

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### **WORKERS' COMPENSATION REVIEW COMMITTEE**

Tuesday and Wednesday, August 5-6, 2008  
Hawk Meeting Room, Alerus Center, Grand Forks, North Dakota  
Reimers Conference Room, Alumni Center, North Dakota State University  
Fargo, North Dakota

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

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

**Others present:** See [Appendix A](#)

**It was moved by Representative Dietrich, seconded by Representative Amerman, and carried on a voice vote that the minutes of the June 17, 2008, meeting be approved as distributed.**

#### **INTRODUCTION**

Chairman Keiser said the committee will be conducting a two-day meeting with the committee reviewing two cases on each day. He said the first day will be conducted in Grand Forks and the second day will take place in Fargo.

Chairman Keiser reviewed the procedure that will be followed to review the injured employees' cases. For all committee case reviews, the committee members had an opportunity before the meeting to review the injured employees' Workforce Safety and Insurance (WSI) records. Additionally, a representative of WSI is available in the room to access the injured employees' records electronically if the need arises during the meeting. He said if at any point in the meeting a committee member would like to view the injured employees' 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 employees to present their cases for review.

Chairman Keiser called on Mr. Chuck Kocher, WSI Office of Independent Review (OIR), to assist the injured employees in presenting their cases for review by the committee. Mr. Kocher distributed to committee members a binder containing information prepared by WSI. He said the information in the binder includes a case summary of each of the four injured employees' records as well as a statement of the issues for review by the committee.

#### **FIRST CASE REVIEW**

##### **Case Summary**

The first injured employee presenting a case for review was Mr. Kenneth L. Wolf, Cavalier. Mr. Kocher provided a summary of Mr. Wolf's case. He said

Mr. Wolf was injured on August 19, 2005, while working as chief of police for the city of Cavalier. He said Mr. Wolf sustained multiple gunshot wounds to his lower torso while attempting to apprehend a suspect. Workforce Safety and Insurance accepted liability for the injury and benefits were paid accordingly.

Mr. Kocher said on November 7, 2005, Mr. Wolf was treated by his physician for the evaluation and management of neutrophilia, a blood disorder related to an elevated white blood cell count. The physician noted Mr. Wolf had had a persistently elevated white blood cell count since his gunshot wound. Additionally, the physician opined that Mr. Wolf's neutrophilia may be due to smoking and dental carries.

Mr. Kocher said on April 4, 2006, WSI issued a notice of decision denying benefits for medical services Mr. Wolf received on October 31, 2005, for the treatment of neutrophilia, a condition determined to be unrelated to Mr. Wolf's workplace injury. He said in a letter dated April 10, 2006, a different physician indicated that there had been no definitive ideology for Mr. Wolf's elevated white blood cell count. The second physician indicated Mr. Wolf's elevated white blood cell count was related to his injury due to the fact there is no other appreciable cause for his elevated white blood cell count, and the only other factor that would play into this would be his gunshot wounds.

Mr. Kocher said that in a letter dated April 18, 2006, a third physician noted that Mr. Wolf has had an elevated white blood cell count in the past, but was of the opinion Mr. Wolf's current elevated white blood cell count since his accident was more likely the result of that injury.

Mr. Kocher said that on April 28, 2006, Mr. Wolf filed a written request for reconsideration of WSI's April 4, 2006, notice of decision denying benefits for medical services.

Mr. Kocher said on August 8, 2006, Mr. Wolf was seen by a physician for an independent medical evaluation (IME). He said this IME physician opined that Mr. Wolf's elevated white blood cell count was unrelated to the gunshot wounds or any deep-seated infection or inflammation. The IME physician noted that Mr. Wolf had not had any signs or symptoms of any deep-seated infection, inflammation, blood disorder, or other pathology related to any elevated

white blood cell count. The IME physician noted documentation in the medical records that Mr. Wolf's white blood cell count had been elevated since 2003.

Mr. Kocher said on October 2, 2006, WSI issued an order denying specific benefits indicating that the greater weight of the evidence did not indicate that Mr. Wolf's neutrophilia was caused by his work injury. He said that on October 13, 2006, Mr. Wolf requested assistance from OIR, and the advocate assigned to the case reviewed the records and, in conjunction with WSI, offered a stipulated settlement to resolve the dispute by paying for one-half of the out-of-pocket expenses associated with the denied bills. He said Mr. Wolf denied the settlement offer as he felt the issue of the high white blood cell count was a direct result of the work-related injury. On March 5, 2007, he said, OIR issued its certificate of completion with no change to the order.

Mr. Kocher said that on March 8, 2007, Mr. Wolf requested an administrative hearing on the issue of the denial of the specific benefits. He said on June 14, 2007, a hearing was held before an administrative law judge, and on July 31, 2007, the administrative law judge issued her recommended findings of fact, conclusions of law, and order indicating the order denying specific benefits should be affirmed. She concluded that Mr. Wolf had failed to establish by a preponderance of the evidence that his medical care related to the treatment of neutrophilia was related to his work injury.

Mr. Kocher said Mr. Wolf did not appeal WSI's order of August 23, 2007, adopting the recommended findings of fact, conclusions of law, and order.

Mr. Kocher said that as a result of Mr. Wolf's work injuries, Mr. Wolf brought a civil action and entered a settlement awarding him a total of \$150,000. He said in accordance with North Dakota Century Code (NDCC) Section 65-01-09, WSI was subrogated to the rights of the injured employee to the extent of 50 percent of the damages recovered, to a maximum of the total amount WSI paid or would otherwise pay in the future in compensation and benefits from Mr. Wolf. He said that after subtracting attorney's fees and costs from WSI's subrogation interests of 50 percent, WSI was reimbursed \$56,215.86.

Mr. Kocher said that since his injury, Mr. Wolf has returned to work for Cavalier County in a modified position as a city administrator. He said that because Mr. Wolf's postinjury employment earnings are less than his preinjury earnings, Mr. Wolf will be eligible for partial disability benefits for a period not to exceed five years.

### Issues for Review

Chairman Keiser called on Mr. Kocher and Mr. Wolf to address the issues Mr. Wolf would like the committee to consider.

Mr. Kocher said in assisting Mr. Wolf, the following three issues were raised:

1. The denial of payment to medical facilities for the treatment of neutrophilia. He said Mr. Wolf believes the elevated white blood cell

count is a direct result of the injury sustained to his body from the gunshot wounds.

2. Workforce Safety and Insurance should be required to pursue its own legal action against a responsible third party instead of requiring the injured employee to bring the civil action. Mr. Wolf indicated that if the injured employee brings the civil action, WSI should allow the injured employee to retain the entire monetary award for the pain and suffering endured.
3. The partial disability benefits should not be limited to a five-year period, but, instead, should be based upon the injured employee's physical ability or inability to sustain the preinjury income level.

Chairman Keiser requested that WSI provide the committee members with a copy of Mr. Wolf's laboratory reports reflecting his elevated white blood cell count.

In response to a question from Representative Keiser, Mr. Wolf said he never met the physician who performed his IME, as the physician only reviewed Mr. Wolf's medical records and file.

Representative Keiser and Senator Hacker pointed out the term "independent medical evaluation" is deceiving because it leads a person to believe there will be a physical examination that takes place.

Mr. Wolf said that during the IME process, he had a question for the physician, but he was not afforded the opportunity to question the physician. He said that was a big disappointment for him.

In response to a question from Representative Keiser, Mr. Wolf said the IME physician first asserted that Mr. Wolf's neutrophilia was not related to his work injuries. However, at the administrative hearing, the IME physician's opinion changed and he instead indicated the level of the white blood cells might have changed as a result of the injury but this increase was just temporary.

