

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Thursday, December 1, 2005
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, Nancy Johnson; Senators Joel C. Heitkamp, Jerry Klein

Members absent: Representative Bill Amerman; Senator Duaine C. Espeland

Others present: See Appendix A

It was moved by Senator Klein, seconded by Senator Heitkamp, and carried on a voice vote that the minutes of the September 12, 2005, meeting be approved as distributed.

CASE REVIEW

Chairman Keiser said the initial plan was to review two workers' compensation cases at today's meeting; however, due to a scheduling conflict, the second injured worker was not available to attend today's meeting. He said there are approximately six injured workers who have been found eligible to present a case before the committee and two of these injured workers reside near Fargo. Therefore, he said, it is likely that the committee's next meeting will be held in the Fargo area.

Chairman Keiser reviewed the procedure that will be followed to receive the injured worker's case for review. He said the injured worker presenting the case for review today is Ms. Florence Haux of Bismarck. He said committee members had an opportunity before the meeting to review the injured worker's workforce safety and insurance records. Additionally, he said, a representative of Workforce Safety and Insurance is available at the back of the meeting room to access the injured worker's records electronically if the need arises during today's meeting. He said if at any point in the meeting a committee member would like to view the injured worker's records, he can recess the meeting to allow for the review. He said he will run a rather informal meeting to provide a comfortable atmosphere for the injured worker to present her case for review.

Chairman Keiser called on Mr. Chuck Kocher, Workforce Safety and Insurance Office of Independent Review, to assist in presenting Ms. Haux's case for review by the committee.

Mr. Kocher distributed to committee members a binder containing information prepared by Workforce Safety and Insurance and a copy of North Dakota Century Code Title 65, the workers' compensation

law. He said the information in the binder includes a case summary of the injured worker's records as well as a statement of the issues for review by the committee. He said at the request of Ms. Haux, he will present the case summary as well as the issues for review.

Case Summary

Mr. Kocher provided a summary of Ms. Haux's case. He said she filed an application for workers' compensation benefits in connection with a work injury to her lower back which occurred on September 3, 1991. He said at the time of the injury, Ms. Haux was employed as a nurse assistant. He reported that this claim was accepted by Workforce Safety and Insurance and the associated benefits and expenses were paid.

Mr. Kocher said that following this injury, Ms. Haux continued to work until February 19, 1992, at which time she reinjured her back. He said as a result of this reinjury, Ms. Haux was fired from her job as a nurse assistant due to her inability to perform the required work. He said Ms. Haux remained unemployed until June 1, 1992, at which time she found and began work at Medcenter One in the medical records department. He said Ms. Haux again received workers' compensation disability benefits from March 16, 1992, through June 1, 1992, and from August 27, 1992, through September 10, 1992, as a result of this injury.

Mr. Kocher said that in June 1996 Ms. Haux quit her job at Medcenter One to work for Mac's Hardware in the upholstery department. He said that this job change allowed her to spend more time with her disabled husband and she continued in this capacity until she experienced a worsening in her condition in April 1997 at which time she no longer was able to work. He said Ms. Haux was diagnosed with a herniated midline disc (L4-L5) and as a result underwent back surgery on April 24, 1997. He said she received total disability benefits from April 11, 1997, through July 7, 1997. Beginning July 8, 1997, he said, she returned to part-time work with Mac's Hardware as a cashier. He said during this part-time work she received partial disability benefits. He said on April 20, 1998, she returned to full-time employment and continued with this employment until 2001, at which time she changed jobs in order to work for King Cole as a receptionist. He said the reason

reported for her changing jobs was to accommodate the pain associated with the continued standing requirements of her position as a cashier.

Mr. Kocher said that on August 8, 2002, Ms. Haux had a second surgery to her back, at which time she had a recurrent left (L4-L5) herniated disc. He said she was reinstated on disability benefits from Workforce Safety and Insurance on June 28, 2002, and has been receiving these benefits to the present date.

Mr. Kocher said that on September 24, 2003, Workforce Safety and Insurance declared Ms. Haux was permanently and totally disabled. He said that because Ms. Haux comes under the Social Security retirement presumption, her Workforce Safety and Insurance disability benefits will be terminated effective December 31, 2005. However, he said, the medical portion of her workers' compensation benefits will remain open and Ms. Haux will continue to remain eligible for the payment of medical expenses related to her back injury.

