

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

INDUSTRY, BUSINESS, AND LABOR COMMITTEE

Monday, April 28, 2008

Reimers Conference Room, North Dakota State University Alumni Center
Fargo, North Dakota

Representative Rick Berg, Chairman, called the meeting to order at 8:30 a.m.

Members present: Representatives Rick Berg, Bill Amerman, Donald L. Clark, Glen Froseth, Jim Kasper, Darrell D. Nottestad, Gary Sukut, Elwood Thorpe, Don Vigesaa, Steve Zaiser; Senators Arthur H. Behm, Nicholas P. Hacker, Jerry Klein, Terry M. Wanzek

Members absent: Representatives Tracy Boe, Mark A. Dosch; Senator Robert M. Horne

Others present: See [Appendix A](#)

Representative Al Carlson and Senator Dick Dever, members of the Legislative Council, were also in attendance.

It was moved by Representative Nottestad, seconded by Senator Behm, and carried on a voice vote that the minutes of the March 5-6, 2008, meeting be approved as distributed.

Chairman Berg said the committee is meeting in Fargo to help make its deliberations accessible and open to the public. He said if committee members are able to sort out the facts from fiction, the committee will be better able to find solutions to any problems identified and get better results. He said the goal of everyone is to have the best workers' compensation system for employees and employers. To do so, he said, everyone must be open-minded and objective in sorting through the information and developing solutions. He said the committee heard reports at its previous meeting regarding consultants' reviews to determine if claims are being denied without cause and to examine the internal management structure at Workforce Safety and Insurance (WSI). He said reports indicated that the employees at WSI are doing their jobs well, but there are management issues that must be addressed. He said this committee will examine whether legislative changes are needed and attempt to develop a bipartisan solution because it is the responsibility of both political parties in the Legislative Assembly to remove politics from the discussion and focus on the responsibility of fixing any problems identified. He said a recent edition of the *High Plains Reader* included about a dozen proposed changes to the workers' compensation system. Of those changes, he said, some are rather simple, while others are more complex. He said the committee will examine those suggestions. In addition, he said, the committee will look at the governance structure of WSI. He said the proposed initiated measure that is being circulated would authorize the Governor to hire

and fire the executive director of WSI. Regardless of the result of the initiated measure, he said, the Legislative Assembly must be prepared to address the governance issue and commit to working with whatever the voters decide.

Chairman Berg called on Mr. Bruce Furness, Interim Executive Director and CEO, Workforce Safety and Insurance. Mr. Furness said he appreciates the involvement of this committee in developing solutions to issues at WSI. He said he had been on the job at WSI for one month and his expectations for the job were based on media reports which indicated that it was an organization in disarray, with poor employee morale, which provided poor results. He said that expectation was incorrect and he has found outstanding employees who get the job done. He said employee morale at the agency is good. However, he said, there is a 10 percent attrition rate and the agency has 28 vacant positions. He said stability is needed at the agency and creating a culture of trust is an area that may be improved. He said the employees of the agency have spent a significant amount of time on nonbusiness functions, such as reviews and audits and open records requests, some of which border on harassing. He said the agency must improve communications, especially externally, and restore credibility.

Mr. Furness said there is, and has been, no conspiracy to deny claims. He said 92 percent to 93 percent of all claims are approved, 60 percent of which are handled within 14 days. Of the approximately 21,000 claims per year, he said, about 2 percent are very complex and difficult to handle. He said those claims can be controversial and sometimes confrontational because of the tragic nature of the claims. He said the agency spends a significant amount of time, energy, and money on those types of claims. In becoming more familiar with the job, he said, he has spent time listening to all stakeholders and has sought information from the stakeholders. He said the agency has begun a process of improvement and revitalization by identifying problems and implementing solutions to help protect North Dakota workers.

Mr. Sylvan Loegering submitted written testimony, a copy of which is attached as [Appendix B](#).

In response to a question from Representative Kasper, Mr. Loegering said he has spoken with legislators, as well as attempted to discuss WSI issues with the Governor, the Attorney General, and

the Insurance Commissioner, but no one was able to address those issues. He said he was told that none of those officials has responsibility over the agency. He said the general impression is that WSI does whatever it does, whether fair or not. He said oversight by the Insurance Commissioner would be an improvement over the current situation. However, he said, he is not sure if that is the best solution. He said the two meetings of the North Dakota Injured Worker Support Group have drawn 40 and 50 attendees. He said about one-third to one-half of the attendees are injured workers.

Representative Berg said he attended both of the meetings. He said Mr. Loegering can be a great resource for the committee. He said about 50 injured workers have contacted the Legislative Council office in response to his request for input from injured workers. He said injured workers with concerns regarding the handling of their claims may be eligible for the continuing jurisdiction review by WSI or eligible to participate in a meeting of the Legislative Council's Workers' Compensation Review Committee.

Mr. Darren Knutsvig said he is a disabled electrician who has been unable to work for 10 years. He said his workers' compensation benefits of \$1,300 per month were discontinued when he refused to go to school as directed by WSI. He said he could not go to school because the physical problems relating to his injury would not allow him to attend classes. He said a functional capacity evaluation indicated that he could work no more than two hours per day. He questioned why it was necessary to send him to a physician in Minneapolis when doctors in this state told him he was unable to work. He said the Minneapolis physician stated that he could work 40 hours per week as a security guard. He said a work injury such as his may also lead to depression, separation from a spouse, and other issues. Although he receives Social Security disability, he said, he has no workers' compensation benefits and has been told that his reapplication for benefits under the continuing jurisdiction review was denied because he refused to participate in the education program.

