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September 15, 2008

Representative George Kaiser, Chairman
Interim Industry, Business and Labor Committee

RE: WSI Claim of Doug Riley

Dear Chairman Kaiser and Members of the Committee:

I have represented Doug Riley in his struggles with WSI for 3 years. In many respects, Doug is typical of the injured workers I have represented for the past 23 years. He was taught the value of hard work at an early age; consequently, he has an outstanding work ethic. He is poorly educated; consequently, all of his life has been spent performing physical labor. He has high expectations of himself and those who say they are there to help him. When he can no longer perform the kind of work he's done all his life or perform routine household chores or participate in lifelong hobbies or his usual social activities, he becomes upset. When he is in chronic pain which simply doesn't go away and affects everything he does, from sleeping to sex, he becomes depressed. When the people who are supposed to help him put his life back together don't seem to care, he becomes angry. Doug's work injury wasn't a speed bump in his life; it was a brick wall.

Doug had three administrative hearings on his workers compensation claim after WSI accepted liability for his work injury. Doug suffered an injury to his neck and both shoulders while working for Wishek Steel and Manufacturing, Inc., on February 11, 2003. He has a G.E.D. On December 11, 2006, Temporary Administrative Law Judge Janet Demarais Seaworth ruled that Doug, despite a 46 percent whole-person impairment, could return to work as a telephone solicitor.

On February 18, 2007, TALJ Seaworth determined that Doug failed to perform a good-faith work search and was not entitled to reinstatement of disability benefits. Finally, on March 19, 2008, TALJ Seaworth ruled that Doug's post-injury depression was directly and substantially related to his work injury. Neither of WSI's earlier orders had taken Doug's work-related depression into account.

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While Doug's work-related depression hadn't been established at the time of his rehabilitation and noncompliance hearings, it has now. It may have been understandable for WSI not to consider his depression in formulating a rehabilitation plan in 2006. It is not understandable why WSI refuses to exercise its continuing jurisdiction to consider the effects of his depression on his employability as a telemarketer now. The purpose of continuing jurisdiction is to correct mistakes. That's all Doug is asking WSI to do.

I understand that this committee is not charged with overseeing WSI's day-to-day decision-making. You're looking for suggestions for legislation to improve the workers compensation process. Here are a few suggestions, based on Doug's experience with WSI:

- 1). Require documented vocational rehabilitation results. Recently, when I asked WSI Deputy Director John Halvorson 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? Don't employers, employees and the public deserve to know if WSI's rehabilitation efforts are actually working? Injured workers aren't lazy; they're discouraged. Are we supposed to believe Doug Riley is drawing Social Security Disability benefits because he doesn't want to work? Isn't it more likely that his skills no longer match his physical abilities? I would suggest that WSI contact every injured worker 6 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 re-evaluate vocational rehabilitation possibilities.
- 2). Exercise some common sense presumptions. WSI often seems to ignore the reality that injured workers live in. WSI should be directed 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 for determining the efficacy of 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

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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 termination such benefits becomes final. In other words, don't 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 MRI's 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 decision makers.

Mr. Chairman, I have limited my suggested legislative changes to Doug Riley's fact situation. This isn't intended to be an all inclusive list of needed changes.

Sincerely,



Stephen D. Little
Attorney at Law

SDL/ps

cc: Doug Riley

