

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Monday, September 12, 2005
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative George J. Keiser, Chairman, called the meeting to order at 1:00 p.m.

Members present: Representatives George J. Keiser, Bill Amerman; Senators Duaine C. Espeland, Joel C. Heitkamp, Jerry Klein

Member absent: Representative Nancy Johnson

Others present: See Appendix A

Chairman Keiser welcomed the committee members and briefly reviewed the committee's charge under North Dakota Century Code (NDCC) Section 54-35-22, the law creating the Workers' Compensation Review Committee.

Chairman Keiser called on Mr. John D. Olsrud, Director, Legislative Council, who reviewed the Supplementary Rules of Operation and Procedure of the North Dakota Legislative Council. Mr. Olsrud said the committee is statutorily created and unique in a variety of ways, including its treatment of Workforce Safety and Insurance records. However, he said, the committee operates according to the laws and procedures governing the operation of other Legislative Council interim committees.

Chairman Keiser called on committee counsel to review a memorandum entitled Workers' Compensation Review Committee - Background Memorandum. Representative Keiser raised the question of whether bill drafts recommended by the committee would need to be accompanied by a fiscal note. Mr. Olsrud said it is in the best interest of the committee to seek information regarding the fiscal impact of proposed legislation; however, there are no requirements prohibiting an interim committee from recommending legislation without a fiscal note.

Senator Heitkamp said if the committee recommends legislation, the committee should look into and request information regarding the fiscal impact of the proposed legislation.

Senator Espeland said the committee should gather information to at least attempt to determine the fiscal impact of proposed legislation.

Senator Klein said that committee bill drafts addressing workers' compensation could have a significant fiscal impact. He said he does not see any problem in having the committee request information regarding the fiscal impact.

It was moved by Senator Espeland, seconded by Senator Heitkamp, and carried on a voice vote

that the committee follow the procedure of seeking fiscal information from Workforce Safety and Insurance regarding bill drafts the committee considers recommending.

It was moved by Senator Heitkamp, seconded by Senator Klein, and carried on a voice vote that in the case of a deceased injured worker, the committee will allow a representative of the deceased to bring the injured worker's claim to the committee to be reviewed.

It was moved by Senator Heitkamp and seconded by Senator Espeland that as a matter of procedure, the committee not make copies of Workforce Safety and Insurance documents.

Senator Klein questioned how committee members would be able to study issues brought to the committee if the committee members are prohibited from making and reviewing copies of the injured worker's Workforce Safety and Insurance records.

Representative Keiser said that although the committee does not have a budget to pay for services to assist injured workers in summarizing their cases, Workforce Safety and Insurance could authorize the Office of Independent Review, through Mr. Chuck Kocher, to summarize the records of injured workers who wish to appear before the committee. He said that in effect Mr. Kocher could serve as an ombudsman for the injured worker.

In response to a question from Representative Amerman regarding whether committee members would be authorized to review an injured worker's records at the Workforce Safety and Insurance office, Representative Keiser answered in the affirmative that if an injured worker signs the required authorization, the committee members could review the injured worker's records onsite at the Workforce Safety and Insurance office.

Chairman Keiser said as chairman he will try to limit committee discussion to the specific issues being brought forward to the committee.

Senator Espeland said the committee will be working with confidential information. He said he would not want the fear of disclosure of sensitive information in an injured worker's records to in effect discourage injured workers from bringing their cases to the committee.

Mr. Olsrud said the Constitution of North Dakota provides an open meeting requirement for the Legislative Council's committees. He said the statute creating this committee seems clear that the committee members will be able to discuss the injured worker's records at the open meeting; however, it appears the actual physical document will not be open to the public for review.

Representative Keiser said he has seen several injured worker case files from Workforce Safety and Insurance and some of these case files are huge.

Senator Heitkamp said he thinks the Legislative Council has some responsibility to fund at least a portion of the costs associated with the committee performing its duties.