In response to a question from Representative Thorpe, Mr. Knutsvig said WSI has shown little flexibility in working with him and has taken a narrow interpretation of the law.

In response to a question from Senator Klein, Mr. Knutsvig said WSI took care of medical expenses and provided benefits for him until he refused to participate in the education program.

Ms. Denise Locnikar said she is unable to work after two surgeries due to a shoulder injury. She said her employer, MeritCare, terminated her employment after she was told that she could be a secretary, but was unable to handle the job. She said the independent medical examination conducted by a physician from Minneapolis indicated a neurological problem. She said a second independent medical examination stated that her medical issues stemmed from depression that began during the 1980s. She

said WSI paid \$1,840 for a 45-minute to one-hour consultation by the independent medical examination physician. She said a psychiatrist who did not examine her concluded that she suffered from depression. She said her WSI claims analyst was changed and the initial opinion of the first claims analyst was reversed. She said WSI has acted fraudulently in dealing with her claims. She said her benefits were discontinued after WSI ruled that she had been noncompliant. She said she did not open all of the letters sent to her and missed her chance for an appeal.

In response to a question from Representative Berg, Ms. Locnikar said she delayed her initial surgery because she was needed at work. She said she was fired from her job after she could not do the work she was requested to do.

Mr. Greg Freitag said he was injured on September 16, 2004. Because his injury was a torn ligament in the wrist, he said, the injury did not show up on x-ray. He said a cyst grew in the injured area and WSI allowed for removal of this cyst. However, he said, the pain remained very extreme due to the torn ligament and he saw a specialist. Because the injury was not treated properly, he said, he suffered irreversible damage to the wrist. He said he was ordered to go back to work, but has lost one job. Therefore, he said, he went back to school on his own. He said WSI delays have caused negative things to happen to him and WSI has beaten him down to the point that he cannot take care of his livelihood. He said employers are not willing to hire an injured employee because the employers do not want to risk further injury and have their workers' compensation premiums increase. Although North Dakota is a great state in which to live, he said, the workers' compensation system makes it a bad state in which to work.

In response to a question from Senator Hacker, Mr. Freitag said the first physician he saw after his injury misdiagnosed the injury.

Mr. Michael Pajala said he was injured on May 7, 2007. He said he suffered a head injury and has suffered seizures since that time. Because he had a previous diagnosis of depression, he said, a physician suggested that the seizures may be triggered by anxiety or depression. He said three physicians have said the seizures are the result of the work injury, but WSI has denied further liability for his injury. He said he would like to continue his education, but the college is concerned about his seizures and has indicated that an ambulance service must be called whenever he suffers a seizure. He said the cost of the ambulance is \$1,000 per call.

In response to a question from Representative Berg, Mr. Pajala said the health insurer that provides his coverage will not pay the medical costs because the costs are related to his work. He said he is caught between WSI and the health insurer with respect to responsibility for his health care costs.

In response to a question from Representative Thorpe, Mr. Pajala said he never experienced seizures before his work injury.

In response to a question from Senator Behm, Mr. Pajala said WSI said the seizures were a preexisting condition due to depression and anxiety.

In response to a question from Senator Klein, Mr. Pajala said WSI covered the initial costs of his injury until the physician indicated that there was a preexisting condition.

Mr. Anthony M. Walker, Marsh U.S.A., Inc., addressed the committee via telephone conference. Mr. Walker presented written information, a copy of which is attached as [Appendix C](#).

In response to a question from Representative Berg, Mr. Walker said two of the claims examined appeared to lack documentation. He said the claims could be considered to have fallen through the cracks. He said WSI has a number of good procedures in place and achieves good results. However, he said, morale issues and turnover could impact the results of the claims review. Of the other 10 questionable denials, he said, the Marsh analyst believed that a threshold may have been reached under which the claim could have been approved. However, he said, the decision to deny the claim was based on state statute.

In response to a question from Senator Behm, Mr. Walker said the review conducted by Marsh did not indicate a pattern where any particular claims handler routinely denied claims. He said denials were judgment calls based on interpretations of state law.

In response to a question from Representative Amerman, Mr. Walker said the state of Washington has a law that states that the presence of a preexisting injury does not result in the denial of a claim and allows the acceptance of the claim under certain parameters. He said Ohio law provides for the acceptance of certain substantial aggravations of injuries.

In response to a question from Representative Nottestad, Mr. Walker said an independent medical examination is a routine procedure in many cases. Because of a smaller concentration of physicians in North Dakota, he said, it may be necessary to go out of state for an independent medical examination. He said a treating physician often may be in a position where that physician has a relationship between the injured worker or the injured worker's family.

In response to a question from Representative Thorpe, Mr. Walker said if the treating physician does not provide good documentation of the injury and treatment, the decision of the claims handler may be impacted. He said claims handlers have flexibility to deal with claims due to definitions in state law that leave room for decisionmaking.

In response to a question from Representative Berg, Mr. Walker said specific laws remove the discretion of claims handlers while broad statutes provide more flexibility and discretion.

Senator Wanzek said it appears that approximately 1 percent of the 21,000 claims annually fall into the area of concern. He said it may be advisable to place additional focus on those types of questionable claims.

Representative Froseth said providing more flexibility to claims handlers may actually lead to additional concerns with interpretations of law. He said a more refined method for reviewing the 1 percent of questionable claims may be a better approach.

Representative Berg said the Workers' Compensation Review Committee may be the solution to that problem.

