

WORKERS' COMPENSATION REVIEW COMMITTEE

North Dakota Century Code (NDCC) Section 54-35-22 established the Workers' Compensation Review Committee. The committee is directed to review workers' compensation claims brought to the committee and determine whether changes should be made to the workers' compensation laws. North Dakota Century Code Section 54-35-22 provides for a six-member committee comprised of two members of the Senate appointed by the Senate Majority Leader, one member of the Senate appointed by the Senate Minority Leader, two members of the House of Representatives appointed by the House Majority Leader, and one member of the House of Representatives appointed by the House Minority Leader. In addition to this statutory directive to review workers' compensation claims, the committee has two additional statutory charges:

1. Select up to four of the elements to be included in the quadrennial performance evaluation of Workforce Safety and Insurance (WSI) and receive the performance evaluation report and review any actions taken resulting from the performance evaluation report (NDCC Section 65-02-30).
2. Receive WSI annual reports on pilot programs to assess alternative methods of providing rehabilitation services (NDCC Section 65-05.1-06.3).

In addition to the three statutory duties of the committee, the Legislative Management charged the committee with receiving three reports:

1. Workforce Safety and Insurance biennial report regarding compiled data relating to safety grants issued under NDCC Chapter 65-03 (NDCC Section 65-03-05).
2. Workforce Safety and Insurance report on recommendations based on a biennial safety review of Roughrider Industries work programs and a biennial performance review of the program of modified workers' compensation coverage by WSI (NDCC Section 65-06.2-09).
3. Workforce Safety and Insurance report on industry interest in using safety programs under NDCC Section 65-03-04 to provide grants to an industry association for alcohol server training to employees of bars and restaurants that serve alcohol to address workplace safety and public safety (Section 3 of 2015 House Bill No. 1416).

Committee members were Senators Nicole Poolman (Chairman), Ralph Kilzer, and George Sinner and Representatives Bill Amerman, George Keiser, and Dan Ruby.

CLAIM REVIEW General Background

Workers' compensation laws in North Dakota are found primarily in NDCC Title 65. The administrative rules adopted by WSI are found in North Dakota Administrative Code (NDAC) Title 92. Section 12 of Article X of the Constitution of North Dakota specifically addresses the state's workers' compensation agency, providing for a constitutional continuing appropriation of the workers' compensation fund for the purpose of paying workers' compensation benefits.

North Dakota Century Code Section 54-35-22 established the Workers' Compensation Review Committee effective August 1, 2005. The law requires the committee to meet once each calendar quarter unless there is no claim to review. The committee operates according to the laws and procedures governing the operation of Legislative Management interim committees.

Interim History

The following is a history of the committee's activities relating to claim reviews conducted under NDCC Section 54-35-22 and legislative recommendations made:

Interim	Claims Reviewed	Bills Recommended
2005-06	11	3
2007-08	15	9
2009-10	4	7
2011-12	2	4
2013-14	1	2

Claims Review Procedure

The committee began the interim by establishing a procedure and protocol for conducting its charge of reviewing claims, based on the protocol and application packet used during the 2013-14 interim. The revised application packet included a cover letter explaining the application process and eligibility requirements, a copy of NDCC Section 54-35-22, a "Release of Information and Authorization" form, and a "Review Issue Summary" form.

To notify the public of the committee's activities and to solicit injured employees to submit their claims for review, the committee published the application packet on the legislative branch website and mailed a copy of the application packet to injured employees who recently utilized the claim review services of WSI's Decision Review Office (DRO).

The committee established the following committee meeting procedure, which was followed for the claims reviewed by the committee:

1. Committee members have an opportunity before and during the committee meeting to review the binder of claim review information and to review the injured employee's WSI electronic records.
2. An ombudsman from WSI summarizes the injured employee's case.
3. The injured employee presents the workers' compensation issues brought forward for review. At the discretion of the injured employee, these issues are presented by the injured employee, a representative of the injured employee, or both of these individuals.
4. One or more representatives of WSI comment on the workers' compensation issues raised.
5. Interested persons are invited to comment on the workers' compensation issues raised as part of the claim review.
6. Committee members have an opportunity to discuss the issues raised.

