made false statements to secure payment of benefits and willfully misrepresented his medical condition within the meaning of NDCC Section 65-05-03, there was insufficient evidence to establish that any false statement or misrepresentation was material so as to either cause WSI to pay the injured employee any workers' compensation benefits in error, or such as could have mislead WSI for a determination of his claim for workers' compensation benefits, and, accordingly, the order denying further benefits and order for repayment issued in March 2004 by WSI was vacated and set aside.
- August 2006 - The administrative law judge submitted additional recommended findings of fact and conclusions of law stating the greater weight of the evidence of record shows the injured employee willfully and intentionally made false statements to a doctor concerning his ability to work and misrepresented his physical ability in that respect for the purpose of influencing the doctor in the evaluation of his physical condition. Therefore, the recommendation was that the order dated March 2004, forfeiting all additional workers' compensation benefits to which he may be entitled

after January 20, 2004, be affirmed. However, the recommended order provided because there was insufficient evidence showing that any false statement or misrepresentation was sufficiently material to cause WSI to pay the injured employee any workers' compensation benefits in error, WSI's order issued in March 2004 for repayment was vacated and set aside. Workforce Safety and Insurance adopted the recommended findings of fact and conclusions of law as recommended by the administrative law judge. The administrative decision became final.

Issues for Review

The workers' compensation issues raised by the injured employee included:

- The injured employee received improper treatment for his work injury and WSI never acknowledged the resulting arachnoiditis and how it exacerbated his spinal injury.
- The fraud statutes and the way they are implemented do not allow the injured employee to cross-examine the accuser. When an injured employee is faced with fraud charges, there is no meaningful way to fight these accusations.
- The state's workers' compensation system takes too long to reach decisions and resolve disputes, resulting in the injured employee incurring severe financial hardships.
- The state's workers' compensation system denies the injured employee's due process. In the case of this injured employee, his due process rights were violated in that he was unable to afford the costs associated with getting the correct specialist to his hearings, his mail was stolen, and his records were withheld by WSI.
- Workforce Safety and Insurance should have brought a civil action against the injured employee's medical provider for the medical malpractice committed.
- To provide more accountability for the state's workers' compensation system, WSI and medical providers should be penalized when they act improperly.
- An injured employee should be able to claim and establish fraud committed by WSI.

Workforce Safety and Insurance Response

The WSI representative reviewed the statutory time requirements for administrative appeals. An appeal must be filed within 30 days after notice of an order is issued.

The WSI representative reviewed the two levels of the state's workers' compensation law fraud standard. The first level is the determination of whether benefits were paid in error based on a false statement, and, if this is found, WSI is allowed to recover benefits. The second level is when it is determined there was a false statement that could have resulted in payments of benefits in error, upon which WSI is allowed to terminate future benefits but not recover past benefits.

In the case of this injured employee, WSI initiated a fraud investigation upon receipt of a tip. Workforce Safety and Insurance has video evidence of several instances of the injured employee participating in activities significantly deviating from the injured employee's medical limitations as well as exceeding his own reported limitations. Generally, WSI acts on fraud tips based on credibility and oftentimes these tips do result in investigations. In the case of the fraud investigation on this injured employee, WSI contracted with a private investigator and to that extent the investigator was acting as WSI's agent. Due to geographical limitations, WSI does contract for some investigation services.

The WSI representative testified that as it relates to the issue of whether WSI considered the injured employee's condition, the administrative hearing record reflects the issue of arachnoiditis was considered by the administrative law judge, and the transcript of the administrative hearing indicates there was an opportunity for cross-examination by the injured employee's attorney. Ultimately, the administrative law judge determined it was not necessary to diagnose arachnoiditis but did recognize the associated symptoms in reaching a recommended decision.

Fifth Claim

Claim Summary

The following is a chronology of events of the injured employee's claim:

- December 1999 - The injured employee sustained a bilateral wrist injury while working for a convenience store. Workforce Safety and Insurance accepted liability for the work-related injury and paid the associated medical expenses and disability benefits. The injured employee returned to work.
- June 2001 - The injured employee filed a reapplication for benefits, indicating he was no longer able to work due to ongoing pain and discomfort. Workforce Safety and Insurance found him eligible for wage-loss benefits and the injured employee was paid TTD benefits from June 21, 2001, through April 11, 2006, at which time he was declared PTD.
- February 2008 - Permanent total disability benefits ceased under the retirement presumption law when the injured employee reached the age of 65 years and 10 months and therefore became eligible for Social Security retirement benefits. Upon cessation of the PTD benefits, the injured employee became eligible to receive the additional benefit payable.

Issues for Review

The primary workers' compensation issues raised by the injured employee related to the retirement presumption and additional benefit payable law under NDCC Sections 65-05-09.3 and 65-05-09.4. The injured employee reported the reduction in his WSI benefits in the amount of \$400 per month caused severe financial hardship in his household, including the possible loss of

his home. He testified that but for the work injury, not only would his quality of life be better, but he would have continued working past the age of retirement and would have been able to vest in his employer's retirement plan.

The injured employee suggested WSI implement a procedure by which WSI perform a case-by-case review of each claimant impacted by the retirement presumption to determine whether it would be appropriate for the injured employee to receive an extension of WSI benefits until the age of 70, in order to accommodate each injured employee's individual financial situation.

Workforce Safety and Insurance Response

The WSI representative reviewed the workers' compensation benefit system and retirement presumption. Approximately 50 percent of the states' workers' compensation systems have some sort of retirement presumption. Under the North Dakota workers' compensation system, an injured employee may receive TPD benefits when the injured employee is able to return to work at a lesser capacity; TTD benefits when the injured employee is unable to return to work at that time in any capacity; and PTD benefits when the injured employee is never able to return to work in any capacity. There is a cost-of-living adjustment available for recipients of PTD but not for TTD or TPD benefits.

The WSI representative reviewed the additional benefit payable system. An additional benefit payable is not intended to be a retirement payment but is intended to address an injured employee's lower Social Security contribution due to workplace injury.

Comments by Interested Persons

A representative of CARE disagreed with the statement the state's workers' compensation system is not meant to be a retirement system. When the state's workers' compensation system was initially created, the system was supposed to allow an injured employee to receive benefits for life, but in 1995 the law changed. The representative testified in support of returning the law to the pre-1995 status.

Sixth Claim

Claim Summary

The following is a chronology of events of the injured employee's claim:

- June 2005 - The injured employee sustained an injury to his facial bones and mouth and WSI accepted the claim and paid benefits accordingly.
- January 2008 - The injured employee underwent a permanent partial impairment (PPI) evaluation by a Fargo doctor.
- February 2008 - Workforce Safety and Insurance issued an order denying PPI benefits because the impairment was less than 16 percent whole body. The order became final.

Issues for Review

The injured employee raised the following workers' compensation issues:

- The state's workers' compensation PPI law--NDCC Section 65-05-12.2--should be

changed. It is wrong for the law to provide a 15 percent whole body deductible for PPI awards. The PPI evaluation system makes it very difficult for the injured employee to get a second opinion on a PPI evaluation determination due to the limited number of medical professionals who are qualified to make these determinations.

- The state's workers' compensation law negatively impacts the injured employee by prohibiting the injured employee from hiring an attorney on a contingency basis. Attorneys are reluctant to take WSI clients due to the statutory low rate of reimbursement.
- The state's workers' compensation law penalizes the injured employee by providing a statute of limitation on the submission of mileage and expense claims. The claims analyst never walked the injured employee through the process or mentioned reimbursement, even when realizing his file lacked any claims submitted for reimbursement.
- Workforce Safety and Insurance is not forthcoming in providing injured employees with requested information. When the injured employee contacted WSI to request the list of medical providers qualified to perform visual PPI evaluations, WSI was very reluctant to provide the list to him. Workforce Safety and Insurance provided the list only after the injured employee told WSI that the administrative law judge said WSI should be able to provide this list.

Workforce Safety and Insurance Response

The WSI representative testified regarding the issues of PPI, attorney's fees, and the statute of limitations for submitting expenses. North Dakota's PPI system is unique in that it is not based on the earnings of the injured employee. In determining the amount of an injured employee's PPI, WSI uses the American Medical Association (AMA) guide for rating impairments and also uses a statutory schedule of injuries.

The WSI representative reported PPI is intended to measure the residual impairment following an injury. Each body part has a separate rating. Additionally, WSI has an internal audit of each PPI award to make sure the evaluating medical provider followed the AMA guide. The reality is there are very few medical providers in the United States certified to perform PPI evaluations in accordance with North Dakota's system.

