

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Wednesday, June 27, 2007
Sterling Hall Room, Holiday Inn of Fargo
Fargo, 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 Nicholas P. Hacker, Richard Marcellais, Terry M. Wanzek

Others present: See [Appendix A](#)

Senator Tim Flakoll, member of the Legislative Council, was also in attendance.

INTRODUCTION

Chairman Keiser welcomed the committee and called on committee counsel to review the [Supplementary Rules of Operation and Procedure of the North Dakota Legislative Council](#). Committee counsel said although the committee is statutorily created by North Dakota Century Code (NDCC) Section 54-35-22 and is unique in a variety of ways, the statute provides the committee will operate under the laws and procedures governing the operation of other Legislative Council interim committees.

Chairman Keiser said as the committee moves forward, his intention is to have the committee travel as necessary to accommodate the location of injured employees who are having their cases reviewed. He said the agenda for today's committee meeting focuses on establishing a procedure and protocol to be used for the rest of the interim as well as to take the opportunity to give committee members an indepth background of workers' compensation law to better understand the issues that will be brought forward by injured employees. He said as far as procedural considerations, he expects the committee will be considering how best to notify the public of the committee's activities in order to solicit injured employees to have their cases reviewed, confidentiality and how to protect the confidentiality of the Workforce Safety and Insurance records of injured employees, and whether there are steps the committee can take to better assist injured employees in organizing their issues for review.

PROCEDURE

Chairman Keiser called on committee counsel to review the procedure used by the Workers' Compensation Review Committee during the 2005-06 interim. Committee counsel said during the 2005-06 interim, the Workers' Compensation Review Committee held seven meetings. She said the committee is required to meet quarterly if there are

injured employees wishing to address the committee. The committee, she said, during the previous interim reviewed the cases of 11 injured employees and held additional meetings as necessary to perform committee work relating to the issues raised by the injured employees. She said the procedure established during the previous interim was to allow a half day for each injured employee to present his or her case. Ultimately, the committee recommended three bill drafts--House Bill No. 1038 and Senate Bill Nos. 2042 and 2043.

In response to a question from Senator Wanzek, Representative Keiser said although the committee should make it clear to injured employees the committee is not providing an appeal forum, the Legislative Assembly did amend some provisions of the committee's bills to make those provisions retroactive, essentially impacting the outcome of the injured employee's case. Conceptually, he said, the committee's approach should be to consider whether changes in the law should be made and to look forward in applying any recommended changes.

In response to a question from Senator Flakoll, Representative Keiser said the committee will not schedule an injured employee to have a case reviewed unless the injured employee signs the necessary authorization to release information form. He said the committee members should work hard to help the injured employee define the issues and to limit questions to those issues, keeping unrelated information private.

Senator Wanzek said he views the success of the committee as depending on the injured employee and that injured employee being adequately prepared to present his or her case.

Representative Keiser said during the previous interim, the committee sought funds from the Legislative Council to help fund private attorneys to provide assistance to injured employees. He said this request was denied.

Representative Amerman said during the previous interim, Mr. Chuck Kocher, Workforce Safety and Insurance Office of Independent Review, played a very important role in the case review process and was an invaluable part of making the process work.

In response to a question from Senator Wanzek, Representative Keiser said it may be valuable to e-mail all legislators to inform them of the committee's activities to encourage legislators to direct their

constituents to apply to have the committee review the constituents' workers' compensation cases.

In response to a question from Senator Flakoll, Representative Keiser said during the last interim, the committee reviewed the cases of 11 injured employees. He said the committee was not faced with an injured employee wishing to present a second case for committee review and is not sure what the committee's wishes might be if the situation arises this interim.

Chairman Keiser called on committee counsel to review the application forms and letters used during the previous interim. Committee counsel reviewed the cover letter sent to individuals who requested an application packet, the release of information and authorization form used, and the review issue summary form that was included in the application packet as well as the approval and denial letters used after application forms were received by the Legislative Council.