Each claim reviewed was allocated a period of time in which the committee conducted the initial claim review. Following the initial review, the committee retained the authority to continue to discuss issues raised as part of the review. The committee may request additional information on specific issues and reviews this information at one or more future meetings. During a committee meeting at which a claim is reviewed, a WSI representative is available to electronically access the injured employee's WSI records.

First Claim

Claim Summary

The following is a summary of events of the injured employee's workers' compensation claim:

- The injured employee injured her knee on September 9, 2009, working as an environmental service worker at a hospital. She was unable to return to work at that time.
- September 22, 2009, WSI accepted the claim and awarded medical and wage loss benefits.
- December 1, 2009, the injured employee returned to work.
- November 16, 2010, the injured employee reapplied for wage loss benefits due to ongoing problems with her injured knee.
- December 2, 2010, WSI accepted the reapplication and awarded wage loss benefits.
- Upon reaching maximum medical improvement, WSI developed a vocational rehabilitation plan. On February 24, 2015, WSI sent the injured employee a notice of intention to discontinue/reduce benefits on April 23, 2015, as her vocational rehabilitation plan had been approved. The vocational rehabilitation plan indicated she has transferable skills to return to work as a receptionist, information clerk, customer service representative, bill and account collector, parking lot attendant, and greeter.
- The WSI order indicated the injured employee's transferable skills should allow her to compete in gainful employment at a wage greater than her preinjury weekly wage, and therefore she was not entitled to partial disability benefits.
- April 20, 2015, the injured employee requested the assistance of DRO.
- July 28, 2015, DRO issued its certificate of completion without any recommended change.
- The injured employee did not request an administrative hearing and WSI's order became final.

Issues for Review

The injured employee provided the following issues for consideration:

- She had an allergic reaction to the nickel in the metal implants used in her knee surgery and she is leery of undergoing another surgery due to these problems she had with the first surgery. Therefore, she is unable to adequately address the pain and limitations she is experiencing and is unable to work. She thinks these surgical problems could have been avoided with adequate presurgery preparatory testing.

- Loss of earnings is only one of the consequences of losing her job due to the workplace injury. She also has lost her health insurance and other employment benefits. Receipt of Social Security disability benefits and Medicare is not an equal trade.
- Vocational rehabilitation assessment should have occurred or reoccurred later in her claim and should have reflected her abilities at the time the claim for wage loss was closed. When she applies for jobs, employers are not interested in hiring her once they learn of her limitations.
- Vocational rehabilitation plan design should include more input from the injured employee and WSI should have been more responsive to her when she contacted WSI with questions and concerns.

Workforce Safety and Insurance Response

The WSI representative provided an overview of the rehabilitation hierarchy options effective after December 31, 2005, reported the injured employee qualified for vocational rehabilitation option F, and clarified option E is seldom used because of the difficulties associated in monitoring local labor markets.

Option	
A	Return to same position, same employer
B	Return to same occupation, any employer
C	Return to modified position, same employer
D	Return to modified or alternative occupation, any employer
E	Assess employability, local labor market, 35-mile radius
F	Assess employability, statewide labor market
G	Retraining, 104 weeks maximum
H	Retrained earnings capacity, NDCC Section 65-05.1-01(6)

The WSI representative reported a vocational rehabilitation assessment includes a functional capacity test performed by a physical therapist and an assessment interview with the injured employee, and before a vocational rehabilitation plan is finalized, WSI checks with medical providers to be certain the proposed jobs are appropriate for the injured employee.

The WSI representative reviewed how WSI documents contacts with injured employees using an electronic notepad field. When an injured employee contacts WSI, the goal is to reply within 24 hours.

Comments by Interested Persons

The committee received comments from two members of the public who reported they are injured employees. Testimony was limited to issues raised by the injured employee scheduled for claim review.

Committee Considerations

Committee members identified the following issues raised by the injured employee:

- Vocational rehabilitation plans may not adequately consider an injured employee's mental and physical abilities.
- Vocational rehabilitation may not adequately address deteriorating medical conditions and practical return-to-work opportunities.
- WSI's responses to injured employees may not be timely.

