

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Tuesday, November 19, 2019
Harvest Room, State Capitol
Bismarck, North Dakota

Representative Dan Ruby, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Dan Ruby, Mary Adams, George Keiser; Senators Randy Burckhard, Dave Oehlke

Member absent: Senator JoNell A. Bakke

Others present: See [Appendix A](#)

It was moved by Representative Keiser, seconded by Representative Adams, and carried on a voice vote that the minutes of the September 5, 2019, meeting be approved as distributed.

REPORTS

Case Processing Standards and Policies

Chairman Ruby called on Mr. Timothy J. Dawson, Director, Office of Administrative Hearings, for testimony ([Appendix B](#)) regarding the results under the case processing standards and policies.

In response to a question from Chairman Ruby, Mr. Dawson said the statistics regarding the decisions issued by the Office of Administrative Hearings (OAH) are good and he is very optimistic about the numbers. He said representatives of Workforce Safety and Insurance (WSI) are in favor of the statistical trends from OAH.

In response to a question from Representative Keiser, Mr. Dawson said OAH has hired new administrative law judges, implemented new written criteria for performance, and focused on managing the statutory 215-day requirement.

In response to a question from Senator Oehlke, Mr. Dawson said after the 30 days that is needed to schedule a hearing, it can take up to 25 days for an administrative law judge to write a decision. He said the 50 to 65 days to a decision is on the low end of the statistical spectrum.

Chairman Ruby called on Ms. Jodi Bjornson, General Counsel, Workforce Safety and Insurance, for testimony ([Appendix C](#)) regarding the report submitted by OAH.

Safety Grant Report

Chairman Ruby called on Mr. Nick Jolliffe, Director of Loss Control, Workforce Safety and Insurance, for testimony ([Appendix D](#)), 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 Oehlke, Mr. Jolliffe said the majority of WSI's ergonomic funding through the ERGO programs goes toward office ergonomics, such as sit-stand desks and ergonomically correct chairs.

In response to a question from Representative Keiser, Mr. Jolliffe said during the 10 to 12 years the ERGO programs have been in effect, WSI has not had an issue with an employer not wanting to participate in the program because of the employer's responsibility to cover 25 percent of the cost. He said when there is a partial employer buy-in, it helps a program become successful because the employer is more engaged.

In response to a question from Chairman Ruby, Mr. Jolliffe said some of the safety programs provide for annual eligibility while others have a one-time cap.

In response to a question from Senator Burckhard, Mr. Jolliffe said WSI's safety training sessions cover numerous classifications, such as medical, industrial, general construction, and manufacturing. He said confined space, defensive driving, and safe lifting are among the largest safety training sessions.

In response to a question from Chairman Ruby, Mr. Jolliffe said the safety training and education program grants, ERGO initiative, ERGO grants, the learning management system, the OSHA programs, and the education offerings are the only programs being funded. He said the hazard elimination learning program grant and the workplace injury reduction challenge grant, which have been discontinued, are no longer funded.

Time Computation

Chairman Ruby called on Mr. Timothy Wahlin, Chief of Injury Services, Workforce Safety and Insurance, for testimony regarding an overview and status update on time computation policies and practices. Mr. Wahlin said Section 65-01-16 relates to how WSI issues a decision and the timeline for issuing those decisions. He said Section 65-01-16 gives a party 30 days from the day the notice of decision was mailed by WSI to file a written request for reconsideration. He said under Section 65-01-16, an employee has 30 days from the day the administrative order was mailed to file a request for assistance from the Decision Review Office (DRO), and a party has 30 days from the date of service of an administrative order or from the day the DRO mails its notice that the office's assistance is complete, to file a written request for rehearing. He said if a written appeal is not received within the 30-day limit, the decision is final. He said if the 30-day limit was changed from the receipt date to the date upon which a postmark is affixed to the envelope, WSI would need to create a new processing system wherein WSI images all envelopes. He said changing the receipt date to the date upon which a postmark is affixed to the envelope also would cause issues if an appeal is claimed to have been mailed and is never received because WSI would have an open appeal timeline that would never be closed.

In response to a question from Senator Burckhard, Mr. Wahlin said WSI mail goes into scan batches that are scanned and imaged into WSI's system. He said each batch is marked with the date it was opened, which is the receipt date. He said if a written appeal is received on day 32, it misses the 30-day deadline. He said the 30-day deadline begins the day after WSI mails the notice of decision.

In response to a question from Senator Oehlke, Mr. Wahlin said WSI considers an email as a written appeal or request for reconsideration.

In response to a question from Chairman Ruby, Mr. Wahlin said if the 30-day deadline falls on a Saturday, Sunday, or a holiday, the 30-day deadline does not expire until the following business day.

Representative Keiser said the 30-day deadline is becoming an issue for injured employees and a change in policy is needed. He said the state's job is to service injured employees and the mail delivery process is no longer reasonable. He said for claimants the time limit for appeals should be changed to the date upon which a written appeal is postmarked.

CLAIM REVIEW

The committee scheduled six 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 Ms. Patsy Peyerl, Constituency Services, 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.

Jon Adams

Claim Summary

Chairman Ruby called on Ms. Peyerl to provide a summary of Mr. Jon Adams' workers' compensation claim. She said:

- Mr. Adams filed a claim for an injury to his lumbar spine sustained on July 21, 1986, while working for the Grand Forks Park District. At the time of the injury, Mr. Adams was building a playground site, anchoring timbers to the concrete when he injured his lumbar spine. Workforce Safety and Insurance accepted Mr. Adams' claim and the associated medical and disability benefits were paid accordingly.
- Mr. Adams currently is receiving permanent total disability payments in the amount of \$1,032, minus his Social Security offset of \$240, every 14 days for a total of \$792. In addition to his permanent total disability benefits, Mr. Adams receives \$166 every 14 days for supplemental benefits.
- Mr. Adams' total 14-day disability payment from WSI is \$958. Mr. Adams has been receiving permanent total disability payments since February 18, 2004.
- The current disability payments were based upon an average weekly wage of \$1,039 per week at the time of a reapplication for wage loss in 2001. At the time of the reapplication, Mr. Adams was a program director for Riverview Healthcare Center.