The WSI representative testified that in determining an injured employee's PPI, it is important to recognize that the actual amputation of an eye differs from an injury to an eye. Amputations are scheduled injuries and differ from the AMA guide. In the case of an amputation of an eye, there is a PPI award of approximately \$33,000.

The WSI representative testified that, historically, WSI has been fairly successful in defending PPI determinations. For an injured employee to overcome a PPI determination, it essentially requires a showing that the test was done improperly. Workforce Safety and Insurance tries to find medical providers in

North Dakota who are willing to perform PPI evaluations and WSI has affirmatively cultivated these relationships in order to have qualified evaluators in this state.

The WSI representative reported NDCC Section 65-02-08 addresses attorney's fees. The law is designed to attempt to prohibit attorneys from double-dipping and being paid by the client as well as by WSI. In 2000 the Supreme Court decision in *Ash v. Traynor* clarified an injured employee may enter a fee arrangement with a private attorney, as long as there is no double-dipping.

The WSI representative testified that as it relates to the one-year statute of limitation for submitting reimbursement for mileage and expense claims, the information is in pamphlets provided to injured employees, and to the extent a claims analyst fails to periodically review the status of reimbursement claims, the review is something that should be done. A valid reason for having a statute of limitation is because it would become an administrative nightmare for a claims analyst to have an unlimited amount of time for which to go back and address reimbursements.

The WSI representative testified WSI does not have the flexibility to overlook the one-year statute of limitation related to reimbursement for mileage and other expense claims.

Comments by Interested Persons

A representative of CARE testified in support of removing the 15 percent whole body impairment not covered by PPI. If an injured employee is determined to have a 1 percent impairment, that injured employee should receive that award. In 1995 state law was changed because WSI was in financial trouble and requested that everyone help just a little bit to help the agency become financially stable. Workforce Safety and Insurance is now in good financial shape so it is time for WSI to help the injured employee.

A representative of the North Dakota Injured Workers Support Group testified from the perception of some injured employees there is a sense that claims analysts are not always working for the injured employee. Additionally, there is a significant amount of paperwork that injured employees have to deal with, and it is not surprising that information can be overlooked when it is provided to the injured employee in a paper format.

A representative of the North Dakota Injured Workers Support Group testified the North Dakota workers' compensation system is designed so the injured employee has a significant burden. He testified in support of shifting this burden to more evenly distribute the burden between WSI and the injured employee. Additionally, loss of vision is a unique impairment and the law should reflect this. Finally, he testified that the PPI threshold of 16 percent is inappropriate and he testified in support of changing this portion of the PPI law.

Seventh Claim

Claim Summary

The following is a chronology of events of the injured employee's claim:

- January 1996 - The injured employee filed an application for workers' compensation benefits for a bilateral wrist injury (carpel tunnel syndrome). Workforce Safety and Insurance accepted liability and paid the associated medical expenses and disability benefits.
- The injured employee received benefits for several years while undergoing treatment for this initial injury. During this treatment the injured employee contracted reflex sympathetic dystrophy (RSD) in her left arm. As part of the RSD treatment, the injured employee had a nerve stimulator surgically implanted in her left shoulder. After having the stimulator implanted, the injured employee contracted methicillin-resistant staphylococcus aureus (MRSA).
- August 2006 - Workforce Safety and Insurance issued an order denying further disability and vocational rehabilitation benefits. The injured employee was released to return to sedentary-level work, 8 hours per day, 40 hours per week. Workforce Safety and Insurance determined the injured employee was capable of pursuing employment as a social services aid, telemarketer, or collection clerk. As a result of her transferable skills, WSI found the injured employee was not entitled to TPD benefits.
- November 2006 - The injured employee requested an administrative hearing relating to the August 2006 order.
- August 2007 - The administrative law judge issued the recommended findings of fact, conclusions of law, and order finding the injured employee had not shown that her MRSA was causally related to her work injury and therefore may not have the MRSA considered in her rehabilitation assessment. The WSI order denying further disability and vocational rehabilitation benefits dated August 2006 was affirmed. Workforce Safety and Insurance adopted the recommended findings of fact, conclusions of law, and order. The order became final.

Issues for Review

The workers' compensation issues raised by the injured employee included:

- Due to her inability to be employed, WSI should award the injured employee full disability benefits.
- Workforce Safety and Insurance should accept liability for the injured employee's MRSA.
- Workforce Safety and Insurance rehabilitation services are not adequate.
- Injured employees are unable to afford legal services to pursue unjust WSI orders.
- WSI has repeatedly disregarded the injured employee's primary doctor's position that she is unable to do repetitive work.

In support of these issues the injured employee provided the following information:

- The injured employee testified WSI ceased using a rehabilitation service called the Expedited Program, which was very effective. The

Expedited Program allowed an injured employee to do telephone work from home and allowed the injured employee to work for 15 minutes and then take a 15-minute break.

- The MRSA was directly related to the injured employee's medical treatment for her work injury. The injured employee testified that approximately one month after having surgery for the insertion of the stimulator she began getting skin sores that progressively got worse.
- Medical reports supported the position the injured employee was unable to work. The administrative law judge found a doctor noted the injured employee's chronic pain was secondary to her RSD and was increasing in intensity and significantly diminished her functional capacity, ultimately resulting in the doctor advising WSI that the doctor felt the injured employee could not work given her skin condition and pain level.

Workforce Safety and Insurance Response

The WSI representative focused her testimony on the issues of the nexus between the injury and acquiring MRSA and on the appropriateness of WSI's vocational rehabilitation plan. The administrative law judge relied on medical testimony indicating there were a significant number of potential causes for contracting MRSA in making a finding there was no nexus between the work injury and the contraction of MRSA.

The WSI representative testified as it relates to the issue of coverage for MRSA, an injured employee has the burden to prove entitlement for benefits. The injured employee needs to prove that it is more likely than not the injury was work-related.

The WSI representative testified the injured employee's FCE found the injured employee was eligible for full-time sedentary employment, and the injured employee's primary care doctor signed off on the FCE. Ultimately, the FCE became the basis for the administrative law judge's order.

Eighth Claim

Claim Summary

The following is a chronology of events of the injured employee's claim:

- December 1993 - The injured employee sustained an injury to her left hand and bilateral knees while employed as a nurse. Workforce Safety and Insurance accepted liability for this claim and paid the associated medical expenses. The injured employee returned to work.
- August 1997 - Workforce Safety and Insurance issued an order denying specific benefits finding the injured employee had not proven with reasonable medical certainty that her recent medical conditions of left carpal tunnel syndrome and fibromyalgia were caused by her December 1993 work injury.
- September 1998 - Workforce Safety and Insurance issued an order denying specific benefits indicating the injured employee had not proven with reasonable medical certainty that her

psychological problems and depression were caused by the December 1993 work injury.

- December 1998 - Workforce Safety and Insurance issued an amended order denying specific benefits and an order denying disability benefits. The order indicated the injured employee had not proven with reasonable medical certainty that her psychological problems and depression were caused by the December 1993 work injury and the injured employee was not entitled to the payment of medical expenses for specific prescription medications.
- August 1999 - An administrative hearing was conducted covering three areas of concern. First, the administrative hearing addressed the order issued in August 1997 denying benefits for the medical conditions of carpal tunnel syndrome and fibromyalgia; second, the hearing addressed the order issued in September 1998 denying payment of medical expenses for specified prescriptions for the treatment of psychological problems and depression; and third, the hearing addressed the amended order denying specific benefits and the order denying disability benefits issued in December 1998, which denied benefits for the treatment of psychological problems and depression.
- September 1999 - The administrative law judge issued the recommended findings of fact, conclusions of law, and order affirming the WSI orders. Workforce Safety and Insurance adopted these recommendations.
- December 1999 - The injured employee filed an appeal to district court, and in February 2000 the district court judge issued an order of dismissal stating the case was dismissed with prejudice and without any cost to either party. The district court order was based on a stipulation signed by the injured employee.

Issues for Review

The workers' compensation issues raised by the injured employee included:

- Workforce Safety and Insurance sided with the employer regarding the injured employee's termination as a licensed practical nurse.
- Not all of the issues and facts relating to the injured employee's situation were considered by WSI. There was a miscommunication between the injured employee, the doctor, and the employer resulting in the loss of opportunity to receive disability benefits from WSI. Because the system is so complicated, WSI should be more understanding in dealing with miscommunications.
- The state's workers' compensation system is very complicated. The injured employee was alone on the journey.