In response to a question from Chairman Berg, committee counsel said the Legislative Council office sent letters to each of the individuals who contacted the office regarding their concerns with WSI. He said the letters included forms for the application for continuing jurisdiction and for release of information. He said approximately 40 percent of the individuals with whom he spoke indicated that their claims were denied due to preexisting conditions. He said about 20 percent of the individuals with whom he spoke expressed concerns with a lack of communication or difficulty in working with representatives of WSI.

Representative Berg said if a claimant returns a release of information form, a review of the claimant's information may indicate whether the claimant may be a candidate for review by the Workers' Compensation Review Committee or whether the claimant should submit an application for the continuing jurisdiction review.

At the request of Chairman Berg, Mr. Furness presented information regarding implementation of audit and review information by WSI. A copy of the summary is attached as [Appendix D](#).

Mr. Furness said some WSI employees have been unable to get their regular jobs done because the agency is currently working on responses to 16 audits and reviews. He said the agency needs to be able to move forward. He said the agency hired a human resource manager last week and is interviewing candidates for the internal auditor position. He said the agency appear to have reached an agreement with the Office of Administrative Hearings, which may be effective by July 1, 2008.

At the request of Chairman Berg, Mr. John Halvorson, Workforce Safety and Insurance, presented information regarding Workforce Safety and Insurance historical premiums and losses. A copy of the presentation is attached as [Appendix E](#).

In response to a question from Representative Berg, Mr. Halvorson said there was a dramatic increase in workers' compensation premiums in the late 1980s and early 1990s due to an inadequate rating structure. He said premium rates increased by \$20 million, yet the fund had an unfunded liability and there were few benefit increases from 1985 through 1994. However, he said, premium levels have since stabilized.

In response to a question from Representative Kasper, Mr. Halvorson said premium rates are set to cover the estimated losses for the succeeding year. He said much of the surplus in the workers' compensation fund is investment driven. He said the agency typically operates with an underwriting loss. During the early 1980s, he said, losses increased while premiums decreased.

Representative Berg said no one would run a business in a manner where premiums were decreasing while losses were increasing, such as in the 1980s. He said the premium rates were kept low due to political reasons, and the dramatic increases in rates affected the economy of the state. However, he said, premiums and expenses are now relatively close. He said it appears that other state workers' compensation funds also have also experienced similar problems when politicians set the rates.

In response to a question from Representative Kasper, Mr. Halvorson said the agency goes through an annual rate review with an actuary to determine the appropriate level of premium rates. He said the process has worked well. Once the actuary makes a recommendation, he said, a public hearing is held and the WSI Board of Directors generally follows the recommendation of the actuary.

In response to a question from Representative Froseth, Mr. Halvorson said the 2005 Legislative Assembly established a statutory surplus range of 120 percent to 140 percent of discounted reserves. He said the reserve level was over that limit in 2005 and continues to be over the limit. He said the agency has taken steps to reduce the surplus. He said \$15 million was allocated to an injured worker loan program and \$35 million has been allocated for a safety program. The remainder of the reserves, he said, have been unallocated.

In response to a question from Representative Berg, Mr. Halvorson said the reserve level has not changed much since 2001. He said reserves currently are discounted at 5 percent.

In response to a question from Senator Wanzek, Mr. Halvorson said a private insurer in the financial condition that the agency was in the early 1990s would likely have been shut down or taken over by the Insurance Commissioner.

In response to a question from Senator Dever, Mr. Halvorson said all legislative bills that relate to workers' compensation benefits must have an actuarial impact report. He said the actuary examines the reserve level impact and the rate level impact of bills affecting benefits.

In response to a question from Representative Berg, Mr. Halvorson said the fund has been more stable and premium rates have leveled due to the quality of data available and the use of a credentialed actuary in determining rates. In addition, he said, the governance structure in place reduces political pressures with respect to ratesetting.

In response to a question from Representative Amerman, Mr. Halvorson said safety programs and

return-to-work programs have limited losses. He said employee expertise in managing claims has increased and likely resulted in lower costs.

In response to a question from Senator Wanzek, Mr. Halvorson said investment revenue is used to cover administrative costs and losses that premiums do not fully cover.

Chairman Berg called on Mr. Tim Wahlin, Workforce Safety and Insurance, for comments regarding WSI claim constituency requests. Mr. Wahlin presented written information, a copy of which is attached as [Appendix F](#).

Mr. Wahlin said outside pressures can drive costs and change the way an organization is run. He said representatives of WSI looked back to about 1995 to attempt to analyze the changes and constituency requests as the structure of the organization changed. He said before the Board of Directors was established, there appeared to be more constituency requests, which indicated the likelihood of more political influence being exerted with respect to the handling of claims. He said it is difficult for a claims analyst to appropriately handle a claim when directly subjected to political influence due to the power disparity when the analyst is subject to being fired by the individual questioning a claim. With some insulation from political pressure, he said, meetings with politicians regarding claims tend to be less political, and the claims are determined on the merits based on the facts and the law applicable to each case. He said all constituency requests coming to WSI go to a specific individual within the agency. He said the individual determines whether a claim has been handled appropriately and focuses on properly applying the law with the facts.

In response to a question from Representative Berg, Mr. Wahlin said privatization of the agency could result in higher costs due to advertising and paying of sales commissions. Under the current model, he said, the fund is solvent and premiums are low. He said the transformation of the workers' compensation fund in West Virginia is still being accomplished and it may be too early to tell if that transformation will solve the crisis in that state.

In response to a question from Representative Kasper, Mr. Wahlin said approximately 400 claims per year are reviewed by the Office of Independent Review. He said the agency receives approximately 200 requests for hearings and, of those requests, approximately 100 cases go to a hearing.

