

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Tuesday, June 17, 2008
Brynhild Haugland Room, State Capitol
Bismarck, North Dakota

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

Members present: Representatives George J. Keiser, Bill Amerman, Donald D. Dietrich; Senators Richard Marcellais, Terry M. Wanzek

Member absent: Senator Nicholas P. Hacker

Others present: See [Appendix A](#)

It was moved by Representative Amerman, seconded by Senator Marcellais, and carried on a voice vote that the minutes of the April 30, 2008, meeting be approved as distributed.

INTRODUCTION

Chairman Keiser said at today's meeting the committee will receive information regarding the state's workers' compensation vocational rehabilitation services process, receive followup information from the Workforce Safety and Insurance Office of Independent Review, and review one workers' compensation case. He said the original plan was to review two cases; however, one of the injured employees scheduled for this meeting was unable to attend due to health reasons. If possible, the committee will attempt to reschedule this injured employee to have her case reviewed at a future meeting held in Bismarck.

VOCATIONAL REHABILITATION SERVICES

Chairman Keiser called on Ms. Robin Halvorson, Workforce Safety and Insurance, and Ms. Beth Veeder, CorVel Corporation (CorVel), to provide an overview of the state's workers' compensation vocational rehabilitation services process.

Ms. Halvorson made a computer presentation, summarizing the return-to-work services and vocational rehabilitation services ([Appendix B](#)).

Ms. Veeder continued the computer presentation, summarizing the vocational consultant services provided by CorVel, the entity that contracts with Workforce Safety and Insurance to provide services.

In response to a question from Representative Amerman, Ms. Veeder said the seven full-time CorVel rehabilitation consultants handle approximately 352 cases, which are evenly distributed among the rehabilitation consultants.

Ms. Veeder reviewed a case to illustrate how the system works and provided two examples of successful return-to-work cases.

In response to a question from Representative Keiser, Ms. Veeder said the skills of the rehabilitation consultants help establish how best to manage a claim and the extent to which an injured employee understands the process. She said rehabilitation consultants seek to engage the injured employee in the entire process.

In response to a question from Representative Amerman, Ms. Veeder said under a law passed in 2005, as part of the case management protocol there are limitations on the lengths of time an injured employee can receive benefits.

In response to a question from Senator Wanzek, Ms. Veeder said there are circumstances under which Workforce Safety and Insurance will pay for tobacco cessation. For example, she said, it may be necessary for an injured employee to be tobacco-free before undergoing surgery.

In response to a question from Representative Keiser, Ms. Halvorson said in 2006 Workforce Safety and Insurance hired a reemployment specialist to provide a range of services, including providing one-on-one assistance to hard-to-place injured employees, contacting employers, and providing group injured employee training sessions. She said with the data currently collected, it is difficult to track the successes of the vocational rehabilitation services and the reemployment services specialist.

Ms. Veeder said CorVel does have statistics regarding how many injured employees find employment during the course of receiving services, but does not have statistics regarding how many injured employees find jobs following completion of receipt of services from CorVel.

Ms. Veeder said her job is to give injured employees skills so the injured employees have an opportunity and the ability to get work. She said some injured employees embrace the services she offers and some do not.

CASE REVIEW

Chairman Keiser reviewed the procedure that will be followed to receive the injured employee's case for review. He said the injured worker presenting the case for review today is Mr. Mark Allensworth of Bismarck. He said committee members had an opportunity before the meeting to review the injured employee'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 employee'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 employee'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 employee to present his case for review. Chairman Keiser welcomed Mr. Allensworth and his representative, Mr. Sebald Vetter, CARE.

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

Mr. Kocher distributed to committee members a binder containing information prepared by Workforce Safety and Insurance. He said the information in the binder includes a case summary of the injured employee's records as well as a statement of the issues for review by the committee.