Workforce Safety and Insurance Response

The WSI representative testified a review of the injured employee's medical records indicated the injured employee previously had received treatment for this

psychiatric condition going back to 1991. In making a determination of coverage, WSI found no nexus between the injured employee's workplace fall and her psychiatric condition.

The WSI representative stated under North Dakota's workers' compensation laws, a psychological injury is compensable if the condition is caused by physical injury but only if the physical injury is at least 50 percent of the cause of the psychological injury. Although the evaluation for coverage of a psychological injury can become grey, there are instances of WSI covering a psychological injury.

Comments by Interested Persons

Representative Karen Karls testified she has known the injured employee for months, and at the injured employee's request she reviewed the injured employee's WSI records. She testified she knows the injured employee is trying very hard to keep her head above water. Although it is possible the injured employee received bad legal advice, it needs to be recognized that the workers' compensation system is a very complex system for a layperson to understand.

Ninth Claim

Claim Summary

The following is a chronology of events of the injured employee's claim:

- January 2008 - The injured employee sustained a work-related injury. The injury occurred while the injured employee was taking out the garbage and the wind caught the steel door and hit her in the face. Workforce Safety and Insurance accepted liability for the injury and paid the associated benefits.
- May 2008 - Workforce Safety and Insurance issued an order denying payment for the replacement of the injured employee's lenses to her eyeglasses, claiming WSI was not responsible for the injured employee's eyeglasses because there was no actual eye injury causing a change in the injured employee's sight attributable to the work injury.

Issues for Review

The workers' compensation law should provide coverage for eyeglasses damaged in the course of a workplace injury. Workforce Safety and Insurance requires a physical injury to the eye before it will pay for a replacement of broken eyeglasses. Workforce Safety and Insurance's denial is in part based upon the assertion that her eyeglasses are "part of her wardrobe." Without her eyeglasses, the injured employee would be unable to drive and unable to perform her job duties.

Workforce Safety and Insurance Response

The WSI representative reviewed the law addressing compensable injury and artificial members. North Dakota Century Code Section 65-01-02(10) defines compensable injury and Section 65-01-02(3) defines artificial members. The most recent legislative history on the definition of artificial members goes back to 1987, at

which time it appears the definition was amended to clarify how WSI was addressing compensation for artificial members.

The statutory language defining artificial members originally goes back to 1941. In 1941 the law stated an artificial member includes any such devices as are substitutes for, and not mere aids to, a natural body part, organ, limb, or other part of the body. From approximately 1943 to 1947 the law stated dentures were not covered as an artificial member.

Tenth Claim

Claim Summary

The following is a chronology of events of the injured employee's claim:

- February 2003 - The injured employee sustained an injury to his neck while working as an assembler. Workforce Safety and Insurance accepted the claim and benefits were paid accordingly.
- May 2003 - The injured employee was diagnosed with a C4-5 herniated disk and severe C5-6 spondylosis with neck and bilateral arm pain. In October 2003 the injured employee was further diagnosed with a C3-4 spondylosis with axial neck pain.
- November 2005 - The FCE indicated the injured employee was able to be employed six hours per day as a telephone solicitor/telemarketer.
- December 2005 - Workforce Safety and Insurance issued an order awarding TPD benefits indicating the injured employee was capable of gainful employment as a telephone solicitor/telemarketer.
- February 2006 - The injured employee requested an administrative hearing relating to WSI's order awarding TPD benefits.
- December 2006 - The administrative law judge issued the recommended findings of fact, conclusions of law, and order providing the greater weight of the evidence established by expert vocational evidence was the injured employee had a retained earning capacity, demonstrated by the injured employee's ability to work as a telephone solicitor in a statewide job pool; there was no disagreement about the injured employee's physical restrictions, the only disagreement concerned the doctor's disbelief that a telephone solicitor can accommodate the injured employee's restrictions. The administrative law judge affirmed the WSI order awarding TPD. Workforce Safety and Insurance adopted the recommended findings of fact, conclusions of law, and order. The order became final.
- April 2006 - Workforce Safety and Insurance issued a notice of intention to discontinue TPD benefits as the injured employee failed to comply with the program of rehabilitation by performing a good-faith job search. The notice further indicated a good-faith job search includes making at least five job contacts per day. Contacts can include visits to Job Service North Dakota, Internet resources, or other employment agencies.
- May 2006 - The injured employee requested reconsideration of WSI's April 2006 informal decision.
- July 2006 - Workforce Safety and Insurance issued an order suspending TPD benefits and an order denying reapplication.
- January 2007 - An administrative hearing was conducted regarding the July 2006 order.
- February 2007 - The administrative law judge issued the recommended findings of fact, conclusions of law, and order affirming WSI's July 2006 order suspending TPD benefits and the order denying reapplication, except to the extent that it requires the injured employee to come back into compliance with vocational rehabilitation by registering with Job Service North Dakota and the preferred worker program, contacting five employers per day, and submitting an employment search log every month. Rather, in order for the injured employee to come back into compliance with vocational rehabilitation, he must make a good-faith work search and return to work utilizing his transferable skills. Workforce Safety and Insurance adopted the recommended findings of fact, conclusions of law, and order. The order became final.
- September 2007 - Workforce Safety and Insurance issued an order denying liability for the injured employee's depression claiming the psychological condition did not arise out of the compensable work injury.
- February 2008 - The administrative hearing was conducted relating to WSI's September 2007 order.
- March 2008 - The administrative law judge issued her recommended findings of fact, conclusions of law, and order finding the greater weight of the evidence showed the injured employee suffers depression caused by his physical injuries and that the work injuries are at least 50 percent of the cause of the condition as compared to all other contributing causes, reversing WSI's order denying benefits. Workforce Safety and Insurance adopted the recommended findings of fact, conclusions of law, and order.
- June 2008 - The injured employee was seen by his psychiatrist who stated "the patient's followup on major depression and irritability, chronic pain in neck, shoulder, and back secondary to a work-related injury. His status is post three neck surgeries and two shoulder surgeries related to that injury." The psychiatrist further stated "he is receiving no benefits from workers' compensation mainly because they contend that he did not try to look for a job, which meant five contacts a day or he worked as a telemarketer. This is a shame because the last job the patient should ever think of having would be a telemarketer. I think it would be a disaster for whatever company he was working for because of the way his personality is

put together and because of irritability related to pain. Why he is not getting benefits considering all that he has gone through, I do not understand."

- September 2008 - Workforce Safety and Insurance awarded PPI benefits in the amount of 55 percent whole body impairment for cervical spine and bilateral shoulders.

Issues for Review

The workers' compensation issues raised by the injured employee included:

- Workforce Safety and Insurance should be required to document vocational rehabilitation results. It was suggested WSI contact every injured employee six months after a vocational rehabilitation plan becomes final and, if the injured employee remains unemployed despite a good-faith job search, recommence disability benefits and reevaluate vocational rehabilitation possibilities. Employers, employees, and the public deserve to know if WSI's rehabilitation efforts are actually working.
- Workforce Safety and Insurance should exercise some common sense presumptions. Workforce Safety and Insurance often seems to ignore the reality in which injured employees live. For example, WSI rehabilitation service providers inform injured employees to tell employers about the injured employees' injuries and limitations; however, the reality is that if an injured employee informs the potential employer about the limitations, 99 percent of those potential employers will not hire the injured employee.
- Workforce Safety and Insurance should be redirected to use the same standards employed by Job Service North Dakota regarding what constitutes a good-faith job search. Workforce Safety and Insurance should use the same standards used by the Department of Human Services Division of Vocational Rehabilitation. Finally, WSI should use the standards adopted by the Social Security Administration for determining the weight of a treating doctor's opinion and the realistic possibility of employment in the appropriate labor market.
- Eliminate WSI's unfettered discretion in exercising its continuing jurisdiction. If an injured employee can show relevant new facts, which either did not exist or were overlooked previously, WSI should be required to consider the facts and issue an appealable decision. Workforce Safety and Insurance historically only uses its continuing jurisdiction to decrease an injured employee's benefits. The injured employee intended to apply for WSI's continuing jurisdiction project and not for review of his claim by the Workers' Compensation Review Committee; however, he inadvertently completed the wrong form and WSI would not accept his application. The injured employee testified WSI has continuing jurisdiction at all times and does not need an injured employee to submit an application by an arbitrary deadline.