- Medical and wage loss benefits were in active payment at the time the legal notices were issued on Mr. Adams' claim.
- Mr. Adams had an October 16, 2018, urine drug screen that showed positive results for an illicit substance. The laboratory report submitted to WSI confirmed the positive test results. The October 16, 2018, urine drug screen was ordered by Mr. Adams' primary provider at the time.
- On January 25, 2019, WSI issued a notice of decision denying chronic opioid therapy. Mr. Adams tested positive for tetrahydrocannabinol (THC) while undergoing chronic opiate therapy. Workforce Safety and Insurance denied ongoing payment of opioids as of January 25, 2019.
- In Mr. Adams' request for reconsideration of the notice of decision dated January 25, 2019, Mr. Adams indicated he needed ongoing opiate support to medically withdraw from the opiates with the goal of having zero opiates prescribed. Without the "weaning off" of opiates Mr. Adams stated he would place his health at serious risk.
- Mr. Adams outlined in his reconsideration the contacts he had with medical providers to assist with opiate reduction and discussed the obstacles with medical providers either not wanting to continue to prescribe opiates, or not wanting to work with medical marijuana as a pain management option. It was Mr. Adams' goal to find the best route and most economical and viable way to use cannabis. Mr. Adams states he was able to locate a provider willing to prescribe him medical marijuana as of January 2019.
- Workforce Safety and Insurance issued an order on February 20, 2019, affirming WSI's original notice of decision denying chronic opioid therapy on January 25, 2019. The order established Mr. Adams had been receiving chronic opioid therapy for greater than 90 days for treatment of his chronic lower back pain.
- The February 20, 2019, order outlined Mr. Adams underwent a urine drug screen on October 16, 2018, which showed a positive result for THC/cannabinoids (marijuana). The level for the Delta 9-THC was 245ng/ml and the THC/creatinine ratio was 145/ng.
- After the order of February 20, 2019, was issued, Mr. Adams requested the assistance of the DRO on March 18, 2019. A certificate of completion was issued by the DRO on April 8, 2019, without any change in decision from the WSI order.
- Mr. Adams did not request a hearing after the DRO closure on April 8, 2019. The decision to end opiates became final.

Mr. Adams' Testimony

Chairman Ruby called on Mr. Adams to review his claim and discuss the issues related to his claim ([Appendix E](#)).

In response to a question from Chairman Ruby, Mr. Adams said when he asked WSI about medical marijuana he was told WSI could not comment on the topic because medical marijuana was not a medically accepted treatment. He said WSI should allow medical marijuana to be used for pain management.

In response to a question from Senator Burckhard, Mr. Adams said when WSI handles thousands of claims, it is easier for WSI to deny claims, treatments, surgeries, and medications than it is for WSI to independently review and evaluate each claim for eligibility. He said he never was notified when his claims were turned over to different claims analysts.

Workforce Safety and Insurance Response

Chairman Ruby called on Mr. Wahlin to respond to the issues raised by Mr. Adams. Mr. Wahlin said Section 65-05-39 provides the relevant criteria for the injured employee and for the prescribing physician. He said to qualify for chronic opioid therapy, an injured employee may not be using illegal substances or abusing alcohol, and must be compliant with the treatment protocol. He said Section 65-05-39 also grants a prescribing physician or WSI the right to request an injured employee on chronic opioid therapy be subject to drug testing, and failure of the test or of timely compliance with the request may result in termination of chronic opioid therapy coverage. He said when Mr. Adams tested positive for THC, medical marijuana was not a medically accepted practice in North Dakota. He said Mr. Adams' case was not a medical marijuana issue, but simply was related to the presence of THC.

In response to a question from Chairman Ruby, Mr. Wahlin said WSI has not yet experienced a claim arise involving legally obtained medical marijuana. He said marijuana is still a federal Schedule 1 drug and is not viewed by the federal government as a credible form of medical treatment.

In response to a question from Senator Oehlke, Mr. Wahlin said New Mexico's court system ruled on how many marijuana joints per day are allowed and how many of those joints should be covered. He said some states do not

tolerate marijuana use for injured employee pain management, so nationwide the issue is all over the map on how other states have handled this issue. He said WSI does not receive any federal aid directly.

Representative Keiser said the unique characteristic of medical marijuana is that it was not passed by the Legislative Assembly but passed by over 70 percent of the voting public via an initiated measure, so the people of North Dakota have spoken on this issue. He said when the people vote, the Legislative Assembly should honor the vote. He said he encourages a bill draft related to this issue to come out of the committee after more discussion on the topic.

John Ell

Claim Summary

Chairman Ruby called on Ms. Peyerl to provide a summary of Mr. John Ell's workers' compensation claim. She said:

- Mr. Ell filed a claim for an injury to his right middle finger sustained on December 3, 2010, while working for Bismarck State College. At the time of the injury, Mr. Ell was attempting to unhook a sanding trailer from a pickup when he sustained a laceration of his right middle finger. Workforce Safety and Insurance accepted Mr. Ell's claim and the associated medical and disability benefits were paid accordingly.
- During the course of his claim with WSI, Mr. Ell received temporary total disability benefits for the following disability periods:
 - January 17, 2013, through February 27, 2013;
 - October 8, 2014, through October 19, 2014; and
 - February 9, 2016, through August 17, 2016.
- Mr. Ell was receiving \$1,512 every 14 days from WSI based on his average weekly wage of \$1089.
- At the time of his second reapplication with WSI on February 16, 2016, Mr. Ell was employed with Mandan Public Schools, a new employer since his December 3, 2010, work injury. Mr. Ell was hired on February 23, 2013, as a bus driver and custodian for Mandan Public Schools. Disability benefits began on February 9, 2016, as Mandan Public Schools could no longer continue employment with Mr. Ell due to his work injury restrictions.
- Because Mr. Ell's employer at the time of the reapplication (Mandan Public Schools) ended his employment due to his work restrictions, WSI assigned vocational services to his claim. Workforce Safety and Insurance vocational services was not able to consider Mandan Public Schools in the vocational process, as they previously informed WSI at the time of the reapplication that they had no ongoing employment options available for Mr. Ell with his new restrictions. Mandan Public Schools informed WSI that Mr. Ell's last day of employment was February 8, 2016.
- Mr. Ell was participating in WSI's vocational rehabilitation program by attending vocational skill upgrading. Mr. Ell stated he had complaints of severe pain in his right finger and hand, and an inability to perform basic activities of daily living and personal hygiene which would make skill upgrading not physically possible for him. Mr. Ell notified WSI that his physician was not allowing him to participate in vocational activities.
- An internal special investigation on Mr. Ell's claim commenced with a "hotline tip" received by WSI on March 29, 2016. Information received from an anonymous source reported Mr. Ell was "pounding posts into his backyard even though he has a right finger injury."
- Workforce Safety and Insurance documented a series of phone calls that occurred between the WSI claims adjuster and Mr. Ell regarding his physical activities outside. These phone contacts were completed on March 29, 2016, April 13, 2016, May 16, 2016, and June 15, 2016.
- Mr. Ell was contacted by WSI's private investigator to discuss his outdoor activities recorded on video surveillance. The private investigator attempted to contact Mr. Ell to arrange a meeting to review the video. The meeting between the private investigator and Mr. Ell did not occur.
- The WSI order issued on July 26, 2016, included documentation from the video surveillance conducted by a private investigator which was submitted to WSI for review. In addition, investigative reports were filed with WSI documenting the surveillance activities. In the order WSI determined that Mr. Ell willfully made false statements and misrepresentations with respect to his physical condition, capabilities, and activities.
- Mr. Ell requested the assistance of the DRO on July 28, 2016. A certificate of completion was issued by the DRO on August 12, 2016, without any change in decision from the WSI order.

- Mr. Ell requested an administrative hearing on the July 26, 2016, order issued by WSI. In Mr. Ell's request for rehearing dated August 18, 2016, he indicated he "did not make false statements and misrepresentations with respect to his physical condition, capabilities and activities." Mr. Ell indicated "WSI cannot limit what he can do in his own home and yard."
- Mr. Ell secured legal representation to represent him at the hearing. A hearing through OAH was scheduled for August 23, 2017.
- On November 11, 2017, WSI received notice the administrative law judge assigned to the hearing issued a decision affirming WSI's July 26, 2016, order for false statements and physical misrepresentation.
- The administrative law judge's order became final as of December 18, 2017, as no appeal was filed by Mr. Ell and his attorney.

Mr. Ell's Testimony

Chairman Ruby called on Mr. Ell to review his claim and discuss the issues related to his claim ([Appendix F](#)).

In response to a question from Chairman Ruby, Mr. Ell said it was inferred in the physician's letter that "no working outside" meant during cold weather, as the letter was written in February and the cold weather would exacerbate his pain.

In response to a question from Representative Keiser, Mr. Ell said his physicians did feel he was ready for vocational rehabilitation. He said it feels like his arm is frozen as if he cannot close his fingers but his arm has a constant burning sensation.

Workforce Safety and Insurance Response

Chairman Ruby called on Mr. Wahlin to respond to the issues raised by Mr. Ell. Mr. Wahlin said Section 65-05-33 provides it is a Class A misdemeanor for a person who claims benefits or payment for services to misrepresent that person's physical condition willfully, including deceptive conduct that misrepresents that person's physical ability. He said under Section 65-05-33, the person claiming benefits or payment for services in violation of Section 65-05-33 forfeits any additional benefits relative to that injury. He said because the penalty is so severe, WSI goes above and beyond when explaining what conduct constituted fraud when writing fraud orders. He said the orders are often 20 to 30 pages in length, and typically include photographs or video recordings. He said WSI had photographic and video evidence of activities performed by Mr. Ell and compared the photographs and videos with what was conveyed by Mr. Ell to his physician regarding his injury and physical capabilities. He said the information provided by Mr. Ell regarding his injury and physical capabilities were significantly different and in direct contrast to what the photographs and videos illustrated. He said Mr. Ell's benefits were terminated based on misrepresentation of his physical condition.

In response to a question from Chairman Ruby, Mr. Wahlin said vocational rehabilitation is WSI's system by which WSI addresses an injured employee who is unable to return to the employment of injury. He said a vocational rehabilitation plan is developed and an order is generated implementing that plan.

In response to a question from Representative Keiser, Mr. Wahlin said Mr. Ell's injury occurred at Bismarck State College and Bismarck State College decided to let Mr. Ell go, after which Mr. Ell secured employment with Mandan Public Schools, which became the new employer. He said there is nothing in the Century Code requiring an employer to modify work for an injured employee.

Linda Ell

Claim Summary

Chairman Ruby called on Ms. Peyertl to provide a summary of Ms. Linda Ell's workers' compensation claim. She said:

- Ms. Ell filed a claim for an injury sustained on July 30, 2009, while working at Hobby Lobby Creative Centers. Ms. Ell indicates she started to have pain and swelling that began on the date of injury of July 30, 2009, and progressed over the 2 weeks since her date of hire on July 16, 2009. The pain and swelling were claimed to be from Ms. Ell's repetitive typing of large merchandise orders.
- Ms. Ell was diagnosed with right hand carpal tunnel syndrome. The claim was filed by Ms. Ell on October 19, 2009. At the time of her claim filing, a protest was submitted by Ms. Ell's employer, noting with a date of injury of July 30, 2009, she worked in her position for about 2 weeks.
- Ms. Ell had a prior medical history for the same body parts that predated her claim filing.

