

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Thursday, October 23, 2008
Harvest Room, State Capitol
Bismarck, North Dakota

Representative George J. Keiser, Chairman, called the meeting to order at 8:10 a.m.

Members present: Representatives George J. Keiser, Bill Amerman, Donald D. Dietrich; Senator Nicholas P. Hacker

Members absent: Senators Richard Marcellais, Terry M. Wanzek

Others present: See [Appendix A](#)

It was moved by Senator Hacker, seconded by Representative Amerman, and carried on a voice vote that the minutes of the September 16-17 and 25-26, 2008, meetings be approved as distributed.

Representative Keiser said that since the last meeting the staff at Workforce Safety and Insurance (WSI) as well as committee counsel have been working to prepare the bill drafts and concurrent resolution draft requested. He thanked these individuals for their hard work on behalf of the committee.

INFORMATION REQUESTED

Chairman Keiser said the committee had requested additional information from WSI on the following issues: a status report on the WSI continuing jurisdiction project; the history, summary, and status of the changes resulting from 2005 House Bill No. 1171; a status report on the WSI internal review of form letters and other correspondence to improve clarity; the history of the permanent partial impairment (PPI) law; overview of the WSI preferred worker program; and an overview of WSI's rehabilitation services.

Continuing Jurisdiction Project

Chairman Keiser called on Ms. Anne Green, Workforce Safety and Insurance, to present information on the status of the WSI continuing jurisdiction project. She said WSI accepted a total of 426 applications for claim review. She said as of this date 131 claims remain to be reviewed. Of the 295 claims that have been reviewed, there has been an approximately 8 percent to 9 percent modification rate.

Ms. Green said 26 of the 295 claims reviewed have resulted in WSI offering to modify an order. She said the 26 claims break down as follows:

- Nine claim reviews resulted in complete reversal. She said it is typical of these cases that there was a discovery of new evidence

since the initial order or it was a case where there was an incredibly close call and the initial order could have gone either way.

- Five claim reviews resulted in partial reversal.
- Two claim reviews resulted in medical bill reversals.
- Three claim reviews resulted in the parties signing a stipulation. She said it is typical of these cases that there was a reversal of a medical bill.
- Two claim reviews resulted in the injured employee being granted a PPI evaluation.
- Five claim reviews resulted in WSI recognizing an appeal process question. She said of these claims, three resulted in the claim being reopened to allow for further adjudication, and two resulted in WSI offering to reopen the case for further adjudication, but the claimant did not respond to WSI's invitation.

In response to a question from Representative Amerman, Ms. Green said procedurally, once the continuing jurisdiction review of a claim takes place, the committee reduces its recommendation to writing and the claims department implements the recommendation.

She said ultimately WSI will issue a final report, but she is not certain of when that report will be prepared.

In response to a question from Senator Hacker, Ms. Green said there is always value in WSI reviewing its work. She said the decisions WSI makes are very important and they have a large impact on people's lives. She recognized it may be beneficial for WSI to offer a similar continuing jurisdiction program at some point in the future.

In response to a question from Representative Keiser, Ms. Green said she is not aware of any specific plan to offer the continuing jurisdiction program in the future. Mr. Bruce Furness, Interim Executive Director and CEO, Workforce Safety and Insurance, said there is no current discussion taking place regarding offering a future continuing jurisdiction program. He said at this point the project is still ongoing with the review of claims and he will wait until this project is complete before considering whether to do it again in the future.

2005 House Bill No. 1171

Chairman Keiser called on Ms. Green to provide a report on the history, summary, and status of the

changes resulting from 2005 House Bill No. 1171, relating to claim processing timelines. She said House Bill No. 1171 resulted in a significant shift in how WSI claims are processed.

Ms. Green said House Bill No. 1171 became effective for claims filed after December 31, 2005. She said one of the major statutory changes in the bill was to clarify the definition of permanent total disability (PTD) and to limit receipt of temporary total disability (TTD) to a maximum of 104 weeks. Additionally, she said, the bill changed the retraining options giving some participants the option of whether to participate in retraining.

Ms. Green said since the law has not been in place very long, there are a limited number of cases to review. She said looking at the claims file from January 2006 to October 2008, there have been nine claims that have exhausted the 104-week TTD limit. She said in all of these nine cases the injured employee was determined to have zero earning capacity; therefore, the injured employee is now receiving temporary partial disability (TPD). She said the transition from TTD to TPD has resulted in the same amount of wage-loss benefits.

Ms. Green said of these nine claims that have exhausted TTD eligibility, one injured employee will likely stay on TPD for five years, four injured employees have vocational plans still pending, two injured employees are earning the same level of benefits as they did under TTD but were unable to move forward with vocational rehabilitation due to medical limitations, and two injured employees are in retraining programs.

Ms. Green said that under the new case management system an injured employee's expectations are identified immediately. She said WSI quickly assigns vocational rehabilitation services, implements medical management, and identifies job goals in retraining.

In response to a question from Representative Amerman, Ms. Green said it is conceivable that some injured employees have lost their TTD benefits because of the 104-week limit but have not returned to work. However, she said, there are safeguards to minimize this from occurring, such as requiring that there be a release by the doctor as well as a completed vocational rehabilitation plan.

In response to a question from Representative Keiser, Ms. Green said since January 2006 there have been three injured employees determined to be permanently and totally disabled.

Workforce Safety and Insurance Correspondence

Chairman Keiser called on Mr. Furness to report on WSI's internal review of form letters and other correspondence to improve clarity in communication.

Mr. Furness distributed examples of three documents WSI has revised in order to improve clarity. Copies of these documents are on file in the Legislative Council office. He said some of the basic

changes in revising forms and correspondence include use of red ink for important information, clarifying the name of the document, and clarifying on envelopes that the material requires a response.

Mr. Furness said thus far in the review process, WSI has addressed the issue through internal review. He said today he seeks the committee members' reactions to the work that WSI has done on this project. He said in the near future WSI plans on seeking comments from focus groups across the state.

Representative Keiser suggested that the focus groups include input from injured employees in order to get their input on whether the forms and other correspondence have been made more clear. Representative Dietrich said perhaps it would be helpful to have advocates for injured employees be invited to participate in the focus groups.

Representative Keiser said in reviewing the example forms distributed, he likes the use of the colored print in order to show the importance of the material and that action is required.

Permanent Partial Impairment

Chairman Keiser called on Mr. Rob Forward, Workforce Safety and Insurance, to present a brief history of the PPI law. Mr. Forward distributed a four-page document ([Appendix B](#)) that reflected a portion of *North Dakota Workers Compensation Interim Permanent Partial Impairment Study* dated September 11, 2000, prepared by Mr. Malcolm Dodge, Professional Risk Management.

Mr. Forward reviewed the history of North Dakota's workers' compensation PPI awards. He said since the workers' compensation system was created in 1919, the benefits available for permanent impairment have evolved. He said as of 1974 the PPI benefit closely reflected a tort award, instead of reflecting the inability of an injured employee to earn a wage.

Mr. Forward said WSI is currently in the process of modifying the administrative rules addressing PPI determinations to include consideration of pain.

In response to a question from Representative Keiser, Mr. Forward said he is not sure why the current PPI schedule was revised in 1995 to create a minimum PPI threshold of 16 percent. However, he said, the legislative history indicates statistics were offered to show that a majority of the state's PPI awards were below 25 percent whole body impairment. Additionally, he said, the legislative history shows WSI testimony indicated that with lower awards there was a perception that PPI awards would be made for conditions that were not closely related to work injuries.

Preferred Worker Program and Rehabilitation Services

Chairman Keiser called on Ms. Robin Halvorson, Workforce Safety and Insurance, to present an overview of the WSI preferred worker program and steps WSI will be taking to increase the use and effect

of this program as well as an overview of WSI rehabilitation services, including job search requirements and the rehabilitation hierarchy. She distributed to committee members a folder of material related to the vocational rehabilitation overview. A copy of this material is on file in the Legislative Council office. Additionally, she distributed a list ([Appendix C](#)) of potential program incentive enhancements for the preferred worker program.

BILL DRAFTS

Rehabilitation Bill Draft

Chairman Keiser called on committee counsel to review a bill draft [\[90350.0100\]](#) regarding rehabilitation services. Committee counsel said the bill draft makes two changes to the workers' compensation law that provides the length of time an employee may qualify for a rehabilitation allowance and provides for WSI to implement rehabilitation services pilot programs.

Committee counsel said the bill draft provides WSI may provide up to a 20-week extension to the 104-week limit for rehabilitation and also provides WSI may award an additional two months of benefits to assist an injured employee in performing work search. Additionally, she said, the bill draft directs WSI to implement a system of pilot programs to allow WSI to assess alternative methods of providing rehabilitation services. She said as part of the pilot programs, WSI would provide reports to the Legislative Council's Legislative Audit and Fiscal Review Committee.

It was moved by Senator Hacker, seconded by Representative Dietrich, and carried on a voice vote that the rehabilitation services bill draft be amended to provide the pilot programs provision include reference to the North Dakota University System as a state agency with which WSI may cooperate.

It was moved by Senator Hacker, seconded by Representative Amerman, and carried on a voice vote that the rehabilitation services bill draft be amended to provide the pilot programs provision direct WSI to report to the Workers' Compensation Review Committee instead of the Legislative Audit and Fiscal Review Committee.

In response to a question from Representative Keiser, Ms. Halvorson said as the Director of Rehabilitation Services, she has broad authority to conduct pilot programs.

Mr. David Kemnitz, AFL-CIO, suggested that as part of the pilot programs provision of the bill draft, the committee consider adding language to authorize WSI to cooperate with federal agencies. Representative Keiser said in addition to referencing governmental agencies, the bill draft could also refer to private sector entities in order to provide WSI as much flexibility as possible.

It was moved by Senator Hacker, seconded by Representative Dietrich, and carried on a voice vote that the rehabilitation services bill draft be amended to provide the pilot programs provision include reference to government and

nongovernmental entities as entities with which WSI may cooperate.

It was moved by Representative Dietrich, seconded by Senator Hacker, and carried on a roll call vote that the amended bill draft relating to rehabilitation services be approved and recommended to the Legislative Council. Representatives Keiser, Amerman, and Dietrich and Senator Hacker voted "aye." No negative votes were cast.

Permanent Partial Impairment - Vision

Chairman Keiser called on committee counsel to review a new version of a bill draft [\[90305.0200\]](#) to provide a workers' compensation PPI scheduled award for vision impairment. She said the bill draft provides a graduated scale for vision impairment beginning at a corrected visual acuity of 20/80 with the highest award for corrected visual acuity of 20/2000 or greater.

In response to a question from Representative Amerman, Ms. Green said if an injured employee has multiple injuries and therefore qualifies for a PPI award under the scheduled injuries as well as under the whole body impairment evaluation, the injured employee receives the higher of the two awards.

It was moved by Senator Hacker, seconded by Representative Dietrich, and carried on a roll call vote that the bill draft relating to a workers' compensation permanent partial impairment scheduled award for vision impairment be approved and recommended to the Legislative Council. Representatives Keiser, Amerman, and Dietrich and Senator Hacker voted "aye." No negative votes were cast.

Preexisting Conditions

Chairman Keiser called on committee counsel to review a bill draft [\[90351.0100\]](#) relating to workers' compensation coverage of preexisting conditions. Committee counsel said the bill draft provides that during the 60 days immediately following injury, WSI is directed to pay for a medical expense unless WSI has made a determination the medical expense was for a noncompensable condition or unless the injured employee or medical provider should have known the medical expense was for a noncompensable condition.

Mr. Kemnitz said the bill draft puts a burden on the injured employee to prove the injured employee did not have reason to believe the medical expenses were noncompensable. He said this is unfair because the injured employee does not have the same expertise or legal resources as WSI and medical providers. He supported removing the bill draft language regarding the knowledge of the injured employee.

Representative Keiser said the bill draft does not require the injured employee to have any specialized knowledge as the language clearly states the injured

employee's knowledge is based on what the injured employee should have reasonably known.

Mr. Kemnitz said the first 60 days following an injury is typically the most traumatic period following an injury and some injured employees are not in the position to "reasonably" understand their injury or treatment.

Representative Keiser raised a concern the bill draft does not provide any time for an injured employee or medical provider to receive WSI's determination that a condition is noncompensable. Ms. Jodi Bjornson, Workforce Safety and Insurance, said the bill draft could be amended to provide a three-day period for WSI to notify the injured employee and the medical provider.

In response to a question from Representative Keiser, Ms. Bjornson said she did not think it was necessary to amend the bill draft to remove the language regarding reasonable knowledge of the injured employee and the medical provider. She said the term "reasonable person" is a term of art in the legal community. However, if the bill draft were amended, WSI would rely on the existing fraud provisions in the workers' compensation law to address situations in which a medical provider or injured employee withholds information from WSI. She said as drafted, the expectations seem more clear and straightforward.

Senator Hacker said it is preferable to be clear in the bill draft versus having to rely on WSI's fraud provisions.

It was moved by Senator Hacker, seconded by Representative Amerman, and carried on a voice vote that the bill draft relating to workers' compensation coverage of preexisting conditions be amended to clarify there is a three-day notice period following WSI's determination of noncompensability.

It was moved by Representative Amerman and failed for lack of a second that the bill draft relating to workers' compensation coverage of preexisting conditions be amended to remove the language regarding the knowledge of the injured employee.

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

Total Disability Benefits

Chairman Keiser called on committee counsel to review a bill draft [\[90353.0100\]](#) relating to expansion of workers' compensation benefits for total disability. Committee counsel said the bill draft addresses TTD and PTD workers' compensation benefits. She said Section 1 of the bill draft shortens from 12 months to 3 months the period of time an injured employee is

required to be off of total disability benefits before WSI will recalculate the benefit amount. She said Sections 2 and 3 of the bill draft provide that for claims covered under the pre-2006 law, an injured employee receiving TTD or PTD is eligible for supplementary benefits after three years.

Ms. Bjornson said WSI requests the committee consider amending the bill draft to include an application clause that clarifies Sections 2 and 3 apply to injured employees who first become eligible for supplementary benefits after June 30, 2009, and to include an emergency clause to allow for an effective date of July 1, 2009.

In response to a question from Representative Keiser, Ms. Bjornson said with the requested application and effective date clauses, the bill draft would not be applied retroactively but would provide for the revised supplementary benefit law to be applied from July 1, 2009, forward.

It was moved by Representative Amerman, seconded by Representative Dietrich, and carried on a roll call vote that the bill draft relating to permanent disability benefits be amended to include an application clause, emergency clause, and effective date of July 1, 2009, and be approved and recommended to the Legislative Council. Representatives Keiser, Amerman, and Dietrich and Senator Hacker voted "aye." No negative votes were cast.

Continuation of Coverage

Chairman Keiser called on committee counsel to review a bill draft [\[90352.0100\]](#) to provide for continued workers' compensation coverage during the appeal process. Committee counsel said the bill draft provides that when an injured employee receives a notice from WSI indicating a decrease or termination in wage-loss benefits, the injured employee would have a right to elect to continue receiving the predecision wage-loss benefits during the reconsideration and rehearing process. She said the benefits could continue until WSI issued its findings, conclusions, and posthearing administrative order.

In response to a question from Representative Amerman, committee counsel said if WSI makes an overpayment, WSI may recoup that amount. She distributed a document ([Appendix D](#)) prepared by WSI which summarizes the outcome of Office of Independent Review claim reviews.

Representative Keiser said he is concerned this bill draft creates an incentive for injured employees to draw out the appeal process and the high likelihood of resulting overpayments could be problematic for injured employees and for WSI. He said in his experience in working with injured employees, when an overpayment occurs the injured employee typically has spent the money and is unable to afford repayment.

Representative Amerman said it is helpful to see the concept in bill draft form, but he recognized

implementation may be a nightmare due to the overpayment issue.

Ms. Bjornson said the challenges WSI has identified in this bill draft include the problem of unintentionally incentivizing litigation and the associated resources this would use; the reality that although WSI sets a benchmark of 160 days at the administrative hearing level, some cases do not meet this benchmark and do languish at this level; and the bill draft should be amended to clarify the injured employee would need to elect to receive the continued benefits in order to allow an injured worker to chose not to receive the benefits if that is the wish of the injured employee.

Mr. Tim W. Smith, injured employee, said in his experience it would be helpful for an injured employee to receive a cash benefit during the appeal period between the Office of Independent Review and the administrative hearing.

The committee did not take any action on the bill draft.

Study Resolution

Chairman Keiser called on committee counsel to review a concurrent resolution draft [\[93018.0100\]](#) to provide for a Legislative Council study. Committee counsel said the concurrent resolution draft would provide for a Legislative Council study of the state's workers' compensation system and whether it is feasible and desirable in making a workers' compensation eligibility determination to consider whether that injured employee qualified for federal Social Security disability insurance or supplemental security income.

Representative Keiser said the issue of the relationship between a federal Social Security determination of disability and a WSI determination of disability has been ongoing. He said frequently an injured employee is found to be disabled at the federal level but not at the WSI level. Unlike the federal requirements, the WSI determination requires that the

injury be work related and there is consideration of preexisting conditions.

Committee counsel said that over the years the discussions regarding this issue have also included the recognition that the federal system and the WSI system have different parties, with the WSI system recognizing the employer as a party to the action.

Mr. Kemnitz and Mr. Sebald Vetter, CARE, supported the committee supporting a bill draft to address this issue instead of a concurrent resolution draft. Mr. Kemnitz said a bill draft could be drafted to provide that a federal determination of disability is one of several factors to be considered by WSI in making a determination.

It was moved by Representative Amerman, seconded by Representative Dietrich, and failed on a roll call vote that the concurrent resolution draft relating to a Legislative Council study be approved and recommended to the Legislative Council. Representatives Amerman and Dietrich voted "aye." Representative Keiser and Senator Hacker voted "nay."

It was moved by Representative Amerman, seconded by Senator Hacker, and carried on a voice vote that the chairman and the staff of the Legislative Council be requested to prepare a report and the bill drafts recommended by the committee and to present the report and recommended bill drafts to the Legislative Council.

It was moved by Representative Dietrich, seconded by Senator Hacker, and carried on a voice vote that the committee be adjourned sine die.

No further business appearing, Chairman Keiser adjourned the committee sine die at 12:30 p.m.

Jennifer S. N. Clark
Committee Counsel

ATTACH:4