- Once a workers' compensation claim is accepted, WSI should continue disability and medical benefits until a subsequent order reducing or terminating such benefits becomes final. Do not starve an injured employee or prevent the injured employee from obtaining medically necessary treatment until WSI's order becomes final.
- Eliminate the 20 percent attorney's fee cap. Removal of the cap will allow an injured employee to challenge decisions that are not cost-effective to pursue under the current system, such as denials of MRIs and other necessary medical tests and treatment, and allow an injured employee to challenge violations of due process, such as ex parte communications between WSI's counsel and WSI's decisionmakers. If the attorney's fee cap is removed from law, it is possible there would be an increase in the number of attorneys willing to represent injured employees. If WSI's attorneys had the same limitations as the injured employees' attorneys, WSI would not be able to find attorneys willing to contract for services.
- Workforce Safety and Insurance should adopt a treating doctor presumption much like the Social Security Administration has.

Workforce Safety and Insurance Response

The WSI representative reviewed the vocational rehabilitation hierarchy established under NDCC Section 65-05.1-01. The WSI job contact requirements are very lenient, as an injured employee can comply with the job search requirements in a variety of ways, including looking at a newspaper or searching the Internet. Workforce Safety and Insurance would not take the issue of noncompliance to a hearing if the injured employee were partially following the job search requirements as long as the injured employee had an honest intention to find employment.

The WSI representative testified that in the case of the injured employee, over a five-month period the injured employee made seven contacts. The injured employee did not make an honest attempt to find work.

The WSI representative testified the injured employee was found to be capable of being a telemarketer. In making this determination, depression was considered in the evaluation of the injured employee's ability to work. The mere fact that depression existed in this case was determined not to prohibit the injured employee from working.

The WSI representative testified that, generally, WSI does not go backwards to consider a change in earlier rulings, unless there is a substantial change in an underlying condition, because there needs to be some level of finality. In the case of the injured employee, two years down the line WSI did not reopen or revisit its earlier decision because the initial determinations did consider depression and found that it was not debilitating. However, it is possible that over a course of two years the injured employee's depression progressed and became worse. Additionally, although WSI has the authority to go back and recoup benefits mistakenly

given for a preexisting condition, WSI typically does not go back to recoup these expenses.

The WSI representative stated that in the case of this injured employee, WSI has not gone back to reevaluate an earlier determination and has not fully evaluated this new evidence. There is no significant value in WSI considering this new evidence because there is little chance new evidence would change the posture of the injured employee's case.

The WSI representative reported that until legislation was enacted in 1997, the North Dakota Supreme Court had directed that all workers' compensation law be read using liberal construction. Under liberal construction the law was read to resolve all reasonable doubts in favor of the injured employee. Liberal construction was used because the workers' compensation law was intended to be remedial. In 1997 the law was changed to even the playing field so the law was not interpreted in favor of one party over another.

The WSI representative testified WSI's job is to determine, based on a statewide job pool, whether there are jobs available for the injured employee. If the Legislative Assembly would find that rural injured employees are not capable of finding jobs in the area, the rural claimants would essentially be excused from finding jobs. A change like this could have far-reaching consequences.

Before July 1, 2008, the Legislative Council office received the injured employee's application for review by the Workers' Compensation Review Committee. The injured employee was contacted to make arrangements to schedule a time for the committee review. It was at this point it became clear the injured employee's intent was to have filed for WSI's continuing jurisdiction program instead of Workers' Compensation Review Committee claim review. As a courtesy to the injured employee the Legislative Council staff contacted WSI and explained the situation to see if WSI would be willing to accept the Workers' Compensation Review Committee application as an application for the continuing jurisdiction program. Workforce Safety and Insurance declined to accept the application for the continuing jurisdiction, and as such the injured employee agreed to appear before the committee to present his claim.

The WSI representative testified that in designing the WSI continuing jurisdiction program parameters, including timelines, initially WSI guaranteed a review of 250 injured employees and set up a cutoff date of July 1, 2008. Workforce Safety and Insurance actually received 425 applications by the cutoff date. Workforce Safety and Insurance has agreed to consider all 425 applications. It would be a slippery slope for WSI to recognize exceptions for some applicants and not for others.

Comments by Interested Persons

The committee received testimony from an injured employee who questioned why WSI refused to exercise its continuing jurisdiction to review this injured employee's claim. The cost of paying for this injured employee's benefits would be minor compared to the

cost of defending WSI's position and conducting another administrative hearing.

A representative of CARE testified in support of a change in the law to provide if substantial additional evidence is found, WSI would be required to exercise continuing jurisdiction.

A representative of the North Dakota Motor Carriers Association testified that as it relates to attorney's fees, the committee should recognize that employers also incur attorney's fees in WSI cases.

Eleventh Claim

Claim Summary

The following is a chronology of events of the injured employee's claim:

- January 1996 - The injured employee sustained a work injury to her back. Workforce Safety and Insurance accepted liability of this injury and awarded payment of the associated benefits.
- February 2005 - Workforce Safety and Insurance issued a notice of intention to discontinue benefits for noncompliance with vocational rehabilitation. The injured employee did not experience a lapse in disability benefits as she came back into compliance before the discontinuation date.
- The injured employee appealed the February 2005 order to the district court. The district court affirmed the WSI order.
- April 2005 - Concurrent with the February 2005 order for noncompliance with vocational rehabilitation, WSI issued a notice of intention to discontinue TTD benefits, noting the injured employee's vocational rehabilitation plan had been approved. The notice indicated the injured employee had transferrable skills to return to work as a customer service representative, collector, and administrative assistant.
- June 2005 - Workforce Safety and Insurance issued an order awarding TPD benefits indicating the injured employee was capable of gainful employment.
- June 2006 - Workforce Safety and Insurance issued a notice of intention to discontinue TPD benefits, based on the injured employee's failure to participate in job search activities. The injured employee appealed the notice and submitted a letter requesting further consideration pertaining to that decision.
- August 2006 - Workforce Safety and Insurance issued an order discontinuing TPD benefits. The order indicated the injured employee was found to be engaged in a second instance of noncompliance for failure to comply with job search activities.
- September 2006 - The injured employee requested a hearing pertaining to the August 2006 order.
- February 2008 - The administrative hearing was held addressing the issue of whether the injured employee had engaged in a second instance of noncompliance without good cause. The

administrative law judge submitted the recommended findings of fact, conclusion of law, and order recommending WSI's order discontinuing TPD benefits be affirmed. Workforce Safety and Insurance adopted the recommendations of the administrative law judge and the order became final.

Issues for Review

The workers' compensation issues raised by the injured employee included:

- Workforce Safety and Insurance does not provide adequate job-seeking assistance to injured employees. Workforce Safety and Insurance sets up roadblocks to interfere with the injured employee complying with WSI's rehabilitation requirements, such as requiring an injured employee to get a doctor's note when classes are missed on account of illness, disregarding occasional medical limitations that may prevent job-seeking activities, providing inadequate retraining, and failing to provide the injured employee with requested assistance in performing job-seeking activities. Workforce Safety and Insurance and Job Service North Dakota do not coordinate services.
- Workforce Safety and Insurance seems to focus on a single event of noncompliance instead of acknowledging the pattern of compliance. Workforce Safety and Insurance's claim of noncompliance focuses on one day of missed classes, but WSI does not recognize the pattern of attending all of the other classes.
- The injured employee has inadequate resources in navigating the state's workers' compensation system. The injured employee was unhappy with the services she received at OIR and she was unhappy with her experience at the administrative hearing. Throughout the whole system it was the injured employee's perception WSI had an unlimited number of people at its disposal, such as claims analysts, OIR, administrative hearing officers, and doctors, whereas the injured employee was left without any help.
- Workforce Safety and Insurance does not support the injured employee's treating doctors. Over the course of her treatment she found 13 doctors who were willing to support her and her limitations; however, WSI regularly limited the injured employee's treating doctor. For example, the injured employee testified she spent thousands of dollars to get an accurate diagnosis, but then WSI hired its own doctor to do an IME and after a 15-minute evaluation found the injured employee was able to be employed full-time. In the injured employee's case it took a long time to receive a final diagnosis of avascular necrosis, and as a result of not finding this diagnosis sooner, the condition progressed to the point it will ultimately lead to her death.
- The state's workers' compensation system is failing the injured employee. As a result of her

workplace injury and the ongoing problems, she became depressed and suicidal. She knows several injured employees who actually committed suicide due to their depressing situations.

Workforce Safety and Insurance Response

The WSI representative testified the injured employee's vocational plan required her to perform a good-faith work search in order to return to work in the local job pool. Workforce Safety and Insurance has a two strike for noncompliance policy. In the first case the injured employee failed to comply with her vocational rehabilitation plan by having an unexcused absence from her training program. An injured employee is allowed to miss training if there is a doctor's excuse.