Second Claim

Claim Summary

The following is a summary of events of the injured employee's workers' compensation claim:

- The injured employee injured his shoulder on December 20, 2013, working as a material handler. He received treatment for the injury and was able to return to work.
- WSI accepted liability and paid the associated medical expenses and wage loss benefits.
- July 16, 2014, the injured employee underwent shoulder surgery to address his workplace injury. Workforce Safety and Insurance paid medical expenses and wage loss benefits.
- December 29, 2014, the injured employee underwent a functional capacity evaluation as part of the vocational rehabilitation process. The functional capacity test provided the injured employee should limit overhead work, not lift over 50 pounds, not push or pull over 100 pounds, and not reach above shoulder level.

- May 28, 2015, the vocational consultant's report was completed, providing the injured employee was qualified to pursue employment in the following fields: operating engineer and other construction equipment operator (heavy equipment operator), heavy and tractor-trailer truck driver, light truck or delivery service driver and bus driver, and transit and intercity driver.
- The WSI order indicated the injured employee's transferable skills should allow him to compete in gainful employment at 90 percent of his preinjury weekly wage, and therefore he was not entitled to partial disability benefits.
- August 17, 2015, WSI issued an order denying further disability and rehabilitation benefits.
- August 31, 2015, the injured employee appealed WSI's order and requested the services of DRO.
- September 11, 2015, DRO issued a certificate of completion, indicating no recommended change to the order.
- The injured employee did not request an administrative hearing and WSI's order became final.

Issues for Review

The injured employee provided the following issues for consideration:

- Although physical therapy treatment initially helped, it was not enough of an improvement for him to return to his preinjury job. He said there is a problem with employers terminating injured employees. He was terminated the same day he underwent an MRI.
- There is a catch-22 when treatment includes narcotic pain medication and an employer has a zero tolerance policy.
- Vocational rehabilitation errs when it finds an injured employee can return to the previous occupation, when in reality, an employer will not hire the injured employee with the injury limitations. Instead, WSI should provide training to allow an injured employee to pursue a less physical line of work.
- Unsafe jobsites contribute to workplace injuries.
- Due to the low incidence of fraud by employees, it is offensive for employers to vilify employees.
- WSI might be practicing age discrimination due to its unwillingness to provide vocational education to train an older worker for a new career.

Workforce Safety and Insurance Response

The WSI representative reported the good faith job search requirement of five daily contacts is not statutory, but sets a standard that, if met by the injured employee, the injured employee will not be at risk of noncompliance issues. Workforce Safety and Insurance established the five contact job search standard in response to requests from employees for a minimum standard. A "contact" includes a newspaper job search and an internet job search. Once an injured employee reaches maximum medical improvement, the injured employee's job is to find a job.

The WSI representative explained the standard for Social Security disability is different from WSI's standards. If an injured employee receives Social Security disability benefits, it impacts the amount of WSI benefits.

Committee Considerations

Committee members identified the following issues raised by the injured employee:

- Employers should want safe workplaces, both to keep employees safe as well as to keep workers' compensation premiums low.
- The use of narcotics by injured employees impacts employability. Misuse of narcotics by injured employees may have far-reaching social consequences.

Third Claim

Claim Summary

The following is a summary of events of the injured employee's workers' compensation claim:

- The injured employee injured his hip on January 15, 2009, working as a concrete foreman.
- WSI accepted a claim for a right hip sprain/strain.
- April 27, 2009, the injured employee was presumed to have reached maximum medical improvement.
- January 16, 2015, the injured employee saw a physician regarding right hip pain and the physician noted some severe degenerative changes in the hip, requiring hip replacement.

- February 23, 2015, WSI denied the injured employee's request to reopen his presumed closed claim.
- March 5, 2015, WSI received the injured employee's request for reconsideration which stated he felt his current degenerative changes were due to 30 years of concrete construction work and due to the January 15, 2009, work incident.
- March 17, 2015, WSI issued an order stating the injured employee was not entitled to additional benefits because the medical evidence did not show his current condition was related to the work injury.
- April 6, 2015, the injured employee requested the assistance of DRO to review the March 17, 2015, order.
- May 19, 2015, DRO issued a certificate of completion indicating no recommended change in the order.
- The injured employee did not request an administrative hearing and WSI's order became final.

