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VIA FACSIMILE AND US MAIL

September 12, 2013

Lonnie J. Laffen, Chairman
Workers's Compensation Review Committee
North Dakota Legislative Council
State Capitol
600 East Boulevard
Bismarck, ND 58505-0360

Re: Response to your letter of August 29, 2013 regarding Workers' Compensation Review Committee.

Dear Chairman Laffen:

Thank you for your letters to Mark and Steve Schneider of August 29, 2013. You state: "Please encourage your clients who are injured employees with worker's compensation to apply to have the committee review their cases."

First, we appreciate that you and the other members of the committee are acting in good faith in pursuing your goal of determining "whether changes should be made to the state's law relating to workers' compensation". However, you point out - - correctly - - that your "committee is not authorized to adjudicate claims, the committee is not a forum for appeal, and the committee is not authorized to change any existing decision of Workforce Safety and Insurance."

Having accepted that your letters to us were sent in good faith, please accept the following in the same spirit: It is simply unreasonable to think that any injured worker who has been abused by the workers compensation system in North Dakota would voluntarily appear before your committee, having been assured in advance that the committee can do nothing to correct the injustice that has been occasioned upon that injured worker.

I can assure you that while this firm could name literally hundreds of clients who have been abused by the current worker compensation system in the last many years, **none** of them would be amenable to revisiting the details of their experience. Certainly, no member of this firm would ask any client to subject themselves to such a fruitless and painful endeavor.

Therefore, please let me emphasize at the outset that the fact that your committee does not hear from a great many injured workers is adamantly **not** a commentary on how satisfied those workers are with their treatment at the hands of Workforce Safety & Insurance (WSI). On the contrary, we know from personal and professional experience that the numbers of injured workers who have been mistreated at the hands of the workers compensation system in North Dakota are legion.

Therefore, if we may, please let us outline but a few of the more egregious injustices and mistreatment of injured workers at the hands of a system that is, in our opinion, irrevocably broken.

WSI's Irreconcilable Conflict of Interest.

First, enclosed please find a copy of the letter that I sent to the current State Bar Association of North Dakota president, Nancy Morris. It is a fact that there are only a few remaining members of the bar who will subject themselves to a system that inevitably works against a fair and reasoned review of their clients' claims. The core of the problem, Chairman Laffen, is that the current system creates an irreconcilable conflict of interest by having the same agency that is responsible for the health of the Workers Compensation Fund also adjudicate the claims of injured workers. There is a direct correlation between the fact that North Dakota has (by far) the lowest premiums and, yet, the highest per capita work place deaths in the country. In short, the only priority at WSI is the health of the fund and maintaining the lowest premiums in the country. **Therefore - - and assuming the good faith of your committee - - a full scale study, including proposed draft legislation, of the current system with an eye towards separating the functions of protection of the fund verses adjudication of claims is essential.**

I am aware, of course, that one person's "study" can be another person's "passing the buck" but, again, assuming the good faith of your committee, you should press for a properly funded study that will deal directly with the inherent conflict of interest issue and offer legislative solutions, free from all interference from WSI bureaucrats.

Beyond that, I am sure your committee is aware that the rights and benefits of injured workers under the Act have been steadily, if not completely, eroded over the past twenty years or so. While the bureaucrats at WSI will point to the ever-rising weekly disability benefit rate, that is of small comfort to an injured worker whose claim is wrongfully denied and receiving nothing. I can assure you that we have many clients who would join in our comments regarding the following matters:

1. **Treating Physician Rule (§ 65-05-08.3).**

   The Treating Physician Rule and misuse of "independent" medical evaluators: Your committee should recommend legislation that unequivocally **requires** WSI to follow the opinion of the treating physician of the injured worker unless WSI meets its "burden of proof" that a "preponderance of the evidence" does not support the opinion of the treating physician. Presently, all WSI has to do to "trump" the opinion of a treating physician is to

hire an "independent" medical evaluator (IME) (who sells their opinions through umbrella organizations in Minnesota - - and more often than not are not licensed North Dakota physicians) and have WSI adopt that "independent" medical opinion. Moreover, these IMEs are being selected ever increasingly by WSI's legal/claims department without any input from WSI's own medical director, i.e., a clear and impermissible adversarial approach to claims adjudication. The legislation supporting the opinion of the treating physician should state that the opinion of an "independent" medical evaluator will not "trump" the opinion of the treating physician unless all the other evidence also supports the opinion of the IME.

2. **Pre-existing condition statute (§§ 65-01-02(10)(b)(7)):** A bedrock adage of workers compensation law is that, "the employer takes the employee as he finds him." Yet, the current statutes permit wholesale denial of claims simply because the injured worker had a "pre-existing" injury or condition, even if that condition was completely asymptomatic prior to the work injury. Studies have shown that this "pre-existing" statute is among the harshest in the nation in terms of denying claims to injured workers who invariably come to the work site with some kind of "pre-existing" condition. Think of it this way: The injured worker was able to work without restrictions, regardless of the "pre-existing" condition, until the work injury took place. From that perspective, how is it fair to deny the claim?

