NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Tuesday and Wednesday, September 16-17, 2008
Harvest Room, State Capitol
Bismarck, North Dakota

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

Members present: Representatives George J. Keiser, Bill Amerman, Donald D. Dietrich; Senators Nicholas P. Hacker, Richard Marcellais

Member absent: Senator Terry M. Wanzek

Others present: Senator David O'Connell and Representative Shirley Meyer, members of the Legislative Council, were also in attendance.

See Appendix A for additional persons present.

It was moved by Senator Hacker, seconded by Representative Amerman, and carried on a voice vote that the minutes of the August 5-6, 2008, meeting be approved as distributed.

INTRODUCTION

Chairman Keiser said the committee will conduct a two-day meeting, with the committee reviewing three cases the first day and two cases the second day. He said during the course of the two-day meeting, as the committee has free time between reviewing injured workers' claims, the committee will consider bill drafts prepared by the Legislative Council staff as well as discuss issues that may merit requests for bill drafts.

Chairman Keiser reviewed the procedure that will be followed to review the injured employees' cases. He said the committee members had an opportunity before the meeting to review the five injured employees' Workforce Safety and Insurance (WSI) records. Additionally, he said, a representative of WSI is available in the room to access the injured employees' WSI records if the need arises during the meeting. If at any point in the meeting a committee member would like to review an injured employee's records, he said, the meeting can be recessed to allow further review of the records. He said he will run a rather informal meeting to provide a comfortable atmosphere for the injured employees to present their cases for review.

Chairman Keiser called on Mr. Chuck Kocher, WSI Office of Independent Review (OIR), to assist each of the injured employees in presenting their cases for review by the committee. Mr. Kocher distributed to committee members a binder containing information prepared by WSI. He said the information in the binder includes a case summary of each of the five injured employees' records as well as a statement of issues for review by the committee.

FIRST CASE REVIEW

Case Summary

The first injured employee presenting her case for review was Ms. Kimberlyn Getzlaff. Mr. Kocher provided a summary of Ms. Getzlaff's case. He said Ms. Getzlaff filed an application for workers' compensation benefits for a bilateral wrist injury (carpel tunnel syndrome) sustained on January 29, 1996. He said WSI accepted liability and paid the associated medical expenses and disability benefits.

Mr. Kocher said Ms. Getzlaff received benefits for several years while undergoing treatment for this initial injury. However, he said, during this treatment she contracted reflex sympathetic dystrophy (RSD) in her left arm. He said the nature of RSD is the nerves of the limb do not shut off and they are constantly firing until they ultimately burn out. As part of her treatment, Mr. Kocher said Ms. Getzlaff surgically had a nerve stimulator implanted in her left shoulder. He said after having the stimulator implanted, Ms. Getzlaff contracted methicillin-resistant staphylococcus aureus (MRSA). He said MRSA is an infection that is resistant to treatment.

Mr. Kocher said on August 17, 2006, WSI issued an order denying further disability and vocational rehabilitation benefits. He said Ms. Getzlaff was released to return to sedentary-level work, eight hours per day 40 hours per week. He said the WSI determination was that given Ms. Getzlaff's education, experience, skills, and medical limitations, she was deemed capable of pursuing employment as a social services aid, telemarketer, and collection clerk. He said as a result of her transferable skills, Ms. Getzlaff was not entitled to partial disability benefits.

Mr. Kocher said on September 14, 2006, Ms. Getzlaff requested the assistance of OIR as it relates to the August 2006 order. On October 16, 2006, OIR issued a certificate of completion with no change to the order. He said on November 21, 2006, Ms. Getzlaff requested an administrative hearing relating to the August 2006 order.

Mr. Kocher said on August 17, 2007, the administrative law judge issued her recommended findings of fact, conclusions of law, and order. The administrative law judge provided "Ms. Getzlaff has not shown that her MRSA is causally related to her work injury. And, Ms. Getzlaff may not have the MRSA considered in her rehabilitation assessment. . . . It is ordered that Workforce Safety and Insurance's order denying

further disability and vocational rehabilitation benefits dated August 17, 2006, is affirmed, and that Ms. Getzlaff is able to pursue the jobs of telemarketing and collections clerk, and, accordingly the first appropriate rehabilitation option under Section 65-05.1-01(4) is return to an occupation within her local job pool." Mr. Kocher said WSI adopted the recommended findings of fact, conclusions of law, and order. Ms. Getzlaff did not appeal the order to district court and as such it became final.

In response to a question from Representative Keiser, Ms. Getzlaff said approximately one month after having surgery for the insertion of the stimulator, she began getting skin sores that progressively got worse.

In response to a question from Representative Keiser regarding the hearing officer's finding of fact No. 13 indicating Dr. Miller noted that Ms. Getzlaff's chronic pain was secondary to her RSD and was increasing in intensity and has significantly diminished her functional capacity, ultimately resulting in Dr. Miller advising WSI that she did not feel Ms. Getzlaff could work, given her skin condition and pain level. Mr. Kocher said the record reflects there were several doctors with several different opinions regarding Ms. Getzlaff's MRSA and her employability relating to pain.

In response to a question from Representative Amerman, Ms. Getzlaff said WSI did accept liability for the implantation of the stimulator.

Ms. Getzlaff said the sores relating to her MRSA typically return seasonally, being worse in the spring and the fall. Additionally, she said, she notices her sores are worse when she is under stress. She said when she breaks out into sores they are on her arms, legs, and stomach. She said when she has these breakouts, not only is she in severe pain, but she needs to exercise extreme caution in order to prevent spreading the infection to other individuals. She said although she has learned how to take appropriate measures to minimize the chance of spreading her infection, she is very concerned that she could be held civilly liable if she were to infect another person. For example, she said, she has a son who manages a pizza restaurant who is unwilling to hire her due to the liability risk. Ms. Getzlaff showed committee members photographs of her sores on her arms, legs, and stomach.

Ms. Getzlaff said her RSD has affected not only her arms, but as a result of the RSD, eventually she will be required to have both of her knees replaced. However, she said, the fact that she has MRSA makes her very high risk for surgery and it is possible she will be ineligible to have joint replacement surgery. She said the risk with MRSA and a joint replacement surgery is that if there is an infection at the site of the surgery, the limb might have to be amputated.

In response to a question from Representative Amerman, Ms. Getzlaff said her initial diagnosis was carpal tunnel, which was treated by undergoing carpel tunnel surgery. She said following her surgery she contracted RSD, which resulted in her undergoing a second surgery to implant the stimulator. She said it was after the second surgery that she contracted MRSA, and therefore had the stimulator removed to see if the MRSA would resolve itself. However, she said, removal of the stimulator did not include removal of electrodes still located in her arm. She said with the removal of most of the stimulator, her MRSA has improved, but it has not resolved the MRSA.

Ms. Getzlaff said following the administrative hearing, she did not appeal to district court. She said the attorney she had used at the administrative level was not willing to continue to take her case to the district court level and she couldn't afford to hire an attorney to take the case to the district court level.

Issues for Review

Chairman Keiser called on Mr. Kocher and Ms. Getzlaff to address the issues Ms. Getzlaff would like the committee to consider. Mr. Kocher said in assisting Ms. Getzlaff, the following two issues were raised:

1. Due to her inability to be employed, Ms. Getzlaff should receive full disability benefits from WSI.
2. Workforce Safety and Insurance should accept liability for Ms. Getzlaff's MRSA.

Ms. Getzlaff said in addition to the two issues Mr. Kocher states, she also has concerns regarding WSI's rehabilitation services. She said when she was initially injured, she was living in the Fargo area and received rehabilitation services through CorVel. She said she was able to do limited work and she was accepted for the Expedited program. She said through this program she was able to do telephone work from her home and was able to work for 15 minutes and then take a 15-minute break.

Ms. Getzlaff said when she moved to Bismarck, the Expedited program was no longer available. She said upon her move to Bismarck, she changed doctors and her new doctor seemed to rely heavily on medication for the treatment of her medical problems. She said ultimately she had addiction problems with taking these pain killers.

Ms. Getzlaff said when she used the CorVel services in Bismarck, she was put in a typing class, which was not successful. Overall, she said, the rehabilitation services she received in Bismarck were unacceptable and ineffective.

Additionally, Ms. Getzlaff said she is concerned that WSI has repeatedly disregarded her primary doctor's position that she is unable to do repetitive work.

Workforce Safety and Insurance

Chairman Keiser called on Ms. Anne J. Green, Workforce Safety and Insurance, to provide testimony regarding the issues raised by Ms. Getzlaff. Ms. Green provided a brief overview of MRSA. She said it is only in the last 10 years that MRSA has

received attention in the medical community. She said initially MRSA was found in medical environments; however, now MRSA has expanded to the community at large. She said MRSA occurs in environments where there is close contact and improper hygiene.

Ms. Green said she will focus her comments into main areas of the nexus between Ms. Getzlaff's injury and acquiring MRSA and the appropriateness of WSI's vocational rehabilitation plan. She said the administrative law judge found that there was no nexus between the work injury and the contraction of MRSA. She said the administrative law judge found there was a significant number of potential causes for Ms. Getzlaff's MRSA. For example, she said, the administrative law judge stated "given all of the other possible causes for contracting MRSA that have not been ruled out--such as non work-related hospitalizations, medical procedures and medications; the son's girlfriend, the community at large, poor nutrition and hygiene, and evidence that she developed sores even when she was not prescribed narcotics; the importance of medical opinion on causation cannot be dispensed with."

In response to a question from Representative Amerman, Ms. Green said she is not aware of any other WSI cases dealing with this issue of whether MRSA is compensable. She said there are a variety of different circumstances impacting how a person can become infected with MRSA and which might result in different outcomes relating to coverage by WSI.

Ms. Getzlaff said that when she contacted a lawyer, the lawyer informed her that it was possible she could be held civilly liable if she did not inform potential employers of her MRSA status.

In response to a question from Representative Keiser, Ms. Green said as it relates to the issue of coverage for MRSA, an injured employee has the burden to prove entitlement for benefits. She said the injured employee needs to prove that it is more likely than not the injury was work-related.

In response to a question from Representative Keiser, Ms. Green stated certainly surgery is a risk factor for contracting MRSA, but the administrative record indicates that Dr. Martin found chronic behavior that predated the diagnosis of MRSA.

