

## NORTH DAKOTA LEGISLATIVE MANAGEMENT

## Minutes of the

**WORKERS' COMPENSATION REVIEW COMMITTEE**

Tuesday, May 1, 2018  
Harvest Room, State Capitol  
Bismarck, North Dakota

Senator Jonathan Casper, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Senators Jonathan Casper, Randall A. Burckhard, Erin Oban; Representatives Joshua A. Boschee, George J. Keiser, Dan Ruby

**Others present:** See [Appendix A](#)

**It was moved by Representative Keiser, seconded by Representative Boschee, and carried on a voice vote that the minutes of the October 5, 2017, meeting be approved as distributed.**

Chairman Casper said he appreciates the committee members and injured workers understanding his decision to cancel the March 6-7, 2018, meeting due to the inclement winter weather. He said his priority as Chairman is the committee members' and injured workers' ability to arrive to committee meetings safely.

**SAFETY GRANT REPORT**

Chairman Casper called on Ms. Jane Wick, Supervisor of Loss Control/Special Programs, Workforce Safety and Insurance, for testimony ([Appendix B](#)) regarding the biennial report of compiled data relating to safety grants issued under North Dakota Century Code Chapter 65-03, as provided for under Section 65-03-05.

In response to a question from Senator Oban, Ms. Wick said Workforce Safety and Insurance (WSI) is on a performance review. She said WSI's grant programs are being reviewed for overall effectiveness and, pending the outcome of the performance review, WSI hopefully will have something more detailed to report on the effectiveness, outcomes, and injury reduction data of the grant programs at the next committee meeting.

In response to a question from Senator Burckhard, Ms. Wick said the Learning Management System has 580 different courses covering a multitude of topics, including courses in Spanish.

**VOCATIONAL REHABILITATION PILOT PROGRAM REPORT**

Chairman Casper called on Ms. Robin Halvorson, Return to Work Services Director, Workforce Safety and Insurance, for testimony ([Appendix C](#)) regarding the annual report on WSI pilot programs to assess alternative methods of providing rehabilitation services, as provided for under Section 65-05.1-06.3.

In response to a question from Representative Ruby, Ms. Halvorson said WSI has contracted with The Village Family Service Center. She said the behavioral counseling sessions are available in Bismarck, Devils Lake, Grand Forks, and Fargo, and also can be accessed online. She said the financial services sessions are available in Fargo or online and also are provided by The Village Family Service Center.

In response to a question from Representative Keiser, Ms. Halvorson said WSI continually trains medical case managers and claims adjusters to monitor the claims and if at any point they are able to refer the injured worker into the injured worker assistance program, the injured worker is asked to complete the sessions within the first 90 days.

**CLAIM REVIEW**

The committee scheduled five workers' compensation claim reviews brought to the committee by injured employees for the purpose of determining whether changes should be made to the statutes relating to workers' compensation as provided for under Section 54-35-22. For each of the claim reviews, the committee received a summary by Mr. Chuck Kocher, Constituent Liaison, Workforce Safety and Insurance, of the injured employee's claim; a presentation by the injured employee of the claim and issues; and a response by a representative of WSI.

**Tom Fryslie****Claim Summary**

Chairman Casper called on Mr. Kocher to provide a summary of Mr. Tom Fryslie's, workers' compensation claim. He said:

- Mr. Fryslie injured his left leg on August 7, 1974, in the course of working as a construction laborer.
- Workforce Safety and Insurance accepted a claim for a fracture, compound mid-shaft left tibia and fibula.
- On November 7, 1988, Mr. Fryslie sought treatment for problems with his ankle following a recent incident.
- On June 29, 2011, Mr. Fryslie saw a physician for continued pain and discomfort in his left leg area.
- On February 12, 2015, Mr. Fryslie saw a second physician for left ankle pain and was diagnosed with post traumatic ankle arthritis.
- On November 3, 2016, Mr. Fryslie saw a third physician for an evaluation of his knee. The physician stated the injuries were related to the severe fall he suffered in 1974, and Mr. Fryslie has developed osteoarthritis in his right knee and needs to have an ankle arthroplasty or arthrodesis.
- On December 2, 2016, WSI received Mr. Fryslie's presumed closed questionnaire wherein Mr. Fryslie indicated he was experiencing right knee problems and was unsure if the symptoms were related to the initial work injury.
- On February 5, 2017, WSI denied Mr. Fryslie's request to reopen his 1974 claim because its medical consultant concluded there was no clear and convincing medical documentation or other evidence indicating Mr. Fryslie's right knee or left ankle problems were primarily caused by the original work injury.
- On March 7, 2017, WSI received Mr. Fryslie's request for reconsideration.
- On April 25, 2017, WSI issued an order denying the request to reopen the claim for payment of benefits because the 1974 work injury was not the primary cause of the right knee and left ankle condition.
- On April 27, 2017, Mr. Fryslie requested the assistance of the WSI Decision Review Office (DRO) to review the April 25, 2017, order.
- On May 8, 2017, the DRO issued a certificate of completion indicating no change in the decision of the order.
- Mr. Fryslie requested a hearing on the April 25, 2017, order but withdrew the request and WSI's order became final.