Issues for Review

The injured employee provided the following issues for consideration:

- Regardless of the existence of a pre-existing condition, before the workplace injury he did not have hip pain or problems performing his job and after the injury he has hip pain causing him problems performing his job.
- The injured employee feels he is being penalized because he did not continue to complain about his right hip pain, resulting in his claim closing. If the workers' compensation program is not designed to help hard working people like him, he questioned who is it designed to help.
- Although health insurance will cover his hip replacement surgery, he will not receive wage loss benefits during his postsurgery recovery and he will be subject to out-of-pocket medical expenses such as copayments.
- Injured employees choose to not pursue appeals of WSI decisions because of the difficulty of finding legal representation and there is a perception it is unlikely WSI will be overturned on appeal.

Workforce Safety and Insurance Response

The WSI representative reviewed NDCC Section 65-01-02(10)(b)(7), which clarifies when an injury attributable to a pre-existing condition is not considered to be a compensable injury. However, under NDCC Section 65-05-15, the law addresses circumstances under which coverage may exist when a compensable injury combines with a noncompensable injury.

The WSI representative reviewed NDCC Section 65-05-35, which establishes the closed claim presumption, which applied in this injured employee's claim. If a claim is dormant for an extended period of time without treatment, the claim becomes difficult to assess. If a claim is dormant for 4 years or more, the claim is presumed closed. Clear and convincing evidence is required to reopen a claim presumed closed due to dormancy.

Committee Considerations

Committee members identified the following issues raised by the injured employee:

- In the orthopedic specialty there are scholarly studies on joint degeneration and it is likely a preinjury x-ray would have shown degeneration, even if there was no report of pain at that time.
- An employee's experience and knowledge is very valuable to an employer.
- The issues of pre-existing conditions and degenerative conditions are issues constituents commonly raise with legislators, and these issues are especially relevant as the workforce ages.

Fourth Claim

Claim Summary

The following is a summary of events of the injured employee's workers' compensation claim:

- The injured employee injured his lumbar spine on February 19, 2007, working as a laborer.
- March 8, 2007, WSI accepted the claim and awarded medical and wage loss benefits.
- The injured employee received wage loss benefits for the period May 24, 2007, through July 8, 2007, after which he was released to return to work.
- August 28, 2009, WSI issued an order denying further disability and rehabilitation benefits.
- October 27, 2009, the injured employee, through his attorney, requested a hearing on the August 28, 2009, order.
- August 4, 2010, the injured employee withdrew his request for hearing and the hearing scheduled for August 10, 2010, was canceled.

- July 5, 2014, the injured employee reapplied for wage loss benefits, claiming a worsening of his work-related medical condition.
- October 1, 2014, WSI issued a notice of decision accepting reapplication and awarding medical and wage loss benefits.
- The injured employee received wage loss benefits beginning July 24, 2014.
- August 11, 2014, the injured employee's treating physician submitted to WSI information regarding the injured employee's cervical spine because the injured employee felt his cervical spine problem was directly related to his lumbar spine injury.
- November 25, 2014, WSI issued a notice of decision denying the injured employee's claim, based on a finding the injured employee's cervical spine condition was unrelated to his February 19, 2007, lumbar spine work injury.
- December 6, 2014, the injured employee submitted to WSI a request for reconsideration indicating why he felt his cervical spine problems are related to his 2007 work injury.
- March 23, 2015, WSI issued an order stating WSI was not liable for the injured employee's cervical condition.
- April 2, 2015, the injured employee requested the assistance of DRO.
- April 29, 2015, DRO issued a certificate of completion indicating no recommended change in WSI's order.
- October 6, 2015, an administrative law judge issued findings of fact, conclusions of law, and final order, affirming WSI's March 23, 2015, order.
- The injured employee did not appeal the administrative decision and the order became final.

Issues for Review

The injured employee provided the following issues for consideration:

- WSI's system does not deal well with multiple injuries related to a single work-related event.
- WSI's system does not deal well with multiple workplace injuries filed over a long period of time.
- If a misdiagnosis is discovered at a later date, WSI should reopen the claim and provide coverage based on the later discovered information.
- Vocational rehabilitation plans are not always accurate and list jobs for which the injured employee does not have the necessary abilities. Additionally, if the plan identifies a low-paying job with poor benefits, it is not reasonable to expect an injured employee to move across the state to take that low-paying job with poor or nonexistent benefits.
- It would be beneficial to have programs that incentivize employers to take the risk of hiring an injured employee to allow an injured employee to establish a positive relationship with an employer and to allow a trial work period to determine whether the injured employee can perform the job duties.
- Medical providers are frustrated with WSI's system.
- DRO is biased.
- Vocational rehabilitation plans should be designed through collaboration with the injured employee.
- Since every employee is going to have some degree of degeneration, WSI should not be able to deny responsibility claiming a pre-existing condition.

