

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Tuesday, July 1, 2014
Prairie Room, State Capitol
Bismarck, North Dakota

Senator Lonnie J. Laffen, Chairman, called the meeting to order at 11:00 a.m.

Members present: Senators Lonnie J. Laffen, George B. Sinner; Representatives Bill Amerman, Curtiss Kreun, Gary R. Sukut

Member absent: Senator Tom Campbell

Others present: Senator Mac Schneider, Grand Forks, member of the Legislative Management
See [Appendix A](#) for additional persons present.

It was moved by Representative Kreun, seconded by Representative Sukut, and carried on a voice vote that the minutes of the August 21, 2013, committee meeting be approved as distributed.

REPORTS

Performance Evaluation

Chairman Laffen called on Mr. Jason Wahl, Audit Manager, State Auditor's office, to report on the status of the Workforce Safety and Insurance (WSI) performance evaluation ([Appendix B](#)).

In response to a question from Chairman Laffen, Committee Counsel said for purposes of planning future meetings, the committee could plan on scheduling a meeting in early September to receive the WSI performance evaluation, and at that time, the committee can determine whether it will be necessary to hold an additional meeting in October.

Safety Grants

Chairman Laffen called on Mr. Barry Schumacher, Workforce Safety and Insurance, to present the biennial report ([Appendix C](#)) regarding compiled data relating to safety grants issued under North Dakota Century Code Chapter 63-03.

In response to a question from Chairman Laffen, Mr. Schumacher said under the safety training and education program (STEP), there are several associations that have assisted in reducing injuries and accidents. He listed multiple associations as examples, including the North Dakota Motor Carriers Association, North Dakota Safety Council, and North Dakota Association of Builders.

In response to a question from Senator Sinner, Mr. Schumacher said it is not uncommon for recipients of STEP funds to provide training at annual meetings. He said the funding for STEP comes from WSI premiums.

In response to a question from Representative Sukut, Mr. Schumacher said STEP is separate from the safety discount program.

In response to a question from Chairman Laffen, Mr. Schumacher said the ergonomic initiative program (ERGO) and the ERGO grant are available to all employers that have employees and are in good standing with WSI.

Rehabilitation Services

Chairman Laffen called on Mr. Timothy Wahlin, Workforce Safety and Insurance, to present the annual report from WSI on pilot programs to assess alternative methods of providing rehabilitation services under Section 65-05.1-06.3. Mr. Wahlin said WSI has three new rehabilitation services programs it is working on. He said the first new program is in the early stage of development and will provide for a vocational support program. This new program will provide rehabilitation services to assist with psychological, economic, and social elements. He said if an injured worker participates in this new program, some of the rehabilitation timelines will be relaxed. He said the

hope is that the use of some of these new tools and the collaborative process will improve the rehabilitation services outcomes.

Mr. Wahlin said the second new rehabilitation services program is a scholarship program for retraining students. He said there are currently six injured workers participating in this program. Under this new scholarship program, he said, WSI makes scholarships available to assist in paying for additional education beyond the traditionally covered associates degree. He said the scholarship program will assist in helping the injured worker achieve a bachelor's degree. He said the program will be evaluated at the backend in order to determine whether it is effective.

Mr. Wahlin said the third new rehabilitation services program is a rehabilitation grant program for grants to rehabilitation partners. For example, he said, a grant might be provided to an adult learning center, which traditionally closes during the summer months, in order to allow the adult learning center to remain open during this period to allow injured workers to continue with training during the summer months.

In response to a question from Chairman Laffen, Mr. Wahlin said for the new scholarship program, not every injured worker is interested in participating.

In response to a question from Senator Sinner, Mr. Wahlin said under the new scholarship program, an eligible injured worker would be eligible to have school expenses paid, but would not be eligible for continued wage loss benefits during this extension.

In response to a question from Representative Amerman, Mr. Wahlin said under the new scholarship program, participation is voluntary and only a small number of injured workers have opted to participate. He said if the program is successful, it is likely the program will be expanded. He said he does not think it would work well to make the program mandatory.

Chairman Laffen requested WSI provide additional information at a future meeting regarding the new scholarship program.

In response to a question from Representative Sukut, Mr. Wahlin said none of the three new rehabilitation services programs require a general fund appropriation. He said he will provide fiscal information regarding the rehabilitation programs at a future meeting.

In response to a question from Chairman Laffen, Mr. Wahlin said even with the state's employment mix moving to heavier industry and the associated higher risk and more expensive injuries, the system continues to be balanced and rates continue to be very stable.

In response to a question from Senator Sinner, Mr. Wahlin said WSI utilizes a number of different systems to stay on top of the shift in industry and growth being experienced in the state.