In response to a question from Representative Dietrich, Ms. Getzlaff said as a result of treatment for her work injury, she was prescribed multiple pain-killing medications. She said several of these narcotics caused her skin to itch. She said before her injury, she did not have pain problems or pain medication addiction problems. Additionally, she said, she takes issue with the hearing officer's statement that she may have contracted MRSA from her son's girlfriend. She said her son's girlfriend started getting sores after Ms. Getzlaff started getting sores, so it is more likely the girlfriend contracted an infection from Ms. Getzlaff.

In response to a question from Representative Dietrich, Ms. Getzlaff said a variety of instances occurred in which she was treated differently because of her MRSA infection. For example, she said, CorVel treated her as though her MRSA was a safety risk for them. St. Alexius was scheduled to do a functional capacity evaluation (FCE) but because of her MRSA would not perform an evaluation and when she was at her administrative hearing, upon hearing of her MRSA the administrative law judge stopped the hearing and when the hearing was reconvened she was not allowed to participate in person.

Representative Dietrich said from what he has heard today it seems it would be very difficult for an injured employee to actually prove that MRSA was work-related.

In response to a question from Senator Hacker, Ms. Getzlaff said she had a terrible experience at her administrative hearings. She said once the MRSA was disclosed, there was a horrible reaction by the participants, including someone asking whether they needed to go home and take a shower following the hearing. She said when the hearing was reconvened on another date she was prohibited from attending but was allowed to attend by telephone. She said with a reaction like this at an administrative hearing level, it should not be surprising that employers are not willing to hire someone with MRSA.

Ms. Green said as provided by statute, the injured worker has the burden of proving compensability. She said in the case of Ms. Getzlaff, if Dr. Martin's expert opinion had been different and he had found that was a nexus, the outcome would have been very different.

In response to a question from Representative Keiser, Ms. Getzlaff said she experiences a MRSA breakout about four to five times a year and needs to limit her activity during these times.

Representative Keiser said he wants to bring to the attention of everyone that before the meeting both he and committee counsel met with an infectious disease specialist to better understand the health risks related to MRSA. He said as a result of this meeting, he learned that approximately 5 percent of the population has an active MRSA infection or carries MRSA. He said it was his understanding that a person with MRSA is at the highest risk for infecting others during active days of the infection.

Representative Keiser said he understands with the frequent rate of breakouts, Ms. Getzlaff believes the need to inform potential employers of her infection status. He said if Ms. Getzlaff did not inform a potential employer of her infection status, the employer would eventually become aware because Ms. Getzlaff would regularly need periods of time off work to avoid infecting others.

Ms. Getzlaff said she never had MRSA problems until her surgeries and prescriptions resulting from her workplace injury.

Ms. Green said in dealing with the issue of burden of proof, it would be virtually impossible to change the

burden of proof for just a single situation. She said the Supreme Court has ruled that WSI does not have an obligation to consider medical conditions incurred postinjury.

Ms. Getzlaff said that in considering her functional capacity, it appears as though the only disability considered was the MRSA. She said the three jobs listed on the FCE require repetitive work, such as typing and working on the telephone. She said these activities are inappropriate for her due to her RSD.

In response to a question from Representative Amerman, Ms. Green said the FCE contained the determination that Ms. Getzlaff was eligible for full-time, sedentary employment. She said Ms. Getzlaff's primary care doctor signed off on the FCE and ultimately this FCE became the basis for the administrative law judge's order.

Committee Discussion

Representative Amerman said this is the first time he has ever dealt with the issue of MRSA; therefore, it will likely take a while before he is able to make any firm decisions on whether action should be taken. He said generally he feels frustrated for both himself and Ms. Getzlaff. He said he believes there is a problem but he is not certain of how best to address the problem.

In response to a question from Senator Hacker, Ms. Green said ultimately Dr. Martin's testimony carried the day in determining whether the MRSA was compensable by WSI.

Representative Dietrich said he is frustrated with the issue of trying to determine which came first. He said it appears as though Ms. Getzlaff's joints are at risk and the MRSA may impact what treatment is available. He said it seems like in the case of Ms. Getzlaff, a single doctor's opinion has impacted her entire future.

Representative Keiser said he has concerns that a doctor says "lifestyle" would play such a large role in determining whether a condition is compensable. He said the record seems to reflect that Ms. Getzlaff did have surgery and it's possible the surgery may be a cause of the MRSA. He said the surgery is not a definitive cause, but it seems wrong to rule against Ms. Getzlaff just because there is not a single definitive cause of the MRSA.

Senator Hacker said the reality is the act of living brings inherent risks and if WSI is able to avoid liability by pointing out inherent risks of life, there may be problems with the system.

Chairman Keiser thanked Ms. Getzlaff for appearing before the committee. He clarified that the committee and WSI will continue to consider the issues Ms. Getzlaff raised. Additionally, he clarified the committee's role is to determine whether a change needs to be made in the law. He said the committee is not specifically charged with changing the outcome of Ms. Getzlaff's case.

SECOND CASE REVIEW

Case Summary

The second injured employee presenting a case for review was Ms. Loretta Kesler. Ms. Kesler was accompanied by Representative Karen Karls. Mr. Kocher provided a summary of Ms. Kesler's case. He said Ms. Kesler sustained an injury to her left hand and bilateral knees on December 7, 1993, while employed as a nurse. He said WSI accepted liability for this claim and paid the associated medical expenses.

Mr. Kocher said on August 6, 1997, WSI issued an order denying specific benefits finding that Ms. Kesler had not proven with reasonable medical certainty that her recent medical conditions of left carpal tunnel syndrome and fibromyalgia were caused by her December 7, 1993, work injury. He said Ms. Kesler requested the assistance of OIR and in October 1997 OIR issued a certificate of completion without any change to the order. Following an administrative hearing in September 1998, WSI issued an order denying specific benefits indicating Ms. Kesler had not proven with reasonable medical certainty that her psychological problems and depression were caused by the December 1993 work injury.

Mr. Kocher said in October 1998 Ms. Kesler requested the assistance of OIR as it related to the September 1998 order denying coverage for prescription medications. He said on December 16, 1998, OIR issued a certificate of completion without any change of order, and Ms. Kesler and her attorney requested an administrative hearing.

Mr. Kocher said on December 28, 1998, WSI issued an amended order denying specific benefits and an order denying disability benefits. The order indicated Ms. Kesler had not proven with reasonable medical certainty that her psychological problems and depression were caused by the December 1993 work injury and that Ms. Kesler was not entitled to the payment of medical expenses for specific prescription medications. He said the order also indicated that Ms. Kesler was not entitled to disability benefits in connection with her application filed November 18, 1998.

Mr. Kocher said in January 1999 Ms. Kesler requested the assistance of OIR to review the December 28, 1998, order. He said in January 1999 OIR again issued a certificate of completion without any change to the order. In February 1999 Ms. Kesler's attorney requested an administrative hearing relating to the December 28, 1998, amended order denying specific benefits.

Mr. Kocher said in August 1999 an administrative hearing was conducted covering three areas of concern. First, the administrative hearing addressed the order denying specific benefits issued on August 6, 1997, which denied benefits for the medical conditions of carpal tunnel syndrome and fibromyalgia. The second determination was an order denying specific benefits issued in September 1998 denying payment of medical expenses for specified

prescriptions for the treatment of psychological problems and depression. The third determination was an amended order denying specific benefits amending the order issued in September 1998 and an order denying disability benefits issued December 28, 1998, which denied benefits for the treatment of psychological problems and depression.

Mr. Kocher said in September 1999 the administrative law judge issued recommended findings of fact, conclusions of law, and order stating "based on the findings and facts and conclusions of law, the orders of the North Dakota Workers' Compensation Bureau concerning entitlement of Loretta Kesler to workers' compensation benefits; namely, the order denying specific benefits issued August 6, 1997, the order denying specific benefits issued September 17, 1998, and the amended order denying specific benefits and order denying disability benefits issued December 28, 1998, shall be affirmed."

Mr. Kocher said WSI adopted the recommended findings of fact, conclusions of law, and order, and in December 1999 Ms. Kesler and her attorney filed an appeal to district court. He said 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.

In response to a question from Representative Keiser, Ms. Kesler said before her 1993 injury, she had wrist problems; however, it was the 1993 fall on her wrist that made things worse.

Ms. Kesler said when she filed for WSI benefits in 1997, her claim was denied. She said her employer accused her of falsifying information. She said in addition to accusing her of lying, she had ongoing problems with her employer when she tried to return to work. She said one of the problems she had when she went to WSI was that she didn't get any loss of wages benefits.

Issues for Review

Chairman Keiser called on Mr. Kocher and Ms. Kesler to address the issues Ms. Kesler would like the committee to consider.

Ms. Kesler distributed a written summary outlining the series of events that lead up to her issues for review. A copy of this document is on file in the Legislative Council office.

Ms. Kesler said she has identified the following three issues:

1. WSI sided with the employer regarding her termination as a licensed practical nurse.
2. All the issues and facts relating to her situation were not considered by WSI. There was a miscommunication between Ms. Kesler, her doctor, and her employer, resulting in her loss of opportunity to receive disability benefits from WSI.
3. Ms. Kesler desires that the WSI decision be changed. She would like WSI to reconsider the decision and instate her disability benefits starting now or at her retirement age.

In response to a question from Representative Dietrich, Ms. Kesler said at the time of her work injury, she did not undergo a psychiatric evaluation. However, since the injury, she has had an evaluation indicating suicidal thoughts, depression, anxiety, and obsessive compulsive disorder.

Representative Karls said she has known Ms. Kesler for months, and at Ms. Kesler's request, she has reviewed Ms. Kesler's WSI records. She said she does know that Ms. Kesler is trying very hard to keep her head above water. She said it is possible that Ms. Kesler received bad legal advice but it needs to be recognized that the workers' compensation system is a very complex system for a layperson to understand.

In response to a question from Representative Amerman, Ms. Kesler said she had been a licensed practical nurse for 18 years with her employer before her injury. Additionally, she said, she had four years of prior experience as a licensed practical nurse and worked as a Spanish teacher before that.

Ms. Kesler said she questions WSI's decision in denying her coverage and believes WSI was sticking up for her employer. She said her life was very stressful at the time she was going before the administrative law judge, as the administrative hearing was held after one month of the death of her mother.

In response to a question from Representative Amerman, Ms. Kesler said throughout the whole process she felt like she was alone on this journey. She said her case decisions were made without having necessary information. She said through no fault of her own a letter from her doctor was received a couple of days late and she believes this had a negative impact with WSI as well as her employer.