Financial Summary

Mr. Kocher reviewed the current Workforce Safety and Insurance and Social Security benefits being received by Ms. Haux as well as the anticipated future Workforce Safety and Insurance and Social Security benefits she will receive. He said that currently she is receiving:

- Workforce Safety and Insurance disability benefit - \$234.76 per week (\$1,017.29 per month).
- Social Security widow's benefits - \$667 per month.
- Total monthly benefits - \$1,684.29 per month.

Mr. Kocher said her anticipated future benefits are:

- Social Security widow's benefits - \$667 per month.
- Workforce Safety and Insurance additional benefit payable (which will terminate on October 17, 2010) - \$101.75 per month.
- Total monthly benefits - \$768.75 per month.

Mr. Kocher said that unlike Social Security disability benefits which are offset by Workforce Safety and Insurance before retirement age is reached, Social Security widow's benefits are not offset by Workforce Safety and Insurance before or after retirement age is reached. Additionally, he said, the length of time an injured worker is eligible for additional benefits payable and the amount is based upon the preretirement amount of benefits received as well as the length of time the injured worker received these benefits.

In response to a question from Representative Keiser, Mr. Kocher said the receipt of partial disability benefits from August 27, 1992, through September 10, 1992, was due to a brief worsening in Ms. Haux's work-related injury. He said the record reflects a progressive worsening of the injured worker's back condition. Additionally, he said, the

second surgery relates back to the initial injury in September 1991.

In response to a question from Representative Keiser, Mr. Kocher said he is not able to speak to whether the second surgery was successful; however, he said the records do indicate that the injured worker did experience a worsening of her back injury. Ms. Haux said due to the second surgery, there was a spinal fluid leakage that resulted in dead nerves.

In response to a question from Representative Johnson regarding the financial information of the injured worker, Mr. Kocher said the financial situation of an injured worker who reaches the presumed retirement varies from case to case. However, he said, it is likely that in a more typical Social Security retirement presumption case the benefit amounts preretirement and postretirement are smaller than what is seen in Ms. Haux's case. He said in Ms. Haux's situation, there is a significant decrease in benefit amounts due to the retirement presumption.

In response to a question from Senator Klein regarding how in a typical situation all individuals' earnings decrease following retirement, Ms. Haux said that up until her injury in 1991 she had been setting aside money for retirement. However, she said, following her injury and the illness and death of her husband, she was forced to drain these retirement savings. She said she has tried to work throughout her injury and only stopped working when it progressed to a point she could not tolerate the pain associated with working.

Issues for Review

Mr. Kocher reviewed the issues Ms. Haux is bringing to the committee. He said the injured worker has requested that he present this information; however, he clarified that this is Ms. Haux's statement, not his own.

Mr. Kocher stated that the issue brought forward by Ms. Haux is that she disagrees with the application of the Social Security retirement presumption law to her claim. Specifically, because her injury date was in 1991 and the retirement presumption was not enacted until 1995, she believes the 1995 law should not apply to her situation. He said that Ms. Haux feels the fact that she had a break in the continuous flow of disability benefits after July 31, 1995, should not jeopardize her ongoing disability benefits as long as she remains disabled and unable to work. He said she believes her ability to work and earn a living has been compromised by her work-related injury and the termination of disability benefits effective December 31, 2005, puts her in a very difficult financial position.

Mr. Kocher further presented the injured worker's position. He said that in preparation for the reduction in income that will become effective January 1, 2006, she has gone through bankruptcy proceedings and she will need to apply for public assistance. Ultimately, he said, she believes there will be a cost-shifting of her financial needs to other government

programs. He said it is her belief that Workforce Safety and Insurance should remain the responsible government entity to provide her with the necessary financial assistance that will allow her to pay her bills and maintain a reasonable livelihood.