Workforce Safety and Insurance Response

The WSI representative provided a chronological list of the injured employee's multiple claims as well as a summary identifying the body part injured in each claim.

Committee Considerations

Committee members identified the following issues raised by the injured employee:

- The injured employee, medical providers, and WSI may be challenged when there is a workplace event with multiple injuries as well as when there are multiple claims for workplace injuries over a long period of time.
- There may be methods through which the system could be improved to facilitate better communication between various medical providers.

Fifth Claim

Claim Summary

The following is a summary of events of the injured employee's workers' compensation claim:

- The injured employee injured his left upper arm on January 28, 2014, while working in the oil field.
- February 18, 2014, WSI accepted the claim and awarded wage loss benefits.
- March 2, 2015, a vocational rehabilitation plan was approved, indicating the injured employee has transferable skills to return to work as a manager/owner of land development, cost estimator, first line supervisor of constructions trades, or extraction worker.
- March 20, 2015, WSI issued a notice of intent to discontinue benefits after 2 months of work search benefits.
- March 31, 2015, the injured employee, through his attorney, submitted a request for reconsideration.
- April 22, 2015, WSI issued an order awarding partial disability benefits.
- April 22, 2015, the injured employee requested the assistance of DRO.
- May 20, 2015, DRO issued a certificate of completion indicating no recommended change to the order.
- June 2, 2015, the injured employee, through his attorney, requested a hearing. The hearing was scheduled and the injured employee continued to the hearing without the assistance of an attorney.
- December 19, 2015, the administrative law judge issued an order, affirming WSI's order. The administrative law judge found the first appropriate rehabilitation option was a return to work in the statewide job pool.
- This order was not appealed to the district court.
- This injured employee also appealed WSI's order denying permanent partial impairment benefits, based on an impairment of less than 14 percent whole body. This administrative proceeding was dismissed as a result of the injured employee withdrawing his request.

Issues for Review

The injured employee provided the following issues for consideration:

- The system does not adequately compensate injured employees for the significant loss of motion and ongoing pain resulting from injuries.
- The system does not recognize an injured employee's needs for legal representation. The injured employee needs an attorney to pursue any issues the injured employee might have with WSI. Without an attorney, the deck is stacked against the injured employee.

Workforce Safety and Insurance Response

The WSI representative testified that under NDCC Section 65-05-12.2, to qualify for a permanent partial impairment award, an injured employee must be found to have a whole body impairment of at least 14 percent.

The WSI representative provided a brief history of the workers' compensation system, stating when the workers' compensation system was created, the injured employee gave up the right to sue the employer in exchange for sure and certain relief. As part of this bargain, the injured employee gave up the right to sue for pain and suffering.

The WSI representative summarized the history of the law and administrative rules addressing when WSI is directed to pay an injured employee's attorney's fees. The testimony indicated that before 1995, WSI paid attorney's fees regardless of outcome, and as a result, almost every claim was appealed. According to the representative of WSI, this approach flooded the system and it was a disaster, with an immense amount of money going to pay for plaintiff's counsel. As a result of the legislative reforms in 1995 which limit the payment of attorney's fees to when the injured employee prevails, WSI recognized premium savings.

The WSI representative reported when WSI contracts for outside counsel, it pays those attorneys the same hourly rate as WSI pays an injured employee's attorney--\$150 per hour.

Committee Considerations

Committee members identified the following issues raised by the injured employee:

- There is a difference between a disability, which relates to the loss of ability to work, and impairment, which relates to loss of function of a part of the body.
- The inability of injured employees to find legal representation is an issue that is regularly raised by injured employees.