Representative Keiser said that in retrospect, if he were introducing the legislation creating the committee he would ask for funds to be appropriated. He said the Legislative Council does have some funds available to pay for interim consulting services and the committee could request access to these funds. He said he would envision any assistance provided by the Workforce Safety and Insurance Office of Independent Review to be impartial and separate from Workforce Safety and Insurance.

Mr. Olsrud confirmed that the Legislative Council has some funds available for consultants and procedurally the committee could submit a request to access these funds.

Senator Espeland said the committee may wish to ask Workforce Safety and Insurance for some funds to help summarize and organize the records of injured workers.

Senator Klein questioned whether in discussing an injured worker's claim the committee would be able to specifically address information contained in the injured worker's records.

Mr. Olsrud said the law creating the committee seems to say that the committee members may talk about the information contained in the injured worker's records but the committee members may not show anyone else the actual records.

Senator Heitkamp said if each of the six committee members was allowed a copy of all or part of the injured worker's Workforce Safety and Insurance file, he would not want to have a copy of that file because he would not want to be blamed or criminally charged for a possible leak of that information. He questioned how the committee might be able to use consultants to help frame the case or issue brought to the committee by the injured worker. He said the Legislative Council staff is adequately trained to assist an injured worker in formulating any issues for review by the committee.

Representative Keiser said he agrees the committee needs to provide some sort of assistance to the injured worker to prepare the presentation of the issues to the committee. He said he envisions the Legislative Council office as the contact point for an

injured worker to seek and submit an application. He raised the issue of the importance of the committee considering how best to get the word to the public to contact the Legislative Council if an injured worker wishes to appear before the committee.

Senator Klein said one of the major purposes of the committee is to provide a forum for injured workers to discuss issues relating to workers' compensation; however, some injured workers may not want the public to know the details of their specific cases.

Senator Heitkamp said it is a felony if committee members release confidential records. He questioned whether it might be possible for committee members to review an injured worker's Workforce Safety and Insurance record at the beginning of the meeting and then ask that the injured worker present the case.

Chairman Keiser said he will seek to run committee meetings and establish procedures that will allow committee members to review relevant portions of workers' compensation files. He said he will oppose the motion to prohibit copies because he would like to allow for the possibility of committee members getting copies of the more pertinent portions of an injured worker's Workforce Safety and Insurance file.

Senator Espeland said it would be helpful for committee members to have an opportunity to review an injured worker's record before hearing the testimony of an injured worker and of representatives of Workforce Safety and Insurance.

In response to a question from Senator Klein, Representative Keiser said that procedurally he envisions that if an injured worker presents a claim to the committee, Workforce Safety and Insurance would have a copy of the complete file and the Legislative Council would also have a copy of the complete file which could be kept at the front of the meeting room for committee members to review as may be necessary.

Senator Espeland said to adopt a policy of allowing absolutely no copies may be overly restrictive. **The motion failed on a roll call vote.** Representative Amerman and Senator Heitkamp voted "aye." Representative Keiser and Senators Espeland and Klein voted "nay."

It was moved by Senator Klein and seconded by Senator Espeland that the committee adopt a procedure of allowing pertinent portions of an injured worker's Workforce Safety and Insurance record to be copied and made available to committee members the day of the meeting and returned to committee counsel at the end of that meeting.

Representative Amerman questioned who would be determining what information in an injured worker's file is pertinent.

Representative Keiser said if the committee followed this proposed procedure, the members of the

committee could have the first one or two hours of the meeting to review committee records and then the committee could hear the testimony of the injured worker, injured worker's representative, and Workforce Safety and Insurance.

Senator Heitkamp said if the committee adopted this procedure he envisions that although committee members would have copies of pertinent portions of the injured worker's records, there would be a copy of the injured worker's entire record in the room and available for committee members to review.

The motion passed on a voice vote.

Mr. Olsrud questioned who would be determining what portions of an injured worker's record are pertinent. He said this question is relevant if the Legislative Council staff is asked to determine what portions of the record are pertinent.