In continuing the injured worker's issues, Mr. Kocher presented a comparable case study in which there is a different outcome. He said Ms. Haux has a friend who like Ms. Haux was also injured before the retirement presumption went into effect in 1995; however, since the date of her injury this friend has maintained that she is totally disabled and unable to return to work and as a result she has retained her disability benefits through the present date even though she is over age 65. He said that because this friend had no break in her disability benefit payments after July 31, 1995, she will be able to qualify for ongoing disability benefits into the future and will not be impacted by the retirement presumption law. Mr. Kocher said that Ms. Haux feels her friend manipulated the system and did not return back to work when she could have. Ms. Haux feels that because she was motivated and made every effort to go back and work she is being penalized by having her disability benefits terminated upon reaching retirement age.

Mr. Kocher stated the injured worker's recommended solution is that injured workers who have injury dates before August 1, 1995, should be grandfathered into the system and should not be placed under the Social Security retirement presumption section of law. He said her position is that the date of injury should be the deciding factor rather than considering whether there was a break in the continuous stream of disability benefits after July 31, 1995.

In response to a question from Senator Klein, Mr. Kocher said that had Ms. Haux's situation been different and had she received her initial injury after July 31, 1995, she would be under the same retirement presumption as she is now. However, he said, if she was grandfathered in per her request her workers' compensation disability benefit of \$234.76 would continue and she would not be eligible to receive the additional benefits payable. He said that he is not able to speak to the issue of why these individuals such as Ms. Haux were not grandfathered in to avoid the Social Security retirement presumption.

In response to a question from Representative Johnson, Ms. Haux said her ongoing back problem goes back to the very first injury in 1991.

In response to a question from Senator Klein, Ms. Haux said that beginning January 1, 2006, her workers' compensation medical benefits will continue for purposes of her work-related injury; however, she does not think she will have the funds available to pay for a Medicare supplemental policy to cover all her other medical needs.

In response to a question from Representative Keiser, Ms. Haux said under the Social Security system, she has the choice of whether to draw from

her Social Security retirement or her husband's in the form of widow's benefits. She said she chose to draw widow's benefits because the widow's benefits are more than her retirement and because unlike Social Security retirement prior to age 65 Workforce Safety and Insurance did not offset the amount of her widow's benefits.

WORKFORCE SAFETY AND INSURANCE

Chairman Keiser called on Mr. Tim Wahlin, Attorney, Workforce Safety and Insurance, to provide testimony regarding the issues raised by Ms. Haux. Mr. Wahlin provided a brief history of the Social Security retirement presumption law. He said in 1995 the Legislative Assembly enacted a statutory presumption that an injured worker who becomes eligible for Social Security retirement benefits is considered retired and therefore no longer eligible for workers' compensation disability benefits. He said this Social Security retirement presumption is addressed by North Dakota Century Code (NDCC) Section 65-05-09.3(2). He said that this presumption became effective on August 1, 1995, and as enacted applied to all injured workers regardless of the date of injury.

Mr. Wahlin said that in 1997 the Legislative Assembly amended the Social Security retirement presumption law and created an additional benefit payable for injured workers whose disability benefits are canceled due to the Social Security retirement presumption. The additional benefit payable, he said, is computed as a percentage of the workers' compensation weekly disability benefit based on the length of time the injured worker received these disability benefit payments.

Additionally, Mr. Wahlin said, following the enactment of the 1995 Social Security retirement presumption law, two cases began working their way through the court system. He said in the *Ash* and *Gregory* cases brought against Workforce Safety and Insurance, the North Dakota Supreme Court issued decisions in 1998 providing that the 1995 amendments did not apply to injured workers who were receiving permanent total disability benefits before August 1, 1995. He said in these two North Dakota Supreme Court cases, the court ruled there is constitutional protection for the injured worker's expectation of ongoing benefits. He said that it is a result of the Supreme Court cases that Ms. Haux's friend receives full benefits even after reaching retirement age.

In response to a question from Representative Keiser, Mr. Wahlin said Representative Keiser's understanding of the law is correct in that if an injured worker is continuously receiving workers' compensation disability benefits, the North Dakota Supreme Court has determined that the retirement presumption does not apply; however, if an injured worker has essentially been in and out of receipt of workers' compensation disability benefits, the Social Security retirement presumption under NDCC Section

65-05-09.3 applies. He said Workforce Safety and Insurance finds itself in the position of trying to find a balance. He said that in searching Workforce Safety and Insurance records, 101 to 103 injured workers appear to be in a similar situation to Ms. Haux. He said that Workforce Safety and Insurance is in the process of trying to establish the financial impact this presumption has on this group of similarly situated injured workers. He said the estimate is if this class of injured workers were to avoid the retirement presumption and continue to receive full workers' compensation disability benefits, the impact on the fund would be approximately \$40 million.