Case Summary

Mr. Kocher provided a summary of Mr. Allensworth's case. He said Mr. Allensworth incurred a workplace injury to his low back and his left thigh in October 1994. Workforce Safety and Insurance accepted liability on the claim and paid the associated medical expenses and disability benefits. In 1995 Mr. Allensworth underwent a spinal fusion at the L4/L5 level, at which time Workforce Safety and Insurance once again paid the associated medical expenses and disability benefits.

Mr. Kocher said in January 2000 Mr. Allensworth once again underwent spinal surgery, resulting in an anterior lumbar intrabody fusion at the L4/L5 and L5/S1 levels, an implanted proximity/BAK cage at the L4/L5 level, implantation of a femoral prosthesis of the L5/S1 level, and a pedicle fixation at the L4/L5 level. He said upon recovery from surgery, Mr. Allensworth was assigned rehabilitation services. In February 2001 a vocational consultant report was submitted to Workforce Safety and Insurance for review. He said this report included a proposed rehabilitation program.

Mr. Kocher said on March 7, 2001, a notice of intention to discontinue/reduce benefits was sent to Mr. Allensworth, noting that the vocational rehabilitation plan was approved by Workforce Safety and Insurance. The notice indicated Mr. Allensworth's temporary total disability benefits would cease effective March 29, 2001, because the vocational rehabilitation plan provides Mr. Allensworth is qualified to work in the areas of computer support technician/technical support specialist, management trainee/assistant manager, and telemarketer.

Mr. Kocher said on March 13, 2001, Mr. Allensworth made a timely request for reconsideration. In the request for reconsideration, Mr. Allensworth reported he:

- Was still disabled and unable to work;

- Was attending Bismarck State College in pursuit of a degree in computer information and processing; and
- Believed it would be to his advantage to complete his computer training before returning to work.

Mr. Kocher said on March 22, 2001, Workforce Safety and Insurance issued an order denying further disability and vocational rehabilitation benefits, indicating Mr. Allensworth was capable of acquiring gainful employment as provided under the vocational rehabilitation plan. Mr. Allensworth made a timely request for the assistance of the Office of Independent Review. He said on April 23, 2001, the Office of Independent Review issued a certificate of completion, recommending no change in the order.

Mr. Kocher said Mr. Allensworth requested an administrative hearing and on April 18, 2002, the administrative law judge issued his recommended findings of fact, conclusions of law, and order, stating the preponderance of the evidence supported the Workforce Safety and Insurance order. On May 21, 2002, Workforce Safety and Insurance adopted the administrative law judge's recommended findings of fact and conclusions of law. Mr. Allensworth did not appeal this decision and the order became final.

In response to a question from Representative Keiser, Mr. Allensworth said his first spinal surgery was done wrong and never healed. He said the second surgery removed the hardware from the first surgery and performed a more complex process than the first surgery.

Issues for Review

Chairman Keiser called on Mr. Kocher, Mr. Allensworth, and Mr. Vetter to address the issues they would like the committee to consider.

Mr. Kocher said in assisting Mr. Allensworth he understands Mr. Allensworth's primary issue relates to whether Mr. Allensworth was actually employable at the time Workforce Safety and Insurance declared he was employable.

In response to a question from Senator Wanzek, Mr. Kocher said when an injured employee receives a notice that benefits will be terminated or changed, that termination or change occurs regardless of whether there is an appeal in process.

Mr. Allensworth said he is still working hard to improve his health. He said he has lost 83 pounds over the last 18 months by using Weight Watchers. This weight loss should improve the success of his upcoming spinal surgery.

Mr. Allensworth said upon completion of working with CorVel, nobody would hire him and when he did finally find employment, the pain associated with the jobs required him to quit working. He said when he received the Workforce Safety and Insurance notice that his cash benefits would be discontinued, he notified Workforce Safety and Insurance he was going to school to better himself and in order to be more

employable. He said his educational program was able to accommodate his medical limitations.