Representative Keiser said he thinks the determination of what records are pertinent would need to be based on the claimant's view. He said he envisions that Workforce Safety and Insurance will be able to do its own work and draw its own conclusions as to what information is pertinent.

Senator Espgard said he agrees that the committee should start with the injured worker's view of what portions of the file are pertinent. He said he is concerned that at this point there is a lack of funds to help the injured worker put together the case for presentation to the committee.

Representative Keiser said he is concerned about how best to help an injured worker frame and prepare the issue and documentation brought before the committee. He said it is important that the injured worker have the best chance possible to present the information.

Chairman Keiser called on committee counsel to review proposed forms to be used to put together an injured worker application packet, including a cover letter, release of information and authorization, and review issue summary. A copy of the proposed packet of forms is attached as Appendix B.

Chairman Keiser called on Mr. Kocher to explain the services he provides to injured workers. He said under the Office of Independent Review he serves as an ombudsman to review cases and orders to determine whether there are any recommended changes. He said in his capacity he is independent of Workforce Safety and Insurance.

In response to a question from Representative Keiser regarding whether Mr. Kocher would be available to help the committee in summarizing and organizing injured worker cases to be reviewed by the committee, Mr. Kocher said he tries very hard to be fair and he believes that he could help in summarizing claims of injured workers who wish to bring their claims before the committee. He said he has had experience in working with local labor groups and the services he could provide the committee would work well. He said he did not think it would be a problem to

establish portions of an injured worker's records that are pertinent to the issue being brought before the committee.

Senator Heitkamp said the issue of whether an injured worker's records are pertinent would need to be established by the claimant. Additionally, he said, he has some concerns that an injured worker who brings a case before the committee may already feel as though the Office of Independent Review has let the worker down and this may undermine the services Mr. Kocher could provide.

Representative Keiser said he understands the use of the Office of Independent Review may result in perception problems for injured workers; however, Workforce Safety and Insurance has agreed to fund Mr. Kocher's provision of services to the committee. He asked committee members to consider and suggest options to provide injured workers and the committee with services in summarizing and clarifying issues. He said options might include asking the Legislative Council for funding, seeking assistance from trial lawyers, or requesting funding from Workforce Safety and Insurance.

Senator Klein said he thinks the Office of Independent Review is one option for an injured worker to use; however, the injured worker could also contact other individuals to assist in putting together the presentation. He said an example of an alternative to the Office of Independent Review might include services provided by Mr. Sebald Vetter of the Concerned Advocates Rights for Employees (C.A.R.E.) organization.

Representative Keiser said in reviewing the proposed application letter, in addition to clarifying that individuals qualified to bring a case before the committee may include representatives of deceased injured workers, he would also like the letter modified to clarify that Mr. Kocher would serve in the capacity as an ombudsman, separate from Workforce Safety and Insurance.

Senator Espgard said the committee should request funding from the Legislative Council for the purpose of helping injured workers pay for assistance in organizing their claims. He said the committee could provide for a specified amount of funding available per injured worker.

Senator Heitkamp said if the Legislative Council wants this committee to succeed in its charge, the Legislative Council has an obligation to fund the committee's activities.

It was moved by Senator Espgard and seconded by Senator Heitkamp that the committee request a total of \$10,000 from the Legislative Council to provide \$500 per injured worker for the purpose of allowing the injured worker to pay a third party for assistance in organizing and clarifying the case to be brought forward to the committee.

Representative Keiser said even if funding is made available to an injured worker for payment to a third person, an injured worker would still be able to use the services offered by the Office of Independent Review.

The motion carried on a voice vote.

Representative Keiser said in looking at the proposed cover letter included in the application packet, he would like to simplify the language that says "enclosed are copies of" in order to make the language more reader-friendly.

Senator Heitkamp said in the proposed letter, he likes the language that clarifies the committee review is not a forum for appeal. He said he would suggest this language be repeated throughout all forms provided to applicants.

