

WORKERS' COMPENSATION REVIEW COMMITTEE

North Dakota Century Code 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. Section 54-35-22 provides for a six-member committee composed 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 the statutory directive to review workers' compensation claims, the committee was assigned six statutory directives:

- Section 65-02-30 requires the committee select up to four elements to be included in the quadrennial performance evaluation of Workforce Safety and Insurance (WSI);
- Section 65-02-30 requires the committee receive the performance evaluation report and review any actions taken resulting from the performance evaluation report;
- Section 65-03-05 requires the committee to receive a biennial report from WSI regarding compiled data relating to safety grants issued under Chapter 65-03;
- Section 65-05.1-06.3 directs WSI to include in an annual report to the committee status reports on WSI's current pilot programs in accordance with Section 65-01-19;
- Section 65-01-19 directs WSI to include in an annual report to the committee a summary of findings and recommendations of any current pilot programs and pilot programs completed within the previous 12 months; and
- Section 54-57-09 requires the committee to receive a quarterly report from the Office of Administrative Hearings (OAH) and WSI on statistical information regarding results under the case processing standards and policies.

Committee members were Representatives Dan Ruby (Chairman), Mary Adams, and George Keiser and Senators JoNell A. Bakke, Randy Burckhard, and Dave Oehlke.

CLAIM REVIEW General Background

Workers' compensation laws in North Dakota are found primarily in North Dakota Century Code Title 65. The administrative rules adopted by WSI are found in North Dakota Administrative Code 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.

Section 54-35-22 established the Workers' Compensation Review Committee effective August 1, 2005, and the law originally was set to expire August 1, 2007. The expiration clause was repealed in 2007. 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 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
2015-16	7	1
2017-18	10	0

Claims Review Procedure

Based on the protocol and application packet used during the 2017-18 interim, the committee established a procedure and protocol for conducting its charge of reviewing claims. The revised application packet included a cover letter explaining the application process and eligibility requirements, a copy of 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 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 used the claim review services of WSI's Decision Review Office. The committee adopted the following procedure, which was used during previous interims to determine eligibility for a claim review and to prepare the injured employee for the committee meeting at which the claim is reviewed:

1. An injured employee submits to the Legislative Council office a completed "Release of Information and Authorization" form and a "Review Issue Summary" form on which the applicant summarizes the issues the applicant wants the committee to review.
2. Upon receipt of a completed application, the Legislative Council staff forwards a copy of the application information to an assigned ombudsman at WSI, who reviews the application to make a recommendation regarding whether:
 - a. The applicant was an injured employee or the survivor of an injured employee;
 - b. The workers' compensation claim was final; and
 - c. All of the administrative and judicial appeals were exhausted or the period for appeal had expired.
3. Following this review, the ombudsman contacts the Legislative Council staff to provide a recommendation regarding eligibility for review. Upon receipt of this recommendation, the Legislative Council staff contacts the committee chairman to make a determination of eligibility.
4. Upon a determination of eligibility, the Legislative Council staff contacts the injured employee and the ombudsman to begin the case preparation.
5. Regardless of whether the injured employee accepted the assistance of the ombudsman, the ombudsman prepares a summary of the case to present at the committee meeting.
6. At the injured employee's discretion, the ombudsman assists the applicant in organizing the issues for review.
7. The ombudsman prepares a case review packet and includes the packet in a binder of information prepared for each committee member, Legislative Council staff, and the WSI representative. Although these binders are distributed at each committee meeting, the binders remain the property of WSI and are returned at the completion of each committee meeting.
8. Before each committee meeting at which a claim was to be reviewed, the ombudsman meets with Legislative Council staff to review the case summary and workers' compensation issues to be raised.
9. Upon receipt of these workers' compensation issues, Legislative Council staff notifies a WSI representative of the identity of the injured employee who will be appearing before the committee for a case review, and as appropriate, the basic issues to be raised by the injured employee.

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. The ombudsman 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 comments on the workers' compensation issues raised.
5. The committee members have an opportunity to discuss the issues raised.

Each claim reviewed is allocated a block of time during which the committee conducts the initial claim review. Following the initial review, the committee retains the authority to continue to discuss issues raised as part of the review. The committee may request additional information on specific issues and may review this information at a future meeting. During a committee meeting at which a claim is reviewed, a WSI representative is available to access the injured employee's WSI records electronically.