In response to a question from Senator Wanzek, Mr. Wahlin said claims handlers record all contacts with a claimant and other individuals contacting WSI with respect to a claim. He said there are few cases in which an employer opposes a claim. He said the number of cases in which the employer opposes a claim is nowhere near the 70 percent of employer-challenged claims in Ohio.

In response to a question from Representative Amerman, Mr. Wahlin said it is up to the Legislative Assembly to establish the statutory policy, and WSI

will follow any policy adopted by the Legislative Assembly.

In response to a question from Representative Thorpe, Mr. Wahlin said regardless of the membership of the WSI Board of Directors, the claims analyst and other professionals will attempt to fairly review claims.

Representative Berg said to have true accountability, there must be one individual in charge. However, he said, the problem with having one individual in charge is that the decisionmaking process on premiums is made by that individual. He said having a board of director's means that no one individual can determine rates or direct special treatment of certain persons.

Chairman Berg called on Ms. Jodi Bjornson, Workforce Safety and Insurance, for comments regarding the legal process involved in addressing workers' compensation claims. She submitted a flow chart of the legal process, a copy of which is attached as [Appendix G](#).

In response to a question from Representative Froseth, Ms. Bjornson said a claimant may have an attorney present at any time during the process. She said the administrative hearing level is generally the time in the process when attorneys become involved. She said if the injured worker prevails, WSI will pay the attorney's fees for the injured worker up to a certain level.

In response to a question from Representative Berg, Ms. Bjornson said since 2002, WSI has reversed 22 decisions of administrative law judges in over 600 administrative hearings. She said another 44 decisions were modified in some manner. She said she could provide the committee with additional information regarding the exact number of recommended decisions and the final status of the 22 decisions that were reversed.

In response to a question from Senator Dever, Ms. Bjornson said WSI could examine the possibility of providing a reminder or followup notice to claimants regarding the time limit for appeal to attempt to alleviate the problems with claimants missing appeal deadlines.

In response to a question from Senator Wanzek, Mr. Wahlin said most communications from WSI to claimants are sent first-class mail, with the exception of orders which are sent certified mail. He said first-class mail is used to reduce costs and reduce the number of obstacles with which a claimant must deal.

In response to a question from Representative Froseth, Ms. Bjornson said the legal process flow chart is not provided to claimants. She said a brochure is available, and WSI could examine including a more thorough explanation of the process with materials provided to claimants.

Mr. Gordy Smith, State Auditor's office, said the State Auditor's office selected a company from Portland, Maine, to work on the WSI performance evaluation. He said the deadline for submission of the report of the performance evaluation is September.

He said the evaluation will look at nine specific elements, including independent medical examinations, permanent partial impairments, denied claims, the legal department, and policyholder services. He said the performance audit followup will begin in four weeks to five weeks, and a report should be complete by July or August. He said the auditor's office intends to survey all employees at WSI to evaluate morale and trust issues.

Mr. Smith said in an attempt to avoid duplication of effort for the performance evaluation, he sent a list of questions to Mr. Walker and Mr. Neal Conolly. He said both of those individuals refused to answer his questions, and he consulted with the Attorney General's office regarding that refusal. Although the Attorney General cannot force the individuals to answer the questions, he said, the contracts with the consultants state that the State Auditor may have access to everything from the engagements. He said he has asked for everything that they have, but Mr. Conolly did not cooperate. He said Mr. Walker has cooperated, but has not provided everything that he has requested. He said it appears that electronic mail has been deleted and other documents have been discarded, which is a violation of the contract with Mr. Conolly. He said he has asked Mr. Furness to work with Mr. Conolly to obtain the requested information.

Mr. Smith said the Marsh report indicated that approximately 14 percent of denied claims were denied improperly. He said he requested Mr. Walker to project the rate for the total number of claims, but Mr. Walker has not responded. He said it appears that over 200 claims per year may be questionable denials based upon his projections. He said Mr. Walker indicated that one denied claim was upheld on appeal. However, he said, the notes he reviewed indicated that the appeal was upheld within WSI and had not gone outside the agency. He said he is concerned with the number of questionable denials when over 200 claims may be denied wrongly on an annual basis. He said the committee heard some stories of catastrophic losses by claimants and there could be over 200 similar cases each year. He said Mr. Furness has been cooperative in working with the State Auditor's office and WSI has made progress on responding to some audit recommendations. He said of the audits and reviews being addressed by WSI, six were required by state law and another six were self-inflicted by the WSI Board of Directors. He said Job Service North Dakota has had more performance audits than WSI.

Representative Berg said he is concerned that as an auditor, Mr. Smith is engaging in speculation in a public forum. He said he is concerned by the projections regarding questionable claims.

In response to a question from Representative Carlson, Mr. Smith said there is a statutory requirement that WSI have an annual financial audit. In addition, he said, there is a statutory requirement that a performance evaluation of WSI be conducted

every two years. He said a performance audit of WSI has been conducted once and the State Auditor's office has been directed by the Legislative Audit and Fiscal Review Committee to conduct followups on performance audits. He said his initial involvement with respect to the Marsh and Conolly reports was to try to avoid duplication in the performance evaluation. He said he intends to pass on information to the contractor that will be specifically examining similar issues. He said he was looking to provide for a more efficient evaluation.

Representative Carlson said he is concerned with the State Auditor's office in this process. He said the focus should not be on politics, but on fixing laws if necessary. He said there is no point in arguing about whose audit is correct.