It was moved by Senator Heitkamp, seconded by Senator Klein, and carried on a voice vote that the committee approve the use of the proposed cover letter and release of information and authorization form, with the addition of the language that the review by the committee is not a forum for appeal.

Representative Keiser said if the Legislative Council grants the committee's request for funding, the proposed cover letter and review issue summary form would need to be modified to address this. If the Legislative Council does not award the committee the requested funds, he asked the committee whether it would be appropriate to use the form as presented.

Senator Heitkamp said he agrees that if the funding is awarded, this form should be modified to reflect those funds and if money is not awarded, the form as provided should be used.

It was moved by Senator Espegard, seconded by Representative Amerman, and carried on a voice vote that the committee approve and use the proposed review issue summary form and modify as necessary if funding is made available.

Senator Espegard raised the issue of how the committee should notify the public of the availability of the forum to bring cases before the committee.

Senator Klein asked whether the committee would review an issue if that issue had already been considered by the Legislative Assembly during a previous legislative session.

Representative Keiser said even if the Legislative Assembly has previously voted or acted on an issue, this should not prevent an injured worker from bringing the issue before the committee.

In response to a question by Representative Amerman regarding how old some of these cases brought before the committee may be, Representative Keiser said he anticipates the age of the case may vary from case to case.

Ms. Jodi Bjornson, Workforce Safety and Insurance, said in considering the age of a case, the committee may review the amount of time a case has been open, which will vary from case to case. For

example, she said, in the case of an informal decision, the case could be as little as 30 days old, whereas if the case has gone through all appeal levels, the case may be 3 to 5 years old.

Senator Heitkamp asked whether it might be possible for Workforce Safety and Insurance to mail information regarding the committee to all workers who were denied within the last 10 years.

Ms. Bjornson said she is not sure whether this would be possible, but she would look into this and bring additional information to a future meeting.

Senator Heitkamp said the committee needs to take steps to get the word out to injured workers that the committee is available for them to bring issues.

Representative Keiser said he is not sure of the best way to get the word out to the public; however, there is a possibility that the committee could be overwhelmed with a large number of cases by injured workers who wish to bring them before the committee. He said the committee is faced with the challenge of finding cases that reflect legitimate policy-related issues.

Senator Heitkamp said the workers' compensation advocates within the state should be able to assist in bringing forward the best cases. Additionally, he said, he would recommend the committee hold meetings across the state in order to better access injured workers.

Chairman Keiser said it is his intent to hold meetings at different locations across the state. He said possible ways of getting the word out may include working with the State Bar Association of North Dakota, which may be able to send correspondence to attorneys; sending letters to legislators informing them of this possible forum for workers' compensation issues; notifying the media; and other options that may be brought forward by the committee.

Senator Espegard said he imagines that some of the claims brought before the committee will be similar to each other and if possible the committee may be able to group these issues to be presented at one time.

Representative Keiser said he agrees that it may be possible to group related issues.

Chairman Keiser called on Mr. David L. Kemnitz, North Dakota AFL-CIO, for comments regarding the committee's activities. Mr. Kemnitz said he has given some thought to the issue of how best to notify injured workers of the activities of the committee. He said he would support Workforce Safety and Insurance identifying some of these individuals because it would be impossible for anyone else other than Workforce Safety and Insurance to know who these injured workers are. He said that C.A.R.E. is an association that may be able to notify injured workers; however, this association generally works with active claims. He said the North Dakota AFL-CIO will be holding its state convention on September 22-24, 2005, and if forms are available by that time, he can distribute

them to union members across the state. He agrees that if there were a significant number of claims brought before the committee it may be helpful to batch similar issues.

Chairman Keiser called on Mr. Jack McDonald, representing the North Dakota Newspaper Association, for comments regarding the committee's activities. Mr. McDonald said he would support notifying the State Bar Association of North Dakota. He said there are no more than 20 attorneys in the state who regularly do workers' compensation cases. Additionally, Mr. McDonald suggested putting a public notice in newspapers and over the broadcast media in order to notify the public of the committee's activities.