- Workforce Safety and Insurance completed a medical review by a physician advisor on January 15, 2010, in which it was opined that Ms. Eil's prior right hand and wrist injuries were significant and similar in complaints. It was determined while her duties at work may "trigger the condition," it did not contribute to, accelerate, or cause the condition.
- Workforce Safety and Insurance issued a notice of decision to deny the claim on January 20, 2010. Ms. Eil filed a request for reconsideration on February 3, 2010. Workforce Safety and Insurance issued an order to deny the claim on April 12, 2010.
- Ms. Eil requested the assistance of the DRO on April 26, 2010. In consultation with WSI as part of the DRO review, an independent medical examination was scheduled to determine the significance of the prior treatment. With the results of the independent medical examination on file indicating no relationship to the work duties, the DRO closed the file on October 22, 2010, with no change in decision and notified Ms. Eil of the closure.
- Ms. Eil filed a request for hearing on November 30, 2010, on the order denying the claim. The hearing was scheduled by OAH on June 14, 2011.
- Workforce Safety and Insurance received the administrative law judge's final order dated June 22, 2011, reversing WSI's April 12, 2010, order denying the claim for no work injury. The administrative law judge's order indicated WSI is liable for the tendonitis of the extensor tendons of the right hand.
- On March 12, 2013, Ms. Eil contacted WSI to request that she was being referred to a neurologist for a workup and evaluation of the entire right arm.
- Ms. Eil was notified by WSI that the claim was accepted only for the right wrist per the administrative law judge's decision. Ms. Eil requested coverage for the right shoulder and the additional diagnosis of carpal tunnel syndrome of the right hand.
- A WSI physician advisor completed a medical review on May 28, 2013, to determine if Ms. Eil's current shoulder problems are related to the original work injury. The medical review concluded the right shoulder condition would not be attributed to her original work injury; nor would the diagnosis of thoracic outlet syndrome, which is a compression of the neurovascular bundle which can affect the nerves or blood vessels.
- On January 21, 2014, WSI received a request for occupational therapy for the right and left hands. Workforce Safety and Insurance indicated to the provider that WSI liability was only for the right hand. During this time frame, WSI received a request for a worksite evaluation as Ms. Eil contended her workstation was set up poorly. This would be the second worksite evaluation as the first was completed in August 2013.
- Ms. Eil filed a new claim with WSI on May 15, 2014. With this claim filing, Ms. Eil officially requested WSI coverage for her right shoulder and right hand, right lower arm, right elbow, right upper arm, left shoulder, left elbow, left hand, left lower arm, left upper arm, and left wrist. Ms. Eil claimed a mechanism of injury of daily office job duties including repetitive motion with both hands and arms.
- As the mechanism of injury on the 2009 and the 2014 claims had the same description of injury-repetitive office work, WSI consolidated the new 2014 claim filing into the 2009 claim. Workforce Safety and Insurance consolidated this claim on July 9, 2014.
- Ms. Eil indicated she was not notified formally by WSI that her new 2014 claim filing was consolidated into the 2009 claim. Ms. Eil believed she was denied the ability to file a new claim with her 2014 first report of injury, which requested consideration of new body parts.
- As the 2009 claim was officially accepted for the right wrist, WSI added the right elbow to the 2009 claim, along with the conditions of cubital and carpal tunnel syndrome. Workforce Safety and Insurance paid wage loss benefits after the consolidation.
- On August 19, 2014, WSI issued a notice to Ms. Eil that her left wrist and elbow were added to the 2009 claim along with the corresponding medical conditions of carpal tunnel syndrome, cubital tunnel syndrome, and tenosynovitis/synovitis.
- Ms. Eil contacted WSI on August 19, 2014, that her second claim filed in May 2014 also included the right and left shoulders and these conditions should also be considered work related.
- Workforce Safety and Insurance, after a liability investigation on the bilateral shoulders, denied the bilateral shoulders in a notice issued on October 12, 2016. This denial was based on several medical reviews that occurred asking the question of relatedness to the original work injury.
- On October 18, 2016, Ms. Eil contacted WSI expressing frustration over what she felt to be a 2.5-year delay on making a decision on the claim that she filed in May 2014 with new body parts.

- As Ms. Eil was not able to continue to be accommodated by her employer of injury, WSI vocational services were assigned to her claim. Workforce Safety and Insurance completed an official vocational plan for Ms. Eil.
- Previous to her vocational plan, Ms. Eil was paid temporary total disability benefits starting May 30, 2014, at an average weekly wage of \$581 per week. Ms. Eil was paid temporary total disability until August 24, 2016, at which time she exhausted the 728 days of temporary total disability available to her. Ms. Eil was then switched to temporary partial disability benefits on a \$0 earnings capacity as of August 25, 2016.
- Partial disability benefits on a \$0 earnings capacity continued until her official vocational plan on a retained earnings capacity was issued. This was in an order awarding temporary partial disability benefits on a retrained earnings capacity of \$217.50 per week issued on October 25, 2016.
- On December 14, 2016, WSI issued the order denying liability for the bilateral shoulders in connection with the 2009 claim.
- Workforce Safety and Insurance issued an amended order to deny the bilateral shoulders, hands, forearms, and upper arms on December 28, 2016.
- Ms. Eil requested the assistance of the DRO on all orders. The issues proceeded to an administrative hearing upon the DRO closure with no change in decision.
- On July 12, 2017, an administrative law judge hearing was scheduled to address Ms. Eil's appeal of the three orders.
- Workforce Safety and Insurance received the administrative law judge's decision dated May 3, 2018, reversing and remanding WSI's order awarding partial disability benefits back to WSI to reconsider retraining as an option; and reversing WSI's order denying liability for the bilateral shoulders and reversing WSI's order denying the bilateral hands, forearms, and upper arms.
- Workforce Safety and Insurance reissued a new order awarding temporary partial disability benefits on a retained earnings capacity of \$108.75 on November 28, 2018. It was determined retraining was not a viable option for Ms. Eil due to her work injury limitations.
- Ms. Eil currently receives \$660.00 every 14 days from WSI based on the retained earnings capacity of \$108.75 per week. This calculation was based on an average weekly wage of \$558.00 per week. Ms. Eil is scheduled to have utilized the full 5 years of partial disability benefits available to her as of October 23, 2021.

In response to a question from Chairman Ruby, Ms. Peyerl said Ms. Eil's disability rate for temporary total disability is 66.667 percent of the \$558, and the calculation for temporary partial disability is different at 66.667 percent starting at the average weekly wage minus the money in the injured employee's pockets if the employee is working or the employee's earnings capacity.

Ms. Eil's Testimony

Chairman Ruby called on Ms. Eil to review her claim and discuss the issues related to her claim ([Appendix G](#)).