Mr. Allensworth said he is unsatisfied with the results of the functional capacity evaluation (FCE). He said the FCE was performed prematurely because at the time it was performed he was still healing from his surgery. At the time he performed the FCE, he was still undergoing physical therapy and was self-limiting his activity. He said as a result of these limitations, the FCE claims Mr. Allensworth did not fully comply with the FCE.

Mr. Allensworth said that over time his doctor at Abbott Northwestern Hospital stopped treating him because of the hassle of working with Workforce Safety and Insurance.

Mr. Allensworth said he disagrees with Workforce Safety and Insurance's refusal to assist in paying for his college expenses. He said in May 2002 he graduated with an Associate of Applied Science degree as an information processing specialist.

Mr. Allensworth said he did not have the money necessary to appeal the administrative law judge's decision to the district court. He said Workforce Safety and Insurance should help injured employees pay for legal representation.

In response to a question from Representative Amerman, Mr. Allensworth said his college studies for information processing were related to the FCE vocational plan as a computer support technician/technical support specialist. However, he said, the college courses were necessary for him to realistically have a chance to get a job in the field because he did not have the necessary experience.

In response to a question from Representative Keiser, Mr. Allensworth said he used the preferred worker program one time and he used on-the-job training through Job Service North Dakota. He said he found both of these jobs on his own.

In response to a question from Representative Keiser, Ms. Halvorson said an injured employee is eligible to use the preferred worker program for up to three years. She said she is not aware of anyone reaching the three-year cap. Mr. Allensworth said he thought he had reached the cap of his eligibility under the preferred worker program.

In response to a question from Representative Keiser regarding why an injured employee like Mr. Allensworth is not informed he is still eligible to participate in the preferred worker program, Ms. Veeder said typically injured employees are given a brochure explaining the program and are referred to the preferred worker program manager.

Mr. Timothy Wahlin, attorney, Workforce Safety and Insurance, said the preferred worker program is provided for under North Dakota Century Code (NDCC) Section 65-05-36, and there is a three-year limit. However, he said, the limit applies to a specific employee-employer relationship, so there is no limit to how many times an employee uses the program and there is no limit to the number of times an employer uses the program, but there is a three-year limit to the

length of time an employee uses the program with each employer. He said the intent is that within those three years the injured employee will transfer into unsubsidized employment with that employer.

Mr. Allensworth said he did give potential employers information regarding the preferred worker program, but employers did not seem interested.

Representative Keiser stressed more needs to be done to inform injured employees and employers of the availability and terms of the preferred worker program. He requested additional information from Workforce Safety and Insurance regarding possible suggestions to improve the preferred worker program.

In response to a question from Representative Dietrich, Mr. Allensworth said he began his college coursework in August 1999 and completed his coursework in May 2002. He said he took time off of his studies in order to have surgeries. Additionally, he said, he is not sure why CorVel would have determined he was qualified to be a computer support technician or technical support specialist without additional training.

Mr. Allensworth said CorVel rehabilitation consultants told him what types of jobs to look for, but did not do anything to help him find a job. He said rehabilitation services should not be terminated until the injured employee has a job that is appropriate and which the injured employee can successfully perform.

In response to a question from Representative Amerman, Mr. Allensworth said in his job search he did get to the interview stage several times; however, some potential employers ask potential employees about physical limitations. He said during the interview process he never volunteered information regarding his physical limitations, but did inform potential employers if directly asked. Ultimately, he said, employers would inform him they hired a "more qualified" applicant.

In response to a question from Representative Keiser, Mr. Allensworth said since his benefits were terminated in 2002, he has held three jobs. He said he is currently employed at his third job.

Mr. Vetter said he agrees with Mr. Allensworth's summary. Additionally, he pointed out that Mr. Allensworth will be required to undergo another surgery in July 2008.

In response to a question from Senator Marcellais, Mr. Vetter said as part of the FCE, the physical test is completed by physical therapists and then a CorVel rehabilitation consultant uses these guidelines to determine job abilities.