First Claim

Issues for Review

The injured employee reported WSI denied the employee's chronic opioid therapy for treatment of his chronic lower back pain stemming from a work injury to the employee's lumbar spine sustained in 1986. Workforce Safety and

Insurance denied the employee's chronic opioid therapy because the employee tested positive for tetrahydrocannabinol (THC) while undergoing chronic opiate therapy. The injured employee provided the following issue for consideration:

- Injured employees should be able to use THC for pain management as opiate support while receiving chronic opioid therapy to assist in medically withdrawing from opiate use with the goal of having zero opiates prescribed.

Workforce Safety and Insurance Response

The WSI representative reviewed Section 65-05-39, which provides the relevant criteria for the injured employee and for the prescribing physician. 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. Section 65-05-39 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. When the injured employee tested positive for THC, medical marijuana was not a medically accepted practice in North Dakota.

Committee Considerations

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

- THC is a federal Schedule 1 drug and is not viewed by the federal government as a credible form of medical treatment.
- The initiated measure decriminalizing THC for medicinal purposes was approved by over 70 percent of North Dakota's voting public.
- The injured employee's situation was not a medical THC issue, but simply related to the presence of THC before THC was a medically accepted practice in North Dakota.

Second Claim

Issues for Review

The injured employee reported an administrative law judge affirmed a WSI order relating to termination of benefits for false statements and physical misrepresentations made by the injured employee. The injured employee did not appeal the decision to district court and the order became final. The injured employee provided the following issues for consideration:

- WSI should be more transparent and helpful to injured employees.
- WSI should have been more responsive to the injured employee when he contacted WSI with questions and concerns.
- WSI should be overseen by the North Dakota Insurance Commissioner for decisions and accountability.
- An injured employee should have the right to face the accuser or witness when accused of false statements and physical misrepresentations.

Workforce Safety and Insurance Response

The WSI representative reviewed Section 65-05-39, which provides it is a Class A misdemeanor for an injured employee who claims benefits or payment for services to misrepresent that individual's physical condition willfully, including deceptive conduct that misrepresents that individual's physical ability. An injured employee who violates Section 65-05-39 forfeits any additional benefits relative to that injury. Because the penalty is so severe, WSI typically includes photographs and video recordings when writing fraud orders terminating benefits.

Committee Considerations

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

- WSI's responses to injured employees may not be timely nor presented clearly or transparently enough.
- There may be methods through which the system could be improved to facilitate better communication between the injured employee and WSI.
- WSI always should use photographic and video evidence when terminating benefits due to allegations the injured employee made false statements or intentionally misrepresented the physical injury.

Third Claim

Issues for Review

The injured employee reported WSI issued an order awarding temporary partial disability benefits on a retained earnings capacity of \$108.75 per week and determined retraining was not a viable option for the injured employee due to work injury limitations. The injured employee is scheduled to have exhausted the full 5 years of partial disability benefits available as of October 2021. The injured employee provided the following issues for consideration:

- The claims process takes too long to resolve.
- Injured employees are given 30 days to respond to a decision issued by WSI, yet WSI appears to not have any deadlines to issue decisions relating to claims.
- The system should be designed to take care of the injured employee and do what is right for the injured employee.
- The 5-year limitation on temporary partial disability benefits is arbitrary because an injury or pain does not disappear within a specified time.

Workforce Safety and Insurance Response

The WSI representative reported the injured employee's claim involved short-term employment and pre-existing issues. Workforce Safety and Insurance had to determine whether the flare up was caused by the employee's injury by the employment or by a pre-existing condition. If the flare up 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.

Committee Considerations

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

- WSI may have too few claims analysts which prolongs the time it takes for a claim to be processed.
- In 1991 a 5-year cap was placed on temporary partial disability benefits, and in 2006 a 2-year cap was implemented on temporary total disability benefits for a total of 7 years of benefits combined.
- WSI's responses to injured employees may not be timely.
- The system could be improved to facilitate better communication between WSI and injured employees.

Fourth Claim

Issues for Review

The injured employee reported his second reapplication for medical and disability benefits related to his injured lumbar spine was denied because WSI determined the injured employee did not have any loss of earnings. The medical review concluded the injured employee had a significant change in his compensable work injury but the injured employee's employer did not provide WSI with the requested tax and wage information to see if the evidence supported a loss of earnings due to the significant change. The injured employee provided the following issues for consideration:

- The laws pertaining to WSI are difficult to read and understand.
- The injured employee did not understand the process fully, whereas WSI is very experienced and knowledgeable about the entire process, resulting in an unfair outcome.
- Waiting 30 to 45 days to get mailed correspondence back from WSI regarding surgical procedures and other filings is unacceptable.
- WSI should have been more responsive to the injured employee when he contacted WSI with questions and concerns.