In response to a question from Senator Heitkamp, Mr. McDonald said when it comes to dealing with the sensitivity of information contained in an injured worker's Workforce Safety and Insurance record, the essence of the case will be public due to committee discussion. He said it is unlikely that the details of an injured worker's case will get out to the media; however, an injured worker needs to know that if you come to the committee you are making your case public and open for discussion.

Senator Heitkamp said he is requesting that members of the media use restraint in covering personal details of cases that may be brought forward to the committee. Mr. McDonald said he will counsel his organizations, but in most cases these workers' compensation issues have been brought through the court system and as such have been made public.

Senator Espegard said the committee members should not be raising or discussing the nonpertinent details of an injured worker's Workforce Safety and Insurance record.

Representative Keiser said in the course of a presentation of a claim before the committee, several parties will be presenting information, including the injured worker, a representative of the injured worker, and a representative of Workforce Safety and Insurance. He said that as chairman, he will limit discussion to the relevant information. He said it will be the job of the committee and the chairman to guide the injured worker to limit information to the relevant information and to limit Workforce Safety and Insurance to the relevant information.

Chairman Keiser called on Mr. Vetter for comments regarding the committee's duties. Mr. Vetter said although he can help bring injured workers to the committee, he thinks it is too late to be bringing these issues once an injured worker's case is final. If the committee review is limited to issues that have already had final determinations, there are very few injured workers who are going to show up to bring a claim before the committee.

Senator Heitkamp said he has sponsored legislation addressing some of Mr. Vetter's issues, and as someone who has worked with Mr. Vetter, he would encourage him to find and encourage injured workers

to come before the committee to change the system to help others in the future.

Representative Keiser asked Mr. Vetter for his help in bringing important issues to the committee through injured workers.

Mr. Kemnitz said in addressing the issue of how to help an injured worker summarize the worker's issues, he knows Mr. Kocher to be an honorable man and he will follow the instructions and wishes of the committee in preparing an unbiased presentation of the issues. Mr. Kemnitz said in using the services of Mr. Kocher and the Office of Independent Review, it will be necessary for the committee to:

- Provide Mr. Kocher with clear instructions on how to assist injured workers;
- Provide Mr. Kocher with clear parameters and expectations;
- Provide clear instructions to Mr. Kocher that his job is to clarify the issues through the perspective of the injured worker;
- Request Mr. Kocher help identify barriers in the workers' compensation system;
- Request Mr. Kocher assist in counseling the injured worker in how to present issues to the committee;
- Request Mr. Kocher assist an injured worker in establishing the legal issues for a case review; and
- Request Mr. Kocher advise the Legislative Council and committee when legal services are necessary for an injured worker to put together a case for review.

Representative Keiser said notification of the public of the activities of the committee may be furthered through assistance by the Greater North Dakota Chamber of Commerce, Association of General Contractors, Home Builders Association, and members of the medical community.

Senator Espegard said although it may be helpful to notify physicians of the committee meetings, he does not view the medical community as being a real source of notifying injured workers of the activities of the committee.

Senator Klein suggested that the committee prepare a press release to inform the public of the committee's activities, work with labor organizations, and see how Workforce Safety and Insurance can help to bring issues and injured workers before the committee.

Senator Heitkamp said the use of the media is free and press releases should be used as much as possible. He said a lot of the activities of the committee are going to be driven by attorneys and the organizations the committee has discussed will do their jobs in helping to bring injured workers to the committee.

Chairman Keiser said procedurally the committee needs to have an injured worker bring a case before the committee in order to discuss an issue, but once an issue is raised, the committee will be in a position

to take testimony from interested persons regarding that issue. He said he envisions the committee taking a significant amount of time to review cases brought before the committee. For example, he said, the committee may be limited to hearing two cases per day and the committee may wish to hold meetings that last one and one-half or two days.

No further business appearing before the committee, Chairman Keiser adjourned the meeting at 3:15 p.m.

Jennifer S. N. Clark
Committee Counsel

John D. Olsrud
Director

ATTACH:2