The WSI representative testified the record seems to reflect a tug-of-war between the injured employee and the vocational rehabilitation service providers. When a tug-of-war situation arises, it is typically in the vocational rehabilitation arena.

The WSI representative stated that WSI struggles with how best to get an injured employee to comply with certain requirements. There are choices ranging from using a carrot and using a stick. North Dakota's vocational rehabilitation services are beyond those services other states' workers' compensation systems use. However, getting a job is difficult and there is no easy answer.

Twelfth Claim

Claim Summary

The following is a chronology of some of the events of the injured employee's claim:

- November 1997 - The injured employee sustained a work-related injury to his chest and neck. Workforce Safety and Insurance accepted liability in this claim and paid the associated medical expenses and disability benefits.
- April 1998 - The injured employee underwent an interior C6-7 fusion.
- February 2003 - Workforce Safety and Insurance awarded a PPI award in the amount of 28 percent whole body for cervical spine in the amount of \$6,520.
- October 2006 - Workforce Safety and Insurance issued an order denying further disability and vocational rehabilitation benefits, indicating the injured employee was capable of performing gainful employment as a customer service representative or motor vehicle dispatcher.
- May 2007 - An administrative hearing was conducted. The recommended findings of fact, conclusion of law, and order recognized there were several conflicting medical opinions. It was found the treating physicians were in a better position to review and understand medical records that they themselves created than were the other doctors; therefore, it was found WSI had not shown by a preponderance of evidence that return to an occupation within the local job pool was an appropriate vocational rehabilitation option for the injured employee. The recommended order

reversed the October 2006 order denying further disability and vocational rehabilitation benefits. Workforce Safety and Insurance adopted the recommended findings of fact, conclusion of law, and order.

- April 2008 - The injured employee had the plates at C6-7 removed and had an interior fusion of C5-6 and C4-5.
- May 2008 - A registered nurse at a clinic's neuroscience neurosurgery department reported the injured employee's surgeon opined the injured employee would not be capable of returning to work following his recovery from his surgery and will remain disabled.
- June 2008 - The injured employee's doctor opined it was unrealistic to believe the injured employee would ever return to gainful employment given his extensive cervical surgery and the chronicity of his radiculopathy. The doctor indicated the injured employee should not be considered for any type of vocational activity or return to work activity until at least three months to six months post surgery, and, even then, it is unlikely that he would be a candidate for any such services or activities.

Issues for Review

The workers' compensation issues raised by the injured employee included:

- While faced with struggling day-to-day to make ends meet, the injured employee is constantly haunted by fears his WSI benefits could end at any time.
- The state's workers' compensation system seems to be biased against the injured employee. The injured employee reported he feels as if WSI is constantly seeking ways to deny his eligibility status. On several occasions WSI doctors' opinions have been used to dismiss the validity of objective findings submitted by the injured employee's doctors. WSI, in seeking to reduce caseloads and expenditures, is overreliant on the biased opinions of health care providers affiliated with WSI, resulting in unnecessary financial and health burdens on individuals and families.
- The WSI appeal process takes far too long. An investigation and appeal should be resolved within three months. In the case of the injured employee's claim, a fraud appeal took one year. One year is far too long for a family to go without money. In addition to the length of time to appeal a WSI decision, the cost of legal representation is an unfair burden on the injured employee. Additionally, once the injured employee was cleared of the fraud charges, the employer's representative who made false accusations was never charged with fraud or otherwise penalized.

In order to address some of the workers' compensation issues raised, the injured employee recommended the following:

- Appoint qualified, external evaluators to evaluate WSI's current policies and eligibility requirements. Evaluators might focus on and target the specific

wording of policies that are unclear and easy to manipulate by supervisors and other decisionmakers.

- Provide sensitivity training to WSI managers and claims analysts, with a strong emphasis on ways to reduce conflicts of interest and raise ethical awareness.
- Establish a board to review WSI claims that have been denied over the past five years.
- Find ways to facilitate, improve, and expedite the appeals process.
- Develop a questionnaire to obtain feedback from claimants regarding their satisfaction with WSI.

Workforce Safety and Insurance Response

The WSI representative testified the injured employee's claim was unique because as it progressed it became very complex. For example, at the outset there was a fraud claim that the injury was not work related. Once that issue was resolved, other issues continued to arise and needed to be dealt with, including instances of noncompliance with vocational rehabilitation and law enforcement issues.

The committee received information regarding the TTD law. For injuries occurring before January 1, 2006, there is no statutory limit on the length of time an injured employee may receive TTD. With the enactment of House Bill No. 1171 (2005), there is a two-year limit on receipt of TTD. Under the new system, there is a push to get TTD status reviewed timely to determine whether there is a need to convert the claim to PTD. Recipients of TTD are not eligible for supplemental benefits to recognize cost-of-living adjustments unless there is a change of status to PTD. For those injured employees who are covered under the old law, WSI is making a concerted effort to review these claims periodically.

The WSI representative testified WSI is working with North Dakota doctors to address their unwillingness to perform IMEs. Workforce Safety and Insurance is considering the possibility of implementing a three-member panel for IME review. In 2007 WSI performed 125 IMEs, of these IMEs some were limited to record reviews and some included physical examinations.

Comments by Interested Persons

A representative of the North Dakota Injured Workers Support Group testified the injured employee's claim raises some interesting and reoccurring issues, including:

- When there are false statements from an employer, the employer is not penalized;
- There was a claim of vocational rehabilitation noncompliance, which may or may not be substantiated;
- The IME is given more weight than the opinion of an injured employee's treating doctor; and
- Statutory limitations on TTD impact injured employees.

As the claims covered under House Bill No. 1171 are reaching the two-year limitation on the receipt of TTD, injured employees are beginning to receive notice of the

expiration of those two years and the resulting termination of benefits. It appears that some injured employees are not reaching maximum medical improvement within that two-year period and are being forced off the system.

A representative of the North Dakota Injured Workers Support Group testified that under North Dakota's workers' compensation law, physical laborers have problems with coverage of injuries that WSI regularly considers degenerative. It is common for WSI to fail to cover an injured employee because that deterioration or a degenerative condition is found to be a preexisting condition.

An injured employee testified as it relates to PPI, the current requirements of a 16 percent whole body impairment goes back to legislative changes made in 1989. In 1989 the testimony from WSI was that by adulthood most people have degenerative changes of approximately 16 percent. Although the 1989 PPI changes did increase benefits to catastrophically injured individuals, the law change negatively impacted injured employees who have less than 50 percent impairment.

An injured employee testified it is not uncommon for an injured employee who was seriously injured to experience depression and suicidal thoughts. It was requested the committee and WSI recognize that chronic pain frequently leads to depression.

Thirteenth Claim

Claim Summary

The following is a chronology of events of the injured employee's claim:

- August 2005 - The injured employee sustained an injury to his left ankle while working as a welder. Workforce Safety and Insurance accepted liability for this injury and paid the associated medical expenses and disability benefits.
- March 2006 - The injured employee underwent a triple arthrodesis to the left foot and ankle. In the course of this surgery, the injured employee was administered too much morphine and experienced complications relating to his lung.
- February 2007 - Workforce Safety and Insurance issued a notice of intention to discontinue wage loss benefits claiming the injured employee did not comply with the program of rehabilitation. The injured employee did not appeal and the notice became final.
- April 2007 - The injured employee was admitted to the hospital for treatment. The discharge diagnosis included atelectasis and evolving consolidation of the right mid and lower lobe, bilateral lower extremity cellulitis, hypoxemia secondary to atelectasis and evolving consolidation of right mid and lower lobe, hyponatremia, and pulmonary hypertension.
- May 2007 - Workforce Safety and Insurance issued a notice of decision denying benefits indicating WSI would not cover the bill for the April 2007 medical services because the inpatient stay was found to be unrelated to the work injury to the left ankle. The order became final.

Issues for Review

The primary workers' compensation issue raised by the injured employee was that WSI should cover the cost of the injured employee's oxygen because but for the foot and ankle surgery, the injured employee likely would not have incurred his lung problems. Additionally, the lung problem he is experiencing directly resulted from an overdose of morphine during his surgery; therefore, WSI should be covering all of the lung-related medical bills as well.

Workforce Safety and Insurance Response

The WSI representative reported that initially WSI covered the expenses for the injured employee's oxygen tanks. Workforce Safety and Insurance's computerized billing program for durable medical equipment provides that the program will automatically pay for claims of under \$500. These payments are periodically reviewed and once the error was found, WSI stopped covering the oxygen tanks.