Workforce Safety and Insurance Response

The WSI representative reviewed Section 65-05-08, which provides WSI with the standards to follow when someone previously has received disability benefits, there has been a break in benefits, and disability benefits are being requested again. Reapplications have two statutory requirements. First, the injured employee must show a significant change in the compensable medical condition. Second, the injured employee must show an actual wage loss caused by the significant change. Workforce Safety and Insurance was unable to secure the required payment information from the injured employee's employer to satisfy the requirements of the second prong necessary for approving a reapplication.

Committee Considerations

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

- WSI's responses to injured employees may not be timely nor presented clearly or transparently enough.
- The system could be improved to facilitate better communication between the injured employee and WSI.
- The reapplication process could be improved to allow for an injured employee to submit the requested payment information in cases in which an employer is not providing WSI with sufficient or satisfactory payment documents in a timely manner.

Fifth Claim

Issues for Review

The injured employee reported WSI issued a notice of intention to discontinue wage loss benefits due to her vocational noncompliance. Workforce Safety and Insurance issued an order indicating no permanent impairments benefits were payable in connection with the injured employee's work injuries because the percentage of whole body impairment did not meet the statutory requirement of 14 percent. The injured employee provided the following issues for consideration:

- WSI typically denies benefits for the treatment of depression and other mental injuries.
- WSI selects medical providers who provide opinions favorable to WSI.
- Injured employees are unable to locate or attain adequate legal representation.
- WSI should improve its administrative process and methods to ensure compliance with confidentiality requirements.
- The permanent partial impairment determination should include factors such as the effects of medications and ailments hindering bodily functions and abilities.
- The 5-year limit on partial disability is too short when considering how injuries impact an employee's earning ability.

Workforce Safety and Insurance Response

The WSI representative reported WSI is bound by statute to pay only for mental health conditions caused by the physical condition. It has been challenging to find functional capacity evaluation and independent medical examination providers within the state. Pilot programs and other initiatives have been attempted to increase the availability of those providers. 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.

Committee Considerations

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

- Multiple injured employees have raised the issue of inability to access or afford legal representation.
- Vocational rehabilitation plans may not consider an injured employee's mental and physical abilities adequately.
- Vocational rehabilitation may not address deteriorating medical conditions and practical return-to-work opportunities adequately.

Sixth Claim

Issues for Review

The injured employee provided an overview of the challenge in finding North Dakota attorneys to handle workers' compensation claims and reported WSI should improve assessing injured employee claims because every case is unique. The injured employee provided the following issues for consideration:

- WSI has access to legal counsel while the injured employee does not have equivalent access to legal counsel. Few attorneys in the state are willing to represent injured employees.
- Injured employees choose not to pursue appeals of WSI decisions because of the difficulty of finding legal representation and the perception is it is unlikely WSI decisions will be overturned on appeal.
- More attorneys should be available to represent injured employees. The system does not recognize an injured employee's needs for legal representation. Without an attorney, the injured employee is unable to receive fair treatment.
- The injured employee did not understand the process fully, whereas WSI is very experienced and knowledgeable about the entire process, resulting in an unfair outcome.

Workforce Safety and Insurance Response

The WSI representative reported 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. Injured employees are given an appeal period to notify WSI of any additional body parts the injured employee would like examined.

Committee Considerations

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

- The inability of injured employees to find or afford legal representation is an issue raised regularly by injured employees.
- Section 65-02-08 provides if an injured employee has a successful claim or appeal, whether at the administrative law level or in court, WSI must pay the attorney. The actual amounts reimbursed are specified within North Dakota Administrative Code and the amounts are reviewed and adjusted every other year.

Seventh Claim

Issues for Review

The injured employee reported after WSI issued a notice of decision accepting his reapplication for disability benefits, WSI notified him that because his Social Security retirement date was January 2018, he would not be eligible for disability, and the temporary total disability benefits of \$14,182.86, he received from July 1, 2014, through January 13, 2015 was paid in error. Workforce Safety and Insurance addressed the overpayment by entering a stipulation with the injured employee, indicating the overpayment would be reduced to \$10,000.00, and the overpayment would need to be repaid in full by December 31, 2019. The injured employee provided the following issue for consideration:

- Depending on when an individual's birthday is and when the individual applies for workers' compensation benefits, there is an unforeseen circumstance wherein the individual may not receive benefits.