In response to a question from Representative Keiser, Mr. Wahlin said he does not have the exact terminology that would be required to amend the workers' compensation law to accomplish the changes Ms. Haux is requesting. Additionally, he said, there may be public policy questions regarding whether the change being requested by Ms. Haux is desirable, including possible equal protection issues.

In response to a question from Representative Johnson regarding equal protection and the statutory or court-created groups, Mr. Wahlin said the Supreme Court did not necessarily carve out a specific group but instead pointed to a specific group that already exists which had an expectation interest that the change in the law attempted to take away.

In response to a question from Senator Klein, Mr. Wahlin said in 1995 the workers' compensation fund was \$240 million in debt. He said in looking at the legislative history, the Social Security retirement presumption was enacted to provide an initial savings reduction in benefits of \$35 million and ongoing savings to the fund of \$2 million to \$5 million per year.

Representative Keiser clarified to Ms. Haux that the committee does not have direct authority to change the current law or her case; however, the committee is in a position to recommend changes in the form of recommended legislation. He said the legislative options he sees include: (1) recommending legislation to further Ms. Haux's request or (2) recommending legislation to adjust the additional benefits payable formula to better compensate individuals in Ms. Haux's situation.

Mr. Wahlin said that the two areas Representative Keiser addressed do directly impact the issues raised by Ms. Haux. He said Workforce Safety and Insurance research indicates there is a \$40 million price tag associated with granting Ms. Haux's request. He said this figure is based upon the cost to the fund projected until the time of death of the injured workers. He said if the law were changed per Ms. Haux's request, these costs would come directly out of the Workforce Safety and Insurance reserve fund and would not be charged back to the injured workers' past employers.

Ms. Haux said she finds herself in a very unfair situation and she feels penalized as a result of having the strong motivation to continue to work throughout her injury. She said she understands there is a

decrease in income related to retirement; however, in her situation she drained her retirement funds and her husband died. She said it is clear to see she has needs that will be unmet once her workers' compensation disability benefits terminate.

Representative Keiser said he is concerned when he sees individuals who are acting responsibly and it appears the system is penalizing them.

In response to a question from Senator Klein regarding Ms. Haux's claim that people are able to manipulate the workers' compensation system, Mr. Wahlin said to the extent the system is manipulated, this is Workforce Safety and Insurance's responsibility and if it occurs it is Workforce Safety and Insurance's failure. He said in the state's workers' compensation system, there are 20,000 injuries per year and some of these injured workers are so intent on manipulating the system that they are successful.

Representative Keiser said that the Legislative Assembly does not have the ability to legislate morality or personal responsibility.

Public Comment

Chairman Keiser opened the meeting for comments from the public. He said comments should focus on issues raised in the review of Ms. Haux's case.

Chairman Keiser called on Mr. Ed Christensen, an injured worker, for testimony regarding the case review. Mr. Christensen said if Workforce Safety and Insurance were paying an injured worker's medical bills in 1991, it should continue to pay that injured worker's disability benefits even after the presumption of retirement. He said some changes to the workers' compensation system were made in 2005 that are a step in the right direction; however, the additional benefit payable of 10 percent of the disability benefit payment is not appropriate and should be higher. He said if Workforce Safety and Insurance does not pay the needed benefits to injured workers like Ms. Haux, everyone else will pay as she gets public assistance, such as food stamps, heating assistance, and medical assistance.

In response to a question from Senator Klein, Mr. Christensen said he is not certain whether any bills have been introduced in past sessions in an attempt to address these perceived inequities. However, he said, he was actively involved in drafting the additional benefits payable legislation which is a start that needs ongoing evaluation. He said we should all be ashamed of ourselves that Ms. Haux is in the situation she is in.

Representative Keiser raised the hypothetical situation of a worker who is injured and has a six-month period of disability, but the injury is not reoccurring and that injured worker is able to continue to work.