Fourteenth Claim

Claim Summary

The following is a chronology of events of the injured employee's claim:

- July 2006 - The injured employee sustained an injury to her right ankle. Workforce Safety and Insurance accepted her claim and benefits were paid accordingly.
- August 2006 - The injured employee underwent surgery for her fractured right ankle which included insertion of a plate and seven screws. The injured employee received wage-loss benefits from August 1, 2006, to December 21, 2006.
- Following surgery, the injured employee reported her condition deteriorated and her pain increased. She developed regional pain syndrome.
- November 17, 2006 - Workforce Safety and Insurance issued a notice informing the injured employee of her obligation to attend English as a second language (ESL) classes. This notice was written in English and was sent by certified mail. This initial notice was returned to sender because the injured employee did not pick up the letter at the post office.
- November 27, 2006 - Workforce Safety and Insurance issued a notice directing the injured employee attend ESL classes. This document was written in Spanish and sent by certified mail. This notice was returned to sender because the injured employee did not pick up the letter at the post office.
- November 30, 2006 - Workforce Safety and Insurance issued a notice to terminate TTD benefits. This notice was written in English and sent by regular mail.
- December 2006 - The injured employee sought the assistance of a medical provider to address the WSI notice to terminate benefits. The medical provider wrote a letter to WSI setting forth the reasons why the injured employee was unable to attend the ESL classes and why she was unable

to tolerate the physical therapy required by WSI. Workforce Safety and Insurance did not accept this letter as a request for appeal and therefore wage-loss benefits were terminated and the order became final.

Issues for Review

The workers' compensation issues raised by the injured employee included disagreement with WSI's termination of benefits. The injured employee reported the correct outcome or decision would be for WSI to pay her wage-loss benefits from the time they were terminated in December 2006 until the present. The injured employee's basis for this position was:

- There was a clear reason backed by a medical opinion as to why the injured employee was unable to comply with WSI's rehabilitation requirements of participating in physical therapy and attending ESL classes. The injured employee was experiencing excruciating pain, limiting her ability to participate in physical therapy as well as ESL classes. Additionally, the ESL class attendance requirement was questionable given the fact the injured employee is functionally illiterate and did not have a rehabilitation plan in place.
- The injured employee did not receive fair and objective medical treatment in the treatment of her WSI injury. Ultimately, the injured employee sought the assistance of a physician's assistant to provide medical treatment and to attempt to communicate with WSI.
- Workforce Safety and Insurance treated the injured employee in an unfair and adversarial manner resulting in a negative outcome with her eligibility for benefits and her family experiencing extreme hardship, including forcing her minor children to get jobs to support the family.
- There were language and communication problems throughout the claim process. The injured employee speaks Spanish as her primary language and understands very little English. Although WSI does not have an obligation to accommodate an injured employee whose primary language is not English, WSI does have interpretive services and should utilize those services and also should take the measures necessary to be consistent and should make sure important information is clearly conveyed.
- To give claims the appropriate consideration and treatment, WSI should limit its use of cost assessments of claims. The injured employee took the position that WSI made assumptions from the very beginning of her claim that she would recover by a certain date, regardless of the actual medical basis.
- Workforce Safety and Insurance inappropriately informed the injured employee of the 104-week limit to the receipt of TTD benefits by failing to discuss all of the injured employee's options and by failing to take into consideration the injured employee's injury-related limitations.

- Workforce Safety and Insurance failed to take the necessary measures to gather sufficient medical information or social information to understand the medical problems and social problems the injured employee was having and how they impacted the injured employee's ability to meet the physical therapy and ESL requirements. The record is clear the injured employee does not have a driver's license, does not know how to drive, is limited by language barriers, is functionally illiterate, and only has a sixth grade education.
- Workforce Safety and Insurance's use of a medical claims analyst became adversarial. The injured employee perceived the medical claims analyst played the role of trying to assess an injured employee's ability to return to work and this was typically done by committing the injured employee to hypotheticals posed to medical providers at medical appointments.
- Workforce Safety and Insurance erred in not accepting the injured employee's attempt to file an appeal. The injured employee testified that on receiving the notice to terminate benefits, the injured employee sought the assistance of a physician's assistant. The physician's assistant prepared and mailed a letter to WSI indicating the injured employee's inability to comply with ESL class attendance. Workforce Safety and Insurance received this letter within the period of appeal but did not accept this letter as a formal request for appeal. Although the request did not meet the letter of the law, it met the spirit of the law, especially given the injured employee was functionally illiterate and was unable to speak or write in English.

Workforce Safety and Insurance Response

The WSI representative testified the injured employee's claim posed significant challenges for the claims analyst and for WSI. Workforce Safety and Insurance quickly evaluated the injured employee's ability to return to work. Early on it was clear there were language barriers that needed to be addressed. In part because of these language barriers, WSI assigned a nurse case manager to assist the injured employee when attending medical appointments.

The WSI representative testified over the last four years WSI has begun the practice of using nurse case managers. This practice allows WSI to have someone present at a medical appointment to ask questions and to gather information regarding the injured employee's prognosis, whether there are return to work guidelines, and whether it is necessary for WSI to assist in coordinating medical care.

The WSI representative testified that WSI regularly uses occupation and disability guidelines to aid WSI in identifying which claims are not progressing as expected. It is very important for WSI to use these guidelines to help manage claims.

The WSI representative testified that under current law an injured employee is limited to a maximum of 104 weeks of receipt of TTD. It is very important to keep

injured employees informed and therefore it is appropriate for a claims analyst to inform an injured employee of the time limitations. The best outcomes result from prompt and thorough medical care and timely return to work.

Fifteenth Claim

Claim Summary

The following is a chronology of events of the injured employee's claim:

- October 2003 - The injured employee sustained a work injury to his right shoulder. Workforce Safety and Insurance accepted liability for this injury and awarded payments for the associated benefits.
- February 2005 - Workforce Safety and Insurance issued an order denying specific benefits relating to treatment for depression, anxiety, and any other psychological conditions.
- June 2005 - The Office of Independent Review issued a certificate of completion indicating no change to the order. The injured employee requested an administrative hearing relating to the February 2005 order.
- June 2005 - Workforce Safety and Insurance issued an order awarding rehabilitation benefits directing the injured employee to attend the college preparatory program at the State School of Science beginning June 7, 2005, through July 1, 2005, and to attend an architectural drafting and estimating program scheduled to begin on August 22, 2005. The injured employee requested reconsideration of the order awarding rehabilitation benefits indicating WSI did not consider his depression in developing the vocational rehabilitation plan and that he was not academically prepared to attend the training program identified by WSI.
- July 2005 - Workforce Safety and Insurance reinstated vocational services on the claim to determine the first appropriate rehabilitation option given the injured employee's desire not to proceed with the formal training program at the State School of Science.
- August 2005 - Workforce Safety and Insurance issued an order awarding TPD benefits. The following job goals were identified: complaint clerk, telephone solicitor, team assembler, and security guard.
- September 2005 - The injured employee requested an administrative hearing relating to the August 2005 order.
- November 2005 - The administrative hearing was conducted, reviewing both the February 2005 order and the August 2005 order awarding TPD benefits. The administrative law judge's recommended findings of fact, conclusion of law, and order reversed WSI's August 2005 order awarding TPD benefits and affirmed WSI's February 2005 order denying specific benefits.
- Workforce Safety and Insurance did not agree with the recommended findings of fact, conclusion

of law, and order as it related to the reversal of the August 2005 order awarding TPD benefits.

- July 2006 - Workforce Safety and Insurance issued a memorandum opinion outlining its reasons for rejecting the administrative law judge's recommendations to reverse the order awarding TPD benefits.
- August 2006 - The injured employee signed a stipulated agreement with WSI addressing the issues of whether the injured employee had proven a compensable psychological injury as well as whether the vocational plan was appropriate. The general terms of the stipulation were WSI would pay the injured employee TPD benefits for three years, the injured employee would waive entitlement to vocational rehabilitation benefits, and the injured employee would waive any entitlement to medical treatment for any type of mental condition.