In response to a question from Representative Keiser, relating to the issue of subrogation, Mr. Wolf said he recalled receiving a letter from the Attorney General or WSI indicating it would be appropriate for Mr. Wolf to not pursue a civil action. However, Mr. Wolf decided to pursue the civil action anyway. Representative Keiser requested that WSI provide the committee members with a copy of the letter.

In response to a question from Representative Amerman, Mr. Wolf said his understanding of the state's subrogation law is WSI may take up to 50 percent of an injured employee's award because WSI has paid benefits that equal or exceed 50 percent of the civil award.

In response to a question from Senator Hacker, Mr. Wolf said WSI did not play a role in the civil suit and to his knowledge was not involved in any way.

In response to a question from Senator Wanzek, Mr. Kocher said in the case of receipt of partial disability benefits, an injured employee's cash benefits stop if the injured employee's earnings meet or exceed the preinjury earnings.

Senator Wanzek said in the case of Mr. Wolf, a full-time law enforcement officer, it would seem that the presumptive clause might be relevant in his case. He said the presumption would seem appropriate because law enforcement officers provide a special service to the public.

Senator Hacker said he presumes the presumptive clause for firefighters and law enforcement officers is intended for situations under which the cause of a workplace injury is less clear. However, in the case of a gunshot wound, the cause is clear.

In response to a question from Representative Amerman, Mr. Wolf said at the administrative hearing level he represented himself and did not appeal to district court. Additionally, he said, his only contact with the physician who did the IME was at the administrative hearing at which the physician participated by telephone.

In response to a question from Representative Keiser, Mr. Wolf said WSI never told him why the five-year limit is in place for the partial disability benefits. However, he said, he assumes the five years are intended to allow him to transition back into the workplace following his injury. But, he said, he feels like he is being penalized because he was injured. He said he does recognize how fortunate he has been that Cavalier County has been so supportive and has hired him in a new position. He said the reality is in two and one-half more years he will not have reached his preinjury earning capacity.

Mr. Wolf said he is currently employed by Cavalier County as a city administrator and the salary for this position is less than it was for his position as chief of police. He said following his injury he did participate in vocational rehabilitation through services provided by CorVel Corporation. He said in July 2006 he returned to work as a police officer, thereby ending his vocational rehabilitation program. He said at the time he returned to his preinjury employment, the nerve blocks he was receiving as part of his medical treatment were successful in treating the pain. However, he said, less than one week after returning to work as a police officer, the nerve blocks wore off and he has not been able to work as a police officer since that time.

Mr. Wolf said the gunshot wounds damaged his sciatic nerve and there is nerve damage in his leg. He said he experiences significant pain in his left femur and in his hip. He said the physicians' opinions differ regarding the exact cause of pain.

In response to a question from Representative Amerman, Mr. Wolf said every two weeks he receives a check from WSI in the amount of \$532, which reflects 66 and 2/3 of the difference between his preinjury earnings and his current earnings.

### **Workforce Safety and Insurance**

Chairman Keiser called on Ms. Anne Green, WSI, to provide testimony regarding the issues raised by Mr. Wolf.

### **Preexisting Condition**

Ms. Green first addressed the issue of WSI benefits for Mr. Wolf's blood disorder. She said the basis for denial of these services was that the blood disorder was a preexisting condition with no medical opinion linking the condition to the work injury.

In response to a question from Representative Keiser, Ms. Green said if there is a preexisting condition and a work injury substantially worsens that condition, then the worsening condition is compensable by WSI.

Ms. Green said it is a normal reaction for an individual's white blood cell count to increase following a gunshot wound. However, typically that count will return to normal.

In response to a question from Representative Keiser, Ms. Green said in the case of Mr. Wolf, there was no clear ideology for his elevated white blood cell count.

In response to a question from Senator Hacker, asking how the state's workers' compensation law would address the situation under which a preexisting condition was undiscovered until the work injury, Ms. Green said WSI does not compensate for preexisting conditions discovered at the time of injury.

In response to a question from Senator Hacker, Ms. Green said in the case of Mr. Wolf, she cannot speculate on why WSI offered 50 percent coverage for the blood disorder-related medical bills. However, the offer could reflect that WSI was in a position in which it had to make a tough call.

Senator Hacker said in a situation like Mr. Wolf's, in which a physician prescribes treatment at the time of injury and physicians do not know of any preexisting medical conditions, it seems reasonable for WSI to cover the treatment.

Ms. Green said issues surrounding preexisting conditions are oftentimes not black and white. She said after speaking to the WSI claims analyst, she learned that at the time of the decision the claims analyst made a decision that the bill was "primarily for a blood disorder" and was therefore denied. However, she said, if the claims analyst had determined the bill was primarily for a gunshot wound, the services would have been paid by WSI. She said the tie goes to the worker.

Mr. Wolf said in looking at the medical bills WSI denied, one of the items that was denied was an x ray of his bullet wound. He said to have this bill denied is very frustrating. He said two and one-half years following the injury WSI has changed its position and is now paying for the x rays. He said his claims analyst reported the code on the billing indicated the x ray was for a blood disorder not the gunshot wound. He said a medical records review would clearly show the records are related to a gunshot wound and not the blood disorder. He said the x rays taken in February 2006 were denied until June 2008.

In response to a question from Senator Hacker, Ms. Green said in reviewing Mr. Wolf's records she saw that WSI went back and reversed payment on medical bills that had been previously paid.

Representative Keiser said in reviewing Mr. Wolf's medical records there appears to be three preinjury laboratory results showing an elevated white blood cell count. He said at the time of the work injury Mr. Wolf once again experienced an elevated white blood cell count. However, he said, it seems that sciatic nerve damage and significant pain will result in an increase white blood cell count, as this is the body's natural reaction to pain. Therefore, he said, it seems possible that the elevated white blood cell count could be attributed to Mr. Wolf's work injury.

Ms. Green said pain is very subjective and difficult to measure because different people experience pain differently. She said WSI is in the position of looking at the language of the statute and reviewing the medical records. She said in this case the medical records indicated there was a preexisting condition and there was no evidence linking this preexisting condition to the work injury.

Mr. Wolf provided committee members with a handout that specified the 13 denied medical charges totaling \$7,370 as well as a timeline of his white blood cell counts beginning with the August 19, 2005, gunshot wounds through August 4, 2008. Copies of this handout are on file in the Legislative Council office. He said the elevated white blood cell counts reflect periods of high pain relating to his work injury. Specifically, he said, when he was undergoing physical therapy, initially he was making great progress; however, toward the end he experienced great pain and very little progress. Ultimately, he said, his physician directed him to back off of physical therapy and stay off his leg. Mr. Wolf said as his leg pain increases his white blood cell count increases as well, and, accordingly, as his pain decreases his white blood cell count decreases.

Mr. Wolf said initially his physicians were looking for an infection as a cause of his elevated white blood cell count. However, he said, when his physicians came to realize there was no infection, WSI began denying coverage for the blood disorder.

Mr. Wolf said overall it is his strong belief that following his work injury his elevated white blood cell count is related to pain, and preinjury his elevated white blood cell count was related to illness he was experiencing at the time the tests were run.

In response to a question from Representative Dietrich, Mr. Wolf said initially his doctor opined that his elevated white blood cell count was related to a dental infection. However, following completion of his dental work, the white blood cell count went up again and ultimately his physician opined that the elevated white blood cell count was not related to his dental health.

Representative Keiser expressed the same concern as Senator Hacker, that there are problems associated with an injured employee receiving immediate acute health care and then being denied coverage after the fact.

Ms. Green said she does not see this happening very frequently, as claims analysts are intuitive, bright

people making the best decisions they can given the information they have.