Mr. Christensen said that underlying the whole discussion you need to remember that when an injured worker is receiving workers' compensation, that injured worker is losing money. Additionally, he

said, he can distinguish Ms. Haux's case from the hypothetical situation Representative Keiser raises in that Ms. Haux has been in and out of the disability benefit system since her date of injury and has received continuous medical benefits since her date of injury.

Ms. Haux said her situation differs from Representative Keiser's hypothetical situation because she is permanently and totally disabled at this time as a result of her work-related injury. In addition, she said, it is because of her work-related injury that she experienced a diminished capacity to work and ultimately became unable to work, making it impossible to establish retirement savings.

Representative Keiser said he would be interested in reviewing the Workforce Safety and Insurance records that reflect what medical benefits have been paid for Ms. Haux.

A representative of Workforce Safety and Insurance provided Representative Keiser with a portion of Ms. Haux's records addressing the medical payments that have been made. Representative Keiser said the medical payments made for Ms. Haux reflect regular ongoing payments except for an approximately two and one-half year period from 1994 to 1996. Ms. Haux said during that period, she was probably doing better, in part because her work was only part time while she was doing medical records work. Mr. Kocher said that his recollection of Ms. Haux's records is that they reflect there were good times and bad times related to her medical condition.

Mr. Christensen said the committee needs to remember that in the case of Ms. Haux, the first injury back in 1991 is the cause of all of her workers' compensation benefits and her current disability.

Chairman Keiser called on Mr. Sebald Vetter, Concerned Advocates Rights for Employees (CARE), to comment regarding the committee's case review. Mr. Vetter said there have been bills introduced to address these situations but they have been defeated. He said the committee should remember the North Dakota Supreme Court has ruled the 1995 legislation as enacted was unconstitutional. It is the Legislative Assembly, he said, that has put Ms. Haux in the situation she is in.

Mr. Vetter said that regarding the claimed \$40 million price tag, if this number is correct then the correct response is to increase premiums to help the injured worker. He said that if you look at health insurance premium rates, they have been going up and he questions why workers' compensation premiums have not been going up in North Dakota. He stated that instead of raising workers' compensation premiums, the injured worker has lost benefits. Additionally, he said, the Social Security disability setoff that injured workers are subject to is not equitable. He recommended repeal of NDCC Section 65-05-09.2.

Mr. Vetter said the 1995 bill creating the retirement presumption should never have been passed and

more recent legislation in 2005 created a seven-year limit for benefits unless there was a catastrophic injury.

Chairman Keiser called on Mr. David L. Kemnitz, AFL-CIO, for comments regarding the committee's case review. Mr. Kemnitz said the adversarial business of insurance impacts Workforce Safety and Insurance decisions of whether to make an award. He said under the state's workers' compensation system, the injured worker is put in the position of having to maximize a claim's potential by requesting the maximum amounts and types of benefits for which they may be eligible because if the injured worker does not do this, the injured worker loses and Workforce Safety and Insurance wins by accomplishing its goal of limiting liability. Mr. Kemnitz said that Workforce Safety and Insurance works for a board of directors, which has the goal of limiting liability.

Mr. Kemnitz said this committee could help address why there is despair in the system and how to lessen this. He said that the North Dakota Supreme Court created a class of injured workers who have uninterrupted benefits and Ms. Haux has been harmed because Workforce Safety and Insurance has determined her claim is not uninterrupted.

Mr. Kemnitz said the committee would benefit by using law-trained professionals who are willing to appear before the committee to advocate for the injured worker. He said to be effective, it is imperative these professionals be experienced in workers' compensation law.

Mr. Kemnitz said the discussion has addressed the separation of medical and wage loss benefits but he thinks the date of injury is an important and legally significant factor that should be considered.

Senator Klein said the committee has made great strides today and it is important to note that not all injured workers' lobbyists were in support of the creation of this committee.

Mr. Kemnitz said that nonsupport of this committee is Senator Klein's personal observation. He said he supports open communication between legislators and injured workers and he recognizes the importance of what takes place with this committee and how it will impact the 2007 legislative session. Additionally, he said, he recognizes a weakness of this process is the lack of a law-trained professional to advocate for the injured worker.