Representative Karls said in working with Ms. Kesler she has learned her initial claims analyst was very good and she had a very good relationship with Ms. Kesler. However, she said, Ms. Kesler's second claims analyst did not have a good relationship with Ms. Kesler.

In response to a question from Representative Keiser, Ms. Kesler said as it relates to the miscommunication and the late letter from her doctor, she believes she did everything she could do to facilitate that communication.

Ms. Green said the letter Ms. Kesler is referring to was a letter from Ms. Kesler's doctor to Ms. Kesler's employer.

Representative Keiser said in reviewing the stipulation signed by Ms. Kesler, it is not appropriate to hold WSI accountable for the action of the injured employee's attorney.

Workforce Safety and Insurance

Chairman Keiser called on Ms. Green to provide testimony regarding the issues raised by Ms. Kesler.

Ms. Green said the chronological list of events provided by Mr. Kocher is accurate. She said in

Ms. Kesler's case there were three WSI orders, and it is not unusual to consolidate these orders at appeal. She said consolidation of orders is especially common when issues overlap.

Ms. Green said the February 17, 2000, district court order dismissing the appeal with prejudice was based on a stipulation signed by the parties.

Ms. Kesler said she does not fully understand what she signed and how it resulted in a stipulation and the dismissal of her workers' compensation appeal. However, she did distribute a copy of the documents relating to the stipulation for dismissal. A copy of which is on file in the Legislative Council office.

In response to a question from Representative Keiser, Ms. Green said the December 1998 order denied prescription coverage for depression and sleep disorders. She said a review of medical records indicated Ms. Kesler had previously received treatment for this condition going back to 1991. She said in making a determination of coverage, WSI found no nexus between Ms. Kesler's workplace fall and her psychiatric condition.

Committee Discussion

Representative Amerman said he is trying to put himself in the injured employee's shoes and it seems that in Ms. Kesler's case mistake after mistake was made by all parties involved, including the employer, doctor, WSI claims analyst, and the injured employee's attorney. He said he is not convinced that any law was broken but it does seem like the wrong outcome was reached.

Representative Keiser reviewed the stipulation documents distributed by Ms. Kesler. Ms. Kesler said she does not fully understand the stipulation she signed. She said at the time all of this took place she does recall having filed a complaint with the Department of Labor because of her employer's refusal to rehire her following her disability.

Representative Dietrich said he is concerned with the issue raised by Ms. Kesler that she has undergone a psychiatric evaluation and it might be related to her work injury. He said he would like to receive additional information regarding WSI's coverage of psychiatric disabilities.

In response to a question from Representative Amerman, Ms. Green said 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. She said the evaluation for coverage of a psychological injury can become grey, but there are instances of WSI covering a psychological injury.

Representative Keiser said the committee would continue to consider the issues raised by Ms. Kesler as the committee completes its work for the interim.

THIRD CASE REVIEW

Case Summary

The third injured employee presenting a case for review was Ms. Brenda L. Munson. Mr. Kocher provided a summary of Ms. Munson's case. He said Ms. Munson sustained a work-related injury on January 2, 2008, while working as an assistant manager at a retail store. He stated Ms. Munson stated while taking out the garbage the "wind caught the steel door and hit me in the face." He said the injury included pain in her left arm, a small laceration above the left eye, and a mild headache. He said WSI accepted liability for the injury and paid the associated benefits.

Mr. Kocher said in February 2008 WSI denied payment for Ms. Munson's eyeglasses which broke at the time of injury. He said in March 2008 Ms. Munson requested reconsideration of WSI's decision. He said she indicated in the course of the injury her eyeglasses were knocked off of her face, damaging her lenses.

Mr. Kocher said in May 2008 WSI issued an order denying payment for Ms. Munson's eyeglasses. He said the order concluded "WSI shall not pay claimants medical expenses for treatment received at Optical Outlook on January 18, 2008, in the amount of $363. There was no actual eye injury which caused a change in the claimant's sight attributable to the January 2, 2008, work injury." He said in June 2008 Ms. Munson requested the assistance of OIR, and in July 2008 OIR issued a certificate of completion without any change to the order. He said Ms. Munson did not request a hearing and as such the order became final.

Ms. Munson said when she received the injury, she was hit so hard by the door that she was unconscious for a short period of time. She said immediately following the injury she was taken to the emergency room.

Issues for Review

Vice Chairman Hacker called on Mr. Kocher and Ms. Munson to address the issues Ms. Munson would like the committee to consider. Mr. Kocher said Ms. Munson has raised the issue of WSI compensability for eyeglasses damaged in the course of a workplace injury. Mr. Kocher said the WSI order concluded "claimant has not proven that her vision had changed due to the January 2, 2008, work incident. Artificial members includes only such devices as are substitutes for, and not meer aides to, a natural part, organ, or limb, or other part of the body. The term does not include eye glasses or contact lenses unless the eye is, or eyes are, injured as a result of the compensable injury, and such injury causes a change in sight which requires fitting of eye glasses or contact lenses not previously worn by the injured worker or requires a change in existing prescription."

Ms. Munson said she seeks a change in the law because it seems wrong that WSI requires a physical injury to the eye before it will pay for a replacement of broken eyeglasses. She said WSI's denial is in part based upon the assertion that her eyeglasses are "part of her wardrobe." She said she strongly disagrees with this statement because without her eyeglasses she is unable to drive and she is unable to perform her job duties.

Workforce Safety and Insurance

Vice Chairman Hacker called on Ms. Green to provide testimony regarding issues raised by Ms. Munson. Ms. Green reviewed the law addressing compensable injury and artificial members. She said North Dakota Century Code (NDCC) Section 65-01-02(10) defines compensable injury and Section 65-01-02(3) defines artificial members. She said 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.

In response to a question from Representative Amerman, Ms. Munson said she thinks the situation would have been different had she simply fallen and not received any physical injury. However, she said, in her case she was physically injured and the lack of eyeglasses impedes her ability to reach maximum medical improvement.

In response to a question from Senator Marcellais, Ms. Munson said as a result of her workplace injury, she did incur some dental damage to her front tooth. She said WSI fully covered the amount of her dental bills and she must admit that WSI and her claims analyst have treated her very well. She said she questions why WSI so readily covered $1,200 for her dental bill but thought that paying less than $400 for her eyeglass lenses was unacceptable.

Committee Discussion

In response to a question from Representative Amerman, Ms. Green said the law would provide coverage for a substitute body part, such as a hearing aid or dentures. She said under a strict reading of the law, WSI would not compensate an injured employee for damage done to leg braces.

Vice Chairman Hacker called on Mr. Sebald Vetter, C.A.R.E., for comments regarding Ms. Munson's claim. Mr. Vetter said back in the 1960s WSI paid for damaged eyeglasses.

Representative Amerman said the issue seems broader than just eyeglasses. He said the state worker's compensation coverage of assistive devices should require the injured employee receive bodily injury, and then if there is damage to an assistive device and the job duties require the injured employee to use that assistive device, WSI should provide coverage.

Representative Dietrich said if he was an injured employee and he incurred damage to his teeth or his dentures he would expect that WSI would compensate him for this damage. However, he said, he would be able to perform his job without his teeth or his dentures. And, if he incurred damage to a hearing aid, which is not covered by WSI, his inability to hear would impact his ability to do his job. He said he would like to receive more information from WSI on this issue of compensation for eyeglasses, hearing aids, and other such devices.

Ms. Green said if changes are made to the law, it would be important to clarify that the coverage was for a one-time occurrence and that WSI would not be liable into the future for that injured employee's eyeglasses or other assistive device.

Committee counsel reported the statutory language defining artificial members goes back to 1941. She said there was a brief period of time from approximately 1943 to 1947 during which the law stated dentures were not covered as an artificial member. She said in 1941 the law stated an artificial member shall include any such devices as are substitutes for, and not meer aids to, a natural body part, organ, limb, or other part of the body.

Vice Chairman Hacker said the committee would continue to consider the issues raised by Ms. Munson.

FOURTH CASE REVIEW

Case Summary

The fourth injured employee presenting his case for review was Mr. Doug D. Riley. Mr. Riley was accompanied by his attorney, Mr. Stephen D. Little. Mr. Kocher provided a summary of Mr. Riley's case. Mr. Kocher said Mr. Riley sustained an injury to his neck on February 11, 2003, while working as an assembler. Mr. Riley's claim was accepted and benefits paid accordingly. He said in May 2003 Mr. Riley was diagnosed with the C4-5 herniated disk and severe C5-6 spondylosis with neck and bilateral arm pain. He said in October 2003 Mr. Riley was further diagnosed with a C3-4 spondylosis with axial neck pain.

Mr. Kocher said in November 2005 CorVel submitted a vocational consultants report indicating that Mr. Riley was able to be employed as a telephone solicitor/telemarketer. He said in December 2005 WSI issued an order awarding partial disability benefits indicating that Mr. Riley was capable of gainful employment as a telephone solicitor/telemarketer. He said Mr. Riley was found entitled to partial disability benefits for a period not to exceed five years, subject to the provisions of the retirement statute. Mr. Riley's partial disability benefits were calculated using an earning capacity of $235 or actual wages earned, whichever was greater.

Mr. Kocher said on January 3, 2006, Mr. Riley requested the assistance of OIR, and on January 30, 2006, OIR issued a certificate of completion without any change to the order. He said in February 2006 Mr. Riley and his attorney, Mr. Stephen D. Little, requested a hearing relating to WSI's order for awarding partial disability benefits.

Mr. Kocher said in August 2006 an administrative hearing was conducted. In December 2006 the administrative law judge issued her recommended findings of fact, conclusions of law, and order. The order stated "the greater weight of the evidence established by expert vocational evidence, is that Mr. Riley does have a retained earning capacity; demonstrated by his ability to work as a telephone solicitor in a statewide job pool. The FCE shows that Mr. Riley can work six hours per day. There is no disagreement about Mr. Riley's physical restrictions. The only disagreement concerns doctor Martire's disbelief that a telephone solicitor can accommodate Mr. Riley's restrictions. As Dr. Helm notes, the only question that must be verified is whether the position allows Mr. Riley to change position at his discretion. The greater weight of the evidence shows that it does. Mr. Riley says he doesn't think he can be a telemarketer and that he wouldn't be able to do well on the phone. That remains to be seen. But since Mr. Riley has a retained earning capacity and he is not totally disabled, he is not entitled to total disability benefits. Rather, WSI shall pay partial disability benefits in this instance, pursuant to Section 65-05-10, NDCC. WSI has done so, and accordingly, its order awarding partial disability benefits must be affirmed." Mr. Kocher said in December 2006 WSI adopted the recommended findings of fact, conclusions of law, and order. Mr. Riley did not appeal the order to district court, and as such, the order became final.