**Mr. Fryslie's Testimony**

Chairman Casper called on Mr. Fryslie to review his claim and discuss the issues related to his claim. Mr. Fryslie said he injured his left leg in 1974 as a result of a fall. He said when he had to fill out the workers' compensation forms in 1974, the box on the form indicating his injury read "fell and broke left leg". He said his accident was more severe than falling and breaking his left leg. He said the form lacked a description of what actually occurred, no one investigated the accident, and no one from the agency wrote a detailed report. He said here he is trying to prove his claim about his right knee and left ankle with a form from 1974 that contains no information. He said the attorney he wanted to hire charged more than WSI pays. He said it would be beneficial for injured workers if WSI provided a list of attorneys in North Dakota who work at the rate WSI pays.

In response to a question from Senator Burckhard, Mr. Fryslie said his construction laborer job in 1974 was a summer job while he was in college. He said he returned to college using crutches and had to use the crutches for a very long time.

In response to a question from Representative Ruby, Mr. Fryslie said he reported his right knee and left ankle problems in 1974 both after the accident and again after his cast had been removed from his left leg.

**Workforce Safety and Insurance Response**

Chairman Casper called on Mr. Timothy Wahlin, Chief of Injury Services, Workforce Safety and Insurance, to respond to the issues raised by Mr. Fryslie. Mr. Wahlin said Sections 65-05-01 and 65-05-35(1)(2) provide the claimant bears the burden of proving any entitlements to benefits. He said a claim for benefits is presumed closed if WSI has not paid any benefit or received a demand for payment of any benefit for a period of 4 years, and a claim presumed closed may not be reopened for payment of any further benefits unless the presumption is rebutted by clear and convincing evidence the work injury is the primary cause of the current symptoms.

Mr. Wahlin said there was no diagnosis for Mr. Fryslie's right knee or left ankle in 1974, and it was difficult to establish by clear and convincing evidence Mr. Fryslie's 1974 work-related injury was the primary cause of his current right knee and left knee problems. He said WSI seeks objective medical evidence supporting whether a work-related injury is a compensable injury. In Mr. Fryslie's situation, he said, the medical consultant said there was no evidence a diagnosis of degenerative arthritis could result from Mr. Fryslie's 1974 work-related injury.

In response to a question from Representative Ruby, Mr. Wahlin said in many of the reopening cases, medical history, documented complaints or treatments, and documentation of the initial injury are submitted to establish the work injury is the primary cause of the current symptoms. He said that information is the most common evidence received and considered by WSI.

In response to a question from Representative Boschee, Mr. Wahlin said there are significantly better means utilized now to document work-related accidents and injuries compared to how those reports were documented in the 1970s.

In response to a question from Senator Oban, Mr. Wahlin said he does not know whether Mr. Fryslie's 1974 injury claim outcome would have been any different had WSI received witness statements.

In response to a question from Representative Keiser, Mr. Wahlin said WSI is required by statute to reimburse attorneys representing injured workers up to a certain amount. He said the actual amounts reimbursed are specified within North Dakota Administrative Code and reviewed and adjusted every other year.

### **Debbie Feller**

#### **Claim Summary**

Chairman Casper called on Mr. Kocher to provide a summary of Ms. Debbie Feller's, workers' compensation claim. He said:

- On October 23, 2015, Ms. Feller filed a claim for an injury to her lumbar, pelvis, and unknown leg area due to the numerous tasks of lifting boxes weighing 30 pounds on a continuous daily basis while working as a manager. Ms. Feller twisted her ankle on October 23, 2015, on a small pothole in the factory floor while moving boxes. She has had numerous injuries or irritations since the injury occurred.
- On November 12, 2015, Ms. Feller indicated to a specialist that she was having pain down her buttocks into her right thigh and right foot.
- On April 8, 2016, an MRI was performed of Ms. Feller's lumbar spine and revealed mild protrusive discs with posterior annular tears at both the L4 and L5 levels.
- On June 9, 2016, WSI reviewed Ms. Feller's claim. The medical advisor indicated he was unable to correlate Ms. Feller's history of lumbar and radiating pain through her legs to the October 23, 2015, work injury.
- On June 13, 2016, WSI issued a notice of decision (NOD) accepting claim and awarding specific benefits for Ms. Feller's claim for a lumbar spine injury occurring on October 23, 2015. Workforce Safety and Insurance agreed to pay the associated medical treatment directly related to the October 23, 2015, incident and indicated the claim was accepted with payment for medical expenses through December 2, 2015.
- On June 23, 2016, Ms. Feller submitted a letter requesting reconsideration of the NOD accepting claim and awarding specific benefits.
- On August 31, 2016, WSI issued an order accepting liability for Ms. Feller's lumbar spine sprain/strain from October 23, 2015, through December 2, 2015.
- On September 15, 2016, Ms. Feller requested assistance of the DRO to review the August 31, 2016, order. The Decision Review Office issued a certificate of completion with no change to the order.
- On November 4, 2016, Ms. Feller requested a hearing on the August 31, 2016, order.
- On July 11, 2017, Administrative Law Judge Jeanne Steiner affirmed the August 31, 2016, order. Ms. Feller did not appeal the decision to district court and the order became final.

#### **Ms. Feller's Testimony**

Chairman Casper called on Ms. Feller to review her claim and discuss the issues related to the claim. Ms. Feller reviewed the details of her work-related injury and said her history of lumbar and radiating pain through her legs is a continuation of the October 23, 2015, work injury. She said she has tingling in her legs and a sore back and she finds it inconsistent that her doctors were deemed not to be credible witnesses by WSI, yet those were the doctors who treated her.

In response to a question from Chairman Casper, Ms. Feller said there should be a better method or mechanism for reimbursing attorneys who take claims against WSI.

In response to a question from Representative Keiser, Ms. Feller said all her medical bills until April or May of 2016 should have been covered because she was being seen and treated for injuries and pain related to her October 2015 work injury.

### **Workforce Safety and Insurance Response**

Chairman Casper called on Mr. Wahlin to respond to the issues raised by Ms. Feller. Mr. Wahlin said Section 65-01-02 defines a compensable injury as "an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings". He said under Section 65-01-02(10)(b)(7), the term "compensable injury" does not include injuries attributable to a pre-existing injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the pre-existing injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity.

Mr. Wahlin said WSI does not pay for pre-existing conditions if the conditions become symptomatic, but will pay if work substantially worsens or substantially progresses that underlying condition. He said the distinction is a clear delineation between what is health insurance and what is related to an industrial incident. He said if WSI had been aware of Ms. Feller's pre-existing conditions in a timely manner, her claim never would have been accepted because documentation established that her pre-existing conditions became symptomatic but not substantially worsened.

In response to a question from Senator Burckhard, Mr. Wahlin said there are roughly six or seven attorneys in the state who handle workers' compensation law. He said those attorneys represent injured workers at hearings and appear to be available for cases. He said there does not appear to be an attorney shortage within the scope of workers' compensation law in North Dakota.

Representative Keiser said it was important to recognize that regarding attorney reimbursement and pay for taking workers' compensation cases, the Legislative Assembly changed the law last session so that if an injured worker has a successful claim or appeal, whether at the administrative law level or in court, WSI will pay the attorney.

### **Kathleen Heintz**

#### **Claim Summary**

Chairman Casper called on Mr. Kocher to provide a summary of Ms. Kathleen Heintz's, workers' compensation claim. He said:

- Ms. Heintz filed a claim for a bilateral wrist injury that occurred on June 23, 2016, while working as a nurse. She described her injury as carpal tunnel syndrome.
- On June 23, 2016, Ms. Heintz saw a physician for her bilateral hand pain that had been ongoing for a few weeks. The physician's assessment was arthritis of hand and bilateral hand pain.
- On July 6, 2016, Ms. Heintz saw a second physician for left index finger numbness and left chronic thumb pain. An x-ray examination showed bone-on-bone osteoarthritis of her carpometacarpal joints, stage 3.
- On July 26, 2016, a medical consultant for WSI reviewed Ms. Heintz's claim and concluded he was unable to attribute the carpometacarpal arthritis to the common conditions of the work duties.
- On July 27, 2016, WSI issued a NOD denying benefits indicating "due to the diagnosis of bilateral arthritis the claim was staffed with WSI medical consultant and determined there is no casual relationship between the diagnosis of carpometacarpal and the work duties; therefore the claim is denied."
- On August 4, 2016, Ms. Heintz appealed the NOD and submitted a request for reconsideration asking WSI reconsider its decision to deny benefits.
- On September 22, 2016, WSI issued an order indicating Ms. Heintz's June 23, 2016, claim was denied.
- On September 29, 2016, Ms. Heintz appeals the order and requested the services of DRO to review the order. Workforce Safety and Insurance received a letter dated September 28, 2016, from a physician stating he believed Ms. Heintz's thumb osteoarthritis is directly caused by her many years of nursing activities.
- Workforce Safety and Insurance indicated to DRO the letter did not contain objective medical evidence to support the opinion.
- On October 18, 2016, DRO issued its certificate of completion indicating no change to the order.
- Ms. Heintz did not request a hearing and the order became final.

### Ms. Heintz's Testimony

Chairman Casper called on Ms. Heintz to review her claim and discuss the issues related to her claim. Ms. Heintz said the details of her claim and said her main concern is not understanding how her claim could be denied when the third physician wrote a letter on her behalf opining that her thumb osteoarthritis was directly caused by many years of nursing activities. She said the physician was a specialist and the examining physician and she cannot understand how WSI could conclude the physician's opinion was not objective medical evidence.

### Workforce Safety and Insurance Response

Chairman Casper called on Mr. Wahlin to respond to the issues raised by Ms. Heintz. Mr. Wahlin said Section 65-01-02 defines a compensable injury as "an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings". In Ms. Heintz's claim, he said, the missing objective medical evidence was that her osteoarthritis was caused by her years in the nursing profession as opposed to some other conditions, including aging.

In response to a question from Chairman Casper, Mr. Wahlin said there are all sorts of documented vibrational injuries that may occur or develop due to continuous work duties or tasks, especially in the heavier industries. He said in those cases WSI can numerically link the usage and microtrauma over to a work-related condition which is compensable.

Representative Keiser said during every recent legislative session the Legislative Assembly has rejected bills to make the treating physician the primary physician because the treating physician may not always be an expert in a particular area.

In response to a question from Senator Oban, Mr. Wahlin said Section 65-05-08.3 is the section addressing the factors WSI must consider when resolving conflicting medical opinions.

In response to a question from Representative Boschee, Mr. Wahlin said WSI will either write to the physician that objective medical evidence is needed or issue an order denying the claim for lack of objective medical evidence.

## Craig Whaley

### Claim Summary

Chairman Casper called on Mr. Kocher to provide a summary of Mr. Craig Whaley's workers' compensation claim. He said:

- On May 5, 1997, Mr. Whaley sustained an injury to his lumbar spine while working as an electrician. Mr. Whaley indicated he was "carrying a box of fittings to job trailer, stepped in pay loader ruts and twisted his back." Mr. Whaley's claim was accepted and benefits were paid.
- On June 20, 2006, Mr. Whaley sustained an injury to his cervical spine while working as an electrician. Mr. Whaley's claim was accepted and benefits were paid.
- On May 13, 2016, Mr. Whaley requested a permanent partial impairment evaluation for both the 1997 and 2006 injuries. The impairment evaluation was done in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment, Sixth Edition*. The treating physician rated the percentage of impairment for Mr. Whaley's cervical and lumbar spine at 9 percent (4 percent whole body for cervical combined with 5 percent whole body for lumbar). A minimum of 14 percent whole body impairment was necessary for Mr. Whaley to receive a monetary permanent impairment award.
- On December 16, 2016, WSI issued an order indicating no permanent impairments benefits are payable in connection with Mr. Whaley's 1997 or 2006 work injuries.
- On January 17, 2017, Mr. Whaley requested the assistance of DRO to review the December 16, 2016, order.
- On January 27, 2017, DRO issued a certificate of completion, identifying no information that would cause WSI to change the order.
- On February 23, 2017, Mr. Whaley requested a hearing on the December 16, 2016, order.
- On September 28, 2017, Administrative Law Judge Benjamin Thomas issued a final order indicating "based on the foregoing, Workforce Safety and Insurance's December 16, 2016, Order Denying Permanent Impairment Benefits in connection with Whaley's 1997 or 2006 work injuries is AFFIRMED".
- Mr. Whaley did not appeal the decision to district court and it became final.

