

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

**WORKERS' COMPENSATION REVIEW COMMITTEE**

Monday, September 8, 2014  
Harvest Room, State Capitol  
Bismarck, North Dakota

Senator Lonnie J. Laffen, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Senators Lonnie J. Laffen, Tom Campbell, George B. Sinner; Representatives Bill Amerman, Curtiss Kreun

**Member absent:** Representative Gary R. Sukut

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

**It was moved by Representative Kreun, seconded by Senator Campbell, and carried on a voice vote that the minutes of the July 1, 2014, meeting be approved as distributed.**

**SAFETY REVIEW ROUGHRIDER INDUSTRIES AND  
MODIFIED WORKERS' COMPENSATION REPORT**

Chairman Laffen called on Mr. Barry Schumacher, Workforce Safety and Insurance, to give the report and any related recommendations based on the biennial safety review of Roughrider Industries work programs and the biennial performance review of the program of modified workers' compensation coverage ([Appendix B](#)).

**CLAIM REVIEW FOLLOWUP**

The committee discussed the claim reviewed at the previous meeting. Chairman Laffen called on Committee Counsel to report on the appeal timeline for administrative orders. She said upon reviewing North Dakota Century Code Section 28-32-41(1), and after contacting an administrative law judge to discuss the practice taking place at the administrative level, it appears legislation is not required to provide for reconsideration of an administrative order to stay the period for appeal. Therefore, she said, a bill draft was not prepared to address this matter.

Chairman Laffen called on Committee Counsel to review a bill draft [[15.0264.01000](#)] relating to proof of an offer of employment. She said under this bill draft, proof of offer of employment must be provided by a written offer that the employer provided the employee.

Senator Sinner questioned whether the bill draft would require proof of receipt of the job offer.

Chairman Laffen said the bill draft could be revised to require the job offer be provided via certified or registered mail.

In response to a question from Representative Kreun, Mr. Timothy Wahlin, Workforce Safety and Insurance, stated that under this bill draft, procedurally, when Workforce Safety and Insurance (WSI) contacts an employer to determine if there has been a job offer, the employer would be required to produce documentation of a job offer.

Chairman Laffen requested the Legislative Council staff to revise the bill draft to require the job offer be provided by certified or registered mail.

The committee discussed the material ([Appendix C](#)) WSI provided in followup to the claim review from the previous meeting, relating to post-Decision Review Office consultation fees and costs; the administrative rule establishing the rate WSI reimburses for attorney's fees; vocational rehabilitation statistics; a summary of vocational rehabilitation services expenses; an overview of 2013 Senate Bill No. 2298 regarding independent medical examinations (IMEs); a summary of studies relating to WSI's use of IMEs; and a state-by-state comparison relating to prior injuries, preexisting conditions, and degenerative conditions.

In response to a question from Senator Campbell, Ms. Jodi Bjornson, General Counsel, Workforce Safety and Insurance, stated the administrative rule rate of \$140 per hour for attorney's fees is revised periodically. She said

this rate is both the rate WSI pays for an injured worker's attorney and the rate WSI pays its contracted legal counsel.

In response to a question from Senator Sinner, Ms. Bjornson said WSI's contracted legal counsel seems to think this rate is a reasonable rate and that it is appropriate in the North Dakota market. She said in setting this rate, there is not a precise formula WSI uses, but instead WSI relies on its experience and knowledge of the market and the fact that the market seems to support this rate.

Mr. Wahlin reviewed the summary of studies that have considered WSI's use of IMEs.

In response to a question from Senator Sinner, Mr. Wahlin said WSI can provide the committee with more detailed information regarding these three studies.

## PERFORMANCE EVALUATION

Chairman Laffen called on Mr. Jason Wahl, State Auditor's office, for introductory comments ([Appendix D](#)) regarding the 2014 WSI performance evaluation. Mr. Wahl stated the State Auditor's office role in the WSI performance evaluation has included ensuring that the contracted work is complete and that the contractor is paid according to the contract. Additionally, he said, when the consultant completed the draft of the performance evaluation report, the State Auditor's office reviewed the draft and offered comments for consideration.

Chairman Laffen called on Mr. Malcolm Dodge, Sedgwick Claims Management Services, Inc., for presentation of the WSI performance evaluation. Mr. Dodge stated it was a positive experience working with WSI in preparing the performance evaluation. He said although Sedgwick has experience working with WSI, this is the first four-year performance evaluation that has been conducted. In the past, he said, the performance evaluations were conducted every two years. He said the performance evaluation addressed eight elements.