Mr. Kocher said in April 2006 WSI issued a notice of intention to discontinue/reduce benefits as Mr. Riley failed to comply with the program of rehabilitation. The notice indicated "it is your responsibility to search for work within your restrictions. You have not proven a good-faith job search. As a result, you have voluntarily withdrawn from the workforce and are not entitled to wage loss benefits." He said 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, internet resources or other employment agencies." He said in May 2006 Mr. Riley and his attorney requested reconsideration of WSI's April 2006 informal decision.

Mr. Kocher said in July 2006 WSI issued an order suspending temporary partial disability benefits and an order denying reapplication. The order indicated "the injured employee shall seek, obtain and retain reasonable and substantial employment to reduce the period of temporary disability to a minimum. The employee has the burden of establishing that the employee has met this responsibility." The order further indicated that Mr. Riley's temporary partial disability benefits be suspended after May 10, 2006, and that "it is ordered that disability benefits with claimant's reapplication filed on May 18, 2008, are denied."

Mr. Kocher said in July 2006 Mr. Riley requested the assistance of OIR as it relates to the July 2006 order. He said in August 2006 OIR issued a certificate of completion without a change to the order. In August 2006 Mr. Riley and his attorney requested a hearing. He said in January 2007 an administrative hearing was conducted.

Mr. Kocher said in February 2007 the administrative law judge issued her recommended findings of fact, conclusions of law, and order concluding "it is ordered that WSI's order suspending temporary partial disability benefits and order denying reapplication dated July 3, 2006, is affirmed except to the extent that it provides that for Mr. Riley to come back into compliance with vocational rehabilitation, he must register with Job Service North Dakota and the preferred worker program and he must contact five employers per day, per job opening within his restrictions and he must submit an employment search log every month. Rather, in order for Mr. Riley to come back into compliance with vocational rehabilitation, he must make a good-faith work search and return to work utilizing his transferable skills." He said in March 2007 WSI adopted the recommended findings of fact, conclusions of law, and order. Mr. Riley did not appeal the order to district court and as such the order became final.

Mr. Kocher said in September 2007 WSI issued an order denying liability for Mr. Riley's depression. He said WSI indicated they did not have liability for the claimant's depression or psychological condition in connection with the claim. He said WSI further indicated there was no objective medical evidence presented which provides Mr. Riley's depression or psychological condition rose out of the compensable work injury. He said in September 2007 Mr. Riley requested the assistance of OIR, and in October 2007 OIR issued a certificate of completion without any change to the order. In October 2007 Mr. Riley and his attorney requested a formal hearing relating to WSI's September 2007 order.

Mr. Kocher said in February 2008 an administrative hearing was conducted. He said the issue presented at the hearing was to determine if Mr. Riley had established a compensable psychological injury. He said WSI denied liability for Mr. Riley's depression and psychological condition on the grounds that Mr. Riley had not shown that his physical injury was at least 50 percent of the cause of his psychological condition as compared to all other contributing causes combined. In March 2008 the administrative law judge issued her recommended findings of fact, conclusions of law, and order stating "the greater weight of the evidence shows that Mr. Riley 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. And there is no evidence that Mr. Riley's depression pre-existed his work injuries. Accordingly, Mr. Riley is entitled to benefits for his depression caused by his January 11, 2003, and February 11, 2003, work injuries. It is ordered that WSI's order denying liability from Mr. Riley's depression dated September 4, 2007, is reversed." In April 2008 WSI

adopted the recommended findings of fact, conclusions of law, and order.

Mr. Kocher said on June 10, 2008, Mr. Riley was seen by his psychiatrist, Dr. Haynes, 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." He further states "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."

Mr. Kocher said on September 16, 2005, Mr. Riley was issued an order awarding permanent partial impairment benefits in the amount of 55 percent whole body impairment for cervical spine and bilateral shoulders. This resulted in a $63,000 award.

In response to a question from Senator Hacker, Mr. Kocher said Mr. Riley is not receiving wage-loss benefits from WSI; however, he is receiving medical coverage for his workplace injury, including coverage for his psychological condition.

In response to a question from Representative Keiser, Mr. Kocher said initially WSI did not cover Mr. Riley's psychological condition, but following the administrative law judge decision, WSI has covered the psychological component.

Mr. Little said Dr. Haynes' opinion speaks to whether Mr. Riley is able to be employed as a telemarketer. He said his experience has been that this qualification to be a telemarketer position is found in a lot of CorVel's vocational rehabilitation reports.

Mr. Little said he questions the reasonableness of WSI's five-a-day job search requirement. He said instead of just relying on WSI's job search requirements, perhaps it would be valuable to consider the job search requirements of the Social Security Administration and Job Service North Dakota.

Mr. Little said Mr. Riley went through three separate administrative hearings. He said his first rehabilitation plan required him to be a telemarketer, and in making this decision, Mr. Riley's psychological condition was not taken into account. He said in the second administrative hearing the issue of the good-faith job search was addressed. And finally in the third hearing the issue dealt with was WSI's failure to cover Mr. Riley's psychological condition. He requests that WSI exercise its continuing jurisdiction to revisit the first hearing issue relating to vocational rehabilitation.

Mr. Little said studies support there is a high number of injured employees with chronic pain who suffer from depression.

Issues for Review

Chairman Keiser called on Mr. Little to address the issues Mr. Riley would like the committee to consider. Mr. Little distributed written testimony (Appendix B) which includes an outline of the following five issues for review:

1. Require documented vocational rehabilitation results. Recently, when I asked WSI Deputy Director John Halverson how many injured workers who went through WSI's vocational rehabilitation process ever found work in the fields WSI said they were employable in and made the kind of money WSI predicted, he replied, "WSI does not have the ability to efficiently extract this information." Why not? Do not employers, employees, and the public deserve to know if WSI's rehabilitation efforts are actually working? Injured workers are not lazy; they are discouraged. Are we supposed to believe Doug Riley is drawing Social Security disability benefits because he does not want to work? Is it not more likely that his skills no longer match his physical abilities? I would suggest that WSI contact every injured worker six months after a vocational rehabilitation plan becomes final and, if the injured worker remains unemployed despite a good-faith job search, recommence disability benefits and reevaluate vocational rehabilitation possibilities.
2. Exercise some common sense presumptions. WSI often seems to ignore the reality that injured workers live in. WSI should be redirected to use the same standards employed by Job Service North Dakota regarding what constitutes a good-faith search. It should use the same standards used by the Department of Human Services Division of Vocational Rehabilitation options. Finally, it 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.
3. Eliminate WSI's unfettered discretion in exercising its continuing jurisdiction. If an injured worker can show relevant new facts, which either did not exist or were overlooked previously, WSI should have to consider the facts and issue an appealable decision.
4. Once a claim is accepted, continue disability and medical benefits until a subsequent order reducing or terminating such benefits becomes final. In other words, do not starve an injured worker or prevent him from obtaining medically necessary treatment until WSI's order becomes final.

5. Eliminate the 20 percent fee cap. This will allow injured workers to challenge denials of MRIs and other necessary medical tests and treatment and allow them to challenge violations of due process, such as ex parte communications between WSI's counsel and its decisionmakers.

Mr. Little said as it relates to the recommendation of requiring documented vocational rehabilitation results, he would ask that if injured employees like Mr. Riley are not successful in finding employment, perhaps instead of assuming they are just lazy, WSI could consider the possibility that they are unable to work. He said frankly people who are lazy and do not work are not the same people who are getting hurt on the job and filing for WSI benefits.

Mr. Little said as it relates to his recommendation that the statutory attorney's fee cap be removed, contrary to appearance this is not self-serving. He said he already has at least one-half of the WSI cases in the state and is not seeking additional work in this area. He said 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 do WSI cases. He said he would invite committee members to attend an administrative hearing proceeding so they can see for themselves that it is not an even forum when only one side has legal representation. Additionally, he said, removal of the attorney's fee cap might allow injured employees to challenge WSI decisions that are currently not cost-effective to pursue, such as denial of specified medical treatments.

In response to a question from Representative Amerman, Mr. Little said CorVel informs injured employees to tell employers about the injured employees' injuries and limitations. However, he said, the reality is that if an injured employee informs the employer about his or her limitations, 99 percent of those potential employers will not hire the injured employee. Additionally, he said, if an injured employee is not depressed at the beginning of the job search activities, they will be depressed following the job search.

Finally, he said, 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.

In response to a question from Senator Hacker, Mr. Little said when Mr. Riley submitted his application for claim review by the Workers' Compensation Review Committee, he had intended to submit an application for WSI's continuing jurisdiction program. He said Mr. Riley was provided the wrong form, and therefore inadvertently applied for review by this committee. He said the reality is that WSI has continuing jurisdiction all the time and does not need an injured employee to submit an application by an arbitrary deadline. He said his experience has been that WSI historically only uses its continuing jurisdiction to decrease an injured employee's benefits.

Chairman Keiser called on committee counsel to clarify the application process. She said before July 1, 2008, the Legislative Council office received Mr. Riley's application for review by the Workers' Compensation Review Committee. She said after reviewing Mr. Riley's application for eligibility to have the committee review his claim, she contacted Mr. Riley to make arrangements to schedule a time for the committee review. She said it was at this point she became aware of Mr. Riley's intent to have filed for WSI's continuing jurisdiction program instead of Workers' Compensation Review Committee claim review.

Committee counsel said as a courtesy to Mr. Riley, she contacted WSI to explain 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. She said WSI declined to accept the application for the continuing jurisdiction and as such Mr. Riley agreed to appear before the committee to present his claim.

In response to a question from Representative Keiser, Mr. Riley said when he was working with CorVel, he was informed that he was qualified for the telemarketer position. He said reaching that decision was not a joint decision made by CorVel and the injured employee.

Mr. Little said both Mr. Riley's physical medicine and psychological medicine doctors had serious reservations about Mr. Riley's qualification to be a telemarketer; however, this new medical information was ignored by WSI.

Workforce Safety and Insurance

Chairman Keiser called on Mr. Tim Wahlin, Workforce Safety and Insurance, for testimony regarding the issues raised by Mr. Riley. Mr. Wahlin said WSI's vocational rehabilitation services are intended to address the injured employee's capabilities. He said Mr. Riley is an intelligent man and this was taken into account in determining what jobs he may be qualified to perform. Mr. Wahlin said during the vocational rehabilitation testing process, Mr. Riley was uncooperative. However, he said, it was determined that Mr. Riley would benefit from skill updating. He said Mr. Riley's FCE was signed off by Mr. Riley's doctor. He said Mr. Riley was directed to attend skill updating, but his doctor reported Mr. Riley was not able to attend the skill updating.