Mr. Smith said when someone does not respond to a request, the purpose of an inquiry changes due to the lack of cooperation. He said he wanted information from Mr. Walker regarding the parameters of the sample used in the Marsh report to determine if projections can be made regarding questionable claims. He said the representatives of Marsh would not provide projections for him. He said if 1 percent of 21,000 claims are improperly denied, there are 210 people per year who have been inappropriately denied. He said that is a significant number of inappropriate denials. He said the scope of services for the Marsh review was written by WSI, and WSI officials handled the consultants while they were doing the review.

Representative Berg said if one individual's claim is inappropriately denied, there is a problem. He said whether the number is 1 or 200 does not change the direction of the committee in trying to find a solution. Although there appears to be an interagency conflict going on, he said, the focus of the committee is to improve things for the future.

Representative Carlson said the Legislative Council assigned this committee the responsibility to review issues relating to WSI with the purpose of addressing problems and improving the system, not to argue about numbers. He said he is tired of the fight about which audit is correct.

In response to a question from Representative Zaiser, Mr. Smith said he has no bone to pick with WSI, but owes it to the State Auditor's office to make sure decisionmakers have accurate information. He said something buried in Appendix J of a 600-page report is not information that is readily available to decisionmakers.

Representative Berg said one purpose of this committee is to sort out the truth from false statements and hold people accountable for the false statements. He said a television news report showed two injured workers whom he has tried to contact to hear their story first hand. However, he said, he has been unable to reach those individuals. He said there has also been discussion regarding the actions of the Legislative Assembly during the last legislative session. Although there have been partisan attacks,

he said, the entire Legislative Assembly is responsible in some part for the situation and both parties share responsibility to address the concerns. He said the biggest barrier to positive change is continued political attacks. He said he welcomes accurate and true criticism.

Representative Berg said the minority leader in the House of Representatives publicly stated that over 40 bills relating to WSI were killed during the last legislative session by the majority party. He said that statement has been repeated often over the past couple of months. He distributed a copy of a memorandum summarizing all [Legislation Relating to Workers' Compensation - 1995 Through 2007](#). He said during the 2007 legislative session, 21 bills relating to workers' compensation failed to pass. Of those 21 bills, he said, 9 bills had all sponsors from the minority party. He said the public statements made by the House minority leader and others are not accurate, and legislators who make those statements could have easily found the facts.

Senator Dever said he spent approximately one hour on the legislative branch web page examining workers' compensation-related bills from the 2007 legislative session. He said many of the bills that failed were on unanimous or nearly unanimous votes. He said the statements that have been made suggesting that the majority party defeated all the minority party bills are careless at best.

Representative Berg said statements that have been made regarding this issue which are so blatantly false restrict the committee and the Legislative Assembly from going forward. He said he has requested the Legislative Council office to provide copies of fiscal notes for the legislation related to workers' compensation.

Representative Zaiser said fiscal notes are often inaccurate and are used to kill a bill.

Representative Berg said although that statement may be true with respect to many fiscal notes, he disagrees with respect to WSI bills.

Senator Klein said the committee heard information earlier during the meeting regarding the preparation of actuarial statements for workers' compensation legislation.

Mr. Halvorson said WSI has contracted with a credentialed actuary from Minneapolis to prepare the actuarial impact statements.

Representative Carlson said a similar process is used for bills relating to the Public Employees Retirement System. He said the statements are prepared by a third party and not by the agency like most fiscal notes.

In response to a question from Representative Amerman, Mr. Halvorson said when a bill relating to workers' compensation benefits is introduced or an amendment is adopted, WSI notifies the actuary immediately so that the actuary can begin preparing the statement. He said the actuary knows the history and the benefit structure of the workers' compensation system as well as anyone and the review is very

thorough. He said each actuarial impact statement includes information regarding the actuary's interpretation of the bill. He said the actuary is very clear in the statement if the impact is not quantifiable or predictable. He said the actuary includes on the statement all information that he is provided in making the determination.

Representative Zaiser said the individuals involved in the interpretation of policy often have very different interpretations than he has seen. He said the statements have a huge impact on the bill.

Senator Behm said the committee needs to focus on fixing problems and not placing blame on people.

Mr. Dave Kemnitz, North Dakota AFL-CIO, said he could think of two examples of bills relating to workers' compensation benefits in which WSI used the actuarial impact statement to lobby for the defeat of the bill during the last legislative session. He said House Bill No. 1283 would have repealed the statutory provisions that provide that a civil action or claim arising under the workers' compensation law, which is subject to judicial review, must be reviewed solely on the merits of the action or claim and provide that the workers' compensation law may not be construed liberally on behalf of any party to the action or claim. He said the actuarial statement indicated that WSI anticipated an increase in the uncertainty of outcomes. He said that statement is the equivalent of lobbying by WSI. He said Senate Bill No. 2294, which changed the injured employee's burden of proof in reopening a claim, also had an actuarial statement that indicated that WSI anticipated that the bill would increase costs. He said statements such as that serve as lobbying after a hearing is closed and is an assumption or assertion and not factual. He said he is concerned with how a statement such as that is presented to legislators.

Senator Klein said Senate Bill No. 2294 passed and House Bill No. 1283 failed. He said the statement attached to the bills may or may not have any impact on the votes on the bills.

Mr. Kemnitz said WSI attaches fiscal notes unlike any other agency and he could cite other instances where statements on the actuarial impact served as lobbying.

Mr. Kemnitz said liberal construction was eliminated in 1995 even though it was part of the original payoff in creating the workers' compensation system.