In response to a question from Chairman Ruby, Ms. Eil said WSI's disability payment stepping system makes her feel devalued. She said her base rate of pay has nothing to do with what she was making prior to her injury which was \$15.50 per hour, but she is now valued at \$7.50 per hour which is federal minimum wage, multiplied by the hours a week she can work. She said the time frame for payments also is an issue because she does not know what to do after the 5-year time period allowed for payments expires. She said after the 5-year time period she will be forced to seek employment that potentially would go beyond her physical restrictions just to support her family and pay her bills. She said the injury does not disappear magically at the 5-year mark.

Workforce Safety and Insurance Response

Chairman Ruby called on Mr. Wahlin to respond to the issues raised by Ms. Eil. Mr. Wahlin said Ms. Eil's case involved short-term employment and pre-existing issues. He said WSI had to determine whether the flare up was caused by her injury by her employment, or by her pre-existing condition with which Ms. Eil came to her employment. He said if it was caused by a pre-existing condition, WSI had to determine whether the pre-existing condition was worsened substantially or progressed substantially as a result of her employment.

In response to a question from Representative Keiser, Mr. Wahlin said in 2006 a 2-year cap was implemented on temporary total disability benefits and in 1991 there was a 5-year cap on temporary partial disability benefits, totaling 7 years of benefits combined. He said as of 2006, an injured employee can be determined to be totally and permanently disabled but the determination is based on the severity of the injury which is linked to an evaluation of permanent partial impairment that currently is at a minimum of 25 percent.

Representative Keiser said he would like WSI to provide the committee with a historical overview of how many claims analysts WSI has and how many open claims WSI has had over the past 2 to 3 years. He said the committee can see if there is a pattern or a correlation between the number of claims a claims analyst handles and the time it takes for a claim to be processed.

Jared Lundeen

Claim Summary

Chairman Ruby called on Ms. Peyerl to provide a summary of Mr. Jared Lundeen's workers' compensation claim. She said:

- Mr. Lundeen injured his lumbar spine during the course of his employment with Pure Energy (Technip Stone and Webster Process Technology, Inc.). The mechanism of injury at the time of the claim filing was that Mr. Lundeen had back pain that became progressively worse due to his continuous heavy lifting at work. He was employed as a production testing assistant with Pure Energy since July 23, 2010. He claimed a date of injury of September 16, 2010. Workforce Safety and Insurance accepted Mr. Lundeen's claim and the associated medical and disability benefits were paid accordingly.
- Mr. Lundeen had several periods of disability throughout his claim. His initial disability period began on October 4, 2010, and ended March 1, 2011. Mr. Lundeen was paid based on an average weekly wage of \$969 at the time of his initial wage loss.
- His second period of disability came after a reapplication in 2011. Disability began again on September 29, 2011, through January 7, 2014. For this period of wage loss, Mr. Lundeen was paid at an average weekly wage of \$1,862 per week, and WSI paid temporary total disability and temporary partial disability benefits at a \$0 earnings capacity. Mr. Lundeen exhausted his 728 days of temporary total disability benefits as of June 12, 2013.
- Mr. Lundeen filed a second reapplication with WSI on February 20, 2018. Workforce Safety and Insurance issued a notice of decision denying the reapplication on March 27, 2018, as WSI was not able to verbally confirm information with Mr. Lundeen. This was a technical denial based more on WSI's inability to make contact with Mr. Lundeen. Mr. Lundeen contacted WSI within the appeal period to review information on the reapplication.
- Workforce Safety and Insurance issued a new notice of decision denying benefits on April 18, 2018. There was no evidence Mr. Lundeen sustained a significant change in the compensable medical condition. It also was determined in this notice that Mr. Lundeen did not sustain an actual loss of earnings caused by a significant change in the compensable medical condition.
- Mr. Lundeen submitted an official request for reconsideration on May 7, 2018. Mr. Lundeen claimed his medical condition had changed since his spinal fusion surgery in 2013. Mr. Lundeen was unable to work in a capacity and duration that affected his wages over the last 2 years.
- As part of the reconsideration process, WSI completed a medical review with a WSI physician advisor. Workforce Safety and Insurance requested additional tax and wage information to see if the evidence supported a loss of earnings due to the significant change. The medical review concluded Mr. Lundeen had a significant change in his compensable work injury.
- While it was concluded a significant change in the medical condition was met on the reapplication, it still was determined there was no loss of earnings by Mr. Lundeen.
- Workforce Safety and Insurance issued the order denying disability benefits on the February 20, 2018, reapplication on September 26, 2018.
- Mr. Lundeen requested the assistance of the DRO on October 10, 2018. The DRO issued a certificate of completion on December 18, 2018, with no change in the decision and notified Mr. Lundeen of the DRO closure.
- Mr. Lundeen filed a request for hearing on January 28, 2019, with the assistance of his attorney. The hearing was scheduled by OAH for May 21, 2019.
- On June 12, 2019, WSI received the administrative law judge's final order that affirmed the WSI order denying disability benefits in conjunction with the February 20, 2018, reapplication.
- Mr. Lundeen's attorney, Stephen Little, submitted a petition for reconsideration on July 11, 2019, regarding the June 12, 2019, administrative law judge decision. This petition for reconsideration was submitted directly to the administrative law judge who conducted the hearing on May 21, 2019.
- On July 30, 2019, WSI received the administrative law judge's order denying Mr. Lundeen's request for reconsideration dated July 26, 2019.
- No appeal was received after the July 26, 2019, administrative law judge ruling. The decision became final.

In response to a question from Chairman Ruby, Ms. Peyerl said Mr. Lundeen's employer mailed a letter to WSI stating Mr. Lundeen would get return-to-work on March 2, 2011. She said once the 728 days of temporary total disability ends it switches to temporary partial disability at a \$0 earnings capacity. She said in Mr. Lundeen's case, he alternated back and forth between partial disability and full disability because he was released with restrictions, and there is a gap that led to the second reapplication. She said Mr. Lundeen exhausted his full disability that ended on June 12, 2013, and the partial disability ended on January 7, 2014.