Mr. Wahlin reviewed the vocational rehabilitation hierarchy setup under NDCC Section 65-05.1-01. He said the job contact requirements are very lenient. He said you can comply with the job search requirements in a variety of ways, including looking at a newspaper or searching the Internet. He said the bottom line is that the injured employee needs to be looking for a job. He said WSI would not take the issue of noncompliance to a hearing if the injured employee were partially following the job search requirements.

However, he said, the injured employee must have an honest intention to find employment.

Mr. Wahlin said in the case of Mr. Riley, over a five-month period Mr. Riley made seven contacts over a total of three days. He said Mr. Riley did not make an honest attempt to find work. Mr. Wahlin said Mr. Riley was found to be capable of being a telemarketer. He said in making this determination, depression was considered in evaluation of his ability to work. He said the mere fact that depression exists in this case was determined to not prohibit him from working.

In response to a question from Representative Dietrich, Mr. Riley said he was living in Ashley at the time of his injury. He said following the initial vocational determination, he was aware of one telemarketer position in Ashley but that business was in the process of closing its doors and moving to Texas. He said in doing his job search he found that Bismarck had a few telemarketing positions available but this was 125 miles from Ashley. He said he did apply for a telemarketing position in Napoleon; however, he did not receive this position. He said in doing his job search, there were no telemarketer positions within a 50-mile radius of Ashley. He said he owns his own home in Ashley and it is not financially feasible for him to sell his home and move to Bismarck for a telemarketer job.

Mr. Riley said in complying with WSI's skill training requirements, he was directed to attend classes at the adult learning center. He said in order to comply with this requirement, he had to leave home by 5:30 a.m. Additionally, he said, he did comply with WSI's mandated computer classes; however, when he got there he found that he was unable to type. He said the ability to type was a requirement for successful completion of this course.

Representative Dietrich said it does not seem feasible to request an injured employee to travel over 240 miles round trip for a $7 per hour job. Plus, he said, it is important to recognize the difference in housing markets in Ashley versus Bismarck.

Representative Dietrich said in reviewing the FCE, it appears Mr. Riley was cooperative throughout the evaluation, even though he was in significant pain. He said this observation on Mr. Riley's behavior differs significantly from the administrative law judge's report.

Mr. Wahlin said his testimony was based on the administrative law judge's findings. He said he has every reason to expect the FCE report is correct and that Mr. Riley did cooperate.

Representative Dietrich said referencing Mr. Riley's psychology evaluation for major depression, the diagnosis of major depression with irritability would lend one to believe that Mr. Riley would have a tough time successfully working as a telemarketer. Mr. Wahlin said the June 2008 psychology report was created years after the 2006 FCE.

Mr. Little said the fact that a later determination can have such a significant impact when the ability of an injured employee to work illustrates the whole purpose of Workforce Safety and Insurance to exercise continuing jurisdiction. He said once it became clear that Mr. Riley suffered from a mental condition that was work-related and that impacted his ability to work, WSI should have revisited its earlier decision.

In response to a question from Representative Keiser, Mr. Wahlin said generally WSI does not go backwards to consider a change in earlier rulings unless there is a substantial change in an underlying condition. He said in court proceedings there needs to be some level of finality. He said in the case of Mr. Riley, 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. He said that it is possible that over a course of two years Mr. Riley's depression progressed and became worse.

Mr. Little said he disagrees with Mr. Wahlin's statement at the initial determination of Mr. Riley's ability to work, it was found Mr. Riley's depression was not debilitating. Mr. Little said to the contrary, Dr. Martire made a contrary finding. Mr. Little said it was the administrative law judge who dismissed Dr. Martire's position because Dr. Martire is a physical doctor and not a mental doctor. He said in his experience, WSI does not have any problem going back to recoup benefits from an injured employee. He said he disagrees with Mr. Wahlin's position for a need of finality.

In response to a question from Representative Keiser, Mr. Wahlin said that 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.

Mr. Wahlin said in the case of Mr. Riley, WSI has not gone back to reevaluate an earlier determination and has not fully evaluated this new evidence. He said there is not significant value in WSI considering this new evidence because he does not have any chance in changing the posture of Mr. Riley's case.

Mr. Riley said when he informed Dr. Martire that he was in the process of filling out job applications, Dr. Martire was upset because he did not want Mr. Riley to be searching for a job given his physical condition.

Mr. Riley said the injured employee is put in a difficult position. He said the injured employee needs to decide whether to follow a doctor's recommendation or whether to follow WSI's recommendation. Additionally, he said, when an injured employee complains about the system he is labeled a troublemaker.

In response to a question from Senator Marcellais, Mr. Wahlin said it is a common practice to have the same administrative law judge to be assigned to all related hearings of an injured employee. He said by using the same hearing officer the hearing officer is able to take advantage of the knowledge and background of the case.

Senator Hacker said Mr. Riley's record seems to reflect that depression was considered early on by Dr. Riley's physical medical doctor. He said this would have been the appropriate time for WSI to have done a psychiatric evaluation.

Senator Hacker said he questions Mr. Wahlin's remark regarding the financial feasibility of going back to recoup benefits. He said in the earlier reviewed case of Mr. Wolf, it was an example of WSI going back to recoup a small amount of paid benefits due to the determination of a preexisting medical condition.

Mr. Wahlin said WSI does consider the testimony of doctors, even if the doctor is making a statement in an area outside the doctor's specialty. For example, there are examples of physical medicine doctors or family practice doctors making statements outside their scope of specialty.

Senator Hacker said he questions the failure of WSI to exercise continuing jurisdiction when current evidence indicates an expert in the field has indicated that telemarketing is not an appropriate position for Mr. Riley.

Mr. Little said Mr. Riley's psychiatrist never stated that Mr. Riley was qualified to perform as a telemarketer. He said the record shows there was an independent medical examination (IME) doctor who said Mr. Riley was not psychologically debilitated and prohibited from performing telemarketing skills. He said it is important to know that IME doctor never actually performed a psychiatric evaluation of Mr. Riley. He suggested that WSI adopt a treating doctor presumption much like the Social Security Administration has. He said he believes the administrative law judge dismissed the medicine doctor's position because he was not a specialist in psychology.

At the request of Chairman Keiser, Ms. Peyerl provided the committee members with two letters from Dr. Martire. She said the first letter is dated February 14, 2005, which followed the WSI notice of decision denying depression, and the second letter is dated August 19, 2005, following Mr. Riley's IME.

In response to a question from Representative Amerman, Mr. Wahlin said until legislation enacted in 1997, the Supreme Court had directed that all workers' compensation law be read using liberal construction. He said under liberal construction the law was read to resolve all reasonable doubts in favor of the injured employee. He said liberal construction was used because the workers' compensation law was intended to be remedial. He said in 1997 the law was changed to tip the playing field so the law was not interpreted in favor of one party over another.

Mr. Little said as it relates to the five-a-day job contact requirement, if WSI does not really require five job contacts a day then he suggests that they clarify what the actual expectations are. He said he has seen CorVel representatives assert at the administrative hearing level that failure to comply with the five-a-day job search requirement is a showing of noncompliance.

Mr. Wahlin said the five-a-day requirement is not set by administrative rules but is set by guideline and is part of the job-seeking packet provided to injured employees.

Representative Keiser said he shares Mr. Little's concern that the failure to meet the five-a-day job contact requirement may be used to show noncompliance.

Mr. Riley said at his administrative hearing, WSI's attorney said as a last resort WSI can use failure to meet the five-a-day job search requirement to show noncompliance. He said the injured employee is generally not well-informed. He said he did not realize that under the five-a-day job search requirement he could recontact the same employers over and over again.

Representative Dietrich said he is concerned about the five-a-day job contact requirement. He said in Mr. Riley's hometown of Ashley, it does not seem feasible for an injured employee to make five job contacts. Additionally, he said, it does not seem feasible to require an injured employee to travel 240 miles round trip for a $7-an-hour job.

Mr. Wahlin said WSI's job is to determine, based on a statewide job pool, whether there are jobs available for the injured employee. He said he raises a concern if the Legislative Assembly would find that rural injured employees are not capable of finding jobs in the area, the rural claimants are excused from finding jobs. He said this change could have far-reaching consequences.

Representative Dietrich also raised the concern he has seen a trend that telemarketing is used as a job of last resort. He said it should be recognized that in addition to physical limitations, there are personality limitations for holding certain jobs.

In response to a question from Representative Amerman regarding the stability of working as a telemarketer, Mr. Wahlin said CorVel's job is to determine if there are viable openings in the statewide market.

Committee Discussion

Chairman Keiser called on Mr. Ed Christenson, injured employee, for comments regarding issues raised by Mr. Riley. Mr. Christenson said if WSI has continuing jurisdiction, somebody needs to stand up and help injured employees rectify these improper decisions. He said in the case of Mr. Riley, WSI needs to do the right thing now that WSI realizes Mr. Riley is unable to perform the job as a telemarketer. He said the cost of paying for Mr. Riley's WSI benefits is minor compared to the cost of defending the position and conducting another administrative hearing.

Chairman Keiser called on Mr. Vetter for comments regarding Mr. Riley's claim review. Mr. Vetter said if substantial evidence is found, this should result in WSI being required to exercise continuing jurisdiction. Mr. Vetter discussed his personal experience with depression. He said when

he was depressed following his workplace injury he did not care about anything and he regularly had suicidal thoughts. He said an injured employee, such as Mr. Riley, experiencing depression feels like he or she cannot do anything. He said it is likely that Mr. Riley was depressed immediately following his injury but it was only later that he came to recognize it for what it is.

Chairman Keiser called on Mr. Tom Balzer, North Dakota Motor Carriers, who stated unemployment insurance requires two job applications per week. He said in comparing WSI's job search requirements and Job Service North Dakota requirement is comparing apples to oranges. He said as it relates to attorney's fees, the committee should know that employers also incur attorney's fees in WSI cases.

Mr. Riley said it really concerns him that WSI does not mind spending $5,000 to pay for an IME but does not take the time to followup on an injured employee's doctor's records. He said if Dr. Martire's medical training was inadequate to make a statement regarding his mental condition, WSI should send the injured employee to an appropriate expert to perform a complete evaluation. He said it seems wrong that an IME doctor who spends an insignificant amount of time with the injured employee should be able to issue a decision that totally overrules an injured employee's treating doctor.

