

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### **WORKERS' COMPENSATION REVIEW COMMITTEE**

Wednesday and Thursday, April 26-27, 2006  
Harvest Room, State Capitol  
Bismarck, North Dakota

Representative George J. Keiser, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Representatives George J. Keiser, Bill Amerman, Nancy Johnson; Senators Duaine C. Espegard, Joel C. Heitkamp, Jerry Klein

**Others present:** See Appendix A

**It was moved by Senator Heitkamp, seconded by Senator Klein, and carried on a voice vote that the minutes of the March 29, 2006, committee meeting be approved as distributed.**

Chairman Keiser said over the course of the two-day meeting, the committee will be reviewing four workers' compensation claims. Additionally, he said, the committee will be conducting traditional committee work, reviewing bill drafts, and receiving information regarding previously reviewed claims. He said the committee's next meeting is tentatively set for June 19, 2006, in Fargo. At the June meeting, he said, the committee will not be reviewing any cases but instead will spend the entire day doing committee work regarding issues raised by injured workers who have had their claim reviewed.

Chairman Keiser said during the third quarter of 2006, the committee will plan on holding another two-day meeting at which the committee will review the final four claims of injured workers. He said any injured worker who is not able to have a claim reviewed by the committee this interim will be notified of such.

#### **CASE REVIEWS**

Over the course of the two-day meeting, the committee reviewed workers' compensation claims for the injured workers Ms. Mary Bethke, Mr. Douglas Gronfur, Mr. Troy Beckler, and Mr. Clarence Voigt.

##### **First Case**

Chairman Keiser called on Mr. Chuck Kocher, Workforce Safety and Insurance Office of Independent Review, to assist in presenting Ms. Bethke's case for review by the committee. Mr. Kocher distributed to committee members a binder containing information provided by Workforce Safety and Insurance. He said the information in the binder includes a case summary of the injured worker's records as well as a list of the statutory provisions the injured worker is interested in addressing.

##### **Case Summary**

Mr. Kocher provided a summary of Ms. Bethke's case. Mr. Kocher said Ms. Bethke filed a claim with Workforce Safety and Insurance on January 3, 2002, for an injury that occurred on December 28, 1999. He said the injury occurred in the course of her employment with the Youth Correctional Center, at which she was employed as a cook. He said the nature of her injury was a burn to her right wrist, left leg, and left foot. Mr. Kocher said Workforce Safety and Insurance accepted liability for this claim and paid the associated medical expenses and disability benefits.

Following the injury, Mr. Kocher said Ms. Bethke returned to part-time employment with the Youth Correctional Center, receiving temporary partial disability benefits from Workforce Safety and Insurance. He said that a functional capacity evaluation performed in June 2001 placed Ms. Bethke in the light physical demand level of employment. He said because Ms. Bethke was unable to obtain full-time employment with her preinjury employer, an occupational consultant was assigned to her case to assess her ability to return to full-time employment in an occupation compatible with her work restrictions. Mr. Kocher said on October 14, 2002, Ms. Bethke completed a 25-hour training course with Spherion, providing her with administrative assistant, customer service, and basic computer skills training.

Mr. Kocher said on November 1, 2002, the vocational consultant's report indicated that Ms. Bethke had the necessary skills to obtain employment as a customer service representative, administrative assistant, and secretary. At the time of injury, Ms. Bethke's weekly earnings were determined to be \$420. He said the occupations Ms. Bethke was trained for following her injuries were determined to have weekly earnings of approximately \$389.

Mr. Kocher said on December 12, 2002, Workforce Safety and Insurance issued an order denying further disability and vocational rehabilitation benefits. He said the order indicated as a result of Ms. Bethke's transferable skills, she was able to perform competitive gainful employment as a customer service representative, administrative assistant, and secretary, earning an estimated salary of at least 90 percent of her preinjury earning capacity.

Mr. Kocher said on January 6, 2003, Ms. Bethke requested the assistance of the Office of Independent Review to review the order. He said Ms. Bethke

reported that she did feel she was capable of acquiring employment within the occupations listed and earning at the salary amounts listed. Mr. Kocher said the advocate for the Office of Independent Review reviewed the order and recommended the estimated earnings be reconsidered. He said Workforce Safety and Insurance offered to adjust the estimated earning to \$360 a week, which would make Ms. Bethke eligible for temporary partial disability benefits. He said she rejected the proposal and elected to proceed to hearing.

Mr. Kocher said on February 13, 2003, the Office of Independent Review closed Ms. Bethke's file, without a new order, and mailed the certificate of completion.

Mr. Kocher said on January 24, 2003, Ms. Bethke accepted employment with the railroad as a dispatcher. He said that Ms. Bethke's starting salary at this new job was \$7 an hour and it was her understanding that her salary would increase to \$9 an hour after the completion of her six-month training period.

Mr. Kocher said on February 18, 2003, Ms. Bethke requested a hearing. He said on July 25, 2003, the hearing was conducted and on September 30, 2003, the administrative law judge upheld the order denying further disability and vocational rehabilitation benefits. He said the administrative law judge further ordered that Ms. Bethke receive temporary total disability benefits through December 6, 2002. He said the recommended order also provided that absent a significant change in the claimant's compensable medical condition and absent proof of wage loss due to a significant change in her compensable medical condition, Ms. Bethke is not entitled to further disability or vocational rehabilitation benefits after December 6, 2002.

### Issues for Review

Mr. Kocher stated that the North Dakota Century Code (NDCC) provisions the claimant indicates are an issue in the review are Sections 65-05-08(8) relating to disability benefits and 65-05.1-01 relating to rehabilitation services.

Chairman Keiser called on Ms. Bethke to present the issues she would like the committee to review. Ms. Bethke provided committee members with a written document outlining the issues and concerns she has regarding her workers' compensation claim. A copy of the handout is attached as Appendix B.

Ms. Bethke said following her injury her employer did accept responsibility for the injury; however, her employer made it very difficult for her to return to work. She said she faced harassment and discrimination from her preinjury employer when she returned to part-time work following her injury.

Ms. Bethke said following her injury the training she received through Workforce Safety and Insurance did not make her whole. She said the training was inadequate, in part because it did not consider her age, background and experience, and a realistic view

of the job market and starting wages. Ms. Bethke said she did not receive assistance in finding a postinjury job and ultimately she found her own job.

In response to a question from Senator Klein, Ms. Bethke said the harassment she experienced in the workplace included her employer claiming that her social life was hampering her recovery from her injury. She said she is currently employed at the Burnt Creek Club. She said she is happy at her current employment but she is concerned about how long she will be able to continue to perform this physically demanding work.

Senator Heitkamp said he is concerned about her claim that the Youth Correctional Center harassed Ms. Bethke following her injury. He said the Youth Correctional Center is an agency of the state.

Ms. Bethke said following her injury the Youth Correctional Center asked her to work beyond her medical restrictions.

Representative Keiser said for purposes of this committee, the issue of harassment is beyond the scope of the committee's charge. He said if Ms. Bethke would like to pursue this harassment issue she can take this up with individual legislators, including legislators on the Workers' Compensation Review Committee.

In response to a question from Senator Klein asking what type of training and postinjury employment she would have liked, Ms. Bethke said she is still not sure what type of employment would meet her needs. She said the training she received was inadequate because all it did was refresh her key memory on the keyboard. She said following her injury she expected that Workforce Safety and Insurance would provide her some sort of education that would better prepare her for employment within her physical restrictions.

### Workforce Safety and Insurance Response

Chairman Keiser called on Mr. Timothy Wahlin, Attorney, Workforce Safety and Insurance, to provide testimony regarding the issues raised by Ms. Bethke. Mr. Wahlin said prior to Ms. Bethke's injury, her work history showed she had been employed in the service sector. As a result of her injury, he said, she is required to leave that type of work and enter a different, safe sector of employment.

Mr. Wahlin said following her injury Ms. Bethke was enrolled in and completed a refresher course provided through a business named Spherion.

Mr. Wahlin said that the workers' compensation system allows and provides an injured worker with a forum in which to disagree with proposed retraining schedules or plans. However, Mr. Wahlin said Ms. Bethke requested a hearing on the matter but then chose not to attend the hearing.

In response to a question from Representative Keiser asking why Ms. Bethke did not attend the hearing, Ms. Bethke said at that point in her case she was exhausted, she felt like she had participated in a

battle, she did not feel like she was getting anywhere, and eventually she gave up.

In response to a question from Senator Klein regarding whether Ms. Bethke has any options at this point, Mr. Wahlin said Ms. Bethke still has an open workers' compensation claim. He said that Ms. Bethke is currently receiving medical coverage for her injury and if her injury reoccurs or worsens she can reapply for benefits. He said he is concerned with her current employment situation because she is still working in the service sector. He said her service sector employment is not safe given her physical restrictions and it is likely she will experience a recurrence or worsening of her initial injury.

In response to a question from Representative Amerman, Mr. Wahlin said Spherion is a business with which Workforce Safety and Insurance has entered a contract to provide training to refresh and upgrade skills for injured workers. Mr. Kocher said Spherion helps injured workers with job placement and provides upgrades to skill training. Mr. Kocher said Ms. Bethke did not receive job placement services but did receive skill training.

In response to a question from Representative Amerman regarding what would happen if Ms. Bethke would work beyond her restrictions resulting with a recurrence of her medical condition, Mr. Wahlin said in all likelihood Ms. Bethke would be covered for the recurrence or the worsening of her medical condition unless the employee were to be found to have gone intentionally beyond the working restrictions and the employee had misled the employer regarding the restrictions.

In response to a question from Senator Heitkamp asking how Ms. Bethke got to the situation of being trained in a field she does not want to be trained, Mr. Wahlin said when an injured worker is faced with changing job sectors, Workforce Safety and Insurance tries to employ both the carrot and the stick. He said in the training process Workforce Safety and Insurance first looks for the least invasive form of retraining program. He said Workforce Safety and Insurance does ask for the injured workers' opinions and preferences in what type of employment they would like to enter postinjury.

In response to a question from Senator Heitkamp, Ms. Bethke said the training she received did not make her competitive in the job market.

In response to a question from Senator Espgaard, Ms. Bethke said at the time of her injury she was not asked what type of employment she would like to perform or given a choice of what type of training she could participate. She said it has been six years since her injury and she still does not know what type of employment she would like to do.

In response to a question from Representative Keiser, Mr. Wahlin said he is not certain whether Spherion provided for a proficiency test following the end of Ms. Bethke's training.

In response to a question from Representative Keiser, Mr. Wahlin said he is not certain whether

Workforce Safety and Insurance has educational funds for Ms. Bethke; however, it can review this.

In response to a question from Ms. Bethke asking why the medical portion of her file cannot stay open but instead needs preapproval before any medical provider can see her, Mr. Wahlin said as in any workers' compensation claim if Workforce Safety and Insurance is going to pay for a service it needs to confirm that the treatment is medically related. However, he said, the preapproval being required by Ms. Bethke's providers may be that her health care provider has implemented a policy to ensure that it receives payment from patients.

In response to a question from Senator Heitkamp, Ms. Bethke said she is not sure what type of employment she can do. She said she does need a sit-down job but she is not sure she can be successful in that type of environment.

In response to a question from Senator Klein, Mr. Wahlin said an injured medical worker's medical records are not open to the public; however, they are open to Workforce Safety and Insurance, the employer, and the medical provider.

Representative Keiser said he would like to receive more information regarding how CorVel Corporation and Spherion contract with Workforce Safety and Insurance and how they provide services to injured workers.

### **Comments by Interested Persons**

Chairman Keiser called on Mr. Sebald Vetter, Concerned Advocates Rights for Employees (CARE), Bismarck, for comments regarding the issues raised by Ms. Bethke. Mr. Vetter said when CorVel provides rehabilitation services, the injured worker does not get an opportunity to give preferences and is not given a choice regarding what kind of training or rehabilitation undertaken. He said in the case of Ms. Bethke, she does not know what type of work she wants to do. He said she needs assistance in choosing a new career and CorVel and Spherion have not provided this guidance.