Representative Berg said the decision whether to adopt liberal construction likely relates more to the content of the bill than the actuarial impact statement.

Representative Zaiser said it is not relevant whether the bill passes. He said there only should be objective information on fiscal notes.

Representative Berg said the memorandum summarizing workers' compensation bills indicates that there were very few partisan votes in the standing committees from 1995 through 2005. He said some bills may have turned more partisan after the bills reached the floor.

Representative Kasper distributed two documents prepared for him by representatives of WSI. He said one document ([Appendix H](#)) provides a history of benefit enhancements to the workers' compensation system in the state since 1997. He said the other document ([Appendix I](#)) is a history of defeated or withdrawn bills relating to workers' compensation since 1997.

Representative Berg said he continues to hear statements suggesting that North Dakota is 50th in workers compensation benefits. He said that issue was discussed at the last meeting and is referenced on page 26 of the Conolly report. He said the Conolly report cited United States Department of Labor statistics that indicate the state is 33rd in benefits, while Minnesota is 32nd and South Dakota is 40th.

Representative Amerman said a report published by LexisNexis showed that it is true that North Dakota is 50th in benefits.

Representative Berg said the study published by LexisNexis did not address the medical portion of the workers' compensation system, did not look at actual benefits, and did not examine administration of benefits. He said the study only was a subjective review of statutory benefit provisions.

Representative Amerman said he is aware that the Conolly report contradicts the study that indicates that the state is 50th in benefits. However, he said, people should be aware that a report shows that the state is 50th.

Representative Kasper said the history of benefit enhancement document that he distributed includes information regarding the maximum weekly benefit. He said the maximum weekly benefit in this state for 2007 was \$624 as compared with \$750 in Minnesota, \$545 in Montana, and \$533 in South Dakota.

Representative Zaiser said it is not uncommon for one consultant to trash another's findings. He said he knows there are problems that need to be fixed and the Legislative Assembly should try to improve benefits.

Representative Berg said to improve the system, legislators must know where the state is with respect to other states. He said it is difficult to move forward if part of the committee disagrees regarding where the state stands and there must be a method through which to measure improvement.

Representative Froseth said conflicting statements make a difference if public perception is based on misconceptions. He said the misconceptions must be addressed so that the committee can move forward.

Chairman Berg said the committee will obtain more detailed information regarding the information contained in the Conolly report and the information published by LexisNexis.

Senator Dever said it is important to wade through the multitude of misperceptions. He said he had a constituent who had a very negative perception of WSI and whose perception changed after working with WSI to resolve issues relating to his claim.

Senator Klein said the purpose of hiring the consultant to do a review of WSI was to get a clear picture of the situation. He said the Department of Labor statistics show that this state is right next to Minnesota in benefits paid and some weight must be put on the credibility of the report so the committee can move forward.

Senator Behm said although the reputation of WSI is poor, the perception of the agency is not entirely accurate. He said the misperception must be corrected.

Representative Froseth said the majority of the news media left this meeting as soon as the injured workers told their stories. He said the television reports after this meeting will only portray what the media stayed around to hear and will not report on the good things that are occurring. He said at the last meeting of the committee, employees of WSI were reluctant to speak because of all of the negative press that has been reported regarding the agency.

Representative Berg said the committee should address issues relating to the governance of WSI. He said the committee has heard a proposal by the Insurance Commissioner to have the commissioner provide oversight of the fiscal and market conduct areas of workers' compensation. In addition, he said, there have been suggestions to place oversight for the agency under the Industrial Commission to provide additional accountability for the agency. He said mutualization of the system was also discussed at the last committee meeting.

Senator Klein said before the committee can make decisions relating to changing to a mutual or for-profit system, the committee needs more information regarding how those types of systems work in other states and the premium levels in those states. He said privatization may raise concerns regarding access to coverage for small businesses.

Representative Nottestad said while looking at other models of governance has merit, the committee first should focus on preventing claimants from falling through the cracks. He said if that problem can be solved, changes in the governance likely would not be necessary.

Senator Dever said the most important issue is accountability regardless of the type of governance structure. He said it is important to keep politics out of claims decisions.

Chairman Berg said the committee may need more information regarding the transition in other states from a monopolistic system.

Representative Zaiser said he has heard from legislators in other states that workers' compensation is a controversial issue around the country.

Mr. Kemnitz questioned whether anybody is happy with the way the WSI Board of Directors operates. He said the board is not operating in the way it was envisioned and the Carver method of governance may not be the best model for a board such as this. He said the board seems to have insulated themselves.

Representative Berg said there have been a number of disappointments with the board recently. He said the key item is to assure equal treatment for workers without political influence and keeping political decisions out of ratesetting. He said the board structure has sacrificed individual accountability.

Representative Carlson said the responsibility for the system still lies with the Legislative Assembly adopting appropriate legislation. He said the agency is in place to administer the law, but it is up to the Legislative Assembly to deal with the agency if the agency is not properly administering the law. He said he wants his injured employees to be taken care of and wants the agency to focus on helping those employees. He said WSI is not falling apart and is functioning well. However, he said, there are some problems that need to be fixed and it is up to the Legislative Assembly to work to fix those problems.

Representative Berg said the Legislative Assembly must provide direction to the agency without micromanaging and must see that benefits are being paid according to law. He distributed a list of suggested changes affecting WSI, a copy of which is attached as [Appendix J](#).

In response to a question from Representative Amerman, Mr. Furness said WSI is already doing some of the items suggested. In addition, he said, the agency can implement other recommendations without the need for legislation.