**Mr. Whaley's Testimony**

Chairman Casper called on Mr. Whaley to review his claim and discuss the issues related to his claim ([Appendix D](#)).

**Workforce Safety and Insurance Response**

Chairman Casper called on Mr. Wahlin to respond to the issues raised by Mr. Whaley. Mr. Wahlin said Section 65-05-12.2 governs permanent impairment and provides a permanent impairment is not intended to be a periodic payment and is not intended to reimburse the employee for specific expenses related to the injury or wage loss. He said Section 65-05-12.2 requires WSI to calculate the amount of the award by multiplying 35 percent of the average weekly wage in this state on the date of the impairment evaluation, rounded to the next highest dollar, by the permanent impairment multiplier specified in subsection 10. He said under the schedule found in of Section 65-05-12.2(10) for a whole body impairment between 1 and 13 percent, the permanent impairment multiplier is 0.

In response to a question from Representative Ruby, Mr. Wahlin said Minnesota's permanent partial impairment evaluation system is radically different from North Dakota's. He said Minnesota uses a different set of American Medical Association guides and determines awards differently.

Representative Keiser said many of the concerns brought up by Mr. Whaley have been addressed by previous committees similar to the Workers' Compensation Review Committee. He said it provides great value when injured workers like Mr. Whaley speak with the committee because it helps the Legislative Assembly identify areas within workers compensation which need to be addressed.

**Connie Odegaard****Claim Summary**

Chairman Casper called on Mr. Kocher to provide a summary of Ms. Connie Odegaard's, workers' compensation claim. He said:

- On May 5, 2016, Ms. Odegaard filed a claim for a sprain or strain to her left ankle while working for Community Ambulance Service. Ms. Odegaard described her injury as "Twisted ankle while walking".
- The family nurse practitioner who treated Ms. Odegaard indicated Ms. Odegaard experienced ankle swelling, pain, and instability with walking.
- On June 2, 2016, WSI issued a NOD denying benefits because Ms. Odegaard had not proven a casual connection between her employment and the injury. There was no obstacle causing her injury and her employer did not put her at risk for injury.
- On June 27, 2016, Ms. Odegaard submitted a letter requesting reconsideration of the NOD issued on June 2, 2016. Ms. Odegaard stated she was on duty working a 24-hour shift on May 4, 2016, when the injury occurred on the employer's property.
- On July 14, 2016, WSI issued an order denying the claim indicating no benefits are payable because Ms. Odegaard's injury did not arise out of her employment.
- On August 10, 2016, Ms. Odegaard requested the assistance of DRO to review the July 14, 2016, order.
- On August 19, 2016, DRO issued its certificate of completion indicating no recommended change to the order. Ms. Odegaard requested the assistance of an attorney to review the order denying the claim.
- Ms. Odegaard did not request a hearing and the order became final.

In response to a question from Senator Burckhard, Mr. Kocher said Ms. Odegaard's injury was not associated with the work she was doing.

**Ms. Odegaard's Testimony**

Chairman Casper called on Ms. Odegaard to review her claim and discuss the issues related to her claim. Ms. Odegaard reviewed the details of her injury and said her injuries occurred while on the job and while on the employer's premises and the claim should have been approved, yet was denied.

In response to a question from Representative Boschee, Ms. Odegaard said she did not explore other avenues outside workers compensation, such as with her employer's insurance company.

**Workforce Safety and Insurance Response**

Chairman Casper called on Mr. Wahlin to respond to the issues raised by Ms. Odegaard. Mr. Wahlin said Section 65-01-02 defines a compensable injury as "an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings". Regarding Ms. Odegaard's claim, he said, the key words of Section 65-01-02 are "arising out of and in the course of . . .". He said an unexplained fall is not a compensable event. He said in 2012 the North Dakota Supreme Court said with respect to Section 65-01-02, the legislative intent was for claimant's to prove more than they merely suffered an injury on work premises and during work hours to receive compensation for the injuries.

**COMMITTEE DISCUSSION**

Representative Keiser said he would like WSI to provide a review and an update on vocational rehabilitation and what is happening on the educational training program at the committee's next meeting.

Senator Oban said she would like information from WSI regarding the policy limiting vocational rehabilitation retraining to 104 weeks at the committee's next meeting.

No further business appearing, Chairman Casper adjourned the meeting at 3:00 p.m.

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Christopher S. Joseph  
Counsel

ATTACH:4