Workforce Safety and Insurance Response

The WSI representative reviewed Section 65-05-09.3, which provides the retirement presumption may or may not coincide with actual retirement. The retirement presumption was enacted in 1995 and established a presumed retirement age. An individual older than the presumed retirement age is unable to collect disability benefits, and accepting Social Security retirement unless accepted before full attainment of Social Security retirement is irrelevant. Section 65-05-09.3 would be relevant in a case in which an individual has full retirement at age 65 but starts to receive retirement benefits at age 62. If the medical evidence indicated the injured employee's injury was a new injury, it would have been processed as a new injury. If an individual continues to work beyond the presumed retirement age and suffers a new injury, the individual is entitled to disability benefits not to exceed 3 years. If the injured employee's injury had been a new injury, he would have been entitled to up to 3 years of disability benefits.

House Bill No. 1188 (2019) provided an injured employee who has received disability benefits that have been discontinued before retirement is eligible to receive disability benefits after retirement if the injured employee meets the reapplication criteria. With the enactment of House Bill No. 1188, a claim similar to the injured employee's claim now is covered.

Committee Considerations

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

- Whether the presumed retirement age applies to reapplications postretirement.
- The Workers' Compensation Review Committee is not authorized to make any formal decisions on any workers' compensation claims and cannot change an existing decision made by WSI.

Eighth Claim

Issues for Review

The injured employee reported when he reached maximum medical improvement he completed a two-part permanent partial award evaluation and was found to have a 6 percent whole person impairment as a result of the work injury to his left eye. Workforce Safety and Insurance denied permanent partial impairment benefits because his 6 percent whole person impairment did not meet the threshold required for a monetary award. The injured employee's letter requesting assistance from the Decision Review Office was untimely as the 30-day time limit had expired. The injured employee reported he sent his appeal timely to WSI but did not receive WSI's order denying permanent partial impairment due to an address change. The injured employee provided the following issues for consideration:

- WSI should be more transparent and helpful to injured employees.
- The WSI claims process should be changed to provide more personal insight to a claimant so a claimant is aware a claimant's decision to accept a decision by WSI and not appeal the decision precludes any further or future way of resolving or disputing the decision.
- Claimants should be provided instructional tools and service resources to better inform a claimant of claimant rights and enhance the claimant's awareness of the WSI claims process.
- WSI's responses to injured employees may not be timely.

Workforce Safety and Insurance Response

The WSI representative reviewed Section 65-05-12.2 pertaining to permanent partial impairment benefits. The permanent partial impairment benefit is based on the *Guides to the Evaluation of Permanent Impairment*, American Medical Association, (6th edition). The guide illustrates the human body as a chart and breaks the body into percentages, quantifies the loss of use of every part of the human body, and factors it into a total percent loss. The payment is derived from permanent partial impairment, which is a stand-alone payment, and is unrelated to wage-loss or medical benefits. Permanent partial impairment is an attempt to compensate for the loss of use for an individual and the rating system in North Dakota starts with awards beginning at 14 percent whole person impairment.

The continuing jurisdiction statute authorizes WSI to extend the 30-day allotted time frame in which injured employees and employers have to notify WSI of an intent to appeal or request reconsideration of a decision.

Committee Considerations

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

- WSI's responses to injured employees may not be timely nor presented clearly or transparently enough.
- Claimants may not receive orders or decisions in a timely manner allowing the claimant to appeal an order or request reconsideration within the 30-day allotted time frame.
- Minnesota's permanent partial impairment evaluation system radically differs from North Dakota's system because Minnesota uses a different set of American Medical Association guides.

Ninth Claim

Issues for Review

The injured employee reported his temporary partial disability benefits set him up to fail because his hands are too severely injured and deformed for him to seek employment in good faith. His frostbite developed into complex regional pain syndrome that now renders it impossible for him to get more than 2 hours of sleep at night and he does not understand how WSI reasonably can expect him to seek employment effectively. His benefits end in January 2021. The injured employee provided the following issues for consideration:

- WSI's doctors do not have the injured employee's interests at the forefront because the doctors work for WSI.
- Vocational rehabilitation plans may not consider an injured employee's physical abilities and pain adequately.
- WSI should focus on the treatment of injured employees, not benefits.
- The system does not compensate injured employees adequately for ongoing pain resulting from injuries.