In response to a question from Representative Amerman, Mr. Wahlin said the WSI fraud unit investigates all complaints, whether the complaints are against injured workers, medical providers, or employers.

Representative Zaiser said he is aware that a pain clinic at which he is a patient has chosen to quit dealing with workers' compensation patients because of the hassles of dealing with WSI. He said the paperwork is burdensome and the clients are hassled by WSI.

In response to a question from Representative Nottestad, Mr. Wahlin said information relating to the safety grant criteria is available. He said the agency sees a benefit in getting information regarding safety grants out to the public, and vendors of safety-related equipment are very aware of the availability of the grants. He said the grant process is being reformed to address some glitches in the process and administrative rules are in place with respect to administration of the program.

Representative Berg requested representatives of WSI to provide a summary of outcome measures and followup methods with respect to the safety grants.

Mr. Wahlin said the recommendation to allow injured workers to use e-mail and fax is already being done. He said the appeal statute requires that an appeal be in writing, but the agency construes that broadly to include acceptance of appeals by electronic mail and fax. With respect to the recommendation that claims analysts not be allowed to make

determinations regarding benefits without peer review, he said, the vast majority of decisions are reviewed by a superior in addition to peer review. In addition, he said, some decisions also are reviewed by the legal department. With respect to the suggestion regarding injured workers receiving the same standard of care as provided by physicians to non-workers' compensation patients, he said, WSI compensates at a rate higher than Blue Cross Blue Shield and Medicare.

Representative Berg said he is concerned that waiting periods may delay treatment for some individuals.

Mr. Wahlin said information regarding medical providers that receive payments from WSI is part of the public record. He said he agrees that disclosure of relationships between medical providers may reduce the appearance of impropriety. With respect to the recommendation to provide a cost-of-living increase for disability payments, he said, the waiting period for increases has been decreased from 10 years to 7 years to 3 years.

In response to a question from Representative Amerman, Mr. Wahlin said there have been a number of discussions regarding the separation of the Office of Independent Review from WSI. With the office being part of WSI, he said, there is likely improved collaborative access and a less antagonistic approach than what might be present if the entity were separate from WSI.

Representative Zaiser said the Office of Independent Review is not independent and is inhouse at WSI. He said perhaps the office should be moved to the AFL-CIO.

Mr. Wahlin said positive results have been achieved with the Office of Independent Review being part of WSI. He said he believes the results may not be as successful if there were not a connection to WSI.

Representative Berg said because the Office of Independent Review is close to WSI, the employees of that office and WSI can consistently work closely to find solutions.

In response to a question from Representative Thorpe, Mr. Wahlin said a change of the name of the Office of Independent Review may more accurately reflect the status of the office.

Representative Thorpe said the office cannot be independent if it is a part of WSI.

In response to a question from Representative Zaiser, Mr. Wahlin said the Office of Independent Review does not have the authority to change any decisions of WSI. He said WSI has the authority to reverse or modify decisions of the Office of Administrative Hearings.

Representative Zaiser said claimants will not go to the Office of Administrative Hearings if WSI can overrule the decisions, and are likely to give up. He said it is important to remember that the agency deals with peoples' lives.

Representative Berg said the administrative rules process that WSI follows is not unique to that agency. He said other administrative agencies such as the Department of Transportation and Department of Human Services play by the same rules. He said it is important to keep the facts clear, and if a change is going to be made with respect to the administrative hearing process for WSI, a change may need to be made for all administrative agencies.

Representative Kasper said the committee should take a closer look at the loss of retirement benefits when an injured worker is disabled. He said an individual's ability to save for retirement is gone after a disability occurs. In addition, he said, the committee should examine the need to increase the dependency allowance.

Representative Amerman said he has had a bill draft prepared to address the dependency allowance and has had a bill draft prepared to address the payment of attorney's fees by WSI. He said the second bill draft would limit the payment of attorney's fees by WSI for outside counsel to cases in which the outside counsel has prevailed on behalf of WSI. He said that type of system may lessen litigation.

Representative Berg said WSI should keep in mind that state government language is often different from terminology used by other individuals. He said WSI should work to reduce barriers to communication and make information more understandable to workers.

Mr. Kemnitz submitted written information regarding proposed changes to the workers' compensation law, a copy of which is attached as [Appendix K](#). He said the document he distributed contains 15 priorities for changes to the law, including addressing the Office of Independent Review, reforming the use of independent medical examinations, and reforming vocational rehabilitation definitions.

In response to a question from Representative Kasper, Mr. Kemnitz said the goals for vocational rehabilitation are too low and should be set to bring an individual to a higher standard of living than the current goals.

Ms. Locnikar said the vocational rehabilitation program forces an individual to do something that the individual is not able to do, and then results in the elimination of benefits. She said there should not be a conflict between what a physician states that a person can do and what WSI requires an individual to do to be retrained and return to work.

Ms. Ann Wolf said the law should not limit sure and certain relief to two years of disability. She said she is ashamed of North Dakota due to the treatment of injured workers. She said the vocational rehabilitation program is forcing people into work as telemarketers and security guards and is a method through which WSI can get rid of a worker, rather than provide a safety net. She said the permanent partial impairment law was changed to require an individual to be missing two limbs or have a head injury where an individual is unable to care for himself. She said the

16 percent threshold is too high to be permanently totally disabled. She said the 66 2/3 percent threshold for establishing wage-loss benefits is too low, particularly for a low-paying state like North Dakota. She said the penalties for committing fraud should fit the crime and not automatically make an individual ineligible for benefits. She said the Office of Independent Review should be an advocate for the injured worker and WSI should ask whether something is right or fair before asking what the cost of the benefit is. She said WSI is driving some injured workers to suicide and the state has the sixth highest death rate due to work injuries. She said the WSI Board of Directors should contain an even amount of employers and employees and provide for a fair and independent system. She said WSI should not have the authority to override the decision of an administrative law judge.