Mr. Christensen said that he was the lobbyist who was in opposition to this committee, not Mr. Kemnitz. He said his opposition was because this committee does not directly help an injured worker.

Senator Klein said the importance of the interim is that it allows ongoing discussion on these important issues.

Representative Keiser said it is a point of fact that this committee needs to consider the fiscal impact of any recommended legislation. He said regarding the request for an injured worker to have a law-trained professional with experience in workers'

compensation, following the first meeting there was a request for funding to help provide this service but this request was denied. Additionally, he said, it is important to remember that Workforce Safety and Insurance is doing a better job than it did in 1995.

Mr. Kemnitz said yes, the hearing backlogs have decreased and the fund balance has improved and he recognizes these improvements. However, he said, not all changes have been good. He said now Workforce Safety and Insurance works for a board of directors that has the goal of limiting liability and the board does this quite well. Therefore, he said, it is necessary to legislate that the statutory interpretation should not be so strict and the goal of Workforce Safety and Insurance should not be to provide the statutory minimum. He said the injured workers who are most injured are most likely to be unsatisfied with the workers' compensation system.

In response to a question from Representative Keiser, Mr. Kemnitz said several sections of the North Dakota Century Code apply to getting people back to work. However, he said, the rehabilitation system has failed us. He said it limits services to the black letter of the law resulting in the services merely meeting the minimums. He said the law is interpreted very narrowly in a manner that will limit the liability of Workforce Safety and Insurance. Realistically, he said, the committee needs to consider honestly the willingness of an employer to hire an injured worker who is trying to get back to work after an injury if that injured worker is on a long list of medications to deal with the work-related injury. He said the system just does not work for those injured workers who are not able to go back to some form of work.

Mr. Kemnitz said in the case of Ms. Haux, there was a 1991 injury and Workforce Safety and Insurance retained responsibility for her medical expenses. He said that Ms. Haux did all she could to continue to work and there is a group of injured workers in a similar situation who are being treated unfairly.

Chairman Keiser called on Ms. Deb Bale, an injured worker, for comments regarding the case review. Ms. Bale said she has been an injured worker since 2001. She said she is upset that Workforce Safety and Insurance did not specifically notify her of the opportunity to appear before this committee. Additionally, she said, the forum created by this committee is not friendly to the injured worker. She said if you look around the room you will see the disparity in that there is one injured worker and a room full of Workforce Safety and Insurance personnel and legislators.

Ms. Bale said she has sent a letter to Senator Byron Dorgan and has been characterized as a malingerer. She said the Workforce Safety and Insurance Office of Independent Review has been no help. She said in her case, the judge recognized the impracticality of the rehabilitation plan. She said the state's workers' compensation system destroys lives and the legislators have an obligation to the workers

of this state to prevent this from happening. She said the majority of the injured workers in the state are in the lowest tax bracket.

Ms. Bale said she objects to the \$40 million price tag that has been associated with changing the retirement presumption. She said as a college-educated injured worker, she receives less than \$20,000 per year in workers' compensation disability benefits and does not understand how these benefits can add up to \$40 million.

Ms. Bale said she does not trust Mr. Kocher and she cannot afford legal counsel to help her prepare her case. Additionally, she said, Workforce Safety and Insurance personnel should not be present at these meetings. Finally, she said, if the committee does not have the power to change the law, the committee is useless.

Chairman Keiser said that the committee intends to hold meetings across the state in order to better accommodate injured workers. He encouraged injured workers like Ms. Bale to apply to have their cases reviewed by the committee.

Mr. Kemnitz said the committee needs to have the perspective of the legal profession representing injured workers. He asked whether it might be possible to contact the State Bar Association of North Dakota to request professional testimony from the perspective of the injured worker. He said that a well-trained professional with experience in workers' compensation would be able to address the merits and deficiencies of the law as it pertains to injured workers. Representative Keiser said he could write a letter to the State Bar Association of North Dakota to find out whether the association could provide the committee with this service.

Chairman Keiser called on Mr. Sandy Blunt, Executive Director, Workforce Safety and Insurance, for testimony regarding the committee's case review. Mr. Blunt said the mission of Workforce Safety and Insurance is a passion and he is thankful to have the opportunity to address the committee. He said sometimes there is a difference between theory and application which results in outcomes that are sometimes unanticipated.