Workforce Safety and Insurance Response

The WSI representative reviewed Section 65-05.1-01 pertaining to rehabilitation services and it is the goal of vocational rehabilitation to return the injured employee to substantial gainful employment with a minimum of retraining as soon as possible after an injury occurs. The injured employee was rated at 0 percent whole person impairment and the rating system in North Dakota starts with awards beginning at 14 percent whole person impairment. Permanent partial impairment awards based solely on pain likely are prohibited because pain cannot be measured objectively. In accordance with statute, temporary partial disability benefits may not exceed 5 years.

Committee Considerations

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

- The issues of pain management and severe or ongoing pain resulting from injuries are issues constituents commonly raise with legislators.
- Vocational rehabilitation may not address deteriorating medical conditions and practical return-to-work opportunities adequately.
- Vocational rehabilitation plans should be designed in collaboration with the injured employee.

Tenth Claim

Issues for Review

The injured employee reported he was assessed initially at 24 percent whole person impairment based on an internal permanent partial impairment review by WSI because of his work injury. He was then denied permanent partial impairment benefits by WSI because he was assessed a 9 percent whole person impairment for his right elbow after undergoing a permanent partial impairment evaluation, which is below the 14 percent whole person threshold for a monetary impairment award. The injured employee provided the following issues for consideration:

- If permanent partial impairment evaluations are based on the *Guides to the Evaluation of Permanent Impairment*, American Medical Association, (6th edition), an evaluation should not be able to go from an initial assessment of 24 percent whole person impairment to 9 percent whole person impairment. The impairment rating should remain consistent.
- Decisions to reduce whole person impairment ratings appear to be a judgment call by WSI rather than a medical decision based on knowledge and the *Guides to the Evaluation of Permanent Impairment*, American Medical Association, (6th edition).

Workforce Safety and Insurance Response

The WSI representative reviewed Section 65-05-12.2, which relates to permanent partial impairment benefits, and is based on the *Guides to the Evaluation of Permanent Impairment*, American Medical Association, (6th Edition).

Section 65-05-12.2(3) provides an injured employee is entitled to compensation for permanent impairment only for those findings of impairment that are permanent and which were caused by the compensable injury, meaning an injured employee will not get a permanent impairment award for an injury that heals or could improve. Section 65-05-12.2(4) provides an injured employee is eligible for an evaluation of permanent impairment only when all conditions caused by the compensable injury have reached maximum medical improvement, meaning an injured employee will not qualify for an award until the employee has reached the maximum medical improvement and there is an objectively measurable permanent injury suffered by the injured employee.

A claim can be reduced or increased during an audit. When WSI makes a determination on an award amount, the injured employee may use the appeals process to provide additional input if the worker disagrees with WSI's findings and conclusion.

Committee Considerations

Committee members considered the following issue raised by the injured employee:

- WSI should provide an injured employee with better notice explaining a whole person impairment rating may be reduced or increased after an audit and the injured employee's right to appeal such a decision.

Eleventh Claim

Issues for Review

The injured employee reported WSI denied permanent partial impairment benefits for her headaches, chronic pain, complex regional pain syndrome, and depression, which were consequential conditions resulting from the 2001 crush injury she sustained to her right hand and right upper extremity. The injured employee provided the following issues for consideration:

- WSI awards should provide monthly payments for chronic pain.
- Chronic pain should be considered compensable when caused by the work-related injury.

Workforce Safety and Insurance Response

The WSI representative reviewed Section 65-05-12.2 pertaining to permanent impairment evaluations. Section 65-05-12.2(4) provides an injured employee is eligible for an evaluation of permanent impairment only when all conditions caused by the compensable injury have reached maximum medical improvement. Section 65-05-12.2(7) provides an injured employee is not entitled to a permanent impairment award due solely to pain. Permanent partial impairment awards based solely on pain likely are prohibited because pain cannot be measured objectively.

Committee Considerations

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

- An injured employee who believes a condition has undergone a substantial worsening can request a reevaluation of the initial impairment rating and if the request is denied, the denial is appealable.
- If a treatment or procedure becomes available that would alleviate chronic pain, WSI would cover the cost of the treatment or procedure because it is medically related to the underlying work-related injury.