In response to a question from Representative Zaiser, Ms. Wolf said the Office of Independent Review is not an advocate for the injured worker and does not help the injured worker.

In response to a question from Representative Kasper, Ms. Wolf said she is not aware of anyone specifically who has committed suicide due to problems with WSI, but has heard that people have been driven to the brink of suicide.

Mr. Bruce Lee said his employer reprimanded him for filing workers' compensation claims and he became disabled after being injured again, but did not file additional claims. He said his latest claim was denied due to a degenerative diagnosis. He said he has attempted to reopen old claims, but WSI will not provide him information he is seeking. He said the physician performing his independent medical evaluation told him one thing but submitted a report that was completely opposite of what he was told. He said his employer used the system to get him out of work and to not have to be subject to payment of benefits on his behalf. He said he has had four surgeries on his shoulders and WSI tried to send him to a learning center to prepare him to go to college. However, he said, his physician told him that he should not go to additional education or training. He said a short functional capacity evaluation indicated that he could go back to school. He said he has worked with the Office of Independent Review on three occasions and the office does not help. He said WSI sends a number of letters to claimants and he lost benefits because he forgot to respond to one of the inquiries. He said his first notice of legal representation was not received by WSI and WSI sent paperwork to the wrong attorney for two years. He said the workers' compensation system does not work.

In response to a question from Representative Zaiser, Mr. Lee said the Office of Independent Review initially said his condition was aggravated at work and WSI denied his claim.

Mr. Mike Menschel said a wakeup call is needed to reform workers' compensation. He said the problem

is everybody's fault. He said if his wife makes \$80 more per month, his children will lose medical assistance benefits. He said his injury was diagnosed as a preexisting condition or a degenerative disease. He said he was injured on June 30, 2003, while working for the city of West Fargo as a sanitation worker. Although city policy prohibited lifting more than 50 pounds, he said, he was told by city officials to pick up those items. He said he was injured lifting a box of grass clippings. He said he went through four months of physical therapy, two months under the supervision of his doctor and two months under the supervision of the MeritCare occupational health physician. He said the occupational health case manager was supposed to be there to help, but was responsible to WSI for her job. He said WSI told the occupational health physician how to proceed and wanted to refer him to a clinic to learn to manage his pain. He said he made five, trips to Rochester, Minnesota, on his own referral because his physician would not provide a referral.

In response to a question from Representative Berg, Mr. Menschel said his injury was not taken care of by a professional physician. He said the dependency allowance needs to be increased and 66 2/3 percent of the worker's wage at the time of injury does not take into consideration wages earned through overtime.

In response to a question from Representative Kasper, Mr. Menschel said he received Social Security disability benefits. He said he had to repay WSI for workers' compensation benefits he had received and, after paying attorney's fees, had little left from his Social Security payment. He said his workers' compensation benefits are reduced significantly by the Social Security offset.

In response to a question from Representative Zaiser, Mr. Menschel said the Office of Independent Review is a joke and does not serve as an advocate for the injured worker.

Ms. Wolf said the Office of Independent Review meets in person with only 25 percent of the individuals with which it deals. She said the workers' compensation system was established to protect against devastating injury, but has failed to do so.

Mr. Felix Volk said he was injured in May 2003 and April 2004. He said he was injured because of his foreman's negligence, and when the Occupational Safety and Health Administration was contacted, he was blamed. He said he was forced to go back to work in other departments and was required to lift too much weight. As a result, he said, he hurt his back. When his physician said he was unable to do anything for him, he said, he was referred to a specialist. He said x-rays and other tests showed no injury, but his muscles and ligaments were injured. He said WSI concluded that he suffered from arthritis. He said he received disability payments from WSI, but was told he had to pay for \$3,000 in overpayments due to fraud. He said he had asked his case manager if he was required to include on a form that he had a flea

market business. He said the case manager told him that he did not need to list that fact on the form because he was not making any money. He said WSI did not pay for the \$6,000 in evaluations that WSI had required him to have done. He said the Office of Independent Review was of no help to him and WSI got him to agree to drop his claim in exchange for not pursuing the fraud allegation.

In response to a question from Representative Berg, Mr. Volk said there must be consistency among the caseworkers at WSI. He said the Social Security disability was not affected by his flea market business. He said he would be willing to sign a release so that the committee could further examine his workers' compensation claim. He said WSI does what businesses want them to do and his employer pushed WSI to conduct a fraud investigation.

In response to a question from Representative Kasper, Mr. Wahlin said WSI claims adjusters keep entries on all contacts from claimants.

Mr. Menschel said a physician should be making the decision regarding what an employee can do upon return to work. He said the employer should not be

allowed to make decisions on the limitations of the injured worker.

Representative Berg said the physician should be setting restrictions and communicating those to the employer.

Ms. Locnikar said it is important to remember that people lose their jobs, health insurance, and other benefits when injured. She said the bills can become significant and WSI often authorizes treatment, but then refuses to pay. She said doctors and lawyers do not want to work with WSI and nobody wants to deal with the agency. She said there must be someone that is accountable.

There being no further business, Chairman Berg adjourned the meeting at 5:00 p.m.

John Bjornson
Counsel

ATTACH:11