Committee counsel said last interim, in addition to making the application packet available online, interested individuals contacted the Legislative Council office to have the application mailed. She said the statute provides that the purpose for reviewing an injured employee's case is to determine whether changes should be made to the laws relating to the state's workers' compensation system. She said the statute clearly states that a claim may not be reviewed by the committee unless Workforce Safety and Insurance has issued a final determination and either an injured employee exhausted the administrative and judicial process or the period for appeal expired. Additional requirements included in the statute are that the injured employee must first sign a release of information for constituent authorization, which allows the committee and the Legislative Council staff to review the injured employee's Workforce Safety and Insurance records and allows the discussion of these records at an interim committee hearing. She said although the application packet includes a form to be used to summarize the issue being brought forward for review, completion of the summary is not required to be eligible to appear before the committee.

Committee counsel said the Legislative Council staff tracked the activity of every application mailed from and every application returned to the Legislative Council office. She said once a completed application was returned to the Legislative Council office, a copy was forwarded to Mr. Kocher allowing him to make a determination of whether the injured employee had exhausted the appeal process or whether the period of appeal had expired. She said that upon being notified by the Office of Independent Review of the status of the case, she would consult with the committee chairman to make a final determination on the applicant's eligibility to have the case reviewed by the committee. She said that if a case was determined to be final and eligible for review, Mr. Kocher would contact the injured employee and

offer his services and set up a meeting time to summarize the case as well as summarize the issues the injured employee sought to bring before the committee. She said committee counsel and Mr. Kocher worked with the injured employee to set up a date upon which the injured employee was available to present the case before the committee. The injured employee was notified that at future meetings, the committee may continue to discuss the issues raised. Once an injured employee had a case reviewed by the committee, that injured employee received notices of future Workers' Compensation Review Committee meetings.

Chairman Keiser called on Mr. David L. Kemnitz, North Dakota AFL-CIO, for comments regarding committee procedures. Mr. Kemnitz requested Workforce Safety and Insurance use existing technology to contact claimants who might have issues appropriate to be brought to the committee. He said he had requested this be done during the previous interim, yet Workforce Safety and Insurance did not perform this service.

Mr. Kemnitz said the committee is charged with determining how well the system is working and whether that law is achieving what it was intended to achieve. He said recurring themes and issues for the committee to be aware of include whether an injured employee and that injured employee's family have recovered and how well they have recovered. He said the workers' compensation system provides for a tradeoff and the committee should evaluate whether injured employees are receiving their part of the bargain--sure and certain relief. He said the committee should consider the sustainability of the injured employee and the economic security of that injured employee and whether the end result of the system is that the injured employee is economically secure.

Representative Keiser requested that Workforce Safety and Insurance follow up on Mr. Kemnitz's suggestion about whether there may be a feasible and practicable method to identify injured employees who have known issues as well as whether it may be possible to notify those injured employees. Additionally, he said, he would request that Workforce Safety and Insurance meet with its claims analysts to determine if there are recurring issues and whether it might be possible to help identify injured employees experiencing these recurring issues.

Senator Flakoll said the committee may want to consider whether to implement a followup survey to injured employees who have presented their cases to the committee. He said it might be valuable to seek information regarding how the injured employee became aware of the committee's activities and how well the process worked and also to provide a review of committee legislation to find out whether the proposed legislation was responsive to the issues raised.

It was moved by Senator Wanzek, seconded by Representative Dietrich, and carried on a voice

vote that the committee contact all legislators to notify them of the committee's activities and to encourage injured employees to apply for case review; to request Workforce Safety and Insurance work with the Information Technology Department to evaluate whether it is possible to search all workers' compensation claims to notify injured employees of the committee's activities; and to modify the release of information and authorization form to modify the confidentiality language, clarifying that the information brought before the committee will be discussed by committee members at future meetings and during upcoming legislative sessions.

In response to a question from Senator Wanzek, Mr. John Halvorson, Acting Director, Workforce Safety and Insurance, stated that Workforce Safety and Insurance could use the agency's newsletter to inform employers and medical professionals of the committee's activities.