Mr. Lundeen's Testimony

Chairman Ruby called on Mr. Jack Lundeen, Jared Lundeen's father and representative, to review Jared's claim and discuss the issues related to Jared's claim. Mr. Jack Lundeen reviewed the details of Jared's work-related injury and said Jared no longer can run or ride a bicycle, has had a number of issues with his back, and has had numerous infections. Mr. Jack Lundeen said the reason he is providing testimony on the behalf of his son is because Jared cannot sit in a vehicle driving 120 miles back and forth. He said WSI does not care about mental anguish, the uncertainty of ever being able to walk, or the uncertainty of being able to work again. He said the laws pertaining to WSI are difficult to read and understand, and are equivalent to navigating through a maze in a cornfield. He said waiting 30 to 45 days to get mailed correspondence back from WSI regarding surgical procedures and other filings is unacceptable. He said Jared's unanswered telephone calls to WSI sometimes would not get returned. He said Jared's personal credit has been impacted negatively as a result of waiting on reimbursement vouchers from WSI.

In response to question from Chairman Ruby, Mr. Jack Lundeen said a small remodeling company asked Mr. Jared Lundeen for help. He said Jared thought he would be doing office work or driving a truck. He said the WSI report claiming Jared was laying floors and working on ceilings is completely inaccurate. He said Jared never worked more than 5 hours a week, which was as many hours Jared could handle working.

In response to a question from Representative Keiser, Mr. Jack Lundeen said Jared moved to North Dakota from Arizona to work in the oilfield for a company called Pure Energy. He said when Jared was carrying something to the top of a ladder, he slipped and twisted with 50 to 70 pounds on his back and fell to the ground doing severe damage to his lower back.

Workforce Safety and Insurance Response

Chairman Ruby called on Ms. Ann Schaibley, Staff Counsel, Workforce Safety and Insurance, to respond to the issues raised by Mr. Jack Lundeen. Ms. Schaibley said Section 65-05-08 provides WSI with the standards to follow when someone has previously received disability benefits, there has been a break in benefits, and disability benefits are being requested again. She said Mr. Jared Lundeen received benefits, went back to work, and had a substantial worsening of his injury or a significant change in his medical condition. She said he reapplied for benefits and his reapplication was accepted. She said Mr. Jared Lundeen returned to work in 2014 and worked for a company called Quantum. She said when WSI is looking at a reapplication for benefits, two things are considered. She said first the injured employee must show they sustained a significant change in the compensable medical condition. She said second the injured employee must show they sustained an actual wage loss caused by the significant change. She said the second prong was the missing link in Mr. Jared Lundeen's claim. She said WSI requested Mr. Jared Lundeen's employer to provide verification of wages. She said WSI was unable to secure the payment information.

In response to a question from Representative Keiser, Ms. Schaibley said Mr. Jared Lundeen's employer submitted summary wage information via email to the claims adjuster indicating Mr. Jared Lundeen was getting paid cash on the side and was told Mr. Jared Lundeen worked 30 hours a month for \$600 a month. She said the information provided was insufficient to determine Mr. Jared Lundeen's wages or any wage loss.

In response to a question from Chairman Ruby, Ms. Schaibley said for purposes of reapplication, receiving an injured employee's paystubs from the employer would be an example of a sufficient submission to help determine whether there was an actual loss in wages.

Cheri Heuer

Claim Summary

Chairman Ruby called on Ms. Peyerl to provide a summary of Ms. Cheri Heuer's workers' compensation claim. She said:

- Ms. Heuer filed a claim for an injury to her left ankle/foot sustained on January 3, 2011, while working for American Crystal Sugar Company. At the time of the injury, Ms. Heuer was rolling paper onto a platform and it tipped, landing on her left ankle. The weight of the paper roll was estimated at 750 pounds, and it pinned Ms. Heuer's left ankle under the roll. Ms. Heuer worked as a utilities in packaging which entails watching lines, taking paper out, placing paper on, and making bags. Ms. Heuer sustained a traumatic

fracture and crush injury to the left ankle. Workforce Safety and Insurance accepted Ms. Heuer's claim and the associated medical and disability benefits were paid accordingly.

- Ms. Heuer received temporary total disability benefits beginning on January 4, 2011. Ms. Heuer attempted a restricted return to work with American Crystal Sugar from April 11, 2011, through September 8, 2011, but then reapplied for disability benefits that began again on September 9, 2011.
- Ms. Heuer exhausted the 104 weeks of temporary total disability benefits available to her under North Dakota law. She was switched over to temporary partial disability benefits at a \$0 earnings capacity as of June 1, 2013.
- Ms. Heuer was receiving \$1,152 every 14 days from WSI while she was receiving temporary total disability benefits, and the same amount when she was receiving temporary partial disability benefits.

First Issue:

- Ms. Heuer entered the WSI vocational rehabilitation process as her work injuries and restrictions indicated a possibility she was not able to return back to her original employer and position. A functional capacity assessment completed April 7, 2014, revealed an invalid result.
- As a result of the invalid functional capacity assessment, WSI issued a notice of intention to discontinue wage loss as of May 21, 2014, due to vocational noncompliance on April 30, 2014.
- Ms. Heuer completed a valid functional capacity assessment on May 8, 2014. With the valid functional capacity assessment results she was reinstated her disability benefits.
- Workforce Safety and Insurance issued a notice of decision on June 11, 2014, reinstating wage loss benefits. This notice of decision documented Ms. Heuer became compliant but documented her first instance in vocational noncompliance.
- After reinstatement, Ms. Heuer continued to appeal the issue of a first instance of vocational noncompliance.
- Workforce Safety and Insurance issued an order that Ms. Heuer engaged in a first instance of noncompliance of her vocational rehabilitation on June 17, 2014.
- Ms. Heuer requested the assistance of the DRO on July 7, 2014. A certificate of completion was issued by the DRO on October 2, 2014, notifying Ms. Heuer and her attorney that there was no change in decision.
- Ms. Heuer and her attorney filed a request for hearing with WSI on October 28, 2014, on the issue of vocational noncompliance. This hearing occurred on April 21, 2015.
- The administrative law judge's final order, issued on June 5, 2015, affirmed the June 17, 2014, order that Ms. Heuer engaged in a first instance of vocational noncompliance. No appeal was received after the decision and this decision became final.