Mr. Riley said over a six-year period, he has only missed one doctor's appointment, and he was careful to reschedule that appointment. He said he believes he has been compliant with WSI's program; however, he feels like he has been kicked to the curb at every step.

Representative Keiser said that under the vocational rehabilitation hierarchy, Mr. Riley was at the point where he needed to move to get a telemarketing job.

Mr. Riley said he has worked hard his whole life and now all he can do is be a telemarketer. He said the telemarketer job is a dead-end job and it is not right for an injured employee to be reduced to this position.

Mr. Little said the vocational rehabilitation expectations of WSI need to be reasonably obtainable and need to be based upon consideration of a variety of factors.

Representative Dietrich said at the time of Mr. Riley's injury, he was earning $9 an hour with a plan to move into a $12-an-hour position. He said he is troubled by the fact that Mr. Riley is unable to contribute to Social Security and retirement and that had he been uninjured he would have been able to contribute to Social Security retirement at a much higher level than he was contributing at the time of his injury.

Representative Amerman raised a concern regarding continuing jurisdiction and how best to address this issue. He said perhaps it would work to allow the injured employee to receive benefits until a final decision is made.

Mr. Little said that when an injured employee goes through the appeal process, it typically takes months and even years and during this period the injured employee loses everything while waiting for the final decision.

Representative Keiser stated the appeal process may take years for the injured employee to go to the Supreme Court level. He said he does not want to inadvertently encourage misuse or abuse of the system.

Mr. Little said if OIR were truly an independent entity, this would be a good point at which to designate benefits would be paid during appeal. He said that if OIR were a separate agency, it would be the first opportunity for the injured employee to have someone outside WSI take a look at the dispute.

Mr. Riley said by the time an injured employee reaches OIR, that injured employee is already in serious trouble. He said it would be helpful to continue benefits through OIR.

Senator Hacker questioned whether it might be possible to allow an injured employee to consider benefits until the injured employee has had an opportunity to consult with an attorney.

Committee counsel raised concerns about relying on the private sector as a triggering event and suggested that it might be better policy to rely on a state actor, such as OIR or an administrative hearing. Representative Keiser raised concerns regarding the amount of time it takes to work an issue through the hearing process.

It was moved by Representative Amerman, seconded by Representative Dietrich, and carried on a voice vote that the Legislative Council staff be requested to prepare a bill draft to allow an injured employee to continue receiving benefits up until the time an administrative law judge issues recommended findings of fact, conclusion of law, and order.

Senator Hacker said when the committee reviews this bill draft it will be necessary to also review OIR statistics.

Representative Keiser said the committee will have to further consider the issue of whether a finding of depression should be applied retroactively to address the ability of an injured employee to work.

Representative Keiser said in this instance there was an injured employee who clearly intended to apply for WSI's continuing jurisdiction program but submitted the wrong form. He questioned why WSI failed to accept this as an application for the continuing jurisdiction program.

Mr. Wahlin said in designing the WSI continuing jurisdiction program parameters, including timelines, he said initially WSI guaranteed a review of 250 injured employees and set up a cutoff date of July 1, 2008. He said at this point WSI actually received 425 applications by the cutoff date. He said WSI has agreed to consider all of these applications. He said it is a slippery slope for WSI to recognize exceptions for some applicants and not for others.

Senator Hacker questioned Mr. Wahlin's statement recognizing that WSI has already exceeded its own parameters by accepting more than 250 claims for review.

Representative Keiser distinguished Mr. Riley's application from other applications WSI may consider, as Mr. Riley did submit an application to the Workers' Compensation Review Committee.

In response to a question from Mr. Riley regarding whether WSI will be accepting his application for continuing jurisdiction, Representative Keiser said the current status is that WSI has denied his application.

FIFTH CASE REVIEW

Case Summary and Issues for Review

The fifth injured employee presenting a case for review was Ms. Alice Vick. Mr. Kocher provided a summary of Ms. Vick's case. He said Ms. Vick sustained a work injury to her back on January 15, 1996. He said WSI accepted liability of this injury and awarded payment of the associated benefits. He said on February 4, 2005, WSI issued a notice of intention to discontinue/reduce benefits informing Ms. Vick that her disability benefits will be discontinued after February 25, 2005, for noncompliance with vocational rehabilitation. He said Ms. Vick had failed to attend the skill enhancement training as ordered for the week of January 31, 2005, to February 3, 2005.

Mr. Kocher said on February 10, 2005, Ms. Vick requested consideration of the decision dated February 4, 2005. On April 8, 2005, WSI issued an order documenting noncompliance with vocational rehabilitation. He said this order acknowledged that Ms. Vick had engaged in a first instance of noncompliance with vocational rehabilitation. Ms. Vick did not experience a lapse in disability benefits as she came back into compliance for the discontinuation date.

Mr. Kocher said on April 14, 2005, Ms. Vick requested the assistance of OIR to review the April 8, 2005, order. In May 2005 OIR issued a certificate of completion without recommending any change to the order and Ms. Vick requested a hearing on the order documenting noncompliance of vocational rehabilitation. He said the administrative hearing was conducted in July 2005. He said Ms. Vick was represented by legal counsel.

Mr. Kocher said in August 2005 the administrative hearing officer issued her recommended findings of fact, conclusion of law, and order. She concluded "WSI has met its burden of showing by preponderance of the evidence that Ms. Vick engaged in the first instance of noncompliance with vocational rehabilitation and that Ms. Vick has not met her burden of showing that she had good cause for doing so." She also stated that "the April 8, 2005, order documenting noncompliance with vocational rehabilitation is affirmed."

In August 2005 WSI adopted the recommended findings of fact, conclusion of law, and order. In September 2005 Ms. Vick and her attorney filed an appeal to district court indicating they were not in agreement with WSI's August 2005 order. He said in January 2006 the district court judge "adjudged and determined that the final order of Workforce Safety and Insurance dated August 16, 2005, be in all things affirmed."

Mr. Kocher said concurrent with the order of noncompliance with vocational rehabilitation was a notice of intention to discontinue/reduce benefits dated April 12, 2005, noting Ms. Vick's vocational rehabilitation plan had been approved. The notice indicated that Ms. Vick had completed her administrative assistant program at Spherion Staffing and that Ms. Vick had transferrable skills to return to work as a customer service representative, collector, and administrative assistant based on her full-time sedentary release. Mr. Kocher said the notice indicated Ms. Vick was required to make a good-faith work search for jobs as identified. He said the notice indicated Ms. Vick would not be entitled to partial disability benefits if her postinjury wage were greater than 90 percent of the preinjury wage of $770 a week. He said in June 2005 WSI issued an order awarding partial disability benefits indicating that Ms. Vick was capable of returning back to gainful employment. He said in August 2005 Ms. Vick requested the assistance of OIR to view the June 2005 order. He said in August 2005 OIR issued a certificate of completion without any change to the order. He said Ms. Vick did not request a hearing and as such the order was final.

Mr. Kocher said on June 14, 2006, WSI issued a notice of intention to discontinue/reduce benefits. He said the notice informed Ms. Vick that her weekly benefits for temporary partial disability were being discontinued effective July 5, 2006, for the following reasons: "It is your responsibility to search for work within your restrictions. You have not proven a good-faith work search. As a result, you have voluntarily withdrawn from the workforce and are not entitled to wage loss benefits." Ms. Vick appealed the notice and submitted a letter requesting further consideration pertaining to that decision.

Mr. Kocher said on August 15, 2006, WSI issued an order stating "Ms. Vick is not entitled any disability or vocational rehabilitation benefits after July 5, 2006." He said the order indicated Ms. Vick made minimal job contacts since the order awarding partial disability benefits was issued in June 2005 and had not proven a good-faith work search. The order indicated Ms. Vick was found to be engaged in a second instance of noncompliance with vocational rehabilitation. In August 2006 Ms. Vick requested the assistance of OIR to review the August 2006 order. In September 2006 OIR completed its review and issued a certificate of completion without any change to the order.

Mr. Kocher said in September 2006 Ms. Vick requested a hearing pertaining to the August 2006 order. He said there were several delays in the scheduling of a hearing date as Ms. Vick dismissed

her attorney and considerable time passed before Ms. Vick elected to represent herself at the hearing. He said the hearing was scheduled for February 2008, and the issue presented was whether Ms. Vick had engaged in a second instance of noncompliance without good cause.

Mr. Kocher said in February 2008 the administrative law judge submitted her recommended findings of fact, conclusion of law, and order in which she recommended "Workforce Safety and Insurance's August 15, 2006, order denying Ms. Vick's disability or vocational rehabilitation benefits after July 5, 2006, is affirmed." He said the administrative law judge went on to state "considering all of the arguments of the parties and all evidence in the record, I conclude by preponderance of the evidence in the record that Ms. Vick engaged in a second instance of noncompliance. Moreover, she has failed to demonstrate good cause for noncompliance and has not shown good cause for her failure to perform a good-faith work search. WSI's August 15, 2006, order denying disability or vocational rehabilitation benefits after July 5, 2006, must, therefore, be affirmed."

Mr. Kocher said in April 2008 WSI adopted the recommendations of the administrative law judge. He said Ms. Vick did not appeal WSI's April 2008 order to district court and as such the order became final.

In response to a question from Representative Keiser, Ms. Vick said following her 1996 work injury, she was able to work on and off until 2003 at which time her injuries forced her to stop work.

In response to a question from Representative Amerman, Mr. Kocher said Ms. Vick had received some training from Spherion Staffing to assist her in office support skills.

Ms. Vick said when she was released to return to work, it was her understanding that she was supposed to find a volunteer position that would allow her to work up to 40 hours per week. She was instructed that as she looked for employment she was to limit her job search to those jobs that were within her physical abilities. She said in the course of looking for work she asked CorVel to provide assistance. Additionally, her doctor asked CorVel to help Ms. Vick find a volunteer position that would allow her to increase her hours over time.

Ms. Vick said she performed her job search daily but finally began to apply for full-time jobs that were beyond her limitations. However, she was then informed by WSI that her job search was inappropriate because the jobs were beyond her limits.