In response to a question from Representative Keiser, Mr. Allensworth said throughout his experience with Workforce Safety and Insurance, he never understood why he was not allowed to finish his education and then seek a job. It never made sense to him that Workforce Safety and Insurance would want him to abandon his educational goals.

Mr. Vetter said the situation of transitioning into a new job is very difficult for injured employees. He said the way Workforce Safety and Insurance terminates

cash benefits while an injured employee is seeking employment makes it very difficult for these injured employees to pay their bills. He said Workforce Safety and Insurance should continue benefits until the injured employee is successful in finding and keeping a job.

Workforce Safety and Insurance

Chairman Keiser called on Mr. Wahlin to provide testimony regarding the issues raised by Mr. Allensworth and Mr. Vetter. Mr. Wahlin reviewed NDCC Section 65-05.1-01, which under subsection 4 sets out a hierarchy of rehabilitation services available to injured employees providing:

4. The first appropriate option among the following, calculated to return the employee to substantial gainful employment, must be chosen for the employee:
 - a. Return to the same position.
 - b. Return to the same occupation, any employer.
 - c. Return to a modified position.
 - d. Return to a modified or alternative occupation, any employer.
 - e. Return to an occupation within the local job pool of the locale in which the claimant was living at the date of injury or of the employee's current address which is suited to the employee's education, experience, and marketable skills.
 - f. Return to an occupation in the statewide job pool which is suited to the employee's education, experience, and marketable skills.
 - g. Retraining of one hundred four weeks or less.

Mr. Wahlin said in the case of Mr. Allensworth, he had significant experience, education, and work history with grocery experience, a four-year degree, and recent coursework in electronics and computers. In working through the hierarchy, he said, the first four options were not appropriate.

In response to a question from Representative Amerman, Mr. Wahlin said Workforce Safety and Insurance is not empowered to force the preinjury employer to take an injured employee back in a modified position.

Representative Keiser said employers have incentives to hire injured employees.

Ms. Halvorson said rehabilitation services is tasked with contacting preinjury employers to try to facilitate the return of the injured employee.

Mr. Kocher said a review of Mr. Allensworth's file indicates his preinjury employer has not been contacted since the injury.

Mr. Allensworth said he sought long-term training of two years or less, but Workforce Safety and Insurance never allowed him to get to that level of the rehabilitation services hierarchy.

Mr. Wahlin said the fifth option was the first appropriate option for Mr. Allensworth due to his significant transferable skills, significant educational base, and the availability of appropriate jobs within 35 miles of Mr. Allensworth's address. He said it was this decision, to apply the fifth option, which was appealed to the administrative hearing level.

In response to a question from Representative Keiser regarding whether 35 miles is a reasonable distance within which to expect an injured employee to seek employment, Mr. Wahlin said the distance is appropriate and he does not support making any changes. He said North Dakota is a rural state. Specifically, he said, in the case of Mr. Allensworth there were appropriate jobs available in the Bismarck/Mandan area so the 35-mile distance was not really even relevant.

Mr. Wahlin said in a 1996 decision, the North Dakota Supreme Court ruled that NDCC Section 65-05.1-01 does not require that Workforce Safety and Insurance find injured employees jobs, but that it is Workforce Safety and Insurance's duty to see to it that the injured employee can reasonably compete in the job market in the state. He said if this role is changed, the change would dramatically alter what Workforce Safety and Insurance does, making Workforce Safety and Insurance a guarantor of payments and allowing injured employees to abuse the system.

Mr. Wahlin said he understands Mr. Allensworth sent out over 6,000 applications for jobs. However, he said, he is unsure whether his inability to get a job is related to his workplace injury or whether it is related to some other factor.

Mr. Wahlin said Workforce Safety and Insurance did what it is charged with doing by identifying the first available option in the hierarchy. He said Workforce Safety and Insurance is not an employment agency.

In response to a question from Representative Amerman, Mr. Wahlin said CorVel identifies the appropriate employment and Workforce Safety and Insurance bases its decision on this information. He said nationwide, very few states have rehabilitation services as ambitious as North Dakota's system.