Second Issue:

- The functional capacity assessment completed on May 8, 2014, was used to develop an official return to work option for Ms. Heuer. Workforce Safety and Insurance awarded her temporary partial disability benefits on a retained earnings capacity of \$471.60 per week.
- The retained earnings capacity was based off the following job goals submitted within the vocational case manager's report dated November 26, 2014--telephone sales representative, receptionist and information clerk, bill and account collector, customer service representative, interviewers, except eligibility and loan (hospital/clinic admitting clerk).
- Workforce Safety and Insurance issued a notice of intention to discontinue benefits as of December 18, 2014. This notice provided 2 months of work search benefits at her full disability rate. At the end of the 2 months of work search, she would be paid temporary partial disability on the retained earnings capacity of \$471.60 per week.
- Ms. Heuer requested reconsideration of this notice with her attorney on December 24, 2014. Workforce Safety and Insurance issued an order to affirm the temporary partial disability benefits on a retained earnings capacity of \$471.60 per week up to 5 years. This order was issued on January 20, 2015. Ms. Heuer requested the assistance of the DRO on February 3, 2015. Based upon a review completed in conjunction with the DRO and WSI, WSI reversed the order dated January 20, 2015. The vocational plan was deemed no longer appropriate as Ms. Heuer became medically unstable, and the functional capacity assessment no longer reflected her current physical abilities.

- Workforce Safety and Insurance reinstated Ms. Heuer to the temporary partial disability benefits based on a \$0 earnings capacity as of December 18, 2015. Vocational services were closed due to her medical situation.
- Workforce Safety and Insurance was not able to issue a vocational plan for Ms. Heuer. Ms. Heuer exhausted the remainder of her temporary partial disability benefits on December 30, 2017.
- As of December 31, 2017, Ms. Heuer no longer was able to receive temporary partial disability benefits, which only are payable up to 5 years under North Dakota law. Workforce Safety and Insurance issued a notice to end temporary partial disability on November 2, 2017.
- This notice was not appealed by Ms. Heuer. The decision became final.

Third Issue:

- Workforce Safety and Insurance determined Ms. Heuer could rise to the level of 14 percent whole person impairment. Thus, WSI notified Ms. Heuer she could request a permanent partial impairment evaluation.
- Ms. Heuer had a permanent partial impairment evaluation on January 19, 2018. Dr. Dean Redington, DC, Minot, conducted the permanent partial impairment evaluation. The permanent partial impairment evaluation concluded Ms. Heuer reached a 10 percent whole person impairment.
- Workforce Safety and Insurance issued a notice of decision denying permanent partial impairment benefits on May 4, 2018, as Ms. Heuer's impairment was 10 percent whole person. This was below the 14 percent whole person threshold for monetary impairment award.
- Ms. Heuer appealed this notice in her request for reconsideration dated June 5, 2018. Workforce Safety and Insurance issued an order denying permanent impairment benefits on June 21, 2018.
- Ms. Heuer requested the assistance of the DRO on June 28, 2018. A certificate of completion was issued by the DRO on July 11, 2019, without any change in the order. A copy was mailed to Ms. Heuer and her attorney.
- No appeal was filed by Ms. Heuer on the order issued June 21, 2018. The decision became final.

Fourth Issue:

- Workforce Safety and Insurance entered a signed stipulation with Ms. Heuer and her attorney to resolve the question of whether Ms. Heuer's generalized anxiety disorder, mild recurrent major depression, and complex regional pain syndrome were compensable, and whether her psychiatric treatment for the anxiety, depression, and complex regional pain syndrome were payable by WSI.
- Prior to this stipulation WSI requested an independent medical examination on October 22, 2015, to help determine an appropriate treatment plan for Ms. Heuer's compensable work injuries and to address some causation questions on other conditions.
- In the stipulation WSI and Ms. Heuer agreed to the following: WSI would pay for Ms. Heuer's individual cognitive behavioral intervention services one or two visits per week from March 14, 2016, through September 14, 2016. Workforce Safety and Insurance would pay for any medications prescribed by her nurse practitioner in connection with her psychotherapy from March 14, 2016, through September 14, 2016. Workforce Safety and Insurance would not accept or admit liability for any psychological or psychiatric conditions.
- This signed stipulation became final upon Ms. Heuer's signature dated May 5, 2016, in addition to her attorney's signature dated May 9, 2016. This issue between Ms. Heuer and WSI was considered resolved with the stipulation.

Ms. Heuer's Testimony

Chairman Ruby called on Ms. Tracy Roach, Ms. Heuer's daughter and representative to review Ms. Heuer's claim and discuss the issues related to Ms. Heuer's claim ([Appendix H](#)).

Workforce Safety and Insurance Response

Chairman Ruby called on Ms. Schaibley to respond to the issues raised by Ms. Roach. Ms. Schaibley said WSI is bound by statute to pay only for mental health conditions caused by the physical condition. She said in Ms. Heuer's claim, WSI determined the physical injury was not the cause of the mental health condition but concluded a stipulation for a period of time for mental health treatment would be beneficial to Ms. Heuer. She said it has been challenging to find functional capacity evaluation and independent medical examination providers within the state. She said pilot programs and other various initiatives have been attempted to increase the availability of those providers. She said Ms. Heuer failed five of the six required criteria for a valid functional capacity evaluation.

She said statute requires WSI to use certified evaluators for permanent partial impairment evaluations and the permanent partial impairment percentages are in accordance with the American Medical Association guidelines.

In response to a question from Representative Keiser, Ms. Schaibley said Ms. Heuer's second functional capacity evaluation was determined to be valid.

In response to a question from Senator Burckhard, Ms. Schaibley said WSI regularly encounters a handful of North Dakota attorneys who represent claimants.

In response to a question from Chairman Ruby, Ms. Schaibley said she has not encountered any new or additional attorneys who are undertaking cases on behalf of claimants besides the same handful of attorneys with whom WSI regularly deals.

In response to a question from Senator Burckhard, Ms. Schaibley said statute allows for payment to an injured employee beyond disability and medical payments if the injured employee is deemed to have a whole person impairment exceeding 14 percent.