Representative Keiser said the blood disorder issue raised by Mr. Wolf reminds him of a similar case the committee reviewed during the 2005-06 interim. He said in last interim's case a firefighter received a "false-positive" diagnosis for a heart condition, which was later determined to be inaccurate. He said in the case of an injured worker, that injured worker never really has an opportunity to refuse treatments based upon the knowledge the treatment will not be covered by WSI.

Ms. Green requested that the committee be careful to avoid a chilling effect by which an analyst becomes predisposed to being too cautious in determining whether to initially pay a bill.

Representative Keiser recognized that the faster you treat an injured employee the better the result.

Senator Hacker said a claims analyst should not be slowing treatment and should not also be approving claims with knowledge that the bill is not related to a workplace injury.

Representative Keiser said this issue of preexisting conditions raised by Mr. Wolf is very important and the committee should pursue the matter further. He said it makes sense to him that upon WSI receiving information that there is a preexisting condition, WSI would deny future benefits. However, it does not make sense to him that WSI would then go back and reverse previously paid benefits.

In response to a question from Representative Amerman, Mr. Wolf said in his case once WSI reversed its earlier approval and ultimately denied coverage for his blood disorder-associated bills, the North Dakota Public Employees Retirement System covered these bills, with the exception of the associated deductibles and copayment.

Representative Keiser said in reviewing Mr. Wolf's timeline of white blood cell counts, it appears the laboratory results from before the injury were taken when Mr. Wolf was ill, and, therefore, it hardly seems to definitively rule the cause of the elevated white blood cell counts. He said after Mr. Wolf's injury, it seems clear that there were triggering events resulting in the elevation. He said it seems more likely that the increased stress and pain resulted in Mr. Wolf's increased white blood cell counts.

Chairman Keiser called on Mr. Bruce Furness, Interim Executive Director and CEO, WSI, for comments regarding Mr. Wolf's case. Mr. Furness said the concept of directing WSI to pay for a condition until it is determined to be a preexisting condition makes sense; however, under the surface, this issue is more complicated. He said the committee needs to remember in reviewing these cases "the tie goes to the worker."

Senator Wanzek said if we were to review the medical records of all the participants in today's committee meeting, it is likely the medical records would reflect an elevated white blood cell count whenever somebody is not feeling well or is not healthy. He said therefore, every one of these people

would be subject to a ruling that an elevated white blood cell count is a preexisting condition. He said it seems like there ought to be a way to create some sort of presumption working in favor of the injured employee in situations like this.

### Subrogation

In response to a question from Representative Keiser, regarding WSI subrogation law, Ms. Green said that as a matter of policy, WSI encourages injured employees to pursue civil actions. She said unlike a private insurance company, workers' compensation coverage does not have a duty to defend an insured worker. She said NDCC Section 65-01-09 is a compromise by which WSI is limited to a maximum of 50 percent of an award. She said by allowing the injured employee to keep the other 50 percent of an award, the law acts as an incentive to encourage injured employees to bring third-party actions. She said as the subrogation law relates to Mr. Wolf, the WSI benefits paid to Mr. Wolf as of this date have exceeded the 50 percent WSI took from the civil action.

Ms. Green said that in comparing North Dakota's workers' compensation subrogation laws to other states', most other states take more than North Dakota. She said additionally, a private insurer typically takes 100 percent of the civil award if the insurance company's costs equal or exceed the civil award.

Ms. Green said she is aware of only two cases in which WSI has affirmatively withdrawn and thereby forfeited its position to recoup a portion of the civil award. She said when WSI affirmatively withdraws it is typically because of a low likelihood of success of the civil action. She said another incentive for injured employees to bring a civil action is that WSI pays the injured employee's costs and attorney's fees associated with a civil action, regardless of whether the injured employee actually prevails in his or her civil action.

Ms. Green said that in the case of subrogation, typically WSI involvement is that the claims analysts recognize there might be third-party liability and therefore refers the issue to a WSI paralegal who typically contacts the injured employee to discuss the issue.

Senator Hacker said given the information he has received today, it appears WSI does not take a very affirmative role in third-party actions.

Ms. Green said she disagrees with Senator Hacker's observation. She said WSI is providing support to private attorneys and typically there is significant correspondence between WSI and a private attorney during the course of a civil action. She said perhaps an injured employee would benefit from being better informed of WSI's role in civil actions.

Mr. Wolf said now that he has reviewed the letter he received from WSI, he can still remember that his impression was that WSI was not very supportive of him bringing a third-party action. He said when he

received the letter he thought WSI was telling him to move forward with caution. Additionally, he said, he is not aware of WSI providing his private attorney with any type of support other than providing his medical records. He said he does not recall there having been any regular contact between WSI and his private attorney.

In response to a question from Representative Amerman, Ms. Green said she is only aware of a single instance in which WSI brought a civil action on its own, without the participation of the injured employee.

Representative Keiser posed the question of whether it is possible WSI is losing out on subrogation opportunities because private attorneys will not take the cases unless there appears to be a high likelihood of a large award.

Ms. Jodi Bjornson, WSI, stated WSI and its attorneys are very experienced and well-versed in the area of subrogation, and she thinks they encourage injured employee to bring civil actions. However, she recognized that a recent consultant report indicated WSI could improve its system by better training WSI claims analysts to make better referrals to paralegals for subrogation claims.

Representative Keiser said he agrees with Mr. Wolf and that if he had received a letter like the one WSI sent to Mr. Wolf, he would not have felt supported or encouraged by WSI to bring a civil action.

Ms. Bjornson said the reality is that if a third-party action is brought, a private attorney represents the injured employee as well as WSI and for that reason WSI wants the private attorney to succeed.

Senator Hacker said improvements could be made by better informing an injured employee about the subrogation process. He said a possible improvement might be that if WSI is affirmatively involved, WSI could receive up to 50 percent subrogation. But, he said, if WSI is not affirmatively involved in the action, WSI would take a lesser amount.

Ms. Bjornson said it sounds like the committee members and WSI are on the same page and seeking to help the injured employee as well as to help the WSI fund by working and looking for ways to improve the system. However, she said, WSI needs to remain aware of ethical concerns that may arise when WSI encourages an injured employee to bring a civil action.

Representative Keiser said that in a certain respect WSI is perceived to be the injured employee's attorney because in North Dakota WSI is the exclusive remedy for workers' compensation injuries.

Senator Wanzek said private attorneys act as gatekeepers and only bring valid cases with high likelihood of success.

In response to a question from Representative Keiser, Ms. Green said in the case of Mr. Wolf, the parties reached a settlement before trial and in that settlement the award did not distinguish between the portion of the award intended for medical benefits, lost wages, and pain and suffering.

In response to a question from Senator Hacker, Ms. Green said that under North Dakota law, WSI is entitled to receive up to 50 percent subrogation of any recovery, regardless of how that recovery is structured or designated for medical expenses, lost wages, and pain and suffering.

Mr. Wolf said he agrees with Representative Keiser that in essence WSI is an insurance company, and he thinks WSI rode on his shirrtails in getting 50 percent subrogation. He said in his case WSI was not an active participant and the facts did not change or become more favorable just because the injured employee initiated the action instead of WSI initiating the action. He said in the case of the subrogation issue he feels like he has been victimized two times--first he was shot, and then WSI took 50 percent of his award without doing any of the work in the civil action.

Mr. Wolf said the bottom line is that he understands North Dakota's law, but he questions why WSI does not bring civil actions on behalf of injured employees.

### Temporary Partial Disability

Ms. Green said that temporary partial disability benefits are addressed under NDCC Section 65-05-10. She said these benefits are meant to be a bridge, anticipating the injured employee will be able to return to full-time employment or after a five-year period will be able to work up to the preinjury wages. However, she said, in some instances the injured employee will not be able to reenter the workforce and reach preinjury wages.

Ms. Green said in the case of Mr. Wolf, following his work injury he was not able to return to work as a police officer, but over the next five years he will have the opportunity to grow his skills and experience.

Representative Keiser said that under the current system the reality is that Mr. Wolf will not recognize a pay raise for five years and that is just not right. He said the committee should look into ways to address this inequity.

Senator Wanzek said it seems unfair to freeze an injured employee's wages at the amount they were at on the date of injury.

Senator Hacker said an amendment to this provision of law would likely have a fiscal impact. Ms. Green said that if the committee were to pursue this issue, WSI could provide a fiscal note.

Representative Keiser proposed that the committee consider a bill draft to address the partial disability benefit issue raised by Mr. Wolf. He said that he will work with the Legislative Council staff and WSI to bring a bill draft forward for the committee to consider.

Mr. Wolf thanked the committee for the opportunity to present his case face-to-face. He said he will continue to follow the committee's activities.

Senator Wanzek complimented Mr. Wolf on his willingness to appear before the committee as well as his candor in addressing these very difficult questions.

## SECOND CASE REVIEW

### Case Summary

Following a dinner recess, the committee reviewed the case of Mr. James Bechtold, Grand Forks. Mr. Kocher provided a summary of Mr. Bechtold's case. He said in October 1975 Mr. Bechtold filed an application for workers' compensation benefits due to an injury to his lower back. He said WSI accepted liability for this injury and paid the associated medical expenses and disability benefits.

Mr. Kocher said Mr. Bechtold received wage-loss benefits through April 24, 1977, during which time Mr. Bechtold had surgery and was diagnosed with a herniated disk at L5-S1. He said Mr. Bechtold's wage-loss benefits were terminated in April 1977 because WSI deemed him employable and capable of performing gainful employment. He said Mr. Bechtold underwent further medical evaluation in the late 1980s and early 1990s during which time his medical condition deteriorated. He said Mr. Bechtold underwent a second surgery in May 1990, at which time compressive surgery was performed at L5 to the sacrum. He said WSI wage-loss benefits were reinstated on July 10, 1990, and paid continually through May 5, 1994, at which time Mr. Bechtold was declared permanently and totally disabled.

Mr. Kocher said on December 30, 2003, WSI issued a notice of intention to discontinue benefits, claiming Mr. Bechtold had willfully and intentionally violated NDCC Sections 65-05-33 and 65-05-08, relating to the filing of a false claim or false statement. He said this notice indicated all future workers' compensation benefits would be terminated after July 20, 2004, and notified Mr. Bechtold that an overpayment of benefits had occurred as a result of the willful false statements. Mr. Kocher said the WSI notice stated "WSI received evidence you have willfully and intentionally made material false statements and misrepresentation with respect to your physical condition, capabilities, and activities during your Independent Neurologic Examination performed on May 11, 2002." He said the notice went on to state "WSI received evidence you willfully and intentionally made material false statements and misrepresentations with respect to your physical condition, capabilities, and activities during your functional capacity evaluation performed on July 24, 2002 and July 25, 2002."

Mr. Kocher said during February 2004 Mr. Bechtold submitted a request for reconsideration stating the reasons why he did not commit fraud as indicated by WSI. He said on March 8, 2004, WSI issued an order denying the benefits and an order for repayment. He said on April 7, 2004, Mr. Bechtold requested the assistance of OIR, and on May 13, 2004, OIR closed the file without any changes to the order.

Mr. Kocher said on June 13, 2004, Mr. Bechtold requested an administrative hearing relating to the order denying further benefits and the order for repayment. He said Mr. Bechtold used the services of an attorney to represent him at hearing.

Mr. Kocher said on January 13, 2006, the administrative law judge submitted his initial recommended findings of fact, conclusions of law, and order, stating "Although the greater weight of the evidence of record shows that James Bechtold willfully made false statements to secure payment of benefits and willfully misrepresented his medical condition within the meaning of NDCC Section 65-05-03, there is insufficient evidence to establish that any false statement or misrepresentation or any combination of any false statement and a misrepresentations, was material so as to either cause WSI to pay him any workers' compensation benefits in error, or such as could have mislead WSI for a determination of his claim for workers' compensation benefits, and accordingly the order denying further benefits and order for repayment issued March 8, 2004, by Workforce Safety and Insurance, shall be, and it hereby is, vacated and set aside."

Mr. Kocher said on August 8, 2006, the administrative law judge submitted his additional recommended findings of fact and conclusions of law, stating "the greater weight of evidence of record showing that Mr. James Bechtold willfully, intentionally, made false statements to Ross E. Pettit, MD, concerning his ability to work and misrepresented his physical ability in that respect for the purpose of influencing Dr. Pettit for the evaluation of his physical condition, and that his false statements and misrepresentations were sufficiently material for the forfeiture of his future workers' compensation benefits because they could have misled Dr. Pettit and, in turn, Workforce Safety and Insurance to consider his physical abilities unchanged and perceived further inquiry into his ability to participate in vocational rehabilitation to return to substantial gainful employment; therefore, its order issued March 8, 2004, forfeiting all additional workers' compensation benefits to which he may be entitled after January 20, 2004, for a work injury he sustained on October 7, 1975, shall be, and it hereby is, affirmed. There being insufficient evidence showing that any false statement or misrepresentation was sufficiently material to cause Workforce Safety and Insurance to pay James Bechtold any workers' compensation benefits in error, its order issued March 8, 2004, for repayment shall be, and it hereby is, vacated and set aside."

Mr. Kocher said Workforce Safety and Insurance adopted the recommended findings of fact and conclusions of law as recommended by the administrative law judge. He said although Mr. Bechtold, acting pro se, attempted to appeal the administrative decision, the district court dismissed the appeal for failure to follow appropriate procedure. The administrative decision became final.

### Issues for Review

Chairman Keiser called on Mr. Kocher and Mr. Bechtold to address the issues Mr. Bechtold would like the committee to consider. Mr. Kocher said the North Dakota Century Code sections at issue

appear to be Section 65-05-33, relating to filing false claims or false statements, as well as Section 65-05-08, relating to disability benefits.

In response to a question from Representative Keiser, Mr. Bechtold said the cause of the exacerbation of his disability was an injection of the medication in his spinal cord. He said the medication was not approved by the Food and Drug Administration for this use. He said WSI has never been willing to acknowledge the resulting arachnoiditis.

Mr. Bechtold said in addition to his concerns relating to the arachnoiditis, caused by improper treatment of his work injury, he is also concerned about his inability to cross-examine his accuser as it relates to fraud claims; his concern that WSI did not send him to the appropriate specialist for treatment and evaluation; the state's workers' compensation system takes too much time, and in his case he lost his house while going through the appeal process; the system denied him due process in that he was unable to afford the costs associated with getting the correct specialist to his hearings, his mail has been stolen, and his records have been withheld by WSI; there has been fraud and distortion committed by WSI; and it is improper that WSI never brought a civil action against his medical provider for the medical malpractice committed.

Mr. Bechtold said as a result of his experience with the system, his whole life has been ruined and his body has been ruined. He said as he has objected to his treatment by WSI, his statements have been taken out of context and misstated.

In response to a question from Representative Keiser, Mr. Bechtold said the fraud allegations began when WSI alleged Mr. Bechtold was doing small chores around his house, such as moving a wheelchair, installing a garage door, and performing small painting projects. He said when an injured employee is faced with fraud charges, there is no meaningful way to fight these accusations. Additionally, he said, he does not think WSI applies its laws evenly to all injured employees. He said, generally, what he is seeking is that there be a change in the law so that independent medical examiners and claims adjusters should be penalized when they act improperly. He said there needs to be some accountability in the system.

In response to a question from Senator Wanzek, Mr. Bechtold said medical malpractice committed by a treating doctor led to his major disability. He said not only did WSI fail to pursue a civil malpractice action, but private attorneys are not willing to get involved in WSI cases and are therefore not willing to take civil cases in which WSI is a party.

### Workforce Safety and Insurance

Chairman Keiser called on Ms. Bjornson to provide testimony regarding the issues raised by Mr. Bechtold.

Ms. Bjornson reviewed the statutory time requirements for administrative appeals. She said that an appeal must be filed within 30 days after

notice of an order is given. She said Mr. Bechtold's administrative hearing process was more complicated in that there were two hearings. She said between the first and second hearings, WSI received the administrative law judge's recommended order, and the injured employee and his attorney received additional evidence WSI was going to consider. She said that upon receipt of this new evidence, the administrative law judge determined that although the misrepresentation was an intentional false statement, the false statement was not material.

Ms. Bjornson said there are two levels to the workers' compensation fraud test. She said the first level is the determination whether benefits were paid in error based on a false statement, and if this is found, WSI is allowed to recover benefits. She said the second level is when it is determined there was a false statement that could have resulted in payments of benefits in error, upon which WSI is allowed to terminate future benefits but not recover past benefits.

Ms. Bjornson said as it relates to Mr. Bechtold's expert witness, the administrative law judge ruled the expert was beyond the scope of the hearing and therefore did not allow that expert's testimony.

Ms. Bjornson said in the case of Mr. Bechtold, the fraud investigation was initiated as a result of receipt of a tip. She said according to Mr. Bechtold's medical records, including statements by physicians and the functional capacity evaluation, Mr. Bechtold was limited to doing sedentary activities. However, she said, WSI received video showing physical activity for sustained periods of time.

Mr. Bechtold said he does not deny that he did do some physical activity for sustained periods of time; however, the video was taken out of context. He said his limitations are such that he is not able to perform sustained activities at an employer's beck and call because some days he feels better than others, but when he is having a good day he is able to perform some of these activities.

In response to a question from Senator Hacker, Ms. Bjornson said WSI acts on fraud tips based on credibility. She said oftentimes these tips do result in investigations.

In response to a question from Representative Keiser, Ms. Bjornson said in reviewing the videotapes compiled as part of the fraud investigation, the physical activity viewed significantly deviates from Mr. Bechtold's stated limitations. She said she does have copies of the tapes, which the committee members can view if they are interested.

In response to a question from Senator Wanzek, Mr. Bechtold said the fraud investigation was faulty because the investigator hired by WSI was actually one of Mr. Bechtold's tenants. He said the investigator entrapped him and tricked him into performing repairs on her housing unit.

Senator Hacker said it sounds like there could be possible entrapment when a tenant asks the landlord to come scrape paint and then tapes the landlord scraping the paint in order to support a fraud claim. He said in this case it sounds like there is an odd

relationship between the injured employee, the fraud investigator, and WSI.

Senator Hacker said the WSI Fraud Unit should be held to a standard to ensure accurate investigations that are as objective as possible.

Ms. Bjornson said in the case of Mr. Bechtold's investigation, WSI contracted with a private investigator and to that extent the investigator was acting as WSI's agent. She said that due to geographical limitations, WSI does contract for some investigation services.

Ms. Bjornson said the issue of arachnoiditis was considered by the administrative law judge, and the transcript of the administrative hearing indicates there was an opportunity for cross-examination by the injured employee's attorney. Ultimately, Ms. Bjornson said the administrative law judge determined it was not necessary to diagnose arachnoiditis, but did recognize the associated symptoms.

Representative Keiser said the actual diagnosis of arachnoiditis might be relevant if arachnoiditis is known to result in periods of disability and periods of ability.

Ms. Bjornson said regardless of the diagnosis of arachnoiditis, Mr. Bechtold is high-functioning and employable.

Mr. Bechtold said he has medical testimony that he is unemployable because he cannot be at the beck and call of an employer.

Ms. Bjornson said at the administrative hearing the physician did not provide employability testimony, but only provided a diagnosis. Additionally, she said, the physician did not watch or testify regarding the fraud videos.

Mr. Bechtold said he thinks injured employees should be able to establish fraud committed by WSI.

In response to a question from Representative Keiser, regarding medical malpractice performed in the treatment of a work injury, Ms. Bjornson said medical malpractice becomes a subrogation issue and requires the injured employee to bring a third-party action.

In response to a question from Representative Amerman, Ms. Bjornson agreed that it is possible to distinguish between the subrogation case of Mr. Wolf and the subrogation case of Mr. Bechtold. However, she said, in the case of medical malpractice that exacerbates a work injury, WSI covers the expenses related to the medical malpractice as well as the disability resulting from the medical malpractice.

Mr. Bechtold said that ultimately he stands by his reports to his physicians and he did not intentionally make any misstatements. He said he does not think he was performing gainful employment and the fraud videos are deceiving.

## **THIRD CASE REVIEW**

### **Case Summary**

Mr. Kocher provided a summary of Mr. David T. Moser's case. He said Mr. Moser sustained a bilateral wrist injury on December 15, 1999, while working for a Stop N Go store. He said WSI accepted liability for

Mr. Moser's work-related injury and paid the associated medical expenses and disability benefits.

Mr. Kocher said on June 29, 2001, Mr. Moser filed a reapplication for benefits, indicating that he was no longer able to work due to ongoing pain and discomfort. Workforce Safety and Insurance found him eligible for wage-loss benefits and Mr. Moser was paid temporary total disability benefits from June 21, 2001, through April 11, 2006, at which time he was declared permanently and totally disabled. Mr. Kocher said that Mr. Moser received permanent total disability benefits through February 29, 2008, at which time he came under the retirement presumption law and his permanent and total disability benefits ceased. He said upon cessation of the permanent total disability benefits, Mr. Moser became eligible to receive additional benefits payable.

Mr. Kocher said Mr. Moser's Social Security retirement benefits are approximately \$1,475 per month and his additional benefit payable payments are \$40.65 per week. He said the additional benefit payable payments will continue through November 9, 2014, at which time they will cease.

Mr. Kocher said additional benefit payable benefits are calculated using 15 percent of the injured employee's previous weekly wage amounts and the timeframe represents the length of time the injured employee received wage-loss benefits from WSI. Additionally, he said, additional benefit payable benefits are not offset due to receipt of Social Security retirement benefits.

Mr. Kocher said on March 18, 2008, WSI issued an order notifying Mr. Moser that his permanent and total disability benefits were discontinued effective February 29, 2008, as he began receiving Social Security retirement on March 1, 2008.

Mr. Kocher said Mr. Moser did not appeal the order and as such it became final.

### Issues for Review

Chairman Keiser called on Mr. Kocher and Mr. Moser to address the issues Mr. Moser would like the committee to consider. Mr. Kocher said in assisting Mr. Moser he understands Mr. Moser's primary issues relate to the retirement presumption and additional benefit payable law under NDCC Sections 65-05-09.3 and 65-05-09.4.

Mr. Moser distributed a letter to committee members, outlining the issues he would like the committee to consider ([Appendix B](#)). He said because of the reduction of his WSI benefits upon reaching the age of 65 years and 10 months, he has experienced severe financial hardships. He said he does not have retirement or pension funds to fall back on and due to the financial hardship, he may end up losing his home, which was purchased in early 2000.

Mr. Moser said he thinks the solution to the problem he has encountered would be a WSI case-by-case review to allow an injured employee to receive an extension to WSI benefits until the age of 70 in order to accommodate an individual's financial situation.

The committee members and Mr. Moser discussed the issue of what Mr. Moser's preinjury wages were. The figures stated by Mr. Moser were higher than the figures on record with WSI.

In response to a question from Senator Hacker, Mr. Moser said he was never working and receiving Social Security benefits at the same time.

In response to a question from Representative Amerman, Mr. Kocher said there is a difference between the setoff for Social Security disability, which is 50 percent, and Social Security retirement, which is 40 percent.

### Workforce Safety and Insurance

Chairman Keiser called on Mr. Tim Wahlin, WSI, to provide testimony regarding the issues raised by Mr. Moser.

Representative Keiser requested that WSI provide the committee members with a table of dollar amounts related to Mr. Moser's case.

Mr. Wahlin said that under the state's workers' compensation system, an injured employee may receive temporary partial disability benefits when the injured employee is able to return to work at a lesser capacity; temporary total disability benefits, when the injured employee is unable to return to work at that time; and permanent total disability benefits, when the injured employee is never able to return to work. He said there is a cost-of-living adjustment available for recipients of permanent total disability benefits.

Mr. Moser said he began receiving temporary total disability benefits and then ultimately was reevaluated and determined to be permanently totally disabled.

Mr. Wahlin said that overlapping the issue of workers' compensation benefits is the issue of Social Security disability.

Mr. Wahlin said he believes the additional benefit payable system is working well. He said it is not intended to be a retirement payment, but to address an injured employee's lower Social Security contribution due to workplace injury. He said that approximately 50 percent of the states' workers' compensation systems have some sort of retirement presumption.

In response to a question from Representative Keiser, Mr. Wahlin said there would be a number of pitfalls in changing the system to do what Mr. Moser has requested. He said if there was a case-by-case review exception for the retirement presumption, it would be hard to establish a bright line and, due to anomalies, there would often be unjust results.

Mr. Moser said if WSI was to do a case-by-case evaluation of the retirement presumption, evaluation could be limited to those injured employees who do not have meaningful retirement income or other resources.

### Committee Discussion

Chairman Keiser thanked Mr. Moser for coming before the committee to have his case reviewed. He called on interested persons to comment regarding the issues raised in Mr. Moser's case.

Mr. Sebald Vetter, C.A.R.E., stated that he disagrees with Mr. Wahlin's statement that WSI is not meant to be a retirement system. He said when the state's workers' compensation system was initially created, the system was supposed to allow an injured employee to be set for life, but in 1995 the law changed. He requested the law be returned to its pre-1995 status.

Senator Wanzek and Representative Keiser discussed the issue of what would have happened if Mr. Moser had not received a workplace injury. Representative Keiser said that before the 1995 legislative changes there was no retirement presumption, and an injured employee could continue to receive benefits. Additionally, he said, it appears that had Mr. Moser not received a workplace injury he would have continued working past the age of retirement.

Mr. Moser said that immediately following his workplace injury he used his retirement savings to pay his monthly bills.

Mr. Donnavon Moser, David T. Moser's son, stated that his father's employer did have a pension program for 25-year employees; however, he said, his father was injured before he could reach that length of employment.

Representative Keiser recognized that the issue of the retirement presumption impacts more injured employees than just Mr. Moser.

Senator Wanzek recognized that Mr. Moser's workplace injury stopped his ability to work as well as his ability to accrue a pension. He questioned whether there might be a way to measure the value of this lost opportunity.

Senator Hacker said he agrees that this situation likely occurs to more injured employees than the committee realizes. He said it is not hard to believe that an employee would be injured before a retirement benefit has vested.

Mr. Moser said that if the injury had not occurred he would still be working and he would be able to participate in leisure activities. He said not only has his workplace injury affected his ability to work, but it has greatly impacted his quality of life.

## FOURTH CASE REVIEW

### Case Summary

Mr. Kocher provided a summary of Mr. Dean "Tony" Johannesen's case. He said Mr. Johannesen sustained an injury to his facial bones and mouth on June 23, 2005. He said Mr. Johannesen's claim was accepted and benefits paid accordingly.

Mr. Kocher said on January 10, 2008, Mr. Johannesen underwent a permanent partial impairment (PPI) evaluation by a Fargo physician. On February 4, 2008, he said, WSI issued an order denying PPI benefits because Mr. Johannesen's impairment was less than 16 percent whole body.

Mr. Kocher said Mr. Johannesen did not agree with the 10 percent whole body impairment rating for his left eye, and on February 29, 2008, requested the assistance of OIR. He said on March 12, 2008, OIR

closed his file without any change in the decision and mailed the certificate of completion to Mr. Johannesen.

Mr. Kocher said on April 7, 2008, Mr. Johannesen requested an administrative hearing because he disagreed with the decision of WSI stating "the loss of sight in an eye carries no value and is rated at only 10 percent whole body impairment." He said on May 1, 2008, a hearing officer was assigned to hear Mr. Johannesen's case; however, on June 9, 2008, Mr. Johannesen canceled his hearing so he could appear before this committee.

### Issues for Review

Chairman Keiser called on Mr. Kocher and Mr. Johannesen to address Mr. Johannesen's issues for the committee to consider. Mr. Kocher said in assisting Mr. Johannesen he understands Mr. Johannesen's primary issue relates to the PPI law, which is located at NDCC Section 65-05-12.2.

Mr. Johannesen provided the committee with a copy of written testimony ([Appendix C](#)).

Mr. Johannesen said he objects to WSI's method of determining at what point a PPI award is given, specifically what it called the 15 percent whole body deductible. Additionally, he said, he objects to the law that prohibits injured employees from hiring attorneys on a contingency basis and objects to the statute of limitations on submitting mileage and expense reimbursement claims.

In response to a question from Representative Amerman, Mr. Johannesen said it is his understanding that in 1995 or 1997 a legislative change was made to prohibit injured employees from hiring attorneys on a contingency basis. Ms. Janelle Johannesen, Mr. Johannesen's wife, stated when they were looking for attorneys to represent them, the attorney stated it is not worth their time to take WSI cases due to the low rate of reimbursement. Mr. Johannesen said that when he made arrangements for an administrative hearing, the administrative hearing officer was helpful, but informed him that the administrative hearing process would be limited to determining whether the law was followed, unless new evidence is submitted. The administrative law judge said new evidence would need to be in the nature of an evaluation by another physician which would show something that the existing medical reports did not show. Mr. Johannesen said he learned that doctors must be qualified and certified to do evaluations directed by the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. He said the administrative law judge said WSI should be able to provide him with a list of ophthalmologists qualified to perform these evaluations. He said when he contacted WSI to request this list, it was very reluctant to provide the list to him. He said it was only after he told WSI the administrative law judge said WSI should be able to provide this list, that WSI provided the list to Mr. Johannesen.

Mr. Johannesen said that upon receiving the list of qualified ophthalmologists, there is only one qualified provider in North Dakota, and the other four qualified individuals are located in Texas, Florida, and New Jersey. He said this lack of qualified individuals seems to discourage seeking a second opinion. He questioned whether the limited list would be the same if WSI was seeking a second opinion.

In response to a question from Senator Hacker, Mr. Johannesen said it is likely that he received information regarding the mileage and expense reimbursement in one of his initial letters from WSI; however, he must have overlooked it. However, he said, he takes issue with the fact that his claims analyst never walked him through the process or mentioned reimbursement, even when realizing that his file did not include any claims for reimbursement.

### **Workforce Safety and Insurance**

Chairman Keiser called on Mr. Wahlin to provide testimony regarding the issues raised by Mr. Johannesen.

#### **Permanent Partial Impairment**

Mr. Wahlin stated that North Dakota's PPI system is unique in that it is not based on the earnings of the injured employee. He said in determining the amount of an injured employee's PPI, WSI uses the American Medical Association guide for rating impairments.

Mr. Wahlin said PPI is intended to measure the residual impairment following an injury. He said each body part has a separate rating. Additionally, he said, WSI has an internal audit of each PPI to make sure physicians follow the American Medical Association guide. He said the reality is there are very few doctors in the United States certified to perform PPI evaluations.

Mr. Wahlin said that in determining an injured employee's PPI, it is important to recognize that the actual amputation of an eye differs from an injury to an eye. He said amputations are "scheduled injuries" and differ from the American Medical Association guide. He said in the case of an amputation of an eye, there is a PPI award of approximately \$33,000.

In response to a question from Senator Wanzek, Mr. Wahlin said the American Medical Association guide attempts to objectify the PPI ratings.

Mr. Johannesen said he takes issue with the fact the injured employee has a burden of seeking additional extra testimony to challenge a PPI award outcome.

Mr. Wahlin said that historically WSI has been fairly successful in defending PPI determinations. He said for an injured employee to overcome a PPI determination, it essentially requires a showing that the test was done improperly.

Mr. Wahlin said WSI tries to find physicians in North Dakota who are willing to do PPI evaluations and has affirmatively cultivated these relationships in order to have qualified evaluators in this state.

In response to a question from Representative Keiser, Mr. Wahlin said it is not his sense that the

limited number of physicians qualified to do PPI evaluations is related in any way to the reimbursement, but that instead it is a matter of interest. He said WSI does not have a strict reimbursement schedule for physicians performing PPI evaluations, but instead pays what the market charges.

In response to a question from Representative Amerman, Mr. Wahlin said there is a significant amount of legislative history relating to the 1995 change to the current PPI law.

Chairman Keiser requested that WSI provide history on the 1995 PPI changes.

Mr. Johannesen said in his case he did decide to drop his administrative hearing appeal. He said realistically he would be unable to find an attorney to assist him with the appeal because the award for a PPI of 16 percent is \$3,000. Additionally, he said, he does not think it is reasonable to travel to Texas to get an expert opinion.

In response to a question from Representative Dietrich, Mr. Wahlin said there are a variety of ways WSI cultivates relationships with physicians to perform PPI evaluations. For example, he said, WSI puts on seminars to find out if there are physicians interested in becoming qualified evaluators. He said evaluations for eyes are very specialized and there are very few experts. He said another example of a very specialized impairment is psychological evaluations. He said one element that works to limit the number of qualified evaluators is that other states may use different guides from North Dakota's.

Senator Wanzek said there are very few body parts he values as much as he values his vision. He questioned whether it might be possible to add vision to the schedule of specific injuries.

Mr. Wahlin said in order to add vision to the scheduled list for PPI there would need to be a change in a law.

In response to a question from Representative Amerman, Mr. Johannesen said he is lucky that the Department of Transportation will give him an annual waiver so he can use his commercial driver's license in the state. However, he said, he is required to stay within North Dakota because his commercial license is not valid outside the state and there are federal guidelines that would prevent him from getting an interstate commercial license.

#### **Attorney's Fees**

Mr. Wahlin said NDCC Section 65-02-08 addresses attorney's fees. He said the law is designed to attempt to prohibit attorneys from double-dipping and being paid by the client as well as by WSI. He said in 2000 the Supreme Court decision in *Ash v. Traynor* clarified an injured worker may enter into a fee arrangement with a private attorney, as long as there is no double-dipping.

#### **Statute of Limitation**

Mr. Wahlin said as it relates to the one-year statute of limitation for submitting reimbursement for mileage

and expense claims, the information is in pamphlets provided to injured employees and to the extent a claims analyst does not periodically review the status of reimbursement claims, this is something that should be done. He said the valid reason for having a statute of limitation is because it becomes an administrative nightmare for claims analysts to have an unlimited amount of time for which they have to go back and address reimbursements.

In response to a question from Representative Keiser, Mr. Wahlin said his position is that WSI does not have the flexibility to overlook the one-year statute of limitation related to reimbursement for mileage and other expense claims.

Representative Keiser said the question becomes "What role does the claims analyst have here?"

Mr. Johannesen said at no time did WSI ever call him to initiate communication regarding reimbursement for mileage and other expenses. He said generally speaking, for all elements of this case, he had to initiate communication with WSI.

In response to a question from Representative Dietrich, questioning whether it might be as simple as establishing a checklist for claims analysts to use, Mr. Wahlin said there is a sensitive balance to strike between giving injured employees enough information and giving them too much information.

Mr. Johannesen thanked the committee for the opportunity to present his case for review. He said overall he received good coverage from WSI for his injuries. He said he is not looking to get rich, but it seems like loss of vision should be worth something. He said he understands that any changes in the law would not impact his case, but he does not want this to happen to any other injured employee.

Mrs. Johannesen said she supports the idea of adding vision to the list of scheduled impairments. She said it is possible that there are other body parts that should be added to the special list as well. With his loss of vision, she said, in addition to his physical impairment, her husband also has lost opportunity. She said she questions why other states place more value on eyes and vision than North Dakota does.

### **Committee Discussion**

Chairman Keiser thanked Mr. Johannesen for coming before the committee to have his case reviewed. He invited comments from interested persons relating to issues raised.

Mr. Kocher provided committee members with a copy of an e-mail from Mr. Cade Jorgenson, OIR ([Appendix D](#)). He said the e-mail addresses statistics on the number of injured employees bypassing OIR and going directly to the administrative hearing.

Mr. Vetter said he would support removing the 15 percent of uncovered PPI. He said if an individual is 1 percent impaired the individual should receive that award. In 1995, he said, state law was changed because WSI was in financial trouble and requested that everyone help just a little bit to help the agency become financially stable. However, he said, WSI is

now in good financial shape so it is time for WSI to help the injured employee.

Mr. Sylvan Loegering, North Dakota Injured Workers Support Group, stated from the perception of some injured employees there is a sense that claims analysts are not always working for the injured employee. Additionally, he said, there is a significant amount of paperwork that injured employees have to deal with and it is not surprising that information can be overlooked when it is provided to the injured employee in a paper format.

Mr. Loegering said that the North Dakota workers' compensation system is designed so the injured employee has a significant burden. He said it would be nice if this burden were shifted a bit to be more evenly distributed between the agency and the injured employee. Additionally, he said, loss of vision is a unique impairment and the law should reflect this. Finally, he said, the PPI threshold of 16 percent is inappropriate and he hopes the committee looks at changing this.

Mr. Dan Finneman said North Dakota uses the fifth edition of the American Medical Association's impairment guidelines. He said as an injured employee, when he had his PPI evaluation WSI had to fly a physician up from Georgia. He said as it relates to PPI evaluations, WSI should not have any influence over the physician performing the evaluation.

Mr. Finneman said that he too lost vision in one of his eyes as part of his workplace injury and the fact that there are very few experts in the area of PPI determinations helps illustrate what a complicated concept it is for a layperson to understand and navigate.

Mr. Finneman said he thinks it would be interesting if the committee would evaluate the number of PPI awards in North Dakota over the last three years.

Mr. Loegering said there is a two-year time limit on temporary impairments; however, some injured workers do not reach their maximum medical improvement within those two years and they are therefore not eligible for a PPI determination.

Senator Wanzek requested that the committee work with WSI to add vision to the scheduled list for PPI awards. He said it would be helpful if consideration was given to how other states deal with the loss of vision.

Senator Hacker said he would be supportive of a bill draft adjusting PPI awards for loss of vision in one eye or two eyes.

Ms. Ann Wolfe, Moorhead, stated she has heard from injured employees who indicate that after going to OIR the injured employee feels discouraged and feels like the injured employee does not have a case. Additionally, she said, injured employees have informed her that when using OIR services, the injured employee never actually meets with the representative of OIR.

Mr. Kocher said the services provided by OIR include the opportunity for the injured employee to meet with an individual from OIR. Additionally, he

said, he does not believe OIR staff members squash or otherwise negatively comment on the injured employee's desire to appeal to an administrative law judge.

Ms. Wolfe said injured employees have a real concern that if someone from OIR is faced with a question for which that person does not know the answer, the information is received from WSI. She said this really does not provide for very independent service.

Mr. Kocher stated that he agrees OIR is not completely independent from WSI's main office.

## COMMITTEE DISCUSSION

The committee discussed issues raised by injured employees over the course of the committee's meetings this interim.

Chairman Keiser called on committee counsel to review some of the issues raised by injured employees who have presented before the committee thus far. Committee counsel said the first case reviewed was Mr. Noel Walter, who raised some of the following issues:

- Firefighter presumption;
- Office of Independent Review power should be enhanced;
- Processing time is too long (Mr. Walter's case took over one and one-half years);
- Make the system more consumer friendly and easier for the layman to understand;
- There would be value to reviewing data and statistics regarding the impact of the services offered by OIR as well as the outcome of the cases serviced by OIR;
- Recommendation of a name change for OIR;
- The Office of Independent Review should have true independence;
- Mileage reimbursement should be changed to cover point-to-point travel;
- The ability of WSI to reverse its own rulings at any time sets up an adversarial relationship with the injured employee; and
- There is a real difficulty encountered by the layman navigating the very complicated workers' compensation system.

In response to a question from Representative Keiser, Mr. Wahlin said that after a case is adjudicated, WSI does not change its decision unless there is new evidence that was not available at the time of the adjudication.

Representative Keiser said that some of the specific issues for which he has supported change include the name of OIR as well as the IME definition.

Senator Hacker said when there is an IME that does not include an actual examination, the outcome is set up for failure.

Representative Amerman said he feels too much weight is given to IMEs and therefore he suggested there be a change to provide for an actual examination.

Mr. Furness stated WSI has been holding meetings with providers addressing the issue of IMEs. He said WSI struggles with the issue of finding in-state physicians to conduct IMEs. He said using out-of-state doctors results in a sense of lack of independence. He said WSI needs to deal with the issue of North Dakota doctors having collegiality concerns about reviewing their colleagues' work.

Mr. Furness said although a change in the name of OIR may change perception, it will not actually change the services offered by the entity. He said his only request in addressing the issue of the name of OIR is to avoid words with negative connotations.

In response to a question from Senator Wanzek, Mr. Furness said the impact of requiring all IMEs to include an actual examination would impact approximately 25 percent to 30 percent of the IMEs which have traditionally been record-only examinations.

Mr. Wahlin said although the Century Code only refers to "independent medical examinations," in reality there are two types of IMEs. He said there are physical examinations, which result in issues of transportation, time, and costs, and then there are record review evaluations, which are usually faster and cheaper. He said a possible change relating to IMEs may be to change the name of the record review examinations to independent medical reviews.

Senator Hacker said that perhaps there is a happy medium by which there could be a two-tier system for IMEs. He said if an independent medical review would result in a change or decrease in an injured employee's benefits, then there should be an opportunity for the injured employee to have an actual physical examination. Mr. Wahlin said that a change in the IME practice is not going to affect a high number of cases but it will impact timelines and this is a very significant factor.

Representative Keiser noted that in reality there is a lot of weight given to IMEs. He said he would support the idea of an independent medical review, but then also there should be an option for the injured employee to request an actual physical examination.

Chairman Keiser requested that committee counsel work with WSI to consider legislative language to clarify independent medical reviews and to specify the conditions under which an actual physical examination would be allowed.

Representative Keiser said the committee has heard issues associated with the inability of injured employees to get legal representation. He said perhaps there could be a change to the law to provide injured employees an opportunity to consult with a private attorney following the use of OIR. He said under this new system WSI could pay for the initial legal consultation.

Senator Hacker said he would support this idea of a legal review.

Mr. Wahlin said the concept of a legal review was something WSI has also considered. The committee discussed issues relating to a timeframe by which an injured employee would need to consult an attorney in

order to comply with the 30-day appeal deadline. However, he said, in reality an injured employee may request an appeal before actually consulting with an attorney.

Senator Wanzek said this idea of a legal review sounds like a win-win situation.

In response to a question from Senator Hacker, Mr. Wahlin said he does not have statistics on how private insurance companies use alternative dispute resolution. Committee counsel said there is a broad spectrum of alternative dispute resolution techniques, including arbitration and mediation. She said some alternative dispute resolution techniques would be better-suited than others for state agencies.

Mr. Vetter said he is happy with the committee's discussions. He said some of these changes could really help the injured employee and he especially supports the idea of WSI paying for a legal evaluation.

Mr. Loegering stated that he supports what he has heard today. He said he recognizes the name change for OIR will not actually change the services, but may change the perception. He said it might be valuable to consider adding an actual ombudsman who has the role of actually looking out for the injured employee.

Representative Keiser said he has had similar discussions with individuals from OIR. He said he is considering the value of providing a service to help guide injured employees and employers through the state's workers' compensation system.

Mr. Loegering said laypeople need help in navigating this very complicated system. He said an example of a service that would be helpful would be to help injured employees in how to request a copy of records and get the documents they are actually looking for. He said he questions whether OIR is the appropriate location for this service.

Representative Amerman said he recognizes the value of having satellite offices around the state so injured employees can meet one-on-one to discuss their cases.

Senator Wanzek said he sees the value of providing a system by which the injured employee can go to a private attorney to receive legal information. He said the service would provide actual independence.

Mr. Finneman said he thinks there are examples of several cases that have had positive outcomes as a result of Mr. Kocher and Mr. Vetter working together.

He said it seems like the whole system would benefit by requiring that all available avenues be exhausted before allowing WSI to cut an injured employee off benefits.

Mr. Finneman said WSI should try to limit the number of doctors an injured employee is sent to. He said additionally, WSI should seek in-state IMEs unless the treating physician recommends an out-of-state consultation.

Senator Hacker said there seems to be a perception that IMEs are not independent, in large part because they are paid for by WSI. He said a possible way to address this perception might be to modify how doctors are selected. For example, he said, perhaps the North Dakota Medical Association or the State Board of Medical Examiners could be involved in suggesting qualified physicians for IMEs.

Mr. Furness said WSI is currently considering how it might improve the IME physician selection process.

The committee discussed the issues raised by Mr. Wolf relating to retroactively reversing decisions to cover benefits following a determination of a preexisting condition. The committee requested that committee counsel work with WSI to draft legislation to address this issue.

Representative Keiser said the mileage reimbursement issue raised by Mr. Walter seems to be something worth addressing. He suggested that reimbursements be made based on actual mileage, not based on city limits. The committee requested that committee counsel work with WSI to draft legislation to address this issue.

Senator Wanzek said in reviewing Mr. Wolf's case, he was really troubled that a police officer had the burden of proof to establish that there was no preexisting condition. He said perhaps one way to address this concern would be to create a presumption and shift this burden to WSI.

No further business appearing, Chairman Keiser adjourned the meeting at 3:00 p.m.

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Jennifer S. N. Clark  
Committee Counsel

ATTACH:4