Sixth Claim

Claim Summary

The following is a summary of events of the injured employee's workers' compensation claim:

- July 6, 2011, the injured employee injured his right groin while working for a food manufacturer.
- December 6, 2011, WSI accepted the claim and awarded medical benefits for a lumbar sprain/strain and wage loss benefits.
- March 5, 2014, WSI issued a notice of intention to discontinue benefits as the injured employee had received temporary total disability benefits for a total of 104 weeks, and the injured employee subsequently became entitled to receive temporary partial disability, with an earnings capacity of \$0, as he was not able to work.
- November 24, 2014, WSI received an independent medical examination (IME) report indicating the substantial contributing factor to the injured employee's back pain was degenerative disease. The injured employee's treating doctor agreed with the IME assessment.
- March 19, 2015, WSI issued a notice denying further benefits based on the IME report and the opinion of the treating physician. The medical benefits ended on March 6, 2015, and wage loss benefits ended on April 9, 2015.
- March 24, 2015, the injured employee's attorney requested reconsideration.
- June 5, 2015, the injured employee requested the assistance of DRO.
- June 10, 2015, WSI issued an order denying further liability on the claim.
- June 25, 2015, DRO issued a certificate of completion indicating no recommended change in the decision.
- July 2, 2015, the injured employee requested an administrative hearing and participated in the hearing without legal counsel.
- January 4, 2016, the administrative law judge issued an order affirming WSI's order. This order was not appealed and became final.

Issues for Review

The injured employee provided the following issues for consideration:

- WSI's system does not adequately address the situation in which prior to a workplace injury the employee could work, but following the injury is unable to work.
- WSI's doctors do not have the injured employee's interests at the forefront, as they work for WSI.
- Injured employees do not have meaningful access to legal representation.

Workforce Safety and Insurance Response

The WSI representative stated the law provides WSI may not cover a pre-existing condition unless the workplace injury was a substantial contribution to the condition.

Committee Considerations

Committee members recognized multiple injured employees have raised the issue of inability to access legal representation.

Seventh Claim

Claim Summary

The following is a summary of events of the injured employee's workers' compensation claim:

- November 17, 2014, the injured employee filed a claim with WSI, claiming an injury of infection she incurred while working as a housekeeper for a hotel in Stanley, North Dakota. The date of injury was July 1, 2014. The injured employee reported she came to work one day and she began to itch all over her body. At the emergency room, a physician told her the itching was from the water in Ross, North Dakota.
- The injured employee saw several doctors in an effort to determine the cause of her rash and itching. She received a variety of possible diagnoses. The physicians were unable to determine for certain whether the rash was a result of a workplace exposure.
- December 12, 2014, WSI issued an order denying benefits, concluding the injured employee failed to prove a compensable work injury.

- January 8, 2015, the injured employee appealed WSI's order, requesting reconsideration, indicating her doctor believes the skin condition was caused by something from work.
- March 25, 2015, WSI issued an order denying the claim, finding no objective medical evidence to support the claimant suffered an injury as a result of the work activities that occurred on July 1, 2014.
- The injured employee did not appeal the order and it became final.

Issues for Review

The injured employee stated WSI did not give weight to the opinion of the doctor who stated the skin infection was related to employment.

Workforce Safety and Insurance Response

The WSI representative stated to be eligible for workers' compensation benefits, an employee must establish eligibility by objective medical evidence.

To be objective medical evidence, the evidence must be substantiated.

Committee Considerations

Committee members identified the following issues raised by the injured employee:

- In a civil claim, the plaintiff has the burden of proof, much like the injured employee has the burden to qualify for workers' compensation benefits. If in the future, evidence is discovered linking the injured employee's skin infection to the workplace, WSI should exercise its continuing jurisdiction to reopen the claim.
- Inability of an injured employee to access legal representation is a reoccurring issue.

Workforce Safety and Insurance Status Updates

To keep apprised of current events at WSI, the committee received status updates on timely topics and topics raised as part of the claim review process.

Legislative Package

The committee received a status report on the implementation of 2015 legislation relating to workers' compensation and received an overview of WSI's proposed legislative package for the 2017 legislative session. The proposed legislative package addresses medical and vocational services contracts, credit card fees, subrogation liens, administrative orders, DRO, medical expense assessments, securing premium payments, employer noncompliance, false statements by employers, providing notice to treating doctors, Social Security offset, criminal offenses for filing a false claim, and vocational rehabilitation pilot program reports.