Senator Espgaard said in Ms. Bethke's case, she did not tell anybody what she wanted to do which makes it very difficult for Workforce Safety and Insurance to train her for a new job.

Mr. Vetter said it is very hard for an injured worker to not only receive an injury but to know what options are available under the system.

Ms. Bethke said she would like to go to college but she is worried because she does not know whether she would be able to find employment following her education.

Chairman Keiser called on Ms. Deb Bale, an injured worker from Jamestown, to comment on the issues raised by Ms. Bethke. Ms. Bale said Ms. Bethke's story is a lot like hers. She said she experienced a similar situation when a CorVel educational specialist had less education than she did. She said this educational specialist did not have the background necessary to guide her in finding her

a new career. Additionally, she said, throughout the process nobody is able to answer an injured worker's questions and this results in it being very difficult for an injured worker to navigate the system.

Ms. Bale said when an injured worker is faced with finding a new type of employment, professionals need to provide that injured worker with the guidance necessary to determine what jobs are appropriate and what jobs are available given that injured worker's limitations. She said that in her own situation she has begged for rehabilitation services and has not received them.

Ms. Bale said Ms. Bethke needs help from her physician and rehabilitation specialists to allow her to work within a type of employment that is safe for her. She said in her situation CorVel recommended that she be a customer service representative. She said she thinks it is inappropriate for an honor student with a four-year degree from the University of North Dakota to be a customer service representative.

Ms. Bale said when Workforce Safety and Insurance provides poor treatment to employees, this translates to poor economic development for the state.

Ms. Bale said she believes she is under surveillance by Workforce Safety and Insurance. She said if Workforce Safety and Insurance is using funds to follow her, these funds would be much better spent educating her. Additionally, she said, the excess funds that resulted from the change in the fund formula should all be used to help injured workers.

Chairman Keiser called on Mr. Douglas Kapaun, an injured worker from Jamestown, for comments regarding the issues raised by Ms. Bethke. Mr. Kapaun said he agrees with the statements made by Ms. Bale. In his case, he said, CorVel did not help him at all and are a joke.

In response to a question from Representative Keiser, Mr. Kapaun said as a result of receiving services through CorVel, there was a claim of noncompliance on his part. He said he ultimately ended up settling this noncompliance claim resulting in a loss of benefits to him of approximately \$15,000.

### **Committee Discussion**

In response to a question from Representative Amerman regarding which employer would end up paying if Ms. Bethke were to be reinjured or have a reoccurrence of her initial injury, Mr. Wahlin said it depends on the specific circumstances. He said in the case of an old injury, the responsibility for payment would go back to the original claim; in the case of a new injury, the responsibility would go to the new employer; and if there is a combination of old and new, the responsibility would be split between the old employer and the new employer. Ultimately, he said, Workforce Safety and Insurance makes the determination of which employer is responsible. He said just like in the case of an injured worker, an employer is given the opportunity to appeal a decision regarding responsibility for an injured worker's claim.

However, he said, it is important to note that if an employer does appeal, benefits would be paid to the injured worker throughout that appeal process.

In response to a question from Senator Klein, Mr. Wahlin said through the preferred worker program, an injured worker is allowed a transition period into new employment and the program helps alleviate a new employer's claim history.

Ms. Bethke said as she sought employment following her injury, it was a real red flag for employers when her application indicated she had work restrictions.

In response to a question from Representative Keiser, Ms. Bethke said through the entire course of decisions and appeals, she felt it was very intimidating and felt the hearing process was very complicated. She said she needed an attorney just to go through the hearing process. Although she felt her caseworker did all she could, she said, she felt her employer was determined to win and her employer had a better understanding of the system.

Senator Heitkamp said because the Youth Correctional Center is a state agency, he finds the harassment and discrimination claims to be unacceptable. Additionally, he said, he is concerned that injured workers are being forced into employment they do not want. He said that Ms. Bethke did give up on the appeals process but the committee members need to remember that the process of being forced to make life-altering changes can be overwhelming.

Senator Espegard said he thinks Ms. Bethke has an obligation to have some opinion about what she wants to do.

Representative Johnson said at a future meeting she would like to receive information from Workforce Safety and Insurance regarding data indicating the success of rehabilitation and placement of injured workers following rehabilitation.

Mr. Charles Blunt, Executive Director and CEO, Workforce Safety and Insurance, said Workforce Safety and Insurance would provide this data at a future meeting.

In response to a question from Representative Amerman regarding what type of obligation an injured worker has to move to a different community in order to get a job, Mr. Wahlin said NDCC Section 65-05.1-01 lays out the criteria regarding appropriateness of different types of rehabilitation services. He said although an injured worker is not required to move to take employment if the injured worker chooses not to move, Workforce Safety and Insurance is discharged from liability of payment for wage loss.

Ms. Bethke said by going to Job Service North Dakota she was given one placement. She said this placement was at Tires Plus and her job duties would have been lubing and changing tires. She said this was not appropriate given her working restrictions.

Chairman Keiser thanked Ms. Bethke for coming forward and reminded her that the committee would

be considering the issues she raised as the committee holds future meetings.

### Second Case

Chairman Keiser called on Mr. Kocher to assist in presenting Mr. Douglas Gronfur's case for review by the committee. Mr. Kocher distributed to committee members a binder containing information provided by Workforce Safety and Insurance. He said the information in the binder includes a case summary of the injured worker's records as well as a list of the statutory provisions the injured worker is interested in addressing. Additionally, he said, Mr. Gronfur has made arrangements to have his brother, Mr. Daryl Gronfur, assist him in presenting his issues.

### Case Summary

Mr. Kocher provided a summary of Mr. Douglas Gronfur's case. He said that Mr. Douglas Gronfur filed an application for workers' compensation benefits in connection with an injury sustained on July 26, 1996, while employed by Halliburton Energy Services, Inc., Williston. He said the injury occurred when he lifted an eight-foot section of two-inch iron and sustained a lower back injury. He said the claim was accepted and disability and medical benefits were paid accordingly.

Mr. Kocher said the injured worker continued to experience problems with his lower back and was unable to work. On January 23, 1997, he said, a CT myelogram was performed showing a herniated disk at the L4-5 level. He said the physician thought surgery was unadvisable because of the injured worker's significant weight. On August 14, 1997, Mr. Kocher said a vocational consultant's report was completed indicating that Mr. Douglas Gronfur could return to gainful employment as an advertising sales representative, general merchandise sales representative, communication equipment sales representative, or management trainee. He said these job goals were approved by the injured worker's treating physician in accordance with the functional capacity assessment.

On October 8, 1997, Mr. Kocher said Workforce Safety and Insurance issued an order awarding partial disability benefits indicating that the injured worker was employable. He said the listed occupations provided for a weekly earning of \$340. Given the preinjury weekly earnings, he said, the injured worker was entitled to partial disability benefits. Mr. Kocher said temporary partial benefits were to be paid to the injured worker for a period of up to five years.

On October 31, 1997, Mr. Kocher said Mr. Douglas Gronfur requested the assistance of the Office of Independent Review to review the order awarding partial disability benefits. On November 28, 1997, he said, the Office of Independent Review issued a certificate of completion without any change in decision. He said the injured worker did not request a hearing and as such the order became final.

Mr. Kocher said Mr. Douglas Gronfur was paid temporary partial disability benefits for five years and on August 27, 2002, Workforce Safety and Insurance issued an order denying further partial disability benefits. Mr. Kocher said this order was not appealed and it became final.

Mr. Kocher said Mr. Douglas Gronfur began receiving Social Security disability benefits in February 2002. Additionally, he said, on February 23, 2000, the injured worker filed a written application for disability benefits indicating his injury had worsened. He said Workforce Safety and Insurance indicated that the greater weight of the evidence indicated that the injured worker had sustained a significant change in his compensable medical condition. However, he said, the greater weight of the evidence did not indicate that the injured worker suffered an actual wage loss caused by the significant change in his compensable medical condition. He said Mr. Douglas Gronfur had not worked since July 26, 1996, and continued to be unemployed and not earning any wages at the time of his February 23, 2000, reapplication. On April 28, 2000, he said, Workforce Safety and Insurance issued an order denying reapplication.

On May 23, 2000, Mr. Douglas Gronfur requested the assistance of the Office of Independent Review to review the order denying reapplication. On May 31, 2000, he said, the Office of Independent Review issued a certificate of completion without any change in the decision. He said the injured worker requested a hearing relating to the order denying reapplication. He said in September 2001 the administrative law judge ruled the order denying reapplication was appropriate because the injured worker had not sustained an actual wage loss related to a significant change in his medical condition. On October 8, 2001, he said, Workforce Safety and Insurance adopted the recommended findings of fact and conclusions of law as provided by the administrative law judge. Mr. Douglas Gronfur said he appealed the October 2001 order. On July 3, 2002, he said, the district court found there was no legal basis for any action other than affirming the decision of Workforce Safety and Insurance.

Mr. Kocher said that Mr. Douglas Gronfur appealed the district court decision to the Supreme Court. On April 17, 2003, he said, the Supreme Court upheld the order denying reapplication. A copy of the Supreme Court case *Gronfur v. North Dakota Workers' Compensation Fund*, 2003 ND 42; 658 N.W.2d 337, [www.ndcourts.com/court/opinions/20020250.htm](http://www.ndcourts.com/court/opinions/20020250.htm), is on file in the Legislative Council office.

### Issues for Review

Mr. Kocher stated North Dakota Century Code provisions the claimant indicated are at issue in the review are Section 65-05-08 relating to reapplication for disability benefits; Section 65-05.1-04(4)(f) relating to rehabilitation services; and Section 65-05-04

relating to continuing jurisdiction of Workforce Safety and Insurance.

Chairman Keiser called on Mr. Daryl Gronfur to present the issues raised by his brother, Mr. Douglas Gronfur. Mr. Daryl Gronfur distributed to committee members a folder containing information he compiled to help present his brother's issues. A copy of the information in the folder is on file in the Legislative Council office. The information in the file includes:

- A summary of the way Mr. Douglas Gronfur's medical injury would have been treated differently if Workforce Safety and Insurance had not been involved and Mr. Daryl Gronfur's recommendations on how to change the state's workers' compensation system.
- A six-page list of Mr. Douglas Gronfur's doctors reports relevant to the workers' compensation claim, including approximately 82 entries covering the period July 26, 1996, through October 27, 2002.
- Copies of medical records and medical correspondence supporting and supplementing the six pages of medical reports.
- A six-page list of medications prescribed to Mr. Douglas Gronfur between the periods July 27, 1996, and January 11, 2006.
- Correspondence from representatives of Job Service North Dakota.

Mr. Daryl Gronfur said the information he is presenting for his brother primarily relates to the three areas of:

- Douglas Gronfur's injury and the medical treatment he received;
- Issues relating to Douglas Gronfur's release to return to work; and
- Legal issues relating to medical treatment, the requirement that lack of earnings be established, and the appeal and review process.

Mr. Daryl Gronfur said he also is concerned with the Supreme Court decision finding that his brother did not prove the injury was continuous and did not prove loss of income; that Job Service North Dakota and Workforce Safety and Insurance come to different conclusions regarding his brother's ability to perform work; and a concern that one of his brother's positions was not provided the notice of decision as required under law. He also raised the concern that his brother's attorney was not helpful in the process, his brother's physician had his license to practice medicine removed by the State Board of Medical Examiners, and that throughout the whole workers' compensation process his brother has been on high doses of narcotics which has impacted his ability to follow the status of his case.

Mr. Douglas Gronfur said that since he has been in significant pain since his injury he has not been able to succeed in school or in completing training to help him hold a job.

In response to a question from Senator Klein, Mr. Douglas Gronfur said he is still taking pain medication. He said his pain will never go away and if he has a lapse in medication he experiences significant pain. Additionally, he said, the problems associated with his lower back have never been repaired and he is still unable to work.

In response to a question from Senator Espgaard, Mr. Douglas Gronfur said his lower back is still damaged and has not been treated; the surgical procedure he did undergo was a fusion in his upper back; and the medical procedure he did undergo has not removed the pain as he still experiences significant pain.