In response to a question from Representative Keiser, Mr. Wahlin said Workforce Safety and Insurance does not terminate benefits without providing an opportunity for appeal and without also identifying the basis for the termination.

Mr. Allensworth said in his case when Workforce Safety and Insurance and CorVel considered "transferable skills," it looked really good on paper, but when he went out to actually get a job, the employers did not accept these "transferable skills."

Committee Discussion

Chairman Keiser thanked Mr. Allensworth and Mr. Vetter for coming before the committee to have Mr. Allensworth's case reviewed.

Representative Amerman said under the current statutory hierarchy for vocational rehabilitation,

Mr. Allensworth incurred approximately \$20,000 to improve himself through higher education. He said the system should have more flexibility to allow Workforce Safety and Insurance to provide assistance to those injured employees who want to better themselves. Additionally, he said, he supports the idea of improving the preferred worker program by providing better incentives for employers.

Senator Wanzek said Mr. Allensworth's case may expose some much deeper problems. He said perhaps more efforts could be taken to incentivize employers to hire injured employees.

Representative Keiser said it would be helpful to somehow clarify that new employers are not liable for the existing workplace injuries of new hires. He said he is not certain whether there is a gap in communication or whether the existing incentives are not strong enough to encourage employers to hire injured employees. Additionally, he said, there may need to be some changes in the law to give the injured employees more power in directing their own rehabilitation.

Mr. Vetter said Senator Wanzek and Representative Keiser make good points. He said 99 percent of the injured employees he works with want to return to work but there are some areas of concern. CorVel says there are jobs available for injured employees and Workforce Safety and Insurance says it is not a job placement agency. The reality is some of these injured employees are not able to find postinjury employment. He said he seeks guidance from experts on how best to get people back to work in jobs that allow them to support themselves and their families.

Representative Keiser said this vocational rehabilitation issue seems to be a reoccurring issue for which the committee should consider the public policy issues.

Mr. Vetter said he wants to know the statistics on the state's workers' compensation vocational rehabilitation services.

Chairman Keiser requested that Workforce Safety and Insurance provide the committee with vocational rehabilitation statistics. He said if these statistics are not available, perhaps there should be a legislative directive for Workforce Safety and Insurance to gather this data. As part of this directive, perhaps a pilot program would be appropriate.

Senator Wanzek said he would like to hear from employers to find out why they are not hiring injured employees. He said he is hesitant to establish a policy that state government is going to guarantee employment.

Representative Amerman said Senator Wanzek makes a good point. He said state and federal law likely could or does address some of these concerns and prohibited discrimination. He is hesitant to require Workforce Safety and Insurance or CorVel to actually find injured employees jobs; however, Workforce Safety and Insurance and CorVel could improve their services. He said he would like

Workforce Safety and Insurance and CorVel to make some suggestions on how to improve their services.

Representative Keiser agreed. He does not want the state to be in a position to guarantee an injured employee a job. However, he said, vocational rehabilitation services is one of the "big three" workers' compensation issues. In addressing this issue, he asked that Workforce Safety and Insurance seek creative solutions.

OFFICE OF INDEPENDENT REVIEW

Chairman Keiser called on Mr. Cade Jorgenson, Workforce Safety and Insurance Office of Independent Review, to present information regarding accessibility of information regarding the Office of Independent Review and alternative names for the Office of Independent Review.

Mr. Jorgenson used a projector to show the committee members how to access online information regarding the Office of Independent Review. He said from Workforce Safety and Insurance's home page www.workforcesafety.com, the term "office of independent review" can be entered in the search feature at the upper right corner of the home page. He said linking on the first search result will take a user to information regarding the Office of Independent Review, from which a user can link to a brochure that includes frequently asked questions.