In response to a question from Senator Oehlke, Ms. Schaibley said the stipulation entered in Ms. Heuer's claim is an example of how WSI goes above and beyond to find a solution to helping injured employees since the medical evidence did not support payments for mental health benefits.

William Beaulieu

Claim Summary

Chairman Ruby called on Ms. Peyerl to provide a summary of Mr. William Beaulieu's workers' compensation claim. She said:

- Mr. Beaulieu filed a claim for a head trauma sustained on September 23, 2011, while working for CMG Oil and Gas, Inc. At the time of the injury, Mr. Beaulieu was driving past a parked truck when the shoulder and culvert on the road gave way, and his truck rolled onto the top of the cab. Mr. Beaulieu struck the top of the cab console with his head, sustaining a significant head injury.
- Workforce Safety and Insurance determined that Mr. Beaulieu had an average weekly wage of \$1,293 per week in his work as a truck driver.
- Workforce Safety and Insurance began paying temporary total disability benefits on September 24, 2011, through September 20, 2013. Mr. Beaulieu reached the maximum amount of days available to him under the law, 104 weeks, of temporary total disability benefits. Mr. Beaulieu was switched to temporary partial disability benefits based on an \$0 earnings capacity.
- As a result of his work injuries, Mr. Beaulieu was not able to go back to the occupation of commercial truck driving. Mr. Beaulieu was notified by the State of Wisconsin on May 6, 2014, that his driver's license class of A, B, C, D, and M were cancelled due to his cognitive impairment. The cognitive condition interfered with safe driving.
- It is noted that Mr. Beaulieu had a prior traumatic brain injury from 1971. This prior injury was not a claim on file with WSI.
- Workforce Safety and Insurance assigned vocational services in January 2013 to identify an appropriate return to work option for Mr. Beaulieu. A functional capacity assessment completed on May 14, 2013, and May 15, 2013, fell within the light physical demand level. While his physical abilities would not prevent him from returning to work as a truck driver, there was a safety concern due to his cognitive impairments related to his brain trauma.
- It was determined through a vocational rehabilitation plan submitted for Mr. Beaulieu that no job goals were able to be identified because of a combination of his physical and cognitive impairments. Workforce Safety and Insurance issued an order awarding partial disability benefits on a retained earnings capacity of \$0 on September 22, 2014.
- Workforce Safety and Insurance determined Mr. Beaulieu rebutted the presumption pertaining to his retained earnings capacity. Therefore, he had the retained earnings capacity of \$0. Partial disability benefits are limited to 5 years under North Dakota law.
- Mr. Beaulieu and his attorney requested a hearing on the order awarding temporary partial disability benefits on December 2, 2014. It was agreed by all parties that a hearing on the order awarding temporary partial disability benefits would be pended, as more clarification was needed on the other claims issues that could impact the vocational order.
- Three separate claims issues became intertwined and were concurrently addressed by WSI, as the outcomes on each issue could affect the disability status of Mr. Beaulieu:

Order awarding temporary partial disability benefits up to 5 years on a \$0 earnings capacity issued September 22, 2014.

Order denying the permanent partial impairment award issued on September 10, 2015, to be followed by an amended order denying permanent partial impairment benefits issued on June 28, 2016.

Order denying permanent total disability issued on December 15, 2015.

- On all orders issued by WSI, Mr. Beaulieu requested the assistance of the DRO in September 2015, again in January 2016, and then a final review in October 2018.
- The permanent partial impairment and permanent total disability issues proceeded to a hearing upon a request filed by Mr. Beaulieu.
- A series of appeals and decisions commenced:

A hearing date for all issues occurred on October 6, 2016.

The administrative law judge's final order dated February 21, 2017, reversed the orders from WSI denying permanent partial impairment and permanent total disability benefits. This was received by WSI on February 21, 2017.

Appeal filed by WSI of the administrative law judge's decision to district court.

District court decision dated November 17, 2017, reversing the administrative law judge's decision and affirming WSI's orders denying the permanent partial impairment benefits and permanent total disability status.

North Dakota Supreme Court opinion dated September 13, 2018, affirming the district court's November 17, 2017, decision reversing the administrative law judge's decision dated February 21, 2017, and affirming WSI's orders on permanent partial impairment and permanent total disability status.

- With the ruling from the Supreme Court, the original order awarding temporary partial disability benefits issued on September 22, 2014, remained in effect and in active payment. Mr. Beaulieu reached the end of 5 years of temporary partial disability benefits on September 19, 2018. A final notice was issued to Mr. Beaulieu at the conclusion of the 5 years.
- A final appeal and request for hearing on the notice ending temporary partial disability benefits occurred, but Mr. Beaulieu withdrew his request for a hearing on September 27, 2018. The decision became final.

Mr. Beaulieu's Testimony

Chairman Ruby called on Mr. Mike Beaulieu, William Beaulieu's brother and representative, to review William's claim and discuss the issues related to William's claim. Mr. Mike Beaulieu reviewed the details of William's work-related injury and said it is challenging finding North Dakota attorneys to handle workers' compensation claims. He said he wishes North Dakota had more attorneys representing injured employees. He said WSI should improve assessing injured employee claims because every case is unique.

In response to a question from Chairman Ruby, Mr. Mike Beaulieu said he got power of attorney for Mr. William Beaulieu because William's thought process and mental capacity diminished after his head injury.

Workforce Safety and Insurance Response

Chairman Ruby called on Ms. Schaibley to respond to the issues raised by Mr. Mike Beaulieu. Ms. Schaibley said a requirement for receiving permanent total disability is a 25 percent whole person impairment. She said Mr. William Beaulieu was evaluated and his whole person impairment did not reach the 25 percent threshold for permanent total disability or the 14 percent required for permanent partial impairment disability. She said WSI has revised its notice of decision so when a permanent impairment evaluation is approved and the injured employee is notified about the evaluation approval, WSI lists in the approval letter the body parts that will be examined at the evaluation. She said injured employees then are given an appeal period to notify WSI of any additional body parts the injured employee would like examined.

No further business appearing, Chairman Ruby adjourned the meeting at 3:55 p.m.

Christopher S. Joseph
Counsel

ATTACH:8