Mr. Douglas Gronfur said he was proud of the work he performed for Halliburton. He showed the committee members a bronze plaque he received from his employer indicating his years of service and the fact that he was granted a medical retirement. He said Halliburton kept his job open until February 1998.

In response to a question from Senator Espgaard, Mr. Daryl Gronfur said because of the initial Workforce Safety and Insurance order, his brother lost his Halliburton disability insurance. Additionally, he said, the federal Social Security Administration determined that his brother was disabled, beginning at the date of his workplace injury. He said the workers' compensation system should allow an injured worker to provide new information if it is later discovered and Workforce Safety and Insurance should evaluate this new information and reconsider how it impacts an injured worker's case. In the case of his brother, he said, every order issued by Workforce Safety and Insurance was based on inadequate and incomplete information.

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

Chairman Keiser called on Mr. Wahlin for comments regarding Mr. Douglas Gronfur's claim and issues. Mr. Wahlin briefly reviewed Mr. Douglas Gronfur's case, indicating that Workforce Safety and Insurance did check with Dr. Mattheis, Mr. Douglas Gronfur's treating physician, to determine the physician's opinion on whether the injured worker was able to return to work. He said the record indicated that Mr. Douglas Gronfur could return to work.

Mr. Wahlin said if an injured worker believes he is unable to work, there is an appeal process that can be pursued. He said in the case of Mr. Douglas Gronfur, this appeal process was not pursued. Additionally, he said, Mr. Douglas Gronfur had an attorney involved in the case to ensure that he was informed of his legal rights.

Mr. Wahlin said in the instance when Mr. Douglas Gronfur did appeal from a workers' compensation decision, the district court and the Supreme Court did not overturn the decision of Workforce Safety and Insurance.

Mr. Wahlin said in reviewing this injured worker's case, the committee members need to remember there is a process established to appeal decisions and

in order to make the system work, this process needs to be followed.

In response to a question from Senator Heitkamp questioning the situation in which the process fails to protect an injured worker and whether there is an ability to make a situation right, Mr. Wahlin said yes, if the matter relates to the injured worker's injury, Workforce Safety and Insurance does have the ability to review an injured worker's case through its continuing jurisdiction.

Senator Heitkamp said in looking at the Supreme Court decision, he thinks it is important to note that it was a close decision in which three members of the court joined the majority opinion and two members of the court filed a dissenting opinion. He said that as he reads the Supreme Court opinion, Workforce Safety and Insurance won at this ultimate appeal level because the Supreme Court determined there was no proof of loss of wages. He said that he disagrees with this finding given that Job Service North Dakota seems to say that Mr. Douglas Gronfur was not qualified to hold employment. He questioned how an injured worker can show loss of wages if he were never able to work.

Mr. Wahlin said the Supreme Court decision in *Gronfur* was one of four cases addressed by the North Dakota Supreme Court in 2003 dealing with a specific issue of reapplication based upon a significant change in the compensable medical condition. He said the Supreme Court cases were *Lesmeister*, *Beckler*, *Bachmeier*, and *Gronfur*. Mr. Wahlin said in the case of Mr. Douglas Gronfur, the medical records and the court records indicated that Mr. Douglas Gronfur could work.

In response to a question from Representative Amerman, Mr. Wahlin said that Dr. Mattheis was a neurosurgeon licensed in North Dakota. He said this physician did not have any special standing with Workforce Safety and Insurance.

In response to a question from Senator Klein, Mr. Wahlin said if an injured worker does not like the doctor the injured worker is seeing and wishes to change doctors, the injured worker is able to change physicians. He said unless there is a designated medical provider, the injured worker can see any physician the injured worker wishes. However, he said, once an injured worker begins treatment, the injured worker needs to have the treating physician give a referral to the new physician and the new physician needs to accept treatment of the injured worker. He said in the case of Mr. Douglas Gronfur, the change of physician was not a problem. He said Mr. Douglas Gronfur did see several physicians and it did not appear to him that there was ever any problem in him changing physicians. However, he said, if Workforce Safety and Insurance does determine that an injured worker's medical care is improper, Workforce Safety and Insurance can force the injured worker to change doctors. He said if the situation occurs in which Workforce Safety and Insurance does require an injured worker to change physicians, there

is a procedure that is followed giving the injured worker a choice of three doctors from which to choose.

In response to a question from Representative Keiser whether there was any medical evidence supporting the position that all of Mr. Douglas Gronfur's injury occurred from the one-time lifting that occurred at work, Mr. Wahlin said the medical community is not in agreement over the issue of an injury of this nature occurring due to a single workplace injury.

In response to a question from Representative Keiser, Mr. Daryl Gronfur said that Abbot Northwestern Hospital in Minneapolis, Minnesota, did have the capacity to perform an MRI at or shortly after the time of his brother's injury. He said his brother's size should not have prevented him from being properly diagnosed. He said he thinks there are quality of care issues related to medical malpractice.

In response to a question from Representative Keiser, Mr. Wahlin said if an injured worker receives civil damages from a medical malpractice claim, it will not impact disability payments made by Workforce Safety and Insurance but Workforce Safety and Insurance may have a subrogation interest of up to 50 percent of the civil damages. Additionally, he said, the same is likely true for civil damages related to legal malpractice.

In response to a question from Mr. Daryl Gronfur questioning the rationale for taking up to half of a civil award of an injured worker for whom Workforce Safety and Insurance is not paying monthly disability benefits, Mr. Wahlin said he is not able to answer that question for Workforce Safety and Insurance at this time.

In response to a question from Representative Keiser relating to whether the information regarding Job Service North Dakota's inability to find employment for an injured worker would be appropriate information to reopen a case, Mr. Wahlin said Job Service North Dakota is under a different parameter than Workforce Safety and Insurance; therefore, that information in and of itself would likely not justify reopening or reapplication.

Senator Espgaard said it seems like the information received by the committee is compelling evidence that should allow an injured worker to have a workers' compensation case reopened.

Senator Heitkamp said he thinks Mr. Douglas Gronfur's case meets the requirements to reopen under Workforce Safety and Insurance's continuing jurisdiction. He said that the opportunity already exists for Workforce Safety and Insurance to do what is right.

Mr. Wahlin said reapplication can be made at any time; however, benefits received under reapplication are limited to the 30 days preceding the reapplication.

#### **Comments by Interested Persons**

Chairman Keiser called on Mr. Ed Christensen for comments regarding the issues raised by Mr. Douglas

Gronfur. He said for purposes of services provided by CorVel, he would like to see injured workers receive job placement services. He said at a minimum, the jobs for which injured workers are trained need to provide a living wage for that injured worker.

Chairman Keiser called on Ms. Bale for comments regarding the issues raised by Mr. Douglas Gronfur. She said Mr. Douglas Gronfur is able to stand before the committee today because of the support he received from his family.

Mr. Daryl Gronfur said his brother did ask for a new physician early on in the medical treatment when Dr. Mattheis required Mr. Douglas Gronfur to participate in physical therapy. He said back at that time Mr. Douglas Gronfur did see a different physician but it appeared as though there were no other neurosurgeons available to provide the services in his region of the state.

In response to a question from Mr. Douglas Gronfur regarding whether Workforce Safety and Insurance would be willing to pay for the expenses he incurred in presenting his case, Representative Keiser said no, the committee was not created this way and does not provide for payment expense of injured workers. He said at the beginning of the interim, the committee did request from the Legislative Council that funding be provided, but this funding request was denied.

Ms. Bale said that her experience when she requested to transfer doctors was different from the process explained by Mr. Wahlin. She said in her situation Workforce Safety and Insurance put up roadblocks to prevent her from changing physicians and as an injured worker she did not know her rights and was not in a position to avoid these roadblocks.

Ms. Bale said that the committee should recognize the amount of work it took for the injured worker's brother, Mr. Daryl Gronfur, to prepare his presentation for the committee. She said that Mr. Daryl Gronfur needed to provide the skills of a physician, a lawyer, and a secretary in order to prepare this presentation, all of which he did at the expenditure of his own personal money. To the contrary, she said, Workforce Safety and Insurance has a legal staff and employers have the resources for legal staff which is not available to injured workers.

Ms. Bale said as a nurse, she believes that a CT scan is inappropriate to adequately diagnose a back injury, such as Mr. Douglas Gronfur's. Additionally, she said, the issue of weight is a nonissue when it comes to appropriate diagnosis of a back condition. She said an individual who is overweight is able to be diagnosed and should receive a proper diagnosis.

Ms. Bale said she thinks Workforce Safety and Insurance should stop trying to prove that the injured worker is wrong. She said the system is not working and the committee needs to recognize this.

Chairman Keiser called on Mr. Vetter for comments regarding the issues raised by Mr. Douglas Gronfur. Mr. Vetter said he disagrees with the

requirement of needing to show wage loss in order to receive benefits for a worsening condition. Additionally, he said, he thinks the services provided by CorVel essentially destroy the injured worker. He said Workforce Safety and Insurance never admits that it does anything wrong. Instead, he said, Workforce Safety and Insurance claims there was a "miscalculation" and if an injured worker makes a mistake it is called "fraud."

Mr. Daryl Gronfur thanked the committee for the opportunity to present his brother's case. Additionally, he thanked Senator Dick Dever for helping him get in front of the committee and explain his brother's situation.

### **Committee Discussion**

Senator Klein said he needs to take time to digest the information provided by Mr. Daryl Gronfur and Mr. Douglas Gronfur.

### **Third Case**

Chairman Keiser called on Mr. Kocher to assist in presenting Mr. Troy Beckler's case for review by the committee. Mr. Kocher distributed to committee members a binder containing information provided by Workforce Safety and Insurance. He said the information in the binder includes a case summary of the injured worker's records, a chronological history summarizing the injured worker's case as well as a list of the statutory provisions the injured worker is interested in addressing.

### **Case Summary**

Mr. Kocher provided a summary of Mr. Beckler's case. Mr. Kocher said Mr. Beckler filed an application for workers' compensation benefits in connection with a work injury to his right wrist which occurred on April 26, 1983. He said Workforce Safety and Insurance accepted liability for the injury and paid associated benefits, expenses, and disability benefits.

Mr. Kocher said Mr. Beckler filed a series of reapplications for disability benefits claiming a worsening in his condition and that he should be placed back on disability benefits. The dates for reapplication of benefits are February 12, 2001; June 18, 2001; August 27, 2001; October 18, 2001; December 3, 2001; and June 10, 2002. Mr. Kocher said that ultimately Workforce Safety and Insurance entered into a stipulated settlement with Mr. Beckler on January 10, 2003, in which it was agreed to resolve all of the applications for benefits for the year 2001. He said in the stipulated settlement it was agreed that Workforce Safety and Insurance would pay a lump sum payment in the amount of \$7,500 to the injured worker as full and complete settlement of disability benefits and vocational rehabilitation benefits in connection with the reapplications for the year 2001. He said it was further agreed that Workforce Safety and Insurance and Mr. Beckler would proceed to litigate the 2002 reapplication, which was denied by the administrative law judge dated August 28, 2002.

Mr. Kocher said on May 29, 2003, an administrative hearing was held in regard to the 2002 reapplication. He said the administrative law judge ruled the Workforce Safety and Insurance order denying the 2002 reapplication was affirmed. He said on October 22, 2003, Workforce Safety and Insurance adopted the recommended findings of fact and conclusions of law of the administrative law judge and issued a final order in this matter. He said on November 21, 2003, Mr. Beckler filed his appeal with the district court and on February 6, 2004, Mr. Beckler requested to reopen the record and supplement the record with exhibits for consideration at the district court level. He said on March 19, 2004, Mr. Beckler's request to supplement the record was denied by the district court.

Mr. Kocher said on March 25, 2004, the district court affirmed the Workforce Safety and Insurance order denying reapplication benefits, concluding that the claimant did not establish an actual wage loss as required under law.