In response to a question from Senator Sinner, Mr. Dodge said the draft of the WSI performance evaluation was distributed the first week of August.

Senator Sinner said the committee members received the final version just days before the committee meeting. In the future, he said, he would like the committee members to receive a copy of the draft report with more time to review the report before the report is presented to the committee.

Chairman Laffen said he would like the committee members to have more time to review the final copy of future WSI performance evaluations before presentation to the committee.

## Independent Medical Examinations

Mr. Dodge reviewed the IME portion of the WSI performance evaluation.

In response to a question from Chairman Laffen, Mr. Dodge said in conducting the performance evaluation regarding IMEs, he was surprised WSI has such difficulty in identifying in-state medical providers willing to conduct IMEs. He said it may be possible to retain the professional services of retired physicians to conduct IMEs. Additionally, he said, WSI may need to train providers and clinics in how to conduct IMEs.

In response to a question from Representative Kreun, Mr. Dodge said generally an IME is requested by WSI, not by the injured worker; therefore, the selection of a provider to conduct an IME is in WSI's control.

In response to a question from Chairman Laffen, Mr. Dodge said the average cost of conducting an IME is \$4,000, and a large portion of this amount is attributable to paying for the evaluation. He said the payment rate seems adequate.

In response to a question from Representative Amerman, Mr. Dodge said an IME is a face-to-face evaluation, whereas an independent medical review is a review of records and is typically not conducted face-to-face.

Senator Sinner said it might be worth considering whether it makes sense to have the providers travel to the injured workers to conduct the IME. He said if the injured worker has to travel to the provider, it would be helpful for WSI to pay for a person to accompany the injured worker.

In response to a question from Chairman Laffen, Mr. Dodge said one way to address issues related to IMEs might be for WSI to establish standing appointments for providers coming into the state. He said a provider could have a specified number of appointment slots to fill without identifying the injured worker.

In response to a question from Representative Kreun, Mr. Dodge said although he did find that WSI is looking for an objective opinion when it uses IMEs, it is a reality that WSI's claims department frames the IME questions.

In response to a question from Senator Sinner, Mr. Dodge said it is atypical for the provider conducting an IME to directly contact the injured worker's treating physician; however, it is typical for WSI to share the IME with the treating physician.

Chairman Laffen said he is interested in the idea of WSI looking for providers to travel to North Dakota, instead of sending injured workers out of state.

Senator Campbell said with changes in technology and the increased use of remote consultations, he would like WSI to be open to these opportunities as well.

Mr. Dodge said when participating in an IME, it is common to hear that the injured workers have an expectation that they will be examined and the remote examinations may be problematic for that reason.

In response to a question from Senator Sinner, Mr. Dodge said WSI has not made IME recruitment efforts since 2010.

### **Fraud Investigations**

Mr. Dodge reviewed the fraud investigations portion of the WSI performance evaluation.

In response to a question from Chairman Laffen regarding whether the fraud investigation budget is adequate, Mr. Dodge said the number of fraud investigation referrals should be the data that drives the required level of staffing.

Chairman Laffen said that as the 2015 legislative session nears, if state agencies need full-time equivalent (FTE) positions to address growth, it will be important for the state agencies to make those requests.

In response to a question from Representative Amerman regarding recommendation 2.1, Mr. Dodge said the WSI Special Investigations Unit's manual has not been updated for 8 to 10 years and is in need of updating.

Senator Sinner said with the increase in the number of new employers entering the state, it may be appropriate to audit those employers to ensure they are in compliance with North Dakota's workers' compensation laws.

Mr. Dodge said although he does not have precise data on the number of new employers in the state, the data shows with increases in employers there is an associated increase in investigations of employer fraud.

Representative Kreun said it appears North Dakota is trying to be proactive as new employers enter the state. He said it makes sense to educate the employers at the front end to help them comply with the state's business laws.

### **Claim Processes**

Mr. Dodge reviewed the aspects of the claim processes portion of the WSI performance evaluation.

### **Vocational Rehabilitation**

Mr. Dodge reviewed the vocational rehabilitation portion of the WSI performance evaluation.

### **Preferred Provider Programs**

Mr. Dodge reviewed the preferred provider program portion of the WSI performance evaluation.

In response to a question from Chairman Laffen, Mr. Dodge said he is not sure whether there is any correlation between the classes of employers that are more likely to use the preferred provider program.