Security Breach

The committee received a status report on a security breach that occurred at WSI. In May 2015 the Information Technology Department (ITD) became aware of unusual activity with WSI's information on the ITD server and therefore shut down the server. On June 10, 2015, ITD notified WSI that WSI incident reports and online employer reports from 2006 to 2015 may have been accessed in the breach. Although it appears none of the information was downloaded in the course of the breach, to be cautious, WSI entered a 1-year contract with a company that repairs credit. Workforce Safety and Insurance notified parties that may have been affected and informed them the credit repair services will be available at no charge for 1 year.

Pre-existing Conditions

In response to issues raised during the claim review, the committee reviewed element 5 of the 2010 quadrennial performance evaluation, which was included in the performance evaluation to address a 2009 study charge directing the Workers' Compensation Review Committee to study pre-existing conditions. The related performance evaluation recommendations were:

- **Recommendation 5.1.** Amend the existing internal WSI Claims Procedure 120 to require claims adjusters to send a questionnaire to the treating physician and/or an IME to inquire as to whether the employment substantially accelerated the progression or substantially worsened the severity of the pre-existing injury, disease, or condition. Provide training to all affected WSI claim and DRO staff.
- **Recommendation 5.2.** At the time a compensability decision is made for a claim with a pre-existing/trigger defense, WSI claims adjusters and supervisors should determine if the underlying condition would have progressed similarly absent the work injury, per WSI Claim Procedure 120.
- **Recommendation 5.3.** In circumstances where there is a prior medical condition or pre-existing work restriction, WSI should obtain this information to determine if there is a substantial objective baseline from which to proceed,

such as input from treating physicians familiar with the patient's medical conditions. This would allow WSI to establish an objective baseline and an accurate fact basis from which to proceed. The injured worker and the treating physician should be asked to provide documentation outlining any change in the injured worker's functional level of activity (including activities of daily living, if appropriate), change in any prior level of physical impairment, and/or a change in treatment frequency or severity attributed to the work incident.

- **Recommendation 5.4.** Utilize the IME process to resolve disputes arising out of claim denials for pre-existing conditions, prior conditions, and degenerative conditions.
- **Recommendation 5.5.** We recommend that WSI prepare legislation for consideration by the legislature which repeals the aggravation statute for injuries on or after a date in 2011 to be determined by the legislature.

Vocational Rehabilitation

In response to issues raised during the claim review process, the committee reviewed WSI's vocational rehabilitation system. Of the 2,448 time-loss claims filed with WSI in fiscal year 2016, 772 were referred to vocational rehabilitation.

The committee was informed at any given time there are approximately 500 vocational rehabilitation claims in the system, and \$648 per week is the maximum wage loss benefit WSI will pay an injured employee. However, if the injured employee returns to work at a decreased earning level, that injured employee may qualify for up to 5 years of temporary partial disability payments. As part of the vocational rehabilitation process, if an injured employee experiences an injury that changes or evolves over the course of vocational rehabilitation, the functional capacity evaluation should address this change as the evaluation is a whole body evaluation. If appropriate, WSI may perform a second functional capacity evaluation.

Attorney's Fees

In response to issues raised during the claim review process, the committee reviewed the laws and administrative rules relating to WSI payment of injured employees' attorney's fees. The committee reviewed the origin of WSI's fee schedule for attorney's fees, which is addressed under NDAC Section 92-01-02-11, adopted in 1990. It was reported WSI pays its contract attorneys the same hourly rate WSI pays the injured employee's attorney. Workforce Safety and Insurance calculates the fee cap based on the average attorney costs per appeal. Additionally, approximately every 2 years WSI updates the hourly attorney fees based on changes in the cost for WSI to contract with outside counsel. Under NDCC Section 65-10-03, in the case of a judicial appeal with issues that are unusually complex, an injured employee's attorney may request attorney's fees in excess of the maximum fee. Workforce Safety and Insurance makes the determination of whether issues are unusually complex.

The committee received testimony indicating there is a very low number of instances in which WSI appeals an order in which the injured employee initially prevails. Approximately 5 to 10 times per year WSI appeals an administrative decision, and there are typically 300 administrative appeals per year. At the administrative level, WSI has a 65 to 67 percent rate of prevailing, which translates to approximately 90 claims per year in which the injured employee prevails.