Mr. Kocher said the injured worker appealed the district court decision to the North Dakota Supreme Court. He said the Supreme Court heard the appeal in October 2004 and on February 16, 2005, the Supreme Court affirmed the district court decision, denying Mr. Beckler's reapplication for benefits. The North Dakota Supreme Court decision is available online at [www.ndcourts.com/court/opinions/20040130.htm](http://www.ndcourts.com/court/opinions/20040130.htm).

### Issues for Review

Mr. Kocher stated that the North Dakota Century Code provisions that Mr. Beckler claims are at issue in this review are Section 65-05-08(1) relating to disability benefits, Section 65-05-28 relating to medical examinations of injured workers, Section 65-05.1-04(6) relating to an injured worker's responsibilities, and Section 65-05-33 regarding filing of false claims or false statements. Additionally, he said, Mr. Beckler has identified North Dakota Administrative Code Section 92-01-02.34(5)(i) relating to medical treatments requiring authorization of Workforce Safety and Insurance.

Chairman Keiser called on Mr. Beckler to present the issues he would like the committee to review. Mr. Beckler said he received the assistance of Mr. Kocher in organizing the issues he would like the committee to review and the material in the binder distributed by Mr. Kocher includes a list of the following four items he would like the committee to consider:

1. The inability to admit additional evidence into the record following the administrative hearing.
2. The impact of the Social Security determination of disability. Mr. Beckler said once an injured worker is determined to be eligible to receive Social Security disability benefits, the injured worker should automatically be found to be eligible to receive workers' compensation disability benefits.

3. The impact of an injured worker being found in noncompliance. Mr. Beckler said as an injured worker, there is a constant threat of termination of benefits for failing to comply with medical treatment plans and retraining programs. He said the threat of suspension or termination causes undue stress and pressure. He said he thinks Workforce Safety and Insurance needs to be more sensitive to the injured worker's physical and psychological well-being. Additionally, he said, there is an issue that arises when an injured worker needs to follow the medical advice of the treating physician, but this advice conflicts with the injured worker's existing workers' compensation program and there is a concern that following the physician's directions may result in a Workforce Safety and Insurance finding of noncompliance, resulting in suspension or termination of benefits.
4. Unnecessary spending of Workforce Safety and Insurance funds. Mr. Beckler said examples of unnecessary spending include:
  - a. Unnecessary fraud investigations;
  - b. Forcing injured workers into retraining programs;
  - c. Trigger point injection limitations; and
  - d. Excessive litigation costs spent defending Workforce Safety and Insurance decisions.

Mr. Beckler said that yesterday was the 23rd anniversary of his injury. He said back in 1983 his injury occurred while he was unloading a heavy item at the end of the day without assistance from other employees. He said the accident resulted in his hand slipping and an engine landing on his arm. He said following the injury the condition worsened and his employer was uncooperative in accommodating his work limitations. He said it was the worsening of his condition that resulted in him filing multiple reapplications.

Mr. Beckler said during the administrative hearing, he tried to supplement the record with copies of medical correspondence from his treating physician and this request was denied. He disagrees with this inability of an injured worker to provide the information necessary for the judge or hearing officer to make an informed decision.

Mr. Beckler said he thinks if an injured worker is determined to be eligible for Social Security disability benefits due to the workplace injury, this finding should result in Workforce Safety and Insurance determining the workplace injury resulted in a disability and an inability to work. He said a ruling on the national level should override any disability designation of the state level and this is particularly true for an injured worker who has established a long-term disability.

In response to a question from Representative Keiser, Mr. Beckler said he is not currently receiving

any wage loss payments from Workforce Safety and Insurance. He said he had received a lump sum settlement early on for a finding of permanent partial impairment.

Mr. Beckler said the constant threat of termination of workers' compensation benefits for failure to comply with the laws is a constant stress. He said he knows of injured workers who have had their benefits discontinued due to following the advice of their treating physician.

In response to a question from Representative Keiser, Mr. Beckler said he had been found in noncompliance because he was not able to perform the work in the field for which he was trained due to changes in technology. Ultimately, he said, his treating physician and the Workforce Safety and Insurance doctor agreed that he was unable to perform this work.

In response to a question from Senator Heitkamp, Mr. Beckler said he provided Workforce Safety and Insurance with documentation from his physician stating that he was unable to perform the tasks associated with hotel/motel management. He said this inability to perform the tasks was due in large part to the increased use of computers in this field.

Mr. Beckler said there is a significant amount of unnecessary spending of Workforce Safety and Insurance funds. He said for purposes of the workers' compensation fraud program, this money would be better spent on conducting investigations of injured workers with short-term disabilities. He said in the case of an injured worker who has a long-term disability, the committee needs to remember the injured worker needs to continue to live his or her life. He said in the case of an injured worker with a long-term disability, some days are better than others and that injured worker is in a position to best gauge the limitations on a day-to-day basis. For example, he said, with his disability there are some days where he might be able to play one or two games of darts but at that point he needs to stop and recognize his limitations. He said it is an enormous burden to feel like Workforce Safety and Insurance is watching every move you make every day of your life.

In response to a question from Representative Amerman, Mr. Beckler said he is not certain whether he has been under surveillance through the Workforce Safety and Insurance fraud program but he does know that a couple of years ago a car was parked outside his house for days on end and this made him very uncomfortable.

Mr. Beckler said an injured worker who has a significant disability should not be forced into a retraining program that may result in a finding of noncompliance and termination of benefits. He said the reality is that an injured worker may successfully complete a training program but ultimately may not be able to obtain employment in the new field of training. Like him, he said, many of these injured workers may be receiving Social Security disability and it is a waste

of money to try to return someone to work who is determined to be disabled.

In response to a question from Senator Heitkamp, Mr. Beckler said he is not working at this time. He said it is possible that he would be able to perform some limited employment like bartending for a few hours at a time, two or three days a week. He said he used to be a carpetlayer but he cannot do it now because Workforce Safety and Insurance said that work exceeds his limitations. However, he said, he thinks if he took special care to accommodate his limitations, for a limited amount of time he could perform carpetlaying.

Mr. Beckler said Workforce Safety and Insurance limits the number of trigger point injections that an injured worker can receive in a lifetime. He said he thinks that an injured worker can benefit from trigger point injections and there should not be an administrative rule limiting the number of injections an injured worker can receive. He said not only would a change in the administrative rule help the injured worker in dealing with pain but it would save Workforce Safety and Insurance money by not having to pay for emergency room visits that may result when an injured worker has no other option for pain relief.

Mr. Beckler said instead of Workforce Safety and Insurance spending the high amount of money it does on providing legal services to defend Workforce Safety and Insurance claim decisions, these resources could be better spent assisting injured workers. He said he would like to see these litigation funds used for services for the injured workers to help in the areas of divorce, bankruptcy, drug and alcohol abuse, and rehabilitation services for overuse of pain medications.

Mr. Beckler said in his case he reapplied for benefits in 2001 and 2002 and ultimately received a decision by the Supreme Court in 2005. He said four years is a long time to litigate a workers' compensation case. He said perhaps a different system, such as arbitration, would be a better process than having to go through an administrative law judge, district court, and Supreme Court.

Mr. Beckler said an additional issue he would like to raise relates to timeframe limitations for a claimant to recognize a workforce injury. For example, he said, in his case he injured his back in 1983 and at that time his physician indicated there was a possible cervical spine injury, which was treated and Workforce Safety and Insurance covered. However, he said, some of the ongoing problems related to his c spine may not show up for years. In his case, he said, three years ago problems with C-4, C-5, C-6, and C-7 started to occur but his guess is that Workforce Safety and Insurance will not cover these problems because they are showing up so late. He said if an injury can be determined to relate back to a workplace injury, he questions why Workforce Safety and Insurance would need to have time limitations on when the injury needs to be discovered.

### Workforce Safety and Insurance Response

Chairman Keiser called on Mr. Wahlin to provide testimony regarding the issues raised by Mr. Beckler. Mr. Wahlin said from a legal standpoint, he has never reviewed a more litigated claim than Mr. Beckler's. He said Mr. Beckler's case includes two North Dakota Supreme Court decisions. He said for purposes of the issues brought to the committee today, the orders and litigation relate to reapplications.

Mr. Wahlin said that as Workforce Safety and Insurance reviewed Mr. Beckler's multiple reapplication filings, a settlement was negotiated for the 2001 reapplications. He said the intent of Workforce Safety and Insurance was to leave the most legally valuable application to go to the North Dakota Supreme Court, hoping the Supreme Court would provide some guidance in this area of reapplication.

In response to a question from Senator Klein relating to coverage for trigger point injections, Mr. Wahlin said there is a medical basis for limiting trigger point injections. He said Workforce Safety and Insurance has addressed the issue of trigger point injections through North Dakota Administrative Code Section 92-01-02-34(5)(i) providing a medical service request preservice review from the Utilization Review Department for trigger point injections is required if more than three injections are required in a two-month period. He said his understanding of the rule is that generally Workforce Safety and Insurance treatments are intended to help an injured worker's medical condition improve; however, once a medical treatment stops improving the condition, it becomes palliative in that it does not improve the underlying condition. He said a trigger point injection is a palliative treatment.

In response to a question from Representative Amerman, Mr. Wahlin said there are fee caps on the amounts of litigation expenses for which an injured worker may receive reimbursement from Workforce Safety and Insurance. He said these fee caps are based upon the amount awarded to an injured worker and he said there are similar caps for Workforce Safety and Insurance attorneys. However, Mr. Wahlin said this fee cap was not in place for Mr. Beckler's case. He said he can provide additional information at a future meeting regarding payment of attorney's fees for injured workers as well as Workforce Safety and Insurance.

Senator Heitkamp questioned whether the wage loss issues raised by Mr. Beckler might essentially be a timing issue. He said in looking at the 2005 Supreme Court decision in *Beckler*, Justice Maring's dissent provides "I continue to be of the opinion that "actual wage loss" can be established by showing an inability to obtain employment, which can be proven by medical evidence that the employee is totally disabled from any work as a result of his work injury."

In response to a question from Senator Heitkamp questioning what would happen if the law were changed to be in compliance with Justice Maring's dissent, Mr. Wahlin said he encourages the committee

to beware of unintended consequences. He said by removing the wage loss requirement, it would remove any leverage Workforce Safety and Insurance has to get an injured worker into retraining. He said Workforce Safety and Insurance needs to be able to get injured workers out of unsafe employment. Additionally, he said, being hurt and being unable to find employment at times is in the eye of the beholder.

Senator Heitkamp said written documentation taken from a physician would seem to be reasonable in the "eye of the beholder."

In response to a question from Senator Heitkamp, Mr. Wahlin said as it relates to fraud investigations, Workforce Safety and Insurance has a duty of due diligence to make sure things are as they have been represented. He said Workforce Safety and Insurance does activity checks and regularly finds things that are not as they have been represented.

In response to a question from Senator Heitkamp asking why Workforce Safety and Insurance does not have a requirement of regular appointments with injured workers to confirm the physical status of that injured worker, Mr. Wahlin said he understands that activity checks may be invasive to an injured worker but he feels they are required under the due diligence requirement for Workforce Safety and Insurance. He said the cost of doing spot checks are very high and Workforce Safety and Insurance receives reports from a variety of people, including neighbors. Generally, he said, if Workforce Safety and Insurance receives a report regarding possible fraud, these reports are prioritized and treated accordingly.

In response to a question from Representative Amerman regarding surveillance, Mr. Wahlin said Workforce Safety and Insurance has an in-house investigative unit and, when cost-effective, Workforce Safety and Insurance contracts for these services.

In response to a question from Representative Johnson regarding time limitations for Mr. Beckler's neck injury, Mr. Wahlin said he does not have the necessary facts to speak about Mr. Beckler's medical condition but generally there is a closed claim presumption. He said if an injured worker does not receive treatment for a period of four years, the injured worker then has the burden to prove the work injury was the sole cause of the new injury which is a higher standard of initial application.

In response to a question from Representative Keiser, Mr. Wahlin said aging is usually a contributing factor to most degenerative conditions which makes it difficult to prove the workplace injury was the sole cause of the new injury. However, he said, approximately one-third of the applications for reopening are being accepted by Workforce Safety and Insurance.