Ms. Vick said throughout the process she felt like WSI did not care about her and that WSI repeatedly denied her doctor's proposed treatment. She said as a result of WSI refusing to pay for medical treatment, she ended up paying for this treatment on her own and spent thousands of dollars necessary to finally get an accurate diagnosis. She said it was frustrating when WSI hired its own doctor to do an IME and after a 15-minute evaluation found that Ms. Vick was able to be employed full-time. She said when she reviewed the IME doctor recommendation it became apparent that the doctor was reviewing the wrong file.

Ms. Vick said she has improved her education to approximately the 9th grade level and when she reached this level WSI claimed she was employable full-time. She said WSI enrolled her in administrative service training with Spherion Staffing and she felt this training was inadequate and ineffective. She said although she finished this program ahead of schedule, WSI tried to claim she failed to complete the program.

Ms. Vick said when she went to Job Service North Dakota for assistance in the job search she was essentially laughed at after hearing about her training and skills. She said after a couple of these negative instances she stopped seeking the services of Job Service North Dakota. She said she continued her job search on her own and tried on her own to improve her job skills.

Ms. Vick said she was unhappy with the services she received at OIR and she was unhappy with her experience at the administrative hearing. She said throughout the whole system WSI had an unlimited number of people at their disposal, such as claims analysts, OIR, administrative hearing officers, and doctors, whereas she as an injured employee was left without any help. She said there are only a few attorneys in the state willing to take on WSI cases and for those few attorneys who will take on WSI cases they require a $2,000 retainer.

Ms. Vick said through the course of treatment for her injury, it took a long time to receive a final diagnosis of avascular necrosis (AVN). She said had she received this diagnosis sooner she would have been able to be treated, but because it took so long, the condition progressed to the point it will ultimately lead to her death.

Ms. Vick said she finds it unacceptable that WSI would choose to spend $1,500 to fight an injured employee instead of spending the $1,500 to help the injured employee who has paid into the system. She said she understands that some people commit fraud, but WSI is sophisticated enough to deal with these types of people.

Ms. Vick said as a result of her workplace injury and the ongoing problems she has encountered she had become depressed and suicidal. She said she understands that she is not unique and she knows several injured employees who actually committed suicide due to their depressing situation.

Ms. Vick said that over the course of her treatment she found 13 doctors who are willing to support her and her limitations. However, she said, WSI regularly limits the injured employee's treating doctor. She said WSI needs to listen to the injured employee and the injured employee's doctor.

Ms. Vick said WSI seems to focus on a single event of noncompliance instead of acknowledging the pattern of compliance. For example, she said, WSI'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. She said the humanity seems to be missing from the system.

Ms. Vick said throughout her experience with WSI it seems like WSI sets up roadblocks. She said in her case she experienced multiple medical events, but during this whole time WSI expected her to consistently perform job searches regardless of her medical limitations.

In response to a question from Representative Amerman, Ms. Vick said during the course of her treatment she became infected with MRSA. She said although she has survived that instance, she will suffer the results of the infection her entire life.

In response to a question from Representative Keiser, Ms. Vick said AVN is most typically caused by trauma to a bone, steroid injections, or stress on bones. She said her doctors assume her case of AVN is the result of her back problems.

Workforce Safety and Insurance

Chairman Keiser called on Mr. Wahlin to testify regarding the issues raised by Ms. Vick. Mr. Wahlin said as the committee has heard Ms. Vick's vocational plan required her to perform a good-faith work search. He said as far as the positions for which Ms. Vick was released, in the vocational rehabilitation hierarchy Ms. Vick had been placed to return to work in the local job pool. He said Ms. Vick is a very intelligent woman and tested well.

Mr. Wahlin said WSI has a two-strike for noncompliance policy. He said in the first case Ms. Vick failed to comply with her vocational rehabilitation plan by having an unexcused absence from her training program. He said an injured employee is allowed to miss training if there is a doctor's excuse. He noted the administrative law judge recognized Ms. Vick has problems with sleeping and oversleeping. He said Ms. Vick's record reflects many instances of missed appointments, with some being excused and some being unexcused.

In response to a question from Representative Amerman, Mr. Wahlin said as part of her vocational rehabilitation services Ms. Vick completed the Test of Adult Basic Education (TABE). He said this is a standardized test. He said although having reached a grade 12 level does not automatically qualify a person for most jobs, but it is a good indicator of what that person's abilities are.

Representative Keiser said Ms. Vick makes a good point that if an injured employee has the flu why would an injured employee need a doctor's note to prove the illness. Additionally, he questioned whether an injured employee's pattern of compliance carries some weight in determining whether an injured employee should be found in noncompliance.

Representative Keiser questioned Ms. Vick's statement that the IME doctor reviewed the wrong records. Mr. Wahlin said he was not certain exactly what Ms. Vick was referring to, but he will get a copy of the IME letter to allow Ms. Vick to review the information upon which the IME doctor based his determination.

Representative Dietrich questioned the 20 hours of self-help computer training Ms. Vick completed. He said it seems there may have been a better and more effective method to train Ms. Vick for a customer service job.

Mr. Wahlin said the record seems to reflect a tug-of-war between Ms. Vick and vocational rehabilitation service providers. He said it sounds like Ms. Vick is also voicing her frustration with the vocational rehabilitation process. He said when a tug-of-war situation arises, it is typically in the vocational rehabilitation arena.

In response to a question from Senator Hacker, Mr. Wahlin said in providing vocational rehabilitation services, skill enhancement is a struggle. He said WSI uses a variety of providers to provide these services to injured employees. Senator Hacker mentioned the North Dakota University System has continuing education programs that may be a valuable resource for WSI to consider using.

In response to a question from Representative Dietrich asking Ms. Vick how the adversary relationship between her and WSI could have been avoided, Ms. Vick said she really tried to ask for help. She said her noncompliance is because she was sick and because WSI was telling her she could perform activities she was unable to perform. She said all she asked was that WSI work with her to help her through this situation. Ms. Vick said one of the lessons she learned is that an injured employee should document everything from the first day of injury.

In response to Representative Dietrich's question, Mr. Wahlin said he struggles with this situation. WSI struggles with how best to get an injured employee to do certain things. He said there are choices ranging from using a carrot and using a stick. He said North Dakota's vocational rehabilitation services are beyond those services other states' workers' compensation systems use. But, he said, getting a job is difficult and there is no easy answer.

In response to a question from Representative Meyer, Mr. Wahlin said historically WSI has looked at volunteer programs to assist in work hardening. He said the reality is that there are a limited number of opportunities for injured employees to use volunteer services and he thinks it is an unrecognized opportunity and more of these opportunities should be fostered.

Representative Keiser said the Preferred Worker program has recognized moderate success, but he thinks this program is underutilized.

Ms. Vick said in her experience with the Preferred Worker program, it was of no assistance. She said although she has a Preferred Worker card, and she listed this on her resume, employers are not familiar with the program and Job Service North Dakota is not familiar with the program. She said she had two years of unsuccessful attempts to use the Preferred Worker program.

Committee Discussion

Chairman Keiser called on Mr. Vetter for comments regarding issues raised by Ms. Vick. He said Ms. Vick's story seems like an example of poor communication.

Ms. Vick questioned whether WSI has any data regarding the number of injured employees found in noncompliance. She said some injured employees are seriously ill and are faced with also trying to comply with vocational rehabilitation requirements. She said compliance is difficult when you are dealing with pain, depression, and anger. She said in her case it was very frustrating that three people controlled her whole life. She said WSI needs to be more accountable and needs to be more balanced.

Representative Keiser said he is concerned that at the administrative level the decision was based on the pattern of noncompliance. He said he thinks the decision should also recognize whether there was a pattern of compliance.

Ms. Vick said the record does not show that she arrived at Spherion Staffing on three separate occasions and was turned away because the meeting room was busy and therefore she was unable to perform her self-paced study.

Representative Dietrich said it was likely that in Ms. Vick's situation, compliance was complicated even further by Ms. Vick's complex illness.

Senator Marcellais recognized that both Ms. Vick and Mr. Riley discussed the issue of depression and stress and questioned whether it might be possible to direct administrative law judges to consider an injured employee's mental health when reaching decisions.

COMMITTEE WORK

Senator Marcellais said he questions why WSI and the Social Security Administration are treated totally separately. It seems like it is a waste of time when so many elements are similar.

Representative Keiser said WSI and Social Security are two totally different programs. He said Social Security disability and supplemental security income are federal programs with purposes that differ from WSI's coverage. However, he said, he does support the idea of trying to better coordinate the state and federal programs.

It was moved by Senator Marcellais, seconded by Representative Dietrich, and carried on a voice vote that the Legislative Council staff be requested to draft a study resolution directing a study of the commonalities between various disability programs.

Representative Amerman questioned whether the committee will be receiving information regarding the effectiveness of vocational rehabilitation services. Representative Keiser said committee counsel is in the process of working with WSI to draft a proposed pilot program. He said it would be possible to incorporate data collection as a component of this legislation.

It was moved by Representative Amerman, seconded by Senator Dietrich, and carried on a voice vote that the Legislative Council staff be requested to draft a bill that includes data collection on vocational rehabilitation data.

Representative Dietrich stated that WSI's job search requirements need to be addressed. He requested that WSI reconsider the job search requirements.

Chairman Keiser called on committee counsel to present a bill draft [90305.0100] relating to workers' compensation permanent partial impairment awards for loss of vision. Committee counsel reviewed a bill draft amending NDCC Section 65-05-12.2(11). She said the bill draft provides for an addition to the schedule of injuries, providing that the loss of vision for an eye above 20/200 corrected, there would be a permanent impairment multiplier of 50. She said the bill would apply to all injuries that occur on or after the effective date of the Act.

In response to a question from Representative Dietrich, committee counsel said it would be possible to amend the bill draft to provide an emergency clause. She said the selection of 20/200 as the required vision impairment was based upon the recommendation of WSI. She said this bill draft arises from the issues brought forward by the injured employee, Mr. Johanneson. She said his injury was incurred in June 2005.

In response to a question from Senator Hacker, committee counsel said the permanent partial impairment benefit is a one-time payment intended to compensate the injured employee for damage to the body.

Ms. Green reported the vision standard of 20/200 represents the federal baseline for legal blindness. She said at 20/200 an individual would retain a significant amount of function in an eye. She said the selection of the multiplier of 50 was WSI's attempt to fit this impairment into the already existing schedule of benefits.

Committee counsel stated that based upon a document published by the University of Illinois Eye and Ear Infirmary, a person with 20/200 vision would have to come up to 20 feet to see a letter on an eye chart that a person with normal vision could see at 200 feet. She said the document indicates 20/20 is commonly used as the vision standard for a pilot's license, 20/40 for a driver's license, 20/80 for special education assistance, and 20/200 for tax benefits.