Mr. Schumacher said WSI statistics indicate with the economic growth in the state, there has been a significant increase in WSI's book of business and there has been a significant increase in the number of workers' compensation claims being filed. He said as a result of this economic growth, in 2013 WSI added 2 new full-time equivalent (FTE) positions.

Mr. Schumacher said one new trend WSI has recognized is that with the increase in out-of-state businesses entering the state, some of these new businesses are not familiar with the state's monopolistic system, and there has been a related increase in noncompliance by the employers. However, he said, if an injured worker files a claim with WSI and the employer is not in compliance with the state's workers' compensation laws, WSI will cover the claim; however, the employer may be subject to penalties due to this noncompliance. He said there are several state agencies, such as the Secretary of State and Job Service North Dakota, that help businesses in complying with the state's laws.

In response to a question from Representative Kreun, Mr. Schumacher said although there has been an increase in the number of covered workers in the state, the ratio of claims has remained steady.

Chairman Laffen called on Mr. Bryan Klipfel, Executive Director, Workforce Safety and Insurance, for comments regarding trends at WSI. Mr. Klipfel introduced Ms. Roberta Ripplinger, President, Workforce Safety and Insurance Board of Directors, and Mr. Michael Gallagher, Member, Workforce Safety and Insurance Board of Directors.

Mr. Klipfel said even with the increased economic activity in the state, the WSI fund is healthy and WSI continues to manage claims. Additionally, he said, effective July 1, 2014, injured workers will recognize a cost-of-living adjustment adjustment of 4.1 percent and the maximum weekly benefit level will increase 4.1 percent. He said the WSI Board of Directors has recommended a 39 percent premium dividend credit for the upcoming premium year.

Chairman Laffen said he supports WSI coming in during the 2015 legislative session to request an increase in FTE positions to ensure WSI has the resources necessary to get the job done right.

Mr. Klipfel said WSI has designed a system of using a temporary workforce to address the increased workload. He said WSI has offered these temporary employees high wages to help offset the lack of retirement benefits and an individual health insurance policy, and if the temporary employee wants a family health insurance policy, WSI helps with a portion of that expense as well.

Chairman Laffen said in the course of his travel for work, he has heard employers in other states speak highly of North Dakota's workers' compensation system.

CLAIM REVIEW

Claim Review Process Concerns

Chairman Laffen distributed a copy ([Appendix D](#)) of correspondence from Mr. Mark G. Schneider, Attorney, Fargo, regarding his concerns relating to the committee's claim review process.

Representative Amerman said the issues of preexisting conditions and independent medical examinations (IMEs) are ongoing issues that the committee has tried to address over the years. He said he is open to suggestions on how to address these issues. He said these are high-profile issues that need to be addressed.

Representative Sukut said there are concerns the diagnosis and recommendation of an injured worker's treating physician are not given enough weight. He asked whether it might be valuable to research how other states address this issue.

In response to a question from Chairman Laffen, Mr. Wahlin said he is not certain the last time the legislature studied these issues, but it is likely there are outside studies available.

Senator Sinner said he agrees there is a conflict of interest between the interests of the injured worker and the the interests of keeping premiums low.

Chairman Laffen said since the issue of IMEs was addressed during the 2013 legislative session, he is not interested in revisiting this issue again so soon. He said in looking at the bigger picture, perhaps there is a way to provide an advocate for injured workers. He said he would like to receive information from WSI at the next meeting regarding this issue.

Chairman Laffen called on Senator Mac Schneider for comments regarding Mr. Schneider's letter. Senator Schneider said in addressing the issue, it will be important for the committee to consider data regarding how often IMEs contradict treating physicians, data regarding how many IMEs are performed by North Dakota physicians, and data regarding the expense associated with an injured worker subpoenaing treating physicians to testify on the injured worker's behalf.

Senator Schneider said if a treating physician meets the necessary requirements, that treating physician's opinions should be given greater weight as WSI makes determinations.

Representative Kreun said he is concerned that if we keep portraying physicians who conduct IMEs as "selling themselves," we will be helping to ensure in-state physicians do not not perform these IMEs. Additionally, he said, he is interested in learning more about whether there is a problem with injured workers' access to legal representation.

Senator Schneider said as an attorney, he gets numerous calls from injured workers seeking legal representation; however, he limits the number of workers' compensation cases he is willing to take.

Chairman Laffen requested that WSI provide the committee with an update on the IME law and data regarding IMEs and an update of the laws relating to preexisting conditions. Senator Sinner said he would like this IME information presented at the next meeting to include data regarding the number of physicians who conduct these IMEs and who employs the IME physicians.