In response to a question from Senator Klein, Mr. Wahlin said at a future meeting Workforce Safety and Insurance can provide additional information regarding the amount of resources used for fraud investigations of injured workers and of employers.

In response to a question from Senator Klein regarding retraining programs, Mr. Wahlin said there are social and psychological benefits to rapidly returning an injured worker to some type of employment following an injury. He said generally there is a 12-week window to successfully get an injured worker back to work. He said after 12 weeks, the chance of returning to work decreases to 50 percent. He said Workforce Safety and Insurance does push injured workers into retraining because of the problems associated with an injured worker remaining in an unsafe job.

Representative Keiser said he thinks there are some common threads between some of the cases being heard by the committee today. He said as it relates to the issue of additional benefit, this only becomes an issue if one of the parties is dissatisfied with the outcome of the case. He said he accepts the need for deadlines in this system but the committee members need to recognize that if the door is open and additional evidence is allowed there may also be evidence introduced by the other parties.

Mr. Wahlin said if there is later discovered evidence that is allowed to be introduced, Workforce Safety and Insurance would need to investigate this evidence. He said the current standard that needs to be followed for the introduction of evidence is establishing a justifiable reason for not having provided the evidence at the administrative hearing process.

Representative Keiser said in the case of Mr. Beckler and his desire to continue to perform the occupation of carpetlaying, Workforce Safety and Insurance said this was an unsafe profession.

Mr. Beckler said he received services from the chronic pain clinic and the services helped teach him how to address his limitations. He said utilizing these tools he was taught at the pain clinic he was better able to stay within his limitations of carpetlaying than he was with hotel/motel management.

Representative Keiser said as it relates to the issue of worsening medical condition and loss of wages, he questioned how Workforce Safety and Insurance determines whether there has been a worsening in a medical condition and also questions how Workforce Safety and Insurance evaluates pain.

Mr. Wahlin said generally the determination whether there is a worsening of medical condition is a medical question that includes looking at the medical records and determining whether the underlying condition has changed. He said he does not have a clear answer regarding how pain is evaluated. He said the issues of worsening medical conditions and pain are complicated medical issues and are struggles Workforce Safety and Insurance faces every day.

Mr. Wahlin said as it relates to the loss of wage requirements, the statute is quite clear and the series of Supreme Court cases have supported the interpretation of Workforce Safety and Insurance. He said a loss of wages is necessary to give Workforce

Safety and Insurance the incentive to get an injured worker to return to work or undergo retraining.

In response to a question from Representative Amerman, Mr. Wahlin said he is not familiar with any situations in which Workforce Safety and Insurance wished to supplement the record during the hearing process. However, he said, he is familiar with at least two situations in which an injured worker was allowed to supplement the record.

In response to a question from Representative Johnson, Mr. Wahlin said the tests used to qualify for Social Security disability benefits and Workforce Safety and Insurance benefits are different. He said linking these two programs and the qualifications for establishing a disability under the two programs would mean anytime a worker does not return to work but does qualify for Social Security disability benefits, that injured worker would qualify for Workforce Safety and Insurance.

### **Comments by Interested Persons**

Chairman Keiser called on Ms. Bale for comments regarding the issues raised by Mr. Beckler. Ms. Bale said she is very proud of Mr. Beckler and all the work he has done to present his case to the committee. She said the medical correspondence Mr. Beckler sought to introduce was from Dr. Michael Martire. She said Workforce Safety and Insurance does not like Dr. Martire because he sticks up for the injured worker.

Ms. Bale said it is the job of a physician to determine when it might be appropriate for an injured worker to receive trigger point injections. She said it is not appropriate for Workforce Safety and Insurance, through administrative rule, to place these limitations on an injured worker.

Ms. Bale said committee members need to remember that injured workers are not as sophisticated or well-versed in the nuances of the workers' compensation system. She said injured workers do not know their rights.

Ms. Bale said that as it relates to claims of fraud, the injured worker is constantly concerned that acts of daily living might disqualify them from workers' compensation coverage. For example, she said, an injured worker may be concerned that playing bingo might show that the injured worker sat for too long or going camping or ice fishing may show too much physical activity. She said the fraud system is invasive to injured workers, neighbors, and family members.

Ms. Bale said she agrees with the administrative hearing process because even if an administrative law judge makes a ruling in favor of the injured worker, Workforce Safety and Insurance has the ability to reject the determination of the hearing of the administrative law judge. She said she agrees with the position taken by Mr. Douglas Gronfur suggesting the North Dakota monopolistic workers' compensation system be abolished.

Chairman Keiser called on Mr. Dave Kemnitz, AFL/CIO, for comments regarding Mr. Beckler's case. Mr. Kemnitz commended Ms. Bale for focusing her comments to the issues raised by the injured workers.

Mr. Kemnitz said the committee is charged with looking at barriers that injured workers face under the state's workers' compensation system. He said in the case of Mr. Beckler and the rebuttal made by Workforce Safety and Insurance, it is clear that Workforce Safety and Insurance is seeking to limit its liability. He said the testimony of Mr. Wahlin indicated that Workforce Safety and Insurance will not pay to relieve an injured worker's pain. He said this position is contrary to the statutory requirement to provide injured workers with sure and certain relief. He said just because an injured worker has reached maximum medical recovery does not mean that Workforce Safety and Insurance should disregard an injured worker's pain caused by the workplace injury.

Mr. Kemnitz said the North Dakota Administrative Code rules providing for the 20 trigger point lifetime limitation is an example in which Workforce Safety and Insurance chooses to limit the benefits it provides injured workers.

Mr. Kemnitz said the committee is faced with the issue of determining what is sure and certain relief. He said under NDCC Section 65-01-01, as amended in 1994, the law now provides NDCC Title 65 is not to be construed liberally to any party. He said this is a change in law in that under the old law Title 65 required liberal construction in favor of the injured worker. He said this liberal construction helped provide an injured worker with sure and certain relief.

Chairman Keiser called on Mr. Christensen for comments regarding the issues raised by Mr. Beckler. He said he is troubled by the permanent partial impairment requirement that an individual be at least 25 percent disabled.

Chairman Keiser called on Mr. Vetter for comments regarding the issues raised by Mr. Beckler. He said the common theme thus far in the cases brought before the committee is that Workforce Safety and Insurance takes the position that it is the injured worker's fault. He said Workforce Safety and Insurance is taking the position of blaming the injured worker and this is not fair. He said it is a very difficult burden to require an injured worker to prove wage loss.

Chairman Keiser called on Mr. Kapaun for comments regarding issues raised by Mr. Beckler. He said this committee has seen all kinds of professionals, including attorneys, addressing workers' compensation issues. However, he said, only two lawyers in North Dakota accept workers' compensation claims for injured workers. He said injured workers are unfairly disadvantaged.

Mr. Beckler said for purposes of injured workers with long-term disabilities, there is significant value to providing pain management services. He said if Workforce Safety and Insurance is not going to help him, he would ask that it essentially buy him out and

let him go and make his own arrangement for medical care. It is his understanding that Montana has such an option.

### **Committee Discussion**

Representative Amerman said the cases brought before the committee during the interim have been very interesting and he would suggest that members of the Workforce Safety and Insurance Board of Directors attend some of the committee meetings and review the activities of the committee. Chairman Keiser said when he scheduled the first committee meeting, Workforce Safety and Insurance offered the use of its facilities and offered to invite board members; however, he said, he declined the offer because it seemed like it may be perceived as being too overbearing and may intimidate injured workers in bringing their issues forward to the committee.

Senator Heitkamp said at a future meeting he would like to receive a copy of the Workforce Safety and Insurance policies regarding whether a fraud report is investigated.

Representative Johnson said at a future meeting she would like to receive additional information regarding this issue of buyouts and whether Montana does offer such a program. Mr. Blunt said in North Dakota Workforce Safety and Insurance does occasionally enter into settlements or stipulations. He said this practice used to be more common but is being done less often now.

In response to a question from Senator Heitkamp, Mr. Blunt said in order for a settlement or a stipulation, all parties need to agree and sign the agreement. He said before Workforce Safety and Insurance will enter a settlement, it needs to ensure that the settlement is in the best interest of all parties. Additionally, he said, the committee should recognize that if there is a settlement or stipulation, there may be negative medical implications. He said once an injury is determined to be a workers' compensation injury, private insurers may refuse to provide coverage for the related medical conditions.

Representative Keiser said he is struggling with the concept of worsening medical condition and loss of wages. He said he would like to receive more information regarding these issues at a future meeting. Chairman Keiser said the committee will consider the issues raised by Mr. Beckler and he should follow the future meeting activities of the committee.

### **Fourth Case**

Chairman Keiser called on Mr. Kocher to assist in presenting Mr. Clarence Voigt's case to the committee. Mr. Kocher distributed to committee members a binder containing information provided by Workforce Safety and Insurance. He said the information in the binder includes a case summary of the injured worker's records as well as a list of the statutory provisions the injured worker is interested in addressing.

### Case Summary

Mr. Kocher provided a summary of Mr. Voigt's case. He said that Mr. Voigt filed an application for benefits for a work-related injury which occurred on December 8, 1990. He said Workforce Safety and Insurance accepted liability and paid the associated medical expenses and disability benefits. He said on November 24, 1992, Workforce Safety and Insurance entered into a stipulated settlement agreement in which it was ordered Mr. Voigt be paid a lump sum settlement of \$15,159 as full and complete settlement of the claim for disability benefits and vocational retraining benefits.

Mr. Kocher said the stipulation provided that the medical portion of the file would remain open. Additionally, he said, the agreement provided that the lump sum money was to be used for the sole and exclusive purpose of the injured worker becoming a residential paint contractor and establishing the self-employment venture.

Mr. Kocher said on October 4, 1995, Workforce Safety and Insurance issued an order denying further benefits and a demand for repayment in the amount of \$15,159. He said Workforce Safety and Insurance concluded that the injured worker had breached the agreement between the parties resulting in an overpayment of benefits. He said under NDCC Section 65-05-33, the injured worker was required to forfeit any additional benefits in connection with that December 8, 1990, injury as well as being required to repay the overpayment amount.

Mr. Kocher said the injured worker requested a hearing before an administrative law judge. He said on April 23, 1996, the administrative law judge affirmed the order and this order became final.

Mr. Kocher said on December 1, 2003, Mr. Voigt filed a claim with Workforce Safety and Insurance in connection with an alleged work injury to his neck sustained on November 8, 2003, while employed as a painter. He said on March 1, 2004, Workforce Safety and Insurance denied the application for benefits indicating that the injured worker did not prove he sustained a compensable injury by accident arising out of and in the course of employment or that his employment was more than a trigger to produce symptoms in his underlying preexisting condition. He said it was determined that the injured worker was not entitled to any additional workers' compensation benefits in connection with the December 8, 1990, injury and that his 2003 work injury was to the same exact body part and was therefore denied.

Mr. Kocher said Mr. Voigt disagreed with the order dismissing his claim and requested a hearing before an administrative law judge. He said on March 9, 2005, the administrative law judge determined Mr. Voigt's cervical spine injury for which he filed a claim was a preexisting disease or condition when he returned to work as a painter in May 1999. He said the administrative law judge further indicated that although Mr. Voigt's work may have acted as a trigger to produce symptoms of the preexisting condition, he

determined the injured worker failed to establish that his work as a painter after May 1999 substantially accelerated the progression or worsened the severity of the preexisting cervical spine pathology and as such affirmed the order of Workforce Safety and Insurance.

Mr. Kocher said Mr. Voigt appealed the decision of the administrative law judge and on August 5, 2005, the district court affirmed the decision of the administrative law judge. He said Mr. Voigt did not appeal the district court decision and as such the order became final.

In response to a question from Representative Keiser, Mr. Kocher said it is his understanding that the cervical area injured in 1990 is essentially the same as the cervical area injured in 2003; however, there are representatives from Workforce Safety and Insurance who could confirm this.