In response to a question from Senator Hacker noting the importance of having an employer's perspective as workers' compensation issues are discussed, Mr. Halvorson said it is common to have employers involved in dealing with workers' compensation issues. Committee counsel clarified the statutory charge provides for the participation of injured employees as well as Workforce Safety and Insurance but it is silent as to employer participation. Senator Hacker said perhaps it would be valuable to consider on a case-by-case basis whether it might be helpful to have the perspective of the employer in reviewing an injured worker's case.

BACKGROUND INFORMATION

Chairman Keiser called on Mr. Tim Wahlin, Workforce Safety and Insurance, to make a presentation regarding an overview of the workers' compensation benefits system and terminology; review of recurring workers' compensation policy issues and the historical evolution of these issues; summarize 2007 legislation impacting Workforce Safety and Insurance; and identification of workers' compensation policy issues and trends. Mr. Wahlin gave a computer presentation, a copy of which is attached as [Appendix B](#).

Mr. Wahlin discussed the terms temporary total disability (TTD), temporary partial disability (TPD), permanent total disability (PTD), permanent partial impairment (PPI), supplementary benefits, cost of living adjustments (COLA), state's average weekly wage (SAWW), average weekly wage (AWW) of the injured employee, additional benefit payable (ABP), death benefits, vocational rehabilitation, post rehabilitation benefit (PRB), and catastrophic injuries (CAT claims).

In response to a question from Senator Hacker, Mr. Wahlin stated the time periods specific to temporary and permanent disabilities differ depending on which workers' compensation system covers the employee. He said Workforce Safety and Insurance

would consider the date of the injury and the law that applied on that date. Under the current benefit structure, he said, a permanent total disability determination would not be made until a vocational evaluation is completed.

In response to a question from Senator Hacker, Mr. Wahlin said permanent partial impairment is available to those injured employees with a 16 percent or greater impairment. He said he will provide committee members with data regarding the number of claims above and below that 16 percent impairment threshold and will try to provide the committee members with data on how this compares to the threshold set by other states.

In response to a question from Senator Wanzek, Mr. Wahlin said for employees injured after December 31, 2005, a determination of permanent total disability will also result in determination of permanent partial impairment. Under the pre-2006 system, he said, those two benefits were not linked.

Representative Keiser requested that at a future meeting, Workforce Safety and Insurance provide a brief review of the vocational rehabilitation services and system.

Mr. Wahlin reviewed the recurring issues related to the workers' compensation topics:

- Workforce Safety and Insurance insures work-related injuries;
- Workforce Safety and Insurance pays for wages lost due to a compensable condition;
- Injured employees' return-to-work philosophy;
- The workers' compensation system is not a retirement system;
- Medical benefits are provided for compensable conditions;
- False statements or false claims to gain benefits are unlawful; and
- Payment of attorney's fees.

Mr. Wahlin also reviewed what he characterized as the three benefit structures available under the state's workers' compensation system. Over time, he said, the law has undergone some significant changes resulting in different benefit structures with the first benefit structure being those employees who were injured before the 1995 changes went into effect, the second benefit structure covering those workers injured after June 1995 but before 2006, and the third benefit structure covering those injured workers post-2005.

In response to a question from Representative Amerman regarding repetitive motion injuries, Mr. Wahlin said Workforce Safety and Insurance struggles with the causation issues inherent in repetitive motion injuries. He said at a future meeting he will provide the committee with additional information regarding statistics relating to repetitive motion injuries.

In response to a question from Senator Hacker, Mr. Wahlin said less than 10 percent of the injured employees reach the state average weekly wage maximum of 110 percent. He said the maximum

benefit amount could be increased through legislation but this would impact the Workforce Safety and Insurance fund. Representative Keiser said there is a statutory requirement that workers' compensation bills be accompanied by a fiscal impact statement.

In response to a question from Senator Wanzek regarding the scenario in which an injured employee is unable to return to a previous job but is able to return to work for less money, Mr. Wahlin said Workforce Safety and Insurance would pay that injured employee disability benefits but those benefits would be capped at five years unless there are circumstances that lead Workforce Safety and Insurance to use its discretion to modify the benefits.

In response to a question from Representative Amerman, Mr. Wahlin said an injured employee is considered fully eligible or able to participate in the Social Security retirement system when an injured employee actually draws Social Security retirement benefits or when that injured employee would be eligible to fully draw those benefits.

In response to a question from Senator Hacker, Mr. Wahlin said for purposes of workers' compensation, the definition of fraud includes an element of intent so there would be no such thing as unintended fraud.

Mr. Wahlin reviewed 2007 House Bill Nos. 1038, 1411, and 1140.

Mr. Wahlin addressed the areas of concern relating to attorney's fees, the five-year cap on temporary partial disability, and concerns with the system used for administrative hearings.

In response to a question from Representative Keiser, Mr. Wahlin said increases in the cost of using the Office of Administrative Hearings is in part because cases are taking more hours in the administrative hearings process as well as the increase in the cost per hour of the administrative hearings process. He said he is not certain why there has been an increase in the number of hours it is taking to do an administrative hearing but it appears that the increase in cost per hour is not the most expensive change.

In response to a question from Senator Hacker, Mr. Wahlin said the Workforce Safety and Insurance Office of Independent Review is a division of Workforce Safety and Insurance housed offsite. He said the Office of Independent Review is charged with reviewing cases before the case goes to administrative hearing. He said there have been no substantial recent changes in the role of the Office of Independent Review. He said although Workforce Safety and Insurance would be open to suggestions on ways to address the increasing cost of the administrative hearing process, he does not want to discourage injured employees from using the appeal process. He said perhaps it would be worthwhile to consider ways to empower the Office of Independent Review.

In response to a question from Representative Amerman, Mr. Wahlin said the role of the Office of

Independent Review is to advocate for an injured employee and it would be a policy issue to determine whether it is appropriate to change the role of the Office of Independent Review.

Representative Keiser requested that at a future meeting Workforce Safety and Insurance provide additional information regarding the role and function of the Office of Independent Review as well as statistics of Office of Independent Review cases and how frequently the Office of Independent Review opposes the decision of Workforce Safety and Insurance.

Chairman Keiser called on Mr. Kemnitz for comments regarding the committee discussion. Mr. Kemnitz stated that NDCC Section 65-01-01 provides that for injured workers and their families and dependents there will be sure and certain relief provided to the exclusion of every other remedy. He said as the committee moves forward, he would request that committee members ask the following two questions:

1. Does North Dakota provide adequate and proper mechanisms to ensure "sure and certain relief" to employees and their families?
2. Does the agent charged with administration and delivery of "sure and certain relief" do so, is this done without prejudice, and it is done within the letter and spirit of NDCC Section 65-01-01?

Chairman Keiser called on Mr. Tom Balzer, North Dakota Motor Carriers Association, for comments regarding the committee discussion. Mr. Balzer said North Dakota motor carriers are dealing with the issues relating to the hiring of drivers who work in other states. He said although Workforce Safety and Insurance offers an all-state rider to cover employees working in other states, the system is not working as intended and may need change because as the law is written the all-state rider only covers incidental activities of out-of-state employees and does not cover those employees who work out of state on more than an incidental basis.

Representative Keiser said Mr. Balzer should continue to spend time working on this issue and return to the committee later in the interim when there are more details and there is a requested action. He said the issue of out-of-state coverage is a very complex issue as is the issue of reciprocity.

In response to a question from Representative Amerman, Mr. Balzer said the issue of out-of-state coverage is a nationwide issue.

In response to a question from Senator Hacker, Mr. Balzer said there are a number of private companies that provide workers' compensation coverage; however, the coverage issue is complicated.

Representative Keiser said current law allows companies to set private, 48-state coverage but the policy is very expensive. Mr. Balzer said the cost of providing private workers' compensation coverage is

5 times to 10 times more expensive than North Dakota's coverage.

Chairman Keiser called on Mr. Halvorson to present information regarding an overview of the Workforce Safety and Insurance premium rates. Mr. Halvorson gave a computer presentation, a copy of which is attached as [Appendix C](#).

In response to a question from Senator Hacker, Mr. Halvorson said at a future meeting he will provide committee members with additional information on statistics related to premium rates over time as well as how North Dakota's premium rates compare to other states.

In response to a question from Representative Keiser, Mr. Halvorson said he will provide additional information regarding the number of nonsignificant medical-only claims.

Chairman Keiser called on Mr. James Long, Workforce Safety and Insurance, to present information regarding the status of the Workforce Safety and Insurance fund. Mr. Long gave a computer presentation, a copy of which is attached as [Appendix D](#).

In response to a question from Representative Amerman, Mr. Long said the Retirement and Investment Office is charged with making market investments for the Workforce Safety and Insurance fund.

In response to a question from Senator Hacker, Mr. Long said of the \$35 million set aside for the multiyear safety programs, Workforce Safety and Insurance has expended approximately \$3 million or \$4 million of that amount. He said the remainder of the money set aside for the safety programs will be spent through continuing appropriations. He said when looking at the amount of surplus, it is important to clarify whether that number takes into account the expended safety and loan fund.

Representative Keiser said in evaluating the Workforce Safety and Insurance fund it is important to remember that Workforce Safety and Insurance uses a zero-based budgeting every two years, reallocating remaining surplus every two years.

In response to a question from Senator Hacker, Mr. Long said he understands the legislative intent was to direct Workforce Safety and Insurance to reach the legislatively mandated threshold in a responsible manner within a reasonable period of time.

Senator Hacker said he believes employers are good people who want safe employment environments and disagrees with Mr. Long's theory that large dividends deinceivize safety in the workplace.

Representative Amerman questioned how Workforce Safety and Insurance will work to reach the legislatively mandated directive for the fund balance.

Representative Keiser said Workforce Safety and Insurance must reach the legislatively mandated threshold, and has several options, including dramatically increasing benefits as well as changing the cost parameters, such as medical reimbursement.

Chairman Keiser called on Mr. Long to provide an overview of the Workforce Safety and Insurance information technology initiative. Mr. Long gave a computer presentation, a copy of which is attached as [Appendix E](#).

In response to a question from Senator Hacker, Mr. Long said the overall cost of the information technology initiative will be \$14 million, resulting in an approximate annual savings of 4 percent in claims processing costs. He said it is anticipated the new technology will be good for 10 years to 12 years before it requires replacement.

In response to a question from Representative Keiser, Mr. Long stated he does not believe Workforce Safety and Insurance has taken a proprietary position in the software being created.

Chairman Keiser called on Mr. Halvorson to provide a status report on recent Workforce Safety and Insurance audits. Mr. Halvorson provided written information, a copy of which is attached as [Appendix F](#).

Representative Keiser said the Workforce Safety and Insurance reserve is in part based on the Unemployment Insurance fund law. He said the unemployment insurance system provides for a fund for uninsured risk and he is considering whether it might be valuable to create a similar system for Workforce Safety and Insurance. He said in the case of workers' compensation, the fund would be to cover catastrophic events, essentially providing self-insurance for reinsurance; however, he has great reservations about this concept. In reviewing the history of unemployment insurance, he said, there has been an occurrence in which a large event of unemployment was due to a single employer. He said that Workforce Safety and Insurance used to have reinsurance but the policy became too expensive, therefore, the state dropped the policy.

Senator Hacker said if there were a catastrophic fund established for workers' compensation, the fund balance formula would need to be changed to reflect this. He said he would like to further discuss the issue of how to use the fund surplus.

Representative Keiser said another issue the committee may wish to consider is what roles the Office of Independent Review and independent medical examinations play in the workers' compensation system. At a minimum, he said, the Office of Independent Review and independent medical examinations appear to be inappropriately named.

No further business appearing, Chairman Keiser adjourned the meeting at 2:30 p.m.

Jennifer S. N. Clark
Committee Counsel

[ATTACH:6](#)