Twelfth Claim

Issues for Review

The injured employee reported WSI issued a notice of decision denying benefits because of the lack of evidence of an acute injury to his lumbar spine resulting from his work accident. All diagnostic studies revealed underlying and pre-existing degenerative conditions. The injured employee provided the following issues for consideration:

- WSI's doctors do not have the injured employee's interests at the forefront because the doctors work for WSI.

- 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 reported a compensable injury must be an accident arising out of and in the course of hazardous employment and must be established by medical evidence supported by objective medical findings. Under Section 65-01-02(11), an injury attributable to a pre-existing injury, disease, or other condition, including when employment acts as a trigger to produce symptoms in the pre-existing injury, disease, or other condition, is excluded from being considered a compensable injury unless the employment substantially accelerates its progression or substantially worsens its severity. Magnetic resonance imaging indicated the injured employee had a degenerative disease from his L1 to S1 vertebrae. The medical evidence was reviewed by WSI's internal physician who determined the work accident acted as a trigger to make the prior injury symptomatic but the accident did not accelerate the prior injury.

Committee Considerations

Committee members considered the following issue raised by the injured employee:

- The issues of pre-existing conditions and degenerative conditions are issues constituents commonly raise with legislators and are especially relevant as the workforce ages.

WORKFORCE SAFETY AND INSURANCE STATUS UPDATES

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

Dual Filing

In response to issues raised during the claim review process, the committee reviewed WSI's dual filing guidelines. The committee was informed if a claim for workers' compensation benefits is compensable in North Dakota and a claim for workers' compensation benefits for the same injury or death is filed in another state, WSI may defend at WSI's expense any claim, proceeding, or suit against a North Dakota-covered employer. Workforce Safety and Insurance may not defend a claim for workers' compensation benefits, proceeding, or suit if that claim for workers' compensation benefits is not compensable in North Dakota.

The committee received testimony reviewing WSI's coverage of claims within North Dakota and was informed issues arise when employers or their employees leave North Dakota for business purposes, such as for trade shows, sales calls, or service calls. From WSI's perspective, there is not any workers' compensation coverage when an employer or employee leaves North Dakota. If an out-of-state injury claim comes back to North Dakota and the injured employee wants North Dakota benefits, WSI will adjudicate that claim. Workforce Safety and Insurance has no authority or jurisdiction to handle an out-of-state injury claim filed in another state. Workforce Safety and Insurance has entered an agreement with an insurance carrier called Accident Fund Insurance Company of America under which WSI reinsures Accident Fund 100 percent on out-of-state exposures. However, because Accident Fund is barred by statute from conducting business in North Dakota, Accident Fund cannot respond to North Dakota claims.

Trends and Initiatives

The committee received an overview of WSI trends and initiatives. The overview included WSI's performance metrics for the 2019 fiscal year which covered:

- Investment returns;
- Fund surplus;
- Premium dividends;
- Employer and injured employee satisfaction survey results;
- WSI employee turnover;
- Claims filed for every 100 covered employees;
- Average annual premium rate adjustment; and
- The available surplus ratio.

The committee was informed 5 to 10 percent of farmers provide workers' compensation coverage for their employees. Workforce Safety and Insurance had a robust agricultural initiative about 3 years ago which was coordinated with many of the agricultural associations within the state in an attempt to have more ranchers and farmers opt-in for workers'

compensation coverage. The outreach attempt did not result in a significant increase in ranchers and farmers signing up for coverage. A majority of states, including North Dakota, do not require ranchers and farmers to have workers' compensation coverage for their employees. Workforce Safety and Insurance has continued with the agricultural initiative and WSI attends all major agricultural trade shows within the state with the objective of better educating ranchers and farmers on the benefits of workers' compensation coverage.

Time Computation

In response to issues raised during the claim review process, the committee reviewed WSI's time computation policies and practices. The committee was informed 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. 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, and a party has 30 days from the date of service of an administrative order or from the day the Decision Review Office mails its notice that the office's assistance is complete, to file a written request for rehearing. If a written appeal is not received within the 30-day limit, the decision is final.

Legislative Package

The committee received a status report on the implementation of 2019 legislation relating to workers' compensation. The legislation addressed disability benefits for injured employees who had disability benefits discontinued preretirement and a reapplication for benefits postretirement; authorized WSI to establish alternative dispute resolution pilot programs, and a case processing, tracking, and reporting requirement for OAH; added a civil penalty for a contractor who uses the services of an uninsured employer under a cease and desist order; increased and created employer penalties for offsetting premiums against an employee's wages and for failing to report information; and outlined the penalties for an uninsured employer for failing to secure coverage and for being noncompliant.