Chairman Keiser called on Ms. Gerry Lee, an injured worker, for testimony regarding the case review. Ms. Lee said she is an injured laborer and her experience has been that employers do not want to hire someone with a bad back.

In response to a question from Senator Klein, Ms. Haux said regarding her treatment by Workforce Safety and Insurance, her experience the first few years was that they treated her poorly but in the last couple of years it has been better. She said that Workforce Safety and Insurance did notify her ahead of time that there would be a retirement presumption that would result in termination of her disability benefits. She did add, however, that Job Service North Dakota did not treat her well when she used its services to seek employment.

In response to a question from Representative Keiser, Ms. Haux said that steps she had taken to prepare for retirement included contributions to an IRA through Medcenter One. However, when her husband died, she did an early withdrawal of these funds in order to pay for his funeral.

In response to a question from Senator Klein, Ms. Haux said she felt like Mr. Kocher did a good and fair job in clarifying her issues and summarizing her case.

Chairman Keiser said it is important for Ms. Haux to recognize that the committee will be discussing her case at future meetings.

In response to a question from Representative Johnson, Mr. Wahlin said in determining the \$40 million price tag, they considered the pool of injured workers with a pre-1995 injury who have open claims with loss of earnings since 1995.

In response to a question from Senator Heitkamp, Ms. Haux said that upon termination of her workers' compensation disability benefits, she will be forced to apply for benefits from social services. She said she thinks individuals with workers' compensation issues should be looked at individually because a blanket policy does not result in fair treatment.

Chairman Keiser said he is considering meeting in Fargo next quarter with possible meeting dates in late January or early February. He said in setting a meeting date it is important to make sure the injured worker is available to present the worker's case before the committee.

Senator Heitkamp said possible meeting locations in Fargo may include the North Dakota State University Research Park or the North Dakota State College of Science Skills and Technology Training Center in Fargo.

Senator Klein said it appears as though the case review process takes several hours for each injured worker. Representative Keiser agreed and said the committee should receive a maximum of two cases to review per meeting. Additionally, Representative Johnson said that if the committee has all members present the review of a case may be even more time-consuming.

HEARING AND APPEAL PROCESS

Chairman Keiser called on Mr. Wahlin to provide an overview of the administrative hearing and appeal process used for Workforce Safety and Insurance determinations. Mr. Wahlin provided a written document of a flow chart of the legal process, a copy of which is attached as Appendix B.

In response to a question from Representative Johnson, Mr. Wahlin said a NOD or NOID is a notice of decision or notice of informal decision. He said in the past, Workforce Safety and Insurance issued an order but this process was more difficult and time-consuming; therefore, they changed to issuing a NOD or a NOID.

In response to a question from Representative Keiser, Mr. Wahlin said if there is a change in circumstances, an injured worker can reapply, but if not, a decision is final.

In response to a question from Representative Johnson, Mr. Kocher said in the case of Ms. Haux, a NOD will be issued during the month of December indicating her workers' compensation disability benefits will terminate. He said once that NOD is issued she will have 30 days to request reconsideration.

Chairman Keiser called on Mr. Daryl Gronfur, whose brother is an injured worker, to provide testimony regarding the appeal process. Mr. Gronfur asked what would happen if an injured worker had a case that received a final decision from the Supreme Court and then that injured worker had new information.

In response to Mr. Gronfur's question, Mr. Wahlin said once the decision is final it is not appealable. He said that if there is new information, the injured worker would likely be required to make a reapplication at Workforce Safety and Insurance.

Mr. Wahlin said there is not a specific length of time required for a case to go from a NOD or a NOID all the way through the North Dakota Supreme Court; however, he estimates the process would take at least 12 months in order to get to the Supreme Court and then several more months for the argument to be set and for the Supreme Court decision to be issued.

Mr. Gronfur said in the case of his brother, it took over seven years to go from the issuance of the NOD to the Supreme Court.

No further business remaining, Chairman Keiser adjourned the meeting at 11:55 a.m.

Jennifer S. N. Clark
Committee Counsel

[ATTACH:2](#)