REPORTS

Quadrennial Performance Evaluation

North Dakota Century Code Section 65-02-30 directs the committee to receive a report on the status of the WSI quadrennial performance evaluation. A representative of WSI reported of the 40 recommendations made in the 2014 performance evaluation:

- 7 recommendations, either in full or in part, were works-in-progress before receiving a recommendation.
- WSI concurs with 29 recommendations.
- WSI partially concurs with 5 recommendations.
- WSI does not concur with 6 recommendations.
- As of August 2015, WSI closed out 26 recommendations and 14 remain works-in-progress.

Rehabilitation Services Pilot Program Report

Pursuant to NDCC Section 65-05.1-06.3, the committee received reports on WSI's system of pilot programs allowing WSI to assess alternative methods of providing rehabilitation services. Workforce Safety and Insurance is implementing a collaborative vocational support pilot program for claimants. The focus of this pilot program is to provide funding to assist claimants at the onset of the vocational rehabilitation process to access counseling and financial services. Workforce Safety and Insurance is contracting with two counselors to help claimants deal with coping strategies and with a firm of financial planners to assist claimants with financial stability.

Under this pilot program, a claimant will qualify for up to six visits with the counselors and up to four visits with the financial planners. Sessions are confidential, with the exception of situations for which there is the potential for harm to the claimant or harm to WSI.

Workforce Safety and Insurance will continue to meet regularly with the contractors and survey claimants who have participated in the pilot program to assist WSI in improving the program.

Safety Grants Report

Pursuant to NDCC Section 65-03-05, the committee received the biennial report from WSI regarding compiled data relating to safety grants issued under NDCC Chapter 65-03.

Modified Workers' Compensation Program Performance Review and Roughrider Industries Safety Review

Pursuant to NDCC Section 65-06.2-09, the committee inquired whether the modified workers' compensation program performance review and the Roughrider Industries safety review include any recommendations. Because the reviews do not make any recommendations for a change in either program, WSI was not required to make a report to the committee.

Alcohol Server Training

Section 3 of 2015 House Bill No. 1416 directed WSI to investigate whether there is industry interest in using safety programs to provide grants to an industry association to provide alcohol server training, and to report to the committee the outcome of this investigation.

In performing this charge, WSI consulted with the North Dakota Hospitality Association and determined sufficient efforts are being made by the North Dakota Safety Council, local hospitality establishments, local public health units, and local law enforcement agencies for the purpose of providing server training and there is no need to provide additional resources toward this effort. Workforce Safety and Insurance will not be pursuing the use of safety grants for the purpose of server training.

CONSIDERATIONS AND RECOMMENDATION

Considerations

In response to concerns raised by injured employees in the claim review process that injured employees have problems accessing legal representation, the committee considered three bill draft alternatives that would direct WSI to pay an injured employee's attorney's fees on appeal when the employee prevails, regardless of whether WSI ultimately prevails on further appeal. Under current law and application of administrative rules, WSI does not pay attorney's fees at any level of appeal if an injured employee prevails at a lower level, but WSI ultimately prevails on appeal.

Two of the bill drafts would limit WSI's payment of attorney's fees to the level of appeal at which the injured employee prevailed. Of these two bill drafts, one clarified the total amount of attorney fees paid by the organization may not exceed the fee cap established for the highest appellate level at which the injured employee prevails. A representative of WSI testified in support of including this clarifying language and that the clarifying language is appropriate as a result of the proposed change in law. Although this clarification could be addressed by administrative rule, codifying the language will prevent this possible lapse in clarity until rules are adopted. Committee members had differing opinions on whether it is appropriate to address the fee cap in law versus administrative code.

The third bill draft would not limit WSI's payment of attorney's fees to the level of appeal at which the injured employee prevailed. The proponent of this bill draft stated the expansion of payment of attorney's fees would have a minor fiscal effect as WSI reports it typically appeals fewer than 11 orders per year and it would not encourage frivolous appeals. Committee members had differing opinions on whether this bill draft moved far enough or too far in increasing access to legal representation.

Recommendation

The committee [recommends a bill](#) to direct WSI to pay an injured employee's attorney's fees on appeal when the employee prevails, regardless of whether WSI ultimately prevails on further appeal. The bill limits WSI's payment of attorney's fees to the level of appeal at which the injured employee prevailed.