RECOMMENDATION

The committee recommends a bill draft [21.0072.02000] to extend the 30-day time frame allotted for injured employees and employers to appeal or request reconsideration of a decision by WSI to 45 days and to remove the provision that the failure of an employer to file a response within 14 days from the day a response form was mailed to the employer constitutes the employer's admission the information in the claim form is correct.

REPORTS

Quadrennial Performance Evaluation Update

In accordance with Section 65-02-30, the committee received a status report on the implementation of the 2018 performance evaluation. A representative of WSI reported of the 14 recommendations made in the 2018 performance evaluation:

- WSI concurs with 11 recommendations.
- WSI partially concurs with 3 recommendations.
- As of August 2019, WSI finalized 9 recommendations and 5 recommendations remain works-in-progress.

The next performance evaluation will be conducted during the 2021-22 interim at which time the committee will be responsible for selecting up to four elements to be included in the performance evaluation.

Safety Grants Report

Pursuant to Section 65-03-05, the committee received the biennial report from WSI regarding compiled data relating to safety grants issued under Chapter 65-03. The report provided an overview of the safety training and education program, ergonomic initiative and ergonomic grant programs, learning management system, and the federal Occupational Safety and Health Administration's Outreach Training Programs. The committee received data about each program, including continuing safety appropriation amount by biennium, beginning in 2005. The committee was informed the hazard elimination learning program grant and the workplace injury reduction challenge grant have been discontinued and are no longer funded.

Pilot Programs Report

Pursuant to Sections 65-01-19 and 65-05.1-06.3, the committee received a report from WSI regarding current pilot programs and pilot programs completed within the previous 12 months, including a summary of findings and recommendations.

Alternative Dispute Resolution Pilot Program

The committee was informed the alternative dispute resolution pilot program focuses on claims with conflicting medical information. The program is designed to identify and resolve medical issues much earlier in the adjudication

process and avoid protracted litigation by having a neutral third-party medical professional review the conflicting medical information in the claim and provide an independent opinion. The neutral reviewer is agreed upon by the parties, participation in the process is voluntary for injured employees, and WSI pays the costs associated with the review performed by the neutral third party. Parties are bound by the opinion of the neutral reviewer.

Enhanced Injury Care Program Pilot Project

The committee was informed the enhanced injury care program pilot project focuses on screening and early intervention to give treating providers a reliable tool to identify patients with certain psychosocial markers that may otherwise go unnoticed. The program is coordinated with Sanford Health Occupational Medicine - Bismarck and was designed to provide the ability to escalate the most severe cases for a brief psychological intervention with a specialist. The increased costs of screening and the rare psychological counseling conducted under this program are covered by WSI and the program has been broadened to include all Sanford Health Occupational Medicine clinics within the state.

Case Processing Standards and Policies Report

Pursuant to Section 54-57-09, the committee received quarterly reports from OAH and WSI on statistical information regarding results under the case processing standards and policies adopted to produce a 6-month rolling average of time elapsed to 215 days or fewer between the date OAH receives a WSI file and the date of the administrative law judge's decision. The reports provided a statistical overview of data between 2010 to 2020, which provided the number of files received from WSI each year, the number of WSI-related hearings held each year, the average number of days between receipt of a WSI file and when a hearing is held, and the average number of days between receipt of a WSI file to when OAH closes the file.

The committee was informed the average number of days from OAH receiving a file to when a hearing is held was 248 days in 2017 and 258 days in 2018. In 2010, the average number of days was 141 days. To meet the 6-month rolling average of a 215-day limit, OAH contracted with two additional administrative law judges to help improve capacity and implemented new written criteria for performance, including a new timeline for issuing decisions. As a result of OAH's response and goal of meeting the 6-month rolling average of a 215-day limit, between November 1, 2019, and April 30, 2020, the average number of days was reduced to 176 to 179 days. Between November 1, 2019, and April 30, 2020, the average number of days from when an administrative hearing is held to when a decision is issued was reduced by 27 to 45 days.

The committee was informed the statistics regarding the decisions issued by OAH align with WSI's expectations and WSI was pleased the number of days for a decision to be issued by OAH was reduced by an average of 100 days.