In response to a question from Representative Amerman, Mr. Dodge said he agrees it is problematic if the designated provider does not know of that provider's status as a designated provider. He said this situation could be avoided if the provider were to be required to complete an acknowledgment form.

Representative Kreun said he thought the policy of WSI was that an injured worker would never be left out in the cold. He hopes the preferred provider program follows this policy.

### **Narcotic Utilization**

Mr. Dodge reviewed the narcotic utilization portion of the WSI performance evaluation.

Representative Kreun said he would like to receive additional information regarding past legislation that has addressed narcotic utilization, as well as information regarding the effectiveness of generic medications versus brand name medications.

Mr. Harvey Hanel, Workforce Safety and Insurance, said the WSI administrative rules provide a preference for generic narcotics if available; however, generics are not always available or appropriate. He said it is common for a provider to begin pain treatment using a generic medication and then to progress to newer, brand name medications as efficacy is needed. He said studies indicate that with some exceptions, generic medications should be equivalent to brand names.

In response to a question from Chairman Laffen, Mr. Dodge said in comparing narcotic utilization in North Dakota's workers' compensation population, it is important to note that some states allow an injured worker to settle a claim.

### **Cost-of-Living Adjustments**

Mr. Dodge reviewed the basis for determining annual cost-of-living adjustments (COLAs) portion of the WSI performance evaluation.

In response to a question from Chairman Laffen, Mr. Dodge said it may be complex for WSI to utilize regional COLAs. However, he said, in North Dakota there are some regional differences in the cost of living.

### **Posttraumatic Stress Disorder**

Mr. Dodge reviewed the coverage for the posttraumatic stress disorder (PTSD) portion of the WSI performance evaluation.

In response to a question from Representative Kreun, Mr. Dodge said generally a health insurance plan will cover mental health services; however, some employees are not covered by health insurance.

In response to a question from Senator Sinner, Mr. Dodge said he will provide the committee members with followup information regarding how the Nebraska PTSD law addresses volunteer emergency responders.

Senator Sinner said the volunteer emergency responders are the most vulnerable, as they have less training and less experience than the paid emergency responders.

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

Chairman Laffen called on Mr. Bryan Klipfel, Executive Director, Workforce Safety and Insurance, to comment regarding the WSI performance evaluation and to respond to recommendations. Mr. Klipfel provided written remarks ([Appendix E](#)).

Mr. Klipfel said although a low percentage of claims use IMEs, he understands the preference to not use IMEs. In North Dakota, he said, IMEs are primarily used to address compensability, whereas in other states it is more common to use IMEs to address maximum medical improvement. He said WSI will work to improve the IME process.

Mr. Klipfel said WSI recently hired a new Special Investigation Unit Director. He said in considering the unit's budget, it is important to realize that WSI contracts with private investigators to conduct in-state investigations and contracts with a provider to investigate out-of-state investigations, and the costs of those services are not included in the \$155,000 budget figure.

In response to a question from Chairman Laffen, Mr. Klipfel said WSI currently has 34 temporary full-time employees because it does not have legislative authority to hire FTEs.

In response to a question from Representative Kreun, Mr. Klipfel said WSI recently expanded the size of its Fargo office. In Bismarck, he said, there have been some modifications to the building to accommodate the increase in the number of employees. He said WSI is able to address and fund the physical office modifications and expansions required, but is not able to hire FTEs without legislative authorization.

Chairman Laffen called on Ms. Bjornson to present a bill draft ([Appendix F](#)) for the committee to consider to address PTSD.

In response to a question from Chairman Laffen, Ms. Bjornson said the bill draft provides for a 26-week cap on wage loss benefits and a \$15,000 cap on medical benefits.

In response to a question from Representative Amerman, Ms. Bjornson said in determining whether the caps in the bill draft are appropriate, there is a shortage of data. She said Mr. Dodge reports an average of \$9,000 per PTSD claim, and WSI considered this information as well as WSI claim history and testimony from past legislative attempts to address PTSD.

Chairman Laffen called on Mr. Wahlin to present a bill draft ([Appendix G](#)) for the committee to consider to address narcotic utilization. He said the bill draft has three basic elements--the coverage requires documentation, the injured worker must meet certain requirements, and the prescriber must follow certain protocols.

Chairman Laffen requested the Legislative Council staff to prepare these two bill drafts for presentation at the next committee meeting and to provide copies to committee members ahead of the meeting date.

No further business appearing, Chairman Laffen adjourned the meeting at 1:10 p.m.

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Jennifer S. N. Clark  
Counsel

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