Issues for Review

The workers' compensation issues raised by the injured employee included:

- Workforce Safety and Insurance failed to provide benefits for the injured employee's depression and failed to accept that depression affected the injured employee's ability to effectively participate in his rehabilitation. As a result, the rehabilitation plan put together by WSI was not realistic. Additionally, there is a problem with the system when OIR and the administrative law judge both recognize a problem with WSI's decision, but WSI has the authority to disregard these positions.
- Many of the unsatisfactory things that happened in the injured employee's case were attributable to the injured employee's depression, extreme pain, and ongoing medical problems, which were not appropriately addressed by WSI.
- In determining which medical and prescription bills WSI will cover, WSI exercises its discretion too broadly. Workforce Safety and Insurance uses a pharmacist to review prescription coverage, and if a prescription is red-flagged, it may take significant time for WSI to evaluate and make a final decision whether WSI will cover the prescription.
- The fact that a majority of WSI's fraud investigations are against injured employees tends to create an adversarial environment.
- Although the appeal system is in place to deal with disagreements, the reality is that an injured employee can only move forward if the injured employee can find legal representation. The limitations on attorney's fees adversely impact the willingness of attorneys to take WSI appeal clients.
- Workforce Safety and Insurance seldom exercises its continuing jurisdiction to address wrongs done to injured employees.
- Workforce Safety and Insurance should take into account and consider whether an injured

employee qualifies for Social Security disability benefits.

Workforce Safety and Insurance Response

The WSI representative testified this claim came down to the two issues of whether the injured employee's psychological condition was compensable and whether the vocational rehabilitation plan was appropriate.

The WSI representative testified in this claim the administrative law judge determined the psychological condition was not compensable. North Dakota, like a majority of states, is a physical/mental state, which means in order to be a compensable injury a claimant must establish that a physical injury directly caused a mental condition. A minority of states are mental/mental which means they compensate a mental condition that arises from a psychological trauma.

The WSI representative testified it is expected that when an injured employee is unable to return to past employment there will be depression to some degree. However, state law requires that an injured employee participate in vocational rehabilitation and attempt to return to work. In this case WSI recognized the psychological limitations and for that reason the rehabilitation plan provided for two years of psychological coverage to allow the injured employee to complete school and return to work. In creating rehabilitation plans, to the extent an injured employee has limitations, whether work injury-related or not, the rehabilitation plan needs to take these limitations into account in developing the plan.

The WSI representative testified in putting together a vocational rehabilitation plan for attending school, the plan may include receipt of wage-loss benefits, payment of tuition, payment for a laptop computer, and receipt of a second domicile allowance as well as other financial programs.

The WSI representative reported WSI has experienced moderate success in working with state schools in placing injured employees. Although the schools appreciate the guaranteed payment that comes with enrolling WSI rehabilitation students, there are also concerns that the rehabilitation student might not really want to be attending school.

As it relates to WSI prescription coverage, the WSI representative testified if WSI does not cover a prescription, this decision is appealable as are all other WSI orders. If a prescription is off-formulary, WSI attempts to address the issues at the point of sale. If a prescription is for an off-label use, WSI will not cover the prescription until evaluated.

INFORMATION REQUESTED

Background Information

As part of the study and the consideration of possible changes to the workers' compensation system, the committee requested and received from WSI an overview of the workers' compensation benefits system and terminology, a review of recurring workers' compensation policy issues and the historical evolution of these issues, a summary of 2007 legislation impacting

WSI, and identification of workers' compensation policy issues and trends. Additionally, the committee requested and received an overview of the WSI premium rates; the status of the WSI fund; the status of the recent financial audits, internal audit, performance audit and evaluation, and IME audit; and an overview of the WSI information technology initiative.

Continuing Jurisdiction Program

The committee requested and received a status report on WSI's continuing jurisdiction project. Workforce Safety and Insurance initiated a program through which applications were accepted from injured employees to request that WSI exercise its continuing jurisdiction and review the injured employees' WSI claims. Workforce Safety and Insurance accepted a total of 426 applications for claim review. As of the date of the report, 131 claims remained to be reviewed. Of the 295 claims that had been reviewed, there was an approximately 8 percent to 9 percent modification rate.

Twenty-six of the 295 claims reviewed resulted in WSI offering to modify an order. The 26 claims break down as follows:

- Nine claim reviews resulted in complete reversal. It is typical of these cases that there was a discovery of new evidence since the initial order or it was a case where there was an incredibly close call and the initial order could have gone either way.
- Five claim reviews resulted in partial reversal.
- Two claim reviews resulted in a medical bill reversal.
- Three claim reviews resulted in the parties signing a stipulation. It is typical of these cases that there was a reversal of a medical bill.
- Two claim reviews resulted in the injured employee being granted a PPI evaluation.
- Five claim reviews resulted in WSI recognizing an appeal process question. Of these five claims, three resulted in the claim being reopened to allow for further adjudication and two resulted in WSI offering to reopen the case for further adjudication; however, those two injured employees did not respond to WSI's invitation.

New Claims - Processing Timelines

The committee requested and received a report on the history of, a summary of, and the status of the changes resulting from House Bill No. 1171 (2005), relating to claim processing timelines.

North Dakota's workers' compensation system was characterized as providing three benefit structures, depending on the date of injury. Over time, state's workers' compensation law has undergone some significant changes resulting in different benefit structures--with the first benefit structure covering those injured employees who were injured before the 1995 legislative changes went into effect, the second benefit structure covering those injured employees injured after June 1995 but before 2006, and the third benefit structure covering those injured employees injured post 2005.

House Bill No. 1171 became effective for claims filed after December 31, 2005. One of the major statutory changes in the bill was to clarify the definition of PTD and to limit receipt of TTD to a maximum of 104 weeks. Since the law has not been in place very long, there are a limited number of cases to review. Based on the claims filed from January 2006 to December 2007, there were nine claims that exhausted the 104-week TTD limit. In all of these nine cases, the injured employee was determined to have zero earning capacity; therefore, the injured employee was receiving TPD. The transition from TTD to TPD results in the same amount of wage-loss benefits.

Of the nine claims that exhausted TTD eligibility, one injured employee would likely stay on TPD for five years, four injured employees had vocational plans still pending, two injured employees were earning the same level of benefits as TTD but were unable to move forward with vocational rehabilitation due to medical limitations, and two injured employees were in retraining programs.

Correspondence

The committee requested and received a report on efforts taken by WSI to improve the clarity of WSI's communications with injured employees. Workforce Safety and Insurance initiated an internal review of form letters and other correspondence to improve clarity in communication. As WSI completes this internal review, it will hold focus groups to determine whether the proposed changes are responsive. Some of the basic changes being proposed in revising forms and correspondence include use of red ink for important information, clarifying the name of the document, and clarifying on envelopes that the material enclosed requires a response.

Office of Independent Review

The committee requested and received from WSI an overview of the process used and services provided by the OIR. Information was received regarding the history of OIR, the mission of OIR, as well as the independent review appeal process.

The Workers' Adviser Program was legislatively established in 1995 to provide injured employees with a no-cost, speedy resolution alternative to litigation. The program operated independently from WSI's claims and was scheduled to sunset after four years. In 1999 the sunset provision was repealed and the program was renamed the Office of Independent Review.

In 2000 OIR moved to a location separate from WSI. Since 2002 the duties of OIR have been expanded to include constituency services and binding dispute resolution. Since November 2005 OIR has dedicated a full-time outreach staff.

The Office of Independent Review services include:

- Providing injured employees education to better understand the basis of WSI's decision as well as to better understand the appeal process;
- Serving as a form of alternative dispute resolution; and

- Providing a door through which an injured employee who ultimately prevails in litigation may be awarded attorney's fees.

The objective of the review process is to ensure the injured employee has been granted every opportunity to tell the employee's side of the story, analyze a claim with a fresh set of eyes, facilitate an agreement between the parties, and collaborate with WSI departments. Upon receiving a certificate of completion from OIR, the injured employee has a 30-day period to appeal the WSI order.

The Office of Independent Review received the following requests for reviews:

- Fiscal year 2000 - 531.
- Fiscal year 2001 - 453.
- Fiscal year 2002 - 478.
- Fiscal year 2003 - 401.
- Fiscal year 2004 - 383.
- Fiscal year 2005 - 428.
- Fiscal year 2006 - 384.
- Fiscal year 2007 - 397.

Of these claims requesting review, approximately 20 percent result in a recommendation to change a WSI decision.

The committee discussed whether there should be any legislative changes made to the law creating OIR. Issues the committee considered included:

- Whether OIR should be independent of WSI, and, if so, whether OIR should be freestanding or located within an existing agency.
- Whether OIR should be granted more authority in reviewing WSI decisions, including whether OIR should be granted the authority to implement forms of alternative dispute resolution such as mediation or arbitration.
- Whether an injured employee should be required to use the services of OIR to be entitled to receive attorney's fees.
- Whether OIR should be renamed because the current name is misleading in that OIR is not truly independent of WSI.