Injured Worker Case Summary

Mr. Floyd Seabourn, injured worker, applied and was approved to have the committee review his claim. Chairman Laffen called on Ms. Dorothy Seabourn, Mr. Seabourn's wife, and Mr. Chuck Kocher, Workforce Safety and Insurance, to present the claim for committee review.

Mr. Kocher provided a summary of Mr. Seabourn's case. He testified:

- Mr. Seabourn sustained an injury to his lumbar and thoracic spine on December 11, 2012. At the time of injury, Mr. Seabourn worked as a truck driver and was working in the oilfields of North Dakota. Mr. Seabourn received medical treatment on the date of injury.
- On January 16, 2013, the injured worker's claims adjuster had a telephone conversation with the employer, which indicated the employer offered the injured worker a dispatch position beginning January 15, 2013, and that the injured worker declined the position indicating his injury prevented him from sitting. The employer reported Mr. Seabourn's last day worked was December 13, 2012. Mr. Seabourn voiced concerns regarding reduction of pay with the dispatching job along with the high cost of living in North Dakota, making it difficult to accept and perform the job of dispatcher.
- On January 17, 2013, WSI issued a Notice of Decision Accepting Claim and Awarding Benefits. WSI accepted liability for contusion of back, thoracic sprain and strain, and lumbar sprain and strain. Mr. Seabourn's physician released him to return to light-duty work, which did not include truck driving.
- On March 8, 2013, WSI issued a Notice of Intention to Discontinue/Reduce Benefits effective January 15, 2013, indicating, "You have been released to return to employment by Erin Pirkel, PA-C beginning 12/12/2012. On 12/13/12 you were put on light duty/desk work restrictions and your employer offered you a position within those restrictions on 1/15/13 and you declined it, therefore, self-limiting your income."
- On March 20, 2013, the injured worker requested reconsideration of WSI's Notice of Decision, indicating he was unable to work because of restrictions related to the December 11, 2012, work injury.
- On May 22, 2013, WSI issued an order stating "Claimant is not entitled to disability or vocational rehabilitation benefits while he voluntarily limits his income."
- On May 29, 2013, Mr. Seabourn requested the assistance of the WSI Decision Review Office (DRO), and on June 12, 2013, DRO issued its certificate of completion without a change in the decision of the order.
- On June 20, 2013, Mr. Seabourn requested a hearing on the May 22, 2013, order.
- On December 5, 2013, a hearing was held before an administrative law judge (ALJ).
- On December 11, 2013, the ALJ issued Findings of Fact and Conclusions of Law and Order, finding that the injured worker's employer offered the injured worker light-duty office employment and he declined to accept that offer. Additionally, the ALJ found there were no medical restrictions preventing the injured worker from doing light-duty employment. As a result, the ALJ found the refusal to accept the offered employment was a voluntary failure to limit income pursuant to Section 65-05-08, and this action disqualified the injured worker from receiving disability benefits for wage loss. The WSI order was affirmed.
- Mr. Seabourn did not appeal the ALJ's order, and the decision became final.

In response to a question from Chairman Laffen, Mr. Kocher said he does not think the employer's offer of employment or the employee's denial of employment was in writing.

In response to a question from Representative Amerman, Mr. Kocher said the injured worker did not have legal representation during the administrative hearing. He said he is not certain whether Mr. Seabourn used the WSI funds available to have his claim reviewed after finishing the DRO process.

In response to a question from Chairman Laffen, Mr. Kocher said if the injured worker had accepted a job, WSI would have considered the difference in pay between the old job and the new job. Additionally, he said, if there had been an unsuccessful work attempt, the injured worker may have had his wage loss reinstated; however, neither of these things occurred.

In response to a question from Senator Sinner, Mr. Kocher said a claims adjuster keeps an injured worker informed of the status of the injured worker's case; however, there is typically some material in the injured worker's file which the injured worker may not have been informed of. Senator Sinner said he is concerned that an injured worker may not always fully appreciate the consequences of the injured worker's decisions and the WSI notices can be confusing to a lay person.

Ms. Seabourn attended the meeting telephonically and presented a summary of her husband's claim. As part of the summary, Ms. Seabourn distributed a photograph of her husband and a packet of supporting documentation (on file in the Legislative Council office). Ms. Seabourn testified:

- Many errors were made in her husband's workers' compensation claim, including evidentiary errors.
- Her husband was not allowed time to appeal the ALJ's order, in part because of mistakes on WSI's website which were relied on to her husband's detriment.
- She requested that WSI exercise its continuing jurisdiction and reopen her husband's claim to address the issues she raised and reverse its decision.
- The claimed job offer did not occur. The evidence in the WSI records does not support a finding that the job was offered. There are notepad entries missing in the WSI records. The claimed job offer was more than her husband could handle, it was for less pay, and it was for longer hours.
- The administrative hearing was problematic.
 1. The injured worker did not fully understand the process, whereas WSI is very experienced and knowledgeable about the entire process, resulting in an unfair outcome. WSI has access to legal counsel and the employer has access to legal counsel, but the injured worker does not have access to legal counsel. Not only was Mr. Seabourn unable to afford legal counsel, but there are so few attorneys in the state willing to represent injured workers that he would not have been able to find an attorney even if he had been able to afford one. If the injured worker is not required to have legal counsel and it is nearly impossible to find legal counsel, the system should be designed to look out for the injured worker and do what is right for the injured worker.
 2. WSI limited the information presented at the hearing, failing to admit evidence that would have supported her husband's position.
 3. The injured worker did not have access to a recording of the administrative hearing.
- The appeal from the administrative hearing was problematic.
 1. After the hearing was held and the order was issued, the injured worker provided the ALJ with additional information and the ALJ stated he would treat this as a petition for reconsideration under Section 28-32-40. WSI and the employer opposed the motion for reconsideration. On January 10, 2014, the ALJ issued an Order Denying Request for Reconsideration.
 2. The injured worker did not understand when his time for appeal expired. Not only was the information on the WSI website incorrect regarding when an order becomes final (and this error has since been corrected), but he thought his time for appeal may have run before the ALJ ruled on the petition for reconsideration.

Chairman Laffen reminded Ms. Seabourn the role of the committee is to determine whether the state's workers' compensation law should be changed and that the committee is not designed to change the outcome of WSI decisions. Additionally, he said, the committee will not be taking any position or making findings regarding which party's version of the facts is correct.

In response to a question from Chairman Laffen, Ms. Seabourn said yes, it would have helped if the employer's job offer had been in writing and by registered mail.

Workforce Safety and Insurance and Discussion

Chairman Laffen called on Mr. Wahlin to comment on the issues raised by Ms. Seabourn. He summarized the law relating to appeal times and clarified that the order issued by the ALJ states the appeal process. He agreed that the law can be complicated, but the law needs to be followed in order for the system to work correctly.

Mr. Wahlin testified that WSI does not get involved in providing opinions to injured workers on the issue of when an ALJ's order becomes final and when the period for appeal begins and ends. He said these opinions are more appropriately made by the district court.

In response to a question from Chairman Laffen, Mr. Wahlin said he is unable to comment regarding whether a longer appeal period would be beneficial or helpful to injured workers.

Representative Kreun said if the period for appeal was lengthened, it would also have the effect of slowing down an injured worker's ability to seek relief.

Senator Sinner questioned why the injured worker did not have thirty days from the order denying reconsideration in which to appeal the ALJ's initial order. He said he thinks the bigger issue here is that the injured worker did not get legal counsel on the issue of appeal.

Mr. Wahlin reviewed the number of notices of decision WSI issues in a typical year and the process that an injured worker can follow to pursue a change in a WSI decision. He said following a notice of decision, an injured worker can request review by DRO. Following a decision by DRO, the injured worker has access to up to \$500 to hire an attorney to review the injured worker's claim. He said if the claim goes to an ALJ, WSI has funds available to pay the injured worker's attorney if the injured worker's appeal is successful, but WSI does not pay the attorney if the injured worker's appeal is not successful.

Chairman Laffen requested that WSI provide the committee information regarding the program that provides up to \$500 for claim review following DRO.

In response to a question from Chairman Laffen, Mr. Wahlin said he agrees it would be the best practice to have an employer's job offer in writing, but he does not know if a statutory requirement that the job offer be in writing would have a significant impact on injured workers.

Chairman Laffen said in summary, it appears the injured worker in this claim review has raised issues regarding the following matters:

- The job offer;
- Lack of legal counsel;
- Appeal timeframe;
- Administrative hearing recordings; and
- WSI notepad entries are incomplete or untruthful.

Representative Amerman said the fact that this injured worker was dissatisfied with his claims adjuster is a reoccurring issue. He said he is not sure whether there is a fix, but perhaps if claims adjusters had smaller caseloads they would be better able to provide improved customer service. Chairman Laffen said it is important for the committee to keep this in perspective, as perhaps the number of complaints is very small given the number of client touches each claims adjuster has.

Chairman Laffen said he thinks a job offer by an employer should be required to be in writing. Committee Counsel will prepare a bill draft to accomplish this.

Chairman Laffen said if the appeal clock is not stopped during reconsideration of an an ALJ's order, the law should be revised to accomplish this.

No further business appearing, Chairman Laffen adjourned the meeting at 3:15 p.m.

Jennifer S. N. Clark
Counsel

ATTACH:4