In response to a question from Senator Espgaard, Mr. Kocher said the reason Mr. Voigt was required to repay the settlement amount was because the injured worker did not use the money in accordance with the stipulated agreement working as a painting contractor. He said that it was because of the finding of fraud the injured worker lost his medical coverage for the 1990 injury.

### Issues for Review

Mr. Kocher said he worked with Mr. Voigt in preparing and organizing Mr. Voigt's issues he would like to have the committee review. He said as part of the documents included in the binder, he included a list of approximately 18 North Dakota Century Code sections Mr. Voigt identified as issues he would like the committee to address. Additionally, he said, the binder contains a three-page document he assisted the injured worker in creating which in part raises questions the injured worker has regarding the Workforce Safety and Insurance 2003 and 2005 biennial reports.

Mr. Kocher said the North Dakota Century Code sections included as issues the injured worker would like the committee members to address include Sections 65-10-03 and 65-07.1-03, Chapter 65-05.1, Sections 65-04-28, 65-03-01, 65-02-27, 65-01-01, 65-05-09.1, 65-05-06, 65-05-25, 65-01-08, 65-05-33, 65-05-15.1, 65-06-01, 65-06-02, 65-01-11, 65-10-02, and 65-05-28.

Chairman Keiser called on Mr. Voigt to present the issues he would like the committee to consider. Mr. Voigt said he understands Workforce Safety and Insurance will provide him a response to the questions he raises regarding the 2003 and 2005 Workforce Safety and Insurance biennial reports. Additionally, he said, in preparing for the committee meeting, he met with committee counsel who assisted in identifying the issues that were directly or remotely related to his own personal experience with Workforce Safety and Insurance.

Mr. Voigt said in briefly reviewing some of the issues and concerns he has regarding Workforce

Safety and Insurance, one concern he has is that he does not believe that Workforce Safety and Insurance is abiding with its requirement to provide sure and certain relief to injured workers, regardless of question of fault.

Mr. Voigt said another issue he has regarding the state's workers' compensation system is that during the course of processing his 1990 workers' compensation claim, he believes his claims analyst made false statements and made mistakes that were not fixed.

Mr. Voigt said an additional issue he would like the committee to consider relates to the workers' compensation preferred worker program under which employers are provided cost-saving incentives when they hire preferred workers. He said he would like to receive some information to find out how this program is working. He said they did not have this preferred worker program in 1990 when he was first injured.

Mr. Voigt said another area he would like the committee to consider relates to workplace safety. He said he has concerns that employers are not providing safe work environments for employees. He would like to see more being done to provide workers with a safer environment.

Representative Keiser said the safety programs recently implemented by Workforce Safety and Insurance are success-based and employers have the option of whether to participate.

Mr. Voigt said in the case of larger employers, you are more likely to see actual safety measures being taken to provide a safe working environment for employees but in smaller employment situations it is more likely that the employer is not creating a safe working environment.

Mr. Voigt said he would like to receive information regarding Workforce Safety and Insurance customer satisfaction surveys.

Mr. Voigt said he would like to receive information regarding legislation supported by Workforce Safety and Insurance which would provide additional benefits for injured workers.

Representative Keiser said some of the legislation supported by Workforce Safety and Insurance which provides additional benefits for injured workers include increased death benefits, the creation of a scholarship program, and 2005 House Bill No. 1171, which enhances rehabilitation opportunities for injured workers.

Mr. Voigt said he would like to receive information regarding the administrative hearing process, including the percentage of injured workers' cases in which the injured worker was denied benefits as well as the percentage of administrative hearing cases that went on to district court and were denied at the district court level.

Mr. Voigt said he has questions regarding the Office of Independent Review. He questioned whether that office was doing the job it was intended to do. He said he thinks the office should be closed.

Mr. Kocher said he visited with Mr. Voigt regarding this issue and he can provide Mr. Voigt with the information he is seeking regarding the Office of Independent Review.

Mr. Voigt said he has concerns regarding medical record file retention by Workforce Safety and Insurance. He is concerned that some of his medical records have not been retained in his workers' compensation file.

Mr. Voigt said in the 2007 legislative session he would like to see the North Dakota workers' compensation system changed from its current no-fault insurance model to a private insurance company model. He said there has to be a very good reason why 45 other states have this private insurance company model.

Mr. Voigt said he was not satisfied with the retraining opportunities he had as an injured worker.

In response to a question from Representative Keiser regarding whether Mr. Voigt had any choice in which training he would receive, Mr. Voigt said he does not recall ever being asked what type of training he would be interested in pursuing.

In response to a question from Representative Johnson, Mr. Voigt said although he completed a retraining evaluation, he did not actually participate in the retraining to be a medical administrative assistant because he entered the stipulated settlement instead.

Senator Espegard said at a future meeting he would like to receive information regarding how rehabilitation and training careers are chosen for injured workers. He said he is concerned with testimony the committee has received that injured workers are being trained for jobs that are not available to that injured worker.

Mr. Voigt said that in training an injured worker, Workforce Safety and Insurance needs to take into account the age of the injured worker as well as the educational background of the injured worker.

Mr. Voigt addressed the language of the amended stipulation he signed. He said the lump sum he received did not preclude him from using a portion of that money to support his family and himself during the phase that the business is not self-sufficient. He said it sounds like Workforce Safety and Insurance is contending that the self-employment does offer sufficient income opportunity, whereas he contends it does not.

In response to a question from Senator Espegard, Mr. Kocher said the stipulated settlement Mr. Voigt entered did not terminate his medical coverage. It was the fraud determination that terminated his medical coverage.

Mr. Voigt said he does not agree with the finding that his 1990 injury and 2003 injury are the same. He said his treating physicians would support his claim that they were not the same injury.

Representative Keiser said he views the issues raised by Mr. Voigt as relating to the fraud issue in which coverage related to his first injury was

terminated and the second issue of how to deal with a subsequent injury in the case of a fraud case.

In response to a question from Representative Amerman regarding the repayment of the lump sum amount, Mr. Voigt said the funds he was required to repay were discharged in bankruptcy. He said if he were to qualify for disability benefits, Workforce Safety and Insurance would not offset that amount from future payments.

Mr. Voigt said another issue he would like the committee to consider is that injured workers in North Dakota do not have access to legal counsel. He said the limitations on an injured worker's attorney's fees are outrageous. He said the result of the attorney's fees limitations is that injured workers are left without legal representation.

Mr. Voigt said if employers are going to be relieved of liability for civil damages when an employee is injured, that employer should be required to provide safe working conditions.

Mr. Voigt said if the system provides an employer is not liable for civil damages, that employer has no incentive to provide a safe workplace. He said if an employee can prove the employer exercised a pattern of carelessness, the injured worker should be able to hold that employer liable for injury sustained on the job.

Mr. Voigt said he thinks the workers' compensation Social Security offset provision is inappropriate. He said injured workers need both workers' compensation and Social Security funds just to make ends meet.

In response to a question from Representative Keiser, Mr. Voigt said although the initial stipulation provided all of the money was to be used for starting a business, there was an amended stipulation that did allow him to use some of the funds for self-support. He said Workforce Safety and Insurance claimed the grounds for fraud were false statements. Additionally, he said, the laws relating to false claims and statements are too vague and should be changed to be more clear.

Mr. Voigt said the district court standard of review should be changed. He said the district court should be able to reevaluate the facts of the case. Had he known the district court was limited in its standard of review, he said, he would not have wasted his time appealing his decision to the district court.

Mr. Voigt distributed to committee members a two-page document, which lays out his statement of the facts of his claim. A copy of this handout is on file in the Legislative Council office.

Mr. Voigt said he disagrees with the finding that his 2003 injury had merely triggered the symptoms of his 1990 injury.

In response to a question from Representative Keiser, Mr. Voigt said he understood that one reason for him to be self-employed was that it would allow him to limit his painting bids so he could work within his restrictions.

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

Chairman Keiser called on Mr. Wahlin to provide testimony regarding issues raised by Mr. Voigt. Mr. Wahlin said the 2003 claim filed by Mr. Voigt centers around the 1990 claim. He said following the 1990 injury, the rehabilitation evaluation found that the activity of painting was inappropriate given Mr. Voigt's limitations; therefore, it was arranged to have Mr. Voigt participate in rehabilitation and retraining. He said this would have taken place, except that Mr. Voigt and his attorney objected to the rehabilitation retraining and proposed that Mr. Voigt begin a venture as a painting contractor under which he would submit bids and then hire painters to actually perform the painting.

Mr. Wahlin said it was brought to the attention of Workforce Safety and Insurance that Mr. Voigt was painting. He said upon investigation, Mr. Voigt reported that he was a contractor and had purchased the necessary equipment to perform this venture. However, he said, the investigation indicated that the equipment had not been purchased.

Mr. Wahlin said that the fraud case went to the administrative law judge who made a finding that the injured worker had knowingly and willingly violated the terms of the stipulation. He said this whole situation is a failure. He said it is a failure because Mr. Voigt was painting, which is in violation of the restrictions or limitations of his appropriate work restrictions, and it should come as no surprise that this activity resulted in triggering more damage to the 1990 injury.

In response to a question from Representative Keiser, Mr. Wahlin said that upon a finding of fraud, future benefits for that injury are prohibited.

In response to a question from Senator Espgaard, Mr. Wahlin said in the case of Mr. Voigt, if there had not been a determination of fraud, it is likely that Workforce Safety and Insurance would have covered the 2003 injury even though the statute says if you are knowingly exceeding your limitations you are not eligible for coverage. He said when it comes to denying coverage based upon exceeding working restrictions, the North Dakota Supreme Court established a higher burden. He said that to deny coverage based upon exceeding limitations, the employee needs to have willfully exceeded the limitations and the employer needs to know of these restrictions. He said the high burden makes enforcement almost unattainable.

Mr. Voigt said as it relates to his work restrictions, he modified his work thinking that doing so would keep him within his work restrictions.

In response to a question from Representative Amerman, Mr. Wahlin said state government has given certain powers to address the welfare, health, and safety of its citizens and the creation of Workforce Safety and Insurance is one of these powers. He said before the creation of the workers' compensation system, an injured worker had a very heavy burden when it came to seeking a remedy for a workplace injury.

In response to a question from Senator Heitkamp, Mr. Voigt said yes, he understood the settlement agreement and he did spend some of the settlement money on his living expenses. Additionally, he said, he did buy some equipment for his painting services, although he did not buy the scaffolding.

Senator Heitkamp said if Mr. Voigt understood the terms of the agreement and then he went on and did not follow these terms, it is hard for the committee to take any action to improve Mr. Voigt's situation or the situation of those similarly situated.

Mr. Voigt said after entering the stipulation, he knew he was not allowed to paint but he modified his painting activities thinking that this would keep him within his appropriate restrictions. He said he did not understand that he was totally prohibited from painting.

Mr. Wahlin said the vocational consultant's report dated June 1992 said Mr. Voigt was prohibited from painting and the workers' compensation documents are replete with references excluding painting activities.

In response to a question from Mr. Voigt regarding the statute of limitations on fraud, Mr. Wahlin said he is not certain but he does not think there is a statute of limitation on fraud.

In response to a question from Representative Keiser asking whether Mr. Voigt could challenge the fraud ruling, Mr. Wahlin said Mr. Voigt did challenge the fraud finding and he was unsuccessful at the district court. He said he did not pursue this district decision to the Supreme Court. He said at the fraud hearing it was determined that there was a finding that the injured worker was not allowed to paint but then that is exactly what the injured worker did, he participated in painting.

Senator Espgaard said that once Mr. Voigt lost his fraud case and his workers' compensation benefits, he was no longer prevented from painting but questions what happens when his neck is further injured when he is participating in this prohibited activity.

Representative Keiser thanked Mr. Voigt for bringing his case forward to the committee. He said he understands the sensitivity of the fraud issue and how difficult it must have been for him to come to the committee today.

In response to a question from Senator Heitkamp asking Mr. Voigt why he took the \$15,000 settlement if he knew he was not allowed to paint, Mr. Voigt said he thought he could paint if he modified his painting activities. He said he wants Workforce Safety and Insurance to provide proof that it told him he could not paint at all.