The committee received testimony that when OIR was originally created in 1995, it was set to expire in 1999 and the name of the entity was the Workers' Adviser Program. In 1999 the program was made permanent and the name of the program was changed to the Office of Independent Review. The Office of Independent Review was never intended to be completely separate from WSI.

Vocational Rehabilitation and Return-to-Work Services

The committee requested and received from WSI an overview of the state's workers' compensation vocational rehabilitation services and return-to-work services. The WSI return-to-work services include onsite case management at six medical facilities in the state; medical case management provided by registered nurses; vocational rehabilitation services; provision of relocation expenses; school monitoring through which school and skill enhancement programs are coordinated and monitored; the preferred worker program through which

employers are encouraged to employ injured employees; reemployment services specialist services through which a broad range of services are used, including one-on-one assistance for hard-to-place injured employees, personal contact with employers, and providing group injured employee training sessions; the exceptional circumstances scholarship program; and the education loan fund.

The committee received testimony that WSI does have statistics regarding how many injured employees find employment during the course of receiving services but does not have statistics regarding how many injured employees find jobs following completion of receipt of services or whether individual return-to-work attempts are successful.

Permanent Partial Impairment

The committee requested and received from WSI a brief history of North Dakota's workers' compensation PPI law. As part of this review, committee members reviewed portions of the North Dakota workers' compensation interim permanent partial impairment study dated September 11, 2000, prepared by Mr. Malcolm Dodge, Professional Risk Management. This report was initially provided to the Legislative Council's interim Commerce and Labor Committee as part of WSI's report on the study of the awards provided to injured employees with permanent impairments caused by compensable work injuries.

Since the workers' compensation system was created in 1919, the benefits available for permanent impairment have evolved. As a result of a 1974 North Dakota Supreme Court decision, the WSI PPI benefit system was modified to more closely reflect a tort award, instead of reflecting the inability of an injured employee to earn a wage. Under the current system, an injured employee may now receive both a PPI award and a permanent disability award.

In 1995 the PPI benefit system underwent appreciable change, including revising the law to create a minimum PPI threshold of 16 percent. The legislative history indicates the two likely reasons for this revision were that most adults have some degree of disability no matter what their work injury history may have been and there were benefit changes in 1989 which increased the weekly PPI benefit approximately 74 percent.

COMMITTEE CONSIDERATIONS

Office of Independent Review - Name Change

The committee considered but does not recommend a bill draft that would have changed the name of the OIR to the WSI Decision Review Office.

Continuation of Benefits Through Appeal

The committee considered the issue raised by several injured employees that it is a financial hardship to go without wage-loss benefits during the period of appeal of an order decreasing or terminating wage-loss benefits. The committee received testimony that if an order decreasing or terminating wage-loss benefits is reversed, WSI pays the injured employee back to the date of the order decreasing or terminating the benefits.

The committee weighed the benefits of continued benefits with the cost of receiving benefits and the injured employee then having to repay WSI if the benefits were received in error.

The committee considered but does not recommend a bill draft that, in the case of a reduction or termination of WSI wage-loss benefits, would have provided the injured employee the opportunity to request to continue to receive the preorder amount wage-loss benefits through the administrative hearing process.

Legislative Council Study - Social Security Benefits

The committee considered but does not recommend a concurrent resolution that would have provided for a Legislative Council study of the state's workers' compensation system and whether it is feasible and desirable in making a workers' compensation eligibility determination to consider whether that injured employee qualified for federal Social Security disability insurance or supplemental security income.

RECOMMENDATIONS

Firefighter and Law Enforcement Presumption

The committee recommends Senate Bill No. 2055 to clarify the burden of proof under workers' compensation law that provides a presumption for firefighters and law enforcement officers. The bill provides the presumption that the impairment is work-related can be overcome by clear and convincing evidence the impairment is not work-related. Under existing law, the burden of overcoming the presumption is a showing by competent evidence that the impairment is not work-related.

Mileage Reimbursement

The committee recommends Senate Bill No. 2056 to amend the workers' compensation calculation for medical travel mileage reimbursement to an injured employee so actual mileage is used to compute the reimbursement instead of using city limit to city limit mileage to compute the reimbursement.

Permanent Partial Impairment for Vision Injury

The committee recommends Senate Bill No. 2057 to provide a scheduled workers' compensation PPI award for impairment of vision. The bill provides a graduated schedule for vision impairments beginning at 20/80 corrected visual acuity.

Independent Medical Examinations

The committee discussed concerns raised by injured employees regarding IMEs. The committee considered whether steps should be taken to address:

- The concern IME opinions are given more weight than the opinions of treating doctors;
- The concern IMEs are inconvenient because they frequently are conducted by out-of-state doctors;
- The concern IME doctors are biased in favor of WSI;

- The perception IME doctors are not accessible because they do not physically attend administrative hearings; and
- The perception IME doctors do not take adequate time to perform a thorough examination of the injured employee.

The committee received testimony that WSI is taking steps to improve the IME process, including working with North Dakota medical providers to try to foster relationships with in-state doctors; considering alternatives to the current IME process, such as establishing three-member review boards to consider IME decisions; and improving communication so injured employees better understand the IME process.

The committee recommends Senate Bill No. 2058 to provide a distinction between a WSI independent medical examination, which contemplates an actual examination of an injured employee, and an independent record review, which contemplates a file review of an injured employee's medical records.

Case Reviews

The committee discussed issues raised by injured employees regarding the difficulties injured employees face in negotiating the workers' compensation system. Committee members recognized the importance of injured employees understanding their obligations and opportunities available in working through the workers' compensation system. Often injured employees make decisions based on lack of knowledge or understanding and those decisions negatively impact the injured employees' workers' compensation claims.

The committee members discussed whether there might be value in creating a WSI position to specifically assist injured employees in negotiating the workers' compensation system. This service would be separate from the services offered by claims analysts and the services offered through OIR.

Several injured employees testified they were unable to afford legal representation to appeal a WSI decision, and, in any event, there are limited numbers of attorneys willing to take injured employees as clients. The committee discussed it might be beneficial to provide funds to pay for an injured employee's attorney's fees to review a WSI decision. The payment of attorney's fees for a case review may have the dual effect of increasing the number of attorneys willing to take injured employees as clients and it might also assist the injured employee in better understanding WSI's decisions and whether there is value in appealing the decision.

The committee recommends Senate Bill No. 2059 to provide for WSI to pay an injured employee's attorney's fees and costs for a case review. The bill allows an injured employee who uses the services of OIR to be eligible for payment of \$500 for attorney's fees and \$150 for costs associated with an attorney consultation before an administrative hearing is held.

Artificial Members

The committee recommends House Bill No. 1061 to expand the workers' compensation coverage of artificial members. The bill would extend the definition of "artificial members" to include a prescriptive device that is an aid for a natural part, organ, limb, or other part of the body if the damage to the prescriptive device is accompanied by an injury to the body.

Rehabilitation Services

The committee considered the concerns raised by several injured employees that WSI's rehabilitation services are inadequate. Issues included:

- The concern WSI does not assist the injured employee finding employment once rehabilitation services are completed;
- The jobs identified in an injured employee's FCE are not available or the injured employee is not actually qualified to hold these jobs;
- The injured employee is not involved in the creation of the employee's rehabilitation plan;
- Workforce Safety and Insurance expects rural injured employees to move to get low-paying jobs;
- Telemarketing is the default job for injured employees capable of sedentary employment;
- Under the new claims management system, the injured employee is rushed into rehabilitation services too quickly and without the necessary medical documentation; and
- There is a lack of statistics regarding the effectiveness of WSI's rehabilitation services.

The committee recommends House Bill No. 1062 to expand the workers' compensation rehabilitation awards by allowing WSI to provide an additional 20 weeks of benefits for injured employees participating in retraining programs and to provide an additional two months of benefits while the injured employee is participating in work search and to direct WSI to implement a system of pilot programs to assess alternative methods of providing rehabilitation services.

Preexisting Conditions

The committee recommends House Bill No. 1063 to limit the circumstances under which WSI may deny medical coverage or recoup medical payments.

Cost-of-Living Adjustment

The committee recommends House Bill No. 1064 to shorten to three years the period of time after which an injured employee receiving temporary total disability benefits or permanent total disability benefits qualifies for supplementary benefits and to shorten to three months the period of time an injured employee is required to be off wage-loss benefits before WSI recalculates benefits.