

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Thursday and Friday, September 25-26, 2008
Reimers Conference Room, North Dakota State University Alumni Center
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, Terry M. Wanzek

Member absent: Senator Richard Marcellais

Others present: See attached [appendix](#)

INTRODUCTION

Chairman Keiser said the committee will be conducting a two-day meeting with the committee reviewing two cases on each day. He said 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 to access the injured employees' WSI records electronically if the need arises during the meeting. If at any point in the meeting a committee member requests to review the injured employees' records, he said he will 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 requested that Mr. Chuck Kocher, Workforce Safety and Insurance Office of Independent Review (OIR), assist the injured employees in presenting their cases for review by the committee. Mr. Kocher distributed to committee members a binder containing case review information. The information in the binder includes a case summary of each of the four injured employees' records as well as the statement of issues for review by the committee.

FIRST CASE REVIEW

Case Summary

The first injured employee presenting a case for review was Mr. Starr Roberts, Fargo. Mr. Kocher provided a summary of Mr. Roberts' case. He said Mr. Roberts sustained a work-related injury to his chest and neck on November 16, 1997, while employed in Horace. He said WSI accepted liability in this case and paid the associated medical expenses and disability benefits.

Mr. Kocher said it is Mr. Roberts' desire to present to the committee his experience relating to the management of his claim, including some of the

frustrations he has encountered. He said Mr. Roberts does not wish to review all of the legal orders issuing his claim, which exceed one dozen orders, but instead he would like to limit his review to the most recent order issued by WSI on October 4, 2006.

Mr. Kocher said Mr. Roberts underwent an interior C6-7 fusion on April 16, 1998. He said on April 24, 2008, Mr. Roberts had the plates at C6-7 removed and an interior fusion of C5-6 and C4-5. He said Mr. Roberts continues to treat with Dr. Gonzales who in June 2008 reported "I believe it is unrealistic that he (Starr Roberts) will ever return to gainful employment given his extensive cervical surgery and the chronicity of his radiculopathy. I have indicated in his work ability report that he should not be considered for any type of vocational activity or return to work activity until at least three to six months postsurgery. Even then it is unlikely that he would be a candidate for any such services or activities."

In addition, Mr. Kocher said in May 2008 a registered nurse at MeritCare Clinic Neuroscience Neurosurgery Department reported "Mr. Roberts' surgeon, Dr. Alejandro Mendez, believes Mr. Roberts will not be capable of returning to work following his recovery from his surgery and will remain disabled."

Mr. Kocher said Mr. Roberts continues to receive counseling for depression from chronic pain and in February 2003 Mr. Roberts was awarded a permanent partial impairment award in the amount of 28 percent whole body for cervical spine in the amount of \$6,520.

Mr. Kocher said in October 2006 WSI issued an order denying further disability and vocational rehabilitation benefits, indicating that Mr. Roberts was capable of performing gainful employment as a customer service representative or motor vehicle dispatcher. He said in October 2006 Mr. Roberts requested the assistance of OIR and OIR issued a certificate of completion with no change to the order.

Mr. Roberts and his attorney requested an administrative hearing regarding the October 2006 order. He said in May 2007 the administrative hearing was conducted. The recommended findings of fact, conclusion of law, and order stated that "considering all of the medical opinions it is clear that the MRI, functional capacity evaluation (FCE), and Mr. Roberts' complaints of pain mean one thing to Mr. Roberts' treating physicians and another to Dr. Savannah and still something else to Dr. Belgrade. Dr. Lillestol and Dr. Gonzales, as treating physicians, are in a better position to review and understand medical records

that they themselves created than are either Dr. Savannah or Dr. Belgrade. Therefore, I conclude that WSI has not shown by a preponderance of evidence that return to an occupation within the local job pool is an appropriate vocational rehabilitation option for Mr. Roberts because of physical limitations recognized by his treating physicians." The WSI October 2006 order denying further disability and vocational rehabilitation benefits was reversed. In July 2007 WSI adopted the recommended findings of fact, conclusion of law, and order.

In response to a question from Senator Hacker, Mr. Kocher said Mr. Roberts is receiving temporary total disability (TTD) benefits and medical benefits. He said Mr. Roberts is not receiving rehabilitation services due to his physical restrictions. He said Mr. Roberts' TTD benefits are calculated at 66 2/3 percent of his preinjury wages. He said his TTD benefits are not calculated to recognize a cost-of-living adjustment.

Representative Keiser said it is important for the committee to remember that Mr. Roberts incurred his injury in 1997 and it is therefore covered under the law in effect before the 2005 legislative changes resulting from House Bill No. 1171.

In response to a question from Senator Hacker, Mr. Kocher said generally an injured employee does not receive a cost-of-living adjustment until there has been a determination of permanent total disability (PTD). He said Mr. Roberts has been receiving TTD since approximately 1998.

Issues for Review

Chairman Keiser called on Mr. Roberts to present the issues he would like the committee to consider. Mr. Roberts read a statement into the record. He said as he struggles day-to-day to make ends meet for his family, he is constantly haunted by fears that his WSI benefits could end at any time. He said if he were to lose his WSI benefits, he would be faced with the challenge of how to care for himself as well as his three young children.

Mr. Roberts said during his experience it seems like WSI is constantly seeking ways to deny his eligibility status. For example, he said, on several occasions WSI doctors' opinions have been used to dismiss the validity of objective findings submitted by Mr. Roberts' doctors. He said he is concerned that WSI, in seeking to reduce caseloads and expenditures, is overreliant on the biased opinions of health care providers affiliated with WSI. He said this practice puts unnecessary financial and health burdens on individuals and families. He said management and claims analysts at WSI often lack sensitivity to the needs and concerns of clients and WSI-affiliated doctors, managers, supervisors, and claims analysts have created a pattern of violating ethical principles, such as fairness and honesty.

Mr. Roberts said he strongly recommends implementing the following approaches:

1. Appoint qualified, external evaluators to evaluate the agency's current policies and eligibility requirements. Evaluators might focus on and target the specific wording of policies that are unclear and easy to manipulate by supervisors and other decisionmakers.
2. Provide sensitivity training to managers and claims analysts with strong emphasis on ways to reduce conflicts of interest and raise ethical awareness.
3. Establish a board to review claims that have been denied over the past five years.
4. Find ways to facilitate, improve, and expedite the appeals process.
5. Develop a questionnaire to obtain feedback from clients regarding their satisfaction with WSI.

In response to a question from Representative Keiser, Mr. Roberts said when he initially applied for benefits, there was a report of fraud claiming Mr. Roberts was making a false claim. He said ultimately he had to go to the jobsite to reenact how his injury occurred in order to clear up the claim of fraud.

Mr. Roberts said over the course of his experience with WSI, he has had both good experiences and negative experiences. He said one negative experience was when he participated in an independent medical examination (IME) at which the doctor took no more than five minutes to perform a physical examination.

Mr. Roberts said at 51 years of age this is never where he expected to find himself. He said before his injury he was physically fit and was a very hard worker. He said now he is constantly afraid WSI is going to cut off his benefits. He said he was even afraid to come before the committee today out of fear WSI would retaliate against him.

Chairman Keiser said Mr. Roberts does not have to worry about recrimination for appearing before the committee.

In response to a question from Senator Wanzek, Mr. Roberts said that over the course of the last 10 years he has gone through vocational rehabilitation services and has received services from CorVel two times. He said although the computer classes he took were interesting, the required use of his arms to work on the computer hurt his neck and therefore he is unable to perform computer work.

Mr. Roberts said in his current condition, his quality of life is greatly impaired. He said not only is he unable to work but he also finds it difficult to play with his kids and be the man he wants to be.

In response to a question from Representative Dietrich, Mr. Roberts said the appeal process takes far too long. He said he thinks an investigation and appeal should be resolved within three months. He said one year is far too long for a family to go without money.

In response to a question from Senator Hacker, Mr. Roberts said he underwent the one-year appeal at the point of his initial injury. He said in the process of the appeal he was forced to change attorneys because his first attorney quit after becoming tired of dealing with WSI. He said ultimately he was represented by students at the University of North Dakota School of Law clinic. He said he was very happy with all of the legal representation he received.

In response to a question from Senator Hacker, Mr. Roberts said that although he did win his fraud case and WSI did make backpayments, his attorney took one-third of his award.

In response to a question from Representative Keiser, Mr. Roberts' said that the employee who made the false claim of fraud was not charged with fraud. He said ultimately it was clear at the hearing that the other employee was not credible and was not knowledgeable about the employment situation.

Workforce Safety and Insurance

Chairman Keiser called on Ms. Jodi Bjornson, Workforce Safety and Insurance, for comments regarding the issues raised by Mr. Roberts. She said that in preparing to appear before the committee she did consult with Mr. Roberts' claims analyst. She said the claims analyst reported to her that in the claims analyst's 20 years working at WSI, Mr. Roberts' claim was unique. The claims analyst reported that the things in the case were just not adding up and when the fraud claim came in the analyst acted on evidence and initiated an investigation. She said the records indicate that Mr. Roberts' initial injury was a contusion to the chest; however, she said, that injury then migrated to Mr. Roberts' hips, neck, and shoulders. She said it was very difficult for the claims analyst to track the medical components.

Ms. Bjornson said as Mr. Roberts' case continued, it became more complex. She said the case required an IME, and there were instances of noncompliance with vocational rehabilitation as well as recorded notes relating to law enforcement issues.

Mr. Roberts said he takes issue with Ms. Bjornson making reference to law enforcement issues. He said in 2004 somebody called law enforcement and made a false accusation. He said ultimately the whole issue was resolved in his favor. He said that he does not think that his WSI case should be impacted by a false report to law enforcement.

Ms. Bjornson said she points out the notes in Mr. Roberts' case not to disparage him but to show how complicated his claim was.

In response to a question from Senator Hacker, Ms. Bjornson said in selecting an IME doctor, WSI makes its selection based upon the specialty required. She said in the case of Mr. Roberts,

there was a concern that the treating doctor was an enabler. She said she thinks Mr. Roberts' case reflects an appropriate use of the IME process.

In response to a question from Senator Hacker, Ms. Bjornson said that under TTD there is no cost-of-living adjustment. She said under the amendments made in 2005, the new WSI law provides for a maximum of two years of TTD and a maximum of five years of temporary partial disability (TPD). She said under this new system there is a push to get TTD status reviewed timely in order to determine whether there is a need to convert these cases to PTD. She said once an injured employee is classified as PTD, then the case is eligible for supplementary benefits to recognize changes in the cost of living.

Ms. Bjornson said that for those injured employees who are covered under the old law, there has been a concerted effort to periodically review these cases.

In response to a question from Representative Amerman, Ms. Bjornson said that ultimately in Mr. Roberts' case, the fraud issue was resolved at the administrative hearing level and the administrative law judge ruled in Mr. Roberts' favor. She said that WSI claims analysts undergo a wealth of continuing training to assist in customer service.

In response to a question from Representative Keiser, Ms. Bjornson said Mr. Roberts is currently healing from his second surgery. She said once he has reached his maximum medical improvement, WSI will consider whether vocational rehabilitation is appropriate and will reevaluate his medical records.

In response to a question from Representative Keiser, Ms. Bjornson said that under the 2005 law, there was no limit on the length of time an injured employee could receive TTD. However, she said, she believes there are very few injured employees who receive TTD for more than three consecutive years.

Representative Dietrich said he listened to this case and it appears injured employees like Mr. Roberts are living with an ongoing concern of loss of benefits. He said he finds it troublesome that these injured employees are living without a sense of finality as well as without cost-of-living adjustments.

Ms. Bjornson said in the case of Mr. Roberts, she expects a PTD decision should be made in the near future.

Committee Discussion

Chairman Keiser called for interested parties to testify regarding issues raised by Mr. Roberts.

Mr. Sylvan Loegering, North Dakota Injured Workers' Support Group, quoted North Dakota Century Code (NDCC) Section 65-01-01, "the prosperity of the state depends in a large measure upon the well-being of its wage workers, and, hence,

for workers injured in hazardous employments, and for their families and dependents sure and certain relief is hereby provided regardless of questions of fault and to the exclusion of every other remedy."

Mr. Loegering said Mr. Roberts raises some interesting points, including:

- It seems questionable that when there is a claim of false statements from an employer, the employer is never penalized;
- There was a claim of vocational rehabilitation noncompliance, which may or may not be substantiated;
- Once again, there is a claim that the IME is given more weight than the opinion of an injured employee's treating doctor; and
- Statutory limitation on TTD impacts injured employees.

Mr. Loegering said as the 2005 law's two-year limitation on the receipt of TTD is being implemented, injured employees are now beginning to receive notice of the expiration of those two years and the resulting termination of benefits. He said it appears that some injured employees are not reaching a maximum medical improvement within that two-year period and are being forced off the system.

Mr. Loegering said as it relates to physical laborers, such as Mr. Roberts, it is not surprising that an injured employee would have deterioration issues. In this case, he said, it is common for WSI to fail to cover the injured employee because that deterioration is found to be a preexisting condition.

Mr. Douglas Hersch, injured employee, stated that his case is very similar to what happened to Mr. Roberts. Mr. Hersch reviewed some of the similarities between his case and Mr. Roberts as well as distributed copies of portions of his WSI records.

Mr. Hersch said one of the similarities between his case and Mr. Roberts' was the problems associated with IMEs. Additionally, he stated, injured employees incur significant financial hardships as they work their way through the workers' compensation system.

Senator Hacker said it is interesting to note that when Mr. Roberts was initially injured, gas was less than \$2 per gallon. He said the committee needs to consider the cost-of-living adjustments for claimants.

Representative Amerman said in the review of Mr. Roberts' case, it has become apparent the pre-2005 workers' compensation law differs from the post-2005 changes made by 2005 House Bill No. 1171. He requested that the committee receive additional information from WSI at a future meeting regarding the implementation of House Bill No. 1171.

The committee discussed whether the North Dakota Medical Association has been willing to take any affirmative steps to increase the availability of doctors willing to perform IMEs. Representative Keiser said WSI is working with the association to try to facilitate more North Dakota doctors willing to perform IMEs.

Mr. Bruce Furness, Interim Executive Director, Workforce Safety and Insurance, stated in working

with North Dakota doctors, WSI is faced with the North Dakota doctors' unwillingness to do IMEs. He said WSI is considering the possibility of a three-panel IME review.

Mr. Furness said last year WSI performed 125 IMEs. He said of these IMEs some were limited to record reviews and some included physical examinations.

Ms. Ann Wolfe, injured employee, stated it is not uncommon for an injured employee who was seriously injured to experience depression and suicidal thoughts. The committee and WSI need to recognize that chronic pain frequently leads to depression.

Ms. Wolfe said as it relates to the partial permanent impairment (PPI) issue, the current requirements of a 16 percent whole body impairment go back to legislative changes made in 1989. She said in 1989 the testimony from WSI was that by adulthood most people have degenerative changes of approximately 16 percent. She said although the 1989 PPI changes did increase benefits to catastrophically injured individuals, the law change negatively impacted injured employees who have less than 50 percent impairment. She said it is her belief in North Dakota most injured employees have injuries that have whole body impairment of less than 43 percent.

Senator Wanzek thanked Mr. Roberts for presenting his case to the committee. He said he is especially impressed with the constructive manner used to present the information. Additionally, he said, he is offended by people such as Mr. Hersch stating that nobody cares about how injured employees are affected by the workers' compensation system. Senator Wanzek said he cares and he is here to help address these problems. He said he understands that injured employees are frustrated, but anger is not a constructive way to deal with these issues.

Mr. Roberts thanked the committee for the opportunity to present his case. He said initially he was hesitant to appear before the committee, but now that he has finished presenting his case he honestly can say that it has been a positive experience.

SECOND CASE REVIEW

Case Summary

The second injured employee presenting his case for review was Mr. LaVerne Arthur, Moorhead, Minnesota. Mr. Arthur was accompanied by his wife. Mr. Kocher provided a summary of Mr. Arthur's case. He said Mr. Arthur sustained an injury to his left ankle in August 2005 while working as a welder. He said WSI accepted liability for this injury and paid the associated medical expenses and disability benefits.

Mr. Kocher said Mr. Arthur was diagnosed as having left ankle pain and posterior tibial tendon dysfunction on the left. He said in March 2006 Mr. Arthur underwent a triple arthrodesis to the left foot and ankle.

Mr. Kocher said as a result of Mr. Arthur's inability to return to his preinjury job, WSI assigned rehabilitation services. In February 2007 WSI issued a notice of intention to discontinue/reduce benefits as Mr. Arthur failed to comply with the program of rehabilitation. Since Mr. Arthur failed to attend the required testing, he was deemed to be in noncompliance. Mr. Arthur did not appeal and as such the notice became final. He said in April 2007 Mr. Arthur was admitted to the hospital for treatment. He said the discharge diagnosis was as follows:

1. Atelectasis and evolving consolidation of the right mid and lower lobe.
2. Bilateral lower extremity cellulitis.
3. Hypoxemia secondary to atelectasis and evolving consolidation of right mid and lower lobe.
4. Hyponatremia.
5. Obesity.
6. Possible obstructive sleep apnea.
7. Pulmonary hypertension.
8. Impaired fasting glucose level, probable poor feel vascular disease.

Mr. Kocher said in May 2007 WSI issued a notice of decision denying benefits indicating WSI would not cover the bill for medical services Mr. Arthur received in April 2007. He said the basis for the denial of the bill was that Mr. Arthur's inpatient stay was found to be unrelated to the work injury to the left ankle.

Mr. Kocher said Mr. Arthur submitted a request for reconsideration indicating he felt his hospitalization in April 2007 and the treatment for those conditions were a direct result of his initial hospital admission after his ankle surgery. He said in August 2007 Mr. Arthur requested the assistance of OIR and in September 2007 OIR issued a certificate of completion indicating no change to the order. Mr. Arthur did not request a hearing and as such the order became final. In July 2007 WSI adopted the recommended findings of fact, conclusion of law, and order.

In response to a question from Representative Keiser, Mr. Kocher said Mr. Arthur is not receiving any wage replacement benefits due to the finding of noncompliance. He said Mr. Arthur is receiving medical coverage from WSI.

Mr. Arthur said without the assistance of external oxygen, his breathing capacity is cut in half. He said he wants the committee members to realize that his lung injury impacts him 24/7.

Issues for Review

Mr. and Mrs. Arthur raised several areas of concern relating to Mr. Arthur's workers' compensation claim. They said they think that WSI should cover the cost of Mr. Arthur's oxygen because but for the foot and ankle surgery, Mr. Arthur likely would not have incurred the lung problems he currently has; additionally, he said, it is important to note that they believe the lung problem he is experiencing directly resulted from an overdose of morphine during his

second surgery. Therefore, they said, WSI should be covering all of the lung-related medical bills.

In response to a question from Representative Keiser, Mr. Arthur said the first time he had cellulitis, it was related to a work injury and it was treated and he was able to return to work. The second time he experienced cellulitis, it was due to the surgery he had for his work-related injury to his foot and ankle.

Mrs. Arthur said it was as a result of his surgery that Mr. Arthur received an overdose of morphine and this overdose likely resulted in the collapse of his lung and pneumonia. She said that initially WSI paid for Mr. Arthur's oxygen but then stopped payment after determining initial payments were made by mistake.

In response to a question from Representative Amerman, Mrs. Arthur said the finding of noncompliance with rehabilitation services was a result of a miscommunication. She said that Mr. Arthur had been attending adult education school daily and he thought that this complied with the WSI requirements. It was only later that it became clear that attending these classes did not meet WSI's rehabilitation plan.

In response to a question from Senator Wanzek, Mr. Kocher said the record does indicate that Mr. Arthur spoke to an attorney about the possibility of pursuing a civil action related to the morphine overdose but due to the challenges relating to proving causation the civil action was not pursued.

In response to a question from Senator Wanzek, Mr. Kocher said the WSI notice relating to denial or termination of benefits includes language addressing an injured employee's opportunity to appeal. He said in the case of Mr. Arthur, he did appeal past the OIR level. He said after receiving a certificate of completion, Mr. Arthur did not pursue the appeal any further.

Mr. Arthur said he did not appeal past the OIR level because he felt there was little hope. He said he was lost and he did not know what to do and realized he could not afford an attorney to pursue the action.

In response to a question from Representative Keiser, Mr. Kocher said Mr. Arthur is currently not receiving any wage-loss benefits from WSI, but if he does have future ankle or foot problems related to his work injury, WSI will cover those medical expenses.

Mr. Arthur said he is in financial straits as a result of his medical bills. He said he would like WSI to cover these medical bills. Additionally, he said, what he really prefers is to return to work. He said he really enjoyed his job and would rather be working than be disabled.

Representative Keiser said he is yet to meet an injured employee who would rather not be working.

Workforce Safety and Insurance

Chairman Keiser called on Ms. Bjornson to address the issues raised by Mr. Arthur.

In response to a question from Senator Hacker, Ms. Bjornson said initially WSI covered the expenses for Mr. Arthur's oxygen tanks. She said the

computerized billing program for durable medical equipment provides that the program will automatically pay for claims of under \$500. She said these payments are periodically reviewed and once the error was found, WSI stopped covering Mr. Arthur's oxygen tanks.

THIRD CASE REVIEW

Case Summary

The third injured employee presenting her case for review was Mrs. Maria Nolasco, Oriska. Mrs. Nolasco was accompanied by her husband as well as by Ms. Cindy Shawcross. Mr. Kocher provided a summary of Mrs. Nolasco's case. He said Mrs. Nolasco filed an application for workers' compensation benefits for an injury sustained to her right ankle in July 2006. He said her claim was accepted and benefits paid accordingly.

Mr. Kocher said in August 2006 Mrs. Nolasco underwent surgery for her fractured right ankle which included insertion of a plate and seven screws. Mrs. Nolasco received wage-loss benefits from August 1, 2006, to December 21, 2006.

Mr. Kocher said Mrs. Nolasco reported that following her surgery her condition deteriorated and her pain increased. He said she developed regional pain syndrome, which required her to seek help at the emergency room. She said as she was experiencing this severe pain, her treating WSI doctor and WSI directed Mrs. Nolasco to perform weight-bearing activities. She said she reported to WSI she was unable to perform these activities due to extreme pain.

Mr. Kocher said on November 15, 2006, WSI issued a notice of intent to discontinue benefits due to noncompliance with physical therapy and rehabilitation services. He said the notice was sent registered mail and was returned to WSI as undelivered. Mr. Kocher stated Mrs. Nolasco sought the assistance of Ms. Helen Reddy, physician's assistant. He reported following the notice of intent to discontinue benefits, Ms. Reddy wrote a letter to WSI setting forth the reasons why Mrs. Nolasco was unable to attend the English as a Second Language (ESL) classes and why Mrs. Nolasco was unable to tolerate the physical therapy required by WSI. He stated WSI did not accept Ms. Reddy's letter as a request for appeal and therefore wage-loss benefits were terminated.

Issues for Review

Chairman Keiser called on Mr. Kocher, Mrs. and Mr. Nolasco, and Ms. Shawcross to address the issues Mrs. Nolasco would like the committee to consider.

Mr. Kocher read from a statement prepared by Mrs. Nolasco. He stated Mrs. Nolasco believes WSI's decision to terminate her benefits is wrong because there was a clear reason backed up by a medical opinion as to why she was unable to comply with WSI's rehabilitation requirements. He said she

reported it was not only unfair for WSI to rush Mrs. Nolasco into ESL classes but it was also improper to require her to attend physical therapy while she was still in excruciating pain. Additionally, Mr. Kocher stated Mrs. Nolasco reported she was not given fair and objective medical treatment. He stated Mrs. Nolasco believes WSI treated her in an unfair and adversarial manner. He said Mrs. Nolasco reports the correct outcome or decision should be for WSI to pay her wage-loss benefits from the time they were terminated in December 2006 until the present. Additionally, he stated Mrs. Nolasco is of the opinion that, in addition to the problems with ongoing wage-loss benefits and medical care, WSI has caused her family extreme hardship, including forcing her minor children to get jobs to support the family. He reported she feels WSI should reconsider the irreparable damage WSI caused and WSI should perform the function for which it was created--to provide sure and certain relief to North Dakota's injured employees.

Chairman Keiser called on Ms. Shawcross to present the issues that Mrs. Nolasco would like the committee to consider. Ms. Shawcross said in presenting Mrs. Nolasco's issues, in large part she is relying on the WSI record notepad entries. She said the file entries make it very clear that there were language concerns throughout this claim. She said Mrs. Nolasco speaks Spanish as her primary language and understands very little English. She said the WSI records indicate that the claimant's 15-year-old daughter was used as the primary interpreter for purposes of contacts with WSI. She said the notepad entries indicate that there was language adequacy as well as competency concerns. She said WSI should take the measures necessary to be consistent and to make sure that important information is being clearly conveyed.

Ms. Shawcross said Mrs. Nolasco's record includes information relating to the cost assessment of the claim. She said the assumptions made by WSI from the very beginning of Mrs. Nolasco's claim were that she will recover by a certain date. She said this assumption was made without a medical basis and as a result of this assumption WSI clearly conveyed to the Nolascos that there was a 104-week limit to the receipt of benefits. WSI conveyed to the injured employee that she would have to figure out what to do once her benefits were terminated after 104 weeks.

Ms. Shawcross said the WSI record indicates Mrs. Nolasco's claims analyst informed Mr. Nolasco that Mrs. Nolasco would need to go to physical therapy and ESL classes regardless of what health and pain issues she was experiencing. She said the record does not show that there was any attempt by the medical analyst or claims analyst to get more medical information to find out the medical problems Mrs. Nolasco was having in meeting the physical therapy and ESL requirements. Additionally, she said, the record is clear that Mrs. Nolasco does not have a driver's license, does not know how to drive, is limited

by language barriers, is functionally illiterate, and only has a sixth grade education.

Ms. Shawcross stated it is interesting to note that the Social Security Administration regulations for disability reflect that someone who is functionally illiterate is nearly disabled because of the very few jobs available to these individuals.

Ms. Shawcross said through the course of the claim management, the relationship between Mrs. Nolasco and WSI deteriorated. She said according to the Nolascos, the WSI claims analyst was initially presented as an advocate to help the injured employee through the system; however, this relationship became very adversarial. She said the relationship evolved into the claims analyst telling Mrs. Nolasco that she will attend doctor's appointments. Additionally, she said, the medical claims analyst who was assigned to Mrs. Nolasco's case was also initially presented as an advocate to assist the injured employee. However, she said, this relationship also became adversarial. She said in reality the medical claims analyst plays a role of trying to assess an injured employee's ability to return to work and typically does this by committing the injured employee to hypotheticals posed at medical appointments.

Ms. Shawcross said Mrs. Nolasco's record shows there were ongoing medical complications relating to her workplace injury. She said the record shows several steps needed to be taken to help the injured employee progress to the point where she would be able to do physical therapy, but in reality WSI was requiring her to perform physical therapy and attend ESL classes during this period. She finds it unconscionable that at no point did WSI ever affirmatively recognize that Mrs. Nolasco was in severe pain. She said the record does not reflect that WSI took any steps to help address this pain issue.

Ms. Shawcross said that in addition to the notepad entries it is important to note the personal impact this experience had on the Nolasco family. She said during this claims process, Mr. Nolasco underwent hernia surgery that ultimately resulted in a staph infection that required significant treatment. She said during this time, the Nolascos had five children living at home under the age of 18. She said that Mrs. Nolasco's physical and emotional health deteriorated over this time and this had a significant impact on the family. Unfortunately, she said, WSI has refused coverage of mental health services for Mrs. Nolasco.

Ms. Shawcross said in addition to the emotional toll this process had on the Nolasco family, the family has undergone severe financial hardships. She said Mrs. Nolasco was put in a position to essentially beg for a wheelchair because WSI denied coverage without even doing the necessary diligence to determine whether a wheelchair was appropriate. She said the minor children at home have also been put in a position to seek employment in order to help the family meet its financial obligations.

Ms. Shawcross said review of Mrs. Nolasco's WSI record indicates that WSI was "hopeful" that Mrs. Nolasco would be able to return to work, but, she said, a more indepth review of the record reflects that something more medically significant was going on but still WSI disregarded this information and instead forged ahead with the requirements that Mrs. Nolasco attend physical therapy and ESL classes. She said overall an injured employee should not be put into a position to have to fight with WSI for coverage.

In response to a question from Representatives Amerman and Keiser, Ms. Shawcross explained that Mrs. Nolasco had problems finding a medical provider who would be able to treat her timely and deal with her pain issues. Ultimately, she said, she sought the assistance of Ms. Reddy.

Ms. Shawcross said that at the point WSI was informing the Nolascos that Mrs. Nolasco would need to attend ESL classes, Mr. Nolasco was informing the claims analyst that Mrs. Nolasco was unable to attend classes due to severe pain as well as transportation problems. She said when the claims analyst informed Mr. Nolasco that a notice of informal decision (NOID) would be mailed, indicating noncompliance, Mr. Nolasco informed the analyst that he disagreed with this position and tried to explain why. She said that Mr. Nolasco said that he felt he was being threatened by the worker that he was going to be "NOIDed" but at that time he said he would just have to take that chance as he was more concerned with his wife's health needs.

Ms. Shawcross said it is interesting to note that the ESL class requirement was made before there was an actual rehabilitation plan in place. She said with an individual who is functionally illiterate it seems inappropriate to require that individual to go to ESL classes.

In response to questions from Senator Hacker and Representative Keiser, Ms. Shawcross stated WSI provided Mrs. Nolasco with three notices. She said the first notice was a notice to attend ESL classes. She said this first notice was written in English and on November 17, 2006, was sent by certified mail. She said this initial notice was returned to sender because the Nolascos were unable to pick up the letter at the post office.

Ms. Shawcross said the second notice was also a notice to attend ESL classes. She said this document was written in Spanish and on November 27, 2006, was sent via certified mail. Once again, she said, this letter was unclaimed.

Ms. Shawcross said the third notice was a NOID, which was written in English and mailed via regular mail on November 30, 2006.

In response to a question from Senator Wanzek, Ms. Shawcross said that upon learning of the NOID to terminate Mrs. Nolasco's benefits, the Nolascos went to see Ms. Reddy. She said at the request of the Nolascos, Ms. Reddy prepared and mailed a letter to WSI indicating Mrs. Nolasco's inability to comply with ESL class attendance. She said WSI received this

letter within the period of appeal but did not accept this letter as a formal request for appeal.

Ms. Shawcross said she understands there needs to be rules and time limitations, but in the case of Mrs. Nolasco there were extenuating circumstances. She said it does not seem reasonable to require an injured employee to request an appeal in writing when that injured employee is functionally illiterate and is not able to speak or write in English. She said Ms. Reddy's letter met the spirit of the law, even if it did not meet the letter of the law.

In response to a question from Representative Keiser, Ms. Shawcross said Mrs. Nolasco understands that WSI is not required to provide translation services but does request that language barriers should be dealt with consistently. She said in Mrs. Nolasco's case, the translation issues were dealt with inconsistently and arbitrarily.

In response to a question from Senator Hacker, Ms. Shawcross said she initially met the Nolascos when Ms. Shawcross was a paralegal at Mrs. Nolasco's attorney's law office. She said her recollection is that by the time Mrs. Nolasco came to the attorney's office there was a final NOID and therefore the attorney declined to take the case due to the unlikelihood of success. She said that when the North Dakota injured worker group was established, she came into contact with the Nolasco family again and agreed to help them with the paperwork to apply to appear before this committee.

In response to a question from Representative Keiser, Mr. Kocher said the record indicates that on November 8, 2006, a CorVel consultant sent a letter to Mrs. Nolasco indicating she was assigned to assist Mrs. Nolasco with her rehabilitation services. She said the record does not include any information whether there was ever a consultation with Mrs. Nolasco's doctor to determine whether Mrs. Nolasco was physically able to attend ESL classes. He said there is information in the record to indicate Mr. Nolasco did contact WSI by telephone to convey Mrs. Nolasco's inability to comply with ESL class attendance as well as her intent to get a second medical opinion relating to her physical limitations.

In response to a question from Representative Amerman, Ms. Shawcross said Mrs. Nolasco's injury occurred at work when a drain cover was left off a floor drain hole. She said Mrs. Nolasco stepped into the drain and fell sideways, snapping her ankle bone. She said the pain was so severe Mrs. Nolasco lost consciousness at the time of injury. She said it is interesting to note the medical records offer conflicting histories, but this is most likely a result of language barriers. She said although it is clear there was a work injury, the details of Mrs. Nolasco's case report, how the injury occurred, and how severe the injury was. She said by knowing how this injury occurred she hopes all the involved parties better understand the trauma Mrs. Nolasco experienced.

Workforce Safety and Insurance

Chairman Keiser called on Mr. Tim Wahlin, Workforce Safety and Insurance, to address the issues raised by Mrs. Nolasco. He said that Mrs. Nolasco's claim posed significant challenges for the claims analyst and for WSI.

Mr. Wahlin said under current law an injured employee is limited to a maximum of 104 weeks of receipt of TTD. He said it is very important to keep injured employees informed and therefore it should come as no surprise that a claims analyst informed Mrs. Nolasco of the time limitations. He said it is well-known that prompt and thorough medical care and timely return to work results in the best outcomes. He said WSI takes this seriously.

Mr. Wahlin said in the case of Mrs. Nolasco, WSI quickly evaluated her ability to return to work. He said at that point it was clear there were language barriers that needed to be addressed. He said in part because of these language barriers, WSI assigned a nurse case manager to assist the Nolascos in attending medical appointments.

Mr. Wahlin said WSI does not use certified mail very often but does use this form of mail when it appears proof of receipt will be important to the management of the claim.

Mr. Wahlin said in reviewing the record, it appears that WSI did not have very complete information regarding the doctors Mrs. Nolasco was treating with. Instead, the records show that the injured employee refused to inform WSI who her doctors were.

Mr. Wahlin said in establishing noncompliance for vocational rehabilitation, the first time there is noncompliance, benefits stop 21 days following the notice. He said an injured employee has 30 days to appeal and come back into compliance.

Mr. Wahlin said that WSI regularly uses occupation and disability guidelines to aid WSI in identifying which claims are not progressing as expected. He said it is very important for WSI to use these guidelines to help manage claims.

In response to a question from Senator Wanzek, Mr. Wahlin said if WSI had received a sufficient notice of appeal and if the record had been provided to show good reason for noncompliance, WSI would have continued benefits and would have gone back in time to provide these benefits if there had been a lapse of benefits due to noncompliance.

Ms. Shawcross questioned Mr. Wahlin regarding why Ms. Reddy's letter would not qualify as a written request for appeal. She said Mrs. Nolasco understood she needed to reply in writing and she needed to provide a reason for requesting the appeal. She questioned how a functionally illiterate person would be able to request an appeal other than requesting somebody to assist with the written appeal. She said she thinks it is expecting too much for an injured employee to get a power of attorney in order to comply with the appeal requirement.

Mr. Wahlin said in August 2007 WSI received correspondence from Mrs. Nolasco's attorney

requesting reconsideration. He said at this point WSI had not been provided medical records from Ms. Reddy and had never received additional information from Mrs. Nolasco. He said he admits this may sound bureaucratic, but there are rules that are necessary in any bureaucracy.

In response to a question from Representative Amerman, Mr. Wahlin said that over the last four years, WSI has begun the practice of using nurse case managers. He said this practice allows WSI to have someone present at a medical appointment to ask questions and to gather information regarding the injured employee's prognosis, whether there are return to work guidelines, and whether it is necessary for WSI to assist in coordinating medical care.

Mr. Wahlin said in the case of Mrs. Nolasco, he is not certain whether the nurse case manager spoke Spanish, but it is unlikely that she did because there was a documented need for medical interpretation.

Ms. Shawcross stated the way WSI is informing injured employees of their 104-week TTD limitation is problematic. She said the notepad entries in Mrs. Nolasco's file indicate that when Mr. Nolasco spoke to the claims analyst and told her that Mrs. Nolasco was doing poorly, instead of trying to address Mrs. Nolasco's medical concerns, the record shows the claims analyst reminded Mr. Nolasco of the 104-week limit. She said informing an injured employee of the 104-week limit without also addressing options available after the 104 weeks expires is counterproductive.

Ms. Shawcross said there are problems with the system. The system requires that an injured employee work with WSI to attain a second opinion, but the injured employee was hesitant to work with WSI due to feeling her concerns have not been listened to and there is also a distrust of the assigned nurse case manager.

Committee Discussion

Mr. Hersch discussed similarities between Mrs. Nolasco's WSI experience and his own experience.

Senator Wanzek said Ms. Shawcross seems to have summarized the situation in noting it was a case of miscommunication. He said he believes that Mrs. Nolasco believed she had requested a hearing, but he also recognizes there was no legally sufficient request. Additionally, he said, he can understand why the WSI claims analyst was informing Mrs. Nolasco of the 104-week time limits, but he can also understand how an injured employee would perceive this as a threat.

Representative Keiser said this case is an example of two strong principles--sure and certain relief and the fact WSI is an exclusive remedy. He said the language barrier in the case of Mrs. Nolasco makes this a unique situation. However, he said, we already have a system to deal with this type of situation through the use of WSI's continuing jurisdiction. He said it appears from the information the committee

has received that Mrs. Nolasco made a sincere attempt to appeal.

Ms. Shawcross said the crux of the issue is the administrative law judge was never given the opportunity to consider whether Mrs. Nolasco had good cause for not complying with her physical therapy and ESL class requirements.

Representative Keiser said if an injured employee has a physical, educational, or language barrier, it would be helpful for WSI to assign an advocate to assist that injured employee in navigating the system. Senator Hacker pointed out his concern that if an advocate is assigned to an injured employee, the injured employee will likely object claiming the advocate is bought and paid for by WSI. Senator Wanzek said that he is troubled that the Nolascos did not fully understand the situation until they received the assistance of Ms. Shawcross. He says he sees there is a problem but does not know the answer.

Representative Keiser said he has faith in WSI and has seen examples of when WSI has used continuing jurisdiction to help an injured employee. He said he fully expects that WSI will consider whether to reopen Mrs. Nolasco's case for review.

FOURTH CASE REVIEW

Case Summary

The fourth injured employee presenting his case for review was Mr. Tim Smith, Streeter. Mr. Smith was accompanied by his wife and Ms. Shawcross. Mr. Kocher provided a summary of Mr. Smith's case. He said Mr. Smith filed an application for workers' compensation benefits in connection with a work injury to his right shoulder which occurred in October 2003. He said WSI accepted liability for this injury and awarded payments for the associated benefits.

Mr. Kocher said in February 2005 WSI issued an order denying specific benefits. He said this order denied payment of medical expenses related to the treatment of Mr. Smith's depression, anxiety, and any other psychological condition, denying liability for these conditions. He said in February 2005 Mr. Smith requested the assistance of OIR as it relates to the February 2005 order. He said in June 2005 OIR issued a certificate of completion indicating no change to the order. He said in June 2005 Mr. Smith and his attorney requested a hearing relating to the February 2005 order.

Mr. Kocher said in June 2005 WSI issued an order awarding rehabilitation benefits directing Mr. Smith to attend the college prep program at the State School of Science beginning June 7, 2005, through July 1, 2005, and to attend an architectural drafting and estimating program scheduled to begin on August 22, 2005. He said Mr. Smith requested reconsideration of the order awarding rehabilitation benefits, indicating WSI did not consider his depression in developing the vocational rehabilitation plan and that he was not academically prepared to attend the training program identified by WSI.

Mr. Kocher said in June 2005 Mr. Smith requested the assistance of OIR as it relates to the June 2005 order. He said in June 2005 OIR issued its certificate of completion without any change to the June order. He said in July 2005 Mr. Smith and his attorney requested a rehearing as it relates to the June 2005 order.

Mr. Kocher said on July 1, 2005, WSI reinstated vocational services on the claim of Mr. Smith to determine the first appropriate rehabilitation option for Mr. Smith given his desire not to proceed with the formal training program at the State School of Science. He said in August 2005 an order awarding partial disability benefits was issued by WSI. He said the following job goals were identified in which Mr. Smith was deemed employable given his transferable skills, medical release for work, and education level--customer complaint clerk, telephone solicitor, team assembler, and security guard.

Mr. Kocher said Mr. Smith was not in agreement with the order awarding partial disability benefits and in August 2005 Mr. Smith requested the assistance of OIR to review the August 2005 order. In September 2005 OIR issued a certificate of completion without any change to the August 2005 order. He said in September 2005 Mr. Smith and his attorney requested an administrative hearing relating to the August 2005 order.

Mr. Kocher said in November 2005 the administrative hearing was conducted, reviewing both the February 2005 order to nine specific benefits and the August 2005 order awarding partial disability benefits. He said the administrative law judge's recommended findings of fact, conclusion of law, and order stated the recommended decision is that WSI's August 2005 order awarding partial disability benefits is reversed and WSI's February 2005 order denying specific benefits is affirmed.

Mr. Kocher said WSI did not agree with the recommended findings of fact, conclusion of law, and order as it related to the reversal of the August 2005 order awarding partial disability benefits. He said in July 2006 WSI issued a memorandum opinion outlining its reasons for rejecting the administrative law judge's recommendations to reverse the order awarding partial disability benefits. He stated the memorandum opinion included the following provision: "The organization, after consideration of the recommended findings of fact and conclusion of law has a firm belief the findings reversing and ordering for further rehabilitation consideration is in error. The evidence clearly denotes Mr. Smith is highly resistant to long-term rehabilitative training and as a result his psychological anxieties are piqued, which necessarily will cause the plan to fail. Likewise, the evidence also shows he is a hard worker and his return to work will likewise resolve some of his anxieties. Dr. Virdee indicates the jobs are psychologically appropriate and are within his physical restrictions. This finding is supported by review of the medical information, as well as Mr. Smith's own allegations he submitted to

the organization regarding the appropriateness of the rehabilitation retraining plan."

Mr. Kocher said in July 2006 WSI issued its findings of fact, conclusion of law, and order indicating "Mr. Smith has not shown by a preponderance of the evidence that his current depression, anxiety, and psychological conditions, which preexisted and manifested themselves prior to his work injury, are at least 50 percent caused by his October 9, 2003, compensable work injury, as compared with all contributing causes combined and, therefore, Workforce Safety and Insurance's February 11, 2005, order denying specific benefits is affirmed." Additionally, the order stated "Workforce Safety and Insurance has shown by a preponderance of the evidence that none of the priority options under Subsection 4 of Chapter 65-05.1-01 are viable and will not return the employee to the lesser of 66 2/3 percent of the average weekly wage, or 90 percent of his preinjury earnings and, therefore, Mr. Smith shall continue to minimize loss of earnings capacity and that there are viable and appropriate employment options outlined in Workforce Safety and Insurance's August 22, 2005, order awarding partial disability benefits which is, therefore, affirmed."

Mr. Kocher said in August 2006 Mr. Smith signed a stipulated agreement with WSI addressing the issues of whether Mr. Smith had proven a compensable psychological injury as well as whether the vocational plan was appropriate. He said the terms of the stipulation were as follows:

1. WSI will pay three years of temporary partial disability (TPD) benefits from the date of this stipulation.
2. WSI will pay the TPD benefits in due course; i.e., a stream of payments over time for three years based upon claimant's current presumed earnings ability (current TPD payment) or to be adjusted by his income during the three years if his actual earnings exceed his presumed earnings.
3. Claimant will report any and all income to WSI during the three-year period on a timely basis.
4. Claimant will waive all other claims for disability benefits, whether total or partial or otherwise; past, present, and future, without any option for reopening the matter.
5. Claimant waives, forever, entitlement to vocational rehabilitation benefits.
6. Claimant withdraws his earning request on the order denying specific benefits dated February 11, 2005, order awarding the rehabilitation benefits pursuant to NDCC Chapter 65-05.1 dated June 10, 2005, and order awarding partial disability benefits dated August 22, 2005, in relation to this claim.
7. Claimant remains eligible for payment of reasonable and necessary medical expenses according to the North Dakota medical and hospital fee schedule for treatment directly related to his right shoulder work injury of

October 9, 2003. Claimant's medical expenses are subject to the closed claim provisions of NDCC Section 65-05-35.

8. Claimant waives, now and forever, any entitlement to medical treatment for any type of mental condition, whether labeled as depression, anxiety, or otherwise.
9. The terms of this stipulated settlement contemplate prior application of NDCC Section 65-05-09.1 to all benefits and computations.
10. WSI will pay claimant's legal fees and costs as mandated by law and regulation."

In response to a question from Representative Keiser, Mr. Kocher said Mr. Smith was represented by legal counsel throughout the appeal process, including the stipulation. Ms. Shawcross said she first became familiar with Mr. Smith's case when she was working as a paralegal at Mr. Smith's attorney's office.

Ms. Shawcross said her recollection is that when it appeared the writing was on the wall that WSI was not going to cover Mr. Smith's depression and was not required to adopt the administrative law judge's recommended findings of fact, recommendations, and order; Mr. Smith's attorney recommended he sign the stipulation. She said the fact Mr. Smith signed the stipulation does not mean he agreed with the stipulation but instead likely reflects his belief there was no other recourse.

Ms. Shawcross said she takes issue with the WSI position that Mr. Smith resisted rehabilitation efforts. She said the record shows Mr. Smith was a hard worker. Additionally, even after several fraud investigations were conducted against Mr. Smith, there was never a finding of fraud. She said the fact that approximately 80 percent of the WSI fraud investigations are initiated against injured employees tends to create an adversarial climate.

Ms. Shawcross said when Mr. Smith was required to participate in an IME, there was a perception the IME doctor had a conflict of interest. She said the doctor who performed the IME was married to a doctor who worked for WSI. She said this perception of impropriety exists regardless of whether there was any actual wrongdoing.

Issues for Review

Chairman Keiser called on Mr. and Mrs. Smith and Ms. Shawcross to present the issues that Mr. Smith would like the committee to consider. Mrs. Smith distributed to committee members supplemental documents from Mr. Smith's WSI records. Mrs. Smith said the information in the supplemental documents helps to show that they are honest, hardworking people. She said much of what happened in Mr. Smith's case was attributable to Mr. Smith's depression, extreme pain, and ongoing medical problems.

Ms. Shawcross said the primary issues are that WSI failed to provide benefits for Mr. Smith's depression and failed to accept that depression

affected Mr. Smith's ability to effectively participate in his rehabilitation. As a result, she said, the rehabilitation plan put together by WSI was not realistic. Additionally, there is a problem with the system when OIR and the administrative law judge both recognize a problem with WSI's decision, but WSI has the authority to disregard these positions.

In response to a question from Senator Wanzek, Ms. Shawcross said the legislature can address Mr. Smith's issues by changing the laws to provide for WSI rehabilitation plans that are better-suited to meet the needs of injured employees. She said injured employees need the state's workers' compensation laws to protect them.

In response to a question from Representative Keiser, Ms. Shawcross said that although the appeal system is in place to deal with situations such as Mr. Smith's, the reality is that an injured employee can only move forward if the employee can find legal representation. She said the limitations on attorney's fees adversely impact the willingness of attorneys to take WSI appeal clients. Additionally, although WSI has continuing jurisdiction, and WSI has had numerous opportunities to correct this error, WSI has chosen to not exercise its continuing jurisdiction.

Ms. Shawcross said WSI should at least take into account and consider whether an injured employee qualifies for Social Security disability benefits. She said that with a 10-pound lifting limitation, Social Security recognizes an individual is essentially unemployable.

Ms. Shawcross said Mr. Smith takes issue with the IME report. She said the IME doctor was substantially in agreement with Mr. Smith's treating doctors. However, the IME doctor made a leap based on one brief examination that Mr. Smith would be unwilling to participate in rehabilitation. She said the IME doctor clearly stated she could not establish a percentage attributable to the degree Mr. Smith's psychological disability was related to the work injury. Overall, she said, the IME report was arbitrary based on a full review of the records.

In response to a question from Senator Wanzek, Mr. Smith said the stipulation provides he will continue to receive WSI wage-loss benefits until August 2009 after which time the cash benefits will cease.

Mr. Smith said in addition to the issues raised, he finds it problematic that WSI can exercise such broad discretion in determining which medical and prescription bills it will cover. Ms. Shawcross said WSI uses a pharmacist to review prescription coverage. She said if a prescription is red-flagged, it may take significant time for WSI to evaluate and make a final decision whether WSI will cover the prescription. As it relates to prescriptions, injured employees need expedient coverage.

Mr. Wahlin said if WSI does not cover a prescription, this decision is appealable as are all other WSI orders. He said if a prescription is off-formulary, the issues are attempted to be addressed at the point of sale. He said if a prescription is for an

off-label use, WSI will not cover the prescription until evaluated.

Mr. Smith said his WSI cash benefits will end in less than a year unless WSI exercises its continuing jurisdiction and changes the outcome of his case. He said the system does not look out for the rights of the injured employee. He said injured employees do not have anyone who helps look out for them.

Workforce Safety and Insurance

Chairman Keiser called on Mr. Wahlin to comment regarding the issues raised by Mr. Smith. Mr. Wahlin said Mr. Smith's case comes down to the two issues of whether Mr. Smith's psychological condition is compensable and whether the vocational rehabilitation plan was appropriate.

Mr. Wahlin said the administrative law judge determined the psychological condition was not compensable. He said NDCC Section 65-01-02(10)(a)(6) defines "compensable injury." North Dakota, like a majority of states, is a physical/mental state, which means in order to be a compensable injury a claimant must establish that a physical injury directly caused a mental condition. A minority of states are mental/mental which means they compensate a mental condition that arises from a psychological trauma. He said an example of a mental/mental injury might be an employee who while at work witnessed deaths on September 11, and as a result, experienced posttraumatic stress syndrome.

In response to a question from Senator Wanzek, Mr. Wahlin agreed that North Dakota's physical/mental standard is a high standard to meet. He said the standard is more clearly met in some cases than in others.

In response to a question from Representative Keiser, Mr. Wahlin said it is expected that when an injured employee is unable to return to past employment there will be depression to some degree. However, state law requires that an injured employee participate in vocational rehabilitation and attempt to return to work. In the case of Mr. Smith, he said, WSI recognized Mr. Smith's psychological limitations and for that reason the rehabilitation plan provided for two years of psychological coverage to allow Mr. Smith to complete school and return to work.

In response to a question from Representative Keiser, Mr. Smith said he did want to attend school in Wahpeton to study drafting and engineering; however, he experienced several barriers. He said not only were there financial hardships relating to attending school, but he also was dealing with eye problems that required treatment. He said the financial aid forms he needed to complete to be able to afford school did not arrive until after school had already started. He said the school plans were very rushed.

Mr. Wahlin said the vocational rehabilitation plan for attending school would have included receipt of wage-loss benefits, payment of tuition, payment for a laptop computer, and receipt of a second domicile allowance as well as other financial programs. He

said as part of the plan, Mr. Smith was responsible for applying for student loans to cover expenses not covered by WSI. He said the eye condition problems Mr. Smith experienced did prevent Mr. Smith from attending preparatory classes the summer before the fall term, but WSI did not hold this against Mr. Smith.

Mr. Wahlin said ultimately as the time neared for Mr. Smith to attend school, it became increasingly evident to WSI that the vocational rehabilitation plan likely would be unsuccessful. He said it was at this point that WSI entered the stipulation.

Ms. Shawcross said there are two sides to every story. She said Mr. Smith did want to attend school, which was evidenced by the fact he traveled to the campus and took the entrance examination. She said attending school was a major step for Mr. Smith and he needed proof from WSI that the necessary coverage would be offered.

In response to a question from Representative Keiser, Mr. Wahlin said to the extent an injured employee has limitations, whether work injury-related or not, the rehabilitation plan needs to take these limitations into account in developing the plan. He said in the case of Mr. Smith, the IME doctor supported the rehabilitation plan.

Mr. Wahlin said WSI has experienced moderate success in working with state schools in placing injured employees. He said although the schools appreciate the guaranteed payment that comes with enrolling WSI rehabilitation students, there are also concerns that the rehabilitation student might not really want to be attending school. Mr. Smith said the State College of Science was good to work with.

In response to a question from Senator Wanzek, Mr. Wahlin said WSI does work with the injured employee to establish a start time for education programs but when communication breaks down this does not work well.

Mrs. Smith said she wishes she had more time to review Mr. Smith's record and rebut some of Mr. Wahlin's remarks. Chairman Keiser said Mrs. Smith can supplement the committee record by mailing additional information to committee counsel.

Committee Discussion

Mr. Clay Meadows testified that he was a co-worker of Mr. Smith. He said Mr. Smith was a hard worker and he has witnessed the obstacles Mr. Smith has faced throughout his entire experience with WSI.

Representative Amerman said throughout the interim the topic of psychological disabilities has been a reoccurring issue. He said it seems the injured employee has a difficult burden of proof to establish a psychological condition is compensable.

Senator Wanzek recognized there will always be WSI issues to address and the committee needs to be realistic. However, he said, he finds it very valuable to have these claim reviews to increase his understanding of the issues.

Mr. Furness testified regarding some of the statistics coming out of recent studies being

performed at WSI. Additionally, he said, WSI has recently created a three-person committee to review hardship cases to improve how WSI deals with these issues.

Chairman Keiser clarified the differing study charges of the Workers' Compensation Review Committee and the Industry, Business, and Labor Committee. He said the statutory charge for this committee is to review individual claims, whereas the Industry, Business, and Labor Committee is charged with looking at the management of WSI.

COMMITTEE DISCUSSION

The committee discussed the desire to address cost-of-living adjustments for TTD benefits.

Additionally, Senator Hacker said he would like to provide an incentive for injured employees to attempt returns to work. He said if an injured employee on TTD made an unsuccessful attempt to return to work, upon returning to TTD the benefits should be calculated based on the most recent statewide average weekly wage (AWW) instead of based on the AWW at the time of initial injury.

Chairman Keiser called on committee counsel to review a bill draft [\[90330.0100\]](#) relating to coverage of artificial members, such as eyeglasses. She said the bill draft would extend the definition of "artificial members" to include a prescriptive device that is an aid for a natural part, organ, limb, or other part of the

body if the damage to the prescriptive device is accompanied by an injury to the body.

Ms. Bjornson said WSI has reviewed the bill draft and finds it acceptable. She said WSI has a reimbursement schedule for medical equipment which could be used to cover these prescriptive devices.

In response to a question from Representatives Amerman and Dietrich, Ms. Bjornson and committee counsel said although the bill draft does not specifically state hearing aids would be covered as prescriptive devices, the language seems clear they would be included.

It was moved by Representative Dietrich, seconded by Senator Wanzek, and carried on a roll call vote that the bill draft expanding the workers' compensation coverage of artificial members be approved and recommended to the Legislative Council. Representatives Keiser, Amerman, and Dietrich and Senators Hacker and Wanzek voted "aye." No negative votes were cast.

No further business remaining, Chairman Keiser adjourned the meeting at 4:15 p.m.

Jennifer S. N. Clark
Committee Counsel

ATTACH:1