Mr. Balzer stated the state commercial driver license standards vary from the federal standards. He said federal Department of Transportation requirements require 20/40 vision corrected in both eyes. He said if the vision is impaired in one eye it would be necessary to have a federal waiver. He said North Dakota Department of Transportation requirements for a commercial driver's license are similar, but the waiver process allows for a lower standard.

Representative Keiser said he is not comfortable with using the visual standard of 20/200.

Senator Hacker indicated 20/200 is just one measurement of vision. He said visual impairment can be measured by a variety of factors.

Representative Keiser agreed there are likely a number of ways vision may be measured but addressing visual acuity seems like a good start.

In response to a question from Representative Amerman, Representative Keiser said the use of a multiplier is a way to indicate an amount equal to the number of weeks at the state's average weekly wage.

It was moved by Representative Dietrich, seconded by Representative Amerman, and carried on a voice vote that the permanent partial impairment bill draft be amended to include an emergency clause.

It was moved by Senator Hacker and seconded by Representative Dietrich that the permanent partial impairment bill draft be amended to set a loss of vision standard of 20/80 with a multiplier of 50 and graduate to a larger multiplier for greater visual impairments.

Representative Keiser said he anticipates that additional work will need to be provided on this bill draft but recognizes it is helpful for WSI to have the bill draft on hand in preparing the requested information.

Representative Dietrich said he is concerned with the multiplier of 50. He said the impairment schedule provides amputation of the thumb provides for a multiplier of 65. He said as a right-handed individual he would rather lose his left thumb than the vision in one of his eyes.

In response to a question from Representative Keiser, Ms. Green said the multiplier of 50 would apply unless there was actual enucleation of the eye.

Representative Keiser said he does recognize there is a spectrum of impairment between 20/80 vision and total blindness. He said the committee may wish to consider a graduated scale to recognize this spectrum of visual impairment.

The motion carried on a voice vote.

Chairman Keiser called on committee counsel to review a bill draft [90307.0100] amending the workers' compensation law relating to independent medical examinations. She said the bill creates a distinction between IMEs, which contemplate the actual examination of an injured employee and an independent medical review, which contemplates a file review of an injured employee's records.

In response to a question from Senator Hacker, committee counsel said the creation of the distinction between the independent medical review and the IME is not intended to limit WSI in performing these examinations and reviews. She said in large part the distinction is designed to avoid the misperception that all IMEs would include a physical examination. She said the practice of WSI is to order and arrange whatever IME or review is appropriate. She said as amended this law would continue to allow WSI to arrange for the appropriate examination or review. She said she can envision circumstances under which the independent medical review would evolve into the need for an IME just as it does under current law.

In response to a question from Representative Amerman questioning what would happen if an injured employee wanted an IME instead of an independent medical review, Representative Keiser said the injured employee does not have the authority to dictate the type of examination or review conducted by WSI.

It was moved by Representative Dietrich, seconded by Senator Marcellais, and carried on a roll call vote that the bill draft relating to the distinction between independent medical examinations and independent medical reviews be approved and recommended to the Legislative Council. Representatives Keiser and Dietrich and Senators Hacker and Marcellais voted "aye." Representative Amerman voted "nay."

The committee considered a bill draft [90304.0100] that would amend the workers' compensation mileage for injured employee's medical travel to allow for actual mileage traveled.

Representative Keiser said in today's age and the use of computer programs it seems improper to limit reimbursement from city limit to city limit. He said the bill draft allows for calculation for reimbursement for travel using miles actually and necessarily traveled.

It was moved by Representative Amerman, seconded by Representative Dietrich, and carried on a roll call vote that the bill draft relating to mileage reimbursement for actual miles traveled be approved and recommended to the Legislative Council. Representatives Keiser, Amerman, and Dietrich and Senators Hacker and Marcellais voted "aye." No negative votes were cast.

Chairman Keiser requested committee counsel review a bill draft [90308.0100] that would provide for WSI payment of injured employees' attorney's fees and costs for a case review. She said the bill draft would allow an injured employee who utilizes the services of OIR to be eligible for payment of attorney's fees and costs for consulting an attorney before an administrative hearing is held. She said the bill draft provides some limitations, including an injured employee may consult one attorney per administrative order and the payment amount may not exceed a total of $500 per injured employee per administrative order. She said the bill draft outlines how an attorney submits a statement for reimbursement and outlines what costs may be reimbursed. She said the bill draft will apply to all injured employees who have received a certificate of completion from OIR on or after the effective date of the Act.

In response to a question from Representative Keiser, Ms. Green said the $500 limitation is inclusive of both fees and costs. Representative Keiser said he agrees with Ms. Green's interpretation but is concerned that the costs associated with the review may take a large chunk of the $500 allotted. He said

it would not take much for copy fees at eight cents per page to add up to a substantial sum.

Senator Hacker thought the initial discussion would be to allow $1,500 for attorney's fees.

Representative Keiser suggested the committee consider separating fees and costs to allow fees not to exceed $500 and some other statutorily established amount for costs.

Representative Keiser said he thinks it is important that this bill draft require the injured employee to use the services of OIR in order to be eligible for the attorney's fee option.

In response to a question from Representative Amerman, Mr. Kocher said representatives of OIR are not called to testify at administrative hearings.

It was moved by Senator Hacker, seconded by Representative Dietrich, and carried on a voice vote that the bill draft to provide for an injured employee's attorney's fees and costs be amended to provide a $500 fee maximum and a $150 cost maximum as well as clarifying WSI shall pay for the identified costs.

It was moved by Senator Hacker, seconded by Representative Dietrich, and carried on a roll call vote that the amended bill draft relating to Workforce Safety and Insurance payment of attorney's fees and costs for a case review be approved and recommended to the Legislative Council. Representatives Keiser, Amerman, and Dietrich and Senators Hacker and Marcellais voted "aye." No negative votes were cast.

Chairman Keiser called on committee counsel to review the bill drafts that are still in the development stage. She said she is working with WSI in preparing bill draft language relating to creating a pilot project for rehabilitation services. She said the intent of this bill draft would be to give the injured employee a role in directing his or her own rehabilitation as well as giving employers more incentive to hire injured employees. She said a related item is the issue of meaningful data to track the effectiveness of rehabilitation services.

Committee counsel said another bill draft in the development stage is to address preexisting conditions. She said the intent is to cover the preexisting condition until WSI establishes the condition was preexisting, after which WSI would stop covering that preexisting condition.

Committee counsel said she had discussed the issue of subrogation with WSI and at this time there is no legislation being drafted. She said WSI had mentioned it may evaluate customer service and education as a way to address concerns relating to subrogation.

Committee counsel said she is working with WSI to create bill draft language to address a cost-of-living adjustment for injured employees receiving temporary partial disability benefits.

Senator Hacker questioned whether it might be possible to provide WSI with discretion in when to prohibit recoupment of coverage of a preexisting condition.

Committee counsel reviewed the issues raised by injured employees who have had their claims reviewed this interim.

Committee counsel said the committee reviewed five more injured workers during the course of this committee meeting and there are four additional injured workers up for case review at the upcoming Fargo meeting on September 25-26, 2008.

Senator Hacker said he has received some correspondence from Mr. Walter, the injured employee who had his case reviewed in Fargo. He said since the case was reviewed, Mr. Walter has received a notice that his benefits will be terminated.

Chairman Keiser called on Ms. Peyerl for information regarding the status of Mr. Walter's case. Ms. Peyerl said unfortunately Mr. Walter had a setback in health and has had to stop his vocational rehabilitation plan at this time and is therefore receiving full benefits. However, she said, Mr. Walter incurred an overpayment due to income he received from firetruck sales. She said Mr. Walter had been entirely forthcoming regarding the possibility of receiving payment for earlier sales. She said Mr. Walter was requested to provide WSI verification of income by submission of federal income tax filings, and with his most recent submission, WSI determined there was a $9,000 overpayment. She said the parties have stipulated to give Mr. Walter an extended period of time to pay back this overpayment.

Representative Keiser said he also has been in contact with Mr. Walter. It is his understanding that Mr. Walter believes the law should disregard earnings from a second job. Representative Keiser said he compliments WSI in providing a payment schedule to allow Mr. Walter to address the overpayment over several years time.

Senator Hacker said through the claims the committee has reviewed he has become aware of the problems associated with an injured employee being unable to contribute to Social Security retirement or an individual retirement plan. He said the committee might want to consider whether to allow an injured employee to opt-in to the state's Public Employees Retirement System.

Representative Keiser said another possible way to deal with impaired retirement options would be to allow an injured employee to set one-half of the additional benefit payable amounts aside to invest in some retirement product. He said under this plan the injured employee would not receive additional benefits payable at retirement age but would have a fund at retirement from which to draw.

Senator Hacker said the current workers' compensation system does not encourage an injured employee to be an entrepreneur.

The committee requested WSI to provide a historical analysis of the permanent partial impairment benefits.

Chairman Keiser called on committee counsel to discuss proposed names for the Office of Independent Review. She said WSI has contacted her with the

following names--Office of Benefit Review, Office of Claim Review, and Decision Review Office.

Representative Amerman said he thinks OIR should be totally independent of WSI. He said he is not sure that a name change in and of itself is very important. He said he would like to revisit the issue of whether an injured employee should be required to use OIR in order to have attorney's fees paid.

Representative Keiser said historically OIR was a name change from the Worker Advisory Program. He said the name change was a relatively quick decision and was not made with the intention of making the office independent of WSI.

Mr. Kocher said although the OIR was never intended to be independent, the office does provide valuable services.

It was moved by Senator Hacker to change the name of the Office of Independent Review to the Decision Review Office. The motion failed for lack of a second.

It was moved by Senator Hacker, seconded by Representative Dietrich, and carried on a voice vote that Legislative Council staff be requested to prepare a bill draft to provide workers' compensation coverage for prescribed aides, such as eyeglasses, hearing aids, and body braces.

Representative Keiser requested WSI to provide a presentation on the Preferred Worker program. He said it would be helpful to receive recommendations from WSI and CorVel on how to improve this program.

Representative Keiser said he is seeking suggestions on how to address the concerns raised regarding subrogation. He said there seems to be a concern or perception that WSI is not an active partner in subrogation actions. He said at this point he is not seeking any additional information from committee counsel on the issue of subrogation.

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

_____

Jennifer S. N. Clark
Committee Counsel

ATTACH:2