Mr. Jorgenson distributed a document reflecting possible name changes for the Office of Independent Review ([Appendix C](#)). He said this list of possible names resulted from a brainstorming session attended by Mr. Kocher, Ms. Jodi Bjornson, Representative Keiser, and himself. Alternative names discussed, which are missing from the list, include Office of Decision Review and Claims Dispute Review.

Mr. Jorgenson said approximately 20 percent of Office of Independent Review cases result in a recommendation to change a Workforce Safety and Insurance decision.

Representative Keiser said, although the Office of Independent Review has been very successful, a name change would clarify the office's role. However, he said, a name change would require a statutory change. Additionally, he said, that currently the Office of Independent Review is funded through premium dollars. In order to be truly independent, he said, the Office of Independent Review would require general fund support.

Representative Dietrich said there is a public perception that the current organizational structure of the Office of Independent Review results in the fox guarding the henhouse. He said he would like to consider having the Office of Independent Review placed under the Insurance Commissioner and funded by the general fund.

Representative Keiser said another option would be to have the Office of Independent Review placed under the Attorney General.

Senator Wanzek said he agrees there is a problem with perception. He said he views the Office of Independent Review as a final forum to resolve issues before actually appealing.

In response to a question from Representative Keiser, Mr. Jorgenson said the Office of Independent Review does not track figures regarding the outcome of Office of Independent Review recommendations.

BILL DRAFT

Chairman Keiser said in accordance with the committee directive made at the committee's previous meeting at which the committee reviewed the claim of Mr. Noel Walter, committee counsel worked with legal counsel at Workforce Safety and Insurance and with Mr. Walter's legal counsel, Representative Jasper Schneider, in drafting a bill to address Mr. Walter's concerns with the burden of proof under the firefighter's and law enforcement officer's presumption.

Committee counsel reviewed a bill draft [90161.0100], stating the amendment to NDCC Section 65-01-15.1(1) replaces the language "The condition or impairment of health may not be attributed to any disease existing before that total or partial disability or death unless the contrary is shown by competent evidence" with "The presumption may be rebutted by clear and convincing evidence the condition or impairment is not work-related."

Committee counsel said that under the typical workers' compensation claim, the injured employee has the burden of establishing that an injury is work-related, whereas under the firefighter's and law enforcement officer's presumption, in the case of specified impairments the impairment is assumed to be work-related, thereby shifting the burden to Workforce Safety and Insurance or the employer to establish the impairment is not work-related.

Committee counsel said the bill draft provides the presumption that the impairment is work-related can be overcome by clear and convincing evidence the impairment is not work-related. Under existing law, she said, the burden of overcoming the presumption is a showing by competent evidence that the impairment

is not work-related. She said the bill draft provides an employer or Workforce Safety and Insurance must meet a higher standard that is more difficult to meet.

Chairman Keiser called on Ms. Jodi Bjornson, Workforce Safety and Insurance, to comment regarding the bill draft. She said she does not have any problems with the language of the bill draft. She said the bill draft will be brought before the Workforce Safety and Insurance Board of Directors with a recommendation of support.

It was moved by Senator Wanzek and seconded by Representative Dietrich that the bill draft relating to the burden of proof under the firefighter's and law enforcement officer's presumption be approved and recommended to the Legislative Council.

In response to a question from Representative Amerman, Mr. Wahlin said he is not sure whether there is an established legal definition of "competent evidence." He said "preponderance of the evidence" typically applies in a civil case and means more than 50 percent; "clear and convincing evidence" is more than a preponderance; and "beyond a reasonable doubt" typically applies to criminal cases and is an even higher standard.

In response to a question from Representative Keiser, Mr. Wahlin said, although he cannot be certain, he could speculate that this proposed change in the law would have resulted in a different outcome in Mr. Walter's case.

The motion carried on a roll call vote. Representatives Keiser, Amerman, and Dietrich and Senators Marcellais and Wanzek voted "aye." No negative votes were cast.

No further business appearing, Chairman Keiser adjourned the meeting at 1:40 p.m.

Jennifer S. N. Clark
Committee Counsel

ATTACH:3