3. **"Rehabilitation services" (sic) (Ch. 65-05):** Beginning in 1975, the "Rehabilitation services" chapter was added to the Act, secure in the knowledge that meaningful "vocational rehabilitation" will return injured workers to the job as quickly as possible under the circumstances and to assist those workers in achieving that goal. Currently, WSI does not even pretend to actually help injured workers find employment. WSI contacts no employers on behalf of injured workers to try to convince those employers to hire the injured worker. In short, the "vocational rehabilitation" (sic) portion of the Act has now become a "termination" statute, i.e., completely hypothetical "vocational rehabilitation plans" are drafted, without any meaningful input from the injured worker or his/her physician, hypothetical jobs identified, and benefits terminated or substantially reduced.

   The "rehabilitation services" chapter has become so watered-down by constant anti-injured worker amendments, that it is now simply a tool for WSI bureaucrats to terminate or reduce benefits without any reasonable consideration to whether the injured worker can return to actual employment or not. Again, significant resources should be put into a study to improve vocational rehabilitation services, together with draft legislation, to return vocational rehabilitation to its workable (and still stated purpose to "ensure that injured employees receive services, so far as possible, necessary to assist the employee and the employee's family in the adjustments required by the injury to the end that the employee receives **comprehensive** rehabilitation services, including medical, psychological, economic, and social rehabilitation." § 65-05.1-01(2)); emphasis added.

4. **Truncated total and partial disability benefits:** As Professor Larson, the Dean of workers compensation law, has repeatedly said, an injured worker should receive disability benefits for as long as that worker is disabled and not one second longer. That was the law in North Dakota for decades. However, in a series of anti-worker legislation, culminating in 2005, "total" disability benefits are restricted to a period of two years and "partial" disability benefits are restricted to a period of five years. While "catastrophic" injuries presumably allow additional benefits, the designation of what is "catastrophic" has been vested solely in the discretion of WSI bureaucrats and their own statistics will show that very few disabled workers become eligible for benefits after the two year/five year period.

   Chairman Laffen, these draconian limitations are arbitrary and capricious. WSI statistics will show that there are many workers who receive benefits for a continuous period of seven years but are unable to return to any type of meaningful and gainful employment after that and have absolutely no recourse to further disability benefits because of their work injury. Legislation should be drafted to remove these arbitrary caps and pay disability benefits for so long as an injured worker is disabled and not "one second" longer.

We have attempted to highlight in this letter that there is no easy "fix" to the workers compensation system in North Dakota. Quit simply, the irreconcilable conflict of interest created by an agency responsible for the health of the Fund while adjudicating claims cannot be fixed without directly undoing that conflict. That, with all due respect, should be the focus of your committee.

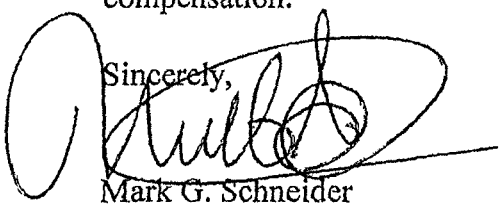
We have also taken pains to provide you with four specific examples where the Act can and must be improved if North Dakotans are ever going to again be able to say with a straight face that, "we treat our injured worker fairly." I hasten to add, however, that even fixing those four areas, without dealing with the root problem of the irreconcilable conflict of interest, will be of no avail.

We sincerely hope that you and the members of your committee will forgive those injured workers (and their families) who have been abused, if not destroyed, by the anti-injured worker system that is "Workforce Safety & Insurance", for not appearing before your committee. Again, we respectfully submit it is unreasonable to expect any of them to do so.

We do hope that your good faith in writing this firm will be demonstrated in the good faith response of you and your committee members to this letter. I assure you that if the sum total of your committee's efforts is to report that few, if any, injured workers have come before your committee and, therefore, the system needs no revision, you are simply wasting taxpayer money and are, in fact, part of the problem. We trust that is not the case. Perhaps resort to the "Golden Rule" is appropriate when you and your committee members consider how to truly embrace your

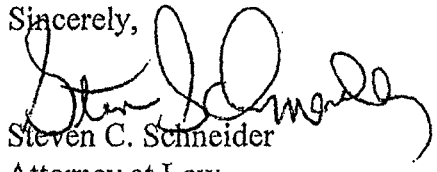
mission to "determine whether changes should be made to the state's law related to workers' compensation."

Sincerely,



Mark G. Schneider
Attorney at Law

Sincerely,



Steven C. Schneider
Attorney at Law

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Enclosure

cc: Dean Haas, Attorney at Law
Steve Little, Attorney at Law
Dan Phillips, Attorney at Law
Pat Springer, *The Forum*