Senator Espgaard said the injured worker's vocational report said he was not allowed to paint and a stipulation further states his limitations on receipt of the lump sum to buy equipment.

Senator Heitkamp said the real issue before the committee is what are you going to do about Clarence Voigt's life. He said it seems Mr. Voigt hastily rented scaffolding when he was being investigated by

Workforce Safety and Insurance, he did have a sense of Workforce Safety and Insurance's expectations.

In response to a question from Representative Amerman, Mr. Voigt said at the time of the 2003 injury, he was an employee of a painting contractor.

### **Comments by Interested Persons**

Chairman Keiser called on Mr. Vetter for comments regarding the issues raised by Mr. Voigt. He said that although he sympathizes with the situation Mr. Voigt finds himself in, he does not condone fraud. He said from the presentation made today it seems as though Mr. Voigt did not use the settlement money as he was supposed to. He said he accepts that perhaps Mr. Voigt did not understand all the terms of the stipulated agreement but in this instance he finds himself siding with the position of Workforce Safety and Insurance.

Chairman Keiser called on Ms. Bale for comments regarding the issues raised by Mr. Voigt. She said the committee needs to remember that Mr. Voigt is a painter with an eighth grade education. She said at the time of his initial injury he was 48 years old. She said the one thing that catches her attention is that Mr. Voigt's educational level may have played a role in the situation.

Chairman Keiser called on Mr. Kapaun for comments regarding the issues raised by Mr. Voigt. He said that in this instance he finds himself agreeing with Workforce Safety and Insurance.

### **Committee Discussion**

Representative Keiser said he has empathy with Mr. Voigt because as a small business owner himself he recognizes that when a small business starts up there is a lot of work that a business person needs to do and it is the business owner that performs all these activities. Additionally, he said, \$15,000 is not a lot of money to start a business; however, he said, there appears to be a significant amount of evidence showing fraud on the part of the injured worker.

Senator Heitkamp requested that Workforce Safety and Insurance respond to the issues raised and requested by Mr. Voigt and that this information be provided to Mr. Voigt.

## **COMMITTEE WORK**

Throughout the course of the two-day meeting, the committee conducted committee work on issues raised on the course of reviewing injured workers' claims. The committee work included receipt of two bill drafts relating to the presumption of coverage for firefighters and law enforcement officers; the status and use of the excess funds resulting from the 2005 changes to the fund balance calculation requirements; receipt of information regarding the calculation of the state's average weekly wage and how neighboring states calculate their average weekly wage for purposes of unemployment insurance and workers' compensation; receipt of information regarding vehicle modifications for injured workers; review of 2005

House Bill No. 1171, regarding rehabilitation of injured workers; and a brief overview of the workers' compensation rehabilitation services.

### Bill Drafts

#### False Positives

Chairman Keiser called on committee counsel to present a bill draft [\[70087.0100\]](#) relating to workers' compensation "false positive" heart and lung tests of firefighters and law enforcement officers.

Committee counsel said this bill draft has two sections. She said the first section amends NDCC Section 65-01-15.1, the section of law creating the presumption of compensability for firefighters and law enforcement officers. She said there are basically two types of changes being made to this section of law. The first change, she said, is not substantive but merely breaks up this single section into five subsections. She said the purpose of this change is to make the section of law easier to read.

Committee counsel said the second change being made under NDCC Section 65-01-15.1 is to add language that provides "If a medical examination produces a false positive result for a condition covered under this section which causes a wage loss, the organization may consider this a period of disability. In the case of a false positive result, the period of disability may not exceed twenty-days."

Committee counsel said Section 2 of the bill provides for an application section that says the Act applies to all false positive tests occurring on or after the effective date of this Act.

Committee counsel said the language added in Section 1 of the bill was provided by Workforce Safety and Insurance and the language in Section 2 of the bill was included to clarify the Act would not be retroactive in application.

In response to a question from Senator Heitkamp, committee counsel said for purposes of the new language added, the use of the term "may" versus the term "shall" indicates that Workforce Safety and Insurance has discretion in whether to provide coverage in the case of a false positive result.

In response to a question from Senator Espgaard regarding how this new language would provide medical coverage in the case of a false positive, Mr. Wahlin said the language in the bill draft specifically deals with a situation in which a wage loss occurs. He said this language could be clarified to better indicate that an injured worker would be eligible for medical and disability benefits. He said the reason the period of 20 days was used is that disability benefits are paid on 14-day cycles and he wanted to give the injured worker enough time to establish whether the positive result was actually false.

Representative Keiser said he supports a timely determination of finality but he thinks it is important to give an injured worker the appropriate amount of time to confirm medical results.

In response to a question from Senator Heitkamp, Mr. Wahlin said the use of the term "may" is

consistent with other areas of the code in that it gives Workforce Safety and Insurance the ability to make determinations on a case-by-case basis.

Senator Espgaard said it seems the situation of a false positive seems to be a definitive situation and he agrees it would be more appropriate to use the term "shall," removing discretion.

In response to a question from Representative Amerman, Mr. Wahlin said in the case of a discretionary decision, it is typically an executive decision which may be made as high up as the executive director.

In response to a question from Senator Heitkamp regarding the application provision of the bill asking how many false positives the state has experienced and whether there is a reason we do not modify the application to go back retroactively, Mr. Wahlin said Workforce Safety and Insurance does not have the ability to determine how many false positives have occurred. He said he would be guessing when he said there may be one or two of these false positives each year.

In response to a question from Representative Keiser regarding what would happen if an injured worker was put on light duty so there was no loss in wages but there might be medical expenses incurred, Mr. Wahlin said that ideally they like to see an injured worker stay in the workforce. He said he does not think wage loss would necessarily be a requirement to receive coverage under this presumption.

In response to a question from Representative Keiser asking whether the bill draft can have the wage loss language struck, Mr. Wahlin said he would need more time to consider proposed language changes.

Senator Espgaard said he does not mind removing Section 2 of the bill draft regarding the application clause.

Senator Klein said the committee needs to consider the feasibility of retroactive application and wants to be even-handed in how this is applied. He said he would support leaving the application section in the bill draft as it is written.

Representative Keiser said he thinks the use of the term "shall" better represents the committee's wishes.

Chairman Keiser called on Mr. Edward Grossbauer, Chief Fire Marshal, for comments regarding the false positive bill draft. He said it is his understanding that Ms. Tana Ostlie, the injured worker who presented her case at the Fargo meeting, was out of work for two weeks. He said her ability to receive the necessary testing within two weeks was a stroke of good luck on her part as it would typically take longer to undergo these tests. He said he would suggest removing the term "false" from the language of the bill draft and he would support changing "may" to "shall."

Mr. Grossbauer said that as a firefighter, in order to trigger a wage loss it would require that the firefighter miss five calendar days of work and it is unlikely that tests would be completed within five days so he does

not think there are any concerns regarding the wage loss requirement.

Mr. Grossbauer said regarding Section 2 of the bill draft, the application clause, he would support making this bill retroactive to January 1, 2005. He said that providing for retroactive coverage would cover Ms. Ostlie's claim. However, he said, he does want to note that her reasons for pursuing this issue were to help other firefighters in the future and not to change the outcome of her case.

Chairman Keiser called on Ms. Bale for comments regarding the false positive bill draft. She said that she has a background as a nurse and even with this medical background she does not understand any of the language being proposed in the bill draft.

In response to a question from Senator Heitkamp regarding the frequency of false positive tests, Mr. Kocher said the only time he has been approached regarding this issue was the case of Ms. Ostlie.

### **Period for Appeal**

Chairman Keiser called on committee counsel to present a bill draft [70088.0100] relating to the period of appeal of a Workforce Safety and Insurance decision relating to the presumption for firefighters and law enforcement officers. She said this bill draft amends NDCC Section 65-01-16 relating to the procedures that must be followed in claims for workers' compensation benefits.

Committee counsel said the language added to this section of law provides that for purposes of a notice of decision, administrative order, or notice that the Office of Independent Review assistance is complete, and for purposes of a decision issued under the firefighter and law enforcement officer's presumption, a party has 45 days in which to file a written request for reconsideration or rehearing.

In response to a question from Representative Keiser, Mr. Wahlin said yes, this extension of time from 30 to 45 days applies equally to the employer and the employee.

Chairman Keiser called on interested parties to comment regarding the bill draft.

Chairman Keiser called on Ms. Bale for comments regarding the bill draft. She said her experience has been that the notice of denial process is not always followed.

Chairman Keiser called on Mr. Grossbauer for comments regarding the bill draft. He said he supports the extension from 30 to 45 days. He said firefighters are unique in some respect due to their shift work. Additionally, he suggested that the bill draft be amended to allow firefighters or law enforcement officers 45 days to file a request for assistance from the Office of Independent Review.

Mr. Wahlin said he does not see any problem in extending from 30 to 45 days the period of time in which to file a request for assistance from the Office of Independent Review under subsection 6 of NDCC Section 65-01-16.

**It was moved by Senator Heitkamp, seconded by Senator Espegard, and carried on a voice vote that the bill draft relating to the period of appeal of a workers' compensation decision based on the presumption of compensability for firefighters and law enforcement officers be amended to provide a 45-day period for firefighters and law enforcement officers to file a request for assistance from the Office of Independent Review.**

**It was moved by Senator Heitkamp and seconded by Representative Johnson that the bill draft, as amended, relating to the period of appeal of a Workforce Safety and Insurance decision relating to the presumption for firefighters and law enforcement officers be approved and recommended to the Legislative Council.**

Representative Keiser said he will vote no on this bill draft because he supports expediting the process. He said he remembers the days when there was a backlog of cases and he perceives this bill draft as being a step backwards. Additionally, he said, he also views this bill draft as a way for employers to extend the process.

Senator Heitkamp said that first responders, like firefighters, do shift work and may benefit from such an extension.

A roll call vote was taken with Representatives Amerman and Johnson and Senators Espegard, Heitkamp, and Klein voting "aye" and Representative Keiser voting "nay." **The motion carried.**

Mr. Blunt testified that the Workforce Safety and Insurance Board of Directors has not yet made a determination whether to support the two bill drafts the committee reviewed today. He said that personally he does not support the bill draft extending the period of appeal because he views it as setting up a disparate system for certain claims filed by firefighters and law enforcement officers.

### **Fund Balance Status**

Chairman Keiser called on Mr. Blunt for comments regarding the status and use of the excess funds resulting from the 2005 changes to the fund balance calculation requirements. Mr. Blunt distributed two handouts, which are attached as Appendix C.

The first document reflects a summary of the financial reserves and surplus for the Workforce Safety and Insurance fund covering the periods 1998 through February 2006. The second document summarizes the use of the surplus funds for the hazard elimination learning program (HELP) and for the education loan fund.

Mr. Blunt explained that in the 2005 legislative session, House Bill No. 1531 modified the Workforce Safety and Insurance fund balance calculation requirements by allowing for a discount rate not to exceed 6 percent. He said the 2005 legislation also set a maximum and minimum range within which the funds need to be maintained.

Mr. Blunt said the Workforce Safety and Insurance Board of Directors has earmarked the surplus funds as follows:

Amount above range (in 000's)	\$232,575
Unrealized investment gains	(57,475)
40% premium dividend (estimated)	(46,500)
Safety education, grants, and incentives	(35,000)
Student loans	(15,000)
Premium discounts	(9,000)
Total earmarked surplus	(\$162,975)
Available surplus	\$69,600

Mr. Blunt said the use of the surplus funds includes the HELP cash grant to improve workers' safety and to conduct research on the effectiveness of each of the specific intervention initiatives and funding of the educational loan fund, which provides a low interest loan to an injured worker who is working to enhance employment through education. He said to date there have been 34 HELP applications submitted and 17 of these grants have been awarded, totaling \$279,701. Additionally, he said, Workforce Safety and Insurance has approved two educational loan applications totaling \$7,800.

In response to a question from Representative Amerman, Mr. Blunt said NDCC Section 65-03-04, as amended in 2005, provides a continuing appropriation to fund the HELP grants. He said the 5-to-1 matching requirement for HELP grant eligibility was established by Workforce Safety and Insurance. He said the rationale for requiring the matching funds was that it would show that there was employer commitment and studies indicate there are to be better outcomes for programs when there is a match requirement. Additionally, he said, it was taken into consideration that employers would be receiving dividend credits which would help cover some of the matching requirements.

Mr. Blunt said another activity Workforce Safety and Insurance is pursuing is the recent request for proposal (RFP) for a learning management software system that would help track patterns of injuries and near misses allowing employers to respond quickly to injuries and to recognize injury patterns.

In response to a question from Representative Keiser, Mr. Blunt said the Workforce Safety and Insurance Board of Directors will include in the June meeting agenda the topic of premium rates and use of excess funds. He said his understanding of the board's intentions are to provide a zero percent increase in premiums for the upcoming year.

In response to a question from Senator Heitkamp, Mr. Blunt said that the reserve fund calculation modifications are included in 2005 House Bill No. 1531, which was introduced by Representatives Keiser, Berg, Carlson, N. Johnson, and Wald.

Representative Keiser said Representative Berg and himself had been working with various actuaries to evaluate the appropriate way to calculate reserve fund balance requirements. He said that House Bill

No. 1531 was a delayed bill, which received hearings in both the House and Senate.

Senator Heitkamp said in the future it would be desirable to understand what the Workforce Safety and Insurance fund status is at the start of the legislative session. He said one of the problems associated with the delayed bill was that earlier workers' compensation bills were essentially squashed based upon the impact the proposed legislation would have on the fund.

Representative Keiser said the Workforce Safety and Insurance fund reserve balances were public information before the legislative session and during the legislative session.

Mr. Blunt said the November 2004 data regarding the fund balance reflected a positive cash balance going into the 2005 legislative session. Additionally, he said, he thinks the record will reflect that at no time did representatives of Workforce Safety and Insurance testify during the 2005 legislative session that the fund was unhealthy or in poor financial condition.

Senator Heitkamp said although Workforce Safety and Insurance may not have testified that the fund was unhealthy, he does recall Workforce Safety and Insurance representatives testifying that legislative proposals would negatively impact the fund and it would have been helpful to recognize the fund would have significant surpluses based upon the new calculations.

### Rehabilitation Services

Chairman Keiser called on Ms. Robin Halvorson, Workforce Safety and Insurance, to present information regarding the rehabilitation and return-to-work services offered through Workforce Safety and Insurance. Ms. Halvorson said that vocational rehabilitation is one of several return-to-work programs provided through Workforce Safety and Insurance. She said if it is determined that an injured worker is unable to return to the preinjury job, that injured worker is referred to the return-to-work program.

Ms. Halvorson said upon referral to the return-to-work program, an injured worker receives an initial evaluation, which includes a vocational assessment as well as a test of adult basic education, and also formulates a return-to-work plan.

Ms. Halvorson said the return-to-work program utilizes several different services, including Spherion and CorVel. She said through the contract with Spherion, basic entry-level skills are provided. She said typically these services are provided through a self-paced skill enhancement and upon completion of each skill there is testing that takes place. She said that typical jobs for which an injured worker would be trained through Spherion might include customer service and positions that provide for sedentary skills. Ultimately, she said, following training an injured worker is intended to return to the local or statewide job market.

Ms. Halvorson said in the case of a lack of local or statewide jobs, an injured worker may receive retraining. However, she said, sometimes there are conflicts between the educational programs offered and those the injured worker seeks.

Ms. Halvorson said if retraining is not an option for an injured worker, it is then appropriate to move to identifying minimum wage jobs. She said this is the least sought after option when it comes to returning to work.

Ms. Halvorson said under the Workforce Safety and Insurance return-to-work program, employers are given incentives to retain a worker who is injured on the job.

Ms. Halvorson said Workforce Safety and Insurance is in the process of implementing a job developer program. She said this individual would work around the state to place disabled workers in specific return-to-work jobs.

In response to a question from Representative Amerman regarding statistics relating to rehabilitation and return to work, Ms. Halvorson said that typically the return-to-work program sees approximately 350 cases opened per year as well as closing approximately the same number of cases per year. She said of the cases opened each year, approximately 72 of these individuals return to work, 72 enter the statewide job market, 50 participate in the retraining program, some of these injured workers are not able to return to work, and some of these injured workers are not able to participate due to medical limitations.

In response to a question from Senator Heitkamp, Ms. Halvorson said in 2005 House Bill No. 1171 was enacted. She said this bill better addresses providing assistance to injured workers.

Ms. Halvorson said if an injured worker wants to go to school, Workforce Safety and Insurance will try to work with the individual to allow this to happen. She said that Workforce Safety and Insurance is currently in the process of implementing House Bill No. 1171.

Chairman Keiser called on Mr. Wahlin to provide a summary of 2005 House Bill No. 1171.

Mr. Wahlin said House Bill No. 1171 modifies case management of workers' compensation claims. For example, he said, if Mr. Beckler's case was managed under this new system, his situation would likely be different.

Mr. Wahlin said House Bill No. 1171 applies to workers' compensation cases filed on or after January 1, 2006. He said that under this new system, there is a two-year maximum period under which an injured worker may receive temporary total disability, which is also known as work replacement. Upon reaching this two-year point, the injured worker basically has four options:

1. Release back to work;
2. Determination of permanent total disability, which requires a minimum of 25 percent permanent partial impairment;

3. A determination of temporary partial disability, which is limited to five years; or
4. Retraining and reeducation, which is limited to two years. Under the retraining and reeducation option, an injured worker may attempt a trial of up to 20 weeks after which if not successful that injured worker may revert over to the temporary partial disability classification and receive up to three and one-half years of benefits.

Mr. Wahlin said that under this new case management system, a temporary partial disability option is considered the default. Additionally, he said, within 90 days following injury, vocational rehabilitation is required to become involved in the injured worker's case.

Chairman Keiser called on Mr. Kemnitz for comments regarding House Bill No. 1171. Mr. Kemnitz said under this new case management system, the burden is shifted to the claimant and a two-year drop-dead date is introduced to the system. He said this new system essentially provides timelines under which Workforce Safety and Insurance will be relieved of its burden.

### State Average Weekly Wage Data

Chairman Keiser called on committee counsel to present information regarding the calculation of the state's average wage and how neighboring states calculate their average weekly wage for purposes of unemployment insurance and workers' compensation. She said she consulted with representatives of Job Service North Dakota and Workforce Safety and Insurance in North Dakota as well as corresponding representatives in South Dakota, Montana, and Minnesota.

Committee counsel said she understood this topic arose out of concern that North Dakota's average weekly wage data may include sectors of labor that are exempt from coverage under our state's workers' compensation laws. She said the workers' compensation definition of the state's average wage, under NDCC Section 65-01-02(6), provides this state's average weekly wage determination is made by Job Service North Dakota. Further, she said, under Section 52-06-04, under the unemployment insurance law, the state's average weekly wage is based upon total wages reported on contribution reports divided by the average monthly wages and the number of covered workers.

Committee counsel said the method of calculation of the state's average weekly wage and its use for workers' compensation purposes in North Dakota is very similar to the calculations used in South Dakota, Montana, and Minnesota. Additionally, she said, North Dakota's unemployment insurance program provides for certain types of labor to be exempted and North Dakota's workers' compensation also has certain exemptions. She said these exemptions are very similar to the exemptions of our neighboring states.

Chairman Keiser called on Mr. Michael Ziesch, Job Service North Dakota, for comments regarding the calculations of the state's average weekly wage. He said under North Dakota's unemployment insurance law, agricultural employment is typically a covered employer; however, there is a very high threshold which results in a large percentage of these employers being excluded.

Chairman Keiser called on Mr. John Halvorson, Workforce Safety and Insurance, for comments regarding the calculation of the state's average weekly wage. He said under North Dakota workers' compensation law, agricultural employment is optional.

### Vehicle Modifications

Chairman Keiser called on Mr. Wahlin for comments regarding the number of injured workers receiving workers' compensation benefits for vehicle modifications and possible alternative methods of dealing with the vehicle modifications. He said the state law addressing vehicle modifications is included under NDCC Section 65-05-07. He said this section of law addresses both vehicle and real estate modifications. He said there is a \$50,000 modification maximum and this law does not allow Workforce Safety and Insurance to actually purchase a vehicle.

Mr. Wahlin said in looking at the workers' compensation coverage for modification to a vehicle, some of the issues that need to be considered are what would happen if a modified vehicle was sold; whether a replacement schedule should be created to deal with modified vehicles; and what would happen if an injured worker with a modified vehicle went through a divorce and there was a property settlement that addressed the ownership of the vehicle.

Mr. Wahlin said in fiscal year 2004, Workforce Safety and Insurance paid approximately \$49,000 for vehicle and real estate modifications under NDCC Section 65-05-07 and in fiscal year 2003, this amount was approximately \$70,000.

Mr. Wahlin said there are currently approximately 66 catastrophically injured workers in the state's workers' compensation system. He said of these 66 individuals, 44 of the files are noted as being active which means benefits are being paid in some way.

In response to a question from Representative Keiser, Mr. Wahlin said Workforce Safety and Insurance would face a dilemma if an injured worker did not have an appropriate vehicle to modify. He said in looking at available funding, an injured worker's disability payments are meant to cover the day-to-day costs of life and the lump sum permanent partial impairment award is better suited to pay for a vehicle. He said between the disability benefits and the permanent partial impairment award, the injured worker is expected to purchase a vehicle and then have Workforce Safety and Insurance pay for the modifications.

In response to a question from Senator Heitkamp, Mr. Wahlin said that approximately five years ago the

maximum vehicle and real estate modifications was raised from \$20,000 to the present amount of \$50,000.

In response to a question from Representative Keiser, Mr. Wahlin said in the case of Ms. Carol, the injured worker that had her case reviewed at the Fargo meeting, it is quite possible that she has additional funds available to pay for additional real estate or vehicle modifications. He said although when she was injured the modifications were limited to \$20,000, it is likely that this \$50,000 maximum applies to her case.

Mr. Blunt said that Workforce Safety and Insurance has been in touch with Ms. Carol regarding her status and what funds might be available for vehicle modifications. Additionally, he said, he intends to bring this issue of vehicle modification to the attention of the Workforce Safety and Insurance Board of Directors to address in its 2007 legislative package.

Senator Heitkamp said he understands the issues relating to the purchase of a vehicle but he thinks there needs to be a way to address these issues.

Representative Keiser requested the Legislative Council staff work with representatives of Workforce Safety and Insurance to prepare a bill draft for a future meeting.

Senator Heitkamp said perhaps the system could be changed to provide for some type of stages, for example, if a catastrophically injured worker survived 10 years after the injury, more money could be made available for modifications. Additionally, he said, perhaps it might be of value to revisit the permanent partial impairment cash settlement guidelines as they apply to catastrophically injured workers.

Representative Amerman said perhaps the committee would like to consider amending NDCC Section 65-05-07 to allow the purchase of a vehicle but not the purchase of any real estate.

Mr. Blunt said that it seems to make sense to address the vehicle purchases; however, he recommends that permanent partial impairment awards not be used as a mechanism to address vehicle modifications.

Representative Keiser said that in part he views this as a longevity issue. He said the vehicle modification becomes an issue when the catastrophically injured individual survives past the functioning of the modified vehicle. He said he agrees that addressing vehicle modification through the permanent partial impairment award would likely be unsuccessful; however, the committee needs to do the right thing and consider whatever avenues might be appropriate to address this issue.

Chairman Keiser said the tentative date for the committee meeting is June 19, 2006, in Fargo. He clarified that this next meeting would not entail any new injured worker case reviews.

Chairman Keiser said he plans on scheduling another two-day meeting in the Bismarck area to review the final four injured workers' cases. He also recognized the good work Mr. Kocher has performed

in helping prepare the case summaries and to prepare the injured workers to present their claims before the committee.

No further work remaining, Chairman Keiser adjourned the meeting at 2:50 p.m.

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Jennifer S. N. Clark  
Committee Counsel

[ATTACH:3](#)