

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Monday and Tuesday, March 22-23, 2010
Eagle Meeting Room, Alerus Center, Grand Forks, North Dakota
Conference Room 1, Law Enforcement Center, Jamestown North Dakota

Representative Dan Ruby, Chairman, called the meeting to order at 9:35 a.m.

Members present: Representatives Dan Ruby, Bill Amerman, Francis J. Wald; Senators Terry M. Wanzek, Rich Wardner

Member absent: Senator Richard Marcellais

Others present: Lonny Winrich, State Representative, Grand Forks

Representative David Monson, member of the Legislative Management, was also in attendance.

See [Appendix A](#) for additional persons present.

It was moved by Senator Wardner, seconded by Senator Wanzek, and carried on a voice vote that the minutes of the August 5, 2009, meeting be approved as distributed.

INTRODUCTION

Chairman Ruby said the committee will conduct a two-day meeting, with the committee reviewing two cases the first day and one case the second day. He said during the course of the meeting, the committee will follow the same basic framework for reviewing each of the injured employee's claims.

Mr. Chuck Kocher, Workforce Safety and Insurance (WSI), will assist each of the injured employees in presenting the case for review by the committee. Committee members will have a binder containing information prepared by WSI which includes a case summary of each of the injured employee's records. Following Mr. Kocher's summary, the injured employee and any representative of the injured employee will have an opportunity to clarify the order of events, as well as raise the issues for the committee to consider. Following the presentation by the injured employee, a representative of WSI will testify regarding the issues raised by the injured employee. A representative of WSI will be available to access the injured employee's WSI records if the need arose during the meeting. He said if at any point in the meeting a committee member wishes to review an injured employee's records, the meeting can be recessed to allow for the review of the records.

FIRST CASE REVIEW

Case Summary

The first injured employee presenting his case for review was Mr. Izja Hajdari. Because he is a new American and English is not his first language, the

Legislative Council arranged to have an interpreter available telephonically. The interpreter participated throughout Mr. Hajdari's case review, both to interpret Mr. Hajdari's statement so the committee would understand as well as to interpret the committee's statements so Mr. Hajdari would understand the proceeding. Mr. Hajdari was accompanied by his attorney, Ms. Ashley Samuelson, as well as his wife, Mrs. Val Hajdari.

Mr. Kocher provided a summary of Mr. Hajdari's case. He said Mr. Hajdari filed an application for workers' compensation benefits on March 10, 2008, for an injury sustained on March 7, 2008. He said the workplace injury resulted in a proximal tibia fracture and multiple metatarsal fractures. Workforce Safety and Insurance found Mr. Hajdari's claim compensable and benefits were paid accordingly.

Mr. Kocher said on June 9, 2008, rehabilitation services were assigned to Mr. Hajdari's case in an effort to determine what type of rehabilitation services would be necessary to assist in his return to gainful employment. He said because Mr. Hajdari is not fluent in English, he required an Albanian interpreter to assist in his communication with WSI and WSI's assigned vendors.

Mr. Kocher said on June 18, 2008, Mr. Hajdari informed WSI's medical case manager and his physician that his mother was very ill and that he planned to return to Kosovo to see her. He said he stated he planned to be gone for approximately six weeks. The treating physician indicated it was okay for Mr. Hajdari to travel and wrote a prescription for physical therapy in the event Mr. Hajdari required treatment while in Kosovo. He said Mr. Hajdari's claims adjuster and rehabilitation consultant were also made aware of his trip to Kosovo to see his ailing mother. Workforce Safety and Insurance verified Mr. Hajdari's mother was in fact ill. He said the claims adjuster made Mr. Hajdari aware of the importance of his early return to the United States, preferably in three weeks, to continue with the rehabilitation process and to participate in physical therapy. He said Mr. Hajdari indicated he may need up to six weeks in Kosovo to visit with his ailing mother and family. Mr. Kocher said on June 20, 2008, Mr. Hajdari and his family left for Kosovo.

Mr. Kocher said that while WSI acknowledged Mr. Hajdari's trip to Kosovo, it was decided to proceed forward with the vocational rehabilitation process while he was gone. He said on June 27, 2008, nine

days following Mr. Hajdari's notification of WSI that he would be leaving the country and seven days following Mr. Hajdari's actual departure from the country, a rehabilitation consultant sent Mr. Hajdari a letter requesting that he contact her to schedule a time to meet. He said Mr. Hajdari did not respond to the consultant's letter, and on July 20, 2008, 20 days following Mr. Hajdari's departure, WSI issued a notice of intention to discontinue/reduce benefits (NOID) informing Mr. Hajdari he was in noncompliance with WSI's vocational rehabilitation program.

Mr. Kocher said the NOID indicated that Mr. Hajdari was in noncompliance with vocational rehabilitation, and according to North Dakota Century Code Section 65-05.1-04(6) if the period of noncompliance continues for 30 days, or a second instance of noncompliance with vocational rehabilitation occurs without good cause, no further disability or vocational rehabilitation benefits will be paid on this claim, regardless of whether he sustains a significant change in a medical condition due to the work injury. The NOID further provided the injured employee had 30 days to contact his claims adjuster through a request of reconsideration. If the request for reconsideration was not received within 30 days, the decision would become final. He said on July 29, 2008, the rehabilitation consultant submitted a closure report on Mr. Hajdari's claim.

Mr. Kocher said on September 12, 2008, Mr. Hajdari and his family returned to the United States. Mr. Hajdari was gone from the United States for a total of 12 weeks. Because Mr. Hajdari missed the 30-day appeal period, he was no longer eligible for wage-loss benefits.

Mr. Kocher said on September 15, 2008, Mr. Hajdari's wife contacted WSI and informed WSI they were back from Kosovo. He said she inquired why they were no longer receiving wage-loss benefits, and the claims adjuster informed her about the issue of noncompliance as a result of her husband's failure to participate in a rehabilitation process. He said Mrs. Hajdari informed the claims adjuster that they had been out of the country, and Mr. Hajdari had approval from WSI and the physician for the trip to Kosovo.

Mr. Kocher said that on September 19, 2008, Mr. Hajdari contacted WSI and requested further consideration for the reinstatement of wage-loss benefits indicating he was unable to appeal the NOID while he was out of the country. He said that on October 9, 2008, WSI informed Mr. Hajdari that no further disability benefits would be paid on his claim as a result of his failure to appeal the July 10, 2008, NOID.

Mr. Kocher said on November 12, 2008, Mr. Hajdari wrote a letter to WSI requesting an appeal of the NOID. He said he stated that he received WSI's letter but did not understand it as he does not speak English. He stated he did not understand that his benefits would be discontinued if he did not write a letter of appeal within the 30-day appeal period. He

further stated that if he would have understood the letter, he would have written a letter immediately upon receiving it.

Mr. Kocher said that on November 17, 2008, WSI responded to Mr. Hajdari's request for reconsideration of WSI's decision dated July 10, 2008. He said WSI indicated "unfortunately, the request was not received within the 30 day appeal period; therefore, WSI's decision was final."

Chairman Ruby called on Mr. and Mrs. Hajdari to further clarify the case summary. Mr. and Mrs. Hajdari testified that their understanding of their conversations with the physician and WSI was that six weeks was an acceptable period of time to be out of the country. They did not understand there was a maximum amount of time that they would be authorized, after which point wage-loss benefits would be terminated. They said they took actions to ensure they had completed the necessary paperwork before leaving the United States.

Mr. Hajdari testified that it was his understanding that as long as he continued to receive appropriate medical care and to perform rehabilitation, he would continue to be in good standing with WSI. He said that while he was in Kosovo, he did continue his rehabilitation services.

Mrs. Hajdari said that while they were in Kosovo, she did attempt to place a telephone call to WSI but was unable to make a connection. She said upon returning to the United States, she was shocked to learn of the termination of wage-loss benefits. She said had she known that wage-loss benefits would be terminated, they would not have left the country.

Mr. Hajdari said that he respects WSI, but he also expects WSI to respect him and his family. Mrs. Hajdari said that she has a limited understanding of English, although she has a better understanding of spoken English than written English. She said she felt like the WSI caseworker was rude and unhelpful. She said that loss of wage-loss benefits is an extreme hardship for her family.

In response to a question from Representative Ruby, Mr. Hajdari said that when WSI sends him letters, they send them to his home address. He said that they did not have their mail forwarded to Kosovo while they were out of the country. He said that because he missed the 30-day window of opportunity to request reconsideration, he was not eligible to use the services of WSI's Decision Review Office.

In response to a question from Senator Wanzek, Mr. Kocher said that after the 30-day appeal deadline, the NOID becomes final. He said an injured employee does not have any recourse after the 30 days expire. He said in the case of Mr. Hajdari there seem to be several dates that were discussed, including WSI's request for no more than 3 weeks from the country, Mr. Hajdari's request for 6 weeks, and the actual period of time out of the country of 12 weeks.

Mr. Hajdari said he feels he was deceived intentionally by WSI in order for WSI to terminate his

wage-loss benefits. Mr. and Mrs. Hajdari testified they understood they could have had their letters forwarded to them in Kosovo, but since they thought they had WSI's permission to leave the country, they did not think it was necessary.

Issues for Review

Chairman Ruby called on the injured employee's attorney, Ms. Samuelson, to address the issues Mr. Hajdari would like the committee to consider. Ms. Samuelson said that at the time of the injury, Mr. Hajdari was working as a general laborer. She said as a result of the serious nature of his injury, Mr. Hajdari would likely have received retraining for less physical employment.

Ms. Samuelson said that in reviewing the case, it is interesting to note that the claims analyst's notes regarding the June 19 discussion with the Hajdaris was not drafted until two days following the discussion. She said it was two days later that these notes indicated WSI's preference that Mr. Hajdari limit his time away from the country to three weeks. Additionally, she said, the claims analyst's notes did not make any reference to discussion relating to vocational rehabilitation. She said this is interesting because the actual denial of services is based upon Mr. Hajdari's failure to comply with vocational rehabilitation. Instead, she said, the claims analyst's notes stressed the importance that Mr. Hajdari comply with his medical treatment, and that if he is not compliant with his medical treatment, it may jeopardize his benefits. She asked the committee members to please remember that Mr. Hajdari did stay in compliance with his medical treatment, as he continued to receive rehabilitation while he was in Kosovo.

Ms. Samuelson said material in Mr. Hajdari's WSI records indicate the vocational rehabilitation worker initially did not attempt to make contact with Mr. Hajdari because she understood he was out of the country. However, she said, it was after the vocational rehabilitation consultant received a telephone call from WSI that contact was attempted.

Ms. Samuelson said that in looking at the different dates relative to this claim, it is important to note that although Mr. Hajdari stayed more than the six weeks he thought he had permission to be out of the country, even if he had returned within six weeks, WSI had already issued the NOID.

In response to a question from Senator Wardner, Ms. Samuelson said that the vocational rehabilitation consultant appeared to understand that Mr. Hajdari was out of the country and had initially decided to forego making any further contact until he returned to the country. However, she said, after the vocational rehabilitation consultant spoke with the claims analyst at WSI and the claims analyst stated it was unknown when Mr. Hajdari would return, the vocational rehabilitation consultant was requested to send a letter to Mr. Hajdari asking that he contact the vocational rehabilitation consultant. She said as a

result of this communication between WSI and the vocational rehabilitation consultant, the vocational rehabilitation consultant sent a letter to Mr. Hajdari asking that he contact her by July 2, 2008, 12 days following Mr. Hajdari's departure from the country.

Ms. Samuelson said it might be possible to change the law to direct WSI to send written correspondence to a designated interpreter. Additionally, she said, the 30-day statutory appeal has an element of finality that prevents the injured employee from taking any other actions. She said the finality results in harsh consequences for injured employees such as Mr. Hajdari. Finally, she said, a change to consider might be to allow WSI more discretion in reopening the appeal in cases of hardship such as Mr. Hajdari's situation.

Ms. Samuelson said she questions the actions and mindset of WSI employees. She said the purpose of WSI is to provide relief to injured employees, but she thinks this situation calls into question whether this is actually being done. She said WSI employees are sophisticated and knowledgeable regarding the state's workers' compensation system. In this case, she said, it appears as though WSI waited for an opportunity to take this action to close Mr. Hajdari's case while he was out of the country. She said the behavior of the WSI employees seems to be that they can act as a standard insurance company, with the goal of limiting liability. She said she thinks employee retraining is necessary to change this mindset. She said WSI's goal should not be to limit liability, but instead should be to offer relief to injured employees as appropriate.

Mr. Kocher said the claims analyst's notepad entry on June 20, 2008, seems to indicate the claims analyst did not discuss vocational rehabilitation with Mr. or Mrs. Hajdari as it related to their departure from the country. He said the notepad entry refers to medical treatment. He said that in the case of failure to comply with medical treatment, this failure can be cured by the injured employee. He said it appears that the issue of vocational rehabilitation was only raised after the Hajdaris left the country.

Mr. Hajdari said when he left the country, it was his understanding that it was of the utmost importance that he continue his medical treatment. He said he was not aware of vocational rehabilitation requirements.

In response to a question from Representative Wald, Mr. Kocher said that Mr. Hajdari no longer receives wage-loss benefits due to his noncompliance with vocational rehabilitation. However, he said, Mr. Hajdari is continuing to receive medical coverage for his workplace injury.

Workforce Safety and Insurance

Chairman Ruby called on Mr. Timothy Wahlin, Workforce Safety and Insurance, to provide testimony regarding the issues raised by Mr. Hajdari.

Mr. Wahlin said every time WSI makes a decision that affects benefits, a notice is issued. He said in addition to issuing a notice, the North Dakota

Supreme Court has issued a decision requiring that WSI pay 21 days of wage-loss benefits to allow the injured employee to appeal the decision with minimal impact on loss of benefits.

Mr. Hajdari questioned Mr. Wahlin stating that at the time the NOID was issued in his case, WSI and vocational rehabilitation understood that he was out of the country. He questioned why he was not informed of the vocational rehabilitation requirements before he left.

In response to a question from Senator Wardner, Mr. Wahlin said that in reviewing Mr. Hajdari's case, it appears that Mr. Hajdari did receive that additional 21-day wage-loss benefit following the issue of the NOID.

Mr. Wahlin said in addition to the notice requirements, the Century Code clearly sets out the requirements for vocational rehabilitation in Section 65-05.1-04(6).

Representative Ruby questioned whether the good cause exceptions under the vocational rehabilitation law might apply to situations such as Mr. Hajdari's in which the injured employee was out of the country following notification of WSI.

Mr. Wahlin said WSI would likely read the situation as the injured employee having 21 days within which time to comply with vocational rehabilitation requirements. He said in the case of Mr. Hajdari the last contact WSI had with him was June 20, 2008. He said that on June 27, 2008, the vocational rehabilitation consultant issued a letter directing Mr. Hajdari to contact her by July 2, 2008. He said after approximately three weeks without contact, WSI issued the NOID to terminate benefits due to failure to comply with vocational rehabilitation. He said the appeal deadline was approximately August 13, 2008. He said as of that date Mr. Hajdari had been paid six weeks and one day of wage-loss benefits and it had been 55 days since WSI lost contact with Mr. Hajdari.

Mr. Hajdari took issue with Mr. Wahlin's statement because he said everyone, including WSI, was aware of where he was, and it was not as though he had simply lost contact with WSI.

Mr. Wahlin said after that June 20, 2008, contact, the next contact Mr. Hajdari made with WSI was on September 15, 2008, which was approximately 89 days from his last contact.

Mr. Wahlin said the North Dakota vocational rehabilitation law and process are very clear. He said the injured employee's goal is to get better and return to work. When WSI is unable to proceed with vocational rehabilitation, it needs to be able to take the necessary steps. He said he finds it unbelievable that a person could be out of touch with WSI for three months and that WSI would have no obligation to provide vocational rehabilitation for that individual. He said failure of WSI to provide these vocational rehabilitation services would be a failure of WSI to do its job.

Mr. Hajdari said he disagrees with Mr. Wahlin's statement because WSI had an obligation to give him

this vocational rehabilitation information before he left the country.

Mr. Wahlin said WSI provides a written guide to each injured employee that lays out that injured employee's responsibilities and duties. He said although the guide is not provided in multiple languages, WSI did provide translation services to Mr. Hajdari.

Mr. Hajdari said he understands that as an injured employee he does have obligations, but he thinks it was his analyst's obligation to tell him about the vocational rehabilitation obligation before authorizing him to leave the country.

Representative Amerman said this is not the first time the Workers' Compensation Review Committee has reviewed the issue of language barriers. He said in this situation it seems problematic that an injured employee receives permission to leave the country, seven days later the vocational rehabilitation consultant sends a letter to that injured employee, and two weeks later a NOID is issued. He said under these circumstances, even if WSI's letter had been forwarded to Kosovo, the NOID would have already been issued by the time the injured employee received this correspondence.

Mr. Wahlin agreed with Representative Amerman that under the scenario there was a significant time delay. However, he said, had the information been forwarded to Kosovo, Mr. Hajdari certainly would have been able to comply with the 30-day appeal period.

Mr. Hajdari said he believes WSI did not want to contact him in Kosovo. Mrs. Hajdari said her recollection of the conversation with the claims analyst was that it would not be necessary to establish contact information.

In response to a question from Representative Wald, Ms. Samuelson said that Mr. Hajdari is receiving Social Security disability benefits due to his workplace injury. Mr. Hajdari said that although he is receiving Social Security disability benefits, the amount he receives is significantly less than he earned before his injury.

In response to a question from Senator Wardner regarding possible solutions to these communication problems that arose in Mr. Hajdari's case, Mr. Wahlin said he is not aware of any statutory changes that could be made to address the situation. He said WSI seeks clear communication. Mr. Hajdari said that had WSI told him up front about the vocational rehabilitation problem, this whole mess could have been avoided.

Senator Wanzek said in this situation it appears to have been a failure in the parties' communication. He said there does not appear to be any question as to the validity of Mr. Hajdari's workplace injury. Mr. Wahlin said WSI is facing a constant balancing act. He said it is very important that WSI provide clear guidelines that are applied evenly to everybody. He said if WSI is authorized to exercise significant judgment in making these decisions, WSI is at risk of being perceived as discriminating against individuals.

Ms. Samuelson said that WSI's guidelines need to be clear and need to be followed fairly. However, she said, on occasion guidelines can result in arbitrary decisions. She said the finality and complicated nature of our state's workers' compensation system require that WSI provide clear explanations and that injured employees are not put into a situation like Mr. Hajdari was in which he was unaware of his vocational rehabilitation obligations when he left the country.

Mr. Wahlin said that given the large volume of cases and the complexity of the workers' compensation law, it would be impossible to explain all possibilities and all conceivable impacts to every injured employee.

In response to a question from Senator Wanzek regarding the language in the NOID, Mr. Wahlin said the last paragraph of the NOID states "**If you feel this decision is incorrect, please write your claims analyst within 30 days** of the date on this notice to request reconsideration."

In response to a question from Representative Wald, Mr. Wahlin stated that WSI mails a NOID first-class United States mail, address service requested.

Representative Ruby said in summarizing what he has heard he believes Mr. Hajdari is indicating he did not receive enough information and that WSI's responsibility to inform the injured employee is not adequate. Whereas, he said, WSI's position seems to be the law was followed, and the information was provided.

Mrs. Hajdari said that in her conversations with her claims analyst, she asks questions, but at no time did her claims analyst ever give her the level of detailed information that the committee received today. Mr. Hajdari said that even his doctors were surprised that his benefits ended, as his doctor thought that Mr. Hajdari stayed in compliance with WSI's requirements. Additionally, Mr. Hajdari said, his employer is unhappy because the employer pays premiums in order for his injured employees to receive benefits, and in this situation his injured employee is not receiving benefits.

Interested Persons

Chairman Ruby called on Mr. Sylvan Loegering, North Dakota Injured Workers' Support Group, for comments regarding Mr. Hajdari's claim. Mr. Loegering said it appears that technically WSI followed the law in Mr. Hajdari's case. However, he said, WSI does have the authority to exercise continuing jurisdiction under Section 65-05-04. He said utilization of this continuous jurisdiction may be appropriate in this case.

Mr. Loegering said under continuing jurisdiction, WSI could change the outcome of Mr. Hajdari's case. He said if WSI chooses not to use the continuing jurisdiction law, the committee could amend the law to make it more clear that WSI is directed to use this continuing jurisdiction law to deal with special

circumstances such as those raised by Mr. Hajdari. He questioned what standard WSI utilizes in determining whether to utilize the continuing jurisdiction law.

Mr. Loegering said in 2009 the North Dakota Senate considered amending Section 65-05-04, but because the proposed amendments were too broad, the legislative measure did not pass. He said generally speaking under existing law, WSI can open any case at any time for any reason. However, he said, WSI appears to be unwilling to admit that it has made any mistakes or that there could be a better outcome and, therefore, does not exercise continuing jurisdiction.

Chairman Ruby thanked Mr. and Mrs. Hajdari, as well as Ms. Samuelson, for taking the time to present the issues for review by the committee.

SECOND CASE REVIEW

Case Summary

The second injured employee to present her case for review was Ms. Sharon Gratton. Representative Monson assisted Ms. Gratton in presenting her case to the committee.

Mr. Kocher provided a summary of Ms. Gratton's case. He said Ms. Gratton filed an application for workers' compensation benefits on April 15, 2007. He said while employed as a security guard, she injured her coccyx (tailbone). Workforce Safety and Insurance determined Ms. Gratton was eligible for workers' compensation benefits, and the benefits were awarded accordingly.

Mr. Kocher said that following Ms. Gratton's injury, she returned to work with the same employer on May 2, 2007, full time with no restrictions. He said on May 16, 2007, Ms. Gratton was terminated from her job. He said she felt she was terminated for reasons associated with the workplace injury; however, her employer indicated the termination was for some other reason.

Mr. Kocher said on May 22, 2007, WSI issued a notice of decision (NOD) informing Ms. Gratton her temporary total disability benefits were being discontinued effective April 29, 2007, as she had been released to return to work without restrictions. Ms. Gratton did not appeal this notice and, therefore, it became final.

Mr. Kocher said that Ms. Gratton continued to treat for her workplace injury, and her condition appeared to have worsened as time went on. On September 7, 2007, Ms. Gratton obtained employment with a different employer doing security work. He said she worked for this firm for four hours and then terminated the job, claiming the job caused her too much pain to perform the required duties. He said on October 29, 2007, Ms. Gratton accepted a part-time temporary job working as a convenience store clerk. He said she continued this work until December 10, 2007, at which time her employment with the store ended. He said on January 3, 2008, Ms. Gratton resumed her treatment with her physician, and on April 2, 2008,

she notified WSI that she had started receiving Social Security disability benefits effective November 2007.

Mr. Kocher said on January 15, 2009, Ms. Gratton reapplied for disability benefits with WSI. He said at the time of her reapplication, she was not employed, with the most recent employment having ended on December 10, 2007.

Mr. Kocher said on February 6, 2009, WSI issued a NOD denying disability benefits on reapplication. He said WSI indicated that Ms. Gratton had not proven that she had sustained an actual wage loss caused by a significant change in her compensable medical condition. Ms. Gratton was not currently employed and had not worked since December 10, 2007, and, therefore, did not have an actual loss of earnings. He said on February 13, 2009, WSI received Ms. Gratton's written request for reconsideration. He said on March 19, 2009, WSI issued an order stating that WSI would not pay disability benefits based on the reapplication because Ms. Gratton did not have any actual wage loss.

Mr. Kocher said Ms. Gratton requested the assistance of the Decision Review Office. He said on March 23, 2009, the Decision Review Office issued a certificate of completion indicating no change in the decision to the order. He said Ms. Gratton requested an administrative hearing and was represented by legal counsel.

Mr. Kocher said on September 11, 2009, the administrative law judge issued his findings of fact, conclusions of law, and order. It was determined that Ms. Gratton failed to prove by a preponderance of the evidence that she has sustained actual wage loss caused by the significant change in her compensable medical condition. The order further stated "the general written statements by Dr. Midgarden that Ms. Gratton tried to go back to work but her coccyx pain worsen significantly over the next six weeks while trying to do her job, was not supported by the medical record and therefore not persuasive. This is not to say that Ms. Gratton's physical condition did not significantly worsen since April 30, 2007. Simply put, Ms. Gratton has failed to show that her physical condition worsened when she was employed mainly because she was rarely employed during this time period. Prior to Ms. Gratton's employment at the C-Store, Ms. Gratton's condition was already significantly worse and her brief employment since then may have caused her pain while doing the job, but that did not make her physical condition worse." Mr. Kocher said Ms. Gratton did not appeal this administrative order to district court and, as such, it became final.

Issues for Review

Chairman Ruby called on Ms. Gratton and Representative Monson to address the issues Ms. Gratton would like the committee to consider. Ms. Gratton said when the employer she had when she received her workplace injury later terminated her, the employer gave several reasons for her

termination, but she believes they were all pretexts. She said she believes what really happened is that the owner's son needed a job so he took her job. Additionally, she said, the owner of the company did not like that Ms. Gratton had a good social relationship with the families on the Air Force base where she worked.

Ms. Gratton said one of her concerns with the way the system works is the way employers are able to treat employees following a workplace injury. She said when her employer terminated her, the reason given was some claim that a complaint was issued against her that she was seen playing in the park with children during her work hours. She said this is a baseless reason.

Ms. Gratton said the reality is when she returned to work if she would have had any restrictions placed on her by her physician, her employer would have refused to allow her to return to work. She said for this reason, when she returned to work, she did not insist on being allowed to use the shoulder holster instead of a belt holster around her waist. She said her employer confided to her, off the record, that her workforce injury was going to cost the company a significant amount of money.

In response to a question from Senator Wardner, Ms. Gratton said although she had received two weeks of wage-loss benefits, even though her doctor had recommended three weeks, her employer refused to make any accommodations when Ms. Gratton returned to work.

Ms. Gratton said under the workers' compensation system, she is concerned that WSI does not tell injured employees all of their options. She said that when she returned to work, WSI did not take any effort to tell her what to do if her condition worsened or if her employer fired her. She said an improvement to the system may include having WSI provide one-on-one contact with the injured employee. For example, she said, after her meeting with Mr. Kocher to organize for this case, she learned a lot. She said it is very helpful for an injured employee to know the injured employee's rights while the claim is active.

Additionally, Ms. Gratton said, if an injured employee gets fired after returning to work, there should be some sort of red flag raised at WSI. She said in her case, WSI never took any notice of the fact that shortly after returning to work following the workplace injury, her employer fired her.

Ms. Gratton said under the workers' compensation system, WSI did not take the time to clearly explain her eligibility for reimbursement for meals and miles. She said she did not know she was eligible for reimbursement until a later date when a friend informed her of this benefit.

Ms. Gratton said when an employee is injured on the job, WSI needs to be very careful to listen to the unique situation of each injured employee. She said her workplace injury has impacted all facets of her life. However, she said, her case analyst did not seem interested in taking the time to understand this.

Additionally, she said, in her case, WSI never took the time to explain what a permanent partial impairment award is, and she had no idea that she might be eligible for one.

In response to a question from Representative Wald regarding the WSI letter issued on May 2, 2009, discontinuing benefits, Ms. Gratton said at the time that letter was issued she did not think that it was incorrect because at that time she was being released to return to work. Therefore, she said, she did not appeal that letter.

In response to a question from Senator Wardner, Mr. Kocher said when an injured employee files for reapplication, WSI typically evaluates the injured employee's medical condition; however, that determination was not necessary in Ms. Gratton's case because there was no loss in wages.

Ms. Gratton said WSI's treatment plans are very complicated, and it is very challenging for an injured employee to understand all the nuances of these treatment plans. Additionally, she said, the approval plan to receive care and pharmaceutical policies can be too cumbersome and time-consuming.

Ms. Gratton said in her case her Social Security disability claim took six months to be approval. She said it is confusing for an injured employee to understand the difference between Social Security disability benefits and policies versus the workers' compensation benefits and policies. She said she was dissatisfied with her WSI caseworker's response when she reported she had been determined eligible for Social Security disability benefits. She said she felt her WSI caseworker was rude and insensitive and did not take into account that the average injured employee does not know the details of these different programs.

In response to a question from Representative Wald, Ms. Gratton said there appears to be no doubt that her inability to work is related to her workplace injury, but due to the way the system works, she is not eligible for wage-loss benefits. She said there is something wrong with a system that allows this to happen.

In response to a question from Representative Amerman, Ms. Gratton said she did not appeal the administrative decision because to do so would have cost her approximately \$3,000.

Senator Wardner questioned whether Ms. Gratton could have gone back on WSI wage-loss benefits when her employer terminated her and when she was unable to perform her previous employment.

Ms. Gratton said she feels like WSI holds an injured employee to a higher standard than it holds itself.

Representative Monson said he has known Ms. Gratton for years. He said she is a hard worker, and she would work if she could. He said the Legislative Assembly should be able to make improvements to the workers' compensation system to prevent situations like this from occurring.

Representative Monson said up until Ms. Gratton's injury, she earned approximately \$32,000 a year. However, he said, under our workers' compensation system, it has been determined that she does not have a loss of wages. He said the system has let her down in part because she did not know the system, and she missed deadlines for appeal or did not understand the repercussions of letting an order stand and not appealing.

Workforce Safety and Insurance

Chairman Ruby called on Mr. Wahlin to provide testimony regarding the issues raised by Ms. Gratton. He said Section 65-05-08 addresses reapplication for benefits. Under this section, he said, the basic two-prong test is determination of whether there has been a significant change in the injured employee's medical condition, and if so, whether this change has resulted in the loss of wages. He said WSI's interpretation of this law has been upheld by the North Dakota Supreme Court.

In response to a question from Senator Wanzek, Mr. Wahlin said if an injured employee wins on appeal, WSI pays that injured employee's attorney's fees. Committee counsel said as a result of legislation recommended by this committee last interim, there is a new program that allows for an injured employee to receive funds to consult with an attorney. However, she said, this funding is only available after the injured employee has used the services of the Decision Review Office and before the case is heard by an administrative law judge.

In response to a question from Representative Wald, Mr. Wahlin said the maximum funds WSI will provide on appeal for an injured employee's attorney are \$3,000 at the administrative hearing level, \$5,000 at the district court level, and \$8,000 at the Supreme Court level. He said these amounts are cumulative.

In response to a question from Representative Amerman, Mr. Wahlin said North Dakota has a Social Security disability offset. He said in application this means if an injured employee receives both workers' compensation benefits and Social Security disability benefits, the workers' compensation benefits are decreased by 40 percent of the amount of the Social Security disability payment. He said it is important for committee members to recognize if WSI does not offset receipt of Social Security disability payments, the Social Security Administration will offset the amount of workers' compensation benefits. He said an injured employee is better off financially by allowing WSI to offset versus having the Social Security Administration offset.

In response to a question from Senator Wardner, Ms. Gratton said she has heard WSI claim that injured employees receive a pamphlet that contains the rules and regulations relating to workers' compensation. She said she did not receive this pamphlet until recently, in preparation for this case.

In response to a question from Representative Ruby, Mr. Wahlin said yes, there are different

standards in order to qualify for Social Security disability versus being able to qualify for workers' compensation benefits. Additionally, he said, there are different interested parties; however, he said, it is possible for the injured employee to qualify for both programs or for an injured employee to qualify for one program but not the other.

In response to a question from Representative Wald, Mr. Wahlin said he does not agree that there should be some type of link between the receipt of Social Security benefits and workers' compensation benefits. He said it is not uncommon for WSI to determine that an injured employee is employable, but for the Social Security Administration to make a determination that an injured employee is disabled.

Representative Monson said as he understands Ms. Gratton's situation, she would have likely had the same outcome had she appealed in district court following the administrative decision. He said the appropriate way to deal with the situation is to change the law. He said Ms. Gratton appeared to have been penalized because she was so eager to return to work, and because she was not eager to reapply for workers' compensation benefits.

Mr. Wahlin said once an injured employee stops receiving benefits from WSI, WSI no longer tracks the injured employee's employment status. He said for this reason, WSI would not be aware of an injured employee's termination following a workplace injury. Ms. Gratton said in her case, her caseworker was fully aware of the fact that Ms. Gratton was terminated after she returned to work.

Representative Monson said he is concerned the law for reapplication requires proof of a worsening of an injured employee's condition. He said in Ms. Gratton's case it is likely that her case did not worsen, but it is true that she did not get any better. As a result of her workplace injury, she was unable to do her previous work.

In response to a question from Senator Wanzek, Mr. Wahlin said the fact in Ms. Gratton's case is that she returned to full employment and her physician did not place any restrictions on her.

In response to a question from Representative Ruby, Ms. Gratton said she is not employable in any capacity at this time. She said she has made work attempts, such as the stint at the convenience store, but this was not successful because it caused too much pain.

Interested Persons

Chairman Ruby called on Mr. Loegering for comments regarding the issues raised by Ms. Gratton. He said the North Dakota Injured Workers' Support Group proposes a bill of rights for injured workers of North Dakota. He distributed a copy of this proposed document ([Appendix B](#)). He said in recognition of the testimony relating to offset of Social Security disability benefits, he said he would like to remove provision VIII from the proposed bill of rights.

Mr. Loegering said it is not uncommon for an injured employee to be fired following a workplace injury. He said technically an employee is not told the employee is being fired due to the injury, but realistically this is often the cause for the termination.

Mr. Loegering said Section 65-05-33, relating to fraud, should be amended so that it has a greater impact on employers. He said employers should be penalized for making false statements when the result prevents the injured employee from receiving benefits.

Mr. Loegering said the process for reapplication seems problematic because it does not allow for a reevaluation of the injured employee's status. He said in Ms. Gratton's case there seems to be a problem with the initial release without limitations.

Mr. Loegering said in the workers' compensation system, WSI makes presumptions regarding an injured employee's earning ability and, therefore, it seems there should also be presumptions regarding an injured employee's loss of wages.

In response to a question from Representative Wald, Mr. Loegering said the biennial performance evaluation of WSI conducted under Section 65-02-03 should provide information regarding how North Dakota's laws relate to those of other states. He said the 2008 performance evaluation indicated North Dakota was very conservative as it relates to preexisting conditions and degenerative conditions and how we address these conditions under our workers' compensation system.

Mr. Loegering said in the criminal arena we recognize how important it is for defendants to receive legal counsel but in workers' compensation we do not. He said an injured employee has difficulty finding legal representation. He said the state only compensates for attorney's fees if the injured employee is successful on the appeal.

Senator Wanzek requested WSI provide information at a future meeting regarding the history of the continuing jurisdiction law as well as the report on the previous project in which WSI accepted applications for consideration of continuing jurisdiction.

Mr. Wahlin said the continuing jurisdiction law is used by WSI when WSI determines a mistake was made in the adjudication of the case. He said the law has been on the books for years. He said it was this law that allowed WSI to perform its continuing jurisdiction review. He said within that review, approximately 300 cases were reviewed, and in approximately 13 cases WSI exercised its continuing jurisdiction to make at least a partial change in the outcome of the case. He said he will provide additional information at a future meeting.

THIRD CASE REVIEW

Case Summary

Chairman Ruby called on Mr. Kocher to provide a summary of Mr. Arlo Weisser's workers' compensation claim. He said Mr. Weisser filed an application for workers' compensation benefits on April 30, 1958, in

connection with a workplace injury to his bilateral lower leg, left lower arm, lumbar spine, left knee, and right shoulder. He said Mr. Weisser's injury occurred when a boom truck came in contact with a power line and Mr. Weisser sustained an electrical shock and burn injury resulting in a right below the knee amputation and above elbow amputation. He said in the course of this incident, Mr. Weisser also sustained an amputation of his toes on the left foot and a lumbar spine injury, which has resulted in three surgeries. Workforce Safety and Insurance accepted liability of the injury and paid the associated medical benefits and disability benefits.

Mr. Kocher said Mr. Weisser's primary issue is the denial of payments for medical treatment he feels is directly related to his workplace injury. Workforce Safety and Insurance denied payment for the following treatment provided to Mr. Weisser between 1997 and 2000:

- Laryngeal cancer;
- Infected cysts and impotence;
- Upper gastrointestinal bleeding testing and symptoms of abdominal pain;
- Hiatal hernia with reflux esophagitis, peptic ulcer disease, and gallbladder condition;
- Acne rosacea and conjunctivitis;
- Treatment of hypertension; and
- Bladder and kidney problems.

Mr. Kocher said payment for these treatments were denied by WSI as being unrelated conditions to his workplace injury. The letters of denial for these services were not appealed by Mr. Weisser in a timely manner and, as such, became final.

Mr. Kocher said Mr. Weisser was also denied payment for placement of a feeding tube. He said on September 21, 2009, Mr. Weisser's physician stated "Mr. Weisser has had lumbar spine problems and has been on long-term tramadol. This ultimately created a problem swallowing and he had to have a permanent feeding tube placed in his stomach." The physician further stated "I feel that this case needs to be given strong consideration to providing Arlo with some help from workmen's comp." Mr. Kocher said the issue relating to the use of long-term tramadol was reviewed by WSI's director of pharmacy, and it was his opinion the tramadol did not significantly contribute to Mr. Weisser's need for a feeding tube. He said on September 25, 2009, WSI sent a letter to Mr. Weisser asking him to provide additional medical information that he might have from any other treating doctors and have this information forwarded to WSI for review. He said WSI did not receive any additional medical information regarding the feeding tube, except for a letter dated September 28, 2009, by Mr. Weisser's physician indicating that Mr. Weisser has had multiple problems over the years, including significant problems with his stomach and esophageal stenosis. The physician went on to state Mr. Weisser has gone through a lot of stress over the years and this has created problems on his stomach, and it is the

physician's belief that Mr. Weisser's lungs are weak and his voice is weak due to the toll that everything is taking on his body over the years. His physician stated "I feel that everything that has pretty much gone on since electrocution is related to the electrocution and it is all injury related and I feel consideration needs to be given to that fact."

Mr. Kocher said on October 23, 2009, Mr. Weisser's attorney drafted a letter for Mr. Weisser to sign suggesting that Mr. Weisser ask WSI to accept liability for the problems he has with his stomach, esophagus, and lungs. He said Mr. Weisser sent a copy of this draft letter to WSI for review and consideration.

Mr. Kocher said on November 3, 2009, WSI sent a letter to Mr. Weisser indicating it had received his request for reconsideration of WSI's earlier decisions dated May 1, 2000, and December 6, 2000. However, due to the fact the request was not received within the 30-day appeal period, WSI's decision remained final.

Mr. Kocher said Mr. Weisser continues to receive medical and disability benefits from WSI and on December 4, 1979, was deemed permanently and totally disabled. He said on June 16, 2009, WSI evaluated Mr. Weisser's physical restrictions and his ability to drive and purchased a specially equipped new van allowing him to commute independently.

In response to a question from Senator Wanzek, Mr. Kocher said although WSI did deny medical coverage for several medical procedures, WSI is covering medical bills for those medical conditions that are directly related to Mr. Weisser's workplace injury.

In response to a question from Senator Wardner, Mr. Weisser said he does not have the finances to hire an attorney to represent him; therefore, he limits his legal services to asking for free consultations.

Senator Wardner said it appears that this is an instance of the injured employee not fully understanding the ramifications of the 30-day appeal requirement.

Mr. Kocher said Mr. Weisser does have some writing limitations; therefore, he has a history of contacting WSI by telephone instead of in writing.

Committee counsel said by using an online readability application for a WSI notice to discontinue or reduce benefits to measure the readability of a document by indicating the number of years of education a person needs to be able to understand the text easily on the first reading, the results ranged from grade 10.69 to grade 12.96. She said this online service is available at www.online/utility.org.

In response to a question from Representative Wald, Mr. Weisser said he does receive Social Security disability benefits and Medicare benefits. However, he said, he does not have enough money to pay all of his bills and still keep up with maintenance required on his house.

Mr. Weisser said he feels that his current medical problems are directly related to his workplace injury. He said he really relies on the assistance of WSI to

help him with his financial needs, including his unmet needs in remodeling his home.

Representative Ruby said the North Dakota Century Code does not provide WSI coverage for home maintenance.

In response to a question from Mr. Weisser regarding whether funeral expenses are covered by WSI, Mr. Wahlin said it appears Mr. Weisser would be eligible for death benefits and funeral expenses.

Mr. Weisser said additionally, he would like to see larger cost-of-living adjustments from WSI.

Mr. Kocher said Mr. Weisser receives 60 percent of the state's average weekly wage in the form of wage-loss benefits from WSI. He said because Mr. Weisser's injury occurred in 1958, the Social Security disability offset does not apply. He said he is currently receiving monthly wage-loss benefits of \$1,596. He said of this amount, \$496 is actual wage-based, whereas \$1,000 is cost-of-living adjustment.

Senator Wanzek said Mr. Weisser's claim seems tough to address given that the appeal period was missed.

Workforce Safety and Insurance

Chairman Ruby called on Mr. Wahlin to provide testimony regarding the issues raised by Mr. Weisser. Mr. Wahlin said the issues raised by Mr. Weisser focus on medical denials that occurred in 2000. He said that upon receipt of the request for coverage, the WSI adjuster did not make the link to the work injury that occurred 42 years earlier. He said that adjuster requested additional information, but that information was not provided.

Mr. Wahlin said WSI does recognize that medical technology has changed significantly over the years, and WSI did exercise continuing jurisdiction in 2009 to determine whether Mr. Weisser's physician's claim that his secondary medical problems were related to his work injury. However, he said, WSI's pharmacist made a determination that the secondary injuries were not related to the medications Mr. Weisser was taking for his work-related injury.

In response to a question from Representative Ruby, Mr. Wahlin said he is not aware of WSI making any effort to contact Mr. Weisser's physician to request additional information regarding whether the secondary medical issues were related to Mr. Weisser's workplace injury.

In response to a question from Representative Amerman, Mr. Wahlin said because Mr. Weisser received a pre-1995 injury, he is not covered under the retirement presumption. Additionally, he said, Mr. Weisser is covered under the old cost-of-living adjustment system. He said over the lifetime of Mr. Weisser's claim, he has received approximately \$250,000 in medical coverage and approximately \$350,000 in wage-loss benefits.

In response to a question from Senator Wanzek, Mr. Wahlin said as a result of legislation recommended by the Workers' Compensation Review Committee, WSI has been authorized to provide

additional vehicle modifications or new modified vehicles for injured employees such as Mr. Weisser. He said Mr. Weisser did benefit from this change in the law when he received a new modified vehicle.

Interested Persons

Senator Wardner asked whether Mr. Loegering and his organization have the resources to help injured employees such as Mr. Weisser better understand the workers' compensation process. Mr. Loegering said it would be a good idea for his group to assist injured workers better understand the workers' compensation system; however, it is a small group and most injured employees in North Dakota are not even aware the group exists. Therefore, he said, it would probably be more helpful for WSI to offer this assistance to injured employees. He said it is not uncommon for injured workers to fail to understand the WSI correspondence.

Representative Ruby said it seems likely that once an injured employee contacts Mr. Loegering's support group, the 30-day appeal period has probably already expired.

Mr. Loegering said it would be most appropriate to provide the assistive service at the state level in order to reach injured employees throughout the state. Senator Wardner said perhaps it would be possible for Mr. Loegering's support group to have volunteers around the state to help injured employees.

Representative Wald said he understands the need for finality in workers' compensation issues; however, it seems the problem in this case is that the injured worker did not understand the finality and the consequences of the decisions.

Mr. Loegering said he meets with many injured employees who do not understand the 30-day appeal period or who had a valid reason for not appealing within the 30 days. He said he would like WSI to exercise the authority it has for continuing jurisdiction more often. He repeated that it may be helpful to pass legislation giving WSI more concrete guidelines regarding when to exercise continuing jurisdiction.

Mr. Loegering said the current workers' compensation system results in hard feelings and fingerpointing. He said the system feels very impersonal to injured employees and, therefore, he is a proponent for having a system in which WSI has more discretion in order to make the system more personal and more responsive to the needs of injured employees.

Mr. Loegering said perhaps it would be possible to keep the 30-day appeal period and then have a six-month opportunity to establish extenuating circumstances for not complying with that 30-day appeal period.

Representative Amerman pointed out that WSI's notices go out using first-class mail, and that it might be valuable to use certified mail return receipt requested instead. Mr. Loegering said his support group recommends that injured employees use certified mail to send WSI appeal requests. He said

an alternative possibility might be to send the first notice via certified mail, and then if the injured employee does not appeal, to provide a second notice to give 30 days in which to make an appeal.

In response to a question from Representative Ruby, Mr. Wahlin said the North Dakota Century Code specifies that WSI use first-class mail. Mr. Wahlin said WSI has experimented with certified mail with return receipt requested; however, this method of mail had the unintended consequence of actually decreasing the number of notices that were actually received by the injured employees.

Representative Ruby called on Mr. Doug Riley, injured employee, for comments regarding issues raised by Mr. Weisser. Mr. Riley said it is not uncommon for the injured employee to suffer from

depression due to a workplace injury. He said when an individual is depressed, it is difficult for that individual to get things done to meet deadlines. He said the current system needs to be changed. He said one example of a needed change is the Decision Review Office needs to be separated from WSI entirely.

No further business remaining, Chairman Ruby adjourned the meeting at 10:40 a.m.

Jennifer S. N. Clark